

**THE STRUGGLE FOR INCLUSION:
ABORIGINAL CONSTITUTIONAL DISCOURSE
IN THE 1970s AND 1980s**

by

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ABSTRACT

Over the past two decades, aboriginal peoples in Canada have become involved in the process of constitutional revision. As they became engaged in constitutional debates, aboriginal peoples developed a discourse that centred on historic rights, past injustices, and differences from the broader Canadian community. New terms and concepts which described these identities were introduced into constitutional language. An analysis of the testimony of the national aboriginal organizations before Special Joint Committees on the Constitution and the transcripts of the First Ministers' Conferences on Aboriginal Constitutional Matters reveals how aboriginal peoples attempted to reshape the political world through the Constitution. Aboriginal discourse has highlighted the role of the Canadian Constitution as an emblem of status and inclusion in Canadian society. Aboriginal peoples have sought recognition in the Constitution as a way to improve their status and gain symbolic admission into the Canadian state. However, they have sought inclusion according to their own narratives of their history, identity, and aspirations. These separate identities have been reflected in the words they have chosen to describe themselves and their relationship to the Canadian state.

Aboriginal constitutional language has served to develop aboriginal identities and alter the terms of Canadian constitutional discourse. The discourse reveals some of the problems posed by aboriginal use of terms such as nation, sovereignty and rights, both for aboriginal and Canadian political leaders. Ultimately, the discourse poses new challenges to concepts of shared Canadian citizenship and identity.

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INTRODUCTION

One sentence, one phrase, even one word, deals with a whole code or system of law or politics, disposes of national or sovereign attributes, makes and unmakes political communities, touches the ancient liberties and the private and public rights of millions of free men, and sets new limits to them all.

Edward Blake¹

In recent years, Canada's Constitution has come to be regarded as much more than a dry collection of legal prescriptions. While the practical function of the Constitution remains intact, its symbolic role has emerged as a central theme in constitutional debates. From a symbolic perspective, the Constitution acts as an emblem of identity and status in Canadian society, "a marker of one's place in the Canadian political order."² Thus, different groups seek to find a confirmation of their own existence in the words and phrases of the Constitution. Groups that are excluded may feel alienated and attempt to have their identities acknowledged in the Constitution. The symbolic role of the Constitution has flourished since 1982, with the growth of "constitutional self-consciousness"³ among groups that had previously

¹ The Ontario Lands Case: Arguments of Mr. Blake, Q.C., before the Privy Council.(1988) Quoted in T. Hall, "What are We? Chopped Liver? Aboriginal Peoples in the Constitutional Politics of Canada in the 1980s," in M. Behiels, ed. *The Meech Lake Primer: Conflicting Views of the 1987 Constitutional Accord*, (Ottawa: University of Ottawa Press, 1989).

² R. Simeon, "Meech Lake and Visions of Canada," in K. Swinton and C. Rogerson, eds. *Competing Constitutional Visions: The Meech Lake Accord*, (Toronto: Carswell, 1988), 295.

³ This term comes from A. Cairns, "The Growth of Constitutional Self-Consciousness," in *Disruptions: Constitutional Struggles from the Charter to Meech Lake*, (Toronto: McClelland and Stewart, 1991). Cairns has written extensively on the altered role of the Constitution. See A. Cairns, "Citizens (Outsiders) and Governments (Insiders) in Constitution-Making: The Case of Meech Lake," *Canadian Public Policy*, 14 (supplement) (September 1988); "Political Science, Ethnicity and the Constitution," in D. Shugarman and R. Whitaker, eds., *Federalism and Political Community*, (Peterborough: Broadview Press, 1989); "Constitutional Minoritarianism in Canada," in R. Watts, ed., *Canada: The State of the Federation, 1990*, (Kingston: Institute of Intergovernmental Relations, 1990).

not been constitutional actors.

The involvement of aboriginal peoples in the constitutional debates of the last two decades can be seen in this light. Aboriginal peoples have been engaged in a broad effort to improve their social and economic situation and gain more control over their lives. Attempts to alter the Constitution are part of this overall effort to bring about practical, material changes. However, there is also a symbolic aspect to aboriginal constitutional struggles. Since the late 1960s, aboriginal peoples, led by Indians, have brought their previously latent senses of identity to life. New political organizations have emerged and become highly visible at the national level. Observers of aboriginal affairs have written of a "cultural and political renaissance,"⁴ a movement "out of irrelevance,"⁵ and an Indian "rebirth."⁶ As they rediscovered and redefined their identities, aboriginal peoples became involved in the ongoing constitutional renewal process.

This project studies how aboriginal peoples have viewed the Constitution, themselves, and their relationship to the Canadian state by examining aboriginal constitutional discourse over the past two decades. Aboriginal peoples have developed their own constitutional discourse, using words and a style of language that reflect their distinct identities and goals. The discourse shows how aboriginal peoples have perceived the Constitution as a symbol of exclusion and inclusion in Canadian society.

⁴ G. Manuel and M. Posluns, *The Fourth World: An Indian Reality*, (Don Mills: Collier-Macmillan, 1974).

⁵ J.R. Ponting and R. Gibbins, *Out of Irrelevance: A Socio-political Introduction to Indian Affairs in Canada*, (Toronto: Butterworths, 1980).

⁶ H. Cardinal, *The Rebirth of Canada's Indians*, (Edmonton: Hurtig Publishers, 1975.)

Most aboriginal peoples have sought constitutional inclusion as a way to reclaim their political status and as a means to a better future. They have argued for inclusion on their terms, according to their perceptions of themselves. The language they have used in constitutional debate has helped to construct aboriginal political communities. Thus, the discourse reflects the development of aboriginal identities over the past twenty years. As well, their constitutional language shows how aboriginal peoples have defined their role in Canada and their relation to the Canadian state.

The analysis will focus on the testimony of the national aboriginal political organizations before the Special Joint Committee of the Senate and of the House of Commons on the Constitution of Canada between 1970 and 1987. As Special Joint Committee hearings present an ongoing forum for public input into the constitutional process, they are able to provide a picture of the development of aboriginal discourse over the past two decades. The transcripts of the First Ministers' Conferences on Aboriginal Constitutional Matters will also be examined. These two major sources will be supplemented by documents that help to provide a clearer picture of aboriginal constitutional positions. While there are a number of other possible sources, an exhaustive analysis of all aboriginal commentary on the Constitution proves to be repetitive, and is beyond the scope of this paper. The Special Joint Committee hearings and First Ministers' Conferences provide an image of how aboriginal peoples have chosen to present themselves to the Canadian government and broader Canadian community in a public forum.

The introduction provides background information on the aboriginal peoples

of Canada and outlines the broader context in which the constitutional discourse of the past two decades has been set. Chapter One explores the literature on the symbolic role of the Constitution and the political nature of language. Chapter Two introduces aboriginal involvement in the constitutional change process by examining reactions to the 1969 *White Paper* and testimony before the 1970-1972 Special Joint Committee. The discourse of the early 1970s shows aboriginal peoples beginning to formulate their political identities and consider the opportunities presented to them by the constitutional change process. Chapter Three covers the period from the mid-1970s until the patriation of the Constitution in 1982. In this era, identities become consolidated around the concepts of aboriginal rights and self-determination. Chapter Four examines the First Ministers Conferences on Aboriginal Constitutional Matters, where self-government emerged as the dominant theme in the discourse. Chapter Five looks at the aboriginal response to the Meech Lake Accord. The symbolic role of the Constitution and the impact of constitutional exclusion stands out in the aboriginal reaction to the Accord. The agreement was viewed as an affront to the identities which had developed over the past twenty years, been recognized to some extent in 1982, and given a public platform at the First Ministers' Conferences. The concluding chapter characterizes the nature of aboriginal constitutional discourse, and points to some of the opportunities and problems it has presented.

The Aboriginal Peoples of Canada

The aboriginal population of Canada is comprised of Indians, Metis, and Inuit. Indians have legally been divided into status and non-status categories, so four different aboriginal groups exist, each of which has developed a separate political identity.⁷ In 1867, the *British North America Act* gave the federal government jurisdiction over "Indians and lands reserved for the Indians". In 1876, the first *Indian Act* established the legal category of status or registered Indians. Status Indians were defined as males of Indian blood belonging to a band, their children, and women who were or had been lawfully married to such people. Through the *Indian Act*, the federal government chose to exercise its constitutional jurisdiction over only status Indians. This policy "fragmented the native population in Canada into legally and legislatively distinct blocs experiencing quite different rights, restrictions, and obligations."⁸ The *Indian Act* replaced traditional tribal governments with a system of bands and band governments. It also established reserves and a federal Indian administration. There are now approximately 633 status Indian bands, constituting more than 60% of the aboriginal population in Canada.

Rick Ponting and Roger Gibbins argue that federal Indian policy has rested

⁷ For a background on federal policy and a description of aboriginal groups see M. Boldt and A. Long, "Introduction," in M. Boldt and A. Long, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights*, (Toronto: University of Toronto Press, 1985); J. Frideres, *Native People in Canada: Contemporary Conflicts*, 3rd ed., (Scarborough: Prentice Hall, 1988); and R. Gibbins and J.R. Ponting, "Historical Overview and Background," in J.R. Ponting, ed. *Arduous Journey: Canadian Indians and Decolonization*, (Toronto: McClelland and Stewart, 1986).

⁸ Gibbins and Ponting, "Historical Overview," 21.

historically on six pillars: protection, assimilation, Christianity, reserves and self-sufficiency, treaties, and enfranchisement.⁹ Protection has been provided through several means. In 1763, the Royal Proclamation enacted a number of measures to protect Indians and their land. In the process, it set the course for the future relationship between Indians and Europeans. The Proclamation stated that it was:

just and reasonable, and essential to our Interest, and the Security of our Colonies, that the several Nations or Tribes of Indians with whom We are connected, and who live under our Protection, should not be molested or disturbed in the Possession of such Parts of our Dominions and Territories as, not having been ceded or purchased by Us, are reserved to them, or any of them, as their Hunting Grounds.¹⁰

Frank Cassidy and Robert Bish describe the Royal Proclamation as "reflect[ing] and fram[ing] the contradictory nature of Britain's and later Canada's relationships with her original peoples."¹¹ While the document recognized "Nations" of Indians, it also proclaimed Indian peoples to be under the sovereignty and protection of the Crown.

The *Indian Act* and the reserves were also seen as a means to protect Indians from white society until they could be assimilated. Assimilation was supported by a number of policies, including the spread of Christianity to the Indian population. The Church played an important role in Indian administration and education. Reserves were also used as a means of assimilation, as they allowed the introduction of institutions such as schools and churches, and freed Indian land for white

⁹ Ibid., 24-31.

¹⁰ Quoted in F. Cassidy and R. Bish, *Indian Government: Its Meaning in Practice*, (Halifax: Institute for Research on Public Policy, 1989), 4.

¹¹ Ibid.

settlement.

Treaties were signed over a period from 1670 to 1923, and today about 57 per cent of status Indians are also treaty Indians. The contents of the treaties varied. They generally included provisions for the cession of land, small annual payments in cash or goods, guarantees of land reserves or the rights to use unoccupied land, the promises of some government services, and peace agreements. No treaties were signed in Quebec, the Maritimes, and most of British Columbia.

Enfranchisement was the process whereby Indians could relinquish their status in exchange for full Canadian citizenship and the right to vote. In giving up their status, Indians also lost rights to band membership, reserve land, and special services. In 1960, the federal government altered the policy to allow Indians to vote in federal elections without surrendering their status.

Non-status Indians are those aboriginal peoples who have lost their status through marriage to non-Indians or through enfranchisement, or the descendants of such persons. Changes to the *Indian Act* in 1985 led to the reinstatement of status and first time registration of some non-status Indians, so the population of this group remains in flux. Like non-status Indians, the Metis do not fall under the *Indian Act*. Thus, non-status Indians and Metis have shared both provincial and federal political organizations. While non-status Indians do not have a distinct constitutional status, they are grouped with the Metis. The Metis are people of mixed Indian and non-Indian ancestry, whose population is concentrated in the prairies. Between 1870 and 1875, the federal government recognized Metis treaty and aboriginal rights, and the

Metis were given individual land grants or payment of government scrip. In 1940, the Department of Indian Affairs changed its position, and refused to recognize the Metis as a legal entity. Since non-status Indians and Metis are not registered as Indians under the *Indian Act*, they do not have a special relationship with the federal government and the benefits of Indian status. With the exception of Alberta, provincial governments have treated Metis and non status Indians like other provincial citizens. In Alberta, the 1939 Metis Betterment Act gave some Metis a land base in northern Alberta. Beginning in the 1970s, the federal government entered into a limited relationship with Metis and non-status, providing some financial support for political organizations, housing, and land claims research.

The Inuit population forms Canada's smallest aboriginal group. The Inuit inhabit Canada's northern regions, and have remained culturally and geographically isolated. In 1939, the Supreme Court ruled that the Inuit came under the federal authority of section 91(24) of the BNA Act.¹² Thus, Inuit fall under the jurisdiction of Indian and Northern Affairs Canada, but they are not subject to the *Indian Act*.

For many years, a variety of obstacles, including an *Indian Act* prohibition on the organization of Indians beyond the local level, worked against national aboriginal political organization. A number of different groups formed and dissolved in the 1940s and 1950s. In 1961 the National Indian Council (NIC) became the official status, non-status, and Metis organization. Conflict between the goals of the three groups led to the split of the NIC into the National Indian Brotherhood (NIB) and the

¹² Re Eskimos (1939) S.C.R. 104.

Canadian Metis Society (CMS) in 1968. The NIB evolved into the Assembly of First Nations (AFN) between 1980 and 1982. Today, the AFN, representing status Indians, is the leading national aboriginal organization. In 1970, the CMS became the Native Council of Canada (NCC), representing Metis and non-status Indians. In the early 1980s, prairie Metis split from the NCC to form the Metis National Council (MNC).

The major Inuit organization, the Inuit Tapirisat of Canada (ITC), was created in 1970 to preserve and promote Inuit culture and advance land claims. Six regional organizations make up the Inuit Tapirisat: the Committee for Original Peoples Entitlement (Western Arctic), Kewatin Inuit Association (Eastern Arctic), Kitikmeot Inuit Association (Central Arctic), Baffin Regional Association (Baffin Island), Makivik Corporation (Newfoundland), and the Labrador Inuit. In 1979, a general meeting of the Inuit Tapirisat formed the Inuit Committee on National Issues (ICNI) to represent Inuit views on the Constitution.

The Historical and Policy Context

While this work analyzes the constitutional discourse since the early 1970s, a background of native policy in Canada provides a context and contrast for recent changes. These changes have been shaped not only from within the aboriginal community, but also by events in the greater Canadian and international communities. International changes in race relations since the end of the Second World War helped to alter Canadian policy and perspectives. Decolonization in Africa and the civil rights movement in the United States influenced Canadian attitudes

toward aboriginal peoples and discrimination. A number of aboriginal and non-aboriginal authors began to apply the terminology of internal colonialism to the situation of Canada's Indians.¹³ Gibbins and Ponting note that the American civil rights movement indirectly called into question the segregation of Canadian Indians through the *Indian Act*.¹⁴

Events within Canada also altered the context of aboriginal politics. In the 1940s and 1950s, committee hearings on the revision of the *Indian Act* drew attention to the poor conditions under which Indians lived and the inadequacies of Canadian Indian policy. The hearings raised both governmental and public awareness of Indian problems, but assimilation was still seen as the means to improve Indian conditions. Revisions to the *Indian Act* in 1951 promoted the integration of Indians into Canadian society.¹⁵ In 1960, the extension of the franchise "recognized at last that full citizenship in Canada need not be conditional on complete assimilation into the Canadian society."¹⁶ The policy of assimilation culminated in the 1969 federal *White Paper*.

Vehement Indian opposition to the *White Paper* also drew attention to Indians concerns and prompted a re-evaluation of federal policy. During the 1970s and 1980s, government funding to aboriginal organizations increased, strengthening these

¹³ see Manuel and Posluns; Frideres; and L. Little Bear, M. Boldt, and J.A. Long, *Pathways to Self-Determination: Indians and the Canadian State*, (Toronto: University of Toronto Press, 1984).

¹⁴ Gibbins and Ponting, "Historical Overview," 32.

¹⁵ Ponting and Gibbins, *Out of Irrelevance*, 13.

¹⁶ Gibbins and Ponting, "Historical Overview," 30.

organizations. The emergence of a new aboriginal elite also enhanced their political strength and visibility. Other events in the 1970s such as the James Bay agreement in Quebec and the Mackenzie Valley pipeline inquiry in the Northwest Territories drew attention to aboriginal concerns. In 1973, the Supreme Court ruling in the Nishga land claim case¹⁷ led the federal government to reconsider its earlier policy of refusing to recognize aboriginal rights.

Harold Isaacs coined the term "post-illusionary"¹⁸ politics to describe changes in ethnic group relations in the United States. The breakdown of white supremacy, he argues, "brought down like pricked balloons a whole cluster of illusions about the nature of American society and raised in new ways and on a new scale the question of the character of the 'American identity'."¹⁹ A similar description could be applied to Canada. Changes in the international and Canadian political environments led to a questioning of the illusions created by the Canadian symbolic order. This provided an atmosphere more conducive to the recognition of aboriginal problems and helped to facilitate the transformation of aboriginal politics and political discourse. The ongoing constitutional change process in Canada has provided aboriginal peoples with a constitutional arena in which to express their concerns. The reassessment of the Canadian constitutional order taking place in the 1970s and 1980s led aboriginal leaders to realize that the Constitution could be a vehicle through which they could

¹⁷ *Calder v. Attorney-General of British Columbia* (1973), 34 D.L.R. (3d) [1973], 145-226 S.C.C.

¹⁸ H. Isaacs, *Idols of the Tribe: Group Identity and Political Change*, (New York: Harper and Row, 1975), 19.

¹⁹ *Ibid.*

advance their interests.

Chapter One

The Symbolism and the Language of Constitutional Identity

Traditionally, political scientists have attributed little overt symbolic value to the Canadian Constitution. The British North America Act has been described as "a document of monumental dullness which enshrines no eternal principles and is devoid of inspirational content."²⁰ The Constitution Act, 1982 was said to lack "logical coherence and evocative symbolism."²¹ Some commentators have sought to infuse the Constitution with greater meaning. They argue that it should function as a deliberate symbol of national unity. In 1965, Marcel Faribault and Robert Fowler wrote,

a constitution is not an ordinary statute. Its spirit is more important than its letter. It should, of course, be precise and carefully worded. But it can afford to speak with inspiration and some emotion to the people whose life it governs. Its form and style need not follow the arid legalisms and technicalities of a tax statute. It should be cast in words that appeal to peoples' emotions and inspire them to some consciousness of a national identity.²²

Others are hesitant to vest so much responsibility in the constitution. Richard Simeon argues that the vision of the Constitution as a symbol of identity "carries with it a great many dangers," for it places on the Constitution a heavy symbolic burden that it may not be able to bear.²³

²⁰ A. Cairns, "The Living Canadian Constitution," in J.P. Meekison, ed., *Canadian Federalism: Myth or Reality*, (Toronto: Methuen, 1977), 86.

²¹ D. Smiley, *The Federal Condition in Canada*, (Toronto: McGraw-Hill Ryerson, 1987), 33.

²² M. Faribault and R. Fowler, *Ten to One: The Confederation Wager*, (Toronto: McClelland and Stewart, 1965), 27.

²³ Simeon, "Meech Lake and Visions of Canada," 295.

Regardless of debates over what role the Constitution *should* play, it is clear that it *is* perceived by different groups in Canadian society as an important symbol. Even if it lacks passages which are overtly symbolic, the Constitution functions as an emblem of collective identity and recognition. Raymond Breton argues:

the formation of societies consists, at one level, in the construction of a symbolic order. This construction entails, first, the definition of a collective identity which, with time, becomes articulated in a system of ideas as to who we are as a people. This identity is represented in the multiplicity of symbols surrounding the ritual of public life, the functioning of institutions, and the public celebration of events, groups and individuals.²⁴

Individuals, Breton contends, want public institutions to reflect their own identities. They expect to see "some consistency between their private identities and the symbolic contents upheld by public authorities, embedded in societal institutions, and celebrated in public events."²⁵ Through such recognition, people attain status and positive identities. Without symbolic acknowledgement, "individuals feel like social strangers; they feel that the society is not *their* society".²⁶

Acknowledgement in a constitution, a state's supreme law, has tremendous symbolic power. Robert Cover writes that

[l]egal precepts and principles are not only demands made upon us by society, the people, the sovereign, or God. They are also signs by which each of us communicates with others...Law is a resource in signification that enables us to submit, rejoice, struggle, pervert, mock, disgrace, humiliate, or dignify.²⁷

Cover's words demonstrate the symbolic power of constitutions. Exclusion from the

²⁴ R. Breton, "The Production and Allocation of Symbolic Resources: an Analysis of the Linguistic and Ethnocultural Fields in Canada," *Canadian Review of Sociology and Anthropology* 21 (1984): 125.

²⁵ Ibid.

²⁶ Ibid.

²⁷ R. Cover, "The Supreme Court, 1982 Term - Foreword: Nomos and Narrative," *Harvard Law Review* 97 (1983): 8.

fundamental law of the land can be interpreted as a mockery, a perversion, and a sign of disgrace. Inclusion, on the other hand, can bring with it dignity and social recognition of a group's worth. Constitutions thus play a vital role in giving shape to societies - reflecting, reinforcing, and at times recreating what sorts of communities and interests are deemed to be of political consequence.²⁸

Cover argues that various communities in American society interpret their role in the Constitution differently. These groups have their own "narratives," unique stories or senses of their collective history, values, and aspirations. Communities which cannot find their own narratives reflected in the text of the Constitution may feel "exiled" or excluded.²⁹ Since constitutional inclusion privileges certain groups and visions of a country, exclusion can imply marginality and insignificance. Those communities whose narratives are excluded may seek to alter the text in order to reflect their understanding of the world. Thus, Cover describes constitutional change in this way:

Prescriptive texts change their meaning with each new epic we choose to make relevant to them. Every version of the framing of the Constitution creates a "new" text in this sense. When the text proves unable to assimilate the meaning of new narratives that are nonetheless of constitutive significance, people do create new texts - they amend the Constitution.³⁰

The perception of Canada's Constitution as a symbol of inclusion or exclusion had become increasingly apparent in the amendment debates of the past several decades. The Constitution has served as a battleground upon which different groups

²⁸ Murray Edelman also discusses the symbolic role of constitutions. See M. Edelman, *The Symbolic Uses of Politics*, (Urbana: University of Illinois Press, 1964),19.

²⁹ Cover, 18.

³⁰ *Ibid.*, 4-5, footnote 4.

have fought to see their narratives represented. These struggles have been of particular importance to Canada's aboriginal peoples. Their involvement in the constitutional change process since the 1970s is part of an effort to escape from the wardship of governments, to improve their material well-being, and to overcome social problems. But on a symbolic level, aboriginal desires to be named in the Constitution and to have their rights acknowledged can be seen as an attempt to introduce their own narratives into the Canadian political text. Symbolic issues of identity and status have been at the core of the debate.

Language, Identity, and Political Change

As aboriginal peoples sought inclusion of their narratives they developed their own constitutional discourse. Theorists of conceptual change have described how communities are constituted by the language they employ. Language serves both to reflect and shape communities. Thus, changes in the language and concepts used by groups imply that changes in group identity have taken place.

James Boyd White argues that "language serves to define and constitute communities."³¹ It expresses "shared conceptions of the world, shared manners and values, shared resources and expectations and procedures for speech and thought."³² Thus the language used by individuals and groups reflects and shapes who they are

³¹ James Boyd White, *When Words Lose their Meanings: Constitutions and Constitution of Language, Character and Community*, (Chicago: The University of Chicago Press, 1984), 193.

³² Ibid.

and how they think.³³ As group goals and identities change, words may fall out of use or take on new meanings, and new words emerge. Quentin Skinner notes that "the surest sign that a group or society has entered into the self-conscious possession of a new concept is that a corresponding vocabulary will be developed."³⁴

James Farr ties conceptual change to alterations in the political world. He argues:

to the extent that our concepts constitute the political world, we can say that *conceptual change* attends any *reconstitution* of the political world. In short, our concepts, beliefs, and practices go together and change together. Sometimes these collective changes find expression in new words. It is as if new worlds are being introduced.³⁵

Conceptual change is said to accompany *any* re-shaping of the political world.³⁶ Rather than reflecting political change, conceptual and political changes interact, relating to each other in a symbiotic fashion. That is, conceptual change plays a role in causing political change. Farr argues that language functions in overtly and covertly political ways, as individuals and groups use it to meet their needs. "Most of language, in short, is politically constituted by the ends to which it is intentionally put or by the consequences which it is subsequently seen to entail".³⁷ Communities will deliberately choose particular words to describe themselves and embody their

³³ T. Ball, J. Farr, R. Hanson, "Editors' Introduction," in R. Ball, J. Farr, and R. Hanson, eds., *Political Innovation and Conceptual Change*, (Cambridge: Cambridge University Press, 1989), 1-2.

³⁴ Q. Skinner, "Language and Political Change," in Ball, Farr and Hanson, 8.

³⁵ J. Farr, "Conceptual Change and Constitutional Innovation," in T. Ball and J. Pocock, eds., *Conceptual Change and the Constitution*, (Lawrence: University of Kansas Press, 1988), 21.

³⁶ *Ibid.*, 30.

³⁷ J. Farr, "Understanding Conceptual Change Politically," in Ball, Farr and Hanson, 27.

aspirations.

For communities that seek inclusion in a larger society but want to retain their sense of difference, discourse also serves to construct boundaries between them and the rest of society. Sociologists and anthropologists have developed the concept of "boundary maintenance"³⁸ to describe how ethnic groups sustain their distinctiveness in modern society. The critical feature in maintaining boundaries is that group members identify themselves and are identified by others as belonging to a specific group. Thus, ethnic communities draw on their differences to separate themselves from other ethnic groups and the larger society. Groups that perceive threats to their separate existence will attempt to reinforce these boundaries. As Evelyn Kallen describes them:

Boundary maintenance mechanisms are ideologies and practices which serve to maintain ethnic group distinctiveness and exclusiveness by minimizing the degree of social distance in relations between insiders and maximizing the degree of social distance between insiders and outsiders.³⁹

Discourse is one means by which boundaries are maintained. Bruce Lincoln argues that "discourse is not only an instrument of persuasion, operating along rational (or pseudorational) and moral (or pseudomoral) lines, but it is also an instrument of sentiment evocation."⁴⁰ Groups and individuals use discourse to

³⁸ The term "boundary maintenance" comes from Fredric Barth, *Ethnic Groups and Boundaries: The Social Organization of Cultural Difference*, (Boston: Little, Brown, 1969). I am using the concept as it has been applied to aboriginal peoples in Canada by Noel Dyck, Evelyn Kallen, and Sally Weaver. See, for example, N. Dyck, "Indian, Metis, Native: Some Implications of Special Status," *Canadian Ethnic Studies* 12 (1980):34-46; E. Kallen, *Ethnicity and Human Rights in Canada*, (Toronto: Gage, 1982); and S. Weaver, "Judicial Preservation of Ethnic Group Boundaries: The Iroquois Case," *Proceedings of the First Congress, Canadian Ethnology Society*, Ottawa: National Museums of Canada, 1974.

³⁹ Kallen, 92.

⁴⁰ B. Lincoln, *Discourse and the Construction of Society*, (New York: Oxford University Press, 1989), 8.

arouse sentiments of affinity and estrangement between themselves and others. These sentiments serve to construct social borders and sustain group differences.

Benedict Anderson conveys similar ideas in his work on nationalism. He characterizes nations as "imagined political communities."⁴¹ They are imagined not in the sense of being false or genuine, but in that the image of the nation rests in the minds of the members. Not all community members know each other, nor can they see the boundaries that separate them from others. Instead, sentiments of nationalism sustain the feeling of community.

To sum up, it has been argued that constitutions function as symbols of status and inclusion in a society. Communities that are excluded from a constitution may seek inclusion of their own narratives. The discourse they employ will help to create their identities, and changes in the concepts used by a group reflects the development of its identity. While it constitutes communities, discourse also serves to maintain social boundaries between different groups.

Aboriginal Constitutional Discourse

The attempt by aboriginal peoples to alter the Constitution is in part an effort to change the political world to incorporate their narratives. As aboriginal peoples have become involved in the political process, their own style of constitutional discourse has emerged. The Constitution has been portrayed as a symbol of aboriginal marginalization in Canadian society. The words and concepts aboriginal

⁴¹ B. Anderson, *Imagined Communities: Reflections on the Origin and Spread of Nationalism*, (London: Verso, 1983).

organizations have employed to gain inclusion reflect their identities, the boundaries between each aboriginal group, and between aboriginal and Canadian society.

In the process of redefining themselves and their relationship to the Canadian political community, aboriginal peoples have introduced new words and concepts into constitutional discourse. As Cairns observes, labels such as First Nations, Inuit, Dene and Aboriginal would not have been found in a dictionary of Canadian political terminology thirty years ago.⁴² "Indian government" was a term first introduced in 1977.⁴³ Today these words are a regular part of constitutional talk. The emergence of so many new terms has led one author to refer to "an almost full-blown industry around the creation of new words," and to speak of a "semantic minefield."⁴⁴ The introduction of these new concepts reflects in part the scope of change aboriginal peoples hope to bring about. For, as William Connolly writes, "to adopt without revision the concepts prevailing in a polity is to accept terms of discourse loaded in favour of established practices."⁴⁵

Aboriginal constitutional discourse also seeks to maintain boundaries between each group, and between all aboriginal peoples and Canadian society. The discourse reveals the separate identities and goals of Indians, Inuit and Metis, but it also

⁴² Cairns, "Constitutional Minoritarianism," 89.

⁴³ D. Sanders, "The Indian Lobby," in K. Banting and R. Simeon, eds. *And No One Cheered: Federalism, Democracy and the Constitution*, (Toronto: Methuen, 1983), 302.

⁴⁴ L. Krotz, *Indian Country*, (Toronto: McClelland and Stewart, 1990), 155.

⁴⁵ W. Connolly, *The Terms of Political Discourse*, 2nd. ed. (Princeton: Princeton University Press, 1983), 2. For an analysis of the discourse of Indian self-government as hegemonic (Canadian government) and counter-hegemonic (First Nations), see B. Stevenson, "Political Integration and Indian Self-Government: Hegemonic and Counterhegemonic Discourse," unpublished M.A.thesis, University of Victoria, 1987.

conveys and builds upon a shared sense of difference rooted in historic pride and grievances. Like Cover's description of law, aboriginal political language speaks of dignity, humiliation, and struggle. This type of discourse reflects and reinforces the boundaries between aboriginal peoples and other Canadians.

The forthcoming chapters show how aboriginal peoples have attempted to incorporate their narratives into the text of the Constitution. The political language they use reflects the symbolic role of the Constitution, their own identity, their perception of the Canadian state and society, and it reveals the changing nature of Canadian constitutionalism.

Chapter Two

The Early 1970s: Citizens Plus and Special Status

The Canadian symbolic order was oriented originally toward the construction of a British-type society in Canada.⁴⁶ When the 1970s began, the Constitution still reflected primarily Canada's British heritage. The 1867 document, entitled, as Breton points out⁴⁷, the *British North America Act*, established in Canada a "Constitution similar in Principle to that of the United Kingdom." The sole reference to aboriginal peoples lay in Section 91(24), the allocation of responsibility for "Indians, and Lands reserved for the Indians" to the federal government. Despite this early constitutional recognition of Indians, the BNA Act could not be said to represent Indian narratives. Section 91(24) grouped a diverse groups of peoples into a single, legally constructed entity. It did not reflect Indians' perceptions of themselves as separate nations or tribes. Rather, Section 91(24) was used by the federal government to establish federal wardship of Indians through the *Indian Act*, and to fashion the legal definition of "Indian" according to criteria established by the government. However, arguments made by the AFN will show how status Indians have fought to hold on to this constitutional recognition. It has provided them with a special status in Canada and among aboriginal peoples, a status they sought to

⁴⁶ Breton, 128.

⁴⁷ Ibid.

maintain.⁴⁸ Thus, the Section 91(24) relationship to the federal government has been incorporated into Indian narratives to become part of their current identity.

In 1969, the federal *White Paper*⁴⁹ on Indian policy proposed an end to Indian special status. This document provides a good starting point for an examination of aboriginal constitutional discourse as it has been identified as the single most powerful catalyst for Indian nationalism.⁵⁰ The *White Paper* provided the impetus for Indians to organize across the country. As the paper was seen as a threat to any potential claims based on aboriginal rights, other aboriginal peoples also became caught up in the tide of protest.⁵¹

The *White Paper* was released in June 1969, after a year of consultation with Indian groups. It came just two years after the publication of the federal *Survey of Contemporary Indians of Canada*.⁵² The survey, known as the *Hawthorn Report* after its major author, had received a positive reception from the Indian community.

⁴⁸ For a further discussion of this relationship, see A. Pratt, "Federalism in the Era of Aboriginal Self - Government," in D. Hawkes, Ed. *Aboriginal Peoples and Government Responsibility*, (Ottawa: Carleton University Press, 1990).

⁴⁹ Canada, Department of Indian Affairs and Northern Development, *Statement of the Government of Canada on Indian Policy*, 1969, (Ottawa: DIAND, 1969). (Hereafter, cited as *White Paper*.)

⁵⁰ S. Weaver, *Making Canadian Indian Policy: The Hidden Agenda 1968 - 1970*, (Toronto: University of Toronto Press, 1981), 171. This book contains a detailed study of the making of the policy and Indians reactions to it. It should be noted that despite the catalytic role of the White Paper, "the growth of and direction of the current movement for Indian self-government had roots that predated the White Paper." Cassidy and Bish, 11. However, the coincidence of the timing of the release of the White Paper with the flowering of the broader Canadian constitutional debate provided a constitutional arena for the expression of aboriginal concerns.

⁵¹ Kallen, 206.

⁵² H. Hawthorn et al., *A Survey of Contemporary Indians of Canada: A Report on Economic, Political, Education Needs and Policies*, (Ottawa: Indian Affairs Branch, 1967). The extensive two volume report was the work of a study team commissioned by the federal government in the mid-60s. Chapters 11 to 18, which dealt with the political situation of Indians, were authored by Alan Cairns.

The Hawthorn Report supported special status for Indians, and emphasized that they should not be forced to assimilate. "Indians," the report recommended, "should be regarded as 'citizens plus'; in addition to the normal rights and duties of citizenship, Indians possess certain additional rights as charter members of the Canadian community."⁵³ The report recognized the historic Indian occupation of the land and the bargains made with the white community, which entitled Indians to "charter rights". Indian status was portrayed in the report as enduring, not a stop on the road to assimilation.

In contrast, the *Statement of the Government of Canada on Indian Policy*, which quickly became known as the White Paper⁵⁴, recommended an end to Indian special status. It proposed the repeal of the *Indian Act*, and the termination of the unique federal responsibility for Indians. The reserve system was to be phased out, and Indians were to receive the same services as other Canadians, through provincial governments. Treaty obligations incurred by the government would be recognized, but the *White Paper* expressed a limited interpretation of treaty rights. Consistent with then Prime Minister Trudeau's liberal ideology, the plan criticized the discrimination inherent in a separate legal status for Indian people, and stressed the equality of all citizens. Full participation as provincial citizens would make Indians

⁵³ *Hawthorn Report*, 7.

⁵⁴ In a move that illustrates the symbolic importance of labels, the federal government sought to avoid the use of the term white paper. Paul Tennant points out that the federal government would normally have issued the policy statement as a white paper. However, they "misleadingly presented the policy statement as a 'green' paper." P. Tennant, *Aboriginal Peoples and Politics*, (Vancouver: University of British Columbia Press, 1990), 149. Indian people quickly labelled the document the *White Paper*. George Manuel wrote that the name change took place, "[b]ecause, like some overadvertised brand of soapflakes, [the *White Paper*] proposed to make us whiter than white." Manuel and Posluns, 169.

"full citizens" of Canada. The *White Paper* presented itself as an option different from both assimilation or reserves. Indians, it asserted, "must be persuaded, must persuade themselves, that this path will lead them to a fuller and richer life."⁵⁵

However, Indians were not persuaded. The National Indian Brotherhood issued a "firm but tempered" repudiation of the policy on June 26. Opposition escalated, and in the process, the Hawthorn Report and its citizens plus ideology became a "focal reference point" for Indian protest.⁵⁶ The reaction to the *White Paper* was expressed in a number of documents, the most prominent being Harold Cardinal's *The Unjust Society*.⁵⁷ This book rapidly became "the Indian manifesto on special rights,"⁵⁸ and its style "accurately depicted the general Indian sentiment toward the *White Paper*."⁵⁹

Cardinal's book provided a foreshadowing of many of the themes which were to resonate in the constitutional discourse of the coming decades. Cardinal showed a keen awareness of the political significance of names and identity, and one of his themes was the need for Indians to forge a new political identity. Before they could progress, he argued, Indians needed to define for themselves who they were, and protect and build on this identity.⁶⁰ In turn, non-Indians needed to accept the

⁵⁵ *White Paper*, 5.

⁵⁶ Ponting and Gibbins, *Out of Irrelevance*, 28.

⁵⁷ H. Cardinal, *The Unjust Society*, (Edmonton: Hurtig Publishers, 1969).

⁵⁸ Weaver, *Making Canadian Indian Policy*, 182.

⁵⁹ *Ibid.*

⁶⁰ Cardinal, *The Unjust Society*, 24.

Indian self-definition. The identity that Cardinal described was not based on separatism. Rather, it was based on special status within Canada. Moreover, this special status was to be inextricably tied to aboriginal and treaty rights. "Until such rights are honoured," he argued, "there can be no Indian identity to take its place with the other identities of Canada."⁶¹ Cardinal called for nationwide Indian unity, and entrusted the responsibility for change to Indian organizations. "The political organization must be the core of an effort to redefine the word Indian in such a way that our people begin to develop a positive sense of identity."⁶²

The Unjust Society clearly showed Cardinal's sense of anger at years of injustice and betrayal by the federal government. It was highly critical of the *White Paper* and its attempt to turn Indians into "brown white men."⁶³ Yet at the same time, the tone of the book was conciliatory. Cardinal stressed the need for the rest of Canada to accept Indians as they are, and the need for Indians to be able to identify with the Canadian nation. Ultimately the book suggested that Indians step back and define who they are together, and then be admitted collectively into the Canadian symbolic order. Cardinal presented this image of Indians' relationship to Canada:

The vast majority of our people are committed to the concept of Canadian unity and to the concept of participation in that unity. The Indians of Canada surely have as great a commitment to Canada, if not a greater one, than even the most patriotic sounding political leaders... Our commitment to Canada exists because of our belief that we have a responsibility to do all we can

⁶¹ Ibid.

⁶² Ibid., 164.

⁶³ Ibid., 3.

to ensure that our country is a nation with which we can proudly identify.⁶⁴

In contrast to the *White Paper's* proposal for "full citizenship" based on the legal equality of all Canadians, Cardinal called for "true citizenship" based on the acceptance of a unique and different Indian identity.

The other major response to the federal policy was the Indian Chiefs of Alberta's report entitled *Citizens Plus*.⁶⁵ It was adopted, with some revision and expansion, as the official National Indian Brotherhood position on June 3, 1970, and presented to the federal cabinet in a dramatic ceremony.⁶⁶ The title and contents of the document, also known as the Red Paper, reflected the terminology and philosophy of the Hawthorn Report.

Citizens Plus shared many of the features of *The Unjust Society*. The report argued that the legal status of Indians under Section 91(24) must be retained and focused on the special history and rights of Indians. It also drew attention to the contribution of Indians to the Canadian nation. The document proposed that an amendment to the Constitution contain a reaffirmation of Indian treaties and a commitment by the government of Canada to abide by the treaties. Indian problems and issues, it argued, must be a part of constitutional revision. However, *Citizens Plus* did not propose any detailed plans for constitutional change.

Other provincial and regional organizations also reacted with their own

⁶⁴ *Ibid.*, 12.

⁶⁵ Indian Chiefs of Alberta, "Citizens Plus," In Waubageshig, ed. *The Only Good Indian*, (Toronto: New Press, 1970).

⁶⁶ see Weaver, *Making Canadian Indian Policy*, 183, for a description of the presentation.

comments on the *White Paper*. Most of these comments shared a common theme emphasizing the special rights of Indians and unequivocal opposition to the *White Paper*. Thus, the *White Paper*, instead of drawing Indians into the mainstream society, provoked the opposite reaction. Indian peoples retreated to prepare their own proposals and define their own political identity. This identity would be grounded in their special rights and treaties. As Weaver notes, "nativism, significantly enhanced by the policy, became firmly fixed on special rights, the basic Indian orientation which the White Paper had been designed to change."⁶⁷ In the face of such vehement opposition, the federal government backed away from its plan, and the *White Paper* was formally withdrawn in 1971.

The Foundation of the Constitutional Discourse

The responses to the *White Paper* set the stage for the formation of renewed aboriginal political identities and a new discourse. At the same time, aboriginal peoples began to make their first forays into the constitutional debates of the 1970s. An examination of the testimony given before the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada from 1970 to 1972 shows a discourse in the making, as yet hesitant and not clearly defined, but firm in some basic principles. Aboriginal testimony, which was limited in quantity, came

⁶⁷ Ibid., 189.

primarily from the NIB and provincial Indian organizations.⁶⁸ The only Metis group to appear was the Manitoba Metis Federation, and COPE was the sole representative of the Inuit people.

NIB president George Manuel appeared with a number of provincial leaders, submitting a 22 page brief on the NIB's constitutional position. Manuel noted that it was the first exposure of his organization to constitutional discussions, and that they were still formulating their views.⁶⁹

We feel it would be premature at this time to take a positive position in relation to our stand. However, we do outline that we were the original people of this country and as such there were special provisions mentioned in the constitution of Canada; that the Indians were recognized through the Indian Act of Canada; that there were treaties negotiated with the various tribes across Canada; and that there were territories definitely recognized and controlled by Indian people in the days when Indian people were the ruling people in Canada.⁷⁰

Thus, the discourse revealed the importance of the constitutional naming of Indians, as Manuel interpreted Section 91 (24) as a recognition of their special position as original peoples. Manuel made use of the citizens plus concept, calling Indian people "constitutionally citizens plus". The brief also made reference to the status of Indian peoples as nations, noting that "Indian people have always considered themselves to be nations and have consistently acted on that assumption."⁷¹

⁶⁸ Committee co-chairman Mark McGuigan commented during the proceedings that the issue of native peoples and the Constitution had received little consideration before the committee. McGuigan, *Minutes of Proceedings and Evidence of the Special Joint Committee of the Senate and the House of Commons on the Constitution of Canada*, No. 59, March 25, 1971, 12. (Cited hereafter as *Special Joint Committee*.)

⁶⁹ G. Manuel, *Special Joint Committee*, No. 88, June 15, 1971, 17.

⁷⁰ *Ibid.*, 7.

⁷¹ *Ibid.*, 59.

Manuel concluded his presentation by speaking about the reclaiming of Indian identity.

Indians in Canada, for a long time, because of the way they were treated and because of the situation in which they lived, were ashamed to be Indians....You wanted to identify yourself as something else rather than Indians. Things are changing today to where a lot of people that denied they were Indians, that lost themselves in the European community are now turning back and are more outspoken about their being Indians."⁷²

David Ahenakew, president of the Federation of Saskatchewan Indians, and a future president of the NIB, presented many of the same positions as Manuel. He used the terms first citizens, citizens plus, and Indian nations, and referred to the treaties as a recognition of Indian nationhood.⁷³ Dave Courchene, president of the Manitoba Indian Brotherhood, focused on the need for national reconciliation prior to the inclusion of amendments to the Constitution concerning Indian people. The rest of Canada, he argued, had a moral and legal obligation to Indians. Justice required a constitution which respected the rights and privileges of minorities. He expressed faith in Canada - "we believe in the democratic institutions of this country and in the fundamental Christian principles upon which it is built"⁷⁴ - and drew attention the contribution of Indians in the formation of the country. Courchene also emphasized the unique position of Indians, drawing boundaries between Indians and other ethnic groups in Canada. "It was our people that gave up this country. No other ethnic group can claim that".⁷⁵

⁷² Ibid., 30.

⁷³ D. Ahenakew, *Special Joint Committee*, No.14, November 18, 1970, 41.

⁷⁴ D. Courchene, *Special Joint Committee*, No. 9, September 11, 1970, 79.

⁷⁵ Ibid., 82.

The input of other aboriginal groups was very limited during this period. A submission by Tom Eagle, vice-president of the Manitoba Metis Federation, contained few specifics on how his group would like to alter the Constitution. He drew attention to Metis movements to organize themselves, and noted that the Metis, despite their "strong Indian identity," lacked the constitutional recognition of Indians.⁷⁶ In a similar vein, Ethel Deschambault, a Manitoba Metis spokesperson, called for the word aboriginal to be redefined to include Metis.⁷⁷ The COPE testimony centred mainly on development and land issues, but did push for entrenchment of aboriginal rights, "thereby making the constitution a document truly representative of all Canadian peoples."⁷⁸

The discourse of the 1970-72 period reveals aboriginal perceptions of the Constitution as a symbolic document, the text of which should reflect the position of aboriginal peoples as the original inhabitants of the land. At this time, the discourse was still in its formative stages as aboriginal peoples were in the process of drawing their communities together and establishing how they wished their narratives to be written into the Constitution.⁷⁹

Status Indians dominated the discussion, reflecting the unique position

⁷⁶ T. Eagle, *Special Joint Committee*, No. 9, September 11, 1970, 122.

⁷⁷ E. Deschambault, *Special Joint Committee*, No. 12, September 14, 1970, 25.

⁷⁸ Nellie Cournoyer, Committee for Original Peoples Entitlement, *Special Joint Committee*, No. 87, June 10, 1971, 29.

⁷⁹ As Ponting and Gibbins have noted in their study of the NIB, the goals of Manuel in his leadership were the internal development of the NIB and the broader Indian community. In 1972, Indian unity was identified as both a goal, and as a means to the larger goal of protecting Indian rights. Ponting and Gibbins, *Out of Irrelevance*, 168.

already held by them. Consistent in their position was the desire to retain their constitutional status and their treaties. The internalized constitutional boundaries separating aboriginal peoples were visible as Indians argued against the *White Paper* for fear it would put them in the same position as the Metis, while the Metis sought to gain the same constitutional position as Indians. The absence of Inuit and Metis testimony may derive from their lack of historical links to the Constitution, as well as the early stages of their organizational development. At this time there was also not the pressure that would be created in the late 1970s by the urgency of the federal constitutional agenda.

Special status was the most frequently repeated catchphrase of this era, with citizens plus not far behind. Both these phrases, in particular citizens plus, conveyed a sense of shared citizenship with other Canadians, but with something extra acknowledging the unique position of aboriginal peoples. For Indians, these words captured their desire for membership in the Canadian nation based on aboriginal and treaty rights. While mention was made at this time of sovereign Indian nations, extensive use of the terminology of sovereignty and First Nations had not yet emerged. However, the reference to their position as Canada's original peoples helped to establish a sense of their unique and different position. Indian constitutional language was beginning to establish an identity based on their historical occupation of the land, Section 91 (24) recognition, and treaties.

The discourse also expressed sentiments of rejection and alienation from the Canadian state. Aboriginal speakers referred to the shame of being Indian in

Canada, the dispossession of native lands, a bitter past, and the unfulfilled moral and social obligations of the dominant society. Again, these words helped to build Indian identity based on sentiments of difference from Canada.

Thus, the discourse showed a rejection of the constitutional status quo, but not a rejection of the Constitution itself or of the Canadian community. Rather, the emphasis was on the need for federal government to live up to what aboriginal peoples viewed to be its constitutional commitments. Aboriginal peoples were beginning to develop a discourse that would shape their future constitutional goals. While Indian, and particularly Metis and Inuit, discourse was still in its formative stages, it held the promise of its future evolution.

Chapter Three

1978 - 1982: The Consolidation of Constitutional Identities

Between 1978 and 1982, the Constitution became the dominant political issue for Indians, Inuit and Metis.⁸⁰ Yet despite the concern that had been expressed by aboriginal peoples over the Constitution in the early 1970s, in 1978 it seemed unlikely that there would be an aboriginal role in constitutional changes. The reform movement had been prompted by concerns over Quebec, the West, and the amending formula, not by the needs of aboriginal peoples. Aboriginal issues were not high on the government agenda. However, the NIB identified constitutional reform as an Indian issue, a linkage which had not been made by their advisors or by Canadian politicians, and aboriginal peoples became very involved in the debate.⁸¹

The Reform Process

In June 1978, the Trudeau government began the process that would lead to the 1982 patriation of the Constitution.⁸² The government released its

⁸⁰ Sanders, "The Indian Lobby," 301.

⁸¹ D. Sanders, "An Uncertain Path: The Aboriginal Constitutional Conferences," R. Elliot and P. Weiler, eds., *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedoms*, (Toronto: Carswell, 1986), 63. see also Assembly of First Nations, *Bulletin*, October 12, 1982, 1.

⁸² For a thorough examination of the 1976-82 constitutional process, see R. Romanow, J. Whyte and H. Leeson, *Canada...Notwithstanding: The Making of the Constitution 1976 - 1982*, (Toronto: Carswell/Methuen, 1984). For an overview of aboriginal involvement, see R. Gibbins, "Canadian Indians and the Constitution: A Difficult Passage Toward an Uncertain Destination," in Ponting, *Arduous Journey*; S. McInnes, "The Inuit and the Constitutional Process, 1978 - 1981," in I. Getty and A. Lussier, eds. *As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies*, (Vancouver: University of British Columbia Press, 1983); and Sanders, "The Indian Lobby."

constitutional proposal in a white paper, *A Time for Action*,⁸³ and accompanying legislation, Bill C-60. The bill made only two references to aboriginal peoples. First, the preamble contained an acknowledgement of the contribution of Canada's original inhabitants. Second, a clause was included to protect the rights acquired by "the native peoples of Canada" under the Royal Proclamation of 1763 from the general application of the proposed Charter of Rights. Aboriginal organizations reacted to the proposal in appearances before the Special Joint Committee over the summer of 1978. The NIB, NCC, and ITC were invited on an observer basis to the October 1978 First Ministers' Conference, and at the February 1979 First Ministers' Conference, an item on "Canada's Native People and the Constitution" was placed on the agenda of future conferences. However, native leaders felt they were being shut out of the renewal process, and pushed for full participation. Two hundred Indians made a trip to Britain in July to draw attention to their cause and meet with British officials. The newly elected Clark government promised aboriginal involvement, and aboriginal organizations began to meet with the Continuing Committee of Ministers on the Constitution to discuss their role in the reform process. In September 1980, the organizations were invited again as observers to the First Ministers' Conference.

In October 1980, the re-elected Trudeau government launched its unilateral resolution to patriate and reform the Constitution.⁸⁴ The resolution contained two

⁸³ Canada, *A Time for Action: Toward the Renewal of the Canadian Federation*, (Ottawa: Queen's Printer, 1978).

⁸⁴ After the September 1980 FMC had made no progress on the agenda items, Trudeau decided that his government would proceed with patriation and the entrenchment of a charter without the provinces. The Trudeau plan was to request the British Parliament to pass a bill ending that Parliament's power to amend the Canadian Constitution, and to entrench a Charter applying to both levels of government, an amending formula, and a

sections affecting aboriginal peoples: a general clause allowing affirmative action, and a provision protecting the rights of native peoples from the application of the Charter of Rights. The move pushed aboriginal organizations into action. The NIB, NCC and ICNI opposed the federal resolution, and fought it in the courts and British Parliament. In a joint submission to the British Foreign and Commonwealth Affairs Committee of the House of Commons, they stated that they were seeking to become "self-governing nations within Canadian Confederation," and expressed their desire to maintain their relationship with the British Crown, arguing that patriation would sever their links to the British Sovereign.⁸⁵

Between November 1980 and January 1981, the Special Joint Committee on the Constitution held hearings. "Because the committee gave non-governmental peoples and organizations their first opportunity to participate directly in the formation of the new Constitution, it acquired an importance, and a power, that no one had predicted for it."⁸⁶ Aboriginal testimony urged the amendment of the resolution to entrench aboriginal and treaty rights. In January, the federal government agreed to three changes to its resolution. An altered Section 25 stated that the provisions of the charter could not violate the rights of aboriginal peoples. Section 34 was amended to entrench aboriginal and treaty rights, and Section 37 was

commitment to the principles of equalization and the reduction of regional disparities. Ontario and New Brunswick supported the federal move, but the other provinces, known as the Gang of Eight, opposed Trudeau, and challenged the federal action in three provincial appeal courts. The case eventually went before the Supreme Court of Canada.

⁸⁵ McInnes, 329.

⁸⁶ Romanow, Whyte and Leeson, 121.

included to commit the first ministers to further meetings with aboriginal leaders on outstanding issues. "Indian, Inuit and Metis leaders declared they were beginning a new era in which they would at last take control of their own destiny."⁸⁷ However, their optimism changed to a feeling of betrayal when they discovered that Section 34 fell under the general amending formula and could be altered without their consent. Some NIB constituent groups reacted very negatively, and the NIB withdrew its support, resuming political and legal action in Canada and London. The NIB unsuccessfully appealed to British courts to block the resolution on the grounds that the Crown had a continued responsibility to protect aboriginal rights under the Royal Proclamation.

Then, in September, the Supreme Court of Canada ruled on the constitutionality of the federal initiative. The Court upheld the legality of unilateral patriation, but ruled that convention required substantial provincial consent to major constitutional changes. The Supreme Court decision pushed the First Ministers back to the bargaining table. A constitutional deal was reached at the November 1981 First Ministers' Conference, but in the process Section 34 was dropped. The NCC, ICNI, Dene Nation, Native Women's Association of Canada, and the Council of Yukon Indians formed the Aboriginal Rights Coalition, and along with the NIB, held public protests against the agreement. In late November, the premiers agreed to a modified Section 34, adding "existing" to the phrase "aboriginal and treaty rights". The new wording and the failure of the agreement to meet their long term political goals led

⁸⁷ Sanders, "The Indian Lobby," 315.

all aboriginal organizations except for the Metis of Alberta to join together against the entire constitutional package.

Thus, the final constitutional package included: Section 25, the guarantee that the rights in the Charter would not derogate from aboriginal rights and freedoms, including those recognized by the Royal Proclamation; Section 35 (the former Section 34), which recognized and affirmed the existing aboriginal and treaty rights of the aboriginal peoples of Canada, who were defined as Indian, Inuit and Metis; and Section 37, mandating at least two conferences on aboriginal constitutional matters.

Aboriginal Constitution Discourse, 1978 - 1982

As Sanders has noted, in the mid-1970s aboriginal organizations began to turn to a new, explicitly political framework to advance their interests.⁸⁸ Led by Indian leaders, the organizations began to put forth notions of government, nationhood and sovereignty in constitutional discourse. The new politicization of aboriginal groups was also reflected in altered group labels, as names changed to reflect the concept of aboriginal nationality.

The first major statement of the new politicization was the July 1975 Declaration of the Dene of the Northwest Territories,⁸⁹ which was given national airing through the Mackenzie Valley Pipeline Inquiry. The former Indian Brotherhood of the Northwest Territories renamed itself the Dene Nation, and

⁸⁸ Ibid., 302.

⁸⁹ "The Dene Declaration," in M. Watkins, ed. *The Dene Nation: The Colony Within*, (Toronto: University of Toronto Press, 1977).

demanded the acknowledgement of their right to self-determination within Canada. The NIB supported the Dene call for recognition as a distinct people. In 1976, the ITC presented the federal government with the Nunavut proposal for the development of an Inuit controlled area in the Eastern Arctic.⁹⁰ In 1976, the Federation of Saskatchewan Indians, under leader David Ahenakew, began to articulate a position that their sovereign power to govern had been affirmed, not extinguished, by the treaties. The FSI introduced the term "Indian government" in 1977, and it quickly became national terminology.⁹¹

Aboriginal testimony before the Special Joint Committee in 1978 and 1980 reflected the changed outlook and terminology. The 1978 hearings provided reactions to Bill C-60, and the 1980 testimony responded to the unilateral resolution. A number of closely related themes can be seen in the discourse.

The assertion of aboriginal nationhood and sovereignty emerges as the most prominent theme in the discourse. The use of the language of nationalism was shared by Indians, Inuit, and Metis. The concept of nationhood was particularly prevalent in the Indian discourse. In his 1978 testimony, NIB president Noel Starblanket repeatedly referred to Indians as nations whose sovereignty had been recognized by the Royal Proclamation. As they had never surrendered their

⁹⁰ see M. Whittington, "Canada's North in the Eighties," in M. Whittington and G. Williams, eds., *Canadian Politics in the 1980s*, 2nd. ed., (Toronto: Methuen, 1984).

⁹¹ S. Weaver, "Self-Government Policy for Indians 1980-1990: Political Transformation or Symbolic Gestures," paper delivered to the 1989 UNESCO Conference on Migration and the Transformation of Cultures in Canada, 6.

sovereignty or been conquered, sovereignty continued to lie with each nation.⁹² However, this national status had been ignored in the Canadian constitutional set-up, and needed to be recognized.⁹³

By 1980, the term "First Nations" was becoming well established in Indian discourse. In April of that year, at an all chiefs conference, the reorganization of the NIB into the Assembly of First Nations had been launched. The new name reflected in part an organizational change. But it also demonstrated the increasingly politicized sense of nation held by the Indian people, and the emphasis on their historic identity as individual nations.

Isaacs writes that name is the most simple of all symbols of group identity. It "will seldom itself be the heart of group identity, but it can often take us to where the heart can be found."⁹⁴ As groups rediscover and revise their visions of themselves, they may alter their names. The switch from Indian Brotherhood to First Nations signified a movement away from the label affixed by European settlers, to a label which reflected the conception that aboriginal peoples had of themselves as historic nations. The use of the word nation carries with it strong sentiments. It is a concept that evokes "the powerful primordial associations projected from one's own birth and one's own parents to all others born in the same place, the same

⁹² N. Starblanket, *Special Joint Committee*, No. 5, August 23, 1978, 68.

⁹³ *Ibid.*, 70.

⁹⁴ Isaacs, 73.

country."⁹⁵

In late November 1980 the NIB issued *A Declaration of the First Nations*, the founding charter of the AFN. As the *Declaration* was to provide the basis for future Indian constitutional discourse, it is worth quoting in its entirety.

We the Original Peoples of this Land know the Creator put us here.

The Creator gave us laws that govern all our relationships to live in harmony with nature and mankind.

The Laws of the Creator defined our rights and responsibilities.

The Creator gave us our spiritual beliefs, our languages, our cultures, and a place on Mother Earth which provided us with all our needs.

We have maintained our freedom, our languages, and our traditions from time immemorial.

We continue to exercise the rights and fulfil the responsibilities given to us by the Creator for the land upon which we were placed.

The Creator has given us the right to govern ourselves and the right to self-determination.

The rights and responsibilities given to us by the Creator cannot be altered or taken away by any other Nation.⁹⁶

Thus, an identity grounded in ancient ties and beliefs, with its own traditions, laws, and rights, was made overtly political through the *Declaration*. The *Declaration* was read by NIB⁹⁷ president Del Riley in his testimony before the Special Joint Committee in 1980. Riley continued on the same themes as his predecessor, emphasizing Indians' continuous sense of themselves as nations, even in the face of government efforts to transform them into an ethnic minority.⁹⁸ Resistance to minority status has also been a persistent part of Indian discourse. As Sanders has noted, "Indian leaders have rejected the terms 'ethnic' or 'cultural minority' as inadequate to describe the special situation of indigenous peoples. They assert a

⁹⁵ *Ibid.*, 172.

⁹⁶ Assembly of First Nations, "A Declaration of The First Nations" printed in Getty and Lussier.

⁹⁷ The organization underwent the transition to the AFN until the spring of 1982, under a joint council of the NIB and AFN. Thus, it appears in 1980 as the NIB.

⁹⁸ D. Riley, *Special Joint Committee*, No. 27, December 16, 1980, 78.

uniqueness which they feel is denied by terms which equate them to Irish Catholics or Chinese."⁹⁹ According to this argument, policies directed at cultural minorities deny aboriginal peoples their status as nations.

The NCC also referred to its people as nations in its 1978 testimony. However, the Metis use of the terminology of nationality was not as developed as it would be after 1982. For them, basic constitutional acknowledgement of their existence had to come first. Harry Daniels, NCC president, spoke of how the Metis, on the understanding that their nationhood would be respected, helped to bring Manitoba into Confederation, only to find that they were no longer considered a nation.¹⁰⁰ In July 1980, the NCC established a Constitutional Commission. Its report expressed opposition to the Canadian government's treatment of Metis and non-status Indians as an ethnic minority or disadvantaged group:

Metis and non-status Indians deny that they are "citizens like any other" ...they think of themselves as cultural collectivities and not simply as aggregates of individuals. They have a much more organic view of the community. They see themselves as a distinct cultural group and they explicitly reject the efficacy of the liberal value of equal opportunity as a means of dealing with them.¹⁰¹

A similar position was echoed in their 1980 testimony, when they described themselves as a "historic national minority."¹⁰²

Nation was not a term used frequently by the Inuit in 1978, but it became

⁹⁹ Sanders, "Article 27 and the Aboriginal Peoples of Canada," in Canadian Human Rights Foundation, *Multiculturalism in Canada: A Legal Perspective*, (Toronto: Carswell, 1987), 156.

¹⁰⁰ H. Daniels, *Special Joint Committee*, No.5, August 23, 1978, 46.

¹⁰¹ H. Daniels, *Report of the Metis and Non-Status Indian Constitutional Commission*, (Native Council of Canada, 1981), 20-21.

¹⁰² Daniels, *Special Joint Committee*, No. 17, December 2, 1980, 113.

popular in the 1980 discourse when the Inuit Committee on National Issues began to speak for the Inuit people. Charlie Watt, ICNI co-chairman spoke of the need to recognize the "national identity" of the group, and of how the Inuit had been recognized as nations within a nation in 1763.¹⁰³ He offered an explanation of what nation meant to the Inuit, cognizant of the ongoing conceptual differences in the aboriginal political arena:

In order to minimize any scaring of you people by talking about nation, it is necessary to mention that when we speak of the nation concept, we understand that within our own terminology it is as a people; Inuit as a nation. There are two alternatives there, and that is where we always have difficulty in understanding which is which.¹⁰⁴

The Inuit organization also identified themselves as special by drawing boundaries between the Inuit and other groups in the Canadian political community. In 1978, Eric Tagoona, president of the ITC, pointed to the circumstances under which the Inuit became members of the Canadian political community, a situation which differentiated them from other citizens.

The Inuit, Mr Chairman, were not aware of the nature of Canadian society when we were incorporated into it. We become citizens not by choice but as government fiat. Today we cannot, as many immigrants who newly become Canadian citizens can, return to our homeland where only our language is spoken and where our culture is free to grow...No, Mr. Chairman, we are not like any other of Canada's ethnic minorities. Our homeland is here. We must survive here as a people or we cease to survive at all.¹⁰⁵

Thus, aboriginal nationhood became a prominent part of discourse between 1978 and 1982. Each organization spoke of the historical national status of its people and how that status had been ignored or distorted by successive Canadian

¹⁰³ C. Watt, *Special Joint Committee*, No. 16, December 1, 1980, 28.

¹⁰⁴ *Ibid.*, 29.

¹⁰⁵ Eric Tagoona, *Special Joint Committee*, No. 7, August 30, 1978, 10.

governments. Aboriginal nationhood was also called upon to maintain boundaries between aboriginal peoples and other groups in Canadian society.

A second theme, self-determination and self-government, arose out of claims to nationhood and sovereignty. All three groups often used the terms self-government and self-determination interchangeably. At the beginning of this era, the notion of Indian self-government was not very developed in the AFN testimony, nor publicly known. However, the issue gained national attention when Starblanket organized the first national conference on self-government in Montreal in 1979.¹⁰⁶ Neither self-determination or self-government were explicitly defined in the discourse. The Declaration of the First Nations stated that the Creator had given the First Nations the right to govern themselves and to self-determination, and this statement was repeated in the 1978 and 1980 testimony. When questioned further on the meaning of the terms in 1980 AFN president Riley did not elaborate, saying simply, "Indian self-government you can conclude as being essentially the same as self-determination, but it is something that we have always had."¹⁰⁷ The AFN held fast to its position that their inherent rights to self-determination and self-government should be entrenched in the Constitution. The definition of these concepts, they argued, should be up to Indians.

The NCC held a somewhat different position, which reflected the distinct needs of its constituency and their relationship to the federal government. As Metis and

¹⁰⁶ Weaver, "Self-Government Policy," 10.

¹⁰⁷ Riley, *Special Joint Committee*, No.27, December 16, 1980, 93.

non-status Indians lacked a land base and special constitutional status, self-government was viewed as something that would have to come through negotiation with the federal government. However, the NCC supported the ICNI and NIB concepts of constitutionally entrenched self-government. Daniels described self-government and self-determination for the Metis and non-status Indians as "preserving the right to govern ourselves as we see fit within the confines of what is happening in Canada now and what other people are subjected to in this country."¹⁰⁸

The ICNI spoke of how its political perceptions had been developed by the land claims process, but had come to be focused on the right to self-determination. Self-determination, Tagoona argued, "means, first of all, a constitutional recognition of the Inuit as one of the original peoples of this nation with an assurance of our right to continuing existence; it means forms of self-government which return political initiative to the Inuit."¹⁰⁹ Self-determination was portrayed as a matter of pride. The Inuit, Tagoona asserted "are a people not about to abdicate our place in history."¹¹⁰

The use of the language of rights was a third constant in the constitutional discourse. Throughout much of the discourse, aboriginal claims were couched in terms of rights: rights to self-determination and self-government, treaty rights,

¹⁰⁸ H. Daniels, *Special Joint Committee*, No. 17, December 2, 1980, 118.

¹⁰⁹ E. Tagoona, *Special Joint Committee*, No. 7, August 30, 1978, 10.

¹¹⁰ *Ibid.*, 11.

aboriginal rights. Rights were said to be an essential part of aboriginal identity.¹¹¹ For the Canadian state to deny the recognition of aboriginal rights thus became, in effect, a denial that aboriginal peoples existed at all. As these rights were held to be inherent, Bill C-60 and the unilateral resolution became targets of criticism because they portrayed the Royal Proclamation as granting, rather than confirming, rights.

Rights, in particular those to self-determination, were also frequently described in international terms. Canada's obligations as the signatory of international covenants were often held up to the Committee. Aboriginal peoples appealed to these international standards and a broad sense of political morality and justice.

The 1978 and 1980 testimony continued to draw boundaries between the aboriginal peoples and other groups in the country. As well, it reflected the differences between aboriginal peoples themselves. Indians, for example, expressed opposition to the use of the label "native people" by the federal government. Indian representatives argued that words like nations and tribes had historic status, unlike the word native, which thus should not be used in the Constitution.¹¹² Underlying this position was Indian attachment to their special status under Section 91 (24). Status Indian feared that policies based on the all-inclusive term native could erode their special rights.¹¹³ Thus, as they had in 1970, they emphasized the need to protect Section 91(24).

¹¹¹ Ibid., 17.

¹¹² Paul Williams, Union of Ontario Indians, *Special Joint Committee*, No. 31, January 5, 1981, 29.

¹¹³ Gibbins and Ponting, "Historical Overview," 19.

In contrast, Metis and non-status Indians sought to expand the meaning of the section. They argued that the term "Indian" under Section 91(24) should include Metis and non-status Indians. Through a more inclusive definition of "Indian" they could gain the constitutional advantages of status Indians. Daniels spoke of how the Constitution had been misinterpreted, thus excluding the Metis and depriving them of rights they possessed at the time of Confederation.

We believe that the Constitution conferred special rights on the Metis, along with its associated benefits and rights...It is our view that the Constitution of 1867, occurring as it did in a context of legislative and judicial recognition of the Metis fact in Canada, was intended to reflect this in Section 91.24... In time, the constitutional reference and the intent it originally represented would become a quaint Canadian idiosyncrasy and a dead letter.¹¹⁴

Daniels expressed a preference for the label "native" because the name Indian had been imposed on aboriginal peoples. However, his greatest concern was that the term used, whatever it was, include Metis and non-status Indians in its definition. This change, he argued, must come before any elaboration of rights.

We simply want to redefine who is included in this special status section of the Constitution to include Metis and those Indians not protected by the Indian Act; we will negotiate whatever special rights we have after that fact. I think it is redundant to argue now what special rights there will be; we have to first of all negotiate the redefinition of that term and the acceptance of our people of that term and what it means, the generic term "Indian" or "native."¹¹⁵

The preferred terminology became clearer in 1980, when the NCC noted that in discussions with the ICNI and NIB, they had agreed that the terms "aboriginal rights", "aboriginal peoples," and "indigenous peoples" were the collective terms they

¹¹⁴ H. Daniels, *Special Joint Committee*, No. 5, August 23, 1978, 43.

¹¹⁵ *Ibid*, 51.

wished to see in the Constitution.¹¹⁶ Despite their differences, however, there were increasing similarities in the discourse between 1978 and 1980, a reflection of common feeling of injustice, and shared perceptions of the problems of the Canadian system.

Aboriginal leaders had spoken in the early 1970s of the need for aboriginal peoples to define their identities. The 1978 and 1980 constitutional discourse responded to this need. Aboriginal identities were much more clearly developed, and the desire for constitutional inclusion was more firmly expressed. The Assembly of First Nations insisted that the constitutional identities of Indians include a recognition of their historic status as nations, treaty rights, and the inherent rights of self-determination and self-government. These rights came from the Creator, not from Canadian law. Thus, constitutional recognition was portrayed as a way to symbolically affirm the Indian narrative contained in the Declaration of the First Nations, and not as a means to gain new rights.

Metis constitutional discourse also reflected a much stronger sense of political identity. The NCC talked of the Metis past as a nation in Manitoba and of the Royal Proclamation as the cornerstone of aboriginal rights. The ICNI position shared this perception of the Royal Proclamation. Like the other groups, the Inuit spoke of inherent rights and the need for their entrenchment in the Constitution.

The broad picture that emerges from the discourse surrounding the patriation of the Constitution was one of exclusion and inclusion. All three aboriginal

¹¹⁶ Ibid., 125.

organizations spoke of a history of exclusion. They presented a past of being left out, of a myth of two nations, and of the denial of their rightful place at the table of Confederation. This sense was accentuated by the use of words like ignored, excluded, distrust, suspicion, false promises, broken commitments, and cultural genocide. These terms, though, were used with reference to the past. The discourse directed toward the future revolved around wanting to join Confederation. The constitutional inclusion of their narratives would be a symbolic means of formally entering the Canadian nation.

The desire for inclusion was also demonstrated by the attempt of all three groups to distance themselves from comparisons with Quebec. Aboriginal assertions of nationhood and sovereignty often led to comparisons of their position with that of Quebec. This link, and aboriginal discomfort with it, became a persistent part of the discourse. As aboriginal peoples saw the federal government responding to Quebec's constitutional concerns, aboriginal leaders attempted to show why their people were even more deserving of special recognition in the Constitution than Quebec. At the same time, however, the aboriginal organizations emphasized that their version of sovereignty did not involve separation from Canada.

While aboriginal peoples sought constitutional inclusion, they desired inclusion on their terms. The discourse revealed how these terms had changed since the early 1970s. The movement away from the citizens plus terminology to the terminology of nationhood and self-determination created a stronger collective sense of identity as historical aboriginal nations. The emphasis on original occupation built on this

unique identity. Rather than holding special rights as citizens plus of Canada, aboriginal peoples would hold special rights as citizens of aboriginal nations. Riley, for example, spoke of wanting to join Confederation as *Indian people*, a sentiment echoed by George Watts of the Nuu-Chah-Nulth Tribal Council. Indians, Watts emphasized, were prepared to be Canadians. However, they could only be good Canadians if they were allowed to be Indians.¹¹⁷ The Inuit reference to wanting to join Confederation as a willing partner reflected a similar sentiment, as did the NCC stance of "collective integration" into the Canadian polity.

Many aboriginal criticisms were aimed not at the provisions of the Constitution, but at the way they had been interpreted. In the Metis discourse there were frequent references to the need to restore the original intent of the Constitution, which, according to the NCC, included the Metis under Section 91 (24).¹¹⁸ As well, from the aboriginal perspective, the Royal Proclamation and the treaties, the confirmations of their nationality, were constitutional documents. However, the governments of Canada had not abided by the spirit of those early documents.

Thus, the discourse of this era shows aboriginal peoples seeking inclusion in the Constitution, but rejecting some of the shared rights and responsibilities of the Canadian political community. The words and concepts employed by aboriginal organizations focused on differences from Canada and on separate aboriginal identities. New terms describing these differences had emerged as aboriginal peoples

¹¹⁷ Watts, *Special Joint Committee*. No. 27, December 16, 1980, 127.

¹¹⁸ see, for example, H. Daniels, *Special Joint Committee*, No. 5, August 23, 1978.

attempted, through the Constitution, to alter their political world. However, the emphasis of aboriginal organizations on seeking constitutional inclusion revealed a degree of acceptance of the Canadian political community, and conversely, a desire that the Canadian community accept aboriginal identities.

As the *Constitution Act, 1982* did not reflect the identities developed in the discourse, aboriginal organizations responded to the provisions of the Constitution negatively. However, the 1982 changes did explicitly recognize the Royal Proclamation as part of aboriginal rights, and placed the word "aboriginal" - defined as Indians, Inuit, and Metis - in the Constitution. Thus, all three groups explicitly gained a place in the Constitution. Section 35 recognized existing aboriginal and treaty rights. However, it left those rights undefined, as yet unformed by any narrative.

Chapter Four

Section 37 and the Language of Aboriginal Self-Government

The 1980s can be labelled the decade of self-government, as the concept and the multiplicity of meanings associated with it came to dominate aboriginal constitutional discourse. As Ponting and Gibbins described them, the events of the early 1980s had been a "roller-coaster ride" for aboriginal peoples.¹¹⁹ Within a year of patriation, aboriginal organizations plunged into more constitutional debate. Section 37 of the *Constitution Act, 1982* mandated a series of conferences to deal with outstanding constitutional matters. Conferences were held in 1983, 1984, 1985 and 1987, and self-government quickly came to dominate the agenda. Ultimately, the first ministers and aboriginal leaders failed to reach agreement on the constitutional entrenchment of self-government, but the discourse reveals the further development and consolidation of aboriginal identities based on historic rights and nationalism.

The Section 37 Process

The first conference, held in March 1983, was generally seen as a success.¹²⁰ An accord was reached on four items: gender equality in aboriginal and treaty rights;

¹¹⁹ Gibbins and Ponting, "Historical Overview," 40

¹²⁰ For a thorough overview of both the details of the conferences and the issues involved see the series on Aboriginal Peoples and Constitutional Reform published by the Queen's University Institute of Intergovernmental Relations. In particular, see D. Hawkes, *Aboriginal Peoples and Constitutional Reform: What Have we Learned?*, (Kingston: Institute of Intergovernmental Relations, 1989). Bryan Schwartz also examines the first three conferences in *First Principles, Second Thoughts: Aboriginal Peoples, Constitutional Reform and Canadian Statecraft*, (Montreal: Institute for Research on Public Policy, 1986).

the protection of land claims agreements under Section 35(1); consultation on constitutional amendments affecting aboriginal peoples, including changes to Section 91(24); and a process for negotiating the definition of aboriginal rights. Between the 1983 and 1984 meetings the federal Penner Report on Indian Self Government¹²¹ was released. The report adopted both the language and ideology of the AFN on First Nations government, and its release showed self-government moving from the First Nations agenda into the federal policy process.¹²² The report focused public attention on self-government. However, as the federal government assumes responsibility only for status Indians, the mandate of the committee, and thus its report, was concerned with self-government just for status Indians.

From 1984 until the final conference, the focus of the Section 37 process was self-government. However, the 1984 conference was a failure "of colossal proportions,"¹²³ as neither an amendment nor a future work plan were agreed on, and the meeting ended in suspicion and innuendo. Then, a new government was elected prior to the 1985 meeting. There was a widespread feeling that the meeting must be seen as a success.¹²⁴ While once again an accord was not reached, the conference did not end on the negative note of the previous year. However, no future process was in sight.

¹²¹ Canada, Report of the Special Parliamentary Committee on Indian Government in Canada, *Indian Self-Government in Canada*, (Ottawa, 1984).

¹²² Weaver, "Self-Government Policy," 14.

¹²³ D. Hawkes, *Negotiating Aboriginal Self-Government: Developments Surrounding the 1985 First Ministers' Conference*, (Kingston: Institute of Intergovernmental Relations, 1985), 10.

¹²⁴ *Ibid.*

The Aboriginal Representatives

The FMC process saw the introduction of new aboriginal groups into the constitutional debate. Because of the diverse identities of their constituents, aboriginal organizations, and the AFN in particular, have had difficulty in maintaining internal unity. The AFN represents peoples highly varied in terms of treaties, region, political views, language, culture, and resources.

Different attitudes held by members of the Indian population were evidenced by the position of the Six Nations Iroquois Confederacy, a group unique among Indians in Canada for their independent and aggressive position.¹²⁵ Historically, they have consistently asserted their sovereign status as independent nations outside of Canada. They expressed strong opposition to the extension of the franchise in 1960, claiming that as members of a separate nation they were not Canadian citizens. Voting as Canadians would require them to give up their national identity and sovereignty.¹²⁶ The Six Nations reacted to the *White Paper* by declaring themselves a sovereign state. This position continued to find some expression in the FMC process. The constitutional discourse of this group might be better labelled non- or anti-constitutional, as they completely rejected the Constitution Act, 1982. They insisted that constitutional reform is irrelevant to them, as they are in no way subject

¹²⁵ Frideres, 265. For an overview of the Mohawk position, see Standing Committee on Aboriginal Affairs, "The Summer of 1990: Report of the Standing Committee on Aboriginal Affairs," May, 1991.

¹²⁶ *Hawthorn Report*, 260.

to the provisions of the Constitution.¹²⁷

Prior to the 1983 meeting, strong nationalists inside the AFN protested the involvement of the provinces, asserting that their historic status as nations required an exclusive relationship with the federal government. One group rejected the process altogether and left the AFN to form the Coalition of First Nations. By the 1985 conference, most of the bands from Alberta and some bands from Saskatchewan and Manitoba had formed a new organization. Its name, the Prairie Treaty Nations Alliance, reflected the incorporation of the treaties as a foundation of the identity of many Indian peoples. Although the PTNA was not given recognition by the federal government in the FMC process, in 1985 the AFN allowed three PTNA representatives to speak using AFN seats.

Metis and non-status Indians also faced division when prairie Metis split from the NCC in March 1983 to form the Metis National Council, and were allocated seats at the conferences. The MNC defines its constituents as the descendants of the historic Metis nation in Western Canada. Their strong nationalistic element wishes to retain the Metis culture as unique and separate from other aboriginal groups. The NCC, on the other hand, considers its constituents all persons of partial Indian ancestry, regardless of place of residence.¹²⁸

¹²⁷ This position was expressed by Chief Billy Two Rivers of the Kahnewake Band. see B. Two Rivers, *Federal-Provincial Conference of First Ministers on Aboriginal Constitutional Matters, Verbatim Transcript*, (Ottawa: Canadian Intergovernmental Affairs Secretariat, 1984), 256-258. (Cited hereafter as Verbatim Transcript, 1984.)

¹²⁸ see M. Dunn, *Access to Survival: A Perspective on Aboriginal Self-Government for the Constituency of the Native Council of Canada*, (Kingston: Institute of Intergovernmental Relations, 1986).

The Section 37 Discourse

Much of the discourse of the four First Ministers' Conferences showed aboriginal peoples further explaining themselves : what self-government meant to them and why it should be constitutionally recognized, what their concept of sovereignty was, and how they wanted their relationship to Canada to develop. As no agreement was reached, the same themes reappeared time and time again. Thus, much of the analysis of the discourse will come from the 1983 meeting, supplemented by commentary from subsequent conferences. As self-government dominated the discourse, it will be discussed separately.

David Ahenakew, National Chief of the AFN, continued to address the themes established in the late 1970s and early 1980s, citing the *Declaration of the First Nations and Treaty and Aboriginal Rights Principles*¹²⁹ as the foundation of the AFN position. The term Indian government appeared more frequently in the AFN discourse. This development reflected the growing popularity of the concept since its introduction in the late 1970s. Ponting called it "the logical culmination of an extraordinarily rapid evolution in Indian political thinking and strategy over just one generation."¹³⁰ The AFN characterized the 1983 conference as "a consultation between the Indian governments and Canada."¹³¹ Indian government was

¹²⁹ This was a statement issued by the joint council of the NIB/AFN in 1981, and expressed the manner in which the AFN wished to see aboriginal title and rights expressed in the Constitution. Joint Council of the National Indian Brotherhood, *Treaty and Aboriginal Rights Principles*, November 18, 1981, in Getty and Lussier.

¹³⁰ Ponting, *Arduous Journey*, 318.

¹³¹ Assembly of First Nations, "Opening Remarks for Presentation by Dr. David Ahenakew, National Chief, AFN," *Federal-Provincial Conference of First Ministers on Aboriginal Constitutional Matters*, (Ottawa: Canadian Intergovernmental Conference Secretariat, 1983), 2.

consistently spoken of as an equal to federal and provincial governments, although Ahenakew labelled Indian governments the "first order" of government in Canada, based on Indians' original occupancy of Canada.

The notion of inherent, pre-existing rights continued to be an unwavering principle. The First Nations were consistent throughout the Section 37 process in their rejection of a new or contingent right to self-government, and in their refusal to accept a municipal type of government with delegated powers.¹³² While the AFN notion of sovereignty precluded municipal government status, the group continued to assert its desire for sovereignty within Canada.

Once again, First Nations discourse presented a vision of completing Canada, and attempted to avoid connotations of separatism. Ahenakew, in 1983, tried to make this position clear: "I ask, Prime Minister, that no one misinterpret our position, strongly held, or our words, no matter how strongly spoken, to mean that we are separatists - seeking to divide Canada and assert the status of foreign nations."¹³³ What they wanted, he asserted, was a middle ground between sovereignty and assimilation. The First Nations sense of sovereignty, as he described it, had "a distinct and special meaning."¹³⁴ It "should make no reasonable, objective Canadian nervous. To us it means full autonomy and self-determination within

¹³² Assembly of First Nation, "Opening Statement by Georges Erasmus, National Chief," *Federal-Provincial Conference of First Ministers on Aboriginal Constitutional Matters*, (Ottawa: Canadian Intergovernmental Affairs Secretariat, 1987), 6.

¹³³ Ahenakew, "Opening Remarks," 1983, 5.

¹³⁴ Ahenakew, "Opening Statement," 1984, 4.

Canada and the Canadian Constitution."¹³⁵ The international dimension of the discourse was also pronounced, as AFN representatives drew attention to Canada's commitment to international standards of self-determination.

In 1983 separate submissions by the Indian Nations of Hobbema, the Peigan Tribe, and the Blood Tribe showed the importance of treaty rights to the political identity of these peoples. As Sanders has noted, prairie Indians have had a long established tradition that the treaties were, in effect, constitutional documents.¹³⁶ The Hobbema, Peigan, and Blood, signatories of treaty 7, made it clear that they did not want to deal with provinces and that their major concern was their treaty identity.¹³⁷ The Blood Tribe emphasized its identity as a unique people: "Perhaps the semantic confusion resulting from the label 'Indian' has confused the Canadian government; be assured that we are not all the same people."¹³⁸ In 1985, the PTNA appeared, representing the signatories of treaties 1,4,5,6,7,8, and 10. The PTNA asserted that as treaty people, they were separate from the AFN and other aboriginal groups at the conference, as they held special rights based on treaties with the Crown.¹³⁹ However, despite the emphasis of these groups on treaties and a unilateral relationship with the federal government, they were similar to AFN in

¹³⁵ Ibid., 5.

¹³⁶ Sanders, "The Indian Lobby," 323.

¹³⁷ see, for example, "Declaration of the Peigan Tribe of the Blackfoot Confederacy," *Federal-Provincial Conference of First Ministers on Aboriginal Constitutional Matters*, 1983.

¹³⁸ "The Constitutional Position of the Blood Tribe," *Federal-Provincial Conference*, 1983, 3.

¹³⁹ J. Snow, *Prairie Treaty Nations Alliance, Verbatim Transcript*, 1985, 109.

their acceptance of the Constitution, if not the Section 37 process, and the need to have their rights entrenched.

The need for equality for all aboriginal peoples dominated the discourse of the NCC. In 1984, the organization's opening statement established equality between aboriginal peoples as their first priority. The definition of Indians under Section 91(24) had "bedeviled our people and befuddled all other Canadians,"¹⁴⁰ NCC president Louis Bruyere argued. Although they had been constitutionally recognized as aboriginal peoples in 1982, the NCC asserted that the federal government, through its refusal to provide them with special rights, had not given the Metis "aboriginal standing". Vice-president Harry Daniels described his group as "second class aboriginal peoples", portraying the problem in terms of two Constitutions of Canada.¹⁴¹ The Constitution containing Section 91(24) recognized only Indians, while the Section 35 Constitution acknowledged the existence of Indians, Inuit and Metis as aboriginal peoples.

Like the AFN, the NCC also focused on the concept of "being here first", although with a twist: as a people who emerged out of early settlements in the west, they called themselves the "First Canadians" and the "very basis of Canadian identity."¹⁴² Thus, they argued, "[f]ar from wanting to separate from this country, the Metis and non-status Indian people want to renew our rightful place as nation-

¹⁴⁰ Bruyere, "Opening Statement," *Federal-Provincial Conference*, 1984, 3.

¹⁴¹ Daniels, *Verbatim Transcript*, 1984, 153.

¹⁴² Native Council of Canada, "Opening Statement," *Federal-Provincial Conference*, 1983, 8.

builders and to re-experience what it felt like when we brought Manitoba into Confederation."¹⁴³

In attempting to make the NCC position clear, Bill Wilson addressed some of the conceptual problems that people have had with their use of the term sovereignty:

immediately people take sovereignty and say that means governments that have their own exclusive jurisdiction and heaven forbid that is apartheid and separatist and all of those other things. Our concept of sovereignty is not like that.¹⁴⁴

Rather, he argued, sovereignty was their right to make decisions themselves, and have their own institutions, culture, and language.

The MNC placed an even greater emphasis than the NCC on their origins as an historic nation and the need to develop nationality within Canada, calling themselves "equal partners in Confederation."¹⁴⁵ Metis leader Louis Riel was referred to as Manitoba's father of Confederation. The MNC asserted that they were the "sole and legitimate representatives of the Metis in the Prairie provinces."¹⁴⁶ Like the NCC, they traced the origins of their nation back to the fur trade, and cited the legal recognition of their people in the Manitoba Act of 1870 and the Dominion Lands Act of 1879. The entrenchment of Metis rights would enable them to "fulfil the historic mission of the Metis Nation."¹⁴⁷ Like the language of other aboriginal

¹⁴³ Ibid., 8.

¹⁴⁴ B. Wilson, *Verbatim Transcript*, 1983, 128.

¹⁴⁵ MNC, "Opening Statement," 1983, 3.

¹⁴⁶ Ibid.

¹⁴⁷ Metis National Council, "Opening Statement," *Federal-Provincial Conference*, 1983, 1.

groups, the discourse of the MNC attempted to construct a sense of nationality and assert a right to recognition as a nation. They continued to talk about wanting the unequal treatment of aboriginal people to end, and expressed their objections to being lumped in with other disadvantaged groups.¹⁴⁸ The MNC discourse also projected strong sentiments of rejection by Canada, and the Metis desire to alter those circumstances.¹⁴⁹ Canada, the MNC argued, had not permitted the Metis to be involved as citizens for the last one hundred years.

When they lost their lands and lost the war, they even lost their citizenship and even though the country had pretended to represent them, it has not. So my proposal is the fact that we are trying to get back into Confederation, not get out. We have been out for the last 100 years.¹⁵⁰

Much of the ICNI commentary carried through with typical themes. ICNI co-chairman Amagoalik spoke of the need to be a "third partner" in Confederation, and called the conferences a forum for nation-building.¹⁵¹ Like the other national organizations, the ICNI stressed that they were not challenging Canada's sovereignty. In contrast, they underscored how their presence in the Arctic helped to assert Canadian sovereignty.¹⁵²

¹⁴⁸ J. Sinclair, *Verbatim Transcript*, 1984, 158.

¹⁴⁹ C. Chartier, *Verbatim Transcript*, 1983, 111.

¹⁵⁰ J. Sinclair, *Verbatim Transcript*, 1983, 272.

¹⁵¹ ICNI, "Opening Remarks," Federal-Provincial Conference, 1983, 1.

¹⁵² Inuit Committee on National Issues, *Completing Canada: Inuit Approaches to Self-Government*, (Kingston: Institute of Intergovernmental Relations, 1987), 5.

Aboriginal Self-Government

The concepts of self-government that came to dominate the Section 37 process subsumed the themes of nationhood, sovereignty, and self-determination that had been discussed from 1978 to 1982. Self-government was widely supported by aboriginal organizations, but there was no agreement on the powers that would be involved, and little discussion of the practical aspects or limitations of self-government.¹⁵³ In part, this was a product of the nature of the process, and of aboriginal peoples' insistence on the need for self-government arrangements to be tailored to fit local communities. Yet the discourse at the constitutional level also revealed a treatment of self-government as a symbol that captured many of the aspirations of aboriginal peoples.¹⁵⁴ Corresponding to their symbolic perception of the Constitution, the notion of self-government became a symbol of how aboriginal peoples wanted their narratives depicted in the Constitution.

 Sally Weaver has described self-government as "a value-notion" that remains undefined.¹⁵⁵ Throughout the 1980s, she observed, the AFN had pinned its hopes on self-government as the vehicle "for the political transformation of Indians from

¹⁵³ Sanders has pointed out that any meaningful form of self-government has to be territorially based. "This reality precludes self-government for Indians, non-status Indians and Metis who live away from Indian reserves or one of the eight Metis settlements. Only the Inuit in the eastern Arctic have any real hope of aboriginal control of what has come to be called 'public government', that is, a government in which non-aboriginal people living in the area have the right of political participation." Sanders, "An Uncertain Path," 72. For a discussion of some of the practical problems that need to be solved, see R. Gibbins, "Citizenship, Political, and Intergovernmental Problems with Indian Self-Government," in R. Ponting, *Arduous Journey*.

¹⁵⁴ For a discussion of the symbolic qualities of self-government, see R. Jhappan, "The Language of Empowerment: Symbolic Politics and Indian Political Discourse in Canada," unpublished Ph.D. thesis, University of British Columbia, 1990.

¹⁵⁵ S. Weaver, "Indian Government : A Concept in Need of a Definition," in Little Bear, Boldt and Long.

dependency to greater autonomy and self-reliance."¹⁵⁶ The MNC discourse expressed an almost messianic view of self-government when they described it as "the very basic foundation for liberation for our people."¹⁵⁷ The language of the Section 37 process revealed problems with the terms of the discourse itself. Many aboriginal representatives asserted the need to define their own identities, through their own terminology. Statements like Ahenakew's "for over 400 years, in your languages and in our languages, we have been unable to get you to understand," expressed frustration with continued conceptual differences and the refusal of governments to listen to aboriginal discourse.¹⁵⁸ The aboriginal perspective was also captured by Bill Wilson of the NCC:

My whole point is that we must stop viewing [aboriginal rights] from the point of the dominant society if we are ever going to understand what the Indian people, the Inuit people and the Metis people want.¹⁵⁹

Aboriginal leaders were frequently asked to explain what they meant by aboriginal rights and title. They continued to reply with talk of original occupation, the Royal Proclamation, treaties, and international human rights standards. However, Indians, Metis and Inuit also argued that aboriginal rights was a term invented by Europeans, not aboriginal peoples.¹⁶⁰ As Ahenakew noted, "aboriginal rights' is a term that gives me a lot of trouble. The reason why I say that is because

¹⁵⁶ Weaver, "Self-Government Policy," 2.

¹⁵⁷ J. Sinclair, *Verbatim Transcript*, 1985, 142.

¹⁵⁸ Ahenakew, *Verbatim Transcript*, 1985, 18.

¹⁵⁹ Wilson, *Verbatim Transcript*, 1983, 128.

¹⁶⁰ Amagoalik, *Verbatim Transcript*, 1983, 130.

there is no real term in my language to define what that means. We use 'inherent rights' because they are inherent."¹⁶¹

Sanderson of the AFN also drew attention to the terms of the discourse.

We have throughout our struggles refrained from using the words of your people in trying to define our rights and our position. We sat and listened for a two-and-a-half hour discussion on the term "aboriginal". We recognize that the term flows from your people as a political term to try to come to grips with dealing with the question of original peoples' rights and titles, with the concept of eventually terminating these rights in some form or another.¹⁶²

Despite these conceptual obstacles, the FMCs did achieve results in expressing aboriginal discourse and identities. Through the emphasis on "firsts" - First Nations, First Canadians, First Order of Government - aboriginal peoples attempted to establish their claim to constitutional priority. The focus on self-government was also accompanied by an increasing use of the rhetoric of nationalism, especially on the part of the ICNI and NCC. In 1982, the concept of aboriginal self-government was said to be "the subject of much ridicule, both within governments and the non-aboriginal population at large."¹⁶³ By 1987, the concept, at least, had been widely accepted. Thus, through their discourse at the constitutional level, aboriginal peoples took advantage of an "opportunity to change the vocabulary of government-aboriginal relations."¹⁶⁴ While there was confusion and hesitancy to accept new concepts on the aboriginal and government sides, the increasing use of new terminology showed

¹⁶¹ Ahenakew, *Verbatim Transcript*, 1983, 137.

¹⁶² Sanderson, *Verbatim Transcript*, 1983, 164.

¹⁶³ Hawkes, "Negotiating Aboriginal Self-Government," in P. Leslie, ed., *Canada: The State of the Federation 1985*, (Kingston: Institute of Intergovernmental Relations, 1985), 170.

¹⁶⁴ This is a phrase used by a participant in the FMC process. Quoted in Hawkes, *What Have We Learned?*, 12.

political change.

The perception of the Constitution as a symbol also came through in the discourse. Erasmus depicted the process as "deathly serious...We are amending the Constitution. We know it is the supreme law of Canada, and we know how important that is."¹⁶⁵ Nungak also described why constitutional entrenchment of self-government was so important to his people:

In the past our fundamental rights have not been respected. French and English language rights are protected in the Constitution along with other rights that Canadians feel are so fundamental that they cannot be entrusted solely to legislation. Similarly, the right of self-government is of such fundamental importance to aboriginal peoples that it requires constitutional entrenchment.¹⁶⁶

Aboriginal peoples used the imagery of completing the circle of Canadian Confederation, and of being admitted to Canada through constitutional inclusion.

As in early 1980s, the discourse, especially that of Metis and non-status Indians, expressed a sense of wanting to redeem the Constitution. The NCC continued to speak of how the original intent of the Constitution had been distorted to leave the Metis out of Section 91 (24). Bruyere, for example, spoke of how the federal government continued to be deprive his people of their just recognition in violation of the Constitution.¹⁶⁷ The MNC also spoke of the need for the federal government to live up to early constitutional promises. While the MNC did not reject the Constitution, the continued legitimacy of the document was called into question. The legitimacy of the Constitution of Canada, the MNC asserted, "must be

¹⁶⁵ Erasmus, *Verbatim Transcript*, 1985, 282.

¹⁶⁶ ICNI, "Opening Remarks," 1984, 10.

¹⁶⁷ Bruyere, "Opening Remarks," 1987, 4.

predicated upon the agreement of all people who live within this nation."¹⁶⁸

The discourse of the Section 37 process continued to show the evolution of aboriginal constitutional identities since the early 1970s. By the end of the FMC process, each organization had developed consistently expressed positions, relating their early status as nations, subsequent historic injustices, and current desires for self-determination and self-government. Indian discourse was centred around the concept of First Nations. AFN leaders consistently used the label First Nations to define their people and First Nations discourse highlighted the historic recognition of Indians as nations in the Royal Proclamation. Indian leaders demanded that Canadian governments acknowledge and constitutionally entrench the status of Indian nations. The discourse of the PTNA revealed some of the diversity in Indian identities. As the name of the group reflected, treaty rights were an integral part of the identity of PTNA members, and had to be part of their constitutional narrative.

Metis and non-status Indian discourse also traced a path of historic identities. The discourse of MNC was especially powerful in expressing sentiments of historic nationalism, referring to the development of Manitoba, and the Metis position as a uniquely Canadian people. The priority of Metis and non-status Indians continued to be the constitutional equality of all aboriginal peoples.

The discourse of the ICNI did not convey the same forceful sense of nationalism as did the discourse of the AFN, NCC, and MNC. This may be a reflection of the fact that the Inuit represent 90% of the population of the regions they inhabit. Thus,

¹⁶⁸ MNC, *Verbatim Transcript*, 1987, 43.

unlike other aboriginal peoples, they were not faced with the need to create a picture of a nation to present to the Canadian public. However, while the ICNI position did not make as much use of the rhetoric of nationalism, it did work to put forth a distinct Inuit identity, grounded in historic traditions, languages and culture.

All aboriginal leaders continued to speak of their constitutional exclusion, and the need to symbolically complete Canada. However, inclusion was now predicated on the recognition of aboriginal self-government. The consolidation of demands for self-government was reflected in a stronger, more emphatic, and by the end of the FMC process, more frustrated discourse. The failure to achieve the inclusion of their constitutional narratives, particularly after aboriginal identities had been given some recognition by the constitutional changes in 1982 and by the Section 37 process itself, left aboriginal leaders disappointed but determined. A statement made by Nungak reflected the importance of the four First Ministers Conferences, and tellingly foreshadowed the reaction to the Meech Lake Accord:

Our very participation has been a constitutional admission that the aboriginal peoples of Canada have a distinct role in the debate about the future of Confederation. It has been an admission that our arguments for self-government are both pressing and just. Legitimacy, once acknowledged, cannot be lightly denied.¹⁶⁹

¹⁶⁹ Nungak, "Opening Remarks," 1987, 6.

Chapter Five

Meech Lake and the Discourse of Exclusion

The attempt to infuse the symbolic recognition of aboriginal rights with constitutional meaning had begun in 1983 with a sense of hope on the part of aboriginal organizations. It gave way to disappointment by the end of the FMC process, and finally, to a feeling of outright betrayal in the aftermath of the signing of the Meech Lake Accord. In the post-Meech era, the symbolic role of the Constitution became sharply evident. The Meech Lake Accord was universally viewed by aboriginal peoples as an affront to their goals and identities. Their role in the defeat of the Accord was seen as a symbolic victory.

The provisions of the Meech Lake Accord of June 1987 were developed in an effort to obtain Quebec's approval of the *Constitution Act, 1982*. The proposed constitutional changes included the recognition of Quebec as a distinct society within Canada. Section 16 of the Accord provided that its provisions would not derogate from the constitutional rights of aboriginal peoples or alter the meaning of Section 91(24), so the agreement appeared to be neutral with respect to aboriginal peoples. However, given their symbolic perception of the Constitution, aboriginal peoples did not interpret the Accord as neutral. As Hawkes noted of the aboriginal opposition:

In part this was seen in symbolic terms. The Meech Lake Accord, achieved so soon after the "failure" of the Section 37 process, hardened the views of aboriginal peoples. Aboriginal peoples resented the "distinct society" clause being applied to Quebec, but not to aboriginal peoples, who

are arguably the most distinct people in Canada."¹⁷⁰

Aboriginal testimony before the Special Joint Committee on the 1987 Constitutional Accord centred on their own distinctiveness, their exclusion from the Constitution and the Constitutional process, and their lack of faith in Canadian governments. The Accord, Nungak asserted, "abjectly ignores that Quebec or people or groups other than Quebec are not distinct; it implies that Quebec is the only distinct thing that deserves such special recognition."¹⁷¹ This, he argued, was a basic fallacy, because the Inuit were "aboriginally distinct." Nungak spoke of his concern that the Inuit could be "outdistincted" by a distinct Quebec.¹⁷² His co-chair, Amagoalik, called the Accord "an insult" that perpetuated the myth of two founding nations.¹⁷³ Through the Accord, he argued, the Canadian people or politicians were trying to ignore the existence of the aboriginal fact.¹⁷⁴ AFN chief Erasmus agreed with the Inuit assessment. He portrayed the Accord as a distortion of history as it suggested that French peoples in Quebec were and had always been the only distinct

¹⁷⁰ Hawkes, *What Have We Learned?*, 50. As Hawkes notes, aboriginal peoples also had other, "more substantive" concerns, including: 1) the agenda-setting mechanism for future First Ministers Conferences, and fears that the provinces could exclude access of aboriginal peoples, and 2) the requirement of unanimous consent of the provinces and the federal government for the admittance of new provinces, which could make the creation of new provinces in the Canadian north extremely difficult. As this paper is concerned with symbolic issues of identity, it will focus on the objections to the distinct society clause and the continued exclusion of aboriginal peoples. For more on other objections, see "Selected Documents from the Assembly of Manitoba Chiefs on the Meech Lake Accord," *Native Studies Review* 6 (1990): 119-152.

¹⁷¹ Z. Nungak, *Minutes of Proceedings and Testimony of the Special Joint Committee of the Senate and the House of Commons of Canada on the 1987 Constitutional Accord*, No.3, August 5, 1987, 25. (Cited hereafter as *Special Joint Committee*).

¹⁷² Nungak, *Special Joint Committee*, No. 3, August 5, 1987, 24.

¹⁷³ Amagoalik, *Special Joint Committee*, No. 3, August 5, 1987, 28.

¹⁷⁴ *Ibid.*

society in the country. For Erasmus, the lack of aboriginal recognition implied that "the peoples of the First Nations never existed."¹⁷⁵ When questioned about whether he really thought that recognition of Quebec as a distinct society meant the province was the only distinct society in Canada, Erasmus drew attention to the significance of constitutional recognition: "when you recognize only one distinct society what is the difference if there are other distinct societies, legally and constitutionally?"¹⁷⁶ NCC president Bruyere also clearly stated his symbolic view of the Constitution and aboriginal exclusion. Constitutions, he argued, "are meant to reflect what Canada is and what it should be."¹⁷⁷ By leaving out "the first founding people of Canada," the Accord provided a vision of the future in which they could not participate.¹⁷⁸

Aboriginal peoples' dismay over the Accord also focused on their exclusion from both the Constitutional process and the future agenda. The discourse frequently referred back to their inclusion in the Section 37 process, and their earlier involvement in the patriation process. As Nungak phrased their position: "we were at least in the executive washroom of the process when we were participating as non-voting invitees to a table of First Ministers. Now we are out on the sidewalk, we are out on the street."¹⁷⁹ Jim Sinclair from the Metis National Council used the

¹⁷⁵ Erasmus, *Special Joint Committee*, No.9, August,19, 1987, 50.

¹⁷⁶ *Ibid.*, 64.

¹⁷⁷ Bruyere, *Special Joint Committee*, No. 12, August 25, 1987.

¹⁷⁸ *Ibid.*, 95-96.

¹⁷⁹ Nungak, 35.

language of exclusion to argue that Canada had left the Metis outside:

We are not here as Canadians speaking in a meeting to people who are asking us to participate. We are outsiders coming to this meeting to tell you a brief history of our people and to offer solutions to bring our people into Confederation.¹⁸⁰

Sinclair also spoke of a history of oppression and laws that kept the Metis out of Confederation. His words clung to the inclusion of the Metis in 1982 as the only change in their long history of exclusion.¹⁸¹ Bruyere, too, focused on 1982 as a high point of inclusion for his people. While it had shortcomings,

the 1982 Constitution Act contained a vision of aboriginal peoples as being partners in Confederation, and it contained several important provisions to bring that vision into being. The 1982 Act recognized certain realities about Canada and the need to provide some countervail, some balance, to allow our people, otherwise weak and without influence, to effectively negotiate our place in Confederation. The 1982 act contained these provisions; the 1987 act abandons them.¹⁸²

In a separate article, Bruyere wrote of "being abandoned" in 1987.¹⁸³ Thus, the Accord was perceived as ousting aboriginal peoples from the status they had achieved in 1982.

Erasmus also spoke of exclusion and inclusion, reiterating the image of completing the circle of Confederation he had employed in the Section 37 process. "The circle will only be complete when the rights of aboriginal peoples in Canada are unequivocally expressed in the Constitution and when the relationship between the

¹⁸⁰ Sinclair, *Special Joint Committee*, No. 9, August 19, 1987, 28.

¹⁸¹ *Ibid.*, 31.

¹⁸² Bruyere, 102.

¹⁸³ L. Bruyere, "Aboriginal Peoples and the Meech Lake Accord," *Canadian Human Rights Yearbook* 5 (1988):51.

First Nations and the rest of Canada is respected."¹⁸⁴

A distrust of government and sentiments of betrayal came through in all aspects of the discourse. The feeling was so pronounced that Tony Hall has written that some aboriginal communities have created a new verb, "to be meeched," to describe cheating and betrayal.¹⁸⁵ The sense of "being meeched" was particularly heightened by aboriginal peoples' own failed attempts at constitutional renewal. First Nations, Erasmus argued, "were told for five years that governments are reluctant to entrench undefined self-government of aboriginal people in the Constitution, yet here is an equally vague idea of distinct society, unanimously agreed to and allowed to be left to the courts for interpretation."¹⁸⁶ The Accord not only left them out, he asserted, it took their language.

All the language we were trying to get into our accord that we could not get these people to concede, they virtually took the same kind of language and put it into this accord. There is no question that there is a double standard in Canada, absolutely no question.¹⁸⁷

This sense of betrayal led to some questioning, at least on the part of the Inuit, of their continued acceptance of Canadian citizenship. Nungak asked what motivation the Inuit had to continue to follow the laws of Canada, "of a country that refuses at least to acknowledge that we have unfinished business and therefore deserve some

¹⁸⁴ Erasmus, 49.

¹⁸⁵ Hall, 423.

¹⁸⁶ Erasmus, 50.

¹⁸⁷ Ibid., 55.

attention."¹⁸⁸

Thus, the aboriginal reaction to the Meech Lake Accord was typified by sentiments of exclusion, betrayal, and distrust. In contrast to earlier discourse, rather than describing aboriginal identities, the response to the Accord voiced anger at the rejection of those identities. The reaction to the Accord in some ways represented a culmination of the process of aboriginal constitutional self-definition begun in the early 1970s. At that time, aboriginal leaders had recognized a need to establish constitutional identities. During the constitutional debates of the late 1970s and early 1980s these identities were developed. During the Section 37 process, aboriginal peoples attempted to have these narratives written into the Constitution. Thus, the absence of aboriginal recognition in the Meech Lake Accord was interpreted as a rejection of the aboriginal constitutional identities developed over nearly two decades. Assuming that these identities had been well developed and stated to Canadian governments, aboriginal leaders were dismayed that they could be ignored. Unified in their opposition to the Accord, aboriginal peoples continued to seek inclusion and recognition, but questioned their affinity with a state that would ignore their existence and shut them out of the constitutional process. Ultimately their role in the defeat of the Accord was seen by them as a "triumph for Aboriginal peoples, a time of solidarity, strength and empowerment."¹⁸⁹

¹⁸⁸ Nungak, 31.

¹⁸⁹ D. Greschner, "Introduction: Selected Documents from the Assembly of Manitoba Chiefs on the Meech Lake Accord," *Native Studies Review* 6 (1990): 122.

CONCLUSION

The Character of the Discourse

The political discourse of aboriginal peoples over the past two decades vividly illustrates the symbolic role of Canada's Constitution. Hesitant steps by aboriginal groups into the constitutional arena in the early 1970s evolved throughout the 1980s into demands for full participation in the process of constitutional renewal. The symbolic role of the Constitution became increasingly apparent, reaching a peak in the discourse reacting to the Meech Lake Accord. The language used by aboriginal peoples has been grounded in the perception that "if one's group, or conception is written into the Constitution, one is a legitimate part of the Canadian community; if not, one is marginalized and somehow excluded."¹⁹⁰ The constitutional discourse of the national aboriginal organizations has been a language of exclusion, seeking inclusion.¹⁹¹

The language of exclusion has highlighted the differences and boundaries between each aboriginal group, and between the aboriginal and Canadian political communities. It has looked to the past, proudly asserting aboriginal national status prior to European settlement and in the early days of contact, and describing history since that time in terms of racism, colonialism, injustice, dispossession, and

¹⁹⁰ Simeon, "Meech Lake and Visions of Canada," 295.

¹⁹¹ This characterization applies to the national organizations represented in the discourse, the AFN, NCC, MNC, and ICNI. For a small number who do not seek to participate in the Canadian state, such as the Six Nations Confederacy, theirs is solely a discourse of exclusion, relating their own perception of themselves as nations *outside* the Canadian nation and their desire to be recognized as such.

misunderstanding. Aboriginal peoples have spoken about what the Canadian state has done to them; about how they have been kept out. The discourse has highlighted historical landmarks of injustice, such as Confederation, the *White Paper*, the November 1981 constitutional agreement, and the Meech Lake Accord. While the feeling of being left out is conveyed by all the aboriginal groups, it is particularly strong among the Metis and non-status Indians, who have felt doubly excluded due to their lack of special status in relation to the federal government.

The language of inclusion, in contrast, looks to a shared future. It speaks of closing the circle of Confederation, of building a new nation, and of completing Canada. Yet it conveys a desire for inclusion that incorporates sentiments of exclusion and difference, for it does not seek inclusion on any terms. Sanders described the Indian approach to the Constitution in 1978 as, in one sense, rooted in history but, in another sense, free from history, as Indians sought to negotiate a new relationship with the Canadian state.¹⁹² This characterization applies to aboriginal discourse in general. Aboriginal constitutional language has called on the past, but has stressed the right of contemporary aboriginal peoples to build a future of inclusion on their own terms, and to assert their own voices. As AFN National Chief Ovide Mercredi told the provincial premiers in the summer of 1991, "You cannot speak for us because we are different."¹⁹³

Technically, as citizens of Canada, aboriginal peoples are part of the Canadian

¹⁹² Sanders, "The Indian Lobby," 303.

¹⁹³ O. Mercredi, National Chief of the Assembly of First Nations, "Statement to the Annual Premiers Conference," Whistler, British Columbia, August 26, 1991,

state. In 1967, the *Hawthorn Report* observed that the historic denial of voting privileges had led both Indians and non-Indians to share the attitude that Indians were outside the Canadian community.¹⁹⁴ The unconditional extension of the franchise to status Indians in 1960 ended federal voting restrictions on aboriginal peoples. As Cairns and Williams describe it,

The 1960 extension of the federal franchise, which was opposed by many Indians, was an attempt to reconcile citizenship as a universal attribute, with a continuing distinctiveness of Indian status and treatment based on history, the Constitution, and the existence of a traditional branch of government with an ethnic clientele. It brought Indians into the political community as full participants on an individual basis.¹⁹⁵

Thus, Indians joined other aboriginal peoples as participants in the political community, but on an *individual* basis. Hence the opposition to the extension of the franchise by many Indians. Indians and other aboriginal peoples have sought to join the Canadian political community as self-defined *collective* entities. From Cardinal's desire for a "true citizenship" that recognized Indian self-identity, to current demands for aboriginal self-government, aboriginal peoples have sought to stretch the imagination of the Canadian political community to incorporate new ideas of membership based on aboriginal narratives.

Cardinal wrote in 1970, in a statement applicable to all aboriginal groups, that the "challenge to Indians today is to redefine [their] identity in contemporary terminology. The challenge to the non-Indian society is to accept such an undated

¹⁹⁴ *Hawthorn Report*, 262.

¹⁹⁵ A. Cairns and C. Williams, "Constitutionalism, Citizenship and Society in Canada: an Overview," in A. Cairns and C. Williams, eds., *Constitutionalism, Citizenship and Society in Canada*, (Toronto: University of Toronto Press, 1985), 30.

definition."¹⁹⁶ As seen through their constitutional language of the last twenty years, aboriginal peoples have redefined their identities in increasingly nationalistic terms. The demand for recognition as the first order of government in Canada conveys a much different image than did earlier calls for citizens plus status. In seeking to symbolically join the Canadian political community, aboriginal groups have, to a degree, stepped away from Canada to define themselves. They have made stronger, more consistent, and more persistent claims to nationhood and self-determination. And, in their attempt to reconstitute the political world, conceptual change has taken place. Declarations of nationhood, pronouncements of sovereignty, and the now common use of the terms First Nations and aboriginal self-government have accompanied aboriginal forays into the constitutional realm.

The expression of this type of self-centred discourse¹⁹⁷ is not in itself surprising. Cairns and Williams note that:

The extent to which citizens view state action as legitimate, identify with the political order, are willing to perform multiple citizen roles and to forbear from exploiting strategic positions of power in society are all positively linked to their view of the nature of community membership, the rights and obligations of citizens, and the feeling that they, as community members, are treated equitably and honourably by the state.¹⁹⁸

The language of exclusion has shown that many aboriginal peoples do not see the actions of Canadian governments as legitimate, perceive community membership as something denied to them, view their rights as trampled on, and their treatment as

¹⁹⁶ Cardinal, *The Unjust Society*, 25.

¹⁹⁷ Cairns calls the language of ethnic and aboriginal groups who have gained constitutional identities through the Charter "a centrifugal language more successful in capturing our separate ethnic selves than in addressing our common membership in a single polity..." Cairns, "Political Science, Ethnicity and the Canadian Constitution," 130.

¹⁹⁸ Cairns and Williams, 5.

historically unjust. As a result, they have not identified with the political order of Canada, nor have they been comfortable with or accepted the multiple citizen roles they have to play.¹⁹⁹ Thus, their constitutional discourse has emphasized their rights as aboriginal peoples and the obligations of the Canadian government to them. This sense has been present throughout the discourse, but has been strengthened by the 1982 recognition of aboriginal rights in the Constitution and the Section 37 process. NCC leader Bruyere, in his reaction to Meech Lake, referred to "the spirit of 1982 that clearly established aboriginal rights as the first priority facing Canada and Canadians."⁵¹ Cairns and Williams have observed that every recognition of a right carries with it an altered sense of community.²⁰⁰ In the case of aboriginal peoples, the recognition of rights in 1982 helped to enhance and consolidate the senses of community already in existence.²⁰¹

An examination of the discourse also shows it to be increasingly repetitive, particularly since 1978. In Special Joint Committee appearances and First Ministers' Conferences, the same themes and words reappear time and time again. This reflects both aboriginal organizations' inability to achieve the full extent of their goals, as well as governmental requests for re-explanation. But repeated statements of aboriginal rights and self-government have also contributed to the construction of "imagined

¹⁹⁹ Alan Pratt has observed that "the general acceptance of the idea that aboriginal people possess the *rights* of citizenship has not, however, been accompanied by an equivalent theory of their *obligations* as citizens." Pratt, 39.

²⁰⁰ *Ibid.*, 3.

²⁰¹ Katherine Swinton makes a similar point in reference to all non-territorially based groups who gained recognition through the *Charter*. K. Swinton, "Competing Visions of Constitutionalism: Of Federalism and Rights," in Swinton and Rogerson, 282.

communities." In order to function at the constitutional level, aboriginal organizations have had to find means to draw together diverse constituencies. The repetition of these key phrases helped to create a feeling of affinity among aboriginal peoples. Hawkes has described aboriginal rights as "a rallying cry for aboriginal peoples across Canada."²⁰² Weaver has also noted that "the task of unifying Indian demands on the national level, by necessity, involves NIB leaders in *creating* symbolic and ideological issues (eg., Indian government, Canadian constitutional amendments) as a way of seeking government and the societal affirmation of the unique status of Indians in Canada."²⁰³ Thus, the discourse of the 1970s and 1980s portrayed the development of aboriginal constitutional identities grounded in difference and rights, and increasingly structured around the key concepts of self-government and self-determination.

The Difficulties of Aboriginal Constitutional Discourse

Constitutional debate, Simeon has observed, places a "premium on the symbolic, the abstract, the issues around which compromise is the most difficult."²⁰⁴ Abstraction and symbolism are particularly evident in the aboriginal arena, where the issues presented challenge the dominant narrative that informs the Canadian

²⁰² Hawkes, "What Have We Learned?," 4.

²⁰³ S. Weaver, "Political Representivity and Indigenous Minorities in Canada and Australia," in N. Dyck, ed. *Indigenous Peoples and the Nation-State: Fourth World Politics in Canada, Australia and Norway*, (St. John's: Institute of Social and Economic Research, Memorial University of Newfoundland, 1985), 126.

²⁰⁴ R. Simeon, "Aboriginal Self-Government and Canadian Political Values," in D. Hawkes, *Issues in Entrenching Aboriginal Self-Government*, (Kingston: Institute of Intergovernmental Relations, 1987), 50.

political community. The repetition of key terms has also served to accentuate the non-compromising nature of the discourse. Edelman writes that "once a term becomes a vehicle for expressing a group interest it goes without saying that is it in no sense descriptive, but only evocative."²⁰⁵ Language, he argues, "becomes a sequence of Pavlovian cues rather than an instrument for reasoning and analysis if situation and appropriate cue occur together."²⁰⁶

Aboriginal leaders have repeatedly used phrases like inherent rights, self-government, sovereignty, and self-determination. These terms have evoked sentiments of community within the group, and of difference from Canada. However, they have not been clearly defined. For example, former AFN president David Ahenakew has written of the "impossible and unnecessary task" of identifying and defining aboriginal rights and title.²⁰⁷ He argues that a definition would limit aboriginal rights rather than protect them.²⁰⁸ Through a mix of unclear definitions, conceptual confusion, and resistance to compromise on both sides, efforts to develop a shared understanding between aboriginal and Canadian governmental leaders have foundered. The terminology used by aboriginal peoples has been seen as a threat to government integrity and Canadian values. For example, aboriginal use of the term sovereignty evokes images of separatism. Sanders has noted that sovereignty is a

²⁰⁵ Edelman, 125.

²⁰⁶ *Ibid.*, 115.

²⁰⁷ D. Ahenakew, "Aboriginal Title and Aboriginal Rights: The Impossible and Unnecessary Task of Identification and Definition," in Boldt and Long.

²⁰⁸ *Ibid.*, 28.

term not used frequently in Canadian political debate, and there is no tradition of speaking of federal, provincial, or Indian band governments as sovereign.²⁰⁹ This presents a contrast to the United States, where Indian tribes have long been legally defined as internal sovereigns and domestic dependent nations.²¹⁰ Aboriginal peoples have been cognizant of this problem, and repeatedly asserted that their version of sovereignty should not be viewed as a threat.

The discourse also reveals aboriginal leaders' own struggles with the terminology they employ. Aboriginal groups have made wide use of the currency of rights, but at the same time they have called terms such as aboriginal rights "not ours" in the First Ministers' Conferences.²¹¹ Commentators on aboriginal affairs have made a similar critique of the concept of sovereignty. Boldt and Long argue that the European-western ideal of sovereignty based on authority over a defined territory is incompatible with Indian tradition.²¹² Thus, aboriginal peoples have made use of linguistic weapons they themselves find difficult to manage. These terminological struggles reflect the multiple identities that aboriginal peoples have had to contend with as they attempt to explain their identities as aboriginal nations,

²⁰⁹ Sanders, "An Uncertain Path," 73.

²¹⁰ see Sanders, *Aboriginal Self-Government in the United States*, (Kingston: Institute of Intergovernmental Relations, 1985).

²¹¹ The making of rights claims and the liberal tradition of individual rights is said to be inconsistent with aboriginal traditions of consensual decision-making. See M. Boldt and J.A. Long, "Tribal Philosophies and the Charter of Rights and Freedoms," in Boldt and Long, and M. Turpel, "Aboriginal Peoples and the Canadian *Charter*: Interpretive Monopolies, Cultural Differences," *Canadian Human Rights Yearbook* 6 (1989/90):3-45.

²¹² M. Boldt and J.A. Long, "Tribal Traditions and European-Western Ideologies: The Dilemma of Canada's Native Indians," in Boldt and Long.

within a Canadian political order that makes widespread use of rights. These conceptual difficulties, as well as the abstract, non-compromising nature of aboriginal constitutional language reveal some of the problems inherent in the discourse.

Ultimately, symbolic recognition is linked to practical political, legal, social and economic improvements in the lives of aboriginal peoples. Gibbins has pointed to some of the difficulties in making practical gains in the constitutional arena.²¹³ He calls it a "trap" in which aboriginal peoples have little chance of great victories, but have much to lose. Thus, Gibbins argues that Indian sovereignty might be better pursued incrementally, in specific areas such as education, "no matter how symbolically unappealing this may be."²¹⁴ In their study of the current activities of Indian bands Cassidy and Bish point to some of these incremental advances. They argue that "Canada's aboriginal peoples are practising self-government in a truly diverse range of ways,"²¹⁵ despite the fact that self-government has not been entrenched in the Constitution. Aboriginal peoples are taking control over social and economic programs, managing natural resources, and determining their own membership criteria. Thus, "[a]boriginal government has assumed and is further evolving a meaning in practice that provided a clear and compelling indication of what it is and how it might affect the Canadian political fabric."²¹⁶

²¹³ R. Gibbins, "Canadian Indian Policy: the Constitutional Trap," *Canadian Journal of Native Studies* 1 (1984), 8.

²¹⁴ *Ibid.*, 8.

²¹⁵ Cassidy and Bish, xviii.

²¹⁶ *Ibid.*

As Canada begins a new round of constitutional introspection, the entrenchment of self-government in the Constitution remains high on the aboriginal agenda. Thus, the Constitution continues to be a priority *despite* the potential dangers of the arena and the progress being made outside in non-constitutional areas. This focus on the Constitution has continued because it is such an important symbol to aboriginal peoples. The debate is about much more than practical questions of financing, public administration, social policy. Aboriginal constitutional discourse has centred on symbolic issues of identity, boundaries, and inclusion and exclusion in Canadian society. Their language shows how aboriginal peoples have sought to attain dignity and status through the supreme law of Canada. Ultimately, future discourse will have to grapple with issues of common citizenship and the integration of aboriginal and Canadian narratives in a single Constitution. Over the past twenty years aboriginal discourse has not addressed these difficult problems. However, it has served to develop aboriginal identities, and introduce aboriginal visions of themselves into Canadian constitutional debate, altering the terms of Canadian constitutional discourse.

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