Public Policy and Aboriginal Peoples

1965-1992

Volume 1

Soliloquy and Dialogue

Overview of Major Trends in Public Policy Relating to Aboriginal Peoples

Royal Commission on Aboriginal Peoples

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Overview of Major Trends in Public Policy Relating to Aboriginal Peoples

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by Katherine Graham,
Carolyn Dittburner and Frances Abele
Centre for Policy and Program Assessment
School of Public Administration
Carleton University

Royal Commission on Aboriginal Peoples

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Preface

Soliloquy and Dialogue had its roots in the desire of the Royal Commission on Aboriginal Peoples to understand the evolution of policy discourse on Aboriginal affairs in Canada over the past quarter-century. When the commission was established in the fall of 1991, it was advised by the Honourable Brian Dickson, former chief justice of the Supreme Court of Canada, to build on work already done in Aboriginal affairs. One way the commission followed this advice was to examine reports and studies by federal, provincial, territorial and municipal governments, by Aboriginal organizations, and by non-government organizations on public policy in this field.

The project, conducted for the commission by the Centre for Policy and Program Assessment of the School of Public Administration, Carleton University, examined reports by royal commissions, inquiries, parliamentary and legislative committees, and task forces, as well as commissioned studies. The focus was on reports that involved public input and that recommended changes in government policy relating to Aboriginal peoples.

More than 800 such reports were identified for the period since 1965, when the landmark Hawthorn report provided the last benchmark analysis of government policy in this field. These reports are listed in Volume 4 of the project, the Bibliography.

Volumes 2 and 3 provide descriptive information on more than 200 of the most significant documents, including their background and purpose, the issues examined and their findings, and the recommendations made. Volume 2 contains summaries of reports by the federal government and by Aboriginal organizations. Volume 3 includes summaries of reports and studies by provincial, territorial and municipal governments, as well as non-governmental organizations. The summaries are grouped by government or type of organization and arranged in chronological order by date of publication. This enables the reader to trace the evolution of public policy thinking in each government and organization over time. Both volumes include subject and author indexes.

The approach taken in the present volume is innovative and somewhat risky. From the original group of more than 800 documents, the commission selected some 220 for particular attention. This selection is the subject of the analysis in this book.

For the most part, the authors worked only with the documents; there is minimal use of secondary sources and sources such as interviews with participants in the policy discourse. The strength of this approach is that

particular attention could be paid to the language and conceptual development of the discourse.

For commissioners, the goal of the project was to establish a context for their deliberations, and commissioners used the information as they developed their thinking on public policy recommendations. A significant series of reference documents has been assembled for those interested in the field. The four volumes together provide a comprehensive overview of how discourse on Aboriginal policy has evolved over the years to reach its present stage. We hope that *Soliloquy and Dialogue*, with its companion volumes, will set a new benchmark for public policy analysis and Aboriginal peoples.

Marlene Brant Castellano and David C. Hawkes
Co-Directors of Research

Acknowledgements

WE WOULD LIKE TO THANK the many people who made this volume possible. First, we would like to acknowledge the support of the Royal Commission on Aboriginal Peoples. The Commissioners themselves were unfailing in their interest in this project. Their support for this particular volume, extending our earlier work in compiling a bibliography of key public policy documents and preparing summaries of selected documents, is illustrative of their keen sense of inquiry into policy discussions related to Aboriginal peoples and of their willingness to be innovative in their approach to research.

We owe particular gratitude to the Commission's Co-Directors of Research, Marlene Brant Castellano and David Hawkes, who guided the project from conception to completion.

Numerous people reviewed all or parts of this book. We thank the Royal Commission's anonymous reviewers for their constructive comments. We also received considerable help from: David Elliott, Susan Phillips, Jane Jenson, David Hawkes Jane Dixon-Gilmour and Les Pal as well as three anonymous reviewers of this manuscript.

David Hennes and Alex Ker worked with us through much of this project. Their continuing commitment and intellectual contribution were remarkable. They were wonderful collaborators. In addition, Carolyn Chisholm, John Crump and Alan Kary undertook specific research tasks associated with this particular volume. We thank them for their timely and excellent contributions.

All three of us are connected with the School of Public Administration at Carleton University. Frances Abele and Katherine Graham are on the School's faculty, while Carolyn Dittburner, a graduate of the School, was on staff as a Research Associate for the life of this project.

We would like to thank all of our colleagues in the School of Public Administration for their intellectual and moral support as we toiled on. Many of our faculty colleagues provided specific help, in terms of reviewing our work. Others created the type of encouraging environment that all researchers cherish. Staff of the School also provided invaluable support. In particular, we would like to thank Martha Clark, Amanda Begbie and Lauralee Raffelsieper.

Our thanks would not be complete without recognizing the contribution of our respective families. George Kinloch, David Wright, Andrew Graham and Katherine Graham, the younger, were all unfailingly supportive. We are certain that we seemed, at times, to be working in our own little world.

Their understanding and encouragement, however, did help us more beyond our own soliloquies to dialogue.

With all of this help, we must conclude by indicating that we take responsibility for any errors of fact and all interpretations in this volume.

Katherine Graham
Carolyn Dittburner
Frances Abele

Executive Summary

THIS BOOK EXPLORES THE FOUNDATIONS and characteristics of public policy discourse on Aboriginal affairs in Canada between publication of the two volumes of H.B. Hawthorn's *Survey of the Contemporary Indians of Canada* (the Hawthorn report) in 1966 and 1967 and establishment of the Royal Commission on Aboriginal Peoples in 1991.

Its primary sources are 222 documents prepared by Aboriginal and non-Aboriginal organizations and governments over this period. Our focus in analyzing these documents was to trace the evolution of policy discussions and debates in four key areas: lands and resources, governance, criminal justice, and education.

The analysis builds on our conceptualization of public policy discourse as involving three basic questions: who was involved in policy discussions; how did policy discussions occur; and what was said about key issues in the domain of Aboriginal affairs? In dealing with these questions, we look at the various and sometimes competing public policy paradigms embraced by Aboriginal and non-Aboriginal participants in the discussions.

Our analysis also builds on our approach to historical documents, namely, that it is important to examine what one can learn from the past, as well as to attempt to understand the past in the context of dominant ideas and events of the period itself.

Building on these analytical foundations, we examined the documentary evidence of public policy discourse in light of some broader guideposts: the role of international influences on Aboriginal policy discussions in Canada; the dominant preoccupations of Aboriginal peoples and Canadian governments in the evolution of their relationship; and the extent to which the relationship has been accompanied by clarity of Canadian government policy and genuine consultation. This broader context and our detailed analysis of the documents yielded several conclusions.

In terms of who has been involved in public policy discourse on Aboriginal affairs, we see shifts in the locus of action and the cast of participants at various times. From the Aboriginal perspective, perhaps the most important development was the emergence of national Aboriginal organizations, beginning in the early 1980s. To a considerable degree, this was a result of the heightened intensity of constitutional debates and the funding of national organizations by the federal government. A corresponding development was the more extensive engagement of provincial governments, evolving beyond areas of provincial jurisdiction, such as education. Over the period of our analysis, successive court

decisions related to lands and title and to Aboriginal rights more generally made it evident to provincial governments that they could not ignore fundamental issues of lands, resources and governance. This, coupled with intensifying Aboriginal activity on the constitutional front, contributed to broader provincial engagement.

Our analysis also indicates the absence of a pan-Aboriginal voice, other than to articulate the existence of Aboriginal rights, over the period. This reflects differences between Aboriginal peoples in cultural heritage, objective circumstances, and historical relationships with Canadian governments. These distinctions have been recognized and accommodated increasingly in governments' policy discourse. This represents an important shift.

Examining how the discourse between Aboriginal peoples and other policy participants evolved over the period, we find that the processes of engagement have become increasingly formalized and institutionalized. This may well have its roots in the legacy of consultations leading up to the 1969 White Paper on Indian policy and the widespread sense that the federal government had misrepresented the consultative process. We also see increased formalization resulting from the use of public inquiries to deal with Aboriginal issues and the inclusion of Aboriginal organizations as participants in some exercises in executive federalism, most notably in post-patriation first ministers conferences on Aboriginal issues, but the pattern also extends to evolving Aboriginal/provincial relations in fields such as education.

Heightened and more institutionalized interaction has not resulted in greater Aboriginal voice in the government documents that subsequently emerged. Aboriginal voice has, however, shown increased strength in the reports of independent inquiries established by governments and in the rather scant documentary evidence provided by trilateral organizations, such as the Indian Commission of Ontario, and consociational exercises, such as the constitutional alliances established to discuss the future political development of the Northwest Territories.

Finally, our concluding observations emphasize the obtuseness of the discourse since the 1960s. The language used by governments has changed, moving from assimilationist connotations to expressions suggesting that Aboriginal people should be viewed as 'citizens plus' to, occasionally, adoption of the language of Aboriginal rights. In government documents, however, the meanings associated with this evolving language remain obscure. Corresponding paradigms emerging from the Aboriginal discourse of rights-based or sovereign relationships between Canada and Aboriginal peoples lack a direct government response, also contributing to an absence of explicit foundations and a sense of common ground for policy discussions. In part, this may stem from differences between and among

Aboriginal peoples regarding what they mean when they use such terms. One of the most common terms attending the discourse – self-government – is now used by all parties but with seemingly varied meanings.

Our final conclusion is that the period studied shows examples of three types of situations: instances in which dialogue was realized; instances in which the discourse showed some promise of dialogue but ultimately failed; and instances of soliloquy, which held little promise of dialogue.

There appear to be three essential characteristics of effective dialogue: commensurate participation by all those affected by decisions; a process for sustained discussion, recognizing different starting points and preferences in style of communication among those involved; and evolution toward a common vision of what is to be discussed, based on frank exchanges. More frequent achievement of these conditions speaks to the fundamental nature of the power relationship between Aboriginal peoples and their representatives and Canadian governments, the importance of getting the arrangements and institutions of Aboriginal/Canada policy discussions right, and the need to confront and explore different meanings for concepts used in policy discussions and to recognize the paradigms that underlie policy proposals.

Finally, this analysis shows the importance of public attention, sometimes through the courts but also through other channels, in achieving dialogue on Aboriginal issues and the resulting promotion of a civil society in Canada.

Chapter 1
Introduction

ONE OF THE MOST IMPORTANT ROLES of royal commissions in Canada has been to change public understanding of fundamental national issues. While most attentive Canadians might agree about the importance of certain royal commissions, most people also express a degree of cynicism about royal commissions in general. They are often seen as primarily a means to deflect and absorb dissent and to postpone government action until a 'safer' time. What, then, makes it possible for a royal commission to rise above this role to become the fulcrum for development of a new national consensus?

Three stellar examples of royal commissions that have accomplished such consensus are the Royal Commission on Dominion-Provincial Relations (the Rowell-Sirois commission, 1940), the Royal Commission on Bilingualism and Biculturalism (the Dunton-Laurendeau commission, 1967), and the Royal Commission on the Status of Women (the Bird commission, 1977). In these cases, where a royal commission played a fundamental role in changing the terms of public policy discourse, it appears that two circumstances were present: the timing was right, and the analysis developed by the commission spoke about the future in light of the past. Each of these commissions spoke to Canadians in a new way. They provided a fresh perspective on familiar and troubling issues. They also gave Canadians different approaches to formulating the debate about what should be done to resolve immediate problems and set out new possibilities for addressing the underlying conditions propelling contemporary events and challenges.

The Rowell-Sirois Commission spoke to Canadians as they attempted to deal with the trauma of the Depression. The commission suggested remedial measures, but its recommendations also laid the framework for the national vision of social equity underlying Canadian policy making in the post-Second World War period.

Similarly, the Royal Commission on Bilingualism and Biculturalism spoke to Canadians about a new vision of Canada that recognized English and French as our two national languages and the need to affirm the richness of Canada's multicultural fabric. It did so at a time when many Canadians were struggling to understand the actions of such groups as the Front de Libération du Québec and the Doukhobors in western Canada, as well as the tremors in federal system resulting from the increasingly strong voices of individual provinces, especially Quebec. The Dunton-Laurendeau commission's deliberations, and the research that informed its

recommendations, helped Canadians understand these new voices for change.[1]

The Bird commission spoke to Canadians at a time when fundamental and permanent changes in the role of women were becoming evident. The commission's discussions with Canadians through its public hearings and the vision set out in its final report helped to create an understanding of the aspirations and needs of Canadian women. The report also promoted recognition of the important factors influencing the increasing assertiveness with which those aspirations were being articulated. The Bird commission carried out its work in the context of the women's movement, but also as Canadians were hearing strong voices for equal rights and change elsewhere in Canada, particularly Quebec, and in other countries, most notably the civil rights and anti-war movements in the United States.

In each case, evidence of major changes in social relations coincided with the work of the commission. In each case, the commission was able to sift through events and illuminate Canadians' understanding of the root causes and the way ahead.

The Royal Commission on Aboriginal Peoples is well positioned to fulfil the same role. It is conducting its work as Canadians face two major quandaries. First, Canadians have a heightened awareness of the centrality of Aboriginal rights issues in Canada's future. This awareness has been born of the constitutional process and recognition of the legitimacy of Aboriginal political goals. Second, and perhaps more immediately for many Canadians, there is a sense of revulsion about a number of crises Aboriginal people have experienced and about conditions that many continue to experience. These include the legacy of residential schools, the high incidence of suicide, urban and rural poverty, and racism.

Canadians see these as real problems but generally do not know what to do. The work of the Royal Commission, through its research, hearings, consultations, and other initiatives, provides an opportunity for Canadians to understand the roots of the problems and to provide ideas for immediate remedial action. More fundamentally, the Commission's work may illuminate new perspectives that will contribute to the establishment of a more positive relationship between Aboriginal peoples and other residents of Canada over the longer term.

The Royal Commission's contribution to the development of new paradigms will also inform public policy making.[2] Public policy makers do

1. See Jenson, especially p. 45.

2. We define a policy paradigm as the conceptual framework of interpretation and judgement that indicates what is important and unimportant, and what is right and wrong.

not work in a vacuum. Their philosophical perspectives influence which issues are seen as a priority and how those issues are addressed.[3] Policy environments are also generally complex. Many participants are involved – governments, interest groups and individuals, each with differing philosophical views, past practices to justify, and perceived constraints on action. In addition, myriad other parties often try to assert their needs and interests in the policy process.[4] The interplay between these and among actors, each with its guiding paradigm, forms the basis for public policy discourse, that is, the discussion of what governments should do and how they should do it. This process also conditions the role of organizations outside government and citizens in achieving a better future. Policy discourse is the stuff of all public affairs.

PURPOSE OF THIS BOOK

Earlier we referred to two circumstances that appear to be present in cases where a royal commission has been successful in achieving a new national consensus on troubling issues: the time has been right for change, and the commission has offered recommendations for the future in light of a new understanding of the past. This second element underlies the purpose of this book. When the Royal Commission on Aboriginal Peoples was established in the fall of 1991, it was advised by the Honourable Brian Dickson, former chief justice of Canada, to build on work already done on Aboriginal issues. With this in mind, the purpose of this volume is to extract from past studies the characteristics of the discourse that might foster greater communication and understanding in the future. It is our hope that the lessons learned from our predecessors might suggest the way ahead.

This book explores the foundations and characteristics of public policy discourse on Aboriginal affairs in Canada. Our conception of public policy discourse is simple: the analysis focuses on *who* was involved in policy discussions, *how* policy discussions occurred, and *what* was said about key issues. As our work demonstrates, however, this seemingly straightforward approach pushes many additional questions and issues onto the analytical agenda. Our work was akin to peeling layers off an onion, in terms of refining our conceptualization of policy discourse and exploring the implications of what was actually said.

Our review focuses on the contemporary period, surveying the public policy discourse on Aboriginal peoples since H.B. Hawthorn's *Survey of the Contemporary Indians of Canada* (the Hawthorn report), published in two

3. For a discussion of the role of ideas and ideology in the policy-making process, see Doern and Phidd, pp. 50-70.

4. See Campbell and Pal.

volumes in 1966 and 1967. The Hawthorn report was a modern Canadian government's way of responding to calls from Indian people for recognition of rights and independence.[5] It also responded to growing recognition among Canadians of the material poverty in which many Indians were living. Although the Hawthorn report dealt only with status Indians, public concern was also being raised in the popular press about the health and well-being of Inuit.[6]

Several elements of the policy context in which the Hawthorn report was prepared are relevant. For many years, the main federal legislation affecting the circumstances of Indian people had been the *Indian Act*.[7] Last revised in 1951, the act reflected a circumscribed and control-centred definition of the federal relationship with Indian people. It was founded on the definition of the special relationship set out in section 91(24) of the *Constitution Act, 1867*, which gives Parliament jurisdiction over "Indians, and Lands reserved for the Indians". Federal responsibilities were not recognized as emanating from treaties, except within the framework of the act. 'Eskimos' fell within federal jurisdiction, as a result of a Supreme Court of Canada decision asserting that Eskimos are included in the word 'Indians' in section 91(24).[8] In principle, therefore, Inuit had access to some of the programs available to status Indians; Métis people and non-status Indians were not recognized as a federal responsibility, however. Within this limited orbit, the federal government had been following well documented practices in Indian administration that were akin to colonial administration.[9] Particularly in western and northern Canada, Aboriginal people had witnessed the steamroller effect of non-Aboriginal settlement and resource development since the latter part of the nineteenth century. Giving voice to their needs and concerns had been extremely difficult to this point. Indian political organizations, for example, had been denied the right to raise funds to promote their political purposes without the

5. Throughout this volume, for reasons of clarity and historical accuracy, we use the terminology in use at the time of the report or policy being discussed. Hence the use of terms such as 'Indian', 'status Indian', 'non-status Indian' and so on, most of which have been replaced in today's discourse or are heard much less often.

6. Some concerns of this nature reached the public through the publication of Farley Mowat's novel, *Lost in the Barrens*, in 1956.

7. *Indian Act*, R.S.C. 1985, c. I-5.

8. *In re Eskimos*, (1939) S.C.R., 104; 2 D.L.R., 417.

9. See Ponting.

permission of the federal government.[10] This had obstructed political mobilization to pursue issues of lands and title and other fundamental concerns.

The Hawthorn report established a benchmark for policy discourse on Aboriginal issues. Its contribution as a research report and as a document containing policy advice influenced many of the policy debates and research initiatives in the ensuing years.[11] For the Royal Commission on Aboriginal Peoples and others, it stands as documentary evidence of where the modern era of policy making began.

OVERVIEW OF THE RESEARCH PROCESS

This book has its roots in the early deliberations of the Royal Commission on Aboriginal Peoples and the Commission's concern that it frame proposals for the future with an explicit understanding of past discourse. In the Commission's view, it was imperative to become familiar with major public documents to engage in effective consultations with organizations and the general public. To this end, in March 1992, the Commission asked the Centre for Policy and Program Assessment of the School of Public Administration at Carleton University to prepare briefing material for its first round of hearings. The Commission had identified 65 documents, mostly of federal provenance, seen as central to public policy discussions on Aboriginal issues since the 1960s. The initial task was to summarize the documents and develop analytical commentaries for the Commission, identifying the dominant themes emerging from the documents and areas where important issues existed but where no commentary was evident.

It became obvious that an overview of the evolution of policy making would also have to consider the contribution of Aboriginal organizations and provincial and territorial governments. The Commission wrote to all provincial and territorial governments, as well as national, provincial and territorial organizations representing Aboriginal people, requesting policy documents they deemed important. The responses were uneven. Some sent nothing. Intuition suggested that those who had responded might provide additional material on a second request. Accordingly, the Carleton research team was asked to visit every province and territory to canvas for additional important documents. In each case, visits were made to legislative libraries,

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10. Dickason, p. 328, and Coates, pp. 179-204. Band councils, established under the *Indian Act*, were excluded from this prohibition, but they were generally overwhelmed by the structures of federal administration.

11. An extensive discussion of the impact of the Hawthorn report on Canadian Indian policy is found in Weaver, "The Hawthorn Report: Its Use in the Making of Canadian Indian Policy".

key government departments, and Aboriginal organizations. National Aboriginal organizations based in Ottawa were also canvassed. The priority was to review documents that met one or more of the following criteria: that the document in question was (a) the product of public hearings; (b) the result of major research; (c) a report that culminated in public policy recommendations; or (d) specifically recommended by an organization or government as being crucial to informing public policy debate on a particular issue.

The product of the Canada-wide search is a bibliography of more than 800 documents, published as *Public Policy and Aboriginal Peoples 1965-1992, Volume 4: Bibliography.* In the next phase of the work, the Commission identified 222 documents in the bibliography for detailed review. This volume explores the policy discourse through these documents, with a view to shedding light on the ebb and flow and the content of discourse on Aboriginal affairs since Hawthorn.

It is important to acknowledge that using documents as the primary basis for this review recognizes only indirectly the importance of oral tradition among Aboriginal peoples. Indeed, one of the most important ways Aboriginal peoples have achieved voice in public policy debates has been through oral evidence at hearings, such as those of the Mackenzie Valley pipeline inquiry (the Berger commission), the Alaska Highway pipeline inquiry (the Lysyk inquiry), and the Royal Commission on Aboriginal Peoples itself. In the case of the Berger and Lysyk inquiries, these oral representations had a significant influence on the written legacy that informed subsequent policy discussions and decisions. The Commission's commentaries on its public hearings also provide a documented legacy of a great deal of important oral evidence.[12] Our sense is that much more of the voice of Aboriginal peoples on issues affecting them has been lost because of the dominant society's reliance on the written word as the medium of public policy discourse, and especially as the medium for recording decisions.[13] The fact remains, however, that documents such as those reviewed in this volume remain for all as the record of what was said.

Some other qualifications are warranted. The documents often reflect the product of a vigorous debate and a political struggle. In working with

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12. See *Discussion Paper 1: Framing the Issues* (October 1992), *Overview of the First Round* (October 1992), *Discussion Paper 2: Focusing the Dialogue* (April 1993), *Overview of the Second Round* (April 1993), *Exploring the Options: Overview of Round Three* (November 1993), and *Toward Reconciliation: Overview of the Fourth Round* (April 1994).

13. For more on the role of oral evidence, see Cruikshank, "Claiming Legitimacy: Oral Tradition and Oral History"

the results of such processes – the final reports – it is easy to lose sight of the dynamics that generated them and the debates that occurred in governments and Aboriginal organizations as the policy process proceeded.

The winnowing process also favoured the selection of documents substantial in size and detail and those that were formally published. These documents represent only the tip of the iceberg. They are far outnumbered by working papers and other documents that informed or stimulated discussions but were dropped or withdrawn. For example, the 1975 Nunavut proposal, which was never approved by Nunavut communities, is clearly important in understanding the development of Inuit political goals and strategy, but it is not included in this study, because it was not published.

The many proposals and 'rolling drafts' produced by participants in the constitutional process should also be noted. None has been published; many hold interesting ideas and insights for analysts of the period when they were drafted. Most of the documents are not readily available, nor have they been catalogued. Many lie in the store rooms of Aboriginal organizations and governments or in the archives of key individuals active at the time. It is important to recognize the potential of these documents; many were important at the time they were written, but they may also have potential for future discussions. Relative obscurity is not always an indication of merit.

Finally, it is important to recognize the influence of those who acted as scribes for the documents that have emerged. At different times, a relatively small number of individuals have been extremely active in debates on Aboriginal issues. These individuals, both Aboriginal and non-Aboriginal, have come to the task of writing with their own philosophical and experiential baggage. We do not ascribe personal motives or hidden agendas to anyone who has contributed to policy discussions over the years. It is important to recognize, however, that their perspectives have affected the vocabulary of the discourse and shaped the ideas put forward. Equally, the vocabulary and ideas of these (almost always anonymous) writers have been shaped, over time, by the people they have worked with.[14]

Recognition of these various sources of bias was critical to our task. In examining various forms of historical evidence, it is easy to find documents that now seem to be prejudiced or that seem to have been watered down for publication. Bias in published documents signals the opinion of the government or organization responsible, however, and often defines the limits of what is seen as 'practical' action. Shifts in bias or viewpoint are

14. The identity of specific writers and their influence on particular documents is the basis for another study. The individuals we have in mind are long-time leaders and long-time staffers, consultants and public servants.

thus the basic materials for our analysis of the past. The question becomes, why did the nature of discourse change?

OVERVIEW OF THE VOLUME

The remaining chapters build an analytical framework that provides a context and an interpretation for the documents we examined. Chapter 2 begins the process of situating the documents in time. It opens with an exploration of perspectives on the use of documents to construct history and to draw links between ideas and events. It then looks at the contextual factors that may have influenced the definition of priority issues and contemporary approaches to dealing with those issues at different times – for example, the influence of the U.S. civil rights movement on the efforts of Aboriginal peoples to assert their own voice in the 1960s. In Chapter 2 we try to give a sense of the context for our discussion of Aboriginal policy discourse by advancing some points of reference and some observations.

In Chapter 3 we explore the concept of policy discourse and describe in some detail the analytical strategy underlying this study. We undertake to peel the layers of meaning from our guiding notions of who, how and what. Among other things, we discuss the importance of language as the foundation for developing conceptual paradigms in policy discussions. We also set out important conditions for the realization of dialogue in policy discourse.

In Chapters 4 to 7 we examine subsets of the documents, exploring their historical context and the elements of discourse. The four policy areas chosen for more intensive review are lands and title, governance, criminal justice, and education. In each case, periods of high activity and breakthrough are identified. The documents from each period are reviewed in two ways. First, we let the documents speak for themselves. Second, we analyze the aspects of the policy discourse that emerge as important.

Aboriginal rights and title to land have been at the heart of Aboriginal/European relations since Europeans first set foot on North American soil. From an Aboriginal perspective, resolution of issues related to lands and title are the foundation for dealing with the challenges of cultural survival and economic development, as well as for recognition and realization of the right of self-government. Issues of lands and title have also been important to Canadian governments; in the period covered by this review, they have often had to deal with these issues as a result of court decisions affirming Aboriginal rights where title to land had not been formally circumscribed or extinguished. Proposals for development on traditional lands propelled discussion of Aboriginal claims and the process for resolving them to the top of the policy agenda. Discussions at the constitutional table reinforced the centrality of these issues.

The documents on governance were selected for examination for three reasons. First, issues of governance flow out of those related to land and title. It is important, then, to explore the extent to which policy discussions of governance issues have been informed by perspectives emerging on land and title. The second purpose was to determine whether conceptions of appropriate and viable approaches to Aboriginal government and the relations between Aboriginal governments and Canadian governments have changed since the Hawthorn report. The influence of the *Indian Act* (which has not been overhauled since 1951) and paternalistic approaches to government in Indian communities were noted earlier as forming part of the context for Hawthorn's work. It is appropriate, then, to explore whether perspectives changed in the intervening years. Finally, the preoccupation with issues of self-government from the time of patriation in 1982 to the end of the Canada Round of constitutional negotiations a decade later suggest the potential for significant evaluation of policy discourse.

In our review of governance documents, we discuss the documents emerging from the hot house environment of the three first ministers conferences on Aboriginal constitutional matters following patriation. Discussion of documentation surrounding the Meech Lake Accord and the Charlottetown round of constitutional negotiations receives less emphasis, however. One of the central features of the Meech Lake Accord was the absence of Aboriginal peoples from the table. The vigourous representations by Aboriginal peoples from across Canada that followed the Meech Lake agreement were not accompanied by the type of documentation that is the focus of this volume. Aboriginal reaction and interaction with governments took place largely through the media and, of course, through the work of Elijah Harper on the floor of the Manitoba legislature.[15] Though certainly worthy of study, much of the documentation for the Charlottetown round produced by governments and Aboriginal organizations emerged after the time frame covered by this review.[16] We have, however, considered one report pertaining to this period, the 1992 report of the Special Joint Committee on a Renewed Canada as it pertains to our broader discussion of governance in Chapter 4.

Our focus on documents related to criminal justice and education policy is intended to explore the nature of discourse in more specialized areas. These areas differ from the previous two fields in terms of the key actors

15. For a discussion of this period see, for example, Hawkes and Devine.

16. The Royal Commission on Aboriginal Peoples was among the participants in the policy discourse during the Charlottetown round. See Royal Commission on Aboriginal Peoples, *The Right of Aboriginal Self-Government and the Constitution: A Commentary*.

involved in the discourse, the processes followed, and the substance of the ideas shaping the discourse.

The documents on criminal justice were chosen for special examination because of increasing concern about the over-representation of Aboriginal people in the justice system and the establishment of provincial inquiries into justice issues, such as the Royal Commission on the Donald Marshall, Jr., Prosecution in Nova Scotia and the Aboriginal Justice Inquiry of Manitoba. Criminal justice was also seen as an important area to explore because of the shared role of the federal government and the provinces in the administration of justice. While the conception of issues related to lands and title and governance tends to be couched in terms of relations between Aboriginal peoples and the federal Crown, the relationship of Aboriginal people to the provincial (and municipal) components of the justice system suggests this as an area for focus. Our assessment of criminal justice documents suggests how policy discourse has evolved where there is both the assertion of an acute sense of urgency and a strong involvement with provincial and federal policies and practices.

Finally, documents on education were chosen for special attention for three reasons. First, education is a provincial responsibility.[17] This is in contrast to the other three areas chosen for review. Second, education issues are central to Aboriginal interests. The education system could build bridges of understanding and respect between Aboriginal and non-Aboriginal people. Education policy also has the potential to support Aboriginal cultures or destroy them. The contrast between documents and policies affirming the importance of teaching Aboriginal languages and the legacy of residential schools, which tried to obliterate Aboriginal languages, suggests that the road away from assimilationist visions of education should be explored. Finally, the link between education and the socio-economic circumstances of Aboriginal people is important in suggesting emphasis on the evolution of policy discourse on education.

The distinctiveness of the documents in the four policy areas required slightly different approaches. In preparing these chapters, it became clear that the discourse on lands and title and on governance was extremely complex. For instance, a discussion of governance, broadly defined, would have required an examination of almost all the documents in our collection. Therefore, it was not possible to discuss these areas in as much detail as criminal justice and education. Indeed, detailed discussion of lands and title or governance could have caused us to lose sight of significant trends in the discourse. These chapters therefore have a broader focus, emphasizing the

17. It should be remembered, however, that provisions for the education of status Indians are included in the *Indian Act*.

changes in policy since the Hawthorn report and the major developments in Aboriginal issues that have brought about these changes. By contrast, the chapters on criminal justice and education contain more detailed reviews of the documents with less emphasis on the broader context in which they were published.

It should also be noted that not all of the 222 documents reviewed fall into one of the policy areas chosen for more detailed analysis. Documents concerning such issues as Aboriginal health and housing are not addressed. Other documents deal with more than one policy area. For instance, *Wahbung Our Tomorrows* touches on all four areas.

The chapters on each policy field yield their own observations and contribute to our understanding of the evolution of policy discourse regarding lands and title, governance, criminal justice and education. Some common observations and themes also emerge, and these are discussed in Chapter 8. The concluding chapter suggests the implications of our observations for the way forward.

SOLILOQUY AND DIALOGUE

The volume title, *Soliloquy and Dialogue*, is meant to suggest that at various times over the period, the policy actors have been talking largely to themselves. Messages have been misunderstood, and the process has meant different things to different people. If we consider attempts by some governments to respond to Aboriginal people's needs, for instance, we see that Aboriginal issues have been placed in the sphere of race relations and multiculturalism in many cases. For many Aboriginal people, this constitutes an unacceptable denial of their Aboriginality; as a result, they have not participated in such processes.

In other instances, there has been more of a dialogue. If we consider the events leading to the Alberta Metis Settlements Accord, for instance, we see evidence of a situation in which both the Alberta Federation of Metis Settlements and the government of Alberta were able to express their views and have their voices heard. Further to the work of the MacEwan Joint Committee, which included representatives of the Alberta government and the Metis settlements, the parties were able to reach a mutually satisfactory agreement.

Most of the time, the discussion has been joined by actors who bring various conceptions of the situation to the table. Sometimes, this has evolved toward shared understanding. If we consider education, for example, the research, the initiatives, the policy and the programs appear to have been developed after intensive consultation with Aboriginal people in many cases. Efforts have been made to include Aboriginal people at every stage of planning, development and implementation, and some of the

success stories that have resulted attest to the value of dialogue.[18] A degree of consensus seems to have been reached on the need for special curriculum and special services to foster the learning process of Aboriginal students.

By contrast, there has been considerable discussion and debate between Aboriginal groups and Canadian governments on the question of self-government, but each has different interests and perspectives on the issues at hand. Among Aboriginal people we see those who seek self-government through public government; others favour land-based government or are preoccupied with the struggle to ensure the application of the *Canadian Charter of Rights and Freedoms*. Similarly, the interests of the federal government in addressing self-government differ markedly from those of its provincial and municipal counterparts.

In this book we search for areas where some degree of consensus has been reached on the fundamental perspectives or paradigms that should be brought to bear on the issues. The volume is entitled *Soliloquy **and** Dialogue* because we see evidence that public policy discussion continues to be characterized by both types of discourse. The challenge for better policy development in the future remains replacing soliloquy with dialogue.

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Chapter 2
Time, Place and Events: The Context for Soliloquy and Dialogue

THE PURPOSE OF THIS CHAPTER is to discuss the relationship between ideas and events in the Aboriginal realm and beyond. It begins the process of situating the documents in time by explaining our approach to historical and contemporary analysis. Without dealing extensively with the document collection itself, we go on sketch the context in which the documents were produced in two ways. First, we look at contextual factors – both international and Canadian – that may have informed the discourse among Aboriginal peoples and Canadian governments. Second, we review major Aboriginal issues over the past 40 years, with emphasis on the Canadian scene.

APPROACHING HISTORY AND CONTEMPORARY TIMES

For some people, the suggestion that this book is 'history' will be contentious. As contemporary analysts of the time, we ourselves have been shaped by its history. We will therefore disappoint those who seek absolute objectivity in the realm of policy analysis. Our selection of what is important and the framework we use are undoubtedly formed by our own experiences and biases. This is equally the case as we select contextual events to set the stage for our assessment of policy discourse and as we undertake the analysis in subsequent chapters.

In this vein, it is important to explore briefly some of the underpinnings of our approach to history, which have been influenced by traditional and contemporary writings on historical method as well as by particular views on the nature of judgement. Our approach borrows from the more traditional approach to understanding history, perhaps best exemplified by the work of R.G. Collingwood and the celebration of contemporary bias articulated succinctly in the work of John Tosh.[1]

Collingwood asserts that the fundamental task of historical analysis is to relive the past imaginatively in the context of the time. This approach advances understanding by re-examining, *in situ*, events and the assertions of witnesses to those events made, in this case, through the medium of documentary evidence. Thinking in the context of the time is also important

1. Collingwood, pp. 1-13, and Tosh, pp. 22-29.

because of the danger of transferring ideas or positions expounded in one period to the present without an adequate understanding of the context in which they emerged. This is true whether the enterprise is historical or policy analysis.

Collingwood states that the "historian's business is to know the past, not to know the future".[2] This view discourages efforts to explain the consequences of events in light of later knowledge. Tosh, on the other hand, assigns considerable importance to the role of retrospective analysis in making lessons from history useful to people in the present. In his words,

> Intellectual curiosity about the past for its own sake is certainly one reason why people read history, but it is not the only one. Society also expects an interpretation of the past which is relevant to the present and a basis for formulating decisions about the future.[3]

In this book we do both. We have tried to analyze policy discourse in the context of its own time and to find lessons in light of what we know now.

The description and analysis of Aboriginal policy discourse in this volume are intended to make a contribution by exploring, and perhaps exploding, what might be described as the conventional wisdom on the nature of contemporary discourse on Aboriginal affairs. To the extent that a conventional wisdom exists, we must acknowledge that it can exert a powerful and perhaps misguided influence on positions and actions taken today. As Tosh suggests,

> it is the recent past on which people draw most for historical analogies and predictions, and their knowledge of it needs to be soundly based if they are to avoid serious error. The recent past has also often proved a fertile breeding ground for crude myths — all the more powerful when their credibility is not contested by scholarly work.[4]

THE CONTEXT

Any review of contemporary events and discourse related to Aboriginal policy has to be conducted in light of what occurred earlier between Aboriginal and non-Aboriginal societies and governments. First, we must consider the legacy of the earliest treaties of peace, friendship and commerce made with the French and British in the early years of European presence in North America. Many contemporary issues related to the existence and exercise of Aboriginal and treaty rights in Ontario, along the

2. Collingwood, p. 54.

3. Tosh, p. 27.

4. Tosh, p. 27.

St. Lawrence valley in Quebec, and in the Maritimes are rooted in differing interpretations of these treaties. Most people would now recognize, however, the evidence of early nation-to-nation relationships in the pre-Confederation treaties.

The *Royal Proclamation of 1763* is a second milepost in the relationship. It recognized Aboriginal peoples as nations with which the Crown would make formal treaties. In the absence of formal treaties, the Crown would protect Aboriginal peoples and their lands from encroachment by its North American colonies. The Royal Proclamation established a special relationship between Aboriginal peoples and the Crown that was carried forward to Confederation and propelled Canada into a formal treaty-making process after 1867.

Treaty making did become important after 1867 as Canada sought expansion of its territory to the west and north. Between 1871 and 1921, eleven numbered treaties were concluded with Indian peoples in the prairies and Northwest Territories.[5] Railway building, the lure of natural resources on Aboriginal lands, and the desire to settle the prairies for agriculture induced the treaty-making process. By the end of this period, the Aboriginal people affected occupied pockets of reserved lands and, in many cases, were being subjected to efforts to turn them into farmers, like the European settlers who were surrounding them, or into wage workers.[6] Views differ on the circumstances under which the numbered treaties were concluded. Aboriginal people argue that the spirit and intent of the treaties, discussed during their negotiation, are just as important as the written text in interpreting Canada's treaty obligations and Aboriginal treaty rights. Debates on these questions are main points of departure for contemporary dealings between Aboriginal people covered by numbered treaties and Canada.

The Second World War and the immediate post-war period were pivotal. One of the main results of the war was the militarization and opening of the north for hydro-electric developments and mining. Wartime projects such as the Alaska Highway resulted in significant disturbance or displacement of Aboriginal people in the northern territories from their traditional lands, with attendant economic and social difficulties.

One contribution of the war was the advance of technology and the enhanced reliability of technology operating in the cold. In the immediate post-war period, these developments, combined with the push for

5. There have been formal adhesions to the treaties since that time, the most recent adhesion having been in 1970. For more on post-Confederation treaties, see Zlotkin, "Post-Confederation Treaties".

6. For a fuller discussion, see Buckley, pp. 39-58.

reconstruction and economic development to displace Aboriginal people further. For example, developments like the aluminum smelter at Kitimat, British Columbia, and the hydroelectric facility at Schefferville, Quebec, were constructed with little regard for Aboriginal interests. In such cases, Aboriginal people were relocated because they were in the way. At the same time, in the high Arctic, Inuit were settled in communities or relocated to new areas.[7] These events were part of a large process of state intervention and economic development that touched the lives of most Aboriginal people living in the northern two-thirds of Canada.

These are among the formative events for the Hawthorn era and its aftermath. They should be considered along with the confounding role of the *Indian Act* (1951) in the lives of First Nations people, the breaking of promises to the Métis after Manitoba's entry into Confederation, and the absence of a treaty process in British Columbia. Together they illustrate the many roots of the policy discourse occurring in the period examined here.

We turn now to a review of the broad events of the past 40 years to see how they might have directed the path toward dialogue between Aboriginal peoples and Canadian governments. The scope of this review is necessarily selective. Books can and should be written about events alluded to in passing or left out of the discussion. This overview has additional seeds of controversy, in that it offers hypotheses or propositions about the relationship between events in the larger context and the discourse that is the main focus of this volume. These reference points, or guideposts, attempt to define a conventional wisdom about how ideas and events in the wider context might have shaped the discourse found in the documents reviewed in the next four chapters. Examination of the extent to which they hold up under scrutiny should provide enhanced understanding of the reality of the past and the way forward. We return to this issue in the concluding chapter.

- **Events in the Aboriginal domain in Canada have been influenced increasingly by international events.**

Two major international developments have had an important effect in the last three decades: the numerous post-war anti-colonial movements in the developing world (the defeat of the French at Dien Bien Phu in 1954, the Mau Mau uprisings in Kenya, the Cuban revolution, culminating in late 1959, the Congo uprising of 1960); and the rise of the U.S. civil rights movement. The modern era of civil rights activism in the United States, beginning with struggles to integrate schools, resulted in a Supreme Court

7. High Arctic relocations were considered significant enough to warrant an interim report by the Royal Commission on Aboriginal Peoples.

decision on integration in the 1950s. One year later, African-Americans began boycotting segregated bus service in Alabama. Civil rights struggles continued with considerable intensity through the 1960s and into the '70s.

These quests by people living under colonial regimes and blacks in the United States were met with a common response from dominant societies – resistance to aspirations for change. This resistance was sometimes passive, but it was also violent at times, with bombings and assassinations in the United States and military intervention in countries where struggles for liberation had taken a violent turn. The Vietnam War was the most outstanding case, but one should not forget the Hungarian uprising of 1956, the Algerian war, which came to a head in 1959, and numerous other military interventions to quell uprisings in Africa and elsewhere.

These international events of the 1950s and '60s may well have had an influence on the rhetoric of Aboriginal discourse and the actions of Aboriginal people in Canada during the late 1960s and early '70s. In this vein, Harold Cardinal's book, *The Unjust Society*, became a bestseller in December 1969. Cardinal asserts that the impoverishment of Indian people in Canada and the stifling of their rights and aspirations were rooted in Canada's Aboriginal policy, especially as manifested in the *Indian Act*. In his words, the *Indian Act* has "subjugated to colonial rule the very people whose rights it was supposed to protect."[8] In the United States, the struggles of African-Americans were accompanied by the rise of the American Indian Movement (AIM) in the 1970s, culminating with the shooting of Indian activists at Wounded Knee, South Dakota in 1973.[9] Some of these events directly affected Aboriginal people in Canada, with a convoy of 50 First Nations members leaving Winnipeg with supplies for AIM members at Wounded Knee in March 1973. The general atmosphere of the time may also have strengthened and inspired some people to try harder to address domestic problems. To cite just two examples of extra-parliamentary activity, in December 1968, residents of the St. Regis reserve blocked the Seaway International Bridge at Cornwall, Ontario to protest the imposition of customs on purchases by Indians in the United States, and in August 1973, 200 Indians occupied the Indian affairs building in Ottawa to protest the James Bay project. These events, although not violent, indicate a perception on the part of the Aboriginal people involved that civil disobedience, at the very least, was required to make the broader society take notice of their case.

The period from the 1950s to the early '70s was characterized by passive and sometimes violent resistance to the struggles of Third and

8. Cardinal, p. 44.

9. See Brown's discussion of the events in *Bury My Heart at Wounded Knee*.

Fourth World peoples.[10] Something of a shift occurred in the mid-1970s. Perhaps as a result the achievement of independence by many former colonial states, we begin to see a heavy emphasis on improving the material conditions of their peoples. Here we see the interplay between ideas and events in the forum of development. During the 1960s and early '70s, the predominant paradigm of development was founded in Rostowian economics. Rostow's prescription for successful development entailed the "boot-strapping" of national economies, beginning with major capital infrastructure projects, on the assumption that benefits from such projects would eventually trickle down to improve the social and material conditions of all sectors of society.[11]

By the mid-1970s, evidence of weaknesses in Rostow's assumptions about the spread of benefits from mega-projects in the developing world was coming to light. There were some stark examples of failure of development projects undertaken on the grand scale – from paved highways that were not subsequently maintained to bakeries that produced no bread. Accompanying these physical manifestations of the need for different approaches to development was the spread of liberation theology (particularly in Latin America and Africa) and the popularization of dependency theories of development.[12] We also see the rise of the notion of more small-scale, project-based, 'people-centred' development as an important ideal underlying the search for improved material conditions and freedom from excessive external domination in the Third World.[13]

This shift in emphasis had a significant impact. Not only did it penetrate the work of major international institutions, such as the World Bank and the United Nations, but these debates became quite transparent to key people active in the discourse about development and Aboriginal peoples in Canada.[14] By the mid-1980s, it was becoming increasingly clear

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10. The term 'Fourth World peoples' alludes to people who live in 'developed' countries but whose collective interests are persistently ignored or overridden. Very often, these people occupy a traditional territory but do not govern themselves. Alternatively, they may have been forced to relocate or disperse. See, for example, Nelson H. Graburn, "1, 2, 3, 4...: Anthropology and the Fourth World", *Culture* 1 (1981), pp. 66-70.

11. For more on Rostow's ideas on development, see "The Takeoff into Self-Sustained Growth".

12. For a fuller discussion, see Kitching, pp. 157-176.

13. See Korten and Klauss, *People Centered Development: Contributions Toward Theory and Planning Frameworks*, for a fuller discussion of people-centred development.

14. See, for example, Berger, p. 4; Dacks, pp. 74-75; and Watkins, pp. 84-89.

that trickle-down benefits to Aboriginal people from major infrastructure projects in areas where they lived were not materializing. This was evident in northern development, in early problems associated with implementation of the James Bay and Northern Quebec Agreement, and in cases of specific Aboriginal communities, such as Big Cove, Nova Scotia, which experienced deterioration of its circumstances as a result of an aluminum smelter on reserve land that polluted the community's water supply.[15]

- **Aboriginal peoples in Canada have been directly involved in international action. This has increasingly penetrated the awareness of Canadian and other governments, forcing Canadian governments to shape the process and substance of their policies in key areas.**

One reason for the international nature of Aboriginal action stems from the fact that Aboriginal peoples' traditional territories cross international borders in the north and south. Two notable cases are the Iroquois Confederacy, which straddles the Canada-U.S. border, and the circumpolar Inuit, who live in Alaska, Canada and Greenland. There are other examples as well. Non-Aboriginal society recognized this traditional occupancy as early as 1874, with the Jay Treaty between the United States and Great Britain.

There is ample evidence of the internationalization of issues. An important case was construction of the St. Lawrence Seaway, a joint effort of Canada and the United States. Construction of the one billion dollar project, which began in August 1953, was opposed by the Six Nations of the Iroquois Confederacy, who objected strongly to their lands being used and, in some cases, flooded without recognition of their rights and traditions. In April 1955, the Six Nations addressed the governments of Canada and the United States, presenting positions on treaties and other rights as seaway construction proceeded apace. The issues raised then were never resolved satisfactorily.

Aboriginal peoples have also taken action to combat the international anti-fur/anti-sealing lobby. The economic consequences for Inuit of adverse publicity on the St. Lawrence seal hunt were recognized as early as 1967. In August of that year, fur prices slumped. By the 1980s, Aboriginal peoples were actively promoting their perspectives, particularly in Europe, on wildlife harvesting.[16]

Another important international initiative occurred in the area of rights for Aboriginal women. As early as October 1971, a Canadian court ruled

15. See, for example, Wojciechowski, pp. 30-32; and Indian Affairs and Northern Development, *James Bay and Northern Quebec Agreement Implementation Review*.

16. For an extended discussion of the period see Wenzel, pp. 142-161.

that, under the *Bill of Rights*, a woman could not lose her Indian status by marrying a non-Indian. It was not until June 1985, however, that Parliament passed Bill C-31, removing the offending *Indian Act* provisions and restoring status to 16,000 women and children. In part, the government was embarrassed into changing the act by a vigorous international campaign – including a successful case before the United Nations Human Rights Commission – conducted by women who had lost their status.[17]

A third major domestic issue fought on an international battleground was the struggle to entrench Aboriginal rights in a patriated constitution. The constitutional debate had begun in February 1980 with the election of a majority Liberal government under Pierre Elliott Trudeau. Shortly after, Trudeau initiated federal-provincial negotiations on patriation. The saga evolved from federal-provincial impasse to a September 1991 Supreme Court of Canada ruling that unilateral patriation would be legal but would breach the spirit of Confederation. Aboriginal people were on a roller coaster. For one thing, constitutional negotiations were being conducted strictly on a federal-provincial basis. Aboriginal peoples had no place at the table. Second, Aboriginal rights were, at various times, in or out of the constitutional package. It was not until November 1981 that first ministers agreed to include reference to Aboriginal rights. This occurred only after intense national and international lobbying by Aboriginal peoples.

Even after this agreement, Aboriginal leaders continued a vigorous campaign, based in Great Britain, to achieve greater enhancement of rights in the constitution when it was considered by the House of Lords. Their formal request to make their case direct to the House of Lords was finally refused in January 1982. The vigour of the Aboriginal campaign did, however, result in some domestic action. In November 1983, the Senate approved a constitutional accord on Aboriginal rights that provided for conferences over the next four years to define those rights further. Although the conferences produced no tangible constitutional change, the international attention focused on Aboriginal peoples during the patriation process did contribute to the initiative.[18]

An important Aboriginal strategy has been to use international forums, such as international courts, to resolve disputes peacefully and recognize rights. Another important aspect of the dynamic between domestic and international issues, however, is the establishment of international Aboriginal institutions with a mandate to negotiate with the governments of Canada and other countries on matters of Aboriginal concern. One example

17. For a discussion of these events, see Jamieson, pp. 128-135.

18. For discussions of this period see Gibbons, pp. 306-313; and Abele and Graham, pp. 117-121.

is the Iroquois Confederacy, which predates Confederation but still plays an international advocacy role. More recently, the Confederacy has been active in issues of gaming and in events such as the Oka crisis.[19]

An important new international Aboriginal institution is the Inuit Circumpolar Conference (ICC), founded in the late 1970s. The ICC advocates the common needs and interests of Inuit in Canada, the United States, Greenland and Russia and has worked extensively on environment and development issues as they affect Inuit.[20] Organizations such as the Six Nations Confederacy and the ICC have certainly been active in events; the extent to which they and similar groups have left their mark on the policy discourse remains to be explored.

- **Aboriginal peoples and Canadian governments have been preoccupied with three dimensions of their relationship – peaceful coexistence, equitable material considerations, and racism and human dignity. In the case of the first two dimensions, the preoccupation has been bilateral. In the case of the third, the tendency has been to treat Aboriginal people like a racial or ethnic minority.**

The first dimension, peaceful coexistence, has not always been achieved, as evident in the Oka crisis, Innu protests over low-level flying in Labrador, and other events. Nonetheless, incidents in which peaceful coexistence has broken down underline the importance of the goal. Two elements have emerged as important in defining the coexistence of Canada and Aboriginal peoples: recognition of Aboriginal rights and determination of appropriate approaches to resolving disputes between Aboriginal peoples and Canadian governments.

The modern crucible for Aboriginal rights was the 1969 White Paper. The sense of betrayal felt by Indians and their protests, leading to the White Paper's abandonment, have been well documented.[21] Within a year of the White Paper's release, reports commissioned by Indian organizations documented broken treaties and the repudiation of Aboriginal rights. In June 1970, 200 Indians met the prime minister and members of cabinet to reject the proposed policy. The 'Red Paper' presented at this meeting argued that the effect of the White Paper within a generation would be to

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19. For a full description of events at Kanesatake (Oka), see York, *People of the Pines*.

20. Indigenous circumpolar politics are chronicled and assessed in Young, Chapter 4.

21. The most substantial work on this period remains Weaver, *Making Canadian Indian Policy: The Hidden Agenda, 1968-70*.

leave Indians with no land and condemn them to urban slums.[22] That summer, in several protests across the country, Indian people rejected the White Paper and called for Aboriginal autonomy.

Preoccupation with rights recognition as the basis for peaceful coexistence continued throughout the 1970s, with a series of landmark court cases, such as the *Calder* and *Paulette* cases of 1973.[23] It became evident that governments would have to develop processes to resolve disputes over rights, especially those related to land and title. The federal government took two initiatives; the first was the use of royal commissions or commissions of inquiry to explore contentious development proposals that might impinge on Aboriginal territory. Establishment of the Berger commission on the Mackenzie Valley pipeline in 1973 and the Lysyk inquiry into the Alaska Highway pipeline in 1977 were two such cases. These inquiries had the notable result of making very explicit the link between the development of infrastructure for national purposes and Aboriginal rights to land. They also highlighted the link between recognition of land rights and title and broader well-being.

The federal government also articulated its first comprehensive claims policy in 1973. The policy and the institution established to implement it, the Office of Native Claims, have been subject to much criticism.[24] They nevertheless represented a departure from the confrontational climate surrounding negotiations with the James Bay Cree and Inuit in northern Quebec. An agreement eventually allowed the James Bay project to proceed, but it was negotiated under the cloud of court injunctions.

The second dimension of the Aboriginal-Canada relationship concerns equitable material conditions. The period was characterized by substantial preoccupation with economic and social development to 'improve' the material circumstances of status Indians and Inuit. In 1954, northern affairs minister Jean Lesage announced a new Inuit policy in the pages of a Hudson's Bay Company publication, *The Beaver*. It called for reforms in Inuit health, education and economic conditions and for the establishment

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22. The Red Paper was a document prepared by the Indian Association of Alberta, *Citizens Plus*. Other Aboriginal responses to the White Paper include Union of British Columbia Indian Chiefs, *A Declaration of Indian Rights: Union of British Columbia Indian Chiefs*; and Indian Tribes of Manitoba, *Wahbung Our Tomorrows*.

23. *Calder et al.* v. *Attorney-General of British Columbia* (1973), S.C.R. 313; *Re Paulette et al. and Registrar of Titles (No. 2)* (1974), 42 D.L.R. (3d) 8 (N.W.T.S.C.).

24. An extensive review of federal claims policy and process was undertaken in 1985; see Task Force to Review Comprehensive Claims Policy, *Living Treaties, Lasting Agreements*. We discuss it in Chapter 4.

of local self-government for Inuit. This initiative was prompted by substantial military activity in the Arctic associated with the Cold War and by the general post-war climate of social reform. In October 1958, the federal government unveiled its 'modern' plan for Indian economic development. It included an initiative to train Indians as technicians and assembly plant workers. Other steps included relocation of communities, placing Indian children in urban foster homes, and integrating youth into provincial school systems. In 1966, the federal government returned its attention to Indian reserves, announcing a $112 million program to improve housing, education, water supplies, sanitation and roads.

The Hawthorn report also influenced government thinking about the economic and social circumstances of Aboriginal people. Its detailed assessment of the woeful circumstances of many Indians and their communities provided a basis for action. As Weaver suggests, what should be done, be it community-based or government-based, was the subject of considerable debate within the federal government, effectively derailing concerted action until the release of the 1969 White Paper, when further disputes erupted.[25]

Much of the discussion about changing the material circumstances of Aboriginal people during the 1970s revolved around changes that would result from natural resource development projects. The benchmark for these discussions was the agreements reached between the governments of Canada and Quebec and Aboriginal peoples in the James Bay area. The James Bay and Northern Quebec Agreement became law in October 1977. It committed the federal government to large infusions of money for community-based infrastructure and economic development.

The contribution of other projects proposed during this period to the material circumstances of Aboriginal people emerged in different ways. In the territorial North, five major comprehensive claims were launched, beginning with the Yukon Indian land claim in February 1973.[26] In these cases, the claims process was much more protracted. In the face of intense development pressures, particularly in the Mackenzie Valley and the western Arctic, the fall-back position of Aboriginal organizations and communities was to negotiate specific benefits from individual projects, which were variously described as providing improvements to the Aboriginal population or as compensating for the negative effects of

25. See Weaver, "The Hawthorn Report: Its Use in the Making of Canadian Indian Policy".

26. The others were claims by Inuvialuit in the Western Arctic, Dene and Métis in the Mackenzie Valley and the western part of the Northwest Territories, and Inuit in the central and eastern Arctic.

development. Some of these initiatives, including the 1985 agreement between Fort Good Hope and British Petroleum regarding exploration on traditional lands, had elements of partnership.[27]

In southern Canada, the link between Aboriginal peoples' interests and resource development has tended to be the subject of litigation and confrontation rather than the basis for discussing economic and social benefits. Controversies over logging in the Queen Charlotte Islands, the construction of a pulp mill in Lubicon territory in northern Alberta, development of the Hemlow gold fields in northern Ontario, and logging in traditional Algonquin territory in northeastern Quebec are examples. With some exceptions, the orientation of resource development initiatives in provinces has been to avoid Aboriginal interests and to deal with the material circumstances of Aboriginal people very much as a side issue.[28]

In the 1980s, beginning with the Native Economic Development Program (1983) and more fully realized with the establishment of the Canadian Aboriginal Economic Development Strategy (1989), emphasis shifted to encouraging changes in the social and economic circumstances of Aboriginal people through entrepreneurship. Simultaneously, the federal government was instituting changes to reduce spending or restrict the growth of spending on Indian post-secondary education and Indian housing.[29]

The foundation of the third dimension, the eradication of racism and recognition of human dignity, is somewhat different. It lies in the dilemma that has confounded Canadian politics since Confederation — the appropriate balance between collective and individual rights. This dilemma has been most acute since the beginning of the Quiet Revolution in Quebec and the rise of Trudeau liberalism.

The foundations of collective rights in Canada go back to passage of the *British North America Act* in 1867, which included the right of Roman

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27. Abele, pp. 163-166.

28. For a variety of perspectives on this point, see Centre for Resource Studies, *Native Participation in Mineral Development, Proceedings No. 15.*

29. Graham, "Cleaning Up After Buffalo Jump: Indian Policy and the Tories", pp. 253-254. For many Aboriginal people, these measures were considered *de facto* implementation of the recommendations of the 1985 Nielsen task force. In April 1985, before the Nielsen task force report was made public, a senior Indian affairs official leaked a memorandum to cabinet, apparently reflecting the task force's recommendations, that outlined $312 million in funding cuts to Aboriginal programs. Although the government of the day repudiated the so-called 'Buffalo Jump' memo, Aboriginal people remained concerned that government actions reflected the task force's intent.

Catholics to a separate school system and the dual system of common law in English Canada and civil law in Quebec. Quebec began to assert a collective right for Quebeckers to be *maitres chez nous* on a range of issues, from language and resource development policy to external affairs, especially after the election of the Lesage government in 1960. This was in response to the aggressiveness of the Quebec government in the federal-provincial arena and to the rash of bombings by the Front de Libération du Québec earlier that year. The federal government established the Royal Commission on Bilingualism and Biculturalism in July 1963. Its 1967 report affirmed the importance of the 'French fact' in Canada and Quebec. In addition, the commission recognized that Canada was more than a country of two dominant linguistic groups; it was also a country with a multi-ethnic/multicultural and multilingual character, which the commission considered a unique and positive characteristic.[30]

Implementation of the commission's report fell to a new Liberal prime minister, Pierre Trudeau, elected in April 1968. In October, Trudeau introduced the bill that became the *Official Languages Act* to make French and English "co-equal". This was followed by a policy statement in 1971 providing a framework for fostering multiculturalism. The government, primarily through the secretary of state, undertook to affirm the notion of Canada as a multicultural country by funding a plethora of ethnic and cultural groups, mainly for cultural activities rather than advocacy. The funding of Aboriginal organizations, which began in the 1960s, was also under the responsibility of the secretary of state.

Trudeau's commitment to liberal individualism propelled his agenda through the 1970s and to the adoption of the *Canadian Charter of Rights and Freedoms* in April 1982. Traditional Aboriginal rights related to hunting and fishing were being confirmed by the courts beginning in the early 1970s. This led to the articulation of the comprehensive claims policy in 1973, but the federal government showed no desire to explore the collective nature of Aboriginal rights. For example, the government accepted the comprehensive claim of the Inuit Tapirisat of Canada to the central and eastern Arctic in 1976; however, the concept of Nunavut as a government for the claimed territory was rejected on the basis that the government would never agree to a political territory based on race.[31] Funding for Aboriginal organizations remained with the secretary of state. The effect of this was to downplay the image of organizations receiving funding as proto-governments for Aboriginal people.

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30. Stasiulis, pp. 81-85.

31. Special Representative for Constitutional Development in the Northwest Territories, *Constitutional Development in the Northwest Territories*, p. 145.

- **Canadian governments have expressed confusing – and perhaps confused – views concerning their relationship with Aboriginal peoples.**

A review of key documents in Aboriginal affairs over the past 40 years reveals government intent only in a somewhat oblique manner. Frankness, clarity and consistency have been extremely rare. This is not likely the result of conspiracy, but rather a consequence of the fact that at least until patriation of the constitution in 1982, the agendas of the federal government and provincial governments were preoccupied with the federal/provincial tug-of-war over constitutional and other issues and with management of broader economic and social issues.

There is another basis of support for this proposition. Aboriginal peoples' concept of their relationship to Canadian governments and non-Aboriginal Canadians is fundamentally different from most Canadians' understanding of it. In some cases, Aboriginal people define this relationship based on formal treaties; in others, the relationship is seen through a prism of fundamental rights and obligations given to Aboriginal people, as indigenous people, by the Creator. Aboriginal perspectives on the relationship between Aboriginal peoples and Canadian governments and between Aboriginal peoples and other Canadians have proven problematic and discomforting. This was certainly true in the constitutional discussions of the 1980s and in the debates surrounding the Meech Lake and Charlottetown Accords.[32] It has been also evident in disputes regarding the right of Aboriginal people to hunt, fish and trap without being subject to provincial and federal laws.[33] Disputes over gaming, such as those in Manitoba in 1992, are another example. Dominant notions of a fiduciary trust relationship and paternalism, which are evident in the *Indian Act*, have shaped the paradigm used by the federal government and provincial governments in their dealings with Aboriginal peoples, at least until Meech Lake. The prevalence of this view and the discomfort caused by the dawning realization that there is another perspective on the relationship between Aboriginal peoples and Canadian governments may have induced governments to attempt to avoid conflict by remaining mute on fundamental questions about Aboriginal rights in policy-related documents.

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32. See, for example, Calder, "The Provinces and Indian Self-Government in the Constitutional Forum".

33. See, for example, Saunders, "The Application of Provincial Law"; and Dickason, *Canada's First Nations*, especially Chapter 23.

- **Government discourse on Aboriginal issues has become less interventionist since the 1970s.**

The postwar activist state generally saw Aboriginal people as objects of policy who would benefit from state-run Aboriginal programming and from spin-offs from other state-sanctioned initiatives, such as resource development. The activist state in Canada was challenged by two key developments: the rise of concern about the impact of state activism on the financial health of governments and public resistance to major resource development projects. The conjuncture of these events in the mid- to late 1970s, followed by the election of a conservative federal government in 1984, contributed to a less interventionist discourse on Aboriginal issues. Persistently, Aboriginal people have been concerned with the fulfilment of Canadian governments' obligations to them and with the impact of financial cut-backs.

At the beginning of the period covered by this review, Canada was still preoccupied with post-war reconstruction. Governments at all levels focused on developing infrastructure to meet the needs of a growing population and the significant expansion of the manufacturing sector. The notion that government activism should extend to the development of a social welfare state had also taken hold.

The politics of the Progressive Conservative governments of John Diefenbaker affirmed this direction. The Diefenbaker Conservatives were first elected in June 1957, partly as a result of public displeasure about the Liberal's use of closure to cut off debate in the House of Commons on construction of a national pipeline. The Progressive Conservatives won a second election in March 1958 and held office until 1963.

Three developments during the Diefenbaker era are important for understanding the evolution of Aboriginal policy. The first was Diefenbaker's own Northern vision, beginning with a statement in February 1958 calling for the development of infrastructure in the North and research on the North. This vision presented a futuristic image of the potential of Arctic sea routes maintained by atomic-powered icebreakers. The second development was the launch of a new era of federal regional economic development programming.[34] Finally, there was the activist, Keynesian response of the Diefenbaker government to the recession of the late 1950s. Winter works programs and other initiatives were undertaken to alleviate unemployment and stimulate local economies.

Election of a Liberal government in 1963 sustained activist momentum in the federal arena. The Pearson government launched the Canada Pension

34. See Phidd, "Regional Development Policy".

Plan and a national health care system, after extensive federal-provincial debate.

By the late 1970s, concern was beginning to emerge about the impact of government initiatives on the deficit and public debt. Concern about the rise in federal spending, coupled with rising inflation, led the federal government to introduce '6 and 5' legislation limiting salary increases for federal public servants to those percentages in 1982 and 1983 respectively.

Election of the Progressive Conservative government in 1984 was followed shortly by the Nielsen task force report on Aboriginal and northern programs and the leaking of the 'Buffalo Jump' memo in May 1985. This was a precursor of Aboriginal protests of cut-backs in many areas, including post-secondary education, housing and support for Aboriginal political organizations and media through the secretary of state.

- **Aboriginal peoples have pushed for explicit and genuine consultation with Canadian governments. Differences in approaches to consultation may stem from differences between Aboriginal agendas and the agendas of Canadian governments.**

It has been argued that the federal government has tended to see consultation with the public and interest groups as a necessary evil. Consultation has often been tangential to the policy process, and the results of elaborate consultation exercises have often appeared after the main decisions have been made. In short, consultation has not been part of the central system of federal policy making. As an antidote, critics suggest a more timely and effective interaction between consultation and other elements of the policy process.[35]

The seeds of the federal approach lay in the modernization of the federal public service, beginning with the establishment of the Royal Commission on Government Organization, chaired by J. Grant Glassco, in September 1960. Reporting at the end of 1962, the Glassco commission made sweeping recommendations about the size of the federal public service, government organization and the need to introduce a management ethos into government. Reforms instituted in the spirit of the Glassco commission coincided with the rise in popularity of systems thinking, proselytized by people such as Robert MacNamara in his capacity as president of the Ford Motor Company and, later, U.S. secretary of defence. Both developments coincided with the rise of citizen activism in the 1960s. All of this likely contributed to the rather elaborate – and ultimately

35. See Phillips.

ineffective – consultation process that attended the run-up to release of the 1969 White Paper.[36]

The White Paper set the tone for discussions between Canadian governments and Aboriginal peoples. From the conflict grew the requirement that governments make their intentions about consultation explicit. In response, Aboriginal peoples have often responded with suggestions for a more iterative process, not bound so heavily by rigid time lines. Examples include representations made during the Berger and Lysyk inquiries of the 1970s, the dynamic of discussions between Canadian governments and Aboriginal peoples surrounding patriation of the constitution and the subsequent first ministers conferences on Aboriginal constitutional matters, and Aboriginal distrust of the rapid momentum built up during the Canada round of constitutional discussions, culminating with the 1992 referendum.

The list of significant features of the context for Aboriginal policy presented in this chapter has been developed from the outside looking in. Before turning to the Aboriginal policy documents, to discover what they reveal about these propositions and assertions, we expand on our approach to examining the documents in Chapter 3.

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36. For discussion of this consultation process, see Weaver, "Making Canadian Indian Policy".

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Chapter 3
Approach to the Research

DOCUMENT-BASED RESEARCH ON POLICY DISCOURSE bears some similarity to geological research. The dated documents provide the sedimentary layers in which can be found the fossil record of concepts and terminology, as they have evolved over time. As with the fossil record, it is important to avoid generalizing from single instances and to remember that diversity and surprise, fault lines and conglomerate rock are as frequent as the neat layers of sandstone and shale in which perfect records are found.

The policy discourse in Aboriginal affairs involves participants, processes, values and ideas. The discourse takes place among people and groups with varying views. Often, Aboriginal and non-Aboriginal political, economic and cultural elites are taken as authoritative sources of opinion.[1] These participants engage in a wide range of processes which, whether bottom-up or top-down, significantly shape the way in the which the policy actors espouse their ideas and values in the discourse.

This extended discussion of Aboriginal affairs has been occurring within Canada's 'public philosophy' — a set of political beliefs that enjoys widespread acceptance in the political community and that may nor may not be formed from a single ideological position.[2] This public philosophy is a highly fragmented, internally contradictory, distinctive form of liberalism that has incorporated socialist and conservative strands from many immigrant peoples over the last two or three centuries.[3] It is apparent that Aboriginal political ideas both participate in the Canadian public philosophy and profoundly challenge it, as Aboriginal peoples have contradicted the 'official' version of their place in Confederation and have attempted to explain their own, distinctive political philosophies and goals for structural change.

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1. In recent years, several striking cases revealed that elites do not always speak for everyone else. The rejection of the Meech Lake and Charlottetown accords are examples.

2. See Manzer (1985), p. 13. Jane Jenson has elaborated a somewhat similar concept, the 'universe of political discourse', to refer to the same sort of influential body of thought.

3. Many people have described the 'mainstream' of Canadian political thought in broadly similar ways. See Manzer (1985) and Abele for a parallel but somewhat different version of this argument, as well as Whitaker and Resnick.

A record of public communication about Aboriginal issues can be found in the several hundred influential documents collected for this project. The documents are the product of 30 years of public effort in Aboriginal affairs, and they do provide a kind of geological record of changes in dominant ideas and values and of the concepts people have used to try to understand and communicate about Aboriginal issues. In this chapter we explain and assess the research approach taken to the selected documentary record to develop an historical analysis of public discussion of Aboriginal affairs. 'Policy discourse' is defined, and we outline our approach to analyzing discourse, which is based on three questions: *who* is involved in the discourse; *how* do they participate; and *what* ideas are the product of this participation? This simple approach makes good use of the fossil-notions left behind by previous toilers, while recognizing that just like geological science, our approach usually omits very soft-bodied creatures (however numerous or important) and may miss important events by the accident of location or lack of discovery.

DEFINITIONS

Some working definitions of key terms will be useful. We use an inclusive and behavioural definition of policy: policy is what a government decides to do or not to do. In this definition, a policy is not necessarily labelled or formally identified as policy, though it often is.[4]

By policy 'discourse' we mean the communication of ideas, concepts, explanations and justifications, written or spoken, concerning policy. For purposes of our research, discourse is evident in the published texts of key documents. We build our case, then, on a partial but probably indicative record. Some important limitations of our approach are discussed later in this chapter. At the outset, it is important to note that discourse does not always involve discussion. In policy discourse there may be more of a monologue than a debate, or as we suggest in the title of this book, a soliloquy rather than dialogue.

The goal of dialogue is, minimally, mutual understanding. In public policy, under certain conditions, the product of dialogue may be mutually or even generally satisfactory decisions for action. The preconditions for effective dialogue are

- commensurate participation by all those affected by decisions;

4. There are many definitions of policy and some approaches more restrictive than ours. For a discussion of the possibilities, see Doern and Phidd; Simeon, pp. 548-580; Brooks; Pal; Manzer (1985); and Manzer (1984), pp. 577-594.

- establishment of a process for sustained discussion, featuring recognition of different starting points and preferences in style of communication and with a problem-solving focus; and
- evolution toward a common vision of what is to be talked about, based on initial frank exchanges in which there is respect for differences.

For Aboriginal peoples, these conditions have prevailed very rarely in Canadian public life, but sometimes they have been approached, even across the great divides created by differences in power, language and priorities. As will become clear in later chapters, it is a general preoccupation of this book to identify the conditions under which channels of effective dialogue have been opened, with the goal of supporting their further elaboration.

DEFINING THE FIELD

What is Aboriginal affairs policy? In one sense, *all* policy fields are Aboriginal policy, as all policy in Canada affects Aboriginal people as it does other residents. As a result of the historical legacy, however, Aboriginal policy is also a separate field, with recognized official and semi-official stakeholders, a designated federal department, and a specialized language of its own. Besides this, there are other federal departments, provincial ministries and other policy fields in which Aboriginal affairs play a major or minor role. A three-part typology of federal policy fields is one way to sort out the situation.

There is, first, policy defined as Aboriginal policy. This includes federal and provincial policy about Aboriginal-specific issues, such as federal claims policy, which guides the federal government's responses to alleged violations of the terms of treaties.

Second, there are policy fields of central interest to Aboriginal peoples, but where Aboriginal representation and issues are still at the margin. Aboriginal consultation may occur as an addendum to business-as-usual, or as an exceptional case of Aboriginal involvement. Examples include policies with respect to national parks, environmental protection or museums collections.

Third, there is a still-large group of important policy areas where decisions have a major effect on Aboriginal people but in which it is still common for Aboriginal interests to be ignored. These include, for example, taxation, customs and excise, and international trade.

One way to understand the changes in Canadian public policy over the last 30 years is to picture a broad movement to dissolve the boundaries between the three types of Aboriginal policy just outlined and to institute a system in which Aboriginal people and their representatives are involved *as Aboriginal people* (rather than as individual citizens) in all policy discussions that affect their collective interests. Forty years ago, it was not

exceptional for Aboriginal people to be excluded from policy discussions about issues that directly concerned them: federal decision making on northern Aboriginal affairs included no Aboriginal representation at all until the early 1960s. Now, no federal or provincial government would act in a policy field clearly identified as Aboriginal (the first category above) without concerted efforts to involve Aboriginal representatives. The effectiveness of this representation, its legitimacy, and its overall effect on public policy are matters for further consideration.

THE ELEMENTS OF POLICY DISCOURSE ANALYSIS

Analysis of policy discourse begins with three simple questions: who is involved, how are they involved, and what ideas and values emerge from this involvement?

WHO IS INVOLVED?

Identification of the primary actors involved in the policy process is a key focus of our investigation. Possible candidates include governments (as represented by politicians and/or officials), Aboriginal governments and organizations of all kinds, arm's length state-funded agencies (such as the Canadian Human Rights Commission), and other individuals and associations in civil society that have been mobilized from time to time (for example, the Canadian Bar Association and the Canadian Wildlife Federation).[5]

Particular attention must be paid to the disposition of different orders of government in the policy process and, to the extent possible, to the role various actors have played *within* governments in determining what has transpired. In examining education policy, for example, it has been important to explore the implications of policy dominance by the federal or provincial governments at different times. In all governments, it is important to note the role and stances of various departments and which levels of government have been absent; for example, municipal

5. There are now community and/or First Nation level governments, tribal councils and regional associations, federations (such as the Inuit Tapirisat), and other political organizations of varying geographical scope. In addition there are many special-purpose Aboriginal organizations, formed to deliver specific services (for example child welfare) or to play an economic role (such as Aboriginal capital corporations and development corporations). Besides these there are interest-specific bodies, such as the Indian and Inuit Nurses Association and the Indigenous Bar Association.

governments have been involved only rarely and reactively in discussions of land and title.[6]

In considering government's participation in policy discourse, it is also important to explore the role of political parties and party predilections in shaping the stance of any particular government. Parties are important, sustained and rarely unidimensional influences. Since electoral success may be a rough indication of prevailing public values, preferences and priorities, it is important to examine the tension between public opinion, party ideology and actual actions of governments.

If parties, Aboriginal organizations and governments, voluntary groups, and federal, territorial and provincial governments and political parties more or less exhaust the range of potential collective political actors, it is important then to ask who, among the candidates, actually was included?[7]

Who is *routinely* included has varied a great deal over the last 30 years; indeed, one measure of change is amendment of the A-list of potential invitees to the political debate. The Hawthorn report was drafted entirely by non-Indians. By contrast, the Royal Commission on Aboriginal Peoples included a majority of Aboriginal people among staff and commissioners. This likely reflects a change in the role and status of Aboriginal peoples in Canada, but it also probably reflects a trend toward greater representativeness in political institutions.[8]

Two observations can be made about the inclusion of policy actors in the discourse on Aboriginal affairs. First, no one that has been included has been dropped. We see the continuing strength of organizations representing treaty peoples and of the Department of Indian Affairs and Northern Development in the discourse from the time of the Hawthorn report to the present. Second, not everyone who has made a bid for inclusion has been successful. Examples include the failed attempt by the Native Women's Association of Canada to claim a seat at the constitutional bargaining table. The issues of inclusion and exclusion invite further examination in subsequent chapters.

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6. See, for example, the brief to the Royal Commission on Aboriginal Peoples by the Federation of Canadian Municipalities regarding land claims, pp. 34-38.

7. We follow Jane Jenson in considering that virtually all political actors are essentially collective, in the sense that even very powerful and charismatic individuals are important because they galvanize or tap important shared causes and because the individual is effective only in social interaction. This does not amount to the claim that individual agency, heroism or strength is irrelevant. On the contrary, these are important factors, but at a less general level than we are speaking of here. See Jenson, "Paradigms and Political Discourse"

8. See Bryden, pp. 81-107.

HOW ARE PEOPLE INVOLVED IN THE POLICY PROCESS?

Public involvement in policy making can be considered in two ways: first, there are issues of representativeness and accountability; second, there are the mechanisms and institutions through which participation takes place. Each of these aspects is important to understanding the nature of participation and the nature of the policy process.

The issue of representation is, in all ways, highly charged.[9] Controversy has attended discussions of 'voice' and the representation of so-called 'minorities' in virtually all the major cultural institutions in Canada in recent years. There is discomfort with essentialism – the view that people's ascriptive characteristics determine their authority on matters of particular concern to the group that shares the same characteristics – and also general recognition that members of particular groups ought to be centrally involved in interpreting their own situations and their relations with other groups. We move into the discussion of representation recognizing these debates but with a simple and we hope pragmatic approach.

A number of observations can be made about how Aboriginal individuals and organizations represent Aboriginal peoples generally in policy discourse. With these in mind, it will be easier to assess the influences that may be evident in documents produced by particular processes.

1. No single voice

We recognize that there is not and never has been a single Aboriginal voice or a single organization or individual with the capacity or the mandate to represent all Aboriginal people in Canada. Indigenous peoples are as diverse and multifaceted as other peoples. Those who occupy Turtle Island (known to most of the world as North America) speak hundreds of different languages and have individual histories, religious traditions, economic practices and political institutions. They do share a common experience of dispossession and conflict with the largely aggressive and overwhelmingly numerous migrants who have come to Turtle Island during the last 500 years. The common experience of colonialism, and certain common features of heritage, support a certain unity among Aboriginal peoples.[10]

2. Basis for common cause

While there is no single Aboriginal perspective, there is certainly a basis for common cause and political action. As Aboriginal peoples have organized

9. See Maracle, Mohanty, and Todorov.

10. See Wright, *Stolen Continents*.

in modern times for self-protection and to advance their interests, they have formed organizations that have found common ground, whatever its basis, and advanced this as the primary political goal, after which differences could be respected and enjoyed. A recent example was Canada's decade-long effort to amend the constitution to include Aboriginal peoples as partners in Confederation. Despite many strategic differences and differences in the real needs of First Peoples and their communities, unity on the key constitutional points held, for the most part, through the debates.

3. Accountability

Where there is a relationship of representation, there is an issue of accountability. In Parliament, for example, members 'represent' large and heterogeneous constituencies within the limits of party discipline. Members are accountable to their constituent, but as a practical matter they cannot directly represent all their constituents' views and necessarily inject their own biases on most issues.

The issue of representation and accountability is particularly acute in Aboriginal affairs.[11] Clearly, it is convenient (perhaps on some issues essential) for federal and provincial governments to have a single 'window' on the Aboriginal community and a single voice to engage. But does the Grand Chief of the Assembly of First Nations truly speak for all treaty and status Indians in Canada? On all issues? What about women? Given the practical limits to dialogue and consultation on a wide range of issues, how does a Grand Chief determine when he or she can comment and when to remain silent?

Similarly, regarding Aboriginal peoples' relations with the rest of Canada, do prime ministers and premiers speak for all Canadians on the toughest issues? Do members of professional associations that have made policy interventions favourable to Aboriginal peoples' goals speak for their members, compelling action or even simply deterring resistance to fundamental changes?

Turning to the analysis in this study, how do we assess the legitimacy and effectiveness of those who 'represented' Aboriginal and non-Aboriginal communities or opinion groups in the production of the documents being analyzed? Without even beginning to worry about whether the representatives were effective in their efforts in particular instances, it is important to recognize that in most cases individuals cannot be understood to speak for the status group or nation to which they belong. For the most part, individuals can contribute only an individual perspective, flavoured, no doubt, by their experience as a member of the group they represent.

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11. See Chartrand, "Aboriginal Self-Government".

We do not assume, for purposes of this analysis, that community interests or a majority view were reflected in any individual's contribution to a public document. Nevertheless, we do proceed on the basis that, in a general way, considering many documents in aggregate, it is possible to draw some tentative conclusions about changes in the type and quality of representation. While it is logically possible for a non-Aboriginal person accurately to represent the majority view of a specific Aboriginal collectivity, it is not likely that a public policy process shaped exclusively by non-Aboriginal people reasoning about Aboriginal affairs will be sufficiently soundly based to be either accurate or effective.

Finally, it is important to recognize that representation is not simply an issue for Aboriginal participation. The perspectives of non-Aboriginal people participating in documentary production are equally individual and equally likely to be idiosyncratic rather than reflective of the majority view or of consensus. Similarly, entire committees of people may produce documents that most imperfectly mirror the state of public opinion or the stage of public debate. One cannot assume that any documentary record is 'the truth' about what happened, or even the truth about what people wanted to happen. In each case, for each document, these are empirical matters to be resolved.

In this context, it is still necessary to consider the mechanisms and institutions through which people engage in policy discourse. These structural factors may have a major impact on outcomes in several ways.[12]

1. The degree and nature of institutionalization of the process.
The 1969 White Paper on Indian policy prompted a Canada-wide mobilization of Aboriginal peoples, lasting several years and with diverse confrontations and strategies on various fronts. Aboriginal peoples were in urgent discussion with the rest of Canada, though there were relatively few formal institutions through which the discourse was channelled. In contrast, another Canada-wide dialogue involved the struggle to have Aboriginal rights entrenched in the newly patriated Canadian constitution; this discussion took place in a highly organized way, through well elaborated institutions. Between these two extremes are many examples. Generally speaking, the higher the degree of institutionalization, the more likely that outcomes will be clear-cut and of a win-lose nature.

12. Very useful considerations of the structural include Phillips, Doern (1993), Pal and Seidle; see also Andrew, pp. 667-683, and Jenson, "Paradigms and Political Discourse".

2. The level at which the debate is engaged.
Most residents of Canada meet the policy process as 'consumers' or 'clients' who may be consulted, in the aggregate, but who are usually simply beneficiaries. When opportunities for more influence are opened, they may be at varying levels, from contact with public servants with a mandate to gather public views to meetings with ministers and premiers on matters of high policy. The level at which Aboriginal peoples' representatives entered the dialogue often influences their impact.

3. The type of interaction that takes place.
Policy discussions can be part of a sustained, long-standing arrangement; they can be episodic but fairly regular, or they may be only occasional or extremely rare. The interaction may be governed by the rules pertaining to information sharing (where views are elicited and offered, with no commitment to follow-up); consultation (where some follow-up is expected); or negotiation or joint planning (where mutual commitment to subsequent action is a ground rule).

4. Funding.
There is a small critical literature on the effect of federal funding on the activities of nominally independent Aboriginal organizations. It is worth considering this literature at some length, since many of the documents analyzed in this book were produced by Aboriginal organizations using federal funding.

Harold Cardinal was among the earliest critics of how federal funding shaped and limited the Aboriginal political movement, but Martin Loney, among others, has made similar observations.[13] Dependence on federal funding has had several effects. First, and most obvious, the federal distinction between 'registered' (treaty and status) Indians and all other Aboriginal people and the consequent differentials in funding have created the current configuration of national and regional representative organizations. Federal distinctions, reflected in funding practices, have shaped the national Aboriginal organizations in a basic way.

Second, core funding of Aboriginal organizations has tended to ebb and flow with other federal fiscal priorities and with federal estimations of the urgency of the challenges to public order presented by Aboriginal people.

Third, receipt of core funding has meant that Aboriginal representative organizations must have a particular legal status and structure, with

13. See Cardinal, pp. 170-176; and Martin Loney, "A Political Economy of Citizen Participation", in Leo Panitch, ed. *The Canadian State: Political Economy and Political Power* (Toronto: University of Toronto Press, 1977), pp. 446-472.

appropriate signing authorities and other forms. These administrative arrangements have not been entirely neutral in their effect on the forms and reach of Aboriginal political forms. The forms, in turn, shape the documents that have been produced.

Fourth, and for purposes of this study most important, the means by which the federal government funds Aboriginal organizations' activities has had a pronounced effect on the areas in which the organizations have pursued policy research. Core funding rarely extends to cover extensive amounts of policy research. For this type of work, extra, special-purpose funding is usually required. Thus, it was possible for the Assembly of First Nations to publish weighty documents on Indian education because federal funding for this purpose was made available. Other issues, while arguably equally important, are not the subject of published documents, because no subsidies were available for their production.

It might be possible to conclude that federal or provincial government policy priorities have determined the policy agenda for Aboriginal organizations. But the reality is more complex. Government funding is often made available for special projects after Aboriginal organizations have lobbied successfully to place particular issues on the public agenda. Once the issue has been recognized as important and capable of resolution, government purse strings are loosened. Of course, not all issues identified as priorities by Aboriginal peoples or organizations meet with success. Some are ignored for political or fiscal reasons.

In short, the record of publications by Aboriginal organizations provides a decidedly incomplete but generally accurate list of topics identified as priorities by representative Aboriginal organizations *and* Canadian governments. It is probably fair to note also that because governments control the flow of funds, ultimately governments' list of issues is more likely to be reflected in the documentary record than is the list that might be identified by Aboriginal communities and nations.

Before leaving this issue, it is important to consider one last possible source of influence. Is the *content* of the documents shaped by the fact that funding is controlled by federal, territorial and provincial governments? We believe that in most cases, funders do not exercise editorial control; federal subsidies have rarely been withheld from Aboriginal organizations because the federal government did not agree with the content of particular reports. For one thing, most of the funds are dispersed before the document is available for inspection by funders. For another, to be caught in such a crude attempt at censorship would carry a political cost that few governments would be willing to risk.

There are, however, more subtle forms of control. Report drafters are people whose livelihood centres on Aboriginal affairs: they may be staffers of Aboriginal organizations (and thus indirectly but personally dependent on

continued federal funding for their income), or consultants who in future will want to be considered sufficiently tuned in or knowledgeable to be hired by government or other Aboriginal organizations. A large part of appearing knowledgeable is understanding the informal boundaries of public philosophy and the universe of political discourse.

WHAT IDEAS AND VALUES EMERGE FROM THE POLICY DISCOURSE?
The ultimate product of policy discourse is the body of ideas that shapes how problems are defined and issues addressed. Each document provides an account of who drafted it and why, and who is responsible for implementing its recommendations. The documents typically omit 'the whole truth'.

It is important to acknowledge the difficulties inherent in relying on a document as evidence of these main ideas. Anyone who has ever been part of a committee drafting a report, or compared someone else's minutes of a meeting with personal recollections of the same events, knows that documents embody comprises – among the drafters, and between the drafters' conception and the words they found to express it. Documents often also conceal important information. Consciously and unconsciously, authors tend to omit inconvenient facts (for example, the high cost of reforms being recommended) or the strong views of a dissenting minority. At the very least, they might soft-peddle any disagreements in the analysis. Drafters may also ignore information whose importance is apparent only in retrospect; today many people think it important that there were no women among the Fathers of Confederation, but in 1867 few people if any would have remarked on this.

Careful dissection of a single document, in a manner designed to uncover the compromises, deceptions and assumptions of a particular set of drafters, is an important and revealing enterprise. It is not, however, the goal of the present study. We have chosen a somewhat broader brush, recognizing that the finer analysis of most of the documents remains to be done. We have asked a number of general questions about a selected body of documents.

1. What are the paradigms that emerge in particular policy subject areas?
The policy paradigm, as stated in Chapter 1, provides the conceptual framework of interpretation and judgement, at the most general level, that indicates what is important and unimportant, and what is right and wrong. Four policy paradigms have appeared and not yet disappeared in discourse on Aboriginal policy:

- the assimilationist position, which treats Aboriginal people as societies or individuals who are moving or must be assisted to move into

industrial civilization, and to assume economic, political and social rights similar to those of other citizens.
- the 'citizens plus' paradigm, in which treaty signatories are held to have all the rights of Canadian citizenship, and also rights arising from their status as descendants of those who signed the original treaties.
- a rights-based approach, in which Aboriginal and treaty rights confer a certain status and entitlement on all First Peoples in Canada, rights held as a consequence or as an expression of aboriginality
- a sovereigntist paradigm based on the inherency of a nation-to-nation relationship between Aboriginal and non-Aboriginal governments.

The interplay of these four paradigms casts a frame for much of the policy discourse on Aboriginal affairs reviewed here, and their incoherence is perfectly appropriate given the incoherence of the prevailing public philosophy in the country.

2. What is defined as the content of the issue?

The policy paradigm sets the parameters of a discussion. Within the paradigm, there is always scope for defining particular issues, and often in policy discourse there is considerable debate about how particular issues should be understood. Will we address 'family violence', 'violence against women' or 'wife assault'? Should the policy address 'Indians' or 'First Nations' or 'Aboriginal people'?[14] Debates over the definition of concepts and the language used to articulate them form an important part of our analysis.

CONCLUDING REMARKS

To ignore history is to risk repeating it. To use uncritically the language of one's own era is to risk imprisonment in the assumptions and omissions of earlier times, as well as the confusion of jargon and metaphor with thoughtfulness and problem solving. It is important that the Royal Commission's contribution to the corpus of public documents proceeds from a well analyzed, stable base and that the concepts the Commission uses are of known heritage and clear expression.

As the title of this book suggests, we have concluded that the principal change in the nature of public policy discourse in Aboriginal affairs has been from a situation where Aboriginal people were treated as the *object* of public policy discourse (so that policy makers were engaged in what was in effect a soliloquy or monologue) to one where Aboriginal peoples' representatives have engaged the 'others' in a dialogue; from the point of

14. See Jenson for a discussion of self-naming.

view of the policy centre, they have become *subjects* in the discussion, with their own voices, agendas and legitimacy.

The historical compass of this study is rather narrow, beginning in the mid-1960s and concluding in the early 1990s. Exclusive focus on the recent past does permit more detailed analysis, but the risk of myopia is great. In an earlier period of Aboriginal/non-Aboriginal relations there was effective dialogue and a high degree of mutuality and respect, beginning with the first contacts in the fifteenth century and ending in some parts of the extreme north in the early years of this century. We acknowledge this earlier period of dialogue and the subsequent periods of conflict, dispossession, accommodation and administrative colonialism, leading ultimately to the period of monologue that had begun to be broken during the decade when our study begins.

The four chapters that follow examine documents in the fields of land and title, governance, criminal justice, and education in an effort to trace the development of the policy discourse in these areas. The fundamental underpinnings of policy discourse articulated in this chapter will guide the analysis and provide the basis for reflections on the nature of the contemporary discourse in later chapters.

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Chapter 4
The Discourse on Land and Title

ISSUES RELATED TO TREATIES AND TREATY RIGHTS, land and land claims have been at the centre of the Aboriginal/non-Aboriginal relationship for centuries. From the negotiation of the first treaties to the current struggle to settle specific and comprehensive land claims, policies on Aboriginal lands and title have been shaped by the efforts of Aboriginal peoples to have their rights to the land recognized. These struggles have been particularly pronounced in the last quarter-century.

This chapter deals with the policy discourse on land and title that has emerged since the Hawthorn report. The Aboriginal relationship to the land encompasses many areas, from spiritual and community health to concerns about the environment and economic and resource development. This chapter does not deal directly with these matters but focuses primarily on the process of land claims and on the legal battles to recognize Aboriginal rights that have propelled the discourse on land and title.

The documents reviewed in this chapter were chosen by the Royal Commission on Aboriginal Peoples because they have had important policy implications for Aboriginal issues. Prominent in this discussion is the Department of Indian Affairs and Northern Development (DIAND), as the issuer of policy statements and the appointer of special inquiries and task forces. The high profile of provincial Indian organizations is also noteworthy, particularly in the earlier discourse, as is the role of provincial governments, which emerged as key policy participants in later years.

While the voices of certain policy actors were loud, others were notably quiet. The three Maritime provincial governments, and the Métis, Inuit and non-status Indian populations are not represented.[1] The apparent silence of some of these groups is perhaps explained by our decision to focus on treaties and land claims; Métis and non-status Indians have not been major actors in the processes surrounding these issues, though achievement of an adequate land base is important to them. The relatively small number of documents by Inuit is probably a simple reflection of the relative size of the Inuit population compared to other Aboriginal groups.

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1. Métis perspectives on land are included in the discussion of governance in Chapter 5. Other Aboriginal groups and organizations have published documents on specific land and resource use questions, such as pipelines and mining in the North, hydro developments in Quebec, and forestry and fishing in British Columbia.

The chapter is divided into two parts. The first traces the development of the discourse through the documents. Four distinct periods of discourse are examined. For each period, the key documents that informed the policy discourse are reviewed and observations are offered concerning their impact on the period. The second revisits the development of the discourse since the Hawthorn report and offers some observations on the evolution of the policy discourse on Aboriginal land and title.

THE DEVELOPMENT OF THE DISCOURSE THROUGH DOCUMENTS

The policy discourse on land and title can be divided into four periods: pre-1973; 1973 to 1982; 1980 to 1987; and 1987 to 1993. These periods organize a discussion of key documents according to three factors: *who* participated in the policy discussions; *how* they participated; and *what* ideas and values were prominent in the discourse. The periods are organizational devices that allow for characterization or grouping of the documents and are based on the introduction of new policy statements released because of some change in conditions, generally legal, that occurred during the previous period.

PRE-1973: ABORIGINAL TITLE AND A NEW ERA OF TREATY MAKING

The documents published before 1973 discuss land and related Aboriginal rights primarily through reflections on proposed government policy changes. As in other policy areas, publication of the *Statement of the Government of Canada on Indian Policy* (the White Paper) in 1969 shaped the discourse on land and title during this period.

The prevailing official attitudes on land and title at the beginning of this period are illustrated in the following excerpt from the 1966 *Report of the Advisory Commission on the Development of Government in the Northwest Territories* (the Carrothers report):

> It is not conceivable that the central government would convey title in the mineral and petroleum resources of one-third of the land mass of Canada to a government of less than 0.2% of the total Canadian population, three-fifths of whom are indigenous peoples who, however great their potential, are at the present time politically unsophisticated and economically depressed. (p. 148).

Legal decisions of the same period were restrictive in their interpretation of Aboriginal rights. In January 1968 a New Brunswick court ruled against the Mi'kmaq position that ancient treaties affirmed their right to hunt and fish year-round, and in April the same year, the Supreme Court

ruled that Indians in western Canada must abide by the *Migratory Birds Convention Act*, which restricts the right to hunt guaranteed in the treaties.[2]

In this context, the Hawthorn report represented a contrary and – from the Indian perspective, more favourable – view, arguing for a more expansive view of Indian rights.[3] The 1969 White Paper, by contrast, conveyed ideas similar to those articulated in the Carrothers report and in the legal precedents of the day.

The White Paper called for the end of separate legal status for Indian people, arguing that this status and the policies stemming from it had "kept the Indian people apart from and behind other Canadians" and that this "separate road cannot lead to full participation, to equality in practice as well as in theory."[4] To ensure equality, the government was prepared to remove all references to separate and special status of Indians from the constitution.

Concerning land and title, the document proposed several measures to facilitate the policy's implementation, including repeal of the *Indian Act*, legislative action to enable Indians to control and acquire title to Indian lands, dismantling of the department of Indian affairs, and appointment of a commissioner to consult the Indians and recommend procedures for adjudicating claims. The policy also called for a new Indian Lands Act to effect the transfer of control of Indian lands to Indian bands and to determine who would share in the ownership of lands. To achieve these steps, the statement called for "discussion, consultation and negotiation with the Indian people – individuals, bands and associations – and with provincial governments."[5]

The White Paper reveals the government's perspective on a number of grievances presented by Aboriginal peoples. The document emphasizes, for instance, the government's commitment to meeting its "legal obligations" while effecting its new policy. Of significance here is the government's position on claims and treaties and on Indian lands, particularly the view that the treaties include only "limited and minimal promises", that these promises have in most cases been kept, and that there is a need for "common understanding" to resolve remaining treaty issues in the future:

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2. *R.* v. *Francis* (196), 10 D.L.R. (3d) 189; and *Daniels* v. *R.* (1968), 2 D.L.R. (3d).

3. The context of the Hawthorn report is discussed in Chapter 2.

4. DIAND, *Statement of the Government of Canada on Indian Policy* (hereafter, White Paper), p. 5.

5. White Paper, p. 6.

> The terms and effects of the treaties between the Indian people and the Government are widely misunderstood. A plain reading of the words used in the treaties reveals the limited and minimal promises which were included in them.
>
> The annuities have been paid regularly. The basic promise to set aside reserve land has been kept except in respect of the Indians of the Northwest Territories and a few bands in the northern parts of the Prairie Provinces.
>
> The Government and the Indian people must reach a common understanding of the future role of the treaties. Some provisions will be found to have been discharged; others will have continuing importance. Many of the provisions and practices of another century may be considered irrelevant in the light of a rapidly changing society, and still others may be ended by mutual agreement. Finally, once Indian lands are securely within Indian control, the anomaly of treaties between groups within society and the government of that society will require that these treaties be reviewed to see how they can be equitably ended.
>
> Other grievances have been asserted in more general terms... Others relate to aboriginal claims to land. These are so general and undefined that it is not realistic to think of them as specific claims capable of remedy except through a policy and program that will end injustice to Indians as members of the Canadian community.[6]

While the policy statement also indicated support for Indian control and ownership of reserve land, it pointed out that control and ownership are not without obligations:

> The Government recognizes that full and true equality call for Indian control and ownership of reserve land.
>
> In our society [ownership] also carries with it an obligation to pay for certain services. The Government recognizes that it may not be acceptable to put all lands into the provincial systems immediately and make them subject to taxes. When the Indian people see that the only way they can own and fully control land is to accept taxation the way other Canadians do, they will make that decision.[7]

Key to this period of discourse is not only the presentation of the White Paper, but also the actions it prompted and the reactions it provoked. One important action was establishment of the Indian Claims Commission. The reactions generated by the paper came in the form of angry rebuttals from

6. White Paper, p. 11.

7. White Paper, p. 12.

Indian organizations, as seen in the subsequent publication of *Citizens Plus* by the Indian Association of Alberta and *Wahbung Our Tomorrows* by the Indian Tribes of Manitoba.

The White Paper recommended that a commissioner be appointed "to consult with the Indians and to study and recommend acceptable procedures for the adjudication of claims".[8] The commissioner, Dr. Lloyd Barber, was appointed in late 1969 and served until 1977, when the position was discontinued.

At the time of the White Paper proposals, an adjudicatory Indian Claims Commission had been at work in the United States for 23 years. In 1973, Dr. Barber commented that after 27 years the U.S. commission was about half-way through its work. He went on to say:

> In contrast to this experience, we in Canada are only beginning to recognize the need for settlement of Indian grievances, and the question of appropriate mechanisms is still very open.[9]

In fact, efforts to create a commission had been recurring since the 1950s. In 1963, Lester Pearson stated that Liberal policy was to establish "as soon as possible an Indian Claims Commission, an independent unbiased, unprejudiced body with broad terms of reference, to review all matters pertaining to this issue."[10]

Because of the commissioner's limited mandate, however, the government's 1969 claims policy remained one that forced Aboriginal people to seek redress in the courts. The commissioner purposely took a low-profile approach, seeking to "lay a base for effective resolution by helping the primary parties, the Indians and the Government, to come to a better understanding of each other's views."[11] Inuit, Métis and non-status Indians were not within the Commission's ambit.

The White Paper prompted an angry reaction from Indian organizations. One response to the White Paper, *Citizens Plus* (also referred to as the Red Paper) was released the following June (1970) by the Indian Association of Alberta and another, *Wahbung Our Tomorrows*, in October 1971 by the Indian Tribes of Manitoba.[12] In the documents, the authors returned to the root sources of their rights and their relationship with the federal

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8. White Paper, p. 6.

9. *Commissioner of Indian Claims: A Report*, p. 37.

10. Quoted in *Citizens Plus*, p. 22.

11. *Commissioner of Indian Claims: A Report*, p. 2.

12. The Red Paper was a direct response to the White Paper, adopting the same format to contest the government's policy statement. *Wahbung Our Tomorrows* was written in the aftermath of the White Paper but was not as direct a reaction.

government, revisiting, for example, the *Royal Proclamation of 1763*, the *British North America Act*, their treaties, and the *Indian Act* of 1952. From this base, they rejected either the intent of the proposed changes or the methods used to justify the government's position. The authors also offered their own views on what Aboriginal policy should be, based on their treaties and Aboriginal rights, and their "sovereignty as a nation of people":

> To us who are Treaty Indians there is nothing more important than our Treaties, our lands and the well-being of our future generations. We have studied carefully the contents of the Government White Paper on Indians and we have concluded that it offers despair instead of hope.[13]
>
> The Indian tribes of Manitoba are committed to the belief that our rights, both aboriginal and treaty, emanate from our sovereignty as a nation of people. Our relationships with the state have their roots in negotiation between two sovereign peoples... The Indian people enjoy "special status" conferred by recognition of our historic title that cannot be impaired, altered or compromised by federal-provincial collusion or consent.[14]

The tone in both the Red Paper and *Wahbung Our Tomorrows* is one of suspicion and distrust. This is reflected in the Red Paper's account of the government's scheme to rid them of their land:

> Under the guise of land ownership, the government has devised a scheme whereby within a generation or shortly after the proposed Indian Lands Act expires our people would be left with no land and consequently the future generation would be condemned to the despair and ugly spectre of urban poverty in ghettos.[15]

The Indian Association of Alberta charged that the government falsely assumed that the Crown owned the land and that the only solution therefore was to transfer ownership to the bands in the same way that land is treated in the broader society. The Indian documents pointed out, however, that the lands were held in trust by the Crown but that ownership continued to rest with the Indians. They argued further that the *Indian Act* could be changed to return control of the lands to the Indians without altering the basic trust relationship:

> Indian lands must continue to be regarded in a different manner than other lands in Canada. It must be held forever in trust of the

13. *Citizens Plus*, p. 1.

14. *Wahbung Our Tomorrows*, pp. xvi-xvii.

15. *Citizens Plus*, p. 1.

> Crown because, as we say, "The true owners of the land are not yet born."[16]

The authors of *Wahbung* added to this their rejection of the White Paper's assumptions about the nature of their treaties and their rights:

> Nor can we accept that which we have is an extinguishment of our title and reserve the right to pursue our claims through Parliament or the courts to obtain justice and equitable treatment on the question of land entitlements.[17]

Both documents note that treaties were the product of verbal discussions in English that were transferred to paper by government lawyers who were often not present at the treaty discussions. They maintain that the written treaties are an insufficient representation of the verbal promises made. The inadequacy of the written treaties can be seen in the reports and diaries of treaty commissioners and other observers, and even these do not describe the full extent of promises made.[18] *Wahbung Our Tomorrows* goes a step further, declaring the treaties "unconscionable agreements" and contrasting the terms of the Alaska Native Claims Settlement with the land allotments and other compensation their ancestors received:[19]

> When one considers the total amount of land available in the province of Manitoba at the time of the signing of the treaty, and the limited population, one can hardly accept that the Crown was either considerate or generous in their negotiations, or that the amount of land set aside for the use of Indian people represented a conscionable settlement between two parties.[20]

The inadequacies of the treaty process also led the authors of the Red Paper to conclude that the "government must declare that it accepts the treaties as binding and must pledge that it will incorporate the treaties in updated terms in an amendment to the Canadian Constitution."[21]

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16. *Citizens Plus*, p. 10.

17. *Wahbung Our Tomorrows*, p. 19.

18. *Citizens Plus*, p. 26.

19. Although the act would not be signed until December 1971, the Alaska Native Claims Settlement Act provided for the formation of 'Native corporations' in Alaska that would receive 40 million acres of land and almost $1 billion in compensation. The authors of *Wahbung* calculated that the Alaska settlement placed 727 acres per person, or 11 per cent of Alaska, in Aboriginal hands, compared to 14 acres and 0.38 per cent of Manitoba lands under their treaty.

20. *Wahbung Our Tomorrows*, pp. xiii-xiv.

21. *Citizens Plus*, p. 10.

Wahbung Our Tomorrows also addressed hunting, trapping, fishing and gathering rights, referring to them in both economic and cultural terms and calling for their recognition and protection:

> We never surrendered the waters, we never surrendered the wildlife, we never surrendered the fish; we did in fact in our negotiations, insist upon the opposite, and the government agreed.[22]

Based on this interpretation, the documents maintain that active steps are required on the part of Canadian governments to make their rights viable and operative.[23]

As with the other components of the White Paper, the proposal for an Indian claims commission and the appointment of Dr. Barber was met with harsh criticism, as seen for instance in the Red Paper:

> We reject the appointment of a sole Commissioner because he has been appointed without consultation and by the Government itself. He is not impartial and he has no power to do anything but a white-wash job.[24]

Dr. Barber subsequently commented that the "office of Commissioner was rejected by Indian leaders because it was seen as a creature of the White Paper and because the Commission's terms of reference appeared to preclude any examination of the question of aboriginal rights."[25]

The White Paper and reaction to it therefore had a major impact on the discourse of the period. Other forces were also at work, however. Intensifying pressures for land claims negotiations, along with the role of the courts in resolving disputes, played a powerful role in development of the policy discourse on land and title. For instance, by July 1972, the Union of British Columbia Indian Chiefs had submitted a land claim to the federal government based on Aboriginal title. Also at this time, negotiations between the Crees of northern Quebec and the Quebec government on the James Bay hydro-electric project had broken down. The James Bay Cree and the Inuit of Arctic Quebec eventually took the James Bay Corporation to court in the fall of 1972.

The report of the Dorion commission, published in 1971, provides a glimpse into the changing views on Aboriginal issues in Quebec in the wake of the White Paper. The commission – officially, the Commission d'étude sur l'intégrité du territoire du Québec – was established in 1966 in

22. *Wahbung Our Tomorrows*, p. 26.

23. *Wahbung Our Tomorrows*, p. 27.

24. *Citizens Plus*, p. 20.

25. *Commissioner of Indian Claims: A Report*, p. 1.

response to a growing sense that the province's territorial integrity needed to be affirmed and strengthened.

The Dorion Commission did not attempt to provide an exhaustive analysis of Aboriginal issues in Quebec; its mandate was to focus primarily on 'external' matters, such as issues related to the border with Ontario and to the legitimacy of the boundary dividing Quebec and Labrador. But in addition to these questions, the Commission examined internal matters such as the existence of federal properties and territorial rights in Quebec — including "Lands reserved for the Indians" — and the implications of the federal government's constitutional responsibilities regarding Aboriginal peoples.

Significantly, the Dorion commission recognized certain Indian and Inuit rights on parts of Quebec territory — rights that vary according to the legal texts from which they emerge.[26] The commission argued that Quebec must have clear title to its entire territory and control over the instruments that may affect it. Furthermore, it suggested that the Quebec government should avoid allowing issues to arise where the province's territorial integrity could be undermined. To do this, the commission recommended that the Quebec government assume greater responsibility for Aboriginal peoples and that the federal government be urged to transfer jurisdiction to the provinces as outlined in the White Paper.[27]

The commission also noted, however, the need for Quebec to use its existing authority to recognize and to act upon the legitimate rights of Aboriginal peoples in the province. The commission recommended that the Quebec government adopt measures to recognize Aboriginal rights on lands in northern Quebec without delay. The 1912 act transferring control of the Ungava region from the Hudson's Bay Company to Quebec stipulated that the provincial government must recognize Indian rights on this territory. These rights were never officially recognized; therefore, the commission suggested that this be done as part of an agreement between Quebec, Canada and Aboriginal groups in the province, the terms of which were to apply to Quebec as a whole without allowances for regional, cultural or linguistic distinctions that might undermine the integrity of the province's borders.[28] The recommendation to pursue an agreement with Canada at that time suggests an attempt to take advantage of the opening created by the release of the White Paper.

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26. *Rapport de la commission d'étude sur l'intégrité du territoire du Québec* (Dorion commission), Volume 4, p. 389.

27. Dorion commission, pp. 293, 401.

28. Dorion commission, p. 401.

While this recommendation did not bear immediate fruit, the 1976 signing of the first of the modern treaties – the James Bay and Northern Quebec Agreement and the 1977 Northeastern Quebec Agreement – began the process. These agreements with Inuit and Cree and later the Naskapi of northern Quebec constitute *de facto* recognition of Aboriginal land rights. At the political level, in separate actions in 1983 and 1985, the governing Parti québécois recognized the Aboriginal nations of Quebec and their right of self-government within the province.[29]

Concurrent with these events were legal efforts to achieve a land claims settlement by the Nisga'a of northwestern British Columbia. This case, known as the *Calder* case, was first ruled on in British Columbia in the fall of 1969, but the Nisga'a appealed to the Supreme Court of Canada, which delivered its decision in January 1973.[30] The court ruled against the Nisga'a claim on a technicality, but more important, six of seven judges upheld the principle of Aboriginal title to land.[31] The decision clearly discredited the White Paper's position of denying claims based on negation of the existence of Aboriginal title.

In the immediate aftermath of *Calder*, the Council for Yukon Indians (CYI), as its first public act, presented its grievances and land claim to the prime minister in *Together Today For Our Children Tomorrow* (January 1973), a document was intended to serve as the basis for the CYI's negotiations with the government of Canada. In the face of the *Calder* decision, Prime Minister Trudeau accepted the claim for negotiation, stating "in principle, I don't think there is a great difference between us." He also described the CYI's approach as "positive and constructive" and "very welcome to the government."[32]

In *Together Today For Our Children Tomorrow*, the CYI asserted that the purpose of a settlement would be "to enable the Indian people in the

29. On 9 February 1983, the cabinet adopted 15 principles that formed the basis for a policy recognizing Aboriginal self-government. On 20 March 1985, the National Assembly adopted a resolution guaranteeing Aboriginal people in Quebec the right to self-government, to their own languages, cultures and traditions, and the right to own and control certain lands. See *The Basis of the Quebec Government's Policy on Aboriginal Peoples* (1988); and Alain G. Gagnon, *Quebec State and Society* (Nelson Canada, 1993).

30. *Calder et al.* v. *Attorney-General of British Columbia* (1973), 34 D.L.R., (3d) 145 (S.C.C.).

31. Those six judges were split three/three, however, on whether Aboriginal title still applied or had been extinguished by acts of the Crown.

32. Quoted in *Report of the Alaska Highway Pipeline Inquiry*, p. 110.

Yukon to live and work together on equal terms with the Whiteman."[33] Indicative of their "positive and constructive" approach, the stated objective of Yukon Indian people was to "obtain a settlement in place of a treaty that will help us and our children learn to live in a changing world. We want to take part in the development of the Yukon and Canada, not stop it. But we can only participate as Indians. We will not sell our heritage for a quick buck or a temporary job."[34]

To achieve its objective, the CYI argued that the Indian people of the Yukon must own the land. The foundation of the claim, clearly, was the establishment of a land base:

> Without land Indian people have no soul – no life – no identity – no purpose. Control of our own land is necessary for our cultural and economic survival. For Yukon Indian People to join in the social and economic life of Yukon, we must have specific rights to lands and natural resources that will be enough for both our present and future needs.[35]

There was also a call for financial compensation for past and future forfeiture of surface and subsurface rights and representation for Yukon Indian people on all Yukon land and water development or control agencies, boards or offices. The document suggested a federal-territorial-tribal management structure for fur, fish, and game and insisted that no change in policy or administration involving Yukon Indians be made before those affected had been consulted.

The government's agreement to negotiate with the CYI was only one of many developments in land claims during this period. In August 1973, the government rejected claims from Maritime Aboriginal peoples, indicating that despite a situation similar to that of the CYI – no treaties of surrender had been concluded in this region – the government's view was that land claims in the Atlantic provinces and southern Quebec were of a different character.[36] In other regions, principally the North, there were huge incentives and pressure on both Aboriginal peoples and the government to settle claims. Large-scale oil and gas exploration continued, oil and natural gas had been discovered at Prudhoe Bay, Alaska, and other major gas deposits were found in the Arctic Islands and the Mackenzie Delta.

Given all this activity, it is not surprising that in the years following establishment of the Indian Claims Commission, individuals and groups

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33. *Together Today For Our Children Tomorrow*, p. 25.
34. *Together Today For Our Children Tomorrow*, p. 18.
35. *Together Today For Our Children Tomorrow*, p. 31.
36. *Commissioner of Indian Claims: A Report*, p. 13.

argued for alternatives to the commission and to the entire claims resolution approach. The Manitoba Indian Brotherhood argued in *Wahbung Our Tomorrows* for a joint commission with equal representation from government and Aboriginal people to examine and make recommendations on land allotment, land development, and a land adjustment policy.[37] By 1971, of course, the Alaska Claims Settlement provided an alternative to the confrontational/adjudicatory approach. Independently, groups in and out of government were coming to their own conclusions based on experience with adjudicatory processes. For some, the adjudicatory approach proved overly legalistic, failing to take into account broader social or political considerations. Moreover, it did not allow for full Aboriginal participation.[38] By contrast, negotiated settlements offered a more comprehensive approach, encompassing forms of redress other than financial compensation:

> Such agreements could accommodate future needs as well as past grievances and, what is more important, would involve mutual acceptability, a result which adjudication by a third party could not achieve.[39]

In response to the *Calder* decision, the acceptance of the CYI claim, and the many other developments and frustrations in the land claims arena during this period, Jean Chrétien, minister of Indian affairs, announced the government's land claims policy in August 1973, stating that the government was willing to accept land claims applications from areas of Canada not covered by earlier treaty negotiations to extinguish Aboriginal title. In addition to these comprehensive claims, the government would also accept specific claims — claims based on allegations by Aboriginal peoples that the government had not fulfilled specific treaty or other legal obligations. The government established the Office of Native Claims in DIAND to process applications.

Forced to confront the *Calder* decision, the government chose the negotiated approach to land claims settlements. In 1973, Dr. Barber made the following statement on this issue:

> In Canada at the present time we are experimenting with the negotiation process as an approach to the settlement of Indian claims. No one is yet sure whether or not it can be successful in settling a major proportion of the treaty-type claims and no one

37. *Wahbung Our Tomorrows*, p. 21.

38. *Commissioner of Indian Claims: A Report*, p. 39.

39. *Commissioner of Indian Claims: A Report*, p. 39.

would suggest at this point in time that arbitration machinery will not be required in the future.[40]

Barber provides a useful overview and assessment of the land claims process. The 'experimental' negotiated claims process outlined by the government in its 1973 policy depended on Aboriginal organizations bringing claims forward for initial review. The government required, and provided funds for, thorough preparation of claims applications. Those that were approved were scheduled for negotiation. The machinery for settling claims was slow, in part because of co-ordination difficulties among Indian bands, the complexity of the issues involved, and hesitation on the part of some Indian people to become involved in a process whose outcome they might find unsatisfactory:

> [F]or the most part governments are now taking an interested and responsive position, although they are very much waiting for Indian initiatives in bringing the issues forward. This, in itself, means that the issues will not emerge quickly because, while there has been extensive organization on a provincial and national scale amongst Indians in the last few years, it is still understandably difficult for the positions of Bands scattered across the country to be developed and co-ordinated into a shape which provides a basis for negotiations at the provincial or national level, even though the framework for such negotiations is starting to emerge.
>
> [A]ppropriate settlement mechanisms are slow to evolve because of the complexity of the issues and the reluctance of Indian people to get locked into any process which has the capability of providing solutions which to them would be unsatisfactory. The Indians have been engaged in a period of researching their claims.... [T]he process of research and articulation of claims is far from over. It would be inappropriate, in my view, and counter-productive to lock into any given mechanism until such time as processes now under way are given a much greater opportunity to work through to fruition. In the meantime, ad hoc negotiation on specific issues is taking place.[41]

By 1977, however, at the end of his term as commissioner, Dr. Barber had concluded that in that time he had "witnessed the acceptance, by both the Government and the Indian people, of the principle of negotiated settlements of Indian claims.[42]

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40. *Commissioner of Indian Claims: A Report: Statement and Submissions*, p. 36.

41. *Commissioner of Indian Claims: A Report*, pp. 51, 35.

42. *Commissioner of Indian Claims: A Report*, p. 1.

During the period 1966-1973, the discourse on Aboriginal policy was framed by the White Paper and reaction to it and by the beginnings of land claims discussions through the Indian Claims Commission, the courts and, finally, the government's 1973 policy. It is important to ask who was involved in the discourse, how were they participating, and what ideas and values were prominent in their contributions to the policy discourse.

The White Paper addressed the rights of treaty or registered Indians, and it was Indians who were first galvanized into action by what they saw as a new threat to their status. Other developments, particularly pressure for resource development in the North, drew other Aboriginal peoples onto the political stage. Provincial and territorial organizations led the movement. In the North, early organizational forms were generally pan-Aboriginal or at least status-blind, while in the south, registered or treaty Indian organizations were prominent.[43]

The increased activity and organization of Indian groups is evident in the documents from this period. In addition to responses to the White Paper – directly in the Red Paper and more obliquely in *Wahbung Our Tomorrows* – it is clear that a number of efforts were being made by various Aboriginal groups, as seen, for example, in conflicts between the James Bay Cree and Inuit and the Quebec government, claims put forward by the Union of British Columbia Indian Chiefs and the Council for Yukon Indians, Mi'kmaq assertion of treaty rights, and opposition among prairie treaty people to the *Migratory Birds Convention Act*. The documents of the Indian Claims Commission are filled with evidence that Indian organizations were making efforts to capture the government's attention and engage its officials in discussions.

The Commissioner of Indian Claims was himself an important policy actor during this period. While his position resulted from the White Paper, and as such was not generally supported by Indian organizations, in the end, the commissioner's strategy – going to the Indians when called upon to collect the facts and gathering their views for transmission to the government – seems to have been of some service to Indians. At a minimum, it provided an established conduit for communicating with the government, albeit not the face-to-face negotiating mechanism they desired. In this way, the commissioner became an important policy actor and his position an important means of facilitating communication between government and Indian groups.

Since the commissioner did not have a mandate to adjudicate claims, however, resolution of claims in this period occurred primarily through the

43. The Council for Yukon Indians, for example, resulted from the union of the Yukon Association of Non-Status Indians and the Yukon Native Brotherhood.

courts. This course was acknowledged to be stacked against Indian claimants, given adverse precedents in legal decisions by Euro-Canadian courts in which the Indian point of view was never represented:

> It would require a radical departure from established precedent for the courts to accord such obligations the character understood by the Indians.[44]

It is perhaps ironic, then, that the impetus for the 1973 reversal of government policy came from a court decision. The *Calder* decision enabled the government to hear the message – or a part of it – that Aboriginal organizations had been sending. In *Wahbung*, for instance, the Indian Tribes of Manitoba asserted that the Canadian/Indian relationship was founded in negotiation and recognition of Aboriginal rights. Thus, the government's decision to base a claims resolution process on negotiation reinforced the treaty Indian position. The proposal for a negotiations-based claims resolution mechanism was just one of several processes considered during this period. Some actors, for instance, continued to advocate an independent adjudication commission to resolve claims.

From the earliest point, however, the essential debate surrounded fundamental notions of Aboriginal rights. The White Paper did not recognize, and instead sought to repeal, the special collective status that Aboriginal rights would convey, offering in its place a future based on individual rights held by all Canadians. The policy statement reveals the government's assumptions that the source of rights was essentially the constitution as enforced by the government and courts. Indian organizations rejected the brazen attempt to extinguish their rights, asserting the source of their rights to be the Creator, their long-standing relationship to the land and, more recently, negotiated treaties between themselves and the Crown. The problem was that the government, the courts and the constitution, for self-serving reasons, did not recognize and enforce the subsisting rights of Aboriginal peoples. Aboriginal rights could not, however, be extinguished unilaterally by the government. As a solution, the Red Paper contained a proposal to entrench Aboriginal rights in the constitution.

The government asserted that Indians did not hold title to the land, but that they could, through the same means as other Canadians, gain title. The Red Paper countered by explaining that Indian lands were unceded lands held in trust by the Crown as promised in the treaties. The *Calder* decision of 1973 recognized the existence of Aboriginal title but failed to define it. The government in response announced that it would negotiate with Aboriginal groups to settle their claims against the government. The settlement of the Alaska Native Claim provided a model for Canadian

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44. *Indian Claims in Canada*, p. 20.

claims, as the CYI's *Together Today for Our Children Tomorrow* demonstrated.

By the end of this period a new process for land claims resolution had just been announced and was considered, by some at least, experimental. It remained to be seen whether negotiations would be the appropriate mechanism to achieve resolution and bring relations between Aboriginal peoples and the Canadian government to a peaceful, equitable state. Aboriginal rights and title remained undefined in the eyes of courts and the government, however, setting the stage for the next period of analysis.

1973-1982: ORGANIZING FOR CLAIMS

The documents of this period are preoccupied with three principal areas – land claims, northern resource development, and the explanation and recognition of treaty rights. Thus, while land claims activity began in earnest and intensified, there were also attempts to articulate and understand various positions on treaty rights and the repercussions of northern resource development. Developments in these areas are highlighted as we review the documents of this period in the context of the key ideas and events influencing the discourse on Aboriginal land and title.

Indian organizations made some efforts during this period to explain and seek recognition for treaty rights. For both treaty and non-treaty people, the right to hunt, fish, trap and gather was an important part of economic and cultural life. In recognition of the value attached to these activities, *The Treaty Rights of Hunting, Fishing, Trapping and Gathering* was submitted to the government in 1974 by the Federation of Saskatchewan Indian Nations, the Manitoba Indian Brotherhood and the Indian Association of Alberta. The document was intended to initiate negotiations between federal, provincial and Indian governments on the hunting, fishing, trapping and gathering rights of treaty Indians in the prairie provinces. The objectives of negotiations were twofold:

> to affirm that the respective Natural Resources Agreements were not intended to alter Treaty Rights; and secondly to restore the Treaty Rights of hunting, fishing, trapping and gathering (which have been abrogated by Federal and Provincial laws which restrict the exercise of those rights).[45]

The motivation of prairie Indian nations stemmed from the historical alteration of their lives and from matters of principle concerning the way they felt they had been dealt with by the federal and provincial governments through treaties and the 1930 natural resources agreements,

45. *Treaty Rights of Hunting, Fishing, Trapping and Gathering*, p. 1.

which placed authority for conserving fish and wildlife in the hands of the provincial governments:

> Since 1930 the Natural Resources Agreements have been increasingly seen by jurists and government administrators as the only source of Indian hunting, fishing and trapping rights. But Indian people were not consulted prior to or during the negotiation of the Natural Resources Agreements, and as a consequence the Federal Government paid little attention to the spirit and terms of the Treaties when drafting the clauses which were designed to recognize Indian Rights.
>
> Since 1930 the Provincial Governments have recognized, through legislation and policy, the interests of sportsmen, non-Indian commercial fishermen and trappers and promoters of tourism, parks and industrial projects, at the expense of Treaty Indian Rights.[46]

Other assertions followed the earlier lines of the Red Paper and *Wahbung Our Tomorrows*, including arguments that the written treaties were an inaccurate record of actual agreements; that Indian people were given assurances that the federal government would act to conserve fish and wildlife resources for their use; that treaties recognized treaty Indians' priority use of these resources; that the treaties recognized pre-existing Aboriginal rights to hunt, fish, trap and gather and that the only restriction agreed to was hunting in settled areas; and that these rights were guaranteed to them "as long as the sun shines and the rivers flow."[47]

More specifically, it was argued that Aboriginal rights should supersede the *Migratory Birds Convention Act* and a number of other provincial laws restricting rights to hunt, trap, fish and gather. Here again, the document presents the crucial argument that there was no consent from the Indian people concerned. In short, the *Migratory Birds Convention Act* was seen as a unilateral abrogation of their treaties.

Also of considerable importance in this period were two key documents concerning resource development in the North. By 1973 there was considerable pressure to settle issues of land ownership and use in the North, with the energy crisis beginning in earnest and with the discovery of large oil and gas deposits in parts of the Northwest Territories. Superimposed on this situation were the proposed northern pipelines.

It was in this context that the *Report of the Alaska Highway Pipeline Inquiry* (the Lysyk inquiry) and *Northern Frontier, Northern Homeland: Report of the Mackenzie Valley Pipeline Inquiry* (the Berger inquiry) were

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46. *Treaty Rights of Hunting, Fishing, Trapping and Gathering*, pp. 2-3.

47. *Treaty Rights of Hunting, Fishing, Trapping and Gathering*, pp. 1-2.

delivered in 1977. Both considered the possible construction of major pipelines in the North, which most people assumed would decisively open northern lands to large-scale resource development. Both involved extensive consultation with the people who would be affected by development, as well as others. Both provided financial assistance for groups to conduct research and prepare briefs and submissions. The Berger inquiry was a comprehensive analysis and assessment of the proposed pipeline, including the social, environmental and economic impact of building, operating and eventually abandoning a pipeline. In contrast to the three-year time frame of the Berger inquiry, the Alaska Highway Pipeline Inquiry began in April 1977 and delivered its report in August of the same year to beat the September 1 deadline for a decision by the U.S. Congress on whether to build a natural gas pipeline across the Yukon along the Alaska Highway. Despite the concerns and opposition raised by the two inquiries, in September 1977, the United States and Canada signed an agreement to build a pipeline.

Ideas about Aboriginal lifestyles and land claims figured prominently in the testimony and final reports of both inquiries. Both concluded that the benefits of pipelines would accrue mainly to non-northern people, while most of the costs and disruptions would fall on northerners, especially Aboriginal people. Berger's overall recommendation was to delay any pipeline development for ten years, until Aboriginal land claims were settled; he also recommended ameliorative measures should the pipeline be constructed. Similarly, the Alaska Highway Pipeline Inquiry recommended measures to mitigate the adverse effects of the pipeline on the Yukon Indian land claim, but it also underlined the importance of a just and timely settlement of the claim.

Both inquiries treated the question of a pipeline as a question of land use and as one approach to economic development in the North. The Berger inquiry presented the pipeline decision in historical terms, comparing the opening of the North with the opening of the prairies over the course of the previous century. In both cases, the situation was portrayed in terms of the imposition of Euro-Canadian needs and ideas of land use and development on the inhabitants of a region. Berger cautioned people to observe the costs this had inflicted on the Aboriginal peoples of western Canada. More than anything else, however, the inquiries uncovered the complexities behind social, economic and political development of the North and the pivotal role played by land claims. Berger noted:

> [Aboriginal] concerns begin with the land, but are not limited to it: they extend to renewable and non-renewable resources, education, health and social services, public order and overarching all of these

considerations, the future shape and composition of political institutions in the North.[48]

Land claims negotiations were under way in the North while the inquiries were in progress, but the final shape of the settlements was quite uncertain, and the parties were far apart on the land question. Indian Brotherhood president James Wah-Shee told the Berger inquiry that

> A 'once-and-for-all' settlement in the tradition of the treaties and Alaska will not work in the Northwest Territories. What we are seriously considering is not the surrender of our rights 'once and for all' but the formalization of our rights and ongoing negotiation and dialogue.[49]

Justice Berger concluded from his consultations that Aboriginal people want their rights recognized to give them an element of control over the land:

> The native people want to entrench their rights to the land, not only to preserve the native economy, but also to enable them to achieve a measure of control over alternative uses of land, particularly the development of non-renewable resources. With such control, they can influence the rate of advance of industrial development in the North.[50]

The Berger report reflects the analysis developed in much of the Aboriginal testimony at the inquiry. Control of the land is understood as essential to the future of Aboriginal peoples in the North. From their point of view, the land and political control of the land are seen as indivisible from each other and from their way of life. With full control they could envision returning to the land rather than living in communities where there is neither work nor game. To do so would require changes and flexibility in service delivery in areas such as education and housing. These changes would not be possible under existing governance structures but could be brought about through settlement of their claims.

Also in 1977, the Metis Association of the Northwest Territories issued *Our Land, Our Culture, Our Future*.[51] The document is a proposed agreement on objectives for settlement of the claim of the Aboriginal peoples of the Mackenzie corridor. It includes 11 objectives on the following issues: land, hunting, trapping and fishing rights; land and

48. *Northern Frontier, Northern Homeland*, p. 163.

49. Quoted in *Northern Frontier, Northern Homeland*, p. 171.

50. *Northern Frontier, Northern Homeland*, p. 178.

51. The Council for Yukon Indians published a document of the same name in 1987.

resource conservation; environmental protection; participation in and powers over land and resource management decisions; development of appropriate political institutions to ensure effective participation and governance; and compensation for past and future exploitation of surface and subsurface resources on the land.

In southern Canada, land issues were expressed in struggles over the recognition of treaty rights. In 1979, the Federation of Saskatchewan Indian Nations (FSIN) published *Indian Treaty Rights: The Spirit and Intent of Treaty*, listing 13 rights stemming from the treaties or from the inherent relationship of Indian people to the land and outlining the FSIN's interpretation of the treaties and expectations regarding the government's responsibilities:

> Indians did not give the Canadian Government the right to usurp the authority and powers of Indian Government. They simply exchanged land for the guarantee of special rights, status and assistance in perpetuity... The trust duty of the federal government must be considered to be a constantly evolving doctrine responsive to the changing circumstances of the times.[52]

The document describes reserve land as "sovereign territory" and outlines the FSIN's position that anything not explicitly surrendered in the treaties remains under Indian jurisdiction:

> Reserve Land – is the land that was reserved by the Indians as sovereign territory. It is important to recognize this fact – Reserves were not granted to the Indian Nations, they are not ceded under Treaty... Anything not specifically ceded by the Indian Nations by the Articles of Treaty remains under Indian jurisdiction. There was no consent reached with regard to a variety of natural resources which therefore remain under Indian jurisdiction subject to additional negotiation and agreement. These include: Water, Minerals, Forests, Game, and Air Space.[53]

Views on hunting, trapping, fishing and gathering rights were also made clear, with the FSIN arguing that the only limitation on these rights be "to the extent that settlement interfered with the traditional mode of life":

> Treaties recognized pre-existing rights to hunt, fish and trap and those rights were guaranteed by Treaty subject to modest limitation. The singular limitation determined that unencumbered hunting rights were intended to continue except to the extent that settlement interfered with the traditional mode of life... Otherwise, their hunting, fishing, trapping and gathering activity, whether for

52. *Indian Treaty Rights: The Spirit and Intent of Treaty*, p. 7.

53. *Indian Treaty Rights: The Spirit and Intent of Treaty*, p. 13.

> commercial or domestic purpose is properly subject to no restriction by boundaries or seasons, in terms of hunting methods or type of game.[54]

The discourse on land and title during this period was dominated by land claims activity, in terms of both policy and process. There was much discussion and much activity in this area, both north and south of the 60th parallel. By 1975, experience with the new claims process began to accumulate, and many Aboriginal participants started to express dissatisfaction with it.

One of the most fundamental concerns was revealed by Lloyd Barber in a letter to the prime minister in December 1974, advising that the government's approach to settlement of non-treaty (comprehensive) claims might not be the best approach. Barber argued that the policy of extinguishing Aboriginal title in return for compensation trod heavily on rights that Indians did not feel were negotiable. He maintained instead that "it is not inconceivable that agreements might be reached which would define modern rights in ways which are acceptable all around.[55]

Another problem raised by Aboriginal leaders was the apparent conflict of interest on the part of the Department of Indian Affairs and Northern Development. Various DIAND branches and divisions were responsible for assessing claims for acceptability along with the Department of Justice. At the same time, because of its responsibility for managing Aboriginal affairs, DIAND was identified as the transgressor in many claims.

It was evident that many Aboriginal people were dissatisfied with the process. Public protests -- the occupation of Anishnabe Park, near Kenora, Ontario; a march on Parliament Hill that sparked open conflict with the RCMP -- underlined the seriousness of the issues. The Indian Claims Commission began a series of discussions with representatives from several Indian associations to try to develop new or modified mechanisms to deal with the diversity, complexity and volume of claims-related questions. In April 1975, the National Indian Brotherhood proposed a joint committee of Aboriginal leaders and federal ministers. The proposal was accepted in principle, and one year later the cabinet acted to establish a committee, with membership from the National Indian Brotherhood's executive council and federal ministers whose departments dealt with Indian people. They also established a joint sub-committee and the Canadian Indian Rights Commission to deal with claims and facilitate negotiations[56].

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54. *Indian Treaty Rights: The Spirit and Intent of Treaty*, p. 26.

55. *Commissioner of Indian Claims: A Report*, p. 46.

56. *Commissioner of Indian Claims: A Report*, pp. 51-52.

Dr. Barber had also proposed new claims negotiation mechanisms. Key features included the elimination of the conflict in DIAND's position as adversary/advocate/arbiter and the establishment of an independent, impartial advisory commission to facilitate negotiations.[57]

There was not only discussion but action on land claims during this period. The first comprehensive claim was settled in November 1975 with the signing of the James Bay and Northern Quebec Agreement. In February 1976 the Inuvialuit of the western Arctic filed their claim for 1.9 million square kilometres of Arctic land and 2 million square kilometres of ocean. By July 1978, an agreement in principle had been reached on this claim. The Northeastern Quebec Agreement was signed in 1978; like the James Bay and Northern Quebec Agreement, it was a settlement to enable development in James Bay. In September 1978, the government announced that it would seek a single settlement in the Mackenzie Valley, rather than negotiating separately with Indian and Métis parties. Also in 1978, the government of Ontario, in partnership with the Aboriginal peoples of Ontario and the federal government, established an Indian Commission to look into questions involving the devolution of authority to govern local affairs and access to resources for Indian people. The Commission was seen as an opportunity to make decisions by negotiation among the three member groups.

A turning point in the discourse on land claims came with the *Baker Lake* case.[58] In December 1979, the Federal Court ruled on an action filed by a number of Inuit organizations and individuals in Baker Lake, N.W.T., to prevent mining nearby. The court ruled that Inuit have Aboriginal title to the land based on four criteria it determined to be necessary for establishing an Aboriginal title recognizable in common law.[59] Despite the recognition of original title, the presiding judge ruled against the Inuit in this case, concluding that their title had been abridged by statute. The *Baker Lake* case was the first ruling after *Calder* to provide some definition for the nature of Aboriginal title. The four criteria were ultimately incorporated into the government's claims policy as the baseline criteria for accepting a comprehensive land claim for negotiation.

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57. *Commissioner of Indian Claims: A Report*, p. 49.

58. *Hamlet of Baker Lake et al.* v. *Minister of Indian Affairs and Northern Development et al.* (1979), 107 D.L.R. (3d) 513 (F.C.T.D.).

59. The criteria were as follows: that they and their ancestors were members of an organized society; that the organized society occupied the specific territory over which they assert the Aboriginal title; that the occupation was to the exclusion of other organized societies; and that the occupation was an established fact at the time sovereignty was asserted by England. See Elliott, p. 69.

Ten months later, in October 1980, the Mi'kmaq of Ktaqamkuk (Newfoundland) issued their statement of claim, *Freedom to Live Our Own Way In Our Own Land*. The government had previously returned two other Mi'kmaq submissions as insufficient to support their claim. The federal government's position was that the Aboriginal title of the Mi'kmaq had been superseded by law over the years. The Mi'kmaq rejected this notion, citing the government's acceptance of other claims from Nova Scotia and Labrador, and submitted their claim. The government continued to consider claims from the Atlantic region to be of a different quality than those from the North or British Columbia, despite the fact that none of the regions was governed by a treaty that could be construed as ceding land or extinguishing title.[60]

The claim consisted of numerous research reports documenting the conditions of life among the Mi'kmaq, their historical heritage and occupancy of the land, as well as a short legal analysis examining the *Baker Lake* criteria. The following excerpt gives a sense of the feelings of injustice among the Mi'kmaq:

> No amount of game regulations, wilderness regulations, or laws will change the way we live. What it has done is made us criminals, in your eyes, in our own homelands for being Indian people and living differently than you do. In that respect, we state emphatically that your laws are *racist* and should be changed.[61]

The Mi'kmaq sought recognition of their rights and recognition of their homelands. More specifically, the Mi'kmaq leadership proposed that the Canadian and provincial governments should recognize Mi'kmaq territory and government. The document concluded by stating that the Mi'kmaq would seek compensation for destruction of their land and wildlife through flooding from development projects.

In response to this activity, in December 1981 the government issued *In All Fairness*, the second iteration of its comprehensive claims policy. The government also issued a companion statement to its specific claims policy, *Outstanding Business*, in early 1982. These policy statements introduced several changes in the process, though the fundamental assumptions remained unchanged from the 1973 approach. The *Baker Lake* criteria were not presented as the new test for the validity of a comprehensive claim, and

60. The Mi'kmaq did sign pre-Confederation treaties of peace and friendship, but these did not involve the cession of lands.

61. *Freedom to Live Our Own Way in Our Own Land*, p. 3.

no explanation was given about how they might influence decisions.[62] Instead, the policy provided only a single declaration on the government's assessment of claims validity, stating that "current practices in relation to determining the validity of claims will continue to be used."[63] According to the document, any changes in the policy were based on considerations that had "evolved from past experience in the area of land claims negotiations, here in Canada and in other countries, as well as from views expressed over the years by Native people in Canada."[64]

Outstanding Business responded, in part, to the many points of contention raised by Aboriginal people. DIAND sought the views of Indian organizations through direct discussions and the review of reports and submissions. Counterbalancing these were constraints posed by 'fiscal responsibility'. This is one of the first explicit references to constraints imposed by the financial implications of claims settlement:

> All of these views have been taken into consideration by the government in developing new policy initiatives... The policy as now adopted by the government, while not meeting in full the wishes of the Indian people in the area of specific claims, will clarify procedures and liberalize past practices. In effect, the government has done its best to meet the aspirations of the Indians, while maintaining the required degree of fiscal responsibility.[65]

The policy included changes in the government's approach to funding the research, development and negotiation of claims and outlined a new system of contributions and loans from various branches of DIAND intended to assure the participation of other levels of government in the comprehensive claims process:

> Where claims fall in provincial areas of jurisdiction and in those cases where provincial interests and responsibilities are affected, provinces must be involved in claims negotiations in order to arrive at fully equitable settlements.[66]

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62. While not presented explicitly in this policy, the *Baker Lake* criteria influenced claims practice and were acknowledged formally in later policies.

63. *In All Fairness*, p. 27.

64. *In All Fairness*, p. 17.

65. *Outstanding Business*, p. 16.

66. *In All Fairness*, p. 27. North of the 60th parallel, however, the rules outlined in the policy statement were somewhat different:

> the process will be bilateral between the claimant groups and the federal government leading to federally legislated settlements. However, provision will be made for the territorial governments to be

In All Fairness set out the government's new policy concerning comprehensive claims, beginning with a statement of assurance:

> What this statement contains above all, in this time of political uncertainty and general financial restraint, is a formal re-affirmation of a commitment: that commitment is to bring to a full and satisfactory conclusion, the resolution of Native land claims.[67]

The government set out three objectives for comprehensive claims policy: to "respond to the call for recognition of Native land rights by negotiating fair and equitable settlements"; to "ensure that settlement of these claims will allow Native people to live in the way they wish"; and to guarantee "that the terms of settlement of these claims will respect the rights of all other people".[68] More specifically, "the thrust of this policy is to exchange undefined aboriginal land rights for concrete rights and benefits. The settlement legislation will guarantee these rights and benefits."[69]

This statement of objectives contrasts with statements presented as the motivation and objective of specific claims policy in *Outstanding Business*, particularly the notion of meeting legal obligations, which is not present in the same way in comprehensive claims policy:

> [Specific claims] have represented, over a long period of our history, outstanding business between Indians and government which for the sake of justice, equity and prosperity now must be settled without further delay....
>
> The government has clearly established that its primary objective with respect to specific claims is to discharge its lawful obligation as determined by the courts if necessary.[70]

According to *Outstanding Business*, a lawful obligation may arise in any of the following circumstances: the non-fulfilment of a treaty or agreement between Indians and the Crown; a breach of an obligation arising from the *Indian Act* or other statutes or regulations pertaining to Indians; a violation of an obligation arising from government administration of Indian funds or other assets; and/or an illegal disposition of Indian land.[71]

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involved in the negotiations under the leadership of the federal government.

67. *In All Fairness*, p. 3.
68. *In All Fairness*, p. 7.
69. *In All Fairness*, p. 15.
70. *Outstanding Business*, pp. 3, 19.
71. *Outstanding Business*, p. 20.

Both policy statements offer significant restrictions and qualifications, providing a strong sense of the limits of the government's intentions. For instance, with regard to specific claims, *Outstanding Business* states that "the significance of a claim settlement is that it represents final redress of the particular grievance dealt with", and "no claims shall be entertained based on events prior to 1867 unless the federal government specifically assumed responsibility therefor."[72] Finally, the statement notes that "the acceptance of a claim for negotiation is not to be interpreted as an admission of liability and, in the event that no settlement is reached and litigation ensues, the government reserves the right to plead all defences available to it, including limitation periods, laches and lack of admissible evidence."[73]

Similar notions of containment, limits and responsibility are put forth in *In All Fairness*. Comprehensive land claims are restricted to groups whose interests in the land "had not been dealt with by treaty nor did any specific legislation exist that took precedence over these interests"[74]. Despite the offer of greater control of Aboriginal lands and a clearer definition of Aboriginal rights, the government asserted the following:

> All areas, whether they include those for exclusive Native use or shared by the general public will continue to be subject to the existing general laws as they apply to hunting, fishing, and trapping; they will be further subject to present and future sound conservation policies and public safety measures.[75]

Furthermore, although the policy proceeded on the basis that Aboriginal people had rights to the land based on traditional use and occupancy and stated that the government was willing to negotiate land claims based on this premise, "acceptance of such a claim would not be an admission of legal liability."[76] Despite the limitations, the policy statements emphasize the permanence of negotiated settlements, as opposed to legal settlements, as a formal process for resolving grievances and claims.[77]

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72. *Outstanding Business*, pp. 24, 30.

73. *Outstanding Business*, p. 30.

74. *In All Fairness*, p. 11.

75. *In All Fairness*, p. 24.

76. *In All Fairness*, p. 12.

77. "Negotiation, however, remains the preferred means of settlement by the government, just as it has been generally preferred by Indian claimants." The government's commitment to continued negotiation is also seen in *In All Fairness*:

> Thus the negotiations process is seen by the Canadian government as the best means of meeting the legitimate concerns of the Native people in the area of

There was therefore considerable movement on land claims, not only in terms of policy, as seen in the unveiling of new comprehensive and specific claims policies, but also in terms of land claims activity, as seen in the number of claims submitted during this period. These events interacted with resource development issues in the North, particularly the inquiries by Berger and Lysyk, who were aware of the importance of claims resolution to future land use in the North. Also contributing to the policy discourse during this period were the positions expressed by prairie treaty Indian organizations concerning the recognition of treaty rights, as they struggled to explain the nature of their rights and pushed for their recognition.

The period 1973-1982 witnessed the emergence of new voices in the policy discourse on land and title. As was the case in the preceding period, the discourse was dominated by government policy statements and the contributions of Indian organizations. The government contributed directly through its policy statements, *Outstanding Business* and *In All Fairness*. It is also significant that the government participated indirectly through federally sponsored inquiries — the Berger and Lysyk inquiries — on gas pipelines in the North.

In terms of Aboriginal contributions to the discourse, there is evidence of a broader and deeper structure of organization emerging. The National Indian Brotherhood became an active participant during this period, and there are documents from provincial treaty and non-treaty organizations, including the Federation of Saskatchewan Indian Nations, the Metis Association of the Northwest Territories, and the Mi'kmaq of Ktaqamkuk (Newfoundland). We also saw signs of collaboration, as the Federation of Saskatchewan Indian Nations, the Manitoba Indian Brotherhood, and the Indian Association of Alberta joined forces to produce *The Treaty Rights of Hunting, Fishing, Trapping and Gathering.*

As was true in the previous period, Aboriginal participants relied on broad consultation within their respective groups about the content and message of documents. For more factual information, such as would be required for submission of a land claim, however, organizations relied on the work of non-Aboriginal academics and consultants. The government and government-sponsored actors, though also relying on internal consultation, especially for policy statements, devoted considerable space in their

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comprehensive claims. It is a process which allows a good deal of elasticity in approach to the concerns of the Native people; it is at once an expression and mutual appreciation of the rights and values of all parties in Canada. And an important factor that cannot be discounted — the government is fully committed to its success. (p. 22)

documents to describing consultations with those outside government, especially Aboriginal people, as part of the process.

The government-sponsored inquiries of this period – the Berger and Lysyk inquiries – made it clear that Aboriginal people would use whatever means were available to reach the government with their views. Aware of how few opportunities there were for even once-removed consultation with government about rights and grievances, Aboriginal people used every vehicle possible. This might imply a contrast between government and inquiry-based consultation; that is, government did not allude to significant consultation with Aboriginal people in its own documents, while inquiries, task forces and other government-sponsored actors were embraced as an opportunity for Aboriginal participation.

The process that dominated the period was associated with the negotiation of land claims. Each new claims submission was the beginning of a formal process of interaction between the government and the claimant band or organization. The government's policy and process for handling claims did not, however, lead to an expansive dialogue between government and claimants over the full range of their relationship. Moreover, it did not immediately become the means for Aboriginal people to achieve formal legal recognition of what they saw as their subsisting rights to land and self-determination, among other rights. It was a tightly controlled process designed to produce highly defined outcomes. It was intended to extinguish, rather than recognize, Aboriginal title. Guided primarily by legal and political criteria, it was to produce clearly defined sets of rights and privileges with regard to land and resources in the case of comprehensive claims and, in the case of specific claims, to redress past breaches in law by the government.

Some of the consequences of the government's policy and organization for handling claims were expressed in the documents by the end of this period. One consequence seems to have been the further development and organization of Aboriginal groups at the band level to conduct claims-related research, assemble a claims submission, and prepare for negotiation. The claims process also created a new focus for the attention of more broadly based Aboriginal organizations. They could raise their demands about rights by addressing themselves to the process and to the assumptions behind the claims policies. The claims policy resulted in one-on-one negotiations between claimants and government, but the rules were so restrictive that many Aboriginal groups left the process frustrated.

Claims policies and processes brought several ideas and issues to the centre of the discourse. The government's legal interpretation of its obligations stood in contrast to the Aboriginal interpretation of the government's trust responsibility. The former was perceived as fixed: the legal criteria were set, those that qualified were treated, and the solution

was a final settlement that precluded further interaction on the subject. The latter was more open to interpretation, offering greater latitude in terms of what could be discussed and how it could be resolved. It envisioned an evolving relationship.

This tension was expressed, in part, in the issue of access to the process for Aboriginal groups. The fact that Aboriginal title and rights were not defined in the eyes of the government and courts led to the government's conservative interpretation of access to the claims process. The 1979 *Baker Lake* decision provided further definition and influenced the 1981 claims policy.

An immediate problem perceived by Aboriginal organizations was the multiple roles of the federal government in the claims process. They argued that it was a conflict of interest for DIAND and Justice officials to decide the validity of claims against DIAND itself, especially specific claims.

Hunting, fishing, trapping and gathering rights also raised the problem of jurisdiction and the power of governments to infringe on as yet unrecognized Aboriginal rights. The constitutional division of powers between federal and provincial legislatures in the areas of Indians and Indian lands, and land and natural resources complicated resolution of the problems.

Restrictions on the number of claims to be negotiated at any one time also made it clear to some that the government's priority was not the settlement of all claims but only the settlement of claims in areas where it wished to allow major energy or other economic development activities to proceed. Several observed, however, that for the rest of the government and even the rest of DIAND, land claims had no effect on development decisions.

The period 1973-1980 was a time of consolidating experience that culminated in the government's 1981 and 1982 statements on comprehensive and specific claims policy. There was no consensus on whether claims settlements reached in the James Bay region offered the best model, or indeed whether there could be a single model for the entire country. The government maintained extremely tight control over the scope of and participation in the claims process, as evident in *In All Fairness* and *Outstanding Business*. Thus, while the policies and processes surrounding land claims created new elements in the discourse during this period, they did not create a dialogue between Aboriginal peoples and the government.

1980-1987: THE CONSTITUTION AND LAND CLAIMS

Developments in policy discourse about land and title during the 1980s took place in two arenas: the constitutional arena, as patriation provided new opportunities and new vehicles for Aboriginal peoples to express their positions on land and title to governments; and the land claims arena. The latter was not a new path, though it did take some new twists during this

Aboriginal rights provisions were deleted. This led the NCC, the Inuit Committee on National Issues, the Native Women's Association of Canada, the Dene Nation of the Northwest Territories and the Council for Yukon Indians to unite as the Aboriginal Rights Coalition with the aim of reinstating the rights. The composition of the coalition was interesting. Although CYI and the Dene Nation were members of the NIB, they included both status and non-status Indians.

By the end of November 1981, existing Aboriginal rights were once more part of the constitutional package, and additional provision was made for a first ministers conference within one year to address Aboriginal constitutional matters. Finally, on 17 April 1982, the constitution was proclaimed with the amended Aboriginal rights provisions intact.

While the struggle to protect Aboriginal interests during patriation continued, there were also developments in the land claims arena, as government fulfilment of its obligations under the first modern land claims settlement came under scrutiny. In March 1981, after at least a year of public statements alleging that Canada and Quebec had not fulfilled their obligations under the James Bay and Northern Quebec Agreement, representatives of the Cree and Inuit signatories appeared before the House of Commons Standing Committee on Indian Affairs and Northern Development. The committee issued a statement endorsing "the claim of the native parties that Canada and Quebec had failed to implement major provisions of the Agreement".[85]

This statement led to an assessment of the government's performance under the agreement. In February 1982, federal officials issued the *James Bay and Northern Quebec Agreement Implementation Review*. A team of officials from DIAND and the Justice department conducted the review. The report, prepared for cabinet consideration, was based on study of Cree and Inuit briefs, DIAND and other departmental files, Justice department opinions, and interviews with Cree and Inuit representatives and others involved in negotiating and implementing the agreement.

Justice officials found that Canada had not committed any legal breaches of the agreement. The review also made clear, however, that the agreement's provisions give the federal government wide discretion in meeting its obligations, making fulfilment of its commitments largely a matter of "public policy" rather than "law":

> many of the key obligations assumed by Canada are worded in such a way as to give Canada wide discretion in fulfilling them. The determination of when and how commitments are fulfilled and

85. *James Bay and Northern Quebec Agreement Implementation Review*, p. 1.

> the level of funding are, in the context of the agreement, usually matters of public policy and not law.[86]

The report also pointed to the fiscal climate as another factor influencing government action:

> Federal budgeting restraint over the past several years has played a major role in delaying or limiting the achievement of goals which, in 1975, it was generally assumed could be quickly accomplished. In general, the funding currently available for native orientated programs is inadequate to meet proven needs. This situation has tended to slow down development in many Indian communities, including those coming under the Agreement.[87]

The document emphasized the need for clarification and understanding of the agreement and pointed out areas where it was evident that the government had not fulfilled its obligations. It called for regular reviews and the development of comprehensive strategies and negotiations to create a more effective implementation system.

Meanwhile, in the Maritimes, the Mi'kmaq were at a different stage of the land claims settlement process. They were still waiting for a decision from the Office of Native Claims on their claim, submitted in 1980 as *Freedom to Live Our Own Way in Our Own Land*. In June 1982, the government of Newfoundland released *Assessment and Analysis of the Micmac Land Claim in Newfoundland*. The assessment was written by a single researcher, Dr. Albert Jones, who relied on a historical and legal approach, including the Baker Lake criteria, to conclude "that the claim is devoid of legal or historical justification. The interpretation and documentation of the Micmac presence in Newfoundland as stated in the claim does not justify the assumption that the Micmac people can be considered aboriginal inhabitants; nor that the area claimed has been used and occupied from time immemorial to the exclusion of others."[88] The premier of Newfoundland accepted Jones's findings and rejected the Mi'kmaq claim.

The following month, July 1982, the Indian and Inuit Support Group of Newfoundland and Labrador responded with its own document, *The Newfoundland Government's Rejection of the Micmac Land Claim*, citing additional research by the Mi'kmaq to support their claim – research Jones had not addressed and that contradicted many of his points. The document emphasized that the claims process is not a formal legal process; that

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86. *James Bay and Northern Quebec Agreement Implementation Review*, p. 9.

87. *James Bay and Northern Quebec Agreement Implementation Review*, p. 15.

88. *Assessment and Analysis of the Micmac Land Claim in Newfoundland*, p. 14.

approach had been proposed and rejected in favour of the less formal negotiation process adopted in 1973. The Indian and Inuit Support Group argued that determining validity is a "quasi-legal" decision and speculated on how the issue might be dealt with by the courts:

> Were the present situation of informal negotiation to change, and the Micmac had to take the government to court, they would no doubt be able to prove their case along the lines set down by the Baker Lake Criteria. But it would first require a legal interpretation of these criteria in the specific geographic and historical context of the Micmac claim.[89]

Of greater concern, however, was the provincial government's interference in the federal claims process.[90]

While land claims were being discussed in Newfoundland, treaty land entitlement was an issue in western Canada. In January 1983, the government of Manitoba released the *Report of the Treaty Land Entitlement Commission*. Commissioner Leon Mitchell examined a range of issues, holding public hearings and reviewing submissions from individuals and organizations, including research by the Treaty and Aboriginal Rights Research Centre of Manitoba. No reference was made to the constitutional process or to the imminent settlement of claims in the federal specific claims process as motivation for the commission. Indeed, the report indicated no specific reason for establishing the commission beyond that "it was deemed advisable that the matter of a basis for contemporary settlement of treaty land entitlement in Manitoba be reviewed".

The report referred to the 1977 Saskatchewan agreement as a precedent for settling treaty land entitlement claims, specifically with regard to determining an appropriate population base, and thereby a land quantum, for a settlement.[91] Regardless of provincial decisions concerning land

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89. *The Newfoundland Government's Rejection of the Micmac Claim*, p. 6.

90. The following excerpt illustrates the point:
> It is absolutely unprecedented for a provincial or territorial government to pass judgement on the validity of an aboriginal claim, since such claims are in fact made to the Federal Government... Even though the province's rejection has no legal weight it is a clear attempt to influence the federal decision. It is also an implicit threat to the federal government that the Province will make negotiations difficult if the Micmac claim is found to be valid. (p. 3)

91. The Saskatchewan agreement, between the Federation of Saskatchewan Indian Nations, the province of Saskatchewan, and the federal government, was announced in a DIAND press release on 24 August 1977. The agreement outlined the means of fulfilling outstanding treaty land entitlement. A key provision was the formula for determining the amount of land to be transferred. The Saskatchewan Formula

entitlement, the commissioner observed that "responsibility to ensure complete fulfilment of land entitlement lay, at all material times, with Canada and not with the Bands or the Province."[92]

Between 1983 and 1987, the discourse was heavily influenced by constitutional conferences on Aboriginal issues. The *Constitution Act, 1982* required that first ministers meet Aboriginal representatives in a constitutional conference within one year of patriation. In March 1983, first ministers met Aboriginal representatives to address "matters that directly affect the Aboriginal Peoples of Canada, including the identification and definition of the rights of those peoples to be included in the Constitution of Canada."[93]

Conference participants developed a constitutional accord on Aboriginal rights to amend the *Constitution Act, 1982*, providing for a series of first ministers conferences on Aboriginal constitutional matters over the following four years. At the same time, section 35(3) was added to the *Constitution Act, 1982* to make it clear that treaty rights protected in 35(1) include "rights that now exist by way of land claims agreements or may be so acquired."

The constitutional conferences were a new arena for discussion and recognition of rights. Many of the documents of this period were prepared to inform conference discussions. In April 1983, for example, the Constitution and Land Claims Secretariat of the Manitoba Metis Federation (MMF) released *Manitoba Metis Rights: Constitutional Consultations: Final Report*. The MMF had undertaken research and community consultation and had convened a Metis Rights Assembly in preparation for the first ministers conference of March 1983. The MMF explained its purposes as follows:

> After 100 years we have one more chance to negotiate for our rights. Our main priorities are still land and self-government, as they were 100 years ago. We expect these constitutional discussions to continue until these rights are resolved.[94]

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established 31 December 1976 as the cut-off date for determining the extent of entitlement. The basic formula was population (as of 31 December 1976) times land allotment equals entitlement. Given that most bands had already received some land, the equation was really population times land allotment minus land already received equals entitlement. During negotiations, the parties debated whether population should be based on the population when the original treaty was signed or on the Indian conception of entitlement under the spirit of the treaties, which asserted that entitlement continued to grow with the population of the band.

92. *The Treaty Land Entitlement Commission: January 18, 1983*, p. 4.

93. *Manitoba Metis Rights: Constitutional Consultation: Final Report*, p. 2.

94. *Manitoba Metis Rights: Constitutional Consultation: Final Report*, p. 26.

On land and title, the MMF argued that the constitution must ensure Métis rights to collective ownership of land and resources, including the general rights to hunt, fish, trap and gather. It must also guarantee that these lands and resources will be exempt from all taxation other than that imposed by Métis governing authorities. Furthermore, the constitution should recognize the distinct Aboriginal and collective character of these land and natural resource rights:

> [Land and resource rights] should be defined within the context of the Canadian Confederation but should reflect the special aboriginal character of our nationhood. They should be entrenched in the Constitution as collective, rather than individual rights. The individual rights spelled out in the Canadian Charter of Rights and Freedoms would still apply to Aboriginal People, but not at the expense of our collective rights.[95]

The document also placed the notion of rights in an international context, citing the Metis National Council's submission to the 1983 first ministers conference, which referred to Canada's obligations as a signatory of the International Covenant on Civil and Political Rights in support of the MNC position that Métis people must have a land base. The importance of a land base to the achievement of self-government was also emphasized, with supporting evidence from New Zealand and Australia.

The MNC was formed in March 1983 to advance prairie Métis interests represented at the provincial level by the Manitoba Metis Federation, the Association of Metis and Non-Status Indians of Saskatchewan, and the Metis Association of Alberta. These former members of the Native Council of Canada argued that the NCC took political positions different from those of Métis provincial organizations. The report outlined the distinctiveness of the MNC approach:

> It also relates to a difference in approach on the handling of the concept of 'aboriginal title'. The prairie Metis do not wish to base their fight for land title or other rights on the notion of 'aboriginal title'. It is a concept which was invented for colonial purposes, has never been clearly defined, and is subject to narrowly based court interpretation.
>
> In the Maritimes, British Columbia, and the Northwest Territories, the NCC affiliate organizations have been involved in long-standing land claims based on the idea of 'aboriginal title'. In contrast, the Metis National Council is arguing for straightforward constitutional recognition of a Metis land base and other rights.[96]

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95. *Manitoba Metis Rights: Constitutional Consultation: Final Report*, p. 31.

96. *Manitoba Metis Rights: Constitutional Consultation: Final Report*, p. 7.

The report cites the *Manitoba Act, 1870* as a precedent for constitutional legislation dealing with Métis land entitlement.[97]

Issues of land claims, treaties and governance merged in October 1983, when the House of Commons Special Committee on Indian Self-Government released its second report, *Indian Self-Government in Canada* (the Penner report). In addition to seven members of Parliament, the committee included an ex-officio member from the Assembly of First Nations and two liaison members, one each from the Native Women's Association of Canada and the Native Council of Canada. The committee's activities included public meetings across Canada at which the members heard oral testimony and received written submissions from Indian organizations and governments and from Indian and non-Indian individuals. The committee also heard from representatives of the departments of Justice, Indian affairs, Health and Welfare, and the Secretary of State. The committee also had several pieces of commissioned research available for consideration.

In presenting its recommendations, the committee pointed out some of the failings and shortcomings of existing institutions, legislation, attitudes and approaches in Canadian/Indian relations:

> While Canadian governments have been slow to find land to settle the Nishga claim, the B.C. cut-off claims, the prairie entitlements, and many others, they have had no trouble finding land for much larger national parks, defence bases, hydro developments, airports and resource projects... Canadians who consider themselves just and fair must reconsider their views on this matter. The government should commit itself to this endeavour with at least the same effort it devotes to finding land for government projects.[98]

The report also provides insight into the divergence of views on treaties between Indian people and non-Indian governments:

> Indian people see treaties as affirming rights and establishing the sharing of land and resources, while non-Indian governments view treaties as extinguishing Indian rights to land and resources.[99]

In its assessment, the committee stated that it was "fully in accord with the principle that Indian lands should be under the control of Indian First Nations. Moreover, it is the responsibility of the federal government to

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97. In bringing the province of Manitoba into Confederation, the federal government, through the *Manitoba Act, 1870*, satisfied many of the demands of the Métis. The act contains most of the items requested by the Métis, as well as asserting their land rights.

98. *Indian Self-Government in Canada*, p. 112.

99. *Indian Self-Government in Canada*, p. 105.

manage its special relationship with each First Nation in such a way that each First Nation's lands will be maintained for its use. This would mean power to decide upon methods of land-holding and land management on reserves. Such areas should be recognized as Indian lands."[100]

> Indian witnesses before the Committee presented an alternative view: Indian witnesses emphasized consistently that their rights did not end at the boundaries of reserves. Instead, emphasizing the need to develop mechanisms whereby Indian people could participate in the control and management of these lands and resources, they advocated a system of coexistence and not the exclusion of other interests.[101]

The committee also heard about problems with the claims process. One witness from the Nishga Tribal Council characterized the 1981-82 policy statements *In All Fairness* and *Outstanding Business* as "written for the public in the corporate world, and created by a very slick process to create in the public mind a definition of what is fair; then, clearly anything that falls outside that definition is unfair, unrealistic, not pragmatic, radical, etcetera. It is a very, very insidious document in that respect."[102] The committee summarized complaints about land claims policy, many of which had been expressed in earlier documents:

> Many witnesses objected to the fact that land claims policy and procedures are defined by government decision rather than by legislation. They pointed to the conflict of interest inherent in departmental control of a process set up to decide upon the rights and entitlement of bands whose claims arise from the actions or inaction of the same Department.... Government legal opinions, which are not available to the band making the claim and cannot be challenged, determine both the validity of claims and eligibility for funding to pursue the matter further. When a claim is rejected, no substantiation is given. This process was condemned by Indian witnesses for its lack of independence from the federal government and for its unilateral imposition of conditions. Although many claims have been filed since the Office of Native Claims was established, few have been settled.[103]

Several other criticisms were presented to the committee, including complaints that claims related to treaties or other events before

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100. *Indian Self-Government in Canada*, pp. 108-109.

101. *Indian Self-Government in Canada*, p. 110.

102. *Indian Self-Government in Canada*, p. 114.

103. *Indian Self-Government in Canada*, p. 114.

Confederation could not be considered under claims policy; that legitimate grievances would not be received if claims had been superseded by law; and that the resolution of land claims rested entirely with the executive. The report criticized the absence of parliamentary scrutiny and lack of access to the judicial system or to an independent tribunal. Witnesses also pointed out that the policy was developed without the involvement of Indian people:

> This policy was developed internally by the Department of Indian Affairs, utterly disregarding in its formulation the strong recommendations of Indian organizations across Canada, and especially Ontario, regarding principles and mechanisms for claims settlement.[104]

Based on the harsh critique heard during its consultations, the committee recommended that a new claims policy be established and complemented by other measures to enhance the land and resource base for Indian self-government. According to the committee, the policy should be negotiated with First Nations and set out in legislation. It was the committee's recommendation that "[c]laims should be negotiated between the government and the claimant with a neutral party to facilitate the settlement. Where a settlement cannot be reached, there should be access to a quasi-judicial process."[105] The Committee also recommended that the extinguishment requirement be eliminated from claims policy.

Following the Penner report, the Alberta minister of municipal affairs released *Foundations for the Future of Alberta's Metis Settlements: Report of the MacEwan Joint Committee to Review the Metis Betterment Act and Regulations*. The report was prepared in response to Métis litigation and demands for self-government and a land base, which were forcing the government to consider changes to the 1938 *Metis Betterment Act*. Métis people were seeking an end to the paternal approach embodied in the act and in the government's relations with Métis people in Alberta.

The committee included three non-Aboriginal members – the chair, an Alberta MLA and a municipal affairs representative – and two representatives from the Federation of Metis Settlements. The committee reviewed historical materials, visited the eight Metis settlements, and worked with the board of the federation on modernizing and improving the legislated relationship between the settlements and the government of Alberta.

Although many other issues were discussed, of primary interest to the committee were issues related to local self-government and land security:

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104. Representative of the Onegaming Band, quoted in *Indian Self-Government in Canada*, p. 115.

105. *Indian Self-Government in Canada*, p. 115.

"the paramount concern of the Metis settlements is the retention of a land base for the preservation of their culture".[106] The committee believed new legislation should address this issue to ensure that Métis land development efforts were not impaired:

> The existing legislation has been interpreted by previous governments as providing the power, by Order in Council, to remove lands set aside for the Metis... The insecurity presented by this possibility casts a pall over Metis land development efforts. In order to provide a solid foundation for the Metis future, title to the Settlement land should be vested in the Metis settlements by legislation.[107]

The committee supported the objective of providing land on which the Métis could "develop economic self-reliance while preserving their cultural ties to the land through the maintenance of traditional pursuits such as hunting, fishing, trapping and gathering".[108] To this end, it recommended that Métis people be granted fee simple title to the surface of all land in the settlement areas and to natural resources, subject to pending court cases brought by the Métis settlements against Alberta for subsurface royalties.

In November 1984, another court decision was delivered that was to have a major impact on the discourse on land and title. In *Guerin*, the Supreme Court found that the Crown had a "fiduciary or trust obligation" to the Musqueam Band in British Columbia to manage reserve lands surrendered to it, based on the fiduciary obligation created by the Crown's discretionary power over a vulnerable group and, secondarily, by section 18(1) of the *Indian Act*.[109] The Court found that the Crown's obligation was based not only on the *Indian Act* but also on the band's Aboriginal title.

The September 1984 election had brought the Progressive Conservatives to power. The new government faced a number of challenges related to land claims. Although an agreement in principle had been reached on the CYI claim, four of the twelve Yukon bands represented by the CYI refused to ratify it. A major issue for these bands was the inclusion of an extinguishment clause. Long-standing federal insistence on extinguishing all Aboriginal rights in perpetuity appeared to be undercut by the new constitutional provisions. In response, the Indian affairs minister proposed a task force to review troublesome issues, including extinguishment. The task

106. *Foundations for the Future*, p. 35.

107. *Foundations for the Future*, p. 5.

108. *Foundations for the Future*, p. 34.

109. *Guerin et al.* v. *The Queen* (1984), 13 D.L.R. (4th) 321 (S.C.C.), pp. 71-77.

force was eventually assigned a far-reaching review of comprehensive claims policy. The resulting report, *Living Treaties: Lasting Agreements*, was completed in December 1985.

The five-member task force consisted of a British Columbia Indian chief, two non-Aboriginal academics, and a non-Aboriginal lawyer. Chaired by Murray Coolican, a non-Aboriginal consultant, the task force conducted research and received submissions and representations from parties affected by the claims process, including claimant groups, provincial and territorial governments, and citizens' organizations.

Living Treaties, Lasting Agreements noted how little progress had been made in settling claims:

> Since 1973, the federal government and aboriginal groups have spent more than $100 million on negotiations, yet have produced only three agreements, while twenty-one claims are under, or await, negotiation. The comprehensive claims policy and the process for negotiation are clearly in need of reform.[110]

To reverse this trend, the task force emphasized the importance of finding common ground as a foundation for settlement resolution:

> It may seem unusual for one of two negotiating parties to consult with the other in the search for a new policy to guide it during the negotiations; however, if a new policy is to succeed, it cannot conflict with the fundamental objections of the aboriginal groups. Thus, we need to find common ground upon which to build agreements.[111]

It also recommended that an independent commission monitor the process for fairness and progress and the use of framework agreements to guide negotiations and assist the parties in achieving a settlement. This was not intended to suggest a standardized approach to agreements. The task force called for flexible arrangements that would be responsive to regional differences:

> To survive, relationships must be flexible, to allow for growth and to meet the changing needs of aboriginal communities and Canadian societies. The policy also should be flexible enough to be responsive to dramatic differences from one region of Canada to another in aboriginal economies and lifestyles, in the economic potential of the land and its resources, and in the policies of provincial or territorial governments... A national formula for land

110. *Living Treaties, Lasting Agreements*, p. i.

111. *Living Treaties, Lasting Agreements*, p. ii.

> quantum or a single settlement model that establishes binding precedents for future agreements should *not* be considered.[112]

The Task Force was particularly critical of certain aspects of claims policy, pointing, for instance, to the policy of blanket extinguishment of Aboriginal rights as a prerequisite for settlement: "A new policy should not require aboriginal peoples to surrender totally rights that our Constitution has so recently recognized and affirmed."[113] Concerning the provision permitting the exclusion of claims in areas where Aboriginal title is deemed to have been superseded by law, the task force stated that it could not "accept that aboriginal peoples should have their land rights taken or superseded without their consent."[114] In conclusion, *Living Treaties, Lasting Agreements* called for "a new policy based upon a relationship of sharing of power and resources" but recognized the difficulty of achieving it:

> A transfer of power, however, is far more difficult to achieve. To be prepared to give up jurisdiction and to change its own decision-making structures is one of the most difficult challenges for any institution the size of the Government of Canada.[115]

Discussion of land and treaty rights in the context of constitutional deliberations was also reflected in a February 1987 publication by the Assembly of First Nations, *Constitutional Task Force Report on Treaties*. The bilateral task force consisted of three federal officials, a law professor, and two members appointed by the AFN.[116]

The task force conducted a preliminary workshop to determine its objectives, then held hearings open to treaty groups, bands and other associations. The task force received submissions, primarily on three specific treaty issues, and circulated a draft report for comment.[117] The

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112. *Living Treaties, Lasting Agreements: Report of the Task Force to Review Comprehensive Claims Policy*, p. iii.

113. *Living Treaties, Lasting Agreements*, p. iii.

114. *Living Treaties, Lasting Agreements*, p. iv.

115. *Living Treaties, Lasting Agreements*, p. iv.

116. The federal representatives were from the Native Law Division of the Justice department, the Self-Government Sector at DIAND, and the Office of Aboriginal Constitutional Affairs in the Privy Council Office.

117. The three issues were options regarding removal of the word 'existing' from section 35(1) of the *Constitution Act, 1982*; an amendment committing governments to adhere to the spirit and intent of the treaties (pre- and post-Confederation, land cession and non-land cession treaties); and a constitutional commitment to a process of discussions between First Nations and governments to renovate, modernize,

report noted the diversity of treaties and of Indian views about them. Distilling the views it heard, the task force presented several commonalities in Indian views of treaties and the treaty process. The report reintroduced the notion of the spirit and intent of treaties and attempted to describe the range of its meaning for Indian people:

> In general this concept suggests that the Indians view their treaties as a collection of mutual guarantees, political and social compacts and a protocol for dealings between nations.[118]

In practice this means that the spirit and intent concept should be considered and applied "in constructing and interpreting" the practical effect of treaties. The views of the AFN representatives contrasted with those of their federal counterparts on the task force:

> in the federal view, an understanding of 'spirit and intent' would begin by examining the specific wording of the treaties and incorporating what the courts have said with respect to the interpretation of those treaties.[119]

The overall intent of the discussion, however, was to explore the possibility of a continuing process in which treaty issues could be negotiated and resolved. The task force pointed out that no process or forum exists to deal with the full range of treaty issues. For some participants, including the AFN, a constitutional amendment was the preferred means of establishing such a process. The response of the government representatives, however, was that the divergence of views on treaties was too great and that the first priority must instead be a constitutional amendment on self-government:

> Because of these divergent views [on the spirit and intent of treaties] the federal officials are not prepared to recommend to their ministers a constitutional amendment on 'spirit and intent' at this time.
>
> With respect to a constitutional amendment, the first priority for the federal government is an amendment on self-government. It was the view of the federal officials that there is insufficient time remaining to reach an agreement on a constitutional amendment for a treaty process. However, the federal government remains willing to continue discussions with treaty groups and bands in an effort to

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clarify and/or renegotiate treaties.

118. *Constitutional Task Force Report on Treaties*, p. 7.

119. *Constitutional Task Force Report on Treaties*, p. 9.

> resolve some treaty grievances, within the existing forums and processes.[120]

Indian participants countered this response by pointing to the inadequacies of existing forums and processes, including the inability of the system to address such treaty issues as social services, child welfare, medical and health services, economic development, education, and non-renewable resources. Concerning the specific and comprehensive claims process, they offered the following comment:

> [The Specific Claims Process] was limited to lawful obligations as determined by the federal government and...cash or land compensation is not always an appropriate means of resolving all treaty issues. The Comprehensive Claims Process is not designed to address existing treaty issues. The non-constitutional self-government process does not take account of these treaty concerns.[121]

In the end, the task force concluded that treaty Indian groups were trapped by the government's narrow legal interpretations:

> Some of the treaty groups made the observation that their efforts to access the Comprehensive Claims policy were rejected as not falling within the criteria and that the specific claims policy was not adequate to address the treaty issues in a comprehensive nature.[122]

Given this assessment, the task force recommended that the federal government establish a process to re-examine treaties "on the basis that the treaties and treaty rights were not frozen concepts but that treaties were living and flourishing documents to provide for present and future generations, all with a view to clarifying treaties or rectifying unconscionable treaties so as to give real meaning to section 35 of the *Constitution Act, 1982*."[123]

The constitutional processes of this period ended in frustration in March 1987, when federal, provincial, and Aboriginal leaders at the last first ministers conference on Aboriginal constitutional matters failed to agree on a constitutional amendment guaranteeing self-government. Also in 1987, the federal government issued a new policy statement, *Comprehensive Land*

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120. *Constitutional Task Force Report on Treaties*, pp. 9, 11.

121. *Constitutional Task Force Report on Treaties*, pp. 10-11.

122. *Constitutional Task Force Report on Treaties*, p. 13.

123. *Constitutional Task Force Report on Treaties*, p. 8.

Claims Policy.[124] The new policy was said to be the result of general dissatisfaction and pressure from Aboriginal organizations stemming from, among other things, the slow rate of progress, the inconsistency of claims policy with other federal policies, and concern that the federal extinguishment policy violated section 35(1) of the constitution. The statement drew on the 1985 DIAND task force report, *Living Treaties, Lasting Agreements*, and on discussions with officials from other levels of government and leaders of Aboriginal organizations. The policy concurred with earlier commentary, such as that provided in the AFN's *Constitutional Task Force Report on Treaties*, noting the divergent views of Aboriginal peoples and non-Aboriginal governments concerning Aboriginal title:

> There is no clear definition of the term 'aboriginal title'. For aboriginal peoples, the term is bound up with a concept of self-identity and self-determination. For lawyers, it is one which has been referred to in case law for many years, but which has eluded judicial definition.[125]

Building on previous policy statements, the government also tried to clarify its concept of the land claims process. It restricted the application of claims policy to land-related rights:

> It is important to re-emphasize that under this policy, only land-related rights are at issue in negotiations and may be affected by the measures used to establish certainty in settlements. Any other rights which may exist will remain unaffected by comprehensive land claims agreements.[126]

Moreover, the government again expressed its intent to respect the rights of the general public and third-party interests in negotiating claims settlements.

This statement signalled a shift in government thinking toward a relaxation of its position on extinguishment:

> Above all other issues, the requirement that aboriginal groups agree to the extinguishment of *all* aboriginal rights and title as part of a claims settlement has provoked strong reactions from aboriginal people... alternatives to extinguishment may be considered provided that certainty in respect of lands and resources is established.[127]

The government also seemed to be loosening its position on what land-related issues could and could not be brought to the table. If claimants

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124. *Comprehensive Land Claims Policy* was prepared in 1986 but not published until 1987.

125. *Comprehensive Land Claims Policy*, p. 5.

126. *Comprehensive Land Claims Policy*, p. 21.

127. *Comprehensive Land Claims Policy*, pp. 11-12.

desired, the government would negotiate land selection, self-government, environmental management, subsurface rights on settlement lands and on some federal Crown lands, resource revenue sharing, preferential or exclusive hunting, fishing and trapping rights on various types of land, and related matters.

Despite these new elements, the new policy did not address fundamental complaints about the claims process, including the notion of Aboriginal title being superseded by law. In practice the government continued to dictate the options available to Aboriginal claimants, rather than co-operatively deciding the best approach. The following excerpt reflects the tight government control over the process:

> Negotiations towards the development of a framework agreement will be initiated when the Minister of Indian Affairs and Northern Development judges the likelihood of successful negotiations to be high, the settlement of claims in the area to be a priority, and where active provincial and territorial involvement may be obtained as necessary.[128]

Comprehensive Land Claims Policy marked the end of another period, just as the 1973 policy and *In All Fairness* and *Outstanding Business* marked earlier turning points in the policy discourse on land and title. This period saw the emergence of a new forum — the constitutional forum — for discussion and negotiation of Aboriginal rights. Though it did not reap the rewards hoped for by Aboriginal policy actors, it provided new opportunities and new resources for the articulation of Aboriginal positions on land and title. Evolution of claims policy and process also continued, as policy actors struggled to understand and respond to concerns about the existing system.

In this period, two main processes pushed the discourse forward. The land claims settlement process continued, but another formal channel developed during this period, through which interaction between Aboriginal peoples and federal and provincial governments occurred. The first ministers conferences on Aboriginal constitutional matters became the preferred and dominant channel for communication because it offered the chance for an exchange of views and ideas in a structure designed to produce a resolution at the highest level, with the largest and most permanent pay-off — constitutional amendment or permanent resolution.

During this period, the cast of policy actors also expanded. The constitutional conference process provided federal funding to help Aboriginal organizations prepare for the meetings. This funding enabled publication of a large number of documents from a growing list of regional

128. *Comprehensive Land Claims Policy*, p. 24.

and national participants. It was in this period that the Metis National Council emerged, that Assembly of First Nations documents appear in our collection, and that the Native Council of Canada established a presence for non-status Indians.

There were also significant numbers of documents from provincial governments. Some addressed constitutional issues; others focused on land claims. Still others, such as those generated by the Manitoba Treaty Land Entitlement Commission and the MacEwan Joint Committee on Alberta's Metis settlements, were the product of provincial commissions or task forces. Provincial government representation in the collection may reflect the fact that some land claims were reaching the stage of negotiations where provincial participation was necessary. In addition, as key players in the patriation process, provincial governments were required to develop their positions more completely.

Provincial government documents emphasized jurisdictional issues. In general, provincial governments were as reluctant as the federal government to give up any real power, but they were also compelled, in the case of Alberta for example, to come to a settlement. Most provincial or provincially commissioned reports maintained that settlement of claims, including compensation, was a federal responsibility, despite the obvious benefits to the provinces of control over certain lands and natural resources.

Federal intervention in the discourse followed a greater number of avenues in this period. In addition to DIAND's new *Comprehensive Land Claims Policy*, the Special Committee on Indian Self-Government delivered its report, the Task Force to Review Comprehensive Claims Policy produced *Living Treaties, Lasting Agreements*, and the James Bay and Northern Quebec Agreement Implementation Review was established. The latter produced the first formal review of a land claims settlement. It was an ad hoc process directed at a specific problem, not the beginning of a continuing process of feedback and adjustment, though the report recommended further discussions and negotiations.

As was the case in the previous period, there was increasing representation of Aboriginal people and Aboriginal organizations on government task forces and commissions. Also of interest was the composition of the AFN's Constitutional Task Force on Treaties and Treaty Rights, which included government representation. Whether representation legitimized the results of these inquiries is, however, a matter of speculation.

Finally, the courts remained central. Their most notable contribution was the decision in *Guerin* – the most influential judgement of the period. The Supreme Court found that the Crown had a fiduciary obligation to manage reserve lands based not only on the *Indian Act* but also on Aboriginal title.

Nevertheless, to a large degree, the first ministers constitutional conferences structured the participation and discourse of this period. If strong political motivation drew participants into the process, the availability of federal funding sustained their presence. The federal government controlled the distribution of seats at the conference table, and provincial governments controlled access to their own preparatory processes. Larger regional and national Aboriginal organizations represented Aboriginal people, though the documents do not indicate the degree to which the larger groups reflected constituents' views. Some groups argued that neither national Aboriginal organizations nor provincial governments could represent them at preparatory meetings and conferences.[129]

Among the fundamental ideas and values that emerged during this period, the dominant focus was achieving a guarantee of Aboriginal rights through constitutional means. This would include, for some groups, Aboriginal title to land and resources, and rights to hunt, trap, fish and gather. This was not, however, the stated aspiration of all Aboriginal groups. The Metis National Council did not endorse the concept of Aboriginal title, preferring instead a direct constitutional provision guaranteeing the right to a land base.

Achievement of recognition of existing Aboriginal and treaty rights in section 35 of the constitution set the scene for rethinking the government's policy on extinguishment, its fiduciary obligations, and other assumptions and practices. It also created a new climate for court rulings, as seen in *Guerin*, which in turn had its own effect on government policy. The reality of constitutional recognition, albeit limited by the term 'existing', was counterbalanced by the failure of first ministers conferences to produce agreement on the meaning of Aboriginal rights. Consequently, the government continued to base policies and practices largely on previous assumptions and positions while acknowledging that section 35 increased the level of constitutional protection of Aboriginal and treaty rights.

Despite the lack of consensus on definitions and obvious problems with the claims process — and certainly because of the uncertainty involved in

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129. Métis people, for example, felt their interests were not properly represented by the Native Council of Canada, and for that reason, Prime Minister Trudeau invited a representative of the Metis National Council to sit at the constitutional table (Gaffney, Gould and Semple, p. 35.) Also, the *Report of the Nova Scotia Advisory Committee* (1992), notes that the Mi'kmaq did not feel adequately represented:

> The second theme that surfaced throughout the Committee's work was the principle that Mikmaq people must directly represent their interests any constitutional reform process. No other organization, whether it be aboriginal or non-aboriginal, national or regional, can speak for Mikmaq people. (p. 5)

pursuing a claim through the courts – most groups continued to affirm the importance of negotiated claims. By the end of the period, many, particularly Aboriginal groups and their advocates, were dissatisfied with progress in settling claims and developing Aboriginal peoples' place in Canadian society. For some it was a sense of exclusion – exclusion from constitutional conferences, exclusion from the land claims process, and exclusion from discussions on the issues most important to them.

Perhaps the sense of exclusion was rooted in the fundamental inertia of the government position. The documentary evidence of this period conveys a general sense that, aside from the policy-making sectors of federal and provincial governments, many groups, including federal commissions and task forces, increasingly advocated the basic positions of Aboriginal peoples. There was continued support, for instance, for the establishment of an independent tribunal to ensure the fairness of the claims process. Continued government rejection of these proposals closed avenues for action and for dialogue.

This period was heavily influenced, then, by constitutional negotiations, particularly first ministers conferences. The cast of actors expanded, fuelled by resources flowing into the constitutional process. The achievement of guaranteed Aboriginal rights came to be seen through constitutional means. By the end of this period, pressures were mounting. New policy actors were adopting advocacy roles in the discourse, a new formal process for the interaction of government and Aboriginal groups had been used, and there was growing frustration on the part of Aboriginal actors about continuing failure to have Aboriginal and treaty rights recognized.

1987-1993: MOUNTING PRESSURES

With the appearance of *Comprehensive Land Clams Policy* in 1987, various policy actors had to react. Provincial governments took on a more active role, and the courts continued to render decisions that influenced the discourse on land and title. The combination of pressure from Aboriginal actors, provincial governments and the courts and the federal government's reaction to these pressures provided an interesting dynamic in which much of the discourse in this period evolved.

An early reaction to the 1987 policy came from the government of Newfoundland and Labrador. The Labrador Inuit Association and the Naskapi-Montagnais Innu Association had submitted claims in 1977. By 1980, the claims process had progressed sufficiently for the federal government to invite the involvement of the provincial government. The 1987 federal policy changes prompted the government of Newfoundland and Labrador to issue its own statement of policy on land claims in December 1987 to "provide the basis for provincial participation in tripartite negotiations":

> The province's prime objective in participating in the land claims process is to contribute towards the effective and final settlement of aboriginal claims to territory within the province.[130]

The policy established several principles to be applied in negotiating land claims settlements, specifying, for instance, that negotiations should facilitate the economic, social and cultural development of the Aboriginal claimants, recognize and protect the rights of third parties, and be consistent with the broad economic and social objectives of the province.

Within this framework, certain restrictions would apply. These restrictions echoed the province's earlier remarks about the validity of the Mi'kmaq land claim and the Baker Lake criteria:

> Before the province agrees to participate in land claims negotiations, claims presentations must be carefully assessed to ensure that they meet the fundamental criteria of aboriginal use and occupancy of the land, from time immemorial, prior to European discovery and the establishment of sovereign jurisdiction. Such assessment shall be of a general nature and shall not constitute a legal opinion as to the existence or non-existence of any legal right or claim.[131]

The government stated its position with regard to several elements of land claims, such as wildlife harvesting and management rights, forest resources, environmental management, water resources and non-renewable resource rights. Its general approach was to "grant" or "give" claimants certain restricted rights in settlement areas. In the area of water rights and non-renewable resource rights, however, the province would not submit to negotiations at all.

The Quebec government also entered the discourse with the release of *The Basis of the Quebec Government's Policy on Aboriginal Peoples* in 1988. The document was prepared to generate understanding within the Quebec government of the principles behind Quebec's policies and to assist departments in their dealings with Aboriginal groups. The statement was also motivated by the "idea of standardizing relations between aboriginal groups and the government."[132]

The document sets out a number of principles concerning land ownership and control. Common to nearly all of them is that each is

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130. *Government of Newfoundland and Labrador Policy Regarding Aboriginal Land Claims*, p. 2.

131. *Government of Newfoundland and Labrador Policy Regarding Aboriginal Land Claims*, pp. 3-4.

132. *The Basis of the Quebec Government's Policy on Aboriginal Peoples*, p. vii.

relevant only in the existing framework of Quebec legislation. For instance, Quebec "recognizes the right of aboriginal nations, within the framework of Quebec legislation, to own and to control the lands that are attributed to them. These rights are to be exercised by them as part of the Quebec community and hence could not imply rights of sovereignty that could affect the territorial integrity of Quebec."[133]

The prominent role of provincial governments in this period was also apparent in events surrounding the Alberta-Metis Settlements Accord of 1989, which marked resolution of the Alberta Metis settlements' claim to a land base and self-government rights and the end of a process of negotiation and litigation that first appeared in this document collection with publication of the MacEwan task force report of 1984.

The Alberta-Metis Settlements Accord consists of several provincial laws, including the *Metis Settlements Land Act*, and two agreements, a Financial Assistance Agreement and a Co-Management of Subsurface Resources Agreement. The *Metis Settlements Land Act* defines what rights were to be transferred, namely fee simple title to surface land, excluding mines, minerals or water. The Crown retained ownership of subsurface mineral resources such as oil, natural gas and gas by-products, crude bitumen and coal. The settlements did retain some measure of control over subsurface access rights, however, and the government assured them that development of subsurface resources would not conflict with the settlements' land use planning:

> Development of these resources, however, must be compatible with the land use objectives and other activities of the Settlements' residents. To this end, the government will enter into an agreement with the Settlements' administration to ensure that the development of subsurface resources is done in an orderly and efficient manner and is compatible with appropriate environmental controls and the land use priorities of the Settlements.[134]

The accord included a dispute resolution board for conflicts over such issues as access rights and compensation. Crown rights of expropriation were qualified, and land held by third parties was deemed unaffected by the accord. The accord does not limit the ability of the Alberta legislature to make laws applicable to settlements lands, except as provided for in the accord. Finally, the government made it clear that the accord would resolve litigation brought against the province by the Métis settlements over control of subsurface resource revenues. In this way, the accord marked

133. *The Basis of the Quebec Government's Policy on Aboriginal Peoples*, pp. 3-4.

134. *Alberta-Metis Settlements Accord, Resource Management Agreement*, p. 2.

achievement of an agreement between a provincial government and an Aboriginal group reached outside the processes laid down by the courts.

Others were becoming engaged in the discourse in this period as well. In August 1988, the Canadian Bar Association released *Aboriginal Rights in Canada: An Agenda for Action*, a rare instance in the collection of third parties contributing to the policy discourse on land and title. The report was prepared by the CBA's Native Justice Committee, established in August 1986 and composed of 11 lawyers and/or persons associated with government service. Three members were of Aboriginal ancestry. The motivation for undertaking the study was an acknowledgement by the CBA and its members that the legal system must be accountable for injustices suffered by Aboriginal peoples in Canada and that the legal profession "must demonstrate that it does care about justice for all."[135]

The report criticized the role of Canadian legal system in Aboriginal affairs. The committee described a never-ending loop of inadequate processes for resolving Aboriginal claims, focusing particularly on the failure of the judiciary to provide clear definition to crucial elements of Aboriginal title and rights. For want of clear legal definitions, the committee said, political processes were unlikely to resolve Aboriginal claims satisfactorily. It cited the failure of first ministers conferences and the extent to which this might "encourage, if not compel, Indian, Inuit and Metis People to pursue the identification of their rights through the courts."[136] Yet the committee also noted reluctance on the part of the courts to provide further definition:

> much of the national/judicial wisdom is that these are essentially political demands requiring political solutions. However, in the absence of greater legal clarification it is quite unlikely that there will be successful resolution of these claims by aboriginal leaders and politicians because their respective legal rights are still too unclear.[137]

The committee discussed other problems facing Aboriginal claimants who, largely out of frustration at the pace of settlement negotiations, seek redress through the courts: inadequate funds, the complexity and formality of the process, and lack of judicial knowledge of Aboriginal customs and laws:

> The only alternative to the claims policies is to go to court. In reality the aboriginal claimant is denied this option because access

135. *Aboriginal Rights in Canada: An Agenda for Action*, preface.

136. *Aboriginal Rights in Canada: An Agenda for Action*, p. 21.

137. *Aboriginal Rights in Canada: An Agenda for Action*, p. 26.

> is largely dependent on the availability of funds, which most aboriginal communities do not have. Secondly, presuming funds can be found for this costly procedure, the process is lengthy and complex, involving lawyers almost to the exclusion of aboriginal claimants. Third, the legal system is renowned for its formality. As well, the judiciary is trained in the English common-law system and has little or no training in aboriginal laws and concepts.[138]

The committee identified several other legal issues requiring resolution: the applicability of Aboriginal title to Métis and non-status Indians; territorial overlaps in claims; the necessary length of land occupation and other basic criteria for entitlement; the extent of title and rights for subsurface rights or bodies of water; and the scope of non-resource rights (cultural, religious, political governance, and so on).

To rectify some of these problems, the committee recommended that the federal government establish an independent Aboriginal rights and title litigation fund similar to the Native American Rights Fund in the United States. This fund would alleviate the funding pressures associated with legal battles while resolving DIAND's conflict of interest:

> Establishing the proposed new fund would eliminate the apparent conflict of interest currently present when DIAND funds the aboriginal party to litigation in which it is an adversary.[139]

Among many other recommendations, the committee also proposed that the government broaden claims negotiations "to include any Indian, Metis or Inuit group whose aboriginal title has not been expressly surrendered under a land cession treaty or has not been extinguished by valid legislation in clear and express terms."[140] Moreover, access to the claims process should not be denied by reason of the 'superseded by law' policy or based on the *Indian Act* registration system. Finally, the committee recommended legislative establishment, after full consultation with Aboriginal people, of a tribunal with a clear mandate to adjudicate specific claims.

Aboriginal organizations were also active during this period, countering positions presented by governments and offering their own. In contrast to perceptions of Aboriginal title and rights presented in provincial policy statements of this period, the Union of British Columbia Indian Chiefs presented a position paper on Aboriginal title and rights in August 1989. Prepared for presentation at the UBCIC's annual meeting, the paper refuted earlier interpretations by provincial and federal governments:

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138. *Aboriginal Rights in Canada: An Agenda for Action*, p. 56.

139. *Aboriginal Rights in Canada: An Agenda for Action*, p. 29.

140. *Aboriginal Rights in Canada: An Agenda for Action*, pp. 26-27.

> The sovereignty of our Nations comes from the Great Spirit. It is not granted nor subject to the approval of any other Nation. As First Nations we have the sovereign right to jurisdictional rule within our traditional territories. Our lands are a sacred gift. The land is provided for the continued use, benefit and enjoyment of our people, and it is our ultimate obligation to the Great Spirit to care for and protect it.[141]

The heavy involvement of provincial, non-governmental and Aboriginal participants in the discourse early in this period, combined with unfolding events and ideas elsewhere, elicited a response from the federal government. In March 1990, the Standing Committee on Aboriginal Affairs released *Unfinished Business: An Agenda for All Canadians in the '90s*, a document that exposes the dominant problems and issues in Aboriginal/Canadian relations. The report was based primarily on hearings with representatives from a selection of groups and organizations involved in Aboriginal affairs, including the Assembly of First Nations, the Native Council of Canada, the Prairie Treaty Nations Alliance, the Inuit Tapirisat of Canada, the Indigenous Bar Association, the Canadian Bar Association, and the Canadian Human Rights Commission.

For the most part, the report reiterated the consensus on problem areas. Concerning claims, the committee reported the high level of dissatisfaction with government policy and efforts, noting that the slow rate of dealing with comprehensive and specific claims "is considered symptomatic of fundamental problems in policy and process."[142]

In response to these problems, the committee argued the need for an independent tribunal or commission to resolve or help resolve claims, believing that this mechanism might facilitate communication between participants in the claims process. The committee described government/Aboriginal dialogue in terms of the chronic repetition of known positions and found that "consultation has been sporadic and inconsistent and, from the aboriginal viewpoint, generally inadequate."[143]

The Committee acknowledged that Aboriginal affairs had entered the international scene. Since 1982, Aboriginal rights had moved to the international level, where Aboriginal organizations had alleged that Canada was violating international human right standards:

> In other words, policy development, legislative action and administrative action on aboriginal affairs in Canada are now

141. *Aboriginal Title and Rights Position Paper*, p. 1.

142. *Unfinished Business*, p. 3.

143. *Unfinished Business*, p. 11.

> increasingly taking place against an international backdrop that includes international norms of acceptable government action.[144]

At the same time, the federal government was tackling key land issues in Saskatchewan. The Federation of Saskatchewan Indian Nations and the Minister of Indian Affairs and Northern Development established the arm's length Office of the Treaty Commissioner on 8 June 1989, seven years after the establishment of the Manitoba Treaty Land Entitlement Commission. The treaty commissioner's task was to determine why the treaty land entitlement settlement – arrived at in 1976-77 and based on the Saskatchewan formula – had largely failed in practice and to recommend measures for the expedient resolution of land entitlement in Saskatchewan.

The Office of the Treaty Commissioner was established because treaty Indians and the government realized that "the Courts are not the best forum for the resolution of issues such as land entitlement. Such matters ought to be resolved by discussion and dialogue between the parties where differences can be accommodated in an atmosphere of mutual understanding and respect."[145]

The commissioner reviewed relevant documents and conducted interviews and discussions with FSIN members of the Battleford Treaty No. 6 Tribal Council and other chiefs and councils of the bands affected. He also consulted DIAND's specific claims branch and its regional lands, revenues and trusts offices. The process was designed to ensure that, "both parties Treaty Indians and the Federal Government - will be required to articulate their respective positions on Treaty issues",[146] although he also met with officials of the provincial Aboriginal affairs secretariat.

The treaty Commissioner's report, issued in May 1990, stated that under treaty there is an implicit recognition and acknowledgement of the government's obligations to settle land entitlement issues. Thus, there was no basis for dispute over this question:

> The history of land entitlement in this province cannot be ignored. Promises *were made* in 1976/77 and reaffirmed by successive Ministers of Indian Affairs through five successive administrations for a decade and more. These ought to be carried out not only with 'utmost good faith' but in a practical, realistic way. The entitlement Bands are unlikely to forget those promises.[147]

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144. *Unfinished Business*, p. 21.

145. *Report and Recommendations on Treaty Land Entitlement*, p. 19.

146. *Report and Recommendations on Treaty Land Entitlement*, p. 1.

147. *Report and Recommendations on Treaty Land Entitlement*, p. 52.

The commissioner adopted principles for evaluating the outstanding issues based on a 1989 decision of the British Columbia Court of Appeal in *Claxton* v. *Saanichton Marina Ltd.* and a 1982 decision of the Federal Court in *R.* v. *Blackfoot Band*.[148] Among the principles were these: treaties should be given a "fair, large and liberal construction in favour of the Indians"; they "must be construed not according to the technical meaning of their words, but in the sense that they would naturally be understood by the Indians"; and any ambiguity in wording should generally be interpreted in favour of the Indians.[149]

The commissioner proposed a new formula for land quantum – the 'equity' proposal – that would have provided less land than the originally agreed Saskatchewan formula of 1976-77. The commissioner recommended reconciling differences between the two formulas by means of a financial payment.

The Manitoba Treaty Land Entitlement Commission, among others, had argued that treaty entitlement is a Canadian responsibility and that Canada, therefore, rather than the province, should bear most if not all responsibility for payments. The Saskatchewan treaty commissioner took another view:

> This argument...overlooks the fact that the principal beneficiary of the extinguishment of the Indian title in Saskatchewan by the Treaties has been this Province and that Canada has paid Saskatchewan in excess of $55,000,000.00 in 'subsidies in lieu of land' pursuant to section 21 of the *Natural Resources Act*... For the federal government to now bear 100% of the cost is, in effect, expecting Canada to pay for the same land twice over.[150]

Another major court decision further shaped these policy discussions. On 31 May 1990, after six years of trial and appeal, the Supreme Court handed down a decision in *Sparrow*, the first case in which an Aboriginal right to fish was asserted on the basis of section 35 of the *Constitution Act, 1982*.[151] Contrary to the Crown's position, the Supreme Court ruled that before the *Constitution Act, 1982*, the right of the accused had been diminished by valid regulation, but it still existed – regulation did not imply

148. *Claxton* v. *Saanichton Marina Ltd.* (1988), 43 D.L.R. (4th) 481 (B.S.C.S.).; *R.* v. *Blackfoot Band* (1982), 3 C.N.L.R. 53 (F.C.T.D.).

149. *Report and Recommendations on Treaty Land Entitlement*, pp. 20-21.

150. *Report and Recommendations on Treaty Land Entitlement*, pp. 57-58.

151. *R.* v. *Sparrow* (1990), 70 D.L.R. (4th) 385 (S.C.C.). Section 35 recognizes and affirms existing Aboriginal and treaty rights and states that the "Aboriginal peoples of Canada" include Indian, Inuit and Métis peoples.

extinguishment. Moreover, the Aboriginal right exists despite the inability of Aboriginal people to maintain continuous use and occupancy of an area.

The decision was based in part on the government's fiduciary responsibility to Aboriginal people and extended the government's fiduciary obligations to encompass Aboriginal and treaty rights. The federal power to regulate must therefore be balanced with its fiduciary or trust obligations.[152] The court held that Parliament was thus limited in its power to diminish the existing right, under section 35, to fish for food and ceremonial purposes and that future legislation or regulation infringing on the right to fish would have to meet a test of justification based on, among other considerations, a valid objective for that law or regulation. Provisions necessary for proper management and conservation of a resource or for the public interest might be considered a valid objective.[153]

By 1990, other developments were under way at the provincial level, this time in Ontario. The Indian Commission of Ontario issued a discussion paper on land claims, following up on a commitment by the commission made to government and First Nations representatives at a tripartite meeting in the summer of 1990. Given the short time frame, the commission relied mainly on a literature review, but it also reviewed a small number of submissions from First Nations organizations and the Ontario Native Affairs Directorate and had direct discussions with individuals from First Nations organizations and government departments. In the foreword, the commission noted the critical tone of the document and of the discourse on claims processes generally:

> The tone of the analysis contained in the paper is frequently critical. To some extent, this reflects the preponderance of views in the literature relied upon. Largely, it reflects the fact that the current claims processes are not now working in Ontario.[154]

The commission argued that "current policies are out of step both with Indian expectations of the process and with existing law." It found that "virtually all of the active claims problems arise from government negotiators' failure to respond quickly or fairly to issues or requests arising in the negotiations (or their simple non-attendance at meetings)".[155]

More specifically, the discussion paper focused on three main problems: the government's conception of lawful obligation; its fiduciary obligations; and the conflict of interest issue. In the commission's view, "all the current

152. *Sparrow* at 386.

153. *Sparrow* at 387.

154. *Discussion Paper Regarding First Nation Land Claims*, p. 2.

155. *Discussion Paper Regarding First Nation Land Claims*, pp. 2, 10.

problems of denied access, grudging validation procedures, arbitrary principles of compensation, frustration and repeated delays can be traced to problems with the concept of lawful obligation as set out in the specific claims policy."[156] Moreover, the report explained the government's aversion to its fiduciary responsibility in the following terms:

> [G]overnment's aversion to trust responsibility, enforceable by the courts, can be attributed to several considerations: the desire to limit liability, to exclude court direction on appropriate conduct, continued reliance on limitation periods and, above all, a fear that past conduct might be measured by current morality.[157]

The paper also identified other problems with the policy and approach, such as vague wording and arbitrary interpretation, the lack of authority given government negotiators, the notion of extinguishment, and the lack of appeal mechanisms.

The report also addressed the role of the courts in the claims process, portraying litigation as a last resort:

> For most claimants...litigation is neither a supplement to negotiations nor a particularly effective threat that will bring government to the table. It is a distinctively alternative process to be resorted to only when all else has failed.[158]

The commission characterized the government's position as follows: "when litigation begins, negotiations end." The commission concluded that unless real problems and barriers are addressed, "the courts are *not* and cannot become a real alternative when negotiations break down. This furthers the very real perception that native claimants do not have meaningful access to justice in Canada."[159]

In its final assessment, the commission asserted that "the problems of policy and process have long been known. Failure to deal with them has caused the frustration and delay that have ground claims settlements in Ontario to a virtual halt". To resolve the situation, "the governments of Canada and Ontario should provide a claims resolution process that is at once fair, expeditious and comprehensive, as well as having some measure of finality — in the sense that all parties and, in particular Indian First Nations, should be left with the knowledge that the substance of their grievances has been addressed."[160]

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156. *Discussion Paper Regarding First Nation Land Claims*, p. 26.

157. *Discussion Paper Regarding First Nation Land Claims*, p. 28.

158. *Discussion Paper Regarding First Nation Land Claims*, p. 53.

159. *Discussion Paper Regarding First Nation Land Claims*, pp. 53, 56.

160. *Discussion Paper Regarding First Nation Land Claims*, pp. 21, 94.

The report explored several possibilities for improving the system. The commission discussed structural changes along a continuum between adjudication and negotiation, procedural changes (some of which also relied on notions of assisted negotiation), and administrative changes. Finally, the discussion paper presented recommendations to open up and expedite the process. The commission suggested that an independent body be established to supervise validation and compensation negotiations and that a "tripartite task force should be commissioned to develop a model for an Ontario Indian Claims Tribunal as a 'third alternative' for resolution of claims in this province."[161]

Another provincial government, British Columbia's, was active in the policy discourse on land and title. During this period, the Premier's Council on Native Affairs was meeting with First Nations and preparing its recommendations to the premier, who had established the council in July 1989. It was made up of three Aboriginal and three non-Aboriginal people, the minister of Native affairs and an MLA. The council's work involved discussions with 11 tribal councils and nine Aboriginal organizations. In its report of April 1991, the council commented on the centrality of land issues to its work:

> The unresolved land question loomed large over most of our meetings with tribal councils. Many aboriginal leaders seemed to consider this the fundamental issue facing their people. Their view appeared to be that settling land claims would demonstrate a commitment to respect aboriginal peoples and that this was a prerequisite for economic and social development, and attainment of self-sufficiency and self-determination.[162]

In discussing the land question and Aboriginal rights, the council acknowledged the role of litigation in resolving land rights issues, remarking that, "it is unfortunate that it has been left to the courts to define what these rights are."[163] The report cited the *Sparrow* decision as placing the burden of resolving land claims on the federal government:

> This suggests to the Council that the Government of Canada must quickly find a workable formula for fulfilling its fundamental responsibilities to deal with the outstanding land question in British Columbia.[164]

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161. *Discussion Paper Regarding First Nation Land Claims*, p. 106.

162. *Final Report: Premier's Council on Native Affairs*, p. 4.

163. *Final Report: Premier's Council on Native Affairs*, p. 5.

164. *Final Report: Premier's Council on Native Affairs*, p. 6.

The council recommended that the federal government rework its land claims policies to reflect new legal and geographic realities. In particular, this meant allowing more than one land claim to be settled at a time in British Columbia and accepting claims, as per the *Sparrow* decision, to traditional lands on which Aboriginal groups might not be able to demonstrate continuous use and occupancy. The council also recommended that the B.C. government establish a negotiating process for land claims, without accepting that this would dilute or diminish federal responsibility.[165]

The report also contained the provincial government's response to the council's earlier recommendations, presented in a report dated 8 August 1990, all of which were accepted by the premier. The provincial government argued that the federal government bears the ultimate responsibility for settlement, including financial responsibility. It also asserted, however, that the province holds title and management authority over the land and resources and should therefore be present at the negotiating table. Despite the provincial government's expressed commitment to partake in land claims negotiations with the federal government and First Nations, it would not recognize Aboriginal title:

> The Province of British Columbia cannot, however, accept as the basis for negotiation of claims the position put forward by some that we must recognize the legal concept of aboriginal title by which Indian groups claim absolute ownership of all land and resources within the province.[166]

Another document that would have a considerable impact on the discourse about land claims in British Columbia was the *Report of the British Columbia Claims Task Force*. Established in December 1990 on the suggestion of First Nations leaders, the task force was "to make recommendations on the scope of negotiations, the organization and process of negotiations, interim measures, and public education."[167]

First Nations leaders appointed three task force members, and the federal and provincial governments appointed two members each. Members met with individuals experienced in similar negotiations and examined written submissions. The task force issued its report in June 1991; in it they argued that land claims issues must be settled through "voluntary negotiations" in which First Nations, Canada, and British Columbia are engaged as "equal participants":

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165. *Final Report: Premier's Council on Native Affairs*, p. 6.

166. *Final Report: Premier's Council on Native Affairs*, p. 19.

167. *Report of the British Columbia Claims Task Force*, p. 15.

> The public and the courts have made it clear that the matters in contention are properly resolved politically, not by confrontation or violence, and not by resorting to the legal process. Whatever the issues may be, it is crystal clear that any new relationship must be achieved through voluntary negotiations, fairly conducted, in which the First Nations, Canada, and British Columbia are equal participants.[168]

The task force called for a new relationship forged through political negotiations. According to the report, these land claims negotiations would result in modern-day treaties:

> Once concluded, these treaties and the rights defined in them are protected under section 35 of the Constitution Act, 1982. They cannot be unilaterally amended. This is a fundamental principle in the new relationship – only those who make the treaty may change it.[169]

The task force also described the proposed role of the Crown in the new relationship in a manner reminiscent of the views of the Indian Commission of Ontario. The report stated clearly that the fiduciary duty of the Crown will continue in any new relationship:

> Important to the relationship between the Crown and aboriginal peoples is the concept of the fiduciary duty owed by the Crown. This duty is rooted in history and reflects the unique and special place of aboriginal peoples in Canada. The treaty-making process will define and clarify the terms of the new relationship between the Crown and aboriginal peoples but it cannot end the Crown's fiduciary duty. The determination of the extent to which fiduciary duty continues to exist is a matter for the courts.[170]

The report presents structures and procedures for resolving claims. Consistent with a fair, open and equitable process, the task force recommended that parties to the negotiation should be able to bring to the table any issues deemed important for establishing the new relationship. Negotiations would proceed through the now familiar framework agreements, agreement in principle and implementation phases, but participants would be assisted by a tripartite British Columbia Treaty Commission to monitor the progress and fairness of the process, manage funding for First Nations, and report on the same to First Nations and the provincial and federal governments. The commission would have no

168. *Report of the British Columbia Claims Task Force*, pp. 16-17.

169. *Report of the British Columbia Claims Task Force*, p. 17.

170. *Report of the British Columbia Claims Task Force*, p. 18.

authority to compel action, but with the approval of the parties to the negotiation, it might suggest options for dispute resolution. The task force also called for the three parties to engage in public education campaigns to prepare the public for the consequences of the negotiations.

DIAND formulated the federal government's response to the task force recommendations in *Building a New Relationship with First Nations in British Columbia: Canada's Response to the British Columbia Claims Task Force*. The response indicated the federal government's commitment to building a new relationship with First Nations in British Columbia and accepted all the task force's recommendations.

Despite its acceptance of the recommendations, the federal government's views on certain issues were more limited. It supported the proposed treaty commission, for instance: "Canada supports the Task Force view of a Commission which will facilitate, not negotiate." When it came to the scope of negotiations, however, the government qualified its earlier support for the recommendations. The task force recommended that all parties be at liberty to introduce any issue at the negotiation table that they saw as significant to the new relationship, but the federal response was that only "the full range of issues included under the federal comprehensive claims and self-government policies will be available for negotiation." Similarly, with regard to access, the task force recommended that the process be open to all First Nations in British Columbia. DIAND qualified its commitment, however, suggesting that the federal government still distinguished between various categories of claims:

> [T]ogether, Canada and First Nations have recently established a separate process to speed settlement of specific claims.... Canada intends that specific claims in B.C. will continue to be dealt with through that process, rather than by the B.C. Treaty Commission.[171]

This position was later cast into confusion, however, as DIAND declared,

> Canada is prepared to participate in further negotiations through the B.C. Treaty Commission process with those B.C. First Nations which are party to the Douglas Treaties.[172]

DIAND also stated that First Nations in areas under Treaty 8 were eligible, but that "land and financial benefits should be comparable to those available by adhesion to Treaty 8." Claims from these treaty First Nations should, according to past government policy, fall under the specific claims

171. *Building a New Relationship with First Nations in British Columbia*, pp. 3, 4.

172. *Building a New Relationship with First Nations in British Columbia*, p. 5.

mandate.[173] The federal government also demonstrated its adjustment to the legal realities imposed by the *Sparrow* decision, writing that "B.C. First Nations will not be required to demonstrate continuing use of resources in order to begin negotiations."[174]

Local governments also became involved in the discussion of British Columbia land claims. In September 1991, the Union of British Columbia Municipalities released *Local Government and Native Land Claims*, recommending that the UBCM play a role in the land claims negotiating process. The paper raised the question of third-party or stakeholder interests in claims settlement and how these interests should be represented. Despite opposition from First Nations and the federal government, the authors argued that "(e)xperience in other jurisdictions has shown that participation by local government in land claims negotiations can be critical to the success of the settlement."[175]

The UBCM recommended that local governments participate in the negotiations as observers, forming part of the provincial government team. Moreover, the report claimed that local governments are uniquely positioned to assist the process through engaging in public education to prepare communities for negotiations and to begin dialogue between non-Aboriginal communities and First Nations.

The events of the period – the *Sparrow* decision, developments in the B.C. claims process, the prime minister's 'four pillars',[176] and the confrontation at Kanesatake - led once again to a review of federal claims policies. In March 1993, DIAND released the *Federal Policy for the Settlement of Native Claims*, containing policy statements on comprehensive and specific claims.

The new policy drew on a three-year process of consultation and study. In October 1990, a meeting between the Indian affairs minister and 20 First Nations leaders produced recommendations for a working group to canvass

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173. Part of the area covered by Treaty 8 (1899) is in British Columbia. As such, claims involving lands covered by Treaty 8 would normally not be subject to comprehensive claim. Exceptions have been made, however, as in the case of the Dene claim in the Northwest Territories.

174. *Building a New Relationship with First Nations in British Columbia*, p. 5.

175. *Local Government and Native Land Claims*, p. ii.

176. On 25 September 1990, Prime Minister Mulroney announced a new course for relations between Canada and Aboriginal peoples. This new direction was to be based on what came to be known as the four pillars of contemporary federal policy on Aboriginal affairs: faster action to settle land claims, improved living conditions on Indian reserves, reform of the *Indian Act*, and seeking consensus on self-government.

the views of First Nations on specific claims. Known as the Chief's Committee on Specific Claims, its co-chairs presented a report to the minister on 14 December 1990. The report was approved by a special assembly of the Assembly of First Nations, the Chiefs of Ontario and the Indian Association of Alberta. Then, "on April 23, 1991 the Prime Minister announced the new $355 million federal government initiative on Specific Claims to resolve claims more quickly, efficiently and fairly."[177] The initiative increased personnel and funding for the settlement of specific claims. The 1993 policy statement contained the results of this process and provided the main elements of the new initiative.

The policy statement maintained the two categories of claims and defined them as follows:

> **Comprehensive Claims** - are based on the concept of continuing Aboriginal rights and title which have not been dealt with by treaty or other legal means.
>
> **Specific Claims** – arise from the alleged non-fulfilment of Indian treaties and other lawful obligations, or the improper administration of land and other assets under the *Indian Act* or formal agreements.[178]

The government's objective with regard to comprehensive claims was "to negotiate modern treaties that provide a clear, certain and long-lasting definition of rights to land and resources."[179]

The statement acknowledged more clearly than its 1986 predecessor the influence of the 1979 *Baker Lake* criteria for determining the acceptance of claims for negotiation. It also stated, however, that the criteria had been amended in response to the 1990 Supreme Court decision in *Sparrow*.[180]

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177. *Federal Policy for the Settlement of Native Claims*, p. 22.

178. *Federal Policy for the Settlement of Native Claims*, pp. 2-3.

179. *Federal Policy for the Settlement of Native Claims*, p. 5.

180. The criteria as proposed in 1993 were as follows:
    1. The Aboriginal group is, and was, an organized society.
    2. The organized society has occupied the specific territory over which it asserts Aboriginal title since time immemorial. The traditional use and occupancy of the territory must have been sufficient to be an established fact at the time of assertion of sovereignty by European nations.
    3. The occupation of the territory by the Aboriginal group was largely to the exclusion of other organized societies.
    4. The Aboriginal group can demonstrate some continuing current use and occupancy of the land for traditional purposes.
    5. The group's Aboriginal title and rights to resource use have not been dealt with by treaty.

The policy statement addressed the question of extinguishment, stating that the government is not seeking to extinguish all Aboriginal rights in claims settlements. Instead,

> in order to avoid ambiguity and uncertainty, the federal government seeks confirmation from Aboriginal groups that the rights written down in claims settlements are the full extent of their special rights related to the subjects of the agreements. To accomplish this, Aboriginal groups are asked to relinquish undefined Aboriginal rights which they may have with respect to lands or resources, in favour of the rights and other benefits which are written down in the settlement agreement.[181]

Much of the 1993 statement was a reiteration of the 1986 statement. The government maintained that it was willing to negotiate revenue sharing for non-renewable resources but clearly did not conceptualize sharing in the context of two equal players:

> resource revenue-sharing arrangements do not imply that claimant groups have resource ownership rights. The federal or provincial government will be responsible for resource revenue instruments and must maintain its ability to adjust the fiscal regime.[182]

This statement stands in contrast to the Coolican report of 1985, *Living Treaties, Lasting Agreements*, which recommended a new policy based on a relationship in which power and resources would be shared.

With regard to specific claims, the government's objective remained the discharge of its lawful obligations.[183] To explain earlier delays in

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6. Aboriginal title has not been eliminated by other lawful means. (pp. 5-6)

181. *Federal Policy for the Settlement of Native Claims*, p. 9.

182. *Federal Policy for the Settlement of Native Claims*, p. 10.

183. A lawful obligation could arise from any of the following circumstances:
   - non-fulfilment of a treaty or other agreement between Indians and the Crown;
   - breach of an obligation under the *Indian Act* or other statutes pertaining to Indians and the regulations under them;
   - breach of obligation arising out of government administration of Indian funds or other assets; or
   - illegal disposition of Indian land.

   or from the following:
   - failure to provide compensation for reserve lands taken or damaged by the federal government or any of its agencies under authority; or
   - fraud in connection with the acquisition or deposition of Indian reserve lands by employees or agents of the federal government where the fraud can be clearly demonstrated. (p. 19)

processing and settling claims, the policy statement pointed to "complexity and labour intensiveness":

> The total settlement budget of approximately $15 million a year did not seem to be a major constraint, since it was not fully utilized in some years. Rather, the complexity and labour intensiveness of the process were repeatedly under-estimated, so that the process within both DIAND and the Department of Justice tended to be understaffed.[184]

To expedite the process, the policy proposed establishment of an Indian Specific Claims Commission "to review disputes between claimant bands and the government to determine whether, under the terms of the policy, a lawful obligation has been established and whether the compensation criteria which are applicable are the most appropriate; and when both parties agree, to assist the government and claimant bands in arranging mediation on any aspect of the negotiations."[185]

The statement listed the three most significant complaints about the process to that date: that the process was too slow; that it was inherently unfair because of the government's multiple roles; and that its acceptance criteria were too restrictive. These complaints had been presented consistently in documents on land and title since Lloyd Barber's assessment of the land claims process in 1977. The recommendations of the Chiefs' Committee on Specific Claims were also presented, among them recommendations for more financial and human resources, an independent authority to ensure fairness, and a joint First Nations/government task force to examine the policy and the process.

The government also added some definition to the 'other claims' category, which had existed since the first policy statement in 1973 but had remained undefined. These are claims that "fall within the spirit of the comprehensive and specific claims policies, but do not meet the strict acceptance criteria of these two programs." The two basic categories are "Claims relating to aboriginal title" and "Claims relating to federal government responsibility". The former are claims where Aboriginal title has been dealt with legally but where "the circumstances of that process may give rise to legitimate concerns by the Aboriginal group and government."[186] The latter involve claims that do not represent a lawful obligation of the government but, nonetheless, represent legitimate grievances that could be resolved in a negotiated settlement.

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184. *Federal Policy for the Settlement of Native Claims*, p. 20.

185. *Federal Policy for the Settlement of Native Claims*, p. 23.

186. *Federal Policy for the Settlement of Native Claims*, p. 29.

Publication of the *Federal Policy for the Settlement of Native Claims* marked the end of this six-year period from 1987 to 1993. The documents of this period centred mainly on land claims. The discourse shifted somewhat, however, with the increasing influence of provincial governments and growing interest in land claims on the part of non-governmental organizations, such as the Canadian Bar Association, and local governments, as evidenced by the contribution of the Union of British Columbia Municipalities. The influence of these new actors, combined with the continuing role of the courts, placed considerable pressure on the federal government to improve the land claims process. The discourse of this period ended with the government's response to these pressures, in the form of yet another policy statement on the settlement of claims.

The documents on land and title in this most recent period reflect changes in the policy actors involved in the discourse, in the processes and structures used for policy discussion and development, and in the ideas and values that emerged to shape the discourse.

This final period of our review saw change in the intensity of the involvement of the discussants. Not only did the role of the provincial governments became more prominent, but the absence of significant documents by Aboriginal organizations was also noteworthy. Most of the Aboriginal documentation in this period addressed governance.[187]

In the land area, however, new additions to the cast of policy actors included independent sources such as the Canadian Bar Association and representatives of a third, local level of government, as reflected in the document by the Union of British Columbia Municipalities. The courts continued to play a key role, delivering the *Sparrow* decision on Aboriginal rights under section 35 of the constitution and providing a test for government's ability to infringe on those rights through legislation.

The claims process remained largely unchanged from the previous period, though the 1987 comprehensive claims policy made some amendments to conform to the reality of the new constitutional provisions. There was considerable evidence in the documents that interaction between government and Aboriginal peoples through the claims process had not improved significantly since the 1970s. The Quebec government continued to speak of standardizing treatment of all Aboriginal people. The Canadian Bar Association wrote of the continuing difficulties facing most Aboriginal groups in gaining access to the legal system, and the Standing Committee

187. See Chapter 5 for further discussion of documents prepared by Aboriginal organizations during these years.

on Aboriginal Affairs commented that "consultation has been sporadic and inconsistent and, from the aboriginal viewpoint, generally inadequate"[188].

Documents from provincial governments reflected their unwillingness to share power. Newfoundland's *Policy on Aboriginal Land Claims*, Alberta's *Alberta-Metis Settlements Accord*, Quebec's *The Basis of the Quebec Government's Policy on Aboriginal Peoples*, and British Columbia's *Final Report: Premier's Council on Native Affairs* all demonstrated efforts to maintain some control of the process and to defend provincial authority over lands and resources, despite political talk to the contrary. By contrast, Aboriginal organizations worked to protect themselves from infringement by federal and provincial authorities in areas perceived as falling under Aboriginal rights. The definition of Aboriginal rights was dominated by assertions of federal and provincial mandates, not by dialogue between the parties.

Jurisdictional controversy over responsibility for Aboriginal peoples had its analogue in the claims area. Some would say that such conflicts were the result of federal efforts to reduce expenditures. The federal government sought to reach cost-sharing agreements for claims compensation with provincial governments in this period. The federal government continued to deny jurisdiction over Métis people; they were still considered outside the parameters of section 91(24) of the *Constitution Act, 1867*. Non-status Indians were treated the same way as the Métis:

> Increasingly in the last few years the dividing line is shifting again, apparently to minimize federal expenditures. Thus, off-reserve status Indians are being viewed by the federal Government as primarily a provincial responsibility.[189]

Other problems raised in this period were similar to those raised in earlier periods: the government's strict reliance on its lawful obligation; its aversion, in the view of many Aboriginal and non-Aboriginal observers, to assuming the full burden of its trust obligation; and its narrowly defined rules for access to the claims process. Aboriginal organizations continued to emphasize their treaty and Aboriginal rights and to demand improvements in the claims process. Several groups recommended establishment of an independent tribunal to help resolve claims. Groups also called for a policy flexible enough to accommodate regional variations and individual circumstances.

In this period, then, change in policy actors, processes, and ideas shaped the discourse. The period saw a strong presence on the part of provincial governments, as well as other new policy actors. It also saw the

188. *Unfinished Business*, p. 11.

189. *Aboriginal Rights in Canada: An Agenda for Action*, p. 63.

continuing presence of the courts and the claims processes as they generated pressure on government policy. While in many ways the same ideas were being reviewed, there was evidence of new interpretations, especially in light of the *Sparrow* decision. The period ended with the federal government's response to these mounting pressures – the *Federal Policy for the Settlement of Native Claims*.

FINAL OBSERVATIONS

We have reviewed the key documents on Aboriginal lands and title in the context of four distinct periods in the development of the policy discourse:

- Pre-1973 – Aboriginal Title and a New Era of Treaty Making
- 1973-1982 – Organizing for Claims
- 1980-1987 – The Constitution and Land Claims
- 1987-1993 – Mounting Pressures

Throughout this review, we saw the impact of changing participants, changing processes and changing ideas on policy affecting land claims and recognition of Aboriginal title and land rights. This final section of the chapter allows us to look back on the development of the discourse and make observations that might inform future efforts in this area.

These observations are based on more than a quarter-century of documents. They cannot be seen, of course, as definitive conclusions, since the documentary record alone could not support such claims. For those concerned with empirical investigation of policy outcomes, as well as for those interested in just what was said, we offer these observations on particular aspects of the discourse:

- the apparent inability of government to articulate its underlying assumptions;
- the effects of governmental control of the means for discussion;
- the divergence in the assumptions held by governments and Aboriginal peoples;
- the influential role of the courts;
- the limitations of the land claims settlement process in achieving dialogue;
- questions concerning whose views are represented by the federal government; and
- the repercussions of the use of different processes on issues of language and representation.

Observation 1: The discourse on land title has taken place on three different levels: the process for pursuing land claims, the content of policy governing land claims settlements, and the assumptions underlying the positions of governments and Aboriginal peoples.

Government policy documents tend to move on the first two levels but not on the third; Aboriginal groups have progressed on all three levels. The documents reviewed in this chapter present, discuss, or criticize one or more of these three issues: the process of land claims; policy on land claims; and underlying assumptions. Government policy documents address both the process and the policy of resolving land claims. They do not articulate underlying assumptions about the Crown's relationship with Aboriginal peoples. Aboriginal and other actors have not been so evasive.

For the most part the government's public discourse on land and land-related issues has been restricted to the first two levels of discourse, in large part because the government is represented in our collection mainly by actual policy statements. There is sufficient evidence and interpretation in other documents, however, to notice the absence of a clear exposition of the federal government's philosophy and of the fundamental assumptions guiding its relationship with Aboriginal peoples. The one exception may well be the 1969 White Paper, which made clear the government's positions with regard to Aboriginal rights, the assumption of authority of the government, and the place of Aboriginal peoples in Canadian society.

Aboriginal groups, and most other participants in the discourse, have presented their views more consistently on all three levels. From the Red Paper (1970) and *Together Today For Our Children Tomorrow* (1973), to the Union of British Columbia Indian Chiefs' *Aboriginal Title and Rights Position Paper* (1989), Aboriginal organizations have provided their perspectives on how to improve the process and alter the policy, as well as explained the assumptions underlying their claims to land and other Aboriginal rights and their aspirations for change in the relationship with Canadian governments and society.

> **Observation 2**: Aboriginal people and the federal government (as well as the courts and provincial governments) have not had a common view of the government's fundamental assumption of sovereignty or its unilateral control of the federal/Aboriginal relationship. The documentary record does not indicate that the government has engaged in, permitted, or responded to sincere attempts to clarify and resolve the differences and problems that follow from this assumption.

This builds on the previous observation. Throughout the documents, the government clearly asserts its sovereignty and authority over the land, its use and revenues from it. It also asserts authority and control over the mechanisms available to Aboriginal peoples and organizations to pursue legal and material recognition of their Aboriginal title and rights. The DIAND task force that reviewed comprehensive claims policy in 1985 provided the only statement of principles guiding the government's policies. Those pertaining to land were the maintenance of the territorial integrity of

Canada and the effective exercise of Canadian sovereignty over "the entire Canadian territory".[190] We are left to assume that the federal government sees its policies as the best way to achieve these objectives. Nowhere does the government offer to involve its citizens or Aboriginal people in constructing possible alternatives.

Both federal and provincial government statements are filled with language connoting that Aboriginal rights are not inherent but are given or granted by government. Moreover, the language implies that the government has the unilateral authority to make decisions regarding and on behalf of Aboriginal people, rather than a responsibility to make decisions with them.

The government's assumption of authority and position is supported by the historical compliance of the Canadian judicial tradition, which is based on the following assumption:

> that any European colonial power, simply by landing on and laying claim to lands previously undiscovered by white European society, became automatically the sovereign of this 'newly discovered' land. Occupation was taken to confirm that right. Rather than obligations which came with the assumption of sovereignty, native rights were conceived as matters of prerogative grace by both government and courts.[191]

This tradition is reinforced by subsequent court rulings and legislation, such as the *Indian Act*, none of which involved Aboriginal presence or representation in their formulation.

Aboriginal actors have consistently asserted a contrasting vision. They have maintained that Aboriginal peoples retain sovereignty over their traditional lands, unless ceded under treaty, and that their rights do not derive from any government or constitution but rather from their Aboriginal inheritance from the Creator. Nonetheless, the documents illustrate that Aboriginal rights are practically meaningless without government or other recognition and enforcement. Thus, the aim of the discourse and the process as represented by the Aboriginal perspective has been, first, to achieve government recognition of subsisting Aboriginal rights to land and self-determination and, second, to achieve legislative or, better yet, constitutional protection, and hence enforcement, of those rights.

The government's purpose in pursuing land claims is to arrive at a clearly defined assignment of rights. The other actors do not oppose this in the public record. However, if claims settlements and the status quo relationship are not based on just means and do not, because they are one-

190. *Living Treaties, Lasting Agreements*, p. 31.

191. *Indian Claims in Canada: An Essay and Bibliography*, pp. 18-19.

sided and unfair, meet the aspirations of Aboriginal peoples, they will not solve the problems of the current relationship. Part of the solution should be achieving an acceptable, common understanding of rights, but it should also include achieving an acceptable, common understanding of sovereignty — the essence of the relationship.

> **Observation 3**: Despite political rhetoric embracing justice and equity for Aboriginal peoples, the guiding principle of government land claims policy has been to do no more than meet the minimum requirements of government's interpretation of its obligations under the law. Despite this, claims agreements have created the basis for new political relationships between Aboriginal peoples and the Crown.

The government's tenacious hold on the doctrine of legal obligations in settling land claims has frustrated Aboriginal negotiators and has been a preoccupation in the discourse surrounding land and title. The following quotation from the 1982 specific claims policy, *Outstanding Business*, illustrates the discontinuity between the professed aspirations of government claims policy and the practical formulation:

> [Specific claims] have represented, over a long period of our history, outstanding business between Indians and government which for the sake of justice, equity and prosperity now must be settled without further delay.[192]

The statement later presents the expanded range of circumstances the government is willing to acknowledge in accepting claims submissions, that is, the government was previously not willing to consider claims based on these circumstances:

> (i) Failure to provide compensations for reserve lands taken or damaged by the federal government or any of its agencies under authority.
>
> (ii) Fraud in connection with the acquisition or disposition of Indian reserve land by employees or agents of the federal government, in cases where the fraud can be clearly demonstrated.[193]

One explanation for the government's approach is that it has exhibited "considerable caution about establishing precedents incapable of consistent application, primarily because of cost."[194]

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192. *Outstanding Business*, p. 3.

193. *Outstanding Business*, p. 20.

194. *Discussion Paper Regarding First Nation Land Claims*, p. 25.

The rejection of comprehensive claims applications from areas where the government regards the claimant group's right to title as having been superseded by law is another example of the legal doctrine behind the claims policy. The clear example in the documents is the efforts of Mi'kmaq of Newfoundland to negotiate their claim. Many of the policy review documents in this collection recommend reversal of this position.

> **Observation 4**: The courts have had a significant influence on the evolution of the government's claims policy. In the absence of any political force strong enough to elicit change in the government's policy, the courts have been the only authority recognized by the government.

The government is strongly committed to the principle of settling claims to meet its lawful obligations. The documents illustrate how the government's conception of its lawful obligations is tightly correlated with the legal boundaries established by the courts. It is readily apparent from the documents that the government has consistently altered its claims policies or procedures to remain consistent with courts decisions.

This situation is readily observable in the August 1973 statement of claims policy, which followed the *Calder* decision. In 1979, the Federal Court's *Baker Lake* decision, with its criteria for determining the existence of Aboriginal title, gave impetus to the restatement of comprehensive and specific claims policies in *In All Fairness* (1981) and *Outstanding Business* (1982). Although not the product of court decision, the *Constitution Act, 1982* forced a re-evaluation of policy, and to this was added the consequences of the Supreme Court's decision in *Guerin*. More recently, the 1990 *Sparrow* decision was followed, in 1991, by the corresponding iteration of the government's claims policy, finally published as *Federal Policy for the Settlement of Native Claims* in 1993. Similarly, the 1990 *Sioui* decision has had far-reaching effects on the official view of treaty rights.

In addition to setting standards, the courts have provided an alternative to the negotiated claims settlement process. Many would agree with the Indian Commission of Ontario that

> For most claimants...litigation is neither a supplement to negotiations nor a particularly effective threat that will bring government to the table. It is a distinctively alternative process to be resorted to only when all else has failed.[195]

It is perhaps in Aboriginal organizations' interest to use the courts to establish legal standards for the government's conduct of its relations and

195. *Discussion Paper Regarding First Nation Land Claims*, p. 53.

fiduciary obligations, for "without such standards they would have a diminished ability to lay claims against the Crown."[196] Along with this effect, of course, resort to the courts carries with it significant disadvantages. Generally, there has been a tendency to displace political initiatives by legal resort, with a consequent shift of power from political leaders to lawyers or to political leaders who are lawyers. Furthermore, as judicial language and legal concepts are used to express Aboriginal peoples' views and goals, they subtly change shared meanings and may limit communication between people at the grass roots and on the legal front lines.

> **Observation 5**: The negotiated claims settlement process has not created a dialogue between government and Aboriginal organizations. Rather it has produced a limited exchange over a tightly controlled, predetermined set of issues.

The Aboriginal documents and many of the policy review documents from federally sponsored task forces and commissions comment on the limited nature of the claims negotiation process. Many of the limitations are attributed to the government's strict control of the process and the narrow scope of negotiations.

These tight controls can be explained in part by the fact that the process is conducted by government officials with no authority to discuss larger issues. Aboriginal negotiators never get to meet with higher level political decision makers. It also illustrates the degree to which Aboriginal peoples are handicapped by pressures to be more homogenous in circumstances and outlook. The claims process is not entered into by large representative Aboriginal organizations, which might have greater leverage to raise certain issues than would smaller bands and tribal councils.[197]

Although the claims process is now a long-standing, formal institution of interaction between the government and Aboriginal organizations, it is essentially a one-time, start-to-finish process with distinct stages. It is designed to produce a specific outcome. It is not a continuing process of interaction designed to gather ideas and develop mutually beneficial solutions.

> **Observation 6**: Most of the documents prepared by independent actors express views that are more similar to the Aboriginal perspective on process, policy, and perhaps even assumptions than they are to the

196. *Discussion Paper Regarding First Nation Land Claims*, p. 28.

197. The North can be seen as an exception.

> federal government's views. This observation raises the question of whose views the federal government's policies represent.

The views expressed in the documents constitute a continuum between Aboriginal perspectives and the federal government's policy statements. Aboriginal organizations are seen to advocate greater openness in acceptance of claims, a less legalistic approach, and a greater recognition of Aboriginal rights to lands and resources. These kinds of views are generally supported by other participants in the discourse, including the Canadian Bar Association, the Berger inquiry, the Indian Claims Commissioner, the Standing Committee on Aboriginal Affairs, the Indian Commission of Ontario and others. They argue in fact that most non-Aboriginal Canadians are either not aware or not in agreement with government positions. For example, according to the Indian Commission of Ontario,

> Canadian governments have made little effort to inform the public that Indian land claims are not vague grievances arising from the fact that aboriginal society has been "overtaken by progress"... While many Canadians probably suspect, as the Supreme Court of Canada recently recognized in *R.* v. *Sparrow*, that Canadian governments have long ignored Indian legal rights, most would be shocked to learn that as recently as 1951 a lawyer could be jailed if he was hired by an Indian or an Indian band to press a land claim in the court.[198]

By contrast, the federal government is often joined only by provincial governments when it insists on granting nothing that would not conform to existing laws or that would appear to weaken the authority or sovereignty of governments over land, land use, resources and revenues derived from them. A closer look at investigations such as the Berger and Lysyk pipeline inquiries and some of the environmental commissions and task forces reveals, however, that there are others who support government positions: cattle rancher associations, oil exploration firms, forestry interests, mining firms, and some of the individuals who work in these industries, as well as municipal governments and environmental groups with economic or other interests in the land.

The documentary record does not contain a clear representation of the opinions of Canadians in general on questions of Aboriginal rights and title. There is a greater representation of the opinions of Aboriginal people, but only to the extent that individual statements of claims, position papers and other documents are based on consultation in the sponsoring Aboriginal group.

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198. *Discussion Paper Regarding First Nation Land Claims*, p. 4.

Observation 7: Three processes have been prominent in the discourse on land and title: the claims process; the legal process; and the constitutional negotiation process. Each uses language in a different way and has different consequences for the representation of Aboriginal interests.

These three processes have different implications for the precision of language and for the adequacy of representation. We see, for instance, that each expressed land and title policy in a different way. The courts have in some cases provided more definition of difficult terms and concepts – of the government's fiduciary obligations in *Sparrow*, for example, and of Aboriginal title in *Baker Lake*. Claims and constitutional processes, on the other hand, use words in a strategic way. The government, for example, in earlier years, required the 'extinguishment' of Aboriginal title on the settlement of claims; it did not, however, recognize Aboriginal 'title'. In this way, the government spoke of extinguishing something it had never recognized.

Policy commentators, particularly Aboriginal people, are represented differently, depending on whether they are articulating their positions in the claims, courts or constitutional arenas. In the claims process, community leaders directly represent the interests of their members in negotiations with the government, and these leaders are accountable through provisions for community ratification of the negotiated agreement. Even in this forum, however, interests may be aggregated in a manner that poses problems for the adequacy of representation; we noted earlier that four of the twelve Yukon bands refused to ratify the land claims agreement in principle negotiated by the CYI.

In the courts, those who wage a legal battle may be Aboriginal people or communities. Those who actually direct the case, however, are often non-Aboriginal lawyers from outside the community, who are retained to represent the interests of their clients. It can be argued that someone with the skills needed to manoeuvre a legal issue through the courts may not have the experience necessary to understand fully or to internalize the client's perspective.

Finally, in the constitutional process, we see a highly centralized process of representation, with the AFN, the NCC, the MNC and the ITC representing the interests of all Aboriginal peoples, despite calls from many communities and groups, such as the NWAC, that their interests are not being represented. In the constitutional arena, issues of representation become more complex, as seen in the attempts of Aboriginal groups to have their interests represented separately at the constitutional table. One prominent example is Métis people, who severed their ties with the Native Council of Canada and formed the Métis National Council. The MNC was first welcomed to the constitutional table at the first ministers conference on

Aboriginal constitutional matters on 15 March 1983. The invitation to the MNC raises interesting questions of representation:

> Since only three associations of Metis from the prairie provinces made up the MNC it appears incontrovertible that the Prime Minister had made certain assumptions about a particular aboriginal label. Those assumptions were that the Metis reside in the prairie provinces and that prairie Metis peoples were not properly represented by the NCC. The first assumption is not correct, the second assumption suited federal government purposes. The curtain was raised on a debate which has detracted significantly from the identification and definition of the rights of aboriginal peoples which was the mandated purpose of the conference. This debate centers on the question, "who are Metis people in terms of a constitutional definition and which delegation speaks for the Metis?"[199]

Other Aboriginal groups, such as the Prairie Treaty Nations Alliance and the Native Women's Association of Canada were not successful in their attempts to secure a separate voice.

CONCLUSION

In this chapter we traced the development of the discourse on Aboriginal land and title through documents published since the Hawthorn report of 1966-67. We saw how changes in participants, in the processes they used to advance their positions, and in the ideas and values they brought to discussions have shaped the policy discourse in this area. Finally, we offered some observations about the discourse in the hope that such insights might inform future discourse and foster the achievement of dialogue on land and title.

In many ways, issues of land and title and governance are inseparable. Similarly, the discourse on land and title is largely inseparable from that on Aboriginal governance. We have attempted to define the parameters in both policy areas to avoid duplication. While this chapter addressed treaties, land claims and Aboriginal rights to land, the next chapter examines foundations and models for Aboriginal governance, the means by which self-government might be achieved, and the structures and processes by which it might operate.

199. Gaffney, Gould and Semple, p. 35.

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Chapter 5
The Discourse on Governance

GOVERNANCE ISSUES HAVE BEEN PARTICULARLY PROMINENT in the discourse on Aboriginal policy since the Hawthorn report. Discussion of municipal models of Aboriginal governance, devolution and delegation, the inherent right of self-government, and public government has been at the forefront in the development of new relationships between Aboriginal and non-Aboriginal people in Canada.

This chapter focuses on existing and proposed constitutional, legislative and administrative frameworks for Aboriginal governance. We trace the evolution of the discourse on Aboriginal governance through documents published since the Hawthorn report, canvassing them for Aboriginal, government and other perspectives on self-government as a treaty or Aboriginal right, proposed models for the relationship between Aboriginal peoples and governments, and administrative arrangements for program and service delivery.

The documents encompass the full spectrum of views on governance presented by groups representing different interests; they address governance from the perspectives of First Nations, Inuit, Metis,[1] non-status Indian (and Métis), and urban and northern Aboriginal peoples. Some documents – those of provincial governments and non-governmental organizations – do not concern themselves with a specific Aboriginal group but deal with Aboriginal issues generally.

Our examination of the documents is presented in two parts. The next section of the chapter traces developments in Aboriginal governance discourse over a 25-year period in terms of who was participating in the discourse, how they were participating, and what ideas were being expressed. Then we present some observations about the discourse that we hope will help to explain the past and inform the future.

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1. We refer here to Métis people of the western and northern regions of Canada, the people who identify with the western Métis Nation, whose origins are in the Red River settlement and other historical Métis communities in western Canada, and who trace their rights to the *Manitoba Act, 1870* or the *Dominion Lands Act*. On the other hand, many people of Aboriginal origin identify themselves as Métis on the basis of mixed Aboriginal and non-Aboriginal origins. Many of these people live in central and eastern Canada. Their concerns are addressed in documents reviewed with those of non-status Indian, urban and off-reserve Aboriginal peoples.

THE DEVELOPMENT OF DISCOURSE THROUGH DOCUMENTS

Our review considers four periods: 1966-1979; 1979-1983; 1983-1990; and 1991-92. Of the 222 documents reviewed, more than 60 dealt mainly with governance in some sense. This chapter relies on the subset of documents that we believe have been particularly influential in advancing the discourse on Aboriginal governance.

The documents chosen for review encompass all regions of Canada and all Aboriginal groups. While the treaty Indians from the prairie provinces are particularly prominent, later periods reveal a surge of Métis activity.[2] There are also a number of document dealing with governance in the North, though only one from our collection of 222 documents deals specifically with Inuit concerns, and in this instance, the concerns of Inuit in Quebec.[3] Because of this gap in the collection, *Building Nunavut* is also reviewed in this chapter.[4]

1966-1979: INDIAN GOVERNMENT AND THE IMPACT OF THE WHITE PAPER

Important points of reference in the policy discourse on Aboriginal governance during this period include the Hawthorn report, the White Paper, *Citizens Plus*, and *Wahbung Our Tomorrows*. These reports focus exclusively on Indian government. Governance in the territorial North was also discussed in this period, with the publication of the Carrothers report.

The Hawthorn report was submitted to the minister of Indian affairs in two volumes in 1966 and 1967. The study was commissioned at a time of challenges to unequal distribution of power and material wealth, greater assertions of rights, and growing political activism on the part of Aboriginal people, particularly Indian people. Furthermore, the sub-standard social and economic conditions of Indian people compared to the rest of the population were becoming increasingly conspicuous. In response to these factors, the minister of citizenship and immigration commissioned a group of consultants, led by H.B. Hawthorn, to study the situation of Indians in Canada. In preparing the report, the research team reviewed files, sent out survey questionnaires, and visited a number of reserves.

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2. While the Métis were particularly prominent in documents of the late 1980s and early 1990s selected for review, all groups were active in the discourse.

3. Société Makivik, *Le besoin de réévaluer et d'améliorer les relations Québec-Inuit* (1983).

4. *Building Nunavut* was not among the 222 documents reviewed by the Centre for Policy and Program Assessment for the Royal Commission on Aboriginal Peoples, but instead, added to our collection to compensate for the lack of Inuit documents in our sample selection.

The Hawthorn report rejected assimilation and integration as policy objectives and instead put forth the idea of "citizens plus":

> Indians 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.[5]

Hawthorn believed that Indians had a right to be treated as citizens plus by virtue of "promises made to them and expectations they were encouraged to hold, and from the simple fact that they once used and occupied a country to which others came to gain enormous wealth in which the Indians have shared little".[6] He advocated the extension of provincial services to Indians where desirable, the pooling and redistribution of government resources to overcome massive disparities, and provincial recognition of Indians as provincial citizens together with increased provincial resources for Indians through federal-provincial fiscal arrangements.

Local self-government arrangements were encouraged on the basis that new forms of local government were needed. These would differ from local governments established by the *Indian Act* and from conventional municipal models. They would blend provincial-municipal models and *Indian Act* models, placing municipal-type governments in a federal legislative context. The Hawthorn vision of Indian local self-government is illustrated in the following recommendation:

> The partial and ad hoc integration of Indian communities into the provincial municipal framework should be deliberately and aggressively pursued while leaving the organizational, legal and political structure of Indian communities rooted in the Indian Act.[7]

According to the report, a modified *Indian Act* should be seen as the legislative vehicle for development of Indian local government, and the Indian affairs branch should have an appropriate role in the development of "self-governing political systems".

Hawthorn did not envisage any form of Indian government based on Indian political traditions. At this time, 'self-government' was understood to mean municipal and non-Indian structures and procedures of government, integrated with existing federal and provincial systems.

Following publication of the Hawthorn report came preparation of the *Statement of the Government of Canada on Indian Policy* (the 1969 White

5. Hawthorn report, volume 1, p. 13.

6. Hawthorn, volume 1, p. 6.

7. Hawthorn, volume 1, p. 18.

Paper) by the Department of Indian Affairs and Northern Development.[8] The White Paper was said to be based on "a series of extensive consultations with the Indian people, and on the knowledge and experience of many people both in and out of government. This review was a response to things said by the Indian people at the consultation meetings which began a year ago and culminated in a meeting in Ottawa".[9]

The White Paper rejected Hawthorn's call to recognize Indians as citizens plus. Instead it regarded Indians as ordinary citizens, with neither special status based on aboriginality nor claim to different administrative arrangements or legal relationships. The document dismissed special treatment in favour of "equal" treatment:

> Indian relations with other Canadians began with special treatment by government and society, and special treatment has been the rule since Europeans first settled in Canada. Special treatment has made of the Indians a community disadvantaged and apart. Obviously, the course of history must be changed....
>
> The Government believes that its policies must lead to the full, free and non-discriminatory participation of the Indian people in Canadian society. Such a goal requires a break with the past. It requires that the Indian people's role of dependence be replaced by a role of equal status, opportunity and responsibility, a role they can share with all other Canadians.[10]

The White Paper would have limited federal responsibility for Indians, most notably in program and service delivery, and placed new responsibilities on provincial governments. The White Paper's suggestion that some aspects of federal jurisdiction over Aboriginal peoples be transferred to the provinces was also seen as an opening for provinces seeking greater autonomy. The report of Quebec's Dorion commission — published in 1971 in the wake of the White Paper — recommended that the government urge the federal government to act quickly on the proposal for jurisdictional transfer and that an agreement be struck between Canada, Quebec and Aboriginal groups in the province to affirm the province's territorial integrity.[11]

Self-government was seen within a provincial legislative framework, but without special protections for communities and their lands. In fact, the White Paper said little about governance, instead advocating integration of

8. For a complete discussion, see Weaver, *Making Canadian Indian Policy.*

9. White Paper, p. 6.

10. White Paper, pp. 3, 5.

11. *Rapport de la commission d'étude sur l'intégrité du territoire du Québec,* Volume 4, p. 401.

program and service delivery with provincial mechanisms. The federal government did not consider questions of governance or self-government beyond these arrangements.

Indian organizations responded strongly to the White Paper. The Indian Association of Alberta published *Citizens Plus* in 1970, and the Manitoba Indian Brotherhood released *Wahbung Our Tomorrows* in 1971. *Citizens Plus* was intended as a direct rebuttal of the White Paper. *Wahbung Our Tomorrows*, while no doubt prompted by the policy statement, was a less direct response. The controversy ignited by the White Paper – as evident in these documents – led - eventually to its abandonment.

Citizens Plus refers to the concept developed in the Hawthorn report that Indians have rights and duties of citizenship in Canada in addition to rights as the original inhabitants of Canada. The report rejected federal attempts to renege on its treaty obligations and responsibilities set out in section 91(24) of the *Constitution Act, 1867*. The document was highly critical of federal attempts at consultation, particularly the White Paper's claim that its policy was a response to what was heard from Indian people during consultations. It revealed a high degree of scepticism about the sincerity and good faith of the government:

> In Alberta, we have told the Federal Minister of Indian Affairs that we do not wish to discuss his White Paper with him until we reach a position where we can bring forth viable alternatives because we know that his paper is wrong and that it will harm our people. We refused to meet him on his White Paper because we have been stung and hurt by his concept of consultation... We felt that with this concept of consultation held by the Minister and his department that if we met with them to discuss the content of his White Paper without being fully prepared, that even if we just talked about the weather, he would turn around and tell Parliament and the Canadian public that we accepted his White Paper.[12]

Citizens Plus sets out an understanding of treaties and treaty rights that recognizes Indians' special legal status. Its view of programs and services is derived from this status. According to the report, programs and services, "are not 'handouts' because the Indian people paid for them by surrendering their lands. The Federal government is bound to provide the actual services relating to education, welfare, health and economic development."[13] By contrast, governance is understood as local control, tribal administration and involvement in local works. It is not discussed specifically as a treaty right:

12. Indian Association of Alberta, *Citizens Plus*, p. 1.

13. *Citizens Plus*, p. 7.

> Many tribes have now had valuable experience in managing their local government affairs. Other tribes are now ready to accept greater responsibility. We believe that there should be a commitment from the government that, as time passes and Indians choose, we should be given those responsibilities we feel we are capable of taking on. The tribe should choose its own arrangements for this local government.[14]

Wahbung Our Tomorrows is presented as the position of four Indian Tribes of Manitoba, which, "through their government", represent the views of the Manitoba Indian Brotherhood. The stated objective is to set out what the Indian Tribes of Manitoba see as the way to a just, honourable and mutually satisfactory relationship with the peoples of Canada, based on restructured treaties and respect for the trust relationship:

> We would emphasize for the purpose of clarity and to avoid any misunderstanding that the Indian tribes of Manitoba are committed to the belief that our rights, both aboriginal and treaty, emanate from our sovereignty as a nation of people. Our relationships with the state have their roots in negotiation between two sovereign peoples.
>
> There can be no delegation of authority or responsibility by the federal state to the province without our consent. There can be no deviation or alternation in this relationship without mutual consent. The Indian people enjoy "special status" conferred by recognition of our historic title that cannot be impaired, altered or compromised by federal-provincial collusion or consent.
>
> We regard this relationship as sacred and inviolate.[15]

Local control over programs and services under a fundamentally amended *Indian Act* and greater independence leading to self-sufficiency are also seen as key elements in the "transition from paternalism to community self-sufficiency"[16] and in the achievement of a new and satisfactory relationship.

The document declares that "our language is the language of change". This reflects a determination to remain an identifiable people and to refuse to have their lives directed by others. There are references to the *International Covenant on Human Rights*, especially with regard to the right of self-determination and the disposition of resources and natural wealth without interference.

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14. *Citizens Plus*, p. 14.
15. Indian Tribes of Manitoba, *Wahbung Our Tomorrows*, p. xvii.
16. *Wahbung Our Tomorrows*, p. xvi.

Other treaty Indian organizations participated in the post-White Paper discourse. *Indian Government* was published by the Federation of Saskatchewan Indian Nations in 1977, at a time when the FSIN and other political organizations were preparing to articulate their positions on Aboriginal rights, self-government and their interpretation of historical and contemporary relationships at a national level. In contrast to *Citizens Plus* and *Wahbung Our Tomorrows*, which were intended for a non-Indian government audience, *Indian Government* appears to have been developed as an internal discussion document, providing the basis for the development of comprehensive positions on Indian government in preparation for anticipated discussions with the federal government. In many ways, this document laid the foundations for Indian understanding of their rights and aspirations, given that the positions set out in it were expressed consistently in the later documents of the 1980s and '90s.

Indian Government identified the main points of departure for reassertion of Indian government authority based on interpretations of the nature and extent of Indian sovereignty, Indian government, treaties and federal/Indian relations. The document asserted that these principles are shared by all Indians in Canada:

> No one can change the Indian belief. We are Nations; we have Governments. Within the spirit and the meaning of the Treaties, all Indians across Canada have the same fundamental and basic principles upon which to continue to build their Governments ever stronger.[17]

The principles recognized in this document are similar to those in many subsequent documents from treaty First Nations:

- that Indian nations historically are self-governing
- that section 91(24) gives the federal government the authority to regulate relations with Indian nations but not regulate their internal affairs
- that Indian government powers have been suppressed and eroded by legislative and administrative actions of Canada
- that Indian government is greater than what is recognized or now exercised and cannot be delegated
- that treaties reserve a complete set of rights, including the right to be self-governing and to control Indian lands and resources without federal interference
- that treaties take precedence over provincial and federal laws
- that the trust relationship imposes fiduciary obligations on the trustee, but the federal government has mismanaged this relationship

17. Federation of Saskatchewan Indian Nations, *Indian Government*, p. 130.

- that Indians have inalienable rights, including the "inherent sovereignty of Indian Nations, the right to self-government, jurisdiction over their lands and citizens and the power to enforce the terms of the Treaties".[18]

The document defines sovereignty as "the right to self-government. It is inherited and it comes from the people. We have never surrendered this right and we were never defeated militarily." Sovereignty, according to the FSIN, is both "inherent and absolute":

> Indian governments traditionally exercised the powers of sovereign nations and the most fundamental right of a sovereign nation is the right to govern its people and territory under its own laws and customs.
>
> "Inherent" means that the right of self-government was not granted by Parliament or any other branch of any foreign government. Indian have always had that right and the Treaties re-enforce this position.[19]

The discourse on governance in the North also reached a turning point during this period with publication of the *Report of the Advisory Commission on the Development of Government in the Northwest Territories* (the Carrothers report) by the minister responsible for northern development in 1966.

The Carrothers report was the product of a public consultation in the Northwest Territories. It recognized the "uniqueness" and the "unpredictability"[20] of political development in the Northwest Territories and proposed a government structure that would be flexible enough to be modified as the future of the North unfolded. It dealt with issues of self-government as a territorial, rather than an Aboriginal matter, looking at greater self-government for the Northwest Territories in general and recommending the same forms of local government arrangements for Indian, "Eskimo" and non-Aboriginal populations:

> In settlements in the west which are predominantly Indian, where the residents are accustomed to a form of government through elected or hereditary chiefs, it should be a comparatively straightforward matter to adopt the system of the local council. In settlements in the north and east which are predominantly Eskimo, there is not the same tradition of government; there is, nonetheless,

18. *Indian Government*, pp. 21-23. The document sets out a total of 16 principles.

19. *Indian Government*, pp. 4, 49, 55.

20. *Report of the Advisory Commission on the Development of Government in the Northwest Territories* (Carrothers), p. 140.

> a contemporary experience with advisory councils, community councils, and cooperatives. Members of the white population of the Territories should have no difficulty adapting to this form of local government.[21]

Significantly, self-government was addressed in terms of the non-Aboriginal population, rather than the Indian and Inuit populations: "The claim of the white population to greater self-government, and, indeed, to patriation of their government, is one of great weight".[22] The report recommended against the division of the Northwest Territories and proposed a government structure, agreed upon by the Northwest Territories and the Department of Indian Affairs and Northern Development, for administration of Indian and Inuit affairs by the territorial government.

The policy discourse during this period, then, was dominated by two participants: the federal minister and department responsible for Indian affairs, and provincial — mainly treaty — Indian organizations from the prairies. Absent from the discourse are provincial governments, Métis, non-status Indian and Inuit organizations, and other federal bodies, such as the House of Commons committee, which would play a role later.

We also see from the documents that processes were largely informal; no structures or mechanisms were in place to establish or promote dialogue. One exception not discussed in the document collection was the Indian Commission of Ontario, established during this period. The commission can be seen as a landmark in the discourse, in that was an intergovernmental mechanism with quasi-dispute resolution functions. The commission introduced a more formalized tripartite environment and facilitated negotiation and discussion on a range of issues, from land claims to self-government.[23]

The discourse of 1966-1979 was noteworthy for its almost exclusive preoccupation with Indian government. We see attempts by the federal government to develop liberal or progressive policies — new policies — through which to improve the situation of Indians. By contrast, Indian actors were asserting their understanding of treaties and treaty rights. All shared a vision of a special trust relationship with the Crown, as embodied in the treaties. This was combined with a certain duality of views on the part of Indian organizations concerning self-government. Organizations such as the Indian Association of Alberta and the Manitoba Indian Brotherhood presented increasingly assertive views of governance depicted as increased

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21. Carrothers, p. 194.

22. Carrothers, p. 146.

23. The Indian Commission of Ontario is also discussed in Chapter 4.

local control over programs and services within an existing or modified legislative framework. By contrast the Federation of Saskatchewan Indian Nations asserted inherent authority, recognition of the original nature of government authority, and protection and non-derogation of this authority in treaties.

1979-1983: THE DISCOURSE BROADENS

Discourse on Indian governance over the next few years was shaped largely by reports from status and non-status Indian and Métis regional and national organizations and from special inquiries into specific issues.[24] Noteworthy during this period was the introduction of Aboriginal perspectives other those of status or treaty First Nations. Whereas First Nations organizations continued to play an important role in the discourse, we see the emergence of concerns expressed by Métis, Inuit and non-status Indian organizations as well.

In 1979, the FSIN published another document, *Indian Treaty Rights: The Spirit and Intent of Treaty*, identifying a view of treaties as recognizing the powers of Indian nations and establishing sovereign relationships between Indian nations and Canada. Sovereignty is seen to include jurisdiction over a full range of institutions in social, economic, cultural, spiritual and educational spheres, as well as jurisdiction over Indian lands. The federal government, conversely, is seen as responsible for establishing facilities and providing resources for education and other services, under the authority and direction of Indian governments. The report is particularly interesting in that it showed a stronger emphasis on issues of jurisdiction and institutions under Indian government than the FSIN's earlier document, *Indian Government*. In this way, it focused more on the detail of Indian government and less on fundamental principles. Like its predecessor, however, *Indian Treaty Rights* did not consider in detail the fiscal implications of the relationship.

The document is also important for its clear assertion that Indian government exists independent of recognition by other governments. Its view of self-government is illustrated in the following passage:

> Indian governments entered into Treaty exercising all the powers of nationhood including the powers necessary for self-government and the powers necessary to maintain political, social and economic stability. In the Treaty negotiations these powers are recognized and their continuance guaranteed.

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24. The inquiries included the *James Bay and Northern Quebec Agreement Implementation Review* and *Constitutional Development in the Northwest Territories: Report of the Special Representative*.

> Nations remain sovereign as long as a functioning government exists. A nation's sovereignty is no less real because one or more nations refuse to recognize its existence.[25]

This provides evidence of the continued assertion of the inherent right of self-government, even though the term inherent is not used, as it was in *Indian Government.*

In contrast to the focus on jurisdiction and institutions in *Indian Treaty Rights,* the Union of British Columbia Indian Chiefs provided views on self-determination and self-government in its 1980 document, *Indian Nations and Self Determination,* including recognition of the right of self-government as inherent. The document showed a preoccupation with the international legal underpinnings of its positions and with the distinct interpretations of the protection afforded Indian rights by the Canadian constitution. The document focused on the impact of patriation, seeing in it the potential to terminate the federal government's trust relationship. The UBCIC argued that the authority of Indian nations does not depend on the constitution, given that the *Constitution Act, 1867* did not create or delegate authority to Indian government. Instead, the *Constitution Act, 1867* is seen as fulfilling British treaty obligations by delegating administrative duties to the Canadian government to protect Indian lands and to provide financial and technical assistance to Indian governments. Finally, the document reflects the chiefs' view that the patriation effort could be a positive development so long as Indians were included in the exercise of nation building.

Other Aboriginal organizations also entered the discourse. The contribution of Métis, non-status Indians, and urban Aboriginal people was shaped largely by the contributions of the Metis and Non-Status Indian Constitutional Review Commission.

The *Report of the Metis and Non-Status Indian Constitutional Review Commission,* published in 1981, was the product of extensive consultations and research conducted by the Native Council of Canada as part of a national process through which the federal government sought broad input to the formulation of a new Canadian constitution. The commission's focus on ensuring that the voices of Métis and non-status Indian people were heard was evident in its consultation method:

> In order to give Native people the opportunity to participate in the discussion of all matters relating to the constitution which affected them, we held a series of regional hearings and conferences across the country. At these hearings Native people participated as

25. Federation of Saskatchewan Indian Nations, *Indian Treaty Rights: The Spirit and Intent of Treaty.*

> individuals, as groups, and as representatives of Native organizations. We also welcomed the views of non-Native people and invited a number of prominent academics and political leaders, among others, to the hearings... The report contains a broad cross-section of perspectives on Native people and the Constitution of Canada. I feel that it adequately reflects the aspirations of the Metis and non-status Indians in how they wish to relate to state and society. The final decision, however, is theirs to make.[26]

The report asserted that Métis and non-status Indian people sought participation in the Canadian political system; in this way, their aspirations for political development differed from those of Inuit and status Indians. This assertion was central to the report and to Métis/non-status objectives in influencing the shape of a new constitution. Three options for political participation were discussed, each with implications for the nature of the relationship between Aboriginal and non-Aboriginal Canadians: assimilation, coexistence, and integration.

Special status, understood as the right to integrate as a collectivity into Canada and to participate in Canadian political, economic, and social institutions, was the preferred option of Métis and non-status Indians:

> Native people told us that government policies and programs are aimed at their participation in the larger society as individuals while they wish to participate as a collectivity. Their numerous and diverse proposals for Native participation in political and legal institutions, the mass media, the economy and other spheres of activity indicate to us that Metis and non-status Indians want their right to integrate as a collectivity to be reflected in the Constitution of Canada. Their proposals indicate that in order for them to integrate they require special status or constitutional provisions for their collective integration into the political, economic, social and cultural life of the country.[27]

At this time, Métis and non-status Indians perceived special status as a vehicle for integration, as opposed to a vehicle for self-government, as was the case with status Indians. Indian approaches were seen to be more in keeping with the coexistence model and were rejected as neither feasible, realistic nor desirable for non-status and Métis people. Coexistence was understood as an outcome when socio-cultural systems exist independent of each other without common participation in institutions.

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26. *Native People and the Constitution of Canada: The Report of the Metis and Non-Status Indian Constitutional Review Commission*, letter of transmittal to the Native Council of Canada from Harry W. Daniels, Commissioner.

27. *Native People and the Constitution of Canada*, pp. 2-3.

The NCC constitutional consultations also emphasized the unique history and contribution of Métis and non-status Indians as a founding people and stressed the need for increased participation and representation in Canadian political institutions through, for example, special Native constituencies, Native and non-Native electoral rolls, and guaranteed seats in legislative assemblies. The consultations also revealed support for the removal of biases stemming from discriminatory application of the *Indian Act*, together with confirmation of federal jurisdiction under section 91(24) for Métis and non-status Indians.

The unique circumstances of urban Aboriginal people were addressed in a 1981 Ontario report, *Native People in Urban Settings: Problems, Needs and Services*. The report was prepared by a task force established by the minister of culture and recreation in response to a proposal in *Strangers in Our Land*, a discussion paper by the Ontario Federation of Friendship Centres that made reference to major problems experienced by Aboriginal people in urban settings. The report concentrated on discrepancies between the special program and service needs of urban Aboriginal people and what is actually provided. There was little discussion of governance outside program and service delivery, and its recommendations were limited to increased delivery, Aboriginal participation, and devolution of resources.

Prairie Métis organizations joined the discourse in this period. Early statements on Métis rights are evident in two documents published in 1983: *Manitoba Metis Rights: Constitutional Consultations: Final Report*, by the Manitoba Metis Federation, and *Metis People and Aboriginal Rights*, published by the Association of Metis and Non-Status Indians of Saskatchewan. Both documents were associated with the first round of constitutional discussions on Aboriginal rights and were prepared following the establishment of the Métis National Council as a participant in constitutional discussions[28]. The emergence of the Métis Nation voice, as distinct from that of Métis and non-status people, coincided with constitutional recognition of the Métis as one of the Aboriginal peoples of Canada in the *Constitution Act, 1982* and with assertions by the prairie Métis that their needs and interests were different from those of Métis and non-status people elsewhere in Canada.

Manitoba Metis Rights was one of the first documents supporting the MNC's constitutional position. Based on extensive community consultation, it emphasized not so much the mechanics of Métis self-government as broader understandings of the principles underlying Métis self-

28. The Métis National Council was established in 1982 when the Native Council of Canada declined to allocate the Métis constitutional committee one of its two seats at the constitutional table.

determination: the right to exist and to develop as a nation, to preserve and use language and culture, and to pursue traditional activities (hunting, fishing and trapping). In terms of governance, the document suggested that Métis people see the right to establish their own forms of government as a component of Métis rights. The Métis assert unique needs in program and service delivery and see control of these as a key element in the move toward self-government because they imply control over implementation, as well as access to resources and decision-making processes. There are calls for Métis to exercise municipal-type powers, as well as authority in land, economic development and social services:

> In addition to municipal governing powers, Metis communities must be given extra government authority to allow us to administer and benefit from Metis land bases and to provide our own economic and social services and programs.[29]

The idea that land is key to the exercise of Métis rights, especially the right of self-government, and to Métis survival and self-sufficiency, was expressed clearly:

> Nations are built on land. Take away the land and you take away our means of survival. Our relationship to the land defines our way of life. Our ancestors' independent occupation and use of the land before European settlement is the foundation of our special national and aboriginal rights today.[30]

The Métis argue, however, that land must be provided collectively rather than through individual land grants.

This document should be seen as a fundamental contribution to the discourse on Métis governance; even though it does not provide many details on Métis self-government, it clearly articulates principles to guide the Metis Nation in relations with other governments. Survival and the right to exist are central principles, and these are linked closely with the question of a land base. Self-government and self-sufficiency (a term that appears repeatedly in Métis documents) are linked integrally to a land base, but for the Métis, at least at the time this report was prepared, municipal forms of government were acceptable.

Like many documents produced by Métis organizations, *The Metis and Aboriginal Rights*, produced by the Association of Metis and Non-Status Indians of Saskatchewan, seeks greater understanding and awareness of the historical basis of Métis claims and rights. The document did not discuss Métis governance in detail, except to acknowledge that Métis rights include the right to establish and operate local governments. The Métis of

29. Manitoba Metis Federation, *Manitoba Metis Rights*, p. 24.

30. *Manitoba Metis Rights*, p. 21.

Saskatchewan, perhaps influenced by strong organizations representing treaty interests, cast the argument for their rights in much the same way as treaty First Nations, the difference being that they trace their rights to a different covenant – the *Manitoba Act, 1870*.

Also prominent during this period was discourse on northern governance. Since the time of the Carrothers report, questions of governance in the North have been shaped by the impact of massive resource development, by claims settlement activities, and by constitutional development. It was in this context that the Drury report and *Public Government for the People of the North* were published.

Constitutional Development in the Northwest Territories (the Drury report) was prepared in 1979 by C.M. Drury, whose mandate was to conduct consultations with the government of the Northwest Territories and Aboriginal and non-Aboriginal northerners regarding constitutional and political development and to report to the prime minister on his findings. Drury focused on the transfer of authority from the federal to the territorial government. He made no specific recommendations with respect to Aboriginal governance, though he did present a three-part approach to meeting the special needs of Aboriginal peoples in the Northwest Territories: the settlement of land claims; devolution of authority to community governments; and extended representation and responsibility.

The report noted the contrasting positions of the federal government and Aboriginal organizations on questions of claims. The federal position was that government structures were not negotiable as part of claims processes, while the Aboriginal organizations saw governance as integral to claims negotiation and settlement. Following what was then government policy, Drury favoured separation of governance questions from claims and recommended that the objective of claims settlement be the protection and promotion of economic and cultural interests:

> The objective of the settlements should be to compensate native collectivities for the loss of their traditional ways of life, land and land use, and to provide them with the economic and cultural strength necessary to participate in territorial and Canadian public life, to maintain the traditional ways of life, or to select a mix of both alternatives.[31]

Drury noted predicaments of local governance in the Northwest Territories that continue to resonate with Aboriginal and non-Aboriginal northerners today, particularly centralized decision making (in Ottawa or, in more recent years, Yellowknife) and limited local authority in program and

31. *Constitutional Development in the Northwest Territories: Report of the Special Representative*, p. 24.

service delivery, especially in areas such as education and social programs, which were considered to be of vital importance to communities but were traditionally outside the purview of local governments. Although no specific references were made to Aboriginal governments, the overall slant of this report was to recommend increased local authority and responsibility.

Two documents published by the Dene of the Northwest Territories elaborated a public government model for Aboriginal self-government. The earliest of these, *Public Government for the People of the North* (1982), was published jointly by the Dene Nation and the Metis Association of the Northwest Territories.[32] It described a model of public government that would generally mirror governments in the rest of Canada, with some provisions to ensure Dene/Métis control in areas of central interest to them. Powers would be divided between a provincial-type government, with authority in provincial and some federal jurisdictions, and community governments, with regular municipal authorities plus powers in natural resource management and in some service areas.

Two documents of this period present Inuit perspectives on governance: *Building Nunavut* (1983), by the Nunavut Constitutional Forum, and in *Le besoin de réévaluer et d'améliorer les relations Québec-Inuit* (1983), by Makivik Corporation (Société Makivik). The documents convey perspectives of Inuit of the eastern Arctic and of Quebec respectively.

The Nunavut Constitutional Forum, which produced *Building Nunavut*, was established in 1982, along with the Western Constitutional Forum. The two bodies were to guide the debate concerning what new governments would be like and how they would represent their respective peoples upon division of the Northwest Territories. Both forums included Aboriginal representatives and members of the territorial assembly. In this context, *Building Nunavut* presents proposals for a constitution for a Nunavut government.

The constitution-building process outlined in *Building Nunavut* is one of community-based consultations and development:

> This booklet is a unique invitation to you to join in the building of Nunavut. As representatives of all the people of Nunavut, we have developed the proposals contained on the following pages for a constitution for a Nunavut government. We want all our people to think about them and discuss them, and then through community meetings, radio, TV and newspaper discussions, and a constitutional assembly to meet later in 1983, to approve the final form. Then we will take the work we have done together and ask the Canadian

32. The second document, *Denendeh Public Government*, is discussed later in the chapter.

> government to make our new constitution a formal law of Canada and help us create our new government.[33]

The NCF sees Nunavut as public government – that is, "government not only for Inuit, but a government firmly founded on the Canadian political tradition of public services and the power of participation for all people who live in a geographical area."[34] The NCF vision of the Nunavut constitution incorporates land claims settlement acts to provide specific guarantees for Inuit in respect of certain of their vital interests and rights. The overall activities of the government of Nunavut, however, are to be strictly public and non-ethnic:

> But Nunavut is not an ethnic government. It is public government within the Canadian tradition. Canadian federalism was designed to accommodate regional diversity, specific cultural tradition and the political rights of minority groups or regions. In Nunavut that philosophical federalism can reach its finest flower.[35]

The report also restates the principles of self-government that Inuit presented at the first ministers conference on the constitution in March 1983:

> (1) the maximum Inuit design and management of public services which affect them, including participation in programs and policy-making which significantly affect their region;
> (2) genuine political representation in provincial and territorial legislatures and the federal Parliament, and in official bodies which make decisions affecting Inuit;
> (3) recognition of the Inuit use and occupation of lands, waters and resources which are the underpinning of the Inuit economy and way of life, and the establishment of clear Inuit rights in respect of these so that Inuit may ensure their own collective survival;
> (4) access to adequate revenues to enable public bodies in the economic homeland to carry out their tasks;
> (5) access to an economic base for the future, and protection of existing economic resources (e.g., wildlife);
> (6) structures of government and other public institutions in the Inuit homeland which reflect and provide for the special needs and circumstances of Inuit and their culture, and with full protection for

33. Nunavut Constitutional Forum, *Building Nunavut: A Discussion Paper Containing Proposals for an Arctic Constitution*, "Message to the Reader".

34. *Building Nunavut*, "Message to the Reader".

35. *Building Nunavut*, p. 5.

> an inclusion of the rights and aspirations of non-Inuit residents in the area.[36]

According to the report, conference participants were "impressed with the reasonableness of these Inuit ideas... The idea that Inuit should have a government which safeguards and reflects their culture and traditions does not upset southern Canadians, and the clear Inuit commitment to a pluralistic society in Nunavut is reassuring to those who talk about the danger of ethnically-based jurisdiction."[37]

Later in 1983, Makivik Corporation published *Le besoin de réévaluer et d'améliorer les relations Québec-Inuit* (The Need to Re-evaluate and Improve Quebec/Inuit Relations). Makivik Corporation was established under Quebec law at the time of the James Bay and Northern Quebec Agreement in 1975 to represent Inuit of Northern Quebec in all economic, social and constitutional matters related to the agreement. The report outlines the concerns of Quebec Inuit with regard to economy, culture, and political systems. Based on its review, it recommended, among other things, that a tripartite (Quebec/Canada/Inuit) committee be established to ensure implementation of the agreement and that Northern Quebec institutions become more independent of Quebec authorities by securing sufficient funding and by entering into agreements to share tax revenues in the region:

> On ne doit pas permettre que les institutions politiques et autres du Nord québécois soient manipulées par le truchement des *budgets* du gouvernement du Québec. Ces institutions éprouvent en ce moment de la difficulté dans l'exercice de leurs pouvoirs en raison de l'insuffisance de leurs budgets annuels. It faut s'efforcer de diminuer leur dépendence à l'égard des budgets gouvernementaux par le biais d'éventuels programmes de partage des revenus dans les régions.[38]

The reports of federal and provincial governments in this period are interesting, for they were the product of new mechanisms being used to discuss governance. We see the emergence of tripartite structures, the use of task forces to deal with pressing issues, such as implementation of the *James Bay and Northern Quebec Agreement*, and the involvement of a sub-committee of the Standing Committee on Indian Affairs. These new processes and new actors differ markedly from those seen in the previous period, when federal involvement was largely a function of DIAND initiative,

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36. *Building Nunavut*, p. 4.

37. *Building Nunavut*, p. 5.

38. Makivik Corporation, *Le besoin de réévaluer et d'améliorer les relations Québec-Inuit*, p. 61.

with documents prepared either internally or through relatively informal processes.

The *Report of the Tripartite Local Government Committee Respecting Indian Local Government in British Columbia* was published in 1981. The committee consisted of provincial and federal government representatives and Indian leaders working together to solve common problems in a manner that, in the end, produced consensus:

> Issues that have caused friction and consternation over the years have been faced and evaluated by the three participating bodies of the Local Government Committee in a spirit of compromise and mutual endeavour. Clear evidence of this is the face that, although the Terms of Reference provide for the expression of "minority opinions if a consensus recommendation cannot be reached," this has not proved necessary; the Report is presented without dissent.[39]

The committee's mandate was to address problems in the delivery of programs and services on Indian reserves, as well as problems stemming from taxation of non-Indian residents on reserve land by municipal and provincial authorities. The committee considered the jurisdictional complexities surrounding local taxation authorities and service delivery arrangements between reserve and municipal governments, as well as allocation of on-reserve service costs between Indian and non-Indian residents.

The committee recommended a new provincial Indian Local Government Act to enable alternative delivery mechanisms for community services and to recognize band governments as municipal governments for certain purposes. Different arrangements would be available to bands meeting different criteria. These arrangements included extension of non-Indian local government services, tax revenue sharing arrangements, the establishment of community improvement areas, and assumption of full local government status involving enhanced band government authority in service delivery and vacation of taxation fields by municipal and provincial authorities. A new legislative base would be achieved through an amended *Indian Act*, allowing new municipal-type taxation powers, extended by-law making power, and entitlement to receive provincial support.

In sum, the Tripartite Local Government Committee attempted to address municipal service needs of Indian reserve communities in the context of the provincial-municipal framework and financial system:

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39. *Report of the Tripartite Local Government Committee Respecting Indian Local Government in British Columbia*, p. 29.

> Effective implementation of self-government choices for Indian bands will require the complete co-operation of the two senior levels of government. This will entail not only legislative change but also agreement on the practical and financial aspects of increased band jurisdiction.[40]

The committee saw enhanced band government powers deriving from an amended *Indian Act*, coupled with provincial legislation enabling the province to recognize Indian band governments and to enter into service delivery agreements in the same way as municipalities.

This period also saw publication of the *James Bay and Northern Quebec Agreement Implementation Report* (the Tait report) in 1982. This report preceded the document from the Makivik Corporation, discussed earlier, which also reviewed the agreement's implementation. The Tait report reviewed the fulfilment of federal obligations under the JBNQA and found that the federal government was not meeting its commitments and upholding its responsibilities for the program, service and benefit provisions of the agreement. The report also found that the federal government was not satisfying its financial expenditure obligations. Given these findings, the Tait report recommended measures to "breathe new life into the Agreement":

> It is therefore important that the parties to the Agreement, having regard to the difficulties and mistakes of the past and to the spirit and importance of the Agreement, and building on achievements already made, work together to breathe new life into the Agreement.[41]

Another important intervention in the discourse came in the form of the *Report of the Sub-Committee on Indian Women and the Indian Act*. The sub-committee was established to study the provisions of the *Indian Act* dealing with band membership and Indian status and to recommend measures to remove provisions that discriminate against women. The sub-committee consisted of seven members, as well as ex-officio members from the Native Council of Canada, the Assembly of First Nations and the Native Women's Association of Canada. The report is important in the context of Aboriginal governance in that it addressed band membership as a key issue of governance.

The positions taken by the ex-officio members are interesting. While the AFN maintained that First Nations must determine their own membership, NWAC saw this as secondary to assurances that discriminatory provision would be removed:

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40. *Report of the Tripartite Local Government Committee*, p. 29.

41. *James Bay and Northern Quebec Agreement Implementation Review*, p. 103.

> If band control of membership means Indian women must suffer under federal discriminatory legislation for another five or twenty years while you hash out the meaning of Indian government, we will not accept this.[42]

Furthermore, the NCC said it would not discuss band control of membership because too many non-status Indians had been excluded from membership. Instead, it wanted to ensure first that Aboriginal rights were recognized and defined in the constitution.

The report is also interesting in the importance it attaches to band control over the definition of membership as an essential feature of self-determination to be exercised through self-government. The report added significant force to the struggle for legislative reform, which led eventually to passage of Bill C-31 in June 1985.[43] It also reflected an overall policy shift toward greater control for band governments over areas such as membership.

The development of the discourse from 1979 to 1983 reflected significant changes from the earlier period. These changes are evident in participants in the discourse, in the processes used for interaction, and in the ideas and issues advanced in the discourse on Aboriginal governance.

In contrast to the limited cast of characters involved in the discourse in the late 1960s and '70s, we see flourishing activity on the part of groups representing a variety of interests in this period. Provincial First Nations organizations were still involved, and they were joined by Métis, Inuit and non-status Indian regional and national organizations. The federal government was still heavily involved, but its contributions came not at the initiative of DIAND, but from special inquiries such as those conducted by Tait and Drury. Parliament also became involved, with the *Report of the Sub-Committee on Indian Women and the Indian Act*. Furthermore, a provincial government was drawn into a tripartite structure in British Columbia.

The processes through which players interacted also distinguished this period from the previous one, which was characterized by informal

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42. Quoted in *Report of the Sub-committee on Indian Women and the Indian Act*, p. 58:15.

43. The passage of Bill C-31 marked the culmination of a long campaign by Aboriginal women to regain Indian status, rights and identity. This campaign involved demonstrations, rallies and legal action, most notably the decision by the United Nations Human Rights Committee, in the *Lovelace* case, that section 12(1)(b) of the *Indian Act* was in breach of the International Covenant on Civil and Political Rights. For a full discussion of the events leading to passage of Bill C-31, see Silman, pp. 9-15 and 249-253.

mechanisms, whereas the period 1979-1983 saw attempts to draw Aboriginal concerns and interests into a more formal or institutionalized setting – for example, the tripartite committee, the Nunavut Constitutional Forum, and ex-officio membership for Aboriginal organizations on the House of Commons sub-committee examining the *Indian Act*. In addition, special inquiries, such as those conducted by Drury and Tait, were commissioned by government but were at arm's length. Finally, the role of Aboriginal organizations in patriation discussions is noteworthy. Aboriginal organizations were on the periphery of formal constitution-making process and instead had to voice their concerns in the less institutionalized setting that surrounded and, to some extent, informed it.

Several key ideas and issues emerged during this period. Most prominent, perhaps, was re-emergence of the language of the inherent right of self-government in the UBCIC's *Indian Nations and Self-Determination*, first seen in the FSIN document, *Indian Government*. Also evident were various views presented by Métis, including rejection of co-existence in favour of "special status", and the assertion of rights, including rights of governance, as historically derived. By contrast, the Nunavut Constitutional Forum equated self-government with public government.

In terms of governance models, the report of the tripartite local government committee supported modified municipal-type governments. There were also calls for increased control in specific areas under the *Indian Act*, as in the *Report of the Sub-Committee on Indian Women and the Indian Act*, which focused on membership as one component of governance. Finally, in the Tait report and in *Le besoin de réévaluer et améliorer les relations Québec-Inuit*, we saw a focus on meeting obligations for program and service delivery and on reaching mutual understanding of agreements.

Women's concerns emerged strongly. In the sub-committee report, the focus was on band membership. Women's issues followed the pattern of the other issues – raised first at the provincial level, and gradually becoming the focus for a national organization, the Native Women's Association of Canada.

This period, then, was marked by increasing diversity in policy participants, the beginning of more formal processes of interaction, and different conceptualizations of governance. In the next period of discourse, which starts with publication of the Penner report, we will see how documents published between 1983 and 1990 built on these elements.

1983-1990: MORE PARTICIPANTS, PROCESSES AND IDEAS

An important turning point in the discourse on governance, particularly on Indian governance, came with publication of *Indian Self-Government in*

Canada: Report of the Special Committee (the Penner report) in 1983.[44] Like the *Report of the Tripartite Local Government Committee Respecting Indian Local Government in British Columbia*, the Penner report promoted an enhanced municipal-style government within a federal legislative framework. By contrast, however, the Penner report envisaged Indian governments as a "distinct order" of government, with delegated powers, whereas the *Report of the Tripartite Committee* saw enhanced band government powers deriving from an amended *Indian Act* and service delivery agreements with provincial governments.

For many at the time, the Penner report constituted a milestone in the recognition of Aboriginal self-government. From today's vantage point, however, the report might be criticized by some for its overemphasis on Indian governments having to meet preconditions or criteria established by the federal government before exercising powers its failure to recognize the inherent nature of Aboriginal government authority. While its findings were extensive, we focus on its recommendations.

The Penner report recommended constitutionally entrenched recognition of the right of Indian self-government as a broad basis for self-government but called for more immediate measures, including enabling legislation, to commit the federal government to recognition of Indian governments:

> The Committee recommends that the federal government commit itself to a constitutional entrenchment of self-government as soon as possible. In the meantime, as a demonstration of its commitment, the federal government should introduce legislation that would lead to the maximum possible degree of self-government immediately.[45]

Other more immediate measures would require Indian government to meet predefined criteria and would include negotiation of the jurisdictional fields, both federal and provincial, to be occupied by Indian governments. The report called for recognition of Aboriginal authority in key areas, such as education, child care, and membership, suggesting that in some areas there would be no need for negotiation of self-government authority; in others, federal approval through negotiation would be required.

The Committee also made several recommendations about new financial arrangements. It suggested that these arrangements should conform to principles of Indian government accountability to the community and incorporate direct grants based on a modified per capita formula, five-year global funding operational bases, and corrections for infrastructure deficiencies. In terms of federal responsibility, the report recommended new

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44. The background of the Penner report was discussed in the previous chapter.

45. *Indian Self-Government in Canada: Report of the Special Committee*, p. 50.

management systems for capital trust funds and revenue monies and, most significant, the phasing out of DIAND in five years.

A different perspective was apparent in the 1985 Nielsen task force report, *Improved Program Delivery: Indians and Natives: A Study Team Report to the Task Force on Program Review*. Prepared in the aftermath of the election of a new Conservative government, with its emphasis on rationalizing programs and services, the Nielsen report was the product of a study team with public and private sector representation but very little Aboriginal representation.[46] Though not a policy document, the report established a basis for the new government's policy regime, particularly in relation to status Indians. This regime was one that reduced program and service delivery and fiscal responsibilities, increased provincial involvement, and asserted a limited interpretation of federal government responsibility for, and therefore the special relationship with, Indian peoples.

The Nielsen report addressed the need for increased community responsibility, through the devolution of authority:

> A general finding of the study team is that the effectiveness and efficiency of federal programs would be improved overall if bands were given more responsibility for managing their own programs and resources in response to community-level needs and priorities. This is consistent with the current thrust of the Department of Indian Affairs to devolve responsibilities to bands.[47]

The roots of most of the major policy initiatives that followed can be traced to this report, including new funding arrangements, capped programs, devolution/decentralization, and an increased focus on tripartite activities. In terms of its impact on policy, the report could be considered more influential than the Penner report, although substantively, it clearly did not indicate a move in the direction of satisfying self-government aspirations.

The Nielsen report spoke of a new approach to Aboriginal issues that recognized that legal responsibility involved *two* levels of government:

> Despite continuing discussion surrounding federal/provincial responsibilities for native peoples (status Indian, non-status, Metis and Inuit), in practical terms, both levels of government have responsibilities because the people in question are either Indian,

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46. The Nielsen report was the product of the ministerial task force on program review, established by the prime minister in September 1984 to review government programs with the goal of reorienting programs to make them simpler, more understandable and more accessible to Canadians. One of its principal motivations was eliminating overlap and duplication between federal and provincial programs.

47. *Improved Program Delivery: Indian and Natives*, p. 32.

disadvantaged or ordinary citizens of Canada and its provinces or territories.[48]

It asserted a need to remove duplication between federal and provincial governments and to decentralize programs and services to promote "Native" control. The new approach would target expenditures, with minimum standards established in areas such as health. Community-level control would be enhanced through increased band responsibility for program and service management and enhanced capacity to respond to their own needs and priorities. Nielsen recommended direct support to bands through "multi year, comprehensive community resourcing agreements"[49]. This recommendation may have sparked the development of Alternative Funding Arrangements, introduced in the mid-1980s.

An interesting feature of the report was its attempts to involve provincial governments in program and service delivery — an idea traceable at least to the Hawthorn report and the White Paper. Nielsen went so far as to propose 50/50 cost sharing schemes, claiming the provinces were already involved in program and service delivery.[50]

The influence of the Nielsen report was profound, given the Mulroney government's policy agenda during its first term in office. Policy alternatives intended nominally to increase band autonomy were, in reality, aimed at capping federal expenditures, increasing provincial involvement in Aboriginal affairs, and promoting policies reflecting the federal government's limited and discretionary interpretation of its responsibilities under section 91(24). The implications of the Nielsen report for governance were significant. It spawned policies affecting program and service delivery and new financial arrangements in the late 1980s that were characterized notionally by increased control but in reality by limited resources.

Parliamentary involvement in the discourse on Aboriginal affairs continued with publication of a 1990 report by Standing Committee on Aboriginal Affairs, *Unfinished Business: Agenda for the 1990s*, also known as the Hughes report. The document was an attempt to gauge the priorities and key policy concerns of Aboriginal peoples. The committee agreed with the Penner committee that Aboriginal self-government required a break with paternalistic practices of the past. Likewise, it envisioned self-government as the key issue of Aboriginal policy, recognizing its interrelatedness with

48. *Improved Program Delivery: Indians and Natives*, p. 39.

49. *Improved Program Delivery: Indians and Natives*, p. 35.

50. The report contended that although provinces might agree to a collaborative approach, they might fall short of agreeing to a 50/50 sharing of costs (*Improved Program Delivery: Indians and Natives*, p. 44).

issues of land, constitution, treaties, intergovernmental relations and justice. The report noted the need to extend section 91(24) and the legislative field to encompass new matters formerly falling under provincial jurisdiction (e.g., child welfare) and to delegate these powers to Aboriginal governments. The committee also saw a need to review current financial arrangements with Aboriginal governments, to establish an independent tribunal to deal with treaty issues, and to adopt a new consultation process in policy development.

While the findings of *Unfinished Business* were not particularly radical, the report did demonstrate a new interest in finding alternative ways to achieve self-government outside of constitutional negotiations. This strategy was characterized by the extension of federal legislation in all areas through the use of the full range of powers available under section 91(24). The report also adopted a broad definition of Aboriginal governments, using the term to refer generally to band governments, tribal councils, Aboriginal associations, and so on.

The document collection for this period also includes three reports central to the development of the Métis settlements of Alberta. The 1984 *Report of the MacEwan Joint Metis-Government Committee to Review the Metis Betterment Act and Regulations Order* was produced by an advisory committee with a mandate to recommend changes in the *Metis Betterment Act* to the Alberta minister of municipal affairs. It was prepared and published in an environment of mistrust, fostered in large part by continuing litigation involving the Métis settlements and the province in a dispute over who would control revenues from subsurface resource development, as well as lingering anxiety over the security of Métis settlement lands following the 1972 report of the Metis Task Force, a provincial Task Force that suggested the province was likely under no obligation to maintain Métis settlement lands in perpetuity.[51]

The MacEwan committee set out to resolve problems associated with the existing legislative framework, to examine future alternatives for Métis settlements in terms of land holding, and to develop local government models. The report recognized the inappropriate paternalism of provincial legislative control of the Métis settlements through the *Metis Betterment Act* and proposed legislation to address two key concerns: the need to move toward development of local self-government and to secure the Métis settlements' existing land base. The recommended system of Métis local government remained closely tied with the provincial and municipal government system. Provincial legislation would predominate, with Métis government bodies elected pursuant to provincial election regulations

51. Martin, pp. 265-271.

similar to those for non-Metis municipal/local governments. For purposes of provincial programs and policies, the Métis settlements would be treated as municipalities. The law-making authority of the settlements would extend into areas traditionally within the purview of municipal governments; however, Métis authority in land allocation and membership – non-municipal areas – would be recognized, but restricted.

In 1986, the Metis Settlements Association of Alberta responded to the Alberta government's *Resolution Concerning an Amendment to the Alberta Act*, which, pursuant to the MacEwan committee's recommendations, called upon the Métis to define their membership criteria, land allocation system and governing bodies, presumably for purposes of inclusion in provincial legislation. The resolution also defined protective measures for Métis lands relative to Crown rights of acquisition, expropriation and use. An amendment to the *Alberta Act* and introduction of new Métis settlements legislation was seen as the way to settle government questions and entrench Métis land rights.

The Métis response is found in *"By Means of Conferences and Negotiations" We Ensure Our Rights: Background and Principles for New Legislation by the Alberta Federation of Metis Settlements Association* (1986). Ratified by all Metis settlements, the document incorporated the Westlock Resolution, which set out Métis land allocation and membership. In terms of governing institutions, however, the Métis took the position that existing settlement associations, as Métis government structures, already had the legal capacity to hold land. This position was taken in conjunction with assertions made in the continuing legal dispute about jurisdiction over natural resources.

Through this document, the Métis proposed the *Metis Settlements Act* as a compromise between provincial legislative control and more substantial Métis control over land and social, economic, political and cultural development. It also set out an institutional framework for Métis governments, which would consist of elected settlement councils, appointed elders committees, Métis arbitration tribunals, and a Metis Settlements (governing) Council to represent all settlements.

The Métis highlighted their tradition of democratic government, in which democratic rights are fused with traditions of consensus and respect for elders. They proposed governing bodies as an amalgam of Métis traditions and models adapted from the framework of the provincial *Municipal Governments Act* and thus saw their government structure as a mix of elected and consensus-based, appointed institutions.

The *Alberta Metis Settlements Accord*, published in 1990 and signed by the province and by representatives of Métis settlements, was the product of these discussions between Alberta and the Métis settlements. It included four pieces of provincial legislation and a subsurface resource management

agreement. The *Metis Settlements Act* established local government arrangements of a municipal character, and an accompanying financial agreement provided for a 17-year transition period.[52]

The documentation demonstrates the Métis settlements' view of self-sufficiency and self-government as achievable within a modified municipal framework and the framework of Métis-provincial relations. The history of relations between the Métis and the province has not always been characterized by dialogue, but this set of documents comes close. The language and emphasis in some of the documents is evidence of the effective and promising nature of the relationship:

> At this juncture the Federation and the Government of Alberta have but one step to take to complete the journey that began 53 years ago with establishment of the Ewing commission. The history of their travel together can be a shining example to Aboriginal people, federal, provincial and territorial governments across Canada. Just as Metisism combines and expresses the best of two distinct cultural traditions, so can the Federation and the Government of Alberta combine forces to produce the first made in Canada legislation defining and ensuring Metis aboriginal rights.[53]

The presence of other provincial governments is evident in the discourse of this period. The provinces of Quebec, New Brunswick, and British Columbia published policy statements. In *The Basis of the Quebec Government's Policy On Aboriginal Peoples* (1988), the province indicated a willingness to consider existing rights of Aboriginal nations arising from the *Royal Proclamation of 1763*, with the caveat that these rights must be recognized explicitly by Quebec legislation. Quebec recognized Aboriginal nations as distinct nations, entitled to culture, language and determination of identity. It also recognized that the nations have Aboriginal rights to govern themselves and to own and control lands attributed to them, though it is evident that for Quebec, rights, especially those relating to Aboriginal governance, are subject to terms and conditions set out in Quebec legislation. This conceptualization of Aboriginal rights is therefore limited. This is evident in the principles adopted by the Quebec government to guide its relations with Aboriginal peoples, which restrict Aboriginal rights in various ways:

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52. Métis settlements were to receive fiscal support through direct government grants to settlements, settlement revenues (including interest from the Metis Trust), other government assistance in the form of grants, loans, etc., from economic and community development, and financial resources from existing social programs (e.g., education, health, etc.).

53. *"By Means of Conferences and Negotiations"*, p. 74.

> These rights are to be exercised by them as part of the Québec community and hence could not imply rights of sovereignty that could affect the territorial integrity of Québec.
>
> The aboriginal nations may exercise, on the lands agreed upon between them and the government, hunting, fishing and trapping rights, the right to harvest fruit and game and to barter between themselves. In so far as possible, their traditional occupations and needs are to be taken into account in designating these lands. The ways in which these rights may be exercised are to be defined in specific agreements concluded with each people.
>
> The aboriginal nations have the right, within the framework of existing legislation, to govern themselves on the lands allocated to them.[54]

The government of New Brunswick published a policy framework proposal in 1989 addressing two main issues:the socio-economic conditions of Aboriginal peoples and self-government. The document indicated a willingness to develop, within a provincial policy framework, improved access to programs and services for Aboriginal peoples. The new policy framework would recognize and respect the culture and heritage of Aboriginal peoples and their self-government aspirations. This position represents a belief that improved access can be achieved by adapting the existing system to meet Aboriginal needs for representation and culturally appropriate programming.

The proposal also addressed Aboriginal self-government, expressing support for national-level processes involving first ministers but also indicating a willingness to co-operate with band councils, primarily through tripartite processes, in establishing practical arrangements aimed at strengthening First Nations communities. The province also expressed support for greater exploration of the concept of self-government for off-reserve populations, once again through tripartite processes. The province emphasized that its role is secondary to that of the federal government but accepted responsibility with regard to Aboriginal residents as New Brunswickers. It therefore recognized a provincial role in Aboriginal affairs, as well as the need to respect the unique historical, legal and cultural features of Aboriginal societies.

In British Columbia, the interim and final reports of the Premier's Council on Native Affairs (1990 and 1991 respectively), though concerned

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54. *The Basis of the Quebec Government's Policy on Aboriginal Peoples*, pp. 4, 5. These excerpts are three of fifteen principles adopted by the cabinet in February 1983 and confirmed by a resolution of the National Assembly in 1985 as the basis for negotiations between the government and Aboriginal nations in Quebec.

mainly with land claims settlements, recognized that legislative barriers and jurisdictional disputes between the federal and provincial governments had frustrated movement toward Aboriginal self-sufficiency and self-determination. Where there had been some success, for example in social programs, this derived from Aboriginal initiative. The government supported constitutional entrenchment of self-government and – although the reports were not explicit on the nature of the right or whether self-government is even a 'right' – called for government to pursue self-government alternatives within the existing constitutional framework through legislation, the transfer of jurisdiction from federal and provincial governments and, incrementally, by increasing First Nation and tribal council control in specific sectors:

> We recommend the provincial government actively look for opportunities to accelerate the process of legislated and incremental self-government, and to encourage discussion of constitutional entrenchment of self-government during any future review of the Canadian Constitution.[55]

In cabinet's response to these recommendations, the province committed itself to "encourage legislated self-government" but rejected "the concept that Indian communities are separate, sovereign nations which are not a part of British Columbia"[56].

Several government agencies and non-governmental organizations also took part in the discourse, including the Canadian Bar Association and the Canadian Human Rights Commission. *Aboriginal Rights in Canada: An Agenda for Action*, published by the Canadian Bar Association in 1988, advocated a constitutional guarantee of the "entitlement of the aboriginal peoples of Canada to a distinct right of self-government" and provincial government involvement and co-operation with "Indian, Inuit and Metis peoples where requested by them, so as to promote the latter's social, economic and political interests".[57]

In *New Commitment: Statement of the Canadian Human Rights Commission on Federal Aboriginal Policy* (1990), the Canadian Human Rights Commission criticized limited progress on increasing Aboriginal control over their own affairs, despite the large number of parliamentary

55. *Final Report: Premier's Council*, p. 10.

56. *Final Report: Premier's Council*, p. 23.

57. *Aboriginal Rights in Canada: An Agenda for Action*, pp. 99, 101.

reports urging change and several years of negotiations under the Community-Based Self-Government program:[58]

> Even a cursory review of the history of native-government relations makes it clear that aboriginal affairs have not been treated with the priority they deserve by the federal and provincial governments.[59]

The CHRC called for repeal of the *Indian Act*, which it saw as "fundamentally and irreparably flawed", and its replacement with "appropriate constitutional and legislative action that recognizes the unique status of Aboriginal peoples".[60] It also recommended dismantling DIAND and establishing a new agency for federal/Aboriginal relations, which would implement a government-to-government forum for political dialogue and intergovernmental relations.

During this period, it is possible to see a shift in Aboriginal opinion concerning northern governance issues. *Denendeh Public Government*, published by the Dene Nation in 1985, adopted a more accommodating approach than its 1982 predecessor, *Public Government for the People of the North*. Co-operation and the coexistence of different and distinct cultural communities was emphasized in a model described as "consociational" and based on "partnership". The model encompassed two principles: democracy and majority rule, coupled with recognition of the rights of cultural minorities to ensure that the rights and interests of Aboriginal peoples are protected even if they constitute minorities in the population. Some matters would be under the specific control of cultural communities while others would be handled on the basis of majority rule.

The document expressed what could be seen as an Aboriginal variation on the 'citizens plus' theme; that is, all citizens would enjoy basic rights of citizenship, but some would enjoy treaty and Aboriginal rights as well. Additionally, some (Inuit, Inuvialuit, Dene and Métis) would have self-government rights, while non-Aboriginal people would have certain collective rights.[61] The implementation and exercise of rights would be through adoption of flexible but unitary forms of local government depending on the circumstances of the cultural community (e.g., band

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58. The report also noted that the federal government had wrongly linked claims and self-government and that the federal government's Community-Based Self-Government Negotiations policy constituted only a stop-gap measure, one that was deficient because if failed to acknowledge the "inherent nature of this claim"

59. *New Commitment: Statement of the Canadian Human Rights Commission on Federal Aboriginal Policy*, p. 2.

60. *New Commitment*, p. 7.

61. These collective rights are not specified in the document.

councils and municipal councils would amalgamate as appropriate). The overall effect would be a form of coexistence in which the interests of all peoples were balanced and protected:

> The consociation model is a different expression of the principles and objectives embodied in the earlier Denendeh model... The Dene and Metis advance it in recognition that it is a model which might better serve and advance the needs and interests of a variety of cultural communities and balance the interests of the Dene, Metis, Inuvialuit, Inuit and non-aboriginal peoples who may be the residents of the Denendeh or Western Arctic province.[62]

Finally, the extensive discourse of this period includes reports from arm's length institutions established by the federal government — an inquiry into matters associated with the Westbank Indian Band and a report from the Cree-Naskapi Commission.

The *Report of the Commission of Inquiry Concerning Certain Matters Associated with the Westbank Indian Band* (1988) appears to have had a significant influence on policy discourse concerning Aboriginal governance. The federal government commissioned an inquiry in 1986 in response to growing concerns among band members and non-Indian residents about the leasing of band lands, the management of band financial affairs and the apparent indifference of DIAND to events unfolding at Westbank, British Columbia. The inquiry began its work in an environment of controversy and confusion in the community.

The inquiry was asked to investigate and report on controversies surrounding band economic development, financial and land management and relations between the band and DIAND. It was also to review and recommend changes to the *Indian Act* with regard to the management of Indian land and monies and the policies and procedures of DIAND. In fulfilling this mandate, the inquiry consulted with the Westbank Band on specific controversies; it also received submissions and heard from witnesses representing Indian groups in British Columbia concerning its review of the *Indian Act*.

The report of the Westbank inquiry described the *Indian Act* as reflecting the historical tension between policies of wardship, assimilation and independence and as an obstacle to self-government because of its paternalistic and intrusive nature and its failure to provide the requisite legal underpinnings to support the exercise of enhanced powers by Indian governments:

> Notwithstanding the Department's gradual development of self-government as a fundamental policy in its administration of the

62. Dene Nation, *Denendeh Public Government*, p. 25.

> *Indian Act*, Indian bands, tribal councils, and national groups have experienced a degree of frustration in obtaining what they regard as the necessary attributes of self-government. A large obstacle to greater self-government is the present statutory structure of the *Indian Act*.[63]

The report also suggested that the *Indian Act* and DIAND policies diverged to such an extent that policies lacked a statutory foundation. Legislative change was recommended to alter the relationship between Indian peoples and the Crown. This would be achieved through amendments to the *Indian Act*, to provide a statutory base for current practices and policies, as well as a new Indian Lands Act and optional First Nations government legislative schemes, similar to those envisioned under Bill C-52.[64]

This report was important in the development of federal public policy, even though many of its more substantive recommendations were not implemented. Its major contribution was to bring clarity to the perceived problems of band governance under the existing legislative regime, especially in the areas of financial management and participation of bands in band government affairs and in distinguishing the administrative responsibilities and relationships of bands and DIAND. Together with the Lands, Revenues and Trusts Review,[65] the Westbank inquiry was a significant precursor of the *Indian Act* alternatives process, which met significant opposition from many political organizations. Most important, this report highlighted the problem of federal administration of Indian

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63. *Report of the Commission of Inquiry Concerning Certain Matters Associated with the Westbank Indian Band*, p. 384.

64. Bill C-52 died on the order paper before the 1984 election. This bill drew on the recommendations of the Penner report, proposing negotiation of different types of agreements setting out essentially delegated First Nations government authority in a range of areas, when First Nations met certain criteria, such as community-ratified constitutions. Westbank recommended new legislative regimes to provide for the development of band constitutions as well as increased by-law making powers, similar to those of municipalities.

65. In response to concerns expressed by Indian leaders and the Auditor General over the adequacy of the *Indian Act*, and specifically its provisions for lands, revenues and trusts, in October 1986, the minister of Indian affairs and northern development asked the president of the Treasury Board to undertake a comprehensive review of the sector of the department dealing with lands, revenues and trusts. The Office of the Comptroller General began the review in February 1987. The review developed into a fundamental analysis of the *Indian Act*.

affairs: discrepancies between the legislative and the policy base, contributing to confusion and incoherent and poor management at all levels.

Also in the document collection are two from the Cree-Naskapi Commission, established to report on implementation of the *Cree Naskapi Act*.[66] The first report (1981) identified several implementation problems, including the lack of qualified administrative personnel and misunderstandings concerning the financial relations set out in the statement of understanding negotiated at the time of the act's promulgation. The commission found that the financial provisions were binding, both morally and legally, and, more important, concluded that an assured level of federal financing was critical. Furthermore, the commission found that DIAND was not geared to implementation of self-government. It recommended the establishment of mechanisms for implementation and, specifically, the appointment of a special representative, linked within the prime minister's office, to be responsible for the JBNQA and the NEQA. This would recognize the Cree and Naskapi view of the relationship set out in the *Cree Naskapi Act* as a government-to-government one, as opposed to a relationship with DIAND.

The second report of the Cree Naskapi Commission, published in 1990, identified many of the same problems with local Cree and Naskapi government — poor training of Indian government personnel and inadequate funding for local government operations and maintenance. It also found that government systems were inappropriate in the Indian context; for instance, land management systems that included registry, zoning and regulation were considered foreign to peoples who hold a collective interest in land.

What began as a discourse dominated by DIAND and by Indian organizations expanded in the period 1979-1983 to include other Aboriginal and government participants, and from 1983 to 1990, this group expanded even further and took on different characteristics. Contributions from actors at the federal level took diverse forms, such as the Standing Committee on Aboriginal Affairs, the Nielsen task force, and federal inquiries such as the Westbank inquiry. In contrast to earlier periods, when the discourse dealt almost exclusively with the concerns of Indian people living on reserves, we now see the concerns of off-reserve, Métis and northern Aboriginal

66. The *Cree-Naskapi (of Quebec) Act* was an outcome of the James Bay and Northern Quebec Agreement and the Northeastern Quebec Agreement. It is the first Indian self-government legislation in Canada. The duties of the commission established by the act were to prepare a report every two years on implementation of the act, to receive and investigate representations of interested persons regarding implementation of the act, and to prepare reports and make recommendations on matters investigated.

peoples reflected in the discourse, as in the contributions of the Maritime Aboriginal Peoples Council, the Alberta Metis Settlements, and the Dene Nation.

Most dramatic, however, was the participation of provincial governments in the discourse during this period. In contrast to their limited involvement in earlier periods, provincial governments adopted a much more active role, as seen particularly in policy statements by the governments of New Brunswick, British Columbia, and Quebec and in the central role of the Alberta government in establishing new government arrangements for the Métis settlements.

The documents reviewed here do not provide many clues about why provinces became more involved in the affairs of the Aboriginal peoples living within their boundaries. We do know, however, that through the constitutional conferences between 1983 and 1987, the provinces had increased contact with Aboriginal organizations, became educated and, in some cases, were not unsympathetic to the aspirations of Aboriginal peoples.[67] Likewise, Aboriginal political organizations operating at the provincial level established networks with provincial officials and developed a good understanding of where their concerns might be addressed at the provincial level. These contacts may have been particularly important as organizations sought sector-specific arrangements aimed at increasing Aboriginal control and participation in the design and delivery of programs and services under provincial responsibility. At the end of the constitutional conferences in 1987, these connections did not disappear. Aboriginal organizations may have pursued them even more vigorously in an effort to establish practical self-government arrangements. The greater involvement of the provinces with Aboriginal peoples may have necessitated the development of more comprehensive provincial policy positions.

As well, discussion of the Meech Lake Accord at the provincial level highlighted Aboriginal opposition to the process as well as the substance of the accord. Some provinces were sensitive and sympathetic to these views and incorporated them as an element of their campaign of opposition to the accord. Perhaps in recognizing Aboriginal opposition to the accord, the provinces began to come to grips with broader concerns about recognition and aspirations for self-government.

A great deal of diversity was also apparent in the mechanisms and processes for interaction. Attempts at formalization intensified during this period, with inquiries, commissions and committees providing forums for

67. A series of first ministers conferences on Aboriginal constitutional matters was held during this period (discussed in Chapter 4). There was little mention of these conferences, however, in the governance documents of this period.

discussion, generally with the objective of examining problems with existing administrative arrangements under federal legislation (for example, the Westbank inquiry, the Cree-Naskapi Commission, and the Nielsen task force).

The need for more institutionalized settings was also recognized in recommendations in some of the documents of this period. This was prominent, for instance, in the Canadian Human Rights Commission report, *A New Commitment*, in which the CHRC asserted the need for a new Aboriginal/government forum:

> It is manifest that the confrontational situations of recent months reflect a breakdown of established mechanisms of political dialogue between Native and non-Native Canadians. At present, there is simply no adequate means whereby aboriginal people can meet with government and work out the issues that separate them. It must now be clear that only an extended encounter at the most senior levels will suffice to define the processes that will be needed. The Conference of First Ministers on Aboriginal Constitutional Affairs, in which representatives of the aboriginal peoples were full participants, did provide such a mechanisms for working out aboriginal concerns. Aboriginal leaders are entitled to a continuing forum in which they can discuss their concerns directly with government leaders who have the authority to make decisions concerning our future together.[68]

It is also noteworthy that there was very little Aboriginal participation in the preparation of government documents. This is characteristic of documents discussed earlier — the Cree-Naskapi Commission and the Nielsen task force — as well as in the development of provincial policies, such as those of New Brunswick and Quebec, which were less process-oriented. The studies conducted by the CBA and the CHRC did not directly solicit the views of Aboriginal people. The CBA and the CHRC acted instead as advocates, or watchdogs, willing to criticize government for what they deemed unacceptable treatment.[69] This approach also characterized the report of the Standing Committee on Aboriginal Affairs, *Unfinished Business*.

Earlier we noted the exchange between provincial and Métis representatives that led eventually to the *Alberta-Metis Settlements Accord*. This exchange demonstrates how parties were able to express their views

68. *New Commitment: Statement of the Canadian Human Rights Commission on Federal Aboriginal Policy*, p. 4.

69. The CBA's Special Committee on Justice, however, did have Aboriginal members.

and have their views heard by other interests. This is perhaps the first step toward achieving dialogue.

This period was also marked by certain ideas and certain ways of conceptualizing Aboriginal governance. Conceptualizations of governance differed broadly from one document to the next, ranging from overhauling existing legislation such as the *Indian Act* (as discussed in the Westbank inquiry), to changing administrative arrangements (as seen in the Westbank and the Nielsen reports), to facilitating 'better' government or 'greater local Indian government control' (as envisaged by Nielsen). Penner, on the other hand, identifying problems with existing arrangements, called for self-government to be exercised following federal legislative recognition of Indian governments. In addition, documents such as *Denendeh Public Government* proposed new arrangements that represent accommodation within a new and different political configuration. Finally, in the documents on the Métis settlements of Alberta, we see an understanding of Métis local government within a provincial framework.

Provincial governments also saw governance in different ways. In the documents reviewed here, some provinces were willing to entertain a 'citizens plus' arrangement, whereby Aboriginal peoples would be recognized but provincial governments would be responsible only for providing for them as citizens. The provinces seemed willing to entertain the negotiation of self-government arrangements but were not explicit about what is negotiable and how they would be involved. The obliqueness of this perspective is evident in the following passage from the New Brunswick proposal:

> Self-government does not mean that there is no role at all for the federal and provincial governments in aboriginal affairs. Removing Indian Bands from the strait-jacket of the past does not mean going to the opposite extreme of sovereign or independent Indian governments. From the perspective of the Province, self-government means that aboriginal people will have responsibilities and opportunities comparable to other Canadians within a context that will promote their ability to maintain and promote their cultures.[70]

The period 1983-1990 was most notable for the variety of participants, the variety of processes, and the variety of ideas emerging in the discourse on Aboriginal governance. In the next period, increasingly diverse opinions and actors began to focus in a particular direction, with consequences for the discourse on governance.

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70. *Discussion Paper on a Proposal for a Provincial Policy Framework on Aboriginal Affairs*, p. 10.

1991-1992: THE CANADA ROUND

The early 1990s witnessed a plethora of documents portraying issues of Aboriginal governance almost exclusively as issues of constitutional development and reform. The Canada round of constitutional negotiations led to agreement among federal, provincial and Aboriginal leaders on the Charlottetown Accord, which included provisions for recognizing the Aboriginal right of self-government, but the accord was rejected – by Aboriginal and non-Aboriginal Canadians – in the October 1993 referendum. The documents of this period focused largely on influencing this process.

Consider first publications of Aboriginal organizations. Seven documents report the results of consultations by regional/provincial affiliates of the Métis National Council in response to the federal government's October 1991 constitutional proposals and developments during the Canada round. This series of reports broadly reflects Métis views concerning the relationship between Métis people and Canada and concerning questions of governance. *The Metis Nation: On the Move*, published by the MNC in 1992, contained "the views of Metis individuals and representative bodies in the consultative process carried out by the Metis National Council...and its member associations", and therefore provides a useful summary of concerns expressed in the other Metis documents.[71]

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71. *The Metis Nation: On the Move*, p. 2. The other documents were as follows:
    - Metis Nation of Alberta, *Report of Public Hearings on Constitutional Reform and Canadian Unity*, which identified its objectives as "self-sufficiency", a common theme in all Métis documentation. It considered non-land-based models of government involving recognition of Metis jurisdiction through agreements and the election of local self-governing institutions to deliver programs and services.
    - Metis Society of Saskatchewan, *Metis Commission on the Canadian Constitution*, which recognized the need to develop the capacities of its local affiliates to assume self-government powers, discussed Métis governance in evolutionary terms, envisaging service delivery organizations assuming political and government functions especially at the provincial or regional level.
    - Manitoba Metis Senate Commission, *National Unity and Constitutional Reform*, which put forward the Métis view of the historical basis for Métis claims and rights in the *Manitoba Act*.
    - Metis Women of Manitoba, *Metis Women's Perspective on National Unity and Constitutional Reform*, which saw Metis governance in terms of control over administration and delivery of programs and services, accompanied by appropriate legislative authorities and resources.

The MNC report identified five issues to be placed on the constitutional agenda: recognition of the Métis as a founding nation of Canada; a Métis land base; Métis self-government; federal assumption of responsibility for Métis; and Métis representation in the House of Commons and in a reformed Senate. The MNC took the position that self-government reflects the right of Métis people to have their own democratic political institutions, to have Métis interests represented within the Canadian federation, and to manage their social, cultural and economic affairs. According to the report, the parameters for Métis self-government would include the following: democratically elected governments and democratic institutions; acceptance of the rule of law; retention of the *Canadian Charter of Rights and Freedoms*; and application of a Métis charter of rights.

The report envisaged Métis self-government on a land base, with negotiated agreements setting out the scope and application of Métis, federal and provincial laws in a broad range of areas:

> Participants indicated that land-based Metis government would have greater and more applicable legislative authority than self-governing bodies off a land base. All Metis on the land base would be subject to the laws of the Metis government by virtue of residence. The nature and scope of the laws would be defined as would the applicability of federal and provincial laws of general application. Participants felt strongly that these arrangements would best be worked out through negotiated government arrangements.[72]

In addition to regular, municipal-type powers, for example, Métis governments would have authority over taxation and management of lands

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- Pacific Metis Federation, *Towards Settlement of Our Rights*, which envisaged Métis government within the Canadian constitutional framework, adhering to democratic principles embraced by western political systems, and emphasized government accountability, adherence to the rule of law, a Métis charter of rights, and protection of individual rights. Among other things, the PMF discussed participation in federal political institutions through guaranteed seats in the Senate and the House of Commons as a means of increasing Métis influence in government affairs.
- Metis Nation of the Northwest Territories and Council for Yukon Indians, *Self-Government: Our Past Traditions, Our Present Lives, Our Children's Future*, which was the only report to discuss citizenship and the idea of shared citizenship, whereby Aboriginal people identify as Aboriginal people first and Canadians second, and Canadian citizenship is gained through treaty-making processes. Also of interest was the degree of scepticism surrounding the question of the development of public government in the territories.

72. *The Metis Nation: On the Move*, p. 25.

and resources and the ability to enter into co-management agreements with provinces.

Self-government off a land base was seen as Métis self-government "institutions" exercising jurisdiction over a clearly defined range of matters. Picking up on proposals in the report of the Métis commission on the constitution, published by the Metis Society of Saskatchewan in 1991, the MNC also advanced the option of establishing Métis governments at the provincial level, through legislative assemblies with power to enact legislation and administrative orders and a provincial executive council/cabinet with responsibility for administering legislation:

> Metis self-governing institutions [off a land base] could take the form of a provincial Metis legislative assembly mandated to enact legislation and administrative orders at periodic assemblies and comprising Local Presidents. A provincial executive council or Cabinet elected on a province-wide basis would be empowered to implement the legislation through its various departments such as economic development, social services, housing, etc.[73]

How provincial Metis government would interact with existing provincial governments was not explored. Nonetheless, through these visions of self-government, the MNC articulated clearly that "The Metis people are willing to work within an expanded version of Canadian federalism".[74]

The document collection for this period also includes constitutional positions set out by organizations representing urban, non-status and off-reserve Aboriginal people. Various constitutional review commissions were established to conduct consultations with these constituencies, as exemplified by *Aboriginal Directions for Coexistence in Canada* (Native Council Canada, 1992); *Response of New Brunswick Aboriginal Peoples Council to the Report of the Commission on Canadian Federalism* (1992); and *Report of the Atlantic First Peoples' Constitutional Forum* (1992).[75]

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73. *The Metis Nation: On the Move*, p. 25.

74. *The Metis Nation: On the Move*, p. 26.

75. Among other things, the NBAPC report pointed out problems with Bill C-31 as they relate to access to on-reserve services and political rights. They also took the position the inherent right of self government should guarantee Aboriginal representation in mainstream Canadian political institutions. Their report notes that off-reserve members can't vote, and often cannot access services, yet their numbers are included in per capita funding formula and in some cases to justify the size of Band Council. This view is one which is notably absent from the 1990 Department of Indian Affairs Report on Bill C-31 Impacts, *Impact of the 1985 Amendments to the Indian Act*.

The language adopted in all these reports conveys a more nuanced view of constitutional negotiations and recognition of the potential for reflecting Aboriginal interests in the constitution beyond the sections that are specifically Aboriginal in focus (sections 25, 35, and 37). Recognition of Aboriginal distinctiveness is seen as a way to achieve equality within Canada, with equality understood as equality between French, English and Aboriginal peoples:

> As proposed by both the Native Council of Canada and the Assembly of First Nations, Aboriginal peoples and Canada should seriously address themselves to the prospect of a national Treaty to affirm our various roles in the major institutions of Canada. One suggestion in particular that has been proposed is recommended for detailed discussion – that Aboriginal peoples join with French and English Canada in a Treaty Covenant to entrench the terms of coexistence.[76]

These documents also typify some of the innovative thinking on mechanisms for achieving a new relationship with Canada emerging in the wake of the failed 1980s constitutional conferences. *Aboriginal Directions for Coexistence*, for example, promoted treaty processes as a way to achieve and affirm a new relationship:

> Treaty-making is viewed by us as the most consistent and practical way to proceed with stating most of the essential terms for co-existence between Aboriginal peoples and Canadians.[77]

The documents also convey the special concerns of off-reserve Aboriginal peoples about the mobility of Aboriginal rights, equity of access to rights (especially for Métis and non-status Indians), and the equitable application of laws, policies and programs. This is reflected in a letter to the president of the Native Council of Canada from its five Atlantic affiliates:

> Mr. President, the intense discussions and interest voiced by everyday Aboriginal People residing off the reserve as represented by us, those who are Metis, registered, and unregistered Aboriginal People of this country, resoundingly concur that there is still very

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The third document was produced by non-status and Métis advocacy groups from the Atlantic provinces, including Newfoundland and Labrador and expressed a desire for section 35 to include governance by democratic, accountable, credible, and responsible Aboriginal governments, with powers in land, economic development, culture and language, health care, fiscal management, justice, establishment of constitutions, etc.

76. *Aboriginal Directions for Coexistence in Canada*, p. 4.

77. *Aboriginal Directions for Coexistence*, p. 4.

> much to be done, by the Associations to which they belong as their Aboriginal Representative Organizations. Also, that the Native Council of Canada must most forcefully demand and state that it has a mandate from the People of Atlantic Canada to ensure that equal social dignity is guaranteed for them in the constitution of Canada, and indeed that there can be no final resolution to the issue of self-government for Aboriginal People, unless there is a Canada Clause that can guarantee equality in the process whereby the off-reserve Aboriginal People can similarly develop forms of self government which are democratic, accountable, credible and responsible to and for all Aboriginal People regardless of choice of residence. To conclude, the Native Council of Canada must ensure that there is no comprise to the social dignity of Aboriginal People by choice of residence, nor access to Aboriginal/Treaty Rights of the First People of this land, the distinct Aboriginal People of Canada.[78]

There was, however, broad acknowledgement that the *Indian Act* is not an appropriate legislative regime. The reports called for recognition of the inherent right of self-government and pointed to the need for accompanying negotiations on fiscal arrangements.

Turning to First Nations, the Assembly of First Nations published *To the Source: First Nations Circle on the Constitution* in 1992. *To the Source* was the result of a commission established to listen to concerns of First Nations people with regard to self-government, constitutional reform, and related matters, as part of the parallel constitutional process. The commission held eight meetings and four constituent assemblies at which women, youth, off-reserve First Nations people and elders were represented. The report placed considerable emphasis on the voices of First Nations citizens, adapting the terms of reference, the consultation process, and the structure of the document to reflect what was said:

> The commissioners of the First Nations Circle on the Constitution chose to interpret our terms of reference in a way that would reflect the voices of First Nations citizens across the country, in accordance with National Chief Ovide Mercredi's explanation of the purpose of the commission... As a result, the report contains a large sampling of direct quotes from First Nations citizens and a few from non-aboriginal people. Our implicit analysis runs throughout. We refrained from engaging in an in-depth analysis for a number of reasons. Our time and resources were, of course, limited, but we had far better reasons for not producing an

78. *Report of the Atlantic First Peoples' Constitutional Forum*, letter of transmittal.

> Aboriginal Beaudoin-Dobbie report. First, we had promised our people at the meeting that we would *listen* and *transmit*; analysis — even the best analysis — "bends" the evidence to make a point. That would have been a violation of our word to our people. Second, who can speak better to the leaders than the people themselves? It is an Aboriginal tradition that leaders listen directly to the grassroots. And finally, we found that our people's voices were so clear that interpretation would have been redundant.[79]

To the Source addressed self-government, funding, and federal administration. It emphasized the inherent nature of the right of self-government, the need for First Nations to be recognized as separate and distinct nations, and the need for the pace and structure of self-government to be tailored to the requirements and wishes of each community:

> Self-government cannot and will not be the same in each First Nation community. Historically, the Haida are no more like the Mohawk than the Irish are like the Poles. Communities vary a great deal in their resources, self-confidence and desires. What's good for Akwesasne isn't necessarily good for the Dene of Fort Rae. The essential point is that each community must have the freedom, power, and resources to draw on its own strength and tradition, in order to heal the wounds that the past has left and get on with the great task of rebuilding.[80]

The report also expressed frustration about federal funding formulas based on on-reserve populations, particularly their inability to allow for service delivery to off-reserve members, and called for repeal of the *Indian Act*.

Provincial and territorial governments also contributed to policy discussions. Reports from the provinces of Manitoba, Nova Scotia, Quebec, and Saskatchewan and from the Northwest Territories were included in the document collection. Provincial constitutional committee reports reflect similar, though subtly different views on Aboriginal and treaty rights and self-government. These are seen as parts of a broader agenda of national reconciliation and constitutional reform.

Several provincial reports conveyed support for recognition of the inherent right of self-government. Almost all spoke of the need to establish a new relationship based on respect and equality, achieved through constitutional means. Many reports embraced the idea of negotiated agreements spelling out the details of self-government. Others, such as the 1992 report of the Select Committee on Ontario in Confederation, in

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79. *To the Source*, p. xi.

80. *To the Source*, pp. 18-19.

supporting constitutional recognition of the inherent right implied that Aboriginal people themselves have to take the lead responsibility in securing this recognition and must clarify and elaborate their understandings and interpretations of self-government and Aboriginal/government relations:[81]

> Although the Aboriginal constitutional conferences of the 1980s do establish a precedent for trilateral consideration of the issue, they failed to reach agreement on the form and process of entrenchment. This failure suggests that a simple commitment to entrenchment may not be enough. While Aboriginal people must lead in this process, there must be a mechanism to get other parties to the negotiating table.[82]

The contributions of territorial governments were aimed at political and constitutional development in the North rather than the Canada round specifically. Two documents from the government of the Northwest Territories (GNWT) were developed in light of territorial division following establishment of Nunavut.[83] In these documents, support for enhanced local

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81. In this context, readers may want to refer to *L'avenir politique et constitutionnel du Quebec : relations entre l'état et les nations autochtones* (1992), a background document prepared by Quebec's Secretariat des commission parlementaires to support the work of two legislative committees studying Quebec's constitutional future. The document contains no recommendations but points to lack of consensus in Aboriginal communities on the question of Quebec's sovereignty, acknowledges the complexity of questions surrounding Aboriginal/government relations and Aboriginal self-government, and suggests that the state has a responsibility to provide the means for Aboriginal peoples to ameliorate their social circumstances.

Also, from the Meech Lake era, the *Report on the Constitutional Amendment, 1987*, by the Ontario Select Committee on Constitutional Reform (1988), commented on what was observed generally by Aboriginal Canadians and some provincial governments with regard to process during the Meech Lake round, noting lack of Aboriginal participation in drafting the Meech Lake Accord, the exclusion of Aboriginal peoples from the Canada clause, disregard for the priority of Aboriginal self-government in the constitutional reform process, and general hostility toward executive federalism.

82. *Final Report: Select Committee on Ontario in Confederation*, p. 30.

83. The Arctic Inuit, represented by the Tungavik Federation of Nunavut (TFN) have negotiated a land claims agreement in the eastern part of the Northwest Territories that will lead to division of the territory into two new territories: Nunavut and the yet unnamed western portion. The Nunavut Political Accord was signed by representatives of the governments of Canada and the Northwest Territories and the TFN on 30 October 1992. In 1999, Nunavut will become a new

authority and flexible forms of community government to accommodate diverse cultural communities, advocated in earlier reports from the North, resurface in modified form.

Proposals in the 1992 GNWT report, *Reshaping Northern Government*, were driven by concerns about public debt and the consequent need to restructure, reduce, integrate and rationalize programs:

> The first step in the process of reshaping government must be to ease the crippling effect of the Government's poor fiscal position by making some tough financial decision right now at both the Territorial and community levels.[84]

The report emphasized "strong and accountable community governments" and proposed the transfer of resources and responsibility to community governments, ostensibly on the basis that this would allow community ownership of programs and services, and delivery systems that reflect the traditions and needs of the people. The GNWT claimed that programs would be available for transfer and that resources to be transferred would be "sufficient for communities to alter or design the programs to meet local needs and priorities".[85]

Significantly, this report discussed exactly what constitutes a community government. Development of an explicit sense of identity by the community was seen as a step in the transfer process, wherein communities will "suggest the make up of community government structures" within the broader framework of public government.[86] As a consequence of land claims settlements, self-government negotiations, and federal and northern constitutional processes, the report recognized that the local government environment (encompassing new Aboriginal governments) would be subject to continuing change. Although written from a public government perspective, this document had significant implications for Aboriginal communities in light of proposals to place more responsibility in local hands through devolution.

Working Toward a Common Future, published by the N.W.T. Commission for Constitutional Development in 1992, provided a glimpse of

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territory fashioned largely on its predecessors, the Yukon and the N.W.T. The new arrangements will not constitute self-government in the sense that they do not create governing institutions that apply exclusively to Inuit. The arrangement is, however, in keeping with the self-governing interests of Inuit, as, in a very practical way, it will be the governing body for that Aboriginal majority.

84. *Reshaping Northern Government*, p. 1.

85. *Reshaping Northern Government*, p. 15.

86. *Reshaping Northern Government*, p. 15.

the most recent approach to addressing governance issues in the new western territory. The commission was established to draft a new constitution for the territory and consisted of territorial political leaders, with representation from the Dene, Métis, Sahtu, Inuvialuit, the GNWT, and western members of the territorial assembly. The report addressed First Peoples' rights to Aboriginal forms of government. The inherent right of self-government was interpreted in a way that offered them exemption from the constitutional process of the new western territory:

> The First Peoples' inherent right to self-government also means that Aboriginal First Nations have the right to opt out of the New Western Territory constitutional process completely and seek a direct [relationship] with the federal government.[87]

The commission considered public forms versus Aboriginal forms of government; it suggested that the "central government" would not likely adopt an Aboriginal form, but would be representative of all cultures. Recommendations aimed at facilitating the exercise of First Peoples' rights favoured a "district" order of government. Districts would vote on the appropriate form of local government – public, Aboriginal or a combination. The division of responsibilities between central and district governments would be determined and respective powers of taxation set out. District governments were not seen as municipal, nor would their existence derive from central government authority. They would have legislative, executive and judicial functions and would possibly exercise asymmetrical provincial-type powers in a full range of areas, for example, education, administration of justice, land and renewable resource management, and direct and property taxation, in addition to conventional municipal functions.

Finally, we have contributions at the federal level to the discourse of this period, which were limited to a report of the Standing Committee on Aboriginal Affairs and the treatment of Aboriginal issues in the report of the Royal Commission on Electoral Reform and Party Financing. Neither was directed at the constitutional process.

Reforming Electoral Democracy, the royal commission report, showed that Aboriginal participation and representation in governments whose laws and policies affect them continued to be the subject of discussion as an alternative to separate systems of Aboriginal government.[88] One of the key recommendations in the report was the establishment of Aboriginal

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87. *Working Toward a Common Future*, p. 19.

88. This was also seen in a provincial document of this period, *Effective Political Representation in Nova Scotia: Report of the Provincial Electoral Boundaries Commission*.

constituencies to address participation by and representation of Aboriginal people in the electoral process. The proposal offered a way to rectify under-representation in the House of Commons and accommodate the desire of some Aboriginal peoples for a greater role in Canada's institutions of government. While the Commission did not address self-government, it stated clearly that its recommendations were not intended to satisfy the demands of Aboriginal people for self-government. This contribution to the discourse was important; it suggested that despite the preoccupation with constitutional considerations, non-constitutional means of accommodation remain available.

The Standing Committee on Aboriginal Affairs published *Summer of 1990* to discuss the evolution of the relationship between First Nations and federal and provincial governments, racism, and the political status of Indigenous peoples in Canada. The primary focus, however, was on establishing a context for understanding the events at Kanesatake and Kahnawake in the summer of 1990. The committee recognized the historical displacement of traditional systems of government and leadership selection by the *Indian Act* and the controversial and complex nature of the issues surrounding them as significant factors confounding the relationship of Aboriginal communities with Canadian governments.

In summary, the policy actors in the 1990s included almost all Aboriginal peoples and non-Aboriginal governments. Whereas in the period immediately following the Hawthorn report Aboriginal participants in the discourse were limited to provincial Indian organizations, and governmental actors were limited to DIAND and DIAND-commissioned inquiries, in this period the cast expanded considerably. Not only had the policy actors changed, but so had the relative prominence of various policy actors in the Aboriginal and government sectors. For instance, while Indian organizations were key in the discourse in the period from the late 1960s to the 1970s, Métis organizations rose to prominence in the document collection of 1991 and 1992. Similarly, in government, the lead role of the federal government in the discourse has been eroded by the extensive participation of provincial and territorial governments.

Constitutional negotiations were the principal means of policy discourse, involving the highly formalized and institutionalized position of Aboriginal people at the constitutional table. They also instigated a satellite grassroots process of preparing documentation to inform constitutional discussions. This latter activity involved extensive consultations at the community level, as seen, for instance, in the documents published by Métis organizations and other actors.

In the Northwest Territories, however, we saw a unique forum, the Commission for Constitutional Development, examining representation and other fundamental governance issues in the western N.W.T. Made up of

territorial political leaders, with representation from the all the Aboriginal groups directly affected, the commission paralleled the constitutional process of the Canada round.

Prominent in the discourse were the different views of Aboriginal participants, with the Métis emphasizing the blending of democratic and traditional forms of consensus government, First Nations advocating recognition of the inherent right, and Aboriginal people in the Northwest Territories promoting local, public government as a way to advance Aboriginal self-determination.

FINAL OBSERVATIONS

The following observations about our examination of the discourse on Aboriginal governance, as seen through selected documents, parallel the four periods of discourse discussed in this chapter, from release of the Hawthorn report to the constitutional process of 1992:

- 1966-1979: Indian Government and the Impact of the White Paper
- 1979-1983: The Discourse Broadens
- 1983-1990: More Participants, Processes and Ideas
- 1991-92: The Canada Round

These observations are intended to enhance our understanding of the past and possibly inform future discourse. They address the following issues:

- the distinct perspectives of Indian/First Nations, Métis, non-status Indian/off-reserve/urban, and northern Aboriginal peoples
- the expansion of the cast of policy actors
- the movement toward more institutionalized forums for interaction
- the influence of constitutional developments and budgetary restraint
- the different strategies and paradigms of Aboriginal and government actors
- the strategic use of language

> **Observation 1**: At least four distinct perspectives on governance are evident: the Indian/First Nation perspective; the Métis perspective; the non-status/Métis/off-reserve/urban perspective; and the northern perspective.

Fundamental to the development of the discourse on Aboriginal governance is the diversity of perspectives, strategies and ideas it contains. The documents pertaining to Indian (later First Nations) governance have unique characteristics that distinguish them from those written from other Aboriginal perspectives. These perspectives deserve separate treatment and analysis.

• First Nations Perspectives

Despite wide-ranging views on the origin, scope and nature of Indian self-government and the special relationship with the Crown, the legislative foundation for Indian/First Nations governance changed little in the period under discussion. There were, however, major policy changes dealing with the practical administrative arrangements of local band government. This is problematic in that the Westbank inquiry indicated that the legislative base diverges considerably from the policy regime supporting Indian band government and is in stark contrast to the long-standing visions and aspirations of First Nations.

The idea of a modified legislative framework was entertained by the federal government, and pursued actively at times, but there was little evidence of a willingness to embrace anything other than quasi-municipal, enhanced or specialized municipal forms of government. There was no indication in the documentation reviewed that the basic messages from First Nations concerning governance were seriously contemplated. From a First Nations perspective, government powers cannot be delegated or diminished, because they are inherent. For treaty First Nations, treaties provide the basis for Indian government. First Nations organizations attempted to use the discourse on governance to argue these two points and to ensure some shared understanding with governments of the nature of the special relationship between First Nations, especially treaty First Nations, and the Crown and its implications for First Nations government. For its part, the federal government always presented a more limited interpretation of the nature of the relationship and tried to portray its involvement in the provision of programs and services as fulfilling a moral obligation rather than its legal and trust responsibilities, except to the extent that these have been defined by Canadian courts.

The documentary evidence also suggests that once there has been legislative change with implications for local First Nation government (for example, in isolated cases such as the *Cree Naskapi Act*), the federal government abrogates its responsibilities even at the stage of implementation. This raises a serious question about what the federal government hopes to achieve through new legislative arrangements – that is, has new legislation been seen as a way for the federal government to reduce its obligations rather than fulfil them?

Finally, there was evidence in many of the documents reviewed of implicit or explicit questioning of the role of the Indian affairs department, particularly whether, as a government agency, it facilitates or frustrates the development of First Nations government.

• Métis Government Perspectives

Among the twelve documents relating to Métis governance in the collection there were three subsets: early, general statements on Métis rights, which parallel the work of First Nations organizations in the late 1970s and early '80s; documents central to the development of local government for the Alberta Métis settlements; and documents setting out Métis constitutional positions.

A variety of models and visions are evident, ranging from enhanced municipal-type governments on and off a land base, to third-order, provincial-type governments operating at the provincial and possibly the national level, to self-government institutions off a land base, with program and service delivery responsibilities in the hands of specially elected Métis institutions.

Although Métis organizations recognize that authority must come from Métis people at the community level, they seem willing to contemplate political authority resting with provincial, regional and national Métis government institutions. There is some suggestion (e.g., in Saskatchewan) that work needs to be done at the community level to strengthen these constituencies.

It is also noteworthy that, with the exception of Métis in Alberta, there is an assertion that Métis are a federal responsibility. The move toward Métis self-government has been frustrated, however, by federal unwillingness to contemplate Métis as being included in section 91(24). With the exception of Alberta, government responses or attempts to engage in dialogue have been absent.

The Métis appear willing to consider alternatives to constitutional amendments as a mechanism for achieving self-government. Bilateral agreements with the province (Metis Nation of Alberta), decentralization and direct participation on boards and commissions (Metis Society of Saskatchewan), and participation in federal political institutions (Métis National Council and Pacific Metis Federation), for example, were raised in the documents.

Finally, the political philosophy of Métis organizations demonstrates a commitment to the traditions of parliamentary and Aboriginal government. The Métis emphasize what they have in common with liberal democratic governments by articulating their adherence to democratic principles and their willingness to accommodate individual rights.

• Non-Status Indian, Métis, Off-Reserve, and Urban Aboriginal Government Perspectives

Two document types characterize this part of the collection: those addressing program and service delivery in an urban context, and those setting out Canada round constitutional positions.

Recommendations of the Ontario Task Force on Native People in Urban Settings may reflect thinking informing public policy development at the time. Specifically, the task force asserted that integration and participation in the institutions and policy processes of the non-Aboriginal community would contribute to reducing differences in material and other conditions between Aboriginal and non-Aboriginal people. In addition, recommendations in the more recent documents might be interpreted as moving away from diffuse but poorly funded community activities and toward consolidated, formalized and institutionalized program and service delivery arrangements for Aboriginal people in urban areas.

An issue of some contemporary relevance to governance for off-reserve, urban and non-status constituencies, and one that does not appear at all in the documents reviewed here, is wrangling over who represents the urban constituency — 'status-blind' institutions or separate Aboriginal political organizations. This gap in the document collection may reflect the controversy surrounding this issue and the fact that inquiries looking at the day-to-day realities of Aboriginal people might not want to get mired in this debate. It might also reflect the complexity of the issues involved.

Finally, the constitutional documentation demonstrates an interest on the part of urban and off-reserve/non-status Aboriginal people to pursue participation in Canadian political institutions, especially through guaranteed seats in legislative assemblies.

• Aboriginal Government in the North

Any discussion of Aboriginal governance in the North must take into account linkages with claims settlements outcomes, division of the Northwest Territories, and political and constitutional development. This is as true today as it was 25 years ago.

The documents reviewed here reveal tension between Aboriginal and public forms of government. It is also clear that the Aboriginal peoples of the territorial North occupy a more influential position in the discourse affecting them than Aboriginal peoples elsewhere in Canada. Territorial governments appear to be responding to Aboriginal realities, notably claims settlements, whereas earlier they had to respond to federal initiatives and strategies for northern political and economic development. Innovative ideas have emerged and been legitimized by acceptance in forums representing a range of Aboriginal and non-Aboriginal interests — such as the Commission for Constitutional Development, the Nunavut Constitutional Forum and the Western Constitutional Forum, all in the Northwest Territories. The emergence of these ideas might be traced to the new ground occupied by northern Aboriginal peoples in policy discourse and processes.

Despite the differences between these perspectives, at the broadest level Aboriginal peoples have common goals in pursuing self-government.

Documentation from Aboriginal organizations shows a focus on seeking recognition of their distinctiveness and their rights. In terms of the understanding of their rights, their origin and implications for governance, however, Aboriginal groups/peoples diverge. For example, the Métis seek recognition of federal responsibility under section 91(24), while First Nations seek federal acknowledgement of a specific view of the nature of the relationship. Northern Aboriginal peoples continue to struggle with the question of whether and how to accommodate Aboriginal governance in a public government framework.

The objectives of non-status, urban and off-reserve Aboriginal peoples have changed over the years, from a focus on program and service delivery, to a more global interest in recognition as Aboriginal peoples, the foundations for a new relationship with governments, and new forums for Aboriginal/government relations. This experience contrasts with the relative consistency of the cause of First Nations over the same 25-year period.

Whereas Aboriginal groups have struggled to have their voices heard separately from others, other actors, particularly governments, have increasingly shown signs of recognizing the diversity of Aboriginal peoples.

Until the mid-1980s, little documentation acknowledged Aboriginal peoples other than those who came within the purview of the *Indian Act* – that is, 'registered Indians'. In the White Paper and the Nielsen report, as well as other government documents, there is limited recognition of the distinct views of treaty and non-treaty First Nations concerning the special relationship with the Crown. Likewise, documents produced by government inquiries in the urban setting fail in some cases (for example, the Ontario Task Force on Native People in Urban Settings) to distinguish the particular perspectives of off-reserve status Indians, non-status Indians, Métis and other urban people. Rather, they tend to be lumped together in the generic category of (mostly urban) "Native people". More recently, there seems to be acknowledgement of difference and separateness.

Despite some movement toward recognizing this diversity, the practical difficulties for purposes of tripartite and intergovernmental processes are obvious. The tension between the need to recognize the unique circumstances of each Aboriginal people, the need to have these diverse interests represented, and the need to establish manageable structures to facilitate dialogue continues to characterize the discourse.

> **Observation 2**: Between 1966 and 1993, the number of representative organizations engaged in the policy discourse expanded, from only federal government and regional Indian associations in the early discourse, to a full range of participants, including provinces, arm's-length federal agencies, and provincial, regional, and national Aboriginal organizations.

The number of participants in the policy discourse grew considerably over the quarter-century examined. Discourse centred around Indian government and, to a lesser extent, government in the North in the period immediately following the Hawthorn report. The range of policy actors remained limited until the next period, 1979-1983, when Métis concerns began to be voiced by provincial and regional organizations. In the mid- to late 1980s, the concerns of the urban and non-status population joined those of First Nations and Métis. Finally, we saw the emergence of provincial governments in the Quebec and Canada rounds of constitutional negotiations and of non-governmental actors such as the Canadian Human Rights Commission. What began, then, as discussion of First Nations concerns, a discourse limited to First Nations organizations and the federal government, developed into a multi-actor discourse, with a variety of government, Aboriginal, and non-governmental participants.

The presence of new participants in later periods was related largely to preoccupation with constitutional issues and the need to organize to influence processes in the 1980s and early '90s to patriate and, later, amend the constitution. Formalization and institutionalization encouraged provincial governments to get involved, through processes of executive federalism. Aboriginal organizations also become involved through the extensive grassroots consultations and accompanying funding that characterized constitutional processes. This leads to our third observation.

> **Observation 3**: There is evidence of movement toward greater institutionalization and formalization of the process for discussing Aboriginal governance.

Between the late 1960s and the late 1970s, documents produced by Aboriginal organizations were not directed to particular policies or processes, with the exception of *Citizens Plus*, which was aimed at forcing the federal government to retract its 1969 White Paper. Rather, there was a preoccupation with articulating comprehensive Aboriginal understandings of Aboriginal and treaty rights, among other things, as the basis for Aboriginal governance.

After 1979, much of the documentation from Aboriginal organizations was directed to constitutional development and reform processes associated with patriation of the constitution. This constitutional renewal process formalized the policy process with the introduction of the institutionalized constitutional forums. Other sources of greater formalization also emerged in the early 1980s, however. Attempts were made to pull Aboriginal representation into more formal settings, through existing structures, such as the Standing Committee on Indian Affairs and Northern Development, and through new structures, such as the Indian Commission of Ontario and the Tripartite Local Government Committee in British Columbia.

The mid- to late 1980s saw many processes involving formalized structures for negotiation, including first ministers conferences and bilateral negotiations involving provincial and territorial governments (for example, the Métis settlements in Alberta, the Dene/Métis, and attempts to establish a regional Atlantic forum for Aboriginal issues). This is evidence of further institutionalization of the Aboriginal voice in the decision-making processes and structures. Processes to review implementation of the James Bay and Northern Quebec Agreement and the *Cree-Naskapi Act* also provided more structured settings in which to discuss Aboriginal governance. Furthermore, in the North, we saw a highly structured process for political and constitutional development, with institutions such as the Nunavut Constitutional Forum, the Western Constitutional Forum, and the Commission for Constitutional Development channelling the discourse.

Finally, the last period, 1991-92, saw parallel but dichotomous processes. On one hand, Aboriginal people were represented in a highly formalized process at the constitutional table. On the other hand, however, non-engaging grassroots consultations were being conducted by provincial governments and Aboriginal organizations.

Thus, in general, the 25-year period since the Hawthorn report witnessed a considerable elaboration of institutionalized structures for discussion and negotiation of Aboriginal governance. Most prominent among them were those associated with patriation and later amendment of the constitution. Others, involving provincial governments, and implementation of self-government legislation in Northern Quebec, also emerged, however, making formal processes for interaction more diverse.

Observation 4: Aboriginal political activity in the policy discourse on Aboriginal governance was influenced by preoccupations about constitutional development but also by the environment of budgetary restraint.

Particularly striking in the document collection was the extent to which the activities of Aboriginal organizations corresponded to peaks and valleys in constitutional discussions and fiscal restraint. The effects of constitution-related funding were evident in the volume of documents from Aboriginal organizations in the early 1980s, before patriation, and in the early 1990s, during the Canada round. There is a striking gap in the documentary record from 1982 to 1987, corresponding of course to the period when a series of first ministers conferences (FMCs) was held. This can be explained by the nature of this constitutional process – a closed form of executive federalism that did not contribute to the public record as reviewed in this chapter. Similarly, the period 1987-1990 saw a slow-down in the publication of documents on issues of Aboriginal governance, perhaps because of

frustration with the FMCs' failure to achieve agreement and a refocusing of efforts on other concerns, such as education and criminal justice.

The discourse on Aboriginal governance was also affected profoundly, in terms of both process and ideas, by the fiscally conservative environment of the 1980s and '90s. Following election of the first Conservative government in 1984, and based apparently on the recommendations of the Nielsen report, came a series of policy initiatives aimed ostensibly at enhancing band government control in delivering programs and services but actually intended, some would argue, to minimize government responsibilities and financial commitments. These included alternative funding arrangements and flexible transfer payments between DIAND and band governments and the capping of programs such as post-secondary education assistance to status Indians.[89]

Based on the documentation, it is difficult to assess the impact of restraint on Aboriginal peoples other than status Indians. Evidence that the fiscal crisis may have an effect on local governments in the North similar to that experienced by First Nations is found in the GNWT's *Reshaping Northern Government*. This document contains overtones of the devolution policies implemented by DIAND in the 1980s, some of which were identified earlier. Program and service transfers are proposed on the basis they will enhance local government control and responsiveness to local needs and traditions. In reality, devolution, as a companion to a budgetary squeeze, may mean off-loading administrative responsibility and the associated political heat to community governments in the absence of a sufficient resource base.

It is also important to consider the effect of Aboriginal organizations' core funding on the policy discourse. The impact of core funding is evident, perhaps, in the volume of documents, which increased dramatically over time. From 1960 to 1981, primarily First Nations perspectives emerge. In the period 1981 to 1991, national and provincial organizations (new or existing) were funded more adequately under the Secretary of State's core funding program and various constitutional processes. Of note here is the establishment of the Métis National Council, which allowed the Métis voice to distinguish itself from the voice of non-status Indians represented by the Native Council of Canada (now the Congress of Aboriginal Peoples). In

89. A more cynical view might associate the Community-Based Self-Government Policy (1986) and program and the *Indian Act* alternatives process (coming out of the Lands, Revenues, and Trusts Review) with attempts by the federal government to reduce its role in Indian affairs by minimizing its responsibilities toward individual bands while keeping Indian governments within the confines of federal legislation and policy and therefore within government control.

1991 and 1992, funds were available to organizations as part of the Canada round, leading to extensive documentation on Aboriginal governance. There was an ebb and flow of documentation between 1987 and 1992, as Aboriginal groups ceased issuing documents on governance. This correlated directly with the winding down of the first constitutional round (1983-87) involving Aboriginal people and with cuts in federal funding to support the development of positions through research and related activities.

There is little evidence that core funding was extended to cover policy and research work on governance beyond supporting the preparation of documentation aimed at constitutional discussions. Documents considered in this chapter tend to address constitutional matters broadly, asserting Aboriginal rights, rather than setting out the specifics of Aboriginal governance. There is no evidence of resources being made available for development work. This is ironic, considering the demands of some governments at the constitutional table for more details on Aboriginal governance before they would agree to its entrenchment in the constitution. This situation is exemplified in the extreme for off-reserve/urban Aboriginal peoples. Until very recently, virtually no documentation discussed possibilities for Aboriginal governance off-reserve or in urban areas.

In summary, few resources were directed to examining or changing the practical details of Aboriginal self-government. Instead, resources have been directed mainly to constitutional processes, where change is notoriously difficult. This suggests what many suspect and what reality bears out – that providing resources to support the development of Aboriginal governance beyond existing and limited arrangements (e.g., under the *Indian Act*) has not been a priority of Canadian governments.

Observation 5: Aboriginal and government participants have used markedly different strategies and paradigms.

We noted the diversity of Aboriginal perspectives on governance. There is a similar element of diversity in perspectives presented by governments. In many ways, however, the development of the discourse was shaped by the competing visions, paradigms and strategies of Aboriginal and government participants.

The Aboriginal contribution to the discourse was characterized by a certain degree of consistency. Their view of their rights and their relationships with non-Aboriginal governments has been sustained over time, though with evolution in what constitutes self-government or Aboriginal government (for example, from greater authority under existing legislation to the establishment of a completely new constitutional and foundational relationship). Throughout the discourse was dominated by the language of rights, however. Later periods of discourse may be more consistent with a 'sovereigntist' paradigm, which uses nationhood and

sovereignty, rather than rights, as the fundamental basis of struggles for self-government.

It is evident from the documents that Aboriginal peoples and organizations have drawn from international politics and law to increase awareness among Canadians and their governments Aboriginal peoples' rights, including the right of self-government, and that this has had some effect on government policy. Evidence is found in documentation emanating primarily from First Nations organizations. In 1971, the Manitoba Indian Brotherhood called on Canada to establish an "honourable relationship" with Indian peoples so as to uphold its position in the international community:

> Canada will not long maintain a position of respect in the councils of the world so long as her first citizens live in degradation and despair.[90]

Wahbung Our Tomorrows emphasized that Aboriginal and treaty rights emanated from the sovereignty of Manitoba Indian people "as a nation of peoples" and referred to international agreements, notably the *International Covenant on Human Rights*, as underpinning recognition of the sovereign status of Indian nations. Documents from treaty Indian organizations, such as the Federation of Saskatchewan Indian Nations and the Prairie Treaty Nations Alliance were less explicit in their references to international legal instruments, but they maintained the consistent view that the treaties were made by separate nations and reflect a nation-to-nation - as opposed to a nation-to-subject or nation-to-ward – relationship.

The two documents from the Union of British Columbia Indian Chiefs also adopted internationalist overtones. In their 1989 position paper on Aboriginal title and rights, the chiefs made explicit their view that the inherent right of self-government and the right of self-determination are based not only on Aboriginal title and rights but also on international covenants, notably the *International Covenant on Economic, Social and Cultural Rights* and the *International Covenant on Civil and Political Rights*:

> First is the principle of self-determination of peoples. The International Covenant on Economic, Social & Cultural Rights and the International Covenant on Civil and Political Rights state that: "All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development." By virtue of this

90. *Wahbung Our Tomorrows*, p. i.

> principle, any alienation of our land or political jurisdiction must carry the consent of the First Nations.[91]

These documents demonstrate that First Nations organizations in particular have adopted the language of rights as used in international law to articulate their understanding of the special relationship, perceived as nation-to-nation, and as a basis for recognition or assertion of their right of self-determination.

By contrast, governments have been much less forthcoming about their true positions and paradigms. While positions may have been couched in terms of a 'citizens plus' approach, the policy itself reveals an attempt to limit federal and provincial responsibility. One might question whether this constitutes assimilation or whether it constitutes 'citizens plus', especially in light of increased provincial involvement.

The obliqueness of federal policy suggests that governments have not made transparent their views about the fundamental nature of relations between Aboriginal peoples and Canadian governments. This is evident in the fact that between 1969 and the Mulroney government's 'four pillars' policy statement in 1990, there was no clear statement of the overall federal approach to Aboriginal policy. Rather, there have been numerous changes in comprehensive and specific land claims policy and various initiatives to broker constitutional change.

The absence of a comprehensive federal position may have been for a number of reasons. The federal government perhaps did not want to find itself experiencing a backlash similar to the one following release of the White Paper. In light of the White Paper experience, it may have been easier to contain opposition by making incremental policy changes. In addition, for most of the 1980s, the federal government could easily use the unresolved constitutional question to justify the absence of a comprehensive Aboriginal policy.

The provinces have become increasingly articulate concerning their visions of relationships with Aboriginal peoples. We have considered policy statements and other documents from British Columbia, Quebec and New Brunswick. The government of Quebec set out its understanding of its relationship with the province's "Aboriginal Nations". New Brunswick's *Policy Framework Proposal* addressed the Aboriginal population in two ways. On the one hand this document speaks to Aboriginal people as individuals, as citizens of the province, who have an individual right to share in the social and economic life of the province. On the other hand, in referring to Maliseet, Mi'kmaq and off-reserve communities, the province appears to acknowledge that it must address Aboriginal citizens as members

91. *Aboriginal Title and Rights Position Paper* (not paginated).

of distinct Aboriginal communities. In British Columbia, however, the Premier's Council on Native Affairs did not tackle the relationship between the province and its Aboriginal peoples directly.

Provincial involvement in Aboriginal policy today relates to ideas spelled out in the Hawthorn report. The provinces have revived some variant of the notion of citizens plus, if not in practice then at least at the level of rhetoric. The provinces have pointed to the need to ensure that Aboriginal citizens have access to equitable social and economic status on the basis of their provincial citizenship. Their positions and statements suggest they are working to fulfil the 'citizens' part of the citizens plus equation. This may of course not be the case in practice, as provincial governments continue to look to the federal government for reimbursement for services provided to Aboriginal people. In addition, the provinces whose policy documents are reviewed here assert that the 'plus' side – meeting the needs and aspirations of Aboriginal peoples as distinct peoples, rather than as provincial citizens – is the federal government's responsibility under section 91(24).

Focusing on Aboriginal self-government arrangements, provinces appear to support negotiations and arrangements within the existing or a new legislative framework. The provincial documents do not make explicit constitutional positions or commitments, however, although they encourage continuing with processes to facilitate constitutional entrenchment.

There was duality in what the provinces contributed to the policy discourse on Aboriginal governance. On one hand, their rhetoric reflected greater acceptance of Aboriginal rights, including the right of self-government, often acknowledged as inherent, and they indicated willingness to participate in negotiations. On the other hand, there was an undercurrent suggesting that they are still hesitant about signing on to either constitutional or practical arrangements in the absence of a detailed picture of what Aboriginal governments will look like. There was little indication that provinces are willing to commit to much beyond their own rhetoric – that is, little evidence they will provide the resources, or even the policy foundation, to facilitate the development of Aboriginal governments or support negotiation of new arrangements on the basis of recognition of the inherent right of Aboriginal self-government.

Observation 6: Language has been used strategically by Aboriginal and non-Aboriginal participants in the discourse on governance.

Aboriginal people have gone to some lengths to choose appropriate terminology, ensuring there is shared understanding of terms in their own constituencies, then sticking to them over time. The most notable example is found in documents from treaty First Nations, which continue to assert a nation-to-nation relationship, the sacredness of agreements, the special

relationship established by treaties, and the inherent rights of government they embody. Terminological consistency, of course, reflects clarity about goals and determination of purpose among First Nations.

Notwithstanding common understandings of what underlies Aboriginal governance, definitions of what self-government implies in practice vary. Over the 25-year period, self-government has been pursued on the basis that it encompasses modified or quasi-municipal arrangements, increased control of program and service delivery systems, or participation in political institutions. For many it means coexistence and separate systems of government outside a federal legislative framework.

Policy discourse on Aboriginal governance has also been dominated by the language of rights, interpretation of rights, and varying understandings of the origin, nature and implications of the relationship between Aboriginal peoples, Canadians and their governments. For their part, governments have not explored the foundations of Aboriginal governance or rights but have manipulated this terminology to suit their needs. At the same time they have held no common view of what self-government implies. In some cases, self-government would seem to involve simply changing administrative arrangements or establishing municipal-type arrangements; in other cases self-government would involve authority delegated through legislation that would also recognize Aboriginal governments.

Although the language used so consistently by many Aboriginal organizations over the past 25 years has entered the mainstream of policy discourse, the ideas associated with it have never been articulated or fully accepted by governments. This suggests a fundamental flaw in the quality of the discussion. It can hardly be called dialogue in the absence of a common understanding about the terms used to inform the exchange. It suggests further that language used in the discourse must always be considered carefully and, especially, that what governments actually mean when they talk about self-government needs to be probed deeply.

CONCLUSION

In this chapter we have traced the evolution of public policy discourse on Aboriginal governance through key documents published over the period from the Hawthorn report in the late 1960s and to the Canada round of constitutional negotiations in the early '90s. The discourse on governance shifted during this period, as participants, processes and ideas changed in interesting and provocative ways. The number of participants grew, processes became more formalized, and ideas became more diverse, but differing paradigms and the absence of consensus about points of joint interest between Aboriginal and non-Aboriginal policy participants made genuine dialogue difficult to achieve. What remained elusive was agreement

on and commitment to the nature of the special relationship between Aboriginal and non-Aboriginal peoples and their governments.

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Chapter 6
The Discourse on Criminal Justice

THE PAST QUARTER-CENTURY HAS SEEN MANY DEVELOPMENTS in the policy discourse on Aboriginal people and the criminal justice system. We have seen the continued over-representation of Aboriginal people at all points in the criminal justice system, and we have seen disturbing events across the country heighten public demands for change. It is in this context that the treatment of Aboriginal people by the criminal justice system has emerged as a policy area fundamental to the lives of Aboriginal people and to the development of the relationship between Aboriginal and non-Aboriginal communities. As we look at these developments through the documents, we hope to see how changing participants, changing processes, and changing ideas have shaped the policy discourse and how such developments might inform future agendas.

As in the previous two chapters, our task in this chapter is to trace the development of the policy discourse on criminal justice by examining key documents published since the Hawthorn report. This task is accomplished in two steps. The next section traces developments through the documents, highlighting major periods of change and fundamental turning points that shaped the discourse. As a second step, we offer some observations that may be of some help in understanding the policy discourse of the past and fostering greater dialogue in the future.

DEVELOPMENT OF THE DISCOURSE THROUGH DOCUMENTS

The policy discourse on Aboriginal people and criminal justice since the Hawthorn report can be broken down into three periods: 1967-1978; 1978-1988; and 1988-1992. Our examination focuses on the three elements introduced in Chapter 3: who was participating in the policy discourse in each period; how were they participating; and what ideas were being expressed.

Provincial and federal governments were particularly prominent in the discourse, as were non-governmental organizations, such as the Canadian Bar Association, and the Law Reform Commission. Aboriginal organizations, particularly at the provincial level, also played an important role, articulating the interests of Métis, non-status and status Indians. Few of the documents speak exclusively to concerns of Inuit or Métis; instead, these concerns tend to be addressed in reports dealing with Aboriginal peoples generally.

The collection also reveals a geographic focus on the prairie provinces, with nine of the reports published by governments or organizations in Alberta, Saskatchewan and Manitoba. By contrast, there was only one report from Atlantic Canada and none from Quebec, British Columbia, or the territories.

1967-1978: THE BEGINNING OF DISCOURSE

This first period saw signs of a growing awareness on the part of Canadians of problems facing Aboriginal people in the criminal justice system. The earlier documents of this period focused largely on Indian issues, but the concerns of Métis and non-status Indians were addressed in documents of the mid- to late 1970s.

The discourse began in August 1967 with the publication of *Indians and the Law*, a survey prepared by the Canadian Corrections Association for the Department of Indian Affairs and Northern Development. The project committee that prepared the report, chaired by Dr. Gilbert C. Monture, consisted of more than 45 individuals, representatives of private agencies, and representatives of provincial and federal department and agencies. Nine of the members, including the chair, were Indian; none of the nine represented a federal or provincial department or agency. The representativeness of the committee facilitated discussion among all parties involved in the criminal justice field:

> The fact that Indian and non-Indian people were able to meet and discuss a contentious subject with frankness and harmony bodes well for the future.[1]

Indians and the Law was written in response to a request from DIAND to gather "whatever material of a statistical nature was readily available".[2] It reflects an attempt to gather objective information to respond to rising public awareness and concern about the situation of Indian people in the criminal justice system. This awakening was evident in a passage written by Dr. Monture:

> True, I had been born and raised on an Indian reserve prior to the turn of the century and had lived there until the beginning of World War I. I was quite aware of the type of misdemeanour and "trouble" (as we naively classed it) that our people were experiencing with the law, such as drunk and disorderly or assault and battery arising out of occasional drinking sprees, but rarely any deliberate crimes of violence or forcible burglary or theft. Now it seemed the whole picture had changed, even to the extent that in

1. *Indians and the Law*, p. 8.
2. *Indians and the Law*, p. 9.

> certain areas Indians constituted a large proportion of the offenders. Moreover, the number of serious offences appeared to be increasing. Why was this so? I asked. The people I had grown up with as a boy and as a young man were inherently law-abiding, kindly and generous. What was bringing their descendants into more frequent trouble with the law? ...The question worried me.[3]

Publication of the report occurred at the same time as the Hawthorn report, which was the first major source of information on the conditions of Indians in Canada. According to *Indians and the Law*, "public opinion as to the disparity between their living conditions and those that apply to other Canadians is becoming aroused as never before."[4] It was in this context that the committee was asked to "engage in an inquiry, or survey, rather than 'in-depth' research, with the aim of producing concrete recommendations which could be implemented without delay on a national scale." The project was to encompass "all people of Indian ancestry, i.e., Metis, and also to include people of Eskimo ancestry."[5]

To collect this information, university students were recruited to visit communities and conduct interviews. Their approach was "informal and exploratory, rather than technically rigorous".[6] In addition, a literature review was conducted and, where available, statistics were collected regarding offences and populations in correctional institutions.

The committee made a series of recommendations for change in the nature and extent of law enforcement, judicial and correctional services for Indian people and 'Eskimos', including resolution of jurisdictional conflicts between federal and provincial governments, greater use of preventive and educational programs in the schools, expansion of the Indian constable system, increased funding for friendship centres, and the recruitment of Indians and 'Eskimos' to work in the criminal justice system. The report also recommended an examination of government violation of treaty rights, for it found that "what the Indian people regard as the failure of successive governments to live up to the terms and the spirit of the original treaties is, in the eyes of most Indian people interviewed, a stumbling block to their acceptance of the white man's law in its widest terms".[7] The committee

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3. *Indians and the Law*, p. 7.

4. Canadian Corrections Association, *Indians and the Law*, p. 20.

5. *Indians and the Law*, pp. 9, 10. Note the categorization of Aboriginal peoples used in this early period of discourse, as a point of reference for documents discussed later.

6. *Indians and the Law*, p. 12.

7. *Indians and the Law*, p. 19.

recognized that implementing these recommendations would require a considerable increase in social services funding from governments:

> They are based on the assumption that substantial increases in services and expenditures will be provided by federal and provincial agencies to meet the massive backlog of social and economic problems which contribute to the difficulty with the law experienced by these people. A considerable increase in expenditures for such services as housing, education, health, employment counselling and placement, and recreation has occurred in recent years...but an even greater rate of increase is needed. Without this, the Indian and Eskimo people who are geographically dispersed, who are socially, economically and politically handicapped, and who are already burdened with an apathy that has been building for a century, will deteriorate further.[8]

Following *Indians and the Law* came publication of *Wahbung Our Tomorrows* by the Manitoba Indian Brotherhood in 1971. While *Wahbung* addressed a number of issues related to many other aspects of Indian/non-Indian relationships, its treatment of legal protection is noteworthy. The report bases its position and recommendations on the view that the Euro-Canadian criminal justice system is alien, discriminatory, and disrespectful to Indians:

> The problem we have with the legal system exists because we must live with White Man's law – a law that was imposed on us from outside, a law often alien to our way of living and thinking, a law we often do not understand, a law that seems to us to protect White men but not Indian people, and consequently a system of law which builds Indian resentment instead of active co-operation.[9]

The MIB also explained the disproportionate contact of Indians with the criminal justice system in terms of a failed education system, high unemployment, racial discrimination, poverty, and their lack of familiarity with the courts and their methods. The report recommended allocating more resources for research, more Indian court workers, the establishment of post-release centres, and incentives to encourage Indians to become lawyers and judges.

In terms of policing, *Wahbung* recommended establishment of a tribal constabulary in Indian communities and a tribal police commission made up of representatives from each of the four Manitoba tribes, the attorney general's department DIAND. The commission would work toward the eventual formation of a permanent provincial Indian police commission,

8. *Indians and the Law*, p. 13.

9. *Wahbung Our Tomorrows*, p. 141.

which would be directly responsible to local Indian communities and establish a close working relationship with the Royal Canadian Mounted Police. In this way, the police could serve local needs better through enforcement but also through prevention and the fostering social progress. In the longer term, the MIB envisaged a system designed and controlled by Indian people:

> In the long run, it is the Indian people who must develop an effective police protection system based upon their needs. There should be a workable combination of effective local control through elected community representatives, Indian constables and liaison with the police who operate beyond the borders of our reserves.[10]

Indian policing was also addressed in the 1973 DIAND study, *Report of the Task Force on Policing on Reserves*. The task force was established in response to evidence — from Indian people and from surveys such as *Indians and the Law* — of the pressing need for better policing services on reserve.

According to the report, DIAND adopted a new policy in 1971 to make the Indian band constable system more flexible and more effectively organized and to ensure better conditions of service. These changes, however, were "never intended as a permanent system to meet ongoing needs, but as a means of dealing with the most pressing problems".[11] The persistence of policing concerns led finally to establishment of the task force, whose objective was to examine policing on reserves and, "after consultation with all concerned at appropriate levels, to make recommendations on this subject"[12].

The task force operated on the assumption that policing on reserves was largely the responsibility of provincial governments and therefore focused its consultations at the regional and provincial levels. Its work was divided into three phases: examining the situation; designing methods to consult Indian peoples and other concerned parties about how to improve policing on reserves; and ascertaining Indian preferences and consulting other parties about the feasibility of these preferences.

The task force prepared an interim report outlining a number of options and circulated it through DIAND regional offices to Indian associations in each region, at which point "Indian bands were to be asked through their associations to indicate their preference for one of the options".[13] Options

10. *Wahbung Our Tomorrows*, p. 147.
11. *Task Force on Policing on Reserves*, p. 3.
12. *Report of the Task Force on Policing on Reserves*, p. 3.
13. *Report of the Task Force on Policing on Reserves*, p. 9.

were presented within a spectrum, based on which of three possible institutions would be the principal authority for the policing function: band council policing, municipal policing, or provincial policing. These three areas were broken down further into specific models.

During the task force's consultative stage, it met with representatives of the RCMP who expressed a strong preference for "option 3(b)", which was to establish an Indian branch or contingent as an integral part of an existing police force. Provincial governments and provincial police forces also expressed broad support for this option. Under option 3(b), band councils would not have administrative control of constables and would have a less direct voice in the appointment of Indian constables. These factors split the views of the band leaders consulted:

> Although some Band Councils may feel the lessening of their authority is not in the interest of the Indian people, some Band leaders have voiced the opinion that the lessening of a Band's administrative power in relation to policing under this option may well ensure better policing on Indian reserves.[14]

The task force tried to establish regional committees to facilitate the consultative process and issued its results on a regional basis:

> Despite a widespread preference for option 3(b) it was apparent that no one option was likely to be accepted by all bands. Some bands would want to continue on with the present band constable system, others would wish to pursue other options. The results of the consultative process can best be summarized on a region by region basis.[15]

The task force presented a number of concluding observations. Unlike *Wahbung Our Tomorrows*, which focused largely on the discriminatory aspects of policing, the task force was much less accusatory in its explanation of shortcomings:

> For a variety of reasons, some of which stem from the isolated and remote nature of some reserves, policing has been less than adequate, and one of several consequences has been the disproportionately high incidence of petty crime among the inhabitants.[16]

The task force asserted a need to focus on preventive policing and noted that "Indian bands should continue to have freedom of choice as to the form of policing on their respective reserves, provided this is acceptable

14. *Report of the Task Force on Policing on Reserves*, p. 23.

15. *Report of the Task Force on Policing on Reserves*, p. 25.

16. *Report of the Task Force on Policing on Reserves*, p. 1.

to Provincial Attorneys-General".[17] To this end, it was recommended that option 3(b) be made available to bands that preferred that model, that the band constable program be reviewed, and that, if the review indicated a continuing need for the program, improvements be made. The task force recognized that improving policing on reserves would inevitably cost more money; it provided cost estimates and asserted that provincial governments should be encouraged to pay a proportionate share of the costs.

An important turning point in the evolution of the discourse came with publication of *Native Peoples and Justice: Reports on the National Conference and the Federal-Provincial Conference on Native Peoples and the Criminal Justice System*, based on conferences held in Edmonton in February 1975. Their objectives were expressed by Warren Allmand, then solicitor general of Canada:

> Our expectations of this conference are high, and so they should be. The right people are here. We share a determination to gain a better understanding of the problems we face and to move towards their solution.[18]

The "right people" included elected representatives of federal and provincial governments, as well as Aboriginal participants who included individuals and representatives of national and provincial Aboriginal organizations and representatives of criminal justice agencies serving Aboriginal people in conflict with the law. Status Indian, Métis, non-status Indian, and Inuit groups were represented. The three-day conference was unusual in that the third day was actually a federal-provincial conference. While these meetings are usually closed, delegates to the general meeting were admitted as observers.

The national conference consisted of a series of workshops covering prevention, policing, courts and corrections, as well as the special concerns of Inuit, from both urban and remote perspectives. Recommendations included the establishment of various programs, such as legal education programs for Aboriginal people and cross-cultural training for non-Aboriginal criminal justice practitioners, the recruitment of Aboriginal people as criminal justice officials, and the establishment of mechanisms for consultation and liaison, such as citizen's committees, to deal with complaints about police treatment of Aboriginal people. A persistent theme was the need for communication between Aboriginal and non-Aboriginal people, emphasized for instance by the study group on probation, parole and aftercare:

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17. *Report of the Task Force on Policing on Reserves*, p. 35.

18. *Native Peoples and Justice*, p. 3.

> "There is no reason for misunderstandings between whites and natives to continue," the study groups said. "We want our people out of jail and at home and to make this happen we all have to stop and listen to what the native brotherhoods and sisterhoods are saying."[19]

The agenda of the federal-provincial conference was developed from suggestions formulated in workshops and presented at the plenary session of the national conference. In his opening remarks, Allmand emphasized the need for federal-provincial co-operation, particularly with regard to resources, and for continuing progress on the issues presented at the national conference:

> Once we agree in principle on things here, we will have to go back to our own governments, our own departments and work out the details, to determine how many people are necessary to carry out the program, how much will it cost, who should pay for this part and who should pay for that part... I hope we can set up continuing mechanisms to make sure that what we start here will be carried forward.[20]

The ministers adopted, as a statement of general philosophy, guidelines to give Aboriginal communities greater responsibility for planning and delivering criminal justice services, encourage more Aboriginal persons to work in the criminal justice system, and emphasize prevention, diversion, alternatives to imprisonment, and the protection of young persons. The need for greater and more systematic communication with bands, councils and chiefs was also noted. To these ends, ministers agreed on a series of resolutions aimed at recruiting more Aboriginal persons, upgrading and extending programs, and forging a stronger relationship between Aboriginal communities and the criminal justice agencies that serve them. Ministers also decided to establish a Federal Advisory Council on Native Peoples and the Criminal Justice System to monitor progress, with a membership representing federal and provincial/territorial governments and Aboriginal agencies:

> Membership on the council comprises one representative of each of the four federal departments involved in native matters — Justice, Secretary of State, Solicitor General, and Indian and Northern Affairs — one representative from each of six national native peoples groups — the Native Council of Canada, Inuit Tapirisat, the Friendship Centres, the National Indian Brotherhood, the National Women's Federation and the Native Law Student's Association —

19. *Native Peoples and Justice*, p. 12.

20. *Native Peoples and Justice*, p. 35.

> and up to four representatives from each of the provinces and territories who would be from government and native groups. Each province and territory would also set up an advisory council with government and native representation.[21]

While *Native Peoples and Justice* included all Aboriginal groups, the first effort to address the needs of Métis and non-status Indians was the *Report of the Metis and Non-Status Indian Crime and Justice Commission*. Published in 1977, the report built on work done for previous reports, with specific reference to "Indians and the Law", the 1975 conference on which *Native Peoples and Justice* was based, and the work of the Federal Advisory Council on Native Peoples and the Criminal Justice System established as a result. The commission expressed considerable frustration with previous studies and investigations, however, noting that repeated recommendations had produced few concrete results:

> If a few of the studies or investigations which have previously carried out are reviewed, it is immediately apparent that many of the same recommendations are made over and over again, particularly those having to do with increased Native responsibility in staffing and programming for Native people... It seems very often that policies are agreed to in principle, but not in practice, and that reiterating the same solutions to old problems gives the impression that something is actually being done. One would normally expect that a recommendation which has been made over and over again during the last ten years, if not longer, might be accepted. That the causes, or some of them at least, of the high involvement of Native people within the criminal justice system might well have something to do with their disadvantaged situation in this country, and yet the statement of this opinion is often treated as a political stand rather than as a "true" explanation.[22]

The report conceded that there were other reasons for slow progress in this area, including the absence of reliable data and the length of time it takes to consider vague recommendations and to engage in extensive consultations. The commission attempted to respond to this situation by offering specific recommendations amenable to immediate implementation.

The commission consisted of four Aboriginal persons with backgrounds in justice and social services and was chaired by the president of the Native Council of Canada at the time, Harry Daniels. In his introduction to the report, Daniels explained the situation of Aboriginal people in the criminal

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21. *Native Peoples and Justice*, p. 59.

22. *Report of the Metis and Non-Status Indian Crime and Justice Commission*, pp. 3-4.

justice system in terms of economic issues stemming from a history of colonization:

> [I]t became glaringly apparent that a major contributing factor was the lack of a meaningful economic base in the majority of communities that the prisoners came from. This is not a phenomenon unique to the Native people of Canada, but one that persists throughout the world where one segment of a society has a colonial relationship with another. As a supposedly conquered people we have been denied and effectively kept out of the institutions and frameworks that would be considered as having a positive effect on the national fabric. Being denied an economic base has kept us at or below the bottom rung of the socio-economic ladder, which prevent us from even dealing with our day to day survival in a meaningful way. Unless we can plan in a realistic and objective manner our own future as a nation of people and are afforded the facilities to do so, we cannot in an intelligent manner think in the broader terms as being an integral part of the Canadian mosaic... Our prior claim to this country has to be satisfied so that we can enter into economic development schemes which would ensure our future as Canadians. Until that is done, Native people will fill the roles of migratory workers doing Gunga Din jobs or else living in their Native communities in a welfare state waiting for the encroaching industrial machine to steamroll them into oblivion.[23]

The commission's study involved the completion of questionnaires and interviews at 24 penitentiaries and two territorial institutions by a random sample of Aboriginal inmates. The commission developed the questionnaire at a workshop attended by representatives from Aboriginal communities, police, corrections and criminal justice agencies serving Aboriginal people. The Federal Advisory Council on Native People and the Criminal Justice System was also represented, as were Aboriginal inmates. The questionnaire was intended to yield findings on all aspects of the Aboriginal experience with the criminal justice system, from the background of individuals, to arrest and court appearances, to institutional and parole experiences. The research was funded jointly by the department of the Solicitor General, the Penitentiary Service, and the department of Justice.[24]

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23. *Report of the Metis and Non-Status Indian Crime and Justice Commission*, pp. v-vi.

24. This report is noteworthy is that it includes a breakdown of funding sources. The department of the Solicitor General, Consultation Centre, provided $55,000, and the Penitentiary Service and the department of Justice contributed $15,000 each. In

Based on its findings, the commission presented recommendations predicated on the belief that the situation was largely a reflection of the socio-economic situation of Aboriginal peoples and that solutions lay in greater involvement and control by Aboriginal peoples:

> We believe that the treatment of offenders is not the sole responsibility of the prison or penitentiary system. We also believe that the causes of the high rate of Native imprisonment lie largely in the social situation in which Native people live in this country... We have taken the view that the Penitentiary and Prison systems are dealing with the results of this much larger problem. We also believe that Native people are prepared, capable and willing to take the responsibility involved in full participation, co-operation and planning of programs and policies which affect them in all areas, including the Criminal Justice system.[25]

The commission's recommendations aimed at ensuring participation and responsibility through Aboriginal peoples' presence in government agencies at all levels. They addressed the need for both structural change and more immediate action. Recommendations requiring structural change were based largely on the commission's identification of "unidirectional" accountability as a problem plaguing the criminal justice system:

> We have also identified one of the major problems to be the lack of, or "unidirectional" accountability, where Native organizations are accountable to Government and the people they serve, and Government seems not to be accountable to Native organizations. This creates a serious imbalance in the structure of the system.[26]

To address this situation, the commission recommended establishing provincial advisory councils (first recommended in *Native Peoples and Justice*[27]), mechanisms for greater Aboriginal input through a special ministerial committee within the Solicitor General's department, and regional teams to co-ordinate efforts to assist Aboriginal inmates. The report also proposed that the Federal Advisory Council on Native Peoples and the Criminal Justice System be given secure funding and that federal

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addition, the salary of one of the commissioners was covered by the department of Indian affairs through a secondment.

25. *Report of the Metis and Non-Status Indian Crime and Justice Commission*, pp. 7-8.

26. *Report of the Metis and Non-Status Indian Crime and Justice Commission*, p. 7.

27. Provincial advisory councils, recommended at the conference on Native People and the Criminal Justice System, were initiated in some provinces but not others.

government representatives on the council be accountable to representatives of Aboriginal organizations for their governments' policies.

The commission also presented recommendations for immediate implementation, including enhancing the role of Aboriginal brotherhood and sisterhood groups and of Aboriginal liaison staff, improving the socio-economic situation of Aboriginal people in remote areas, and developing more opportunities and programs for female offenders. The report also recommended making the system of parole and policing more sensitive to the needs of Aboriginal people by establishing a task force to study policing of Métis and non-status Indian communities. Finally, the commission suggested that further research be undertaken, particularly with respect to Aboriginal juveniles in the criminal justice system, the operation of provincial systems, and the evaluation of new and active programs. The commission reiterated its concern that "implementation of these recommendations occur as quickly as possible" and recommended that a workshop be held in the near future to discuss the recommendations and that the Federal Advisory Council on Native People and the Criminal Justice System monitor implementation of the recommendations.

Provincial governments also played a role in the early discourse. In 1973, a board of review was appointed to examine the operation of provincial courts in Alberta. The fourth and last of the board's reports addressed Aboriginal people and was submitted in June 1978, as *Native People in the Administration of Justice in the Provincial Courts of Alberta.* The board, chaired by Mr. Justice W.J.C. Kirby, held hearings at locations accessible to Indian people living on reserves. Briefs where submitted by the Indian Association of Alberta, the Metis Association of Alberta, band councils, individuals and other interested organizations, including the Native Counselling Services of Alberta. The report was intended as a "response to the views expressed in those submissions".[28]

The tone of the report was vastly different from that of the report of the Metis and Non-Status Indian Crime and Justice Commission. The Commission spoke of the need for the system to become more sensitive to the needs of Aboriginal people, but the review board recommended that Aboriginal people become more sensitive to the needs of the criminal justice system:

28. *Native People in the Administration of Justice in the Provincial Courts of Alberta, Report #4*, p. 1.

> I believe that their [the board's recommendations] implementation will render Native people more responsive to the requirements of the Canadian system of justice.[29]

The report examined the social and economic problems that bring Aboriginal people into conflict with the law, as well as the relationship between Aboriginal people, the police and the courts, using excerpts from transcripts of public hearings to illustrate the problems voiced by Aboriginal people. The recommendations were qualified on the basis that full consideration was beyond the scope of the inquiry:

> The very nature and complexity of many of the problems to which our attention has been directed and the Terms of Reference preclude their proper consideration. Within these limitations, however, consideration is given in this Report to those aspects of the administration of justice in Alberta affecting Native people which can and should be corrected.[30]

To this end the board recommended incremental change, including establishment of structures of liaison and consultation between Aboriginal people and the provincial system, the improvement of programs such as special constables and Aboriginal court workers, and the commitment of funds for substance abuse treatment and recreation programs. To ensure timely implementation, the board recommended that the attorney general and the solicitor general establish an office to initiate and monitor implementation of the report's recommendations.

ANALYSIS OF THE DISCOURSE: 1967-1978

Based on our discussion of the documents that appeared during this period, several observations can be made with respect to the discourse. Participants in the discourse, the process, and the ideas that emerged had certain qualities that made this period distinct.

Participants

A wide range of policy participants were represented in the discourse of this period. There were documents prepared by non-Aboriginal, non-governmental organizations, national and provincial Aboriginal organizations, and federal and provincial government. The interests represented were just as diverse. While there was some preoccupation with the criminal justice concerns of status Indians, efforts were made in such

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29. *Native People in the Administration of Justice in the Provincial Courts of Alberta, Report #4*, p. 1.

30. *Native People in the Administration of Justice in the Provincial Courts of Alberta, Report #4*, p. 1.

documents as *Native Peoples and Justice* to ensure that Inuit, Métis and non-status interests were represented, and the *Report of the Metis and Non-Status Indian Crime and Justice Commission* focused exclusively on the concerns of Métis and non-status Indians. Even *Indians and the Law* encompassed Métis and Inuit. The tension between the diversity and the inclusiveness of Aboriginal interests makes the discourse during this period interesting.

Concern was expressed about accountability and representation. The *Report of the Metis and Non-Status Indian Crime and Justice Commission* was critical of what it saw as "unidirectional" accountability, where "Native organizations and representatives are accountable to Government and the people they serve, and Government seems not to be accountable to Native organizations"[31]. Such issues were also touched on in the commission's recommendations concerning the Federal Advisory Council on Native People and the Criminal Justice System. The commission recommended that the chair be shared by all participating organizations to ensure equal representation for all interests and that government representatives be held accountable to the council for departmental policy:

> Permanent chairmanship of the FAC has been and is now exercised by the representative of the Ministry of the Solicitor General. We feel that a rotating chairmanship would better ensure the representation of the concerns and interests of the different participating organizations....
>
> Finally, the FAC must be accountable to the Native people of Canada; a principle that is seriously lacking at present. We suggest a more effective FAC would develop if the ministries represented on the FAC to the Native organizations were accountable for ministry policy. In turn, the national Native organizations are accountable to the Native people in Canada.[32]

Process

Insight can also be gained into the development of the discourse by considering how the policy participants were involved in the process. We see, for instance, that high value was placed on securing the participation of Aboriginal peoples. This is evident, for instance, in the composition of the committee that prepared *Indians and the Law*, which identified members who were Aboriginal; such efforts to make Aboriginal participation obvious

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31. *Report of the Metis and Non-Status Indian Crime and Justice Commission*, p. 7.

32. *Report of the Metis and Non-Status Indian Crime and Justice Commission*, pp. 201-203.

and visible would seem to imply a preoccupation with ensuring their participation. This preoccupation is also seen in *Native People in the Administration of Justice in the Provincial Courts of Alberta*, where the board of review relied heavily on excerpts from the hearings, particularly interventions from Aboriginal people, in presenting its report.

There was also some emphasis in this period on tripartite discussion. This is evident in *Indians and the Law* and in *Native Peoples and Justice*, where representation of Aboriginal organizations and federal and provincial governments is evident in the composition of the project committee and conference participants. Those involved seemed to take some pride in this achievement, as evidenced by Warren Allmand's statement, "the right people are here".

Determining the extent to which Aboriginal involvement was genuine, rather than tokenism requires closer examination of the documents. We see some evidence, for instance, that although Aboriginal people participated, their participation may not have has the same weight as that of federal and provincial governments. This is illustrated, for instance, in the *Report of the Task Force on Policing on Reserves*. Although the task force work plan said it would "develop, in consultation with the Indians, alternative methods to resolve these problems",[33] the task force presented a series of options, rather than inviting Indian people to take part in their development. Furthermore, although consultations found widespread acceptance of option 3(b) by the RCMP and by provincial governments, the reaction of bands was mixed. The task force claimed, however, that it had found widespread approval for the option and recommended its implementation. Furthermore, while it provided for a review of the band constable program favoured by some of the bands consulted, to give some bands an element of choice, the choice was subject to provincial approval:

> Indian bands should continue to have freedom of choice as to the form of policing on their respective reserves, provided this is acceptable to Provincial Attorneys-General.[34]

The period 1967-1978 also saw many calls for institutionalization and formalization of processes for interaction, including the recommendations of the Metis and Non-Status Crime and Justice Commission to establish provincial advisory councils and a ministerial committee of the department of the solicitor general composed of three Aboriginal people. This was also evident in *Wahbung Our Tomorrows*, which called for a tripartite tribal

33. *Report of the Task Force on Policing on Reserves*, p. 6.

34. *Report of the Task Force on Policing on Reserves*, p. 34.

police commission, and in the proposal for a federal advisory council in *Native Peoples and Justice*, which was in fact established.

There were also indications of frustration with the slow pace of progress, particularly in the *Report of the Metis and Non-Status Crime and Justice Commission*, which criticized recommendations in earlier reports as repetitive and difficult to implement. Frustration was also evident in the recommendations in *Native People in the Administration of Justice in the Provincial Courts of Alberta*, including establishment of an office by the attorney general and the solicitor general to ensure that implementation was "accomplished within a reasonable time by personnel free from other responsibilities".[35] Similarly, the *Report of the Metis and Non-Status Indian Crime and Justice Commission* offered two sets of recommendations, one more structural in nature and the other for immediate implementation, in the hopes of provoking at least some change quickly.

Ideas

The third and final element of the discourse concerns ideas presented in the documents and the language in which they were expressed. As was the case The diversity of ideas no doubt reflected the varied mandates of participants in the discourse. In general, however, there was a some agreement among the documents that the related issues of control, jurisdiction, and funding were important, as were the socio-economic roots of crime, the need for preventive mechanisms, and the role of special programs in improving the situation of Aboriginal people dealing with the criminal justice system.

The need for greater Aboriginal control over criminal justice programs in the longer term was espoused in particular in documents published by Aboriginal organizations, including *Wahbung Our Tomorrows* and the *Report of the Metis and Non-Status Indian Crime and Justice Commission.* Jurisdictional issues were also addressed in many of the reports. Some reports complained that confusion and conflict surrounding who had authority to enact changes in a particular area had halted progress on certain issues, particularly on-reserve policing. Varied views on the nature of jurisdiction were evident in such reports as *Indians and the Law* and *Report of the Task Force on Policing on Reserves*; the former saw jurisdiction over policing as a three-way responsibility, while the latter saw most of responsibility as resting with provincial governments.

Related to jurisdiction is funding. There were calls for greater funding in most of the documents. Some sense of fiscal responsibility was also evident in government documents such as *Report of the Task Force on*

35. *Native People in the Administration of Justice in the Provincial Courts of Alberta, Report #4*, p. 74.

Policing on Reserves, which provided cost estimates and recommended that provincial government provide a proportionate share of the funding for on-reserve policing.

There was also some emphasis on the roots of crime. Most prominent was the link made between the high incidence of crime among Aboriginal people and the social and economic conditions in which they live, a link identified in *Wahbung Our Tomorrows*, the *Report of the Metis and Non-Status Crime and Justice Commission*, and *Native People in the Administration of Justice in the Provincial Courts of Alberta*. The reports of Aboriginal organizations, however, generally saw the roots of social, economic and political disadvantage in the colonial experience and in the racism, dependency and powerlessness that ensued. A passage from the *Report of the Metis and Non-Status Crime and Justice Commission* illustrates the emphasis placed on economic and social well-being and the absence of racism in improving the situation:

> Unless dramatic change takes place in the life styles of Native people and dramatic change takes place in the attitudes and perceptions of decision makers towards Native people, the attitudes and perceptions of Canadian society will remain the same.[36]

This stands in stark contrast to the *Report of the Task Force on Policing on Reserves*, which made no mention of discrimination, instead linking the high incidence of crime to such factors as the isolation of Aboriginal communities.

Finally, the discourse of this period placed considerable value on the importance of special programs, particularly those with preventive components, to deal with the needs of Aboriginal people in conflict with the law. A key impetus to the emergence of dialogue on program development was the 1975 Native Peoples and Justice conference, which stimulated a number of the programs that emerged in this period.[37] Some were developed in existing criminal justice agencies, such as the RCMP Native Special Constables (begun in 1973), the OPP Indian Special Constable Program (begun in 1975), and the Native Justice of the Peace and Native Court Workers programs. Others took the form of separate justice structures created and operated by bands and communities, including the Dakota-Ojibway Tribal Police in Manitoba and the Amerindian Police in Quebec, both begun in 1978, which were generally modelled after non-Aboriginal criminal justice agencies, though some effort was made to re-establish traditional methods. The focus of these programs, and indeed of

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36. *Report of the Metis and Non-Status Indian Crime and Justice Commission*, p. vii.

37. Griffiths and Verdun-Jones, p. 550.

the discourse in general, was on adapting the existing criminal justice system to the meet the needs of Aboriginal people.

This new focus on programs and special initiatives occurred in the 1970s, which saw not only the development of programs designed for Aboriginal people, but also a rapid expansion of the system and a concurrent increase in operating budgets and expenditures.[38] This wave of spending on criminal justice, combined with the growing consciousness of Canadians about the situation of Aboriginal people – spurred by documents like the Hawthorn report and by events such as the Donald Marshall, Jr. case – ushered in many programs and initiatives for Aboriginal people.

To a large extent, this focus on programs was the strategy of governmental participants. Other participants focused on the need to increase Aboriginal control and alleviate socio-economic problems to prevent criminal behaviour, rather than on meeting the needs of Aboriginal people once they become involved in the criminal justice system. These different ways of looking at the issues mirror the ways relationships between Aboriginal and non-Aboriginal people were portrayed in the documents. Recommendations by government were aimed at adapting the system to meet the needs of Aboriginal people through cross-cultural awareness initiatives, recruiting Aboriginal people into criminal justice professions, and greater communication and consultation between the criminal justice system and Aboriginal communities. There was a widespread belief that adding special programs to the system would meet the needs of Aboriginal people; this approach was evident, for example, in the discussion of probation, parole and aftercare in *Native Peoples and Justice*:

> The workshop saw as problems in probation the lack of opportunity for native offenders, the limited choices a magistrate has in considering probation and the absence of rehabilitative services for natives wanting to return to their own communities. Possible solutions were suggested that call for a special unit in the probation service to work with natives, the recruiting of natives for probation work and the setting up of foster or groups homes, or both, for young offenders. Services were sought to make the parole process earlier for native inmates.[39]

By contrast, recommendations from non-governmental participants, such as the Canadian Corrections Association in *Indians and the Law*, were aimed at improving social and economic conditions as a means of dealing with justice issues:

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38. Griffiths and Verdun-Jones, p. 591.

39. *Native Peoples and Justice*, p. 11.

> It has been stressed throughout this report that there is little point in trying to solve the conflict with the law on the part of Indians and Eskimos without a parallel effort to solve the economic and social problems that exist among these people. The difficulties associated with liquor require special attention, but the misuse of liquor is itself associated with these basic economic and social problems.[40]

Further, reports from Aboriginal participants, such as the Indian Tribes of Manitoba (*Wahbung Our Tomorrows*) and the Metis and Non-Status Indian Crime and Justice Commission, began to speak explicitly about the need for greater Aboriginal control in the design and delivery of programs. "We also believe that Native people are prepared, capable and willing to take the responsibility involved in full participation, co-operation and planning of programs and policies which affect them in all ares, including the Criminal Justice system."[41] The views of non-governmental and Aboriginal participants imply less confidence in the system's capacity to meet the needs of Aboriginal people through existing structures.

1978-1988: THE CALM

Following *Native People in the Administration of Justice in the Provincial Courts of Alberta* (1978) came a seven-year period of silence in the discourse; the document collection contained no reports on Aboriginal people and criminal justice published during this period. This stands in stark contrast to the previous decade, which produced six relevant documents, and the years 1988-1992, which produced 17. There was a similar, though slightly Aboriginal earlier period of inactivity in the development of the discourse on Aboriginal education.[42] This might be explained in part by preoccupation with constitutional matters; federal, provincial and Aboriginal participants were voicing broader concerns through the constitutional process rather than by preparing documents on specific policy areas.

The silence was broken with *Reflecting Indian Concerns and Values in the Justice System*, published in April 1985 and based on feasibility studies undertaken jointly by the governments of Canada and Saskatchewan and the Federation of Saskatchewan Indian Nations (FSIN). The objective of the

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40. *Indians and the Law*, p. 57. Similar discussions of the socio-economic factors influencing criminal behaviour appear in *Wahbung Our Tomorrows* and the *Report of the Metis and Non-Status Indian Crime and Justice Commission*.

41. *Report of the Metis and Non-Status Indian Crime and Justice Commission*, p. 8.

42. There was relative silence on Aboriginal education between 1976 and 1982.

studies was to "examine the current situation in relation to the circumstances of the Indian people of Saskatchewan and to recommend improvements or modifications that can be made within the existing constitutional and legal framework, such that the justice system would better reflect Indian concerns, interests, values and culture".[43] The report recognized a role for constitutional and/or legal changes but limited the feasibility studies to changes in the existing system in the four principal areas studied – law enforcement, corrections, Indian Justice of the Peace and the role of the Peacemaker, and customary law.

The fieldwork was undertaken by four working groups under the direction of a steering committee with representation from the federal and provincial governments and the FSIN. Given the short time frame in which the report was prepared – August 1984 to March 1985 – a comprehensive study of all reserves in Saskatchewan was not possible, though an attempt was made to visit communities representative of the variety of tribal groups in Saskatchewan.

The report was noteworthy for its preliminary discussion of customary law and for its treatment of the confusion and ambiguity surrounding the term. This is an important departure from the emphasis on special programs seen in earlier government reports, where the focus was on reinforcing the existing system with a few minor adaptations, rather than recognizing other ways of operating a criminal justice system.

The report's recognition of the legitimacy of traditional Aboriginal concepts of justice was no doubt influenced by general trends in thinking about criminal justice during this period. The 1980s saw calls for more community involvement and a participatory justice system – one that uses dispute resolution techniques such as mediation and negotiation and that strives for consensual arrangements between parties and a restoration of order. Such a system also has potential to be less costly, more efficient, and more effective than the adversary approach to criminal justice.[44]

The similarities between participatory justice and traditional Aboriginal justice are unmistakeable; principles of traditional justice seem to have gained greater acceptance just as principles of participatory justice were being accepted. In other words, negotiation and mediation gained legitimacy because they were now cast in a form recognizable and understandable by the non-Aboriginal majority.

According to the document, interest in customary law grew out of the first ministers conferences:

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43. *Reflecting Indian Concerns and Values in the Justice System*, p. i.

44. Griffiths and Verdun-Jones, p. 595.

> Since the 1983 First Ministers' Conference on Aboriginal Matters the federal government and a number of provincial governments have shown an interest in providing greater recognition to native customs.[45]

The discussion of customary law that ensued, however, emphasized difficulties in its definition and the tendency for the term to have different meanings in different contexts:

> The term "customary law" used in the context of this study does not purport to define "custom" or "customary law" for use in other contexts....
>
> The definition and perceptions of what is "law" [are] generally very different for non-Indians than [they are] for many members of Indian communities. For Indians, "customary law" is not necessarily a set of rules but rather what members of the community know is right because of their upbringing. The difficulty of terminology and perception is certainly inherent to this type of study and such a short study cannot answer this question....
>
> There is difficulty with the term "customary law" and searching for rules as Indians generally do not view their own traditional ways as constituting "law" as they recognize "law" according to the dominant legal system. Furthermore, what appears to be "customary law" is not easily described as a "rule".[46]

The report's recommendations focused on greater participation by Indian communities in all aspects of the justice system, more education for Indian communities on how the justice system works, and a community-based approach to problems with an emphasis on Indian values and customs and co-operation between all levels of government and Indian communities. Recommendations were also made to improve the Native Justice of the Peace Program and the Indian Special Constable Program, to encourage the use of peacemakers, to establish local community justice committees, and to augment legal advisory services to assist in the further development of these recommendations.

The next contribution to the discourse was *Policing Services on Reserves in Manitoba*, published in November 1985 by the Manitoba attorney general. This report reviewed the three on-reserve Indian policing services in Manitoba: the band constable program, the Dakota Ojibway Tribal Council Police Program, and the RCMP Indian Special Constable Program. The strengths and weaknesses of these programs were identified through a review of the literature regarding law enforcement on reserves

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45. *Reflecting Indian Concerns and Values in the Justice System*, p. 1.

46. *Reflecting Indian Concerns and Values in the Justice System*, pp. 1, 8-9, 12.

and through interviews with nine Manitoba chiefs. The findings suggested that greater control of policing on reserves by Indian communities was desirable and inevitable given the movement toward self-government:

> the findings from this rather brief review suggest that Indians desire to control policing on reserves. It was generally accepted that Indian control of on-reserve policing services will accompany Indian self-government, and this was perceived to be the most effective means for the provision of on-reserve policing services in the future....
>
> Indian controlled on-reserve police forces was perceived to be an inevitable and generally desirable result of future Indian self-government.[47]

The report defined band-controlled programs, or "autonomous police programs", in a particular manner:

> the term "autonomous police program" has been used in this report to describe Band controlled programs. This does not indicate a totally independent force with full powers of arrest, but instead refers only to the authority and jurisdiction of each existing program.[48]

The report recommended a permanent steering committee, with representatives of the justice system and the on-reserve Indian population, to deal with concerns about on-reserve policing and the administration of justice. The committee would include representatives of "Prosecution, Provincial Judges Court (Circuit Court), the RCMP, Law Enforcement Services, the Manitoba Police Commission, the Manitoba Department of the Attorney General, DIAND, one representative of each Tribal Council in the province and one representative of each of the three Indian reserves that do not belong to a Tribal Council (Fort Alexander, Dakota Tipi and Norway House)".[49] The report recommended that the steering committee submit a request to the solicitor general and DIAND to fund extensive research on which to base long-term planning for on-reserve policing.

Despite the general lack of activity in this period, the two documents reviewed were distinct from those of the period that preceded it and the one that followed.

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47. *Policing Services on Reserves in Manitoba*, pp. i, 33.

48. *Policing Services on Reserves in Manitoba*, p. 2.

49. *Policing Services on Reserves in Manitoba*, p. 36.

Participants

One innovation was the joint studies conducted by the governments of Canada and Saskatchewan and the FSIN. The relationship between the participants was governed by a memorandum of understanding, and the steering committee had a representative from each of the signatories. In the first period of discourse (1967-1978), there had been calls for more jurisdictional co-operation in such reports as *Report of the Task Force on Policing on Reserves* and *Natives Peoples and Justice*; in 1985, we saw the development and operation of an institutionalized form of co-operation and understanding between Canada, Saskatchewan and the FSIN.

Process

Adoption of a tripartite structure was significant because it implied that each participant asserted equal weight and authority in the process – a characteristic not seen in earlier discourse. Looking deeper, however, reveals that the four working groups that submitted research to the steering committee consisted of only one FSIN representative per group, whereas provincial and federal governments averaged two and four representatives respectively. This may be a function of their relative resources, but it does put parity between participants in question.

One other feature of process was noteworthy. In both *Reflecting Indian Concerns and Values in the Justice System* and *Policing Services on Reserves in Manitoba*, we see evidence that limitations on time and money posed significant obstacles:

> With respect to the research undertaken, in light of the time constraint, the working groups focused on the most pertinent documentation and statistics available and attempted to provide in the research papers as complete information as possible....
>
> As it was not possible to consider these recommendations in more than a preliminary way, nor to project their cost of implementation, it is recognized that they are made subject to further financial and policy consideration.[50]

> It is important, when reviewing the findings of this survey, to keep in mind that only 9 Manitoba Indian Chiefs were interviewed. The opinions of these Chiefs cannot be considered to be representative of the opinions of all Manitoba Indian Chiefs. These findings should be interpreted cautiously and should not, in any way, be considered as reliable or conclusive.[51]

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50. *Reflecting Indian Concerns and Values in the Justice System*, p. ii.

51. *Policing Services on Reserves in Manitoba*, p. 28.

Both reports recommended more in-depth examination of issues they were unable to study conclusively in their own reports. The Manitoba study, for example, had a mandate to "systematize existing models of on-reserve Indian policing services and to gain some exploratory insights from Indian Chiefs, into the problems they are experiencing and their ideals for the future". The recommendations suggest, however, that the findings were inconclusive and that the issue be studied further by a steering committee established to, among other things, "give Band Councils the opportunity to express their concerns relating to the administration of the justice system on their reserves". In addition, the steering committee should conduct in-depth research to fill the gap left by the "lack of information about the success and failure of existing on-reserve policing programs, and a lack of data from which to determine the direction on-reserve policing should take in the future".[52]

Similarly, in *Reflecting Indian Concerns and Values in the Justice System*, the study of customary law was undermined by inadequate time:

> several practical difficulties conspired to prevent the completion of the field research work in the manner which had originally been planned. It has to be noted, at this point, that a comprehensive study of the 69 reserves in Saskatchewan was not possible in the short period of time planned for the study. Therefore only eight communities were visited. Notwithstanding the difficulties and the time frame of the study, the interviews provided a "feel for" and a "feel of" Indian customary law as was intended.[53]

The report recommended further study to "build upon the general 'feel for' Indian customary law that was attained by this project".[54] This suggests that the lack of progress on issues related to Aboriginal criminal justice during this period may be related to a lack of resources devoted to studying the issues effectively.

Ideas

Two ideas prominent in the documents from this period were recognition that criminal justice issues are related increasingly to self-government issues, and the struggle to define words important to the development of the discourse.

There is evidence in both documents that the authors recognized that criminal justice issues were being conceptualized increasingly in a broader

52. *Policing Services on Reserves in Manitoba*, pp. 1, 37-38.

53. *Reflecting Indian Concerns and Values in the Justice System*, p. 7.

54. *Reflecting Indian Concerns and Values in the Justice System*, p. 72.

sphere of constitutional change and movement toward self-government. This is evident, for instance, in the objective of *Reflecting Indian Concerns and Values in the Justice System*:

> The overall objective of these studies was to examine the current situation in relation to the circumstances of the Indian people of Saskatchewan and to recommend improvements or modifications that can be made, within the existing constitutional and legal framework, such that the justice system would better reflect Indian concerns, interests, values and culture.[55]

By acknowledging that the objective was to work within existing frameworks, the authors recognized that there had been discussion of constitutional and legal change that would affect criminal justice issues.

Evidence of the need to relate policing to self-government was seen in *Policing Services on Reserves in Manitoba*, which reflected efforts to make recommendations that would be consonant with the future development of self-government:

> There is a strong possibility that Indian-controlled police programs will be a contingency of Indian self-government. At the present time it is evident that Manitoba Band Councils lack the experience and knowledge necessary to undertake the development and management of a police force therefore, priority should be given to the development of an evolutionary plan by which they can acquire such experience and knowledge.[56]

Recognition of the need to include self-government in the discourse was also apparent in the issues addressed and the ideas expressed. *Reflecting Indian Concerns and Values in the Justice System*, for example, included an extensive discussion of customary law that implied recognition of alternative approaches to justice; that is, solutions to the problem of Aboriginal people in the criminal justice system may not be limited to adapting the Euro-Canadian system but may instead be linked to the realization that another system of social control is possible, one that might legitimately be guided by customary law.

The discussion of customary law brings the ambiguity of terms to the forefront. *Reflecting Indian Concerns and Values to the Justice System* struggled to define customary law. Questions of definition were also seen in *Policing Services on Reserves in Manitoba*, which defined band-controlled policing programs as "autonomous police programs", referring to the authority and jurisdiction of programs but not their independence. There

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55. *Reflecting Indian Concerns and Values in the Justice System*, p. i.

56. *Policing Services on Reserves in Manitoba*, p. 38.

was some confusion over the extent to which 'control', 'jurisdiction' and 'autonomy' might or might not be synonymous.

Our analysis of this period, while based on only two documents, revealed a certain transition in the discourse. In the earlier period the discourse centred on special programs without acknowledging the movement toward self-government; this period saw the beginning of recognition that there may be another way. In the period that follows, ideas alluded to in *Reflecting Indian Concerns and Values in the Justice System* and *Policing Services on Reserves in Manitoba* are picked up as the discourse begins to shift toward more explicit discussion of self-government and the repercussions for Aboriginal criminal justice.

1988-1992: THE STORM

The period 1988-1992 saw a virtual explosion of ideas, events and public attention. This was reflected in the sheer volume of documents published; of the 25 criminal justice documents in our collection, 17 were published between 1988 and 1992. Earlier documents of this period are preoccupied with policing and corrections. Many of the later documents are the product of comprehensive examinations of the issues, marked most notably by provincial inquiries in Alberta, Manitoba and Saskatchewan. The documents reveal shifts in the relative prominence of participants, changes in the process for interaction, and shifts in some of the key concepts and values espoused.

The implicit references to self-government in the 1985 documents were strengthened and reshaped in *Locking Up Natives in Canada: A Report of the Canadian Bar Association Committee on Imprisonment and Release* in 1988. Written by Michael Jackson on behalf of the committee, and based on comparative research in Canada, the United States, Australia, and Papua New Guinea, the report reviewed Aboriginal justice systems and the sentencing of Aboriginal people and examined the situation of Aboriginal people in Canadian prisons. The importance of this document lies in its introduction of the concept of legal pluralism and of the concept of self-government as it pertains to criminal justice – that is, parallel systems. In introducing these concepts, *Locking Up Natives* entrenched the idea that there is another way of delivering justice, as implied earlier in *Reflecting Indian Concerns and Values in the Justice System. Locking Up Natives* examined at length the findings of the Australian Law Reform Commission and quoted its treatment of legal pluralism:

> For settler Australians it would not be adequate to salute "aboriginality". It is both the strength and weakness of [aboriginality] that it specifies so little. It may merely acknowledge another ethnic minority within the multicultural panoply. What we need is a commitment to a stronger and deeper pluralism that can

> take the measure of settler/Aboriginal difference. Pluralism in legal codes is only one concession out of many the settler society needs to make if Aborigines are really to be given a choice not to assimilate.[57]

The report also supported the movement toward self-determination as the answer to problems of Aboriginal people within the criminal justice system, a conclusion stemming from the position that the roots of crime are in colonization and that the socio-economic disadvantages emphasized in earlier reports are a by-product of this historical political relationship:

> What links these views of native criminality as caused by poverty or alcohol is the historical process which native people have experienced in Canada, along with indigenous people in other parts of the world — the process of colonization. In the Canadian context that process...has left native people in most parts of the country dispossessed of all but the remnants of what was once their homeland; that process superintended by missionaries and Indian agents armed with the power of the law, which took such extreme forms of criminalizing central Indian institutions such as the potlatch and sun dance, has systematically undermined the foundations of many native communities. The native people of Canada have, over the course of the last two centuries, been moved to the margins of their own territories and of our 'just' society.[58]

Criminal justice reform was therefore seen as contingent not on better socio-economic conditions, but rather on recognition of the right of Aboriginal peoples to self-determination:

> The implication of a continuing failure by the federal and provincial governments to give constitutional and legal muscle to native self-determination is that the harsh reality which lies behind the official statistics regarding the condition and situation of native people will continue or get worse.[59]

The committee's recommendations reflected its commitment to reform based on the movement of Aboriginal people towards self-determination. Recommendations included the development of parallel Aboriginal justice systems and government funding for to test models of contemporary Aboriginal justice systems. The report encouraged governments to support initiatives by Aboriginal communities and organizations to incorporate

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57. Australian Law Reform Commission, *The Recognition of Aboriginal Customary Laws* (1986), quoted in Jackson, *Locking Up Natives in Canada*, p. 47.

58. *Locking Up Natives in Canada*, p. 6.

59. *Locking Up Natives in Canada*, p. 8.

community values in the criminal justice system and to enable Aboriginal people to assume greater control over the correctional processes that affect them.

After *Locking Up Natives in Canada* came *Policing for Aboriginal Canadians: The RCMP Role* by Robert Head, an assistant commissioner of the RCMP. The report was an evaluation of RCMP programs, from both RCMP and client perspectives, based on consultations with Aboriginal people and leaders, officials overseeing justice, and members of the RCMP and other police forces. The findings were based on questionnaires distributed to Aboriginal leaders, government officials, Aboriginal constables, RCMP managers, and programs managers. Personal interviews were also conducted.

The study brought out several key themes and ideas, including the need to listen to Aboriginal concerns and the need to adopt the concept of policing 'for' rather than 'of' Aboriginal people. These concepts are interrelated, both speaking of the need to work toward a healthy relationship between Aboriginal and non-Aboriginal communities.

The value of listening was expressed in a memo from Head to RCMP Commissioner Norman Inkster that forms part of the report:

> An eminent Indian leader recently opined that in days past, his grandfather frequently told him that human beings are given one mouth and two ears for a very valid reason; we should listen twice as much as we speak! In a nutshell, this term "listening" could well have been the topic for a good portion of this research project. There has, over the years, been an apparent lack of "listening" to Native concerns on the part of many Government agencies, including the Royal Canadian Mounted Police.[60]

The report saw the police as intermediaries between the Aboriginal and the non-Aboriginal, working toward a peaceful and harmonious relationship:

> At best, one can only say that Native issues across Canada between Federal/Provincial Governments (and their agencies) and Native leadership, are in a tense period. Governments and their various bureaucracies at the Federal and Provincial/Territorial level are oft times on one side of the issue while the Aboriginal people are squarely lined up on the other. The Police, unfortunately, are caught in the middle because they are the only visible agency on site when dialogue deteriorates to violent dissent.[61]

The document focused on restoring the police/Aboriginal relationship, emphasizing partnership, co-ownership, and communication.

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60. *Policing for Aboriginal Canadians*, p. 259.

61. *Policing for Aboriginal Canadians*, pp. 264-265.

The document also had some of the characteristics of earlier reports. Time constraints, for example, were evident in the author's covering letter:

> My mandate for the project was broad. While I was pleased to be offered this assignment prior to my retirement from the Force, I was also somewhat apprehensive about the means and methods required of me to complete this study within six months. (As you can see, the time frame was extended by a couple of months). Given the extensive travel and the interview process found necessary to achieve desired results, I had much ground to cover and a wealth of material to digest. In fact, limited time in each jurisdiction did bring forth a few complaints from members who wished to see more time spent in discussion.[62]

The document also showed some preoccupation with how particular words were used and defined:

> The term "Native policing" conjures up different meanings to different people within the various communities of Canada. To a non-Native community, it may be viewed as a police agency giving enhanced or enriched service to Native settlements. To some within the Force, it may means the provision of a police service for Natives by Natives *only*. Native leaders and other Native citizens (both law breakers and victims) may see it in another light as either oppressors or protectors. The judiciary, the legal fraternity and senior government officials will have varying views as to its meaning. It could be viewed as a locally controlled, all-Native police force, or a separate Provincial/Territorial controlled police force with a mix of Native and non-Native personnel, it could be a Native police component of a Provincial/Territorial or Federal (RCMP) Force, or a mix of any of the foregoing. In short, any number of meanings can be given to Native Policing. I approached the study as one without any preconceived ideas – the definition will remain for the reader to decide but I will hopefully supply sufficient material to permit an educated decision.[63]

The report concluded that there is a need for better communication and greater responsiveness by police to the rapidly changing needs of Aboriginal communities. To this end, the report recommended a "new policing approach":

> There can be no more appropriate beginning to this diagnosis than to repeat here your own 1989 Directional Statement: "We must also consider a *new* policing approach for Aboriginal Peoples. *Our*

62. *Policing for Aboriginal Canadians*, p. 261.

63. *Policing for Aboriginal Canadians*, p. 270.

> emphasis must be policing *for* rather than *of* Native people. We must have imagination to truly understand their culture and problems so that we can adjust our approach to provide a service that is fair and sensitive to their needs. I shall issue further direction on this matter once the study on services to Native People is concluded". The *"new* policing approach" stands out. It says that we must enter a new era of understanding and sensitivity and 1989 is the year to begin.[64]

To this end, the report made 82 recommendations to modify practices and policies to increase the RCMP's responsiveness and sensitivity to the needs of the Aboriginal communities it serves.

While *Policing for Aboriginal Canadians* considered policing in the context of Aboriginal peoples, the *Report of the Race Relations and Policing Task Force* addressed First Nations policing in the sphere of race relations and multiculturalism. The task force was established by the Ontario solicitor general in December 1988, in response to two incidents in which black men were shot to death by police officers. The six-member task force was chaired by Clare Lewis, public complaints commissioner for Metropolitan Toronto. Its members brought extensive backgrounds in community development, race relations and policing to their examination of police training, policies, practices and attitudes as they relate to visible minorities.

The task force held public hearings to "permit the community and the police, in an open and visible way, to outline their concerns, achievements, policies and recommendations, within the terms of the Task Force mandate."[65] The task force sent questionnaires to Ontario police forces, received written briefs from community and professional organizations concerned with visible minority issues, and reviewed the literature related to its terms of reference, including previous reports.

The report centred on racism and discrimination in policing, emphasizing the need for police to represent the values of the communities they serve. Referring to the police as the least representative and least accountable of our institutions, the task force focused on the need for change:

> Public institutions must reflect the public and the public values which they serve. It is the public institution which must adapt to public demand.[66]

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64. *Policing for Aboriginal Canadians*, pp. 271-272.

65. *Report of the Race Relations and Policing Task Force*, p. 4.

66. *Report of the Race Relations and Policing Task Force*, p. 26.

The task force referred only briefly to the policing experiences of First Nations. It recommended a tripartite task force to study the feasibility and necessary structures and processes of Aboriginal justice systems in Ontario and recommended working models as pilot projects.[67]

Also in 1989, *Peace and Good Order: Recognition of First Nations Jurisdiction in the Administration of Justice in Manitoba* was prepared by the Assembly of Manitoba Chiefs as a brief to the Aboriginal Justice Inquiry of Manitoba. The report addressed the discriminatory nature of the criminal justice system in Manitoba and how such discrimination might be eliminated:

> surely the expectation and desire of humanity requires a search for an accommodation that will seek to eradicate the societal and institutionalized discrimination that characterizes the abuse and injustice which flows from a situation where tolerance and respect is a one-way street.[68]

The document called for establishment of Aboriginal justice systems in the context of the inherent right of self-government:

> Our most basic recommendations is that aboriginal control of our own justice systems is necessary. Furthermore, our commitment and expectation in the long term is that the basis upon which aboriginal justice will be premised and established is through the inherent authority of self-governing peoples.[69]

Achieving of this objective would involve the restoration of two concepts: "that the traditional system of aboriginal justice served the needs of its society based on the object of healing, reconciliation and re-establishment of the community in situations where the peace and harmony

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67. The Task Force was reconstituted in 1992, on the recommendation of Stephen Lewis, special adviser to the premier on race relations. Lewis pointed out that "there existed a 'strong perception' that the implementation of the Task Force recommendations had slowed" (*Report of the Race Relations and Policing Task Force*, 1992, pp. 1-2.) The task force reconvened to assess implementation of the 1989 recommendations and make further recommendations as appropriate. It found that the 1989 recommendation for a tripartite task force to study Aboriginal justice systems had not been implemented. The explanation offered by the responsible minister responsible was that a task force was no longer necessary given self-government negotiations and pilot projects already under way. Concern remained, however, given that there was seen to be no Aboriginal input to the Ontario government's selection of Aboriginal justice projects. The 1992 report reiterated the 1989 recommendation of a tripartite task force.

68. *Peace and Good Order*, p. 1.

69. *Peace and Good Order*, p. 3.

of the community is disrupted; and that the same object of peace and harmony was intended to serve the needs of two societies when conflicts arose".[70]

The report criticized earlier reports for recommending incremental or "cosmetic" changes in the criminal justice system to meet the needs of Aboriginal people:

> The situation of aboriginal peoples and the justice system is an old problem that is not easily resolvable especially if the measures to resolve the problems are geared towards cosmetic changes within the system or to the system. Measures such as having more aboriginal people in the system to serve as lawyers, judges, court workers or translators have not brought about significant improvement nor has bringing the system to the community.[71]

The document provided some interesting insights into the development and acceptance of Aboriginal concepts of justice. The chiefs expressed the belief that traditional Aboriginal concepts of justice are accepted by the non-Aboriginal community only if framed in non-Aboriginal language:

> The goals of "healing, reconciliation and re-establishment of the community" is how Mr. Justice John Sopinka of the Supreme Court of Canada described his understanding of the method of traditional North American native community justice. Furthermore, when Mr. Justice Sopinka was making his observations he was doing so in the context of elaborating the concept of mediation as a form of dispute resolution. He specifically noted that mediation was finding its way into new territory such as criminal law.
>
> We believe that this demonstrates acceptability of aboriginal concepts so long as they can be conceptualized or described in non-aboriginal languages. To a large degree mysteries, barriers and fears disappear when an effort to understand and appreciate people's differences and the circumstances of that society are explored.[72]

Based on these ideas, the Assembly of Manitoba Chiefs recommended establishment of an Indian tribal court and development of a tripartite framework agreement to outline the process for reform. Also emphasized in the report was the need for federal and provincial governments to take immediate action to work with the assembly to address social and economic problems associated with the disproportionate extent of contact and conflict between Aboriginal people and the law.

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70. *Peace and Good Order*, p. 3.

71. *Peace and Good Order*, p. 13.

72. *Peace and Good Order*, p. 7.

The report of the Task Force on Aboriginal Peoples in Federal Corrections, by the federal solicitor general's department, was also published in 1989. The task force's steering and working committees had representatives from a variety of federal departments and agencies, as well as one member from Native Counselling Services of Alberta who served on the steering committee. The task force undertook extensive consultations:

> the Task Force opted for an approach based on exhaustive consultation rather than one of empirical research. The Task Force consulted with federal institutional staff and Aboriginal inmate groups, Parole Board staff and members, and CSC staff, Aboriginal communities, and many other groups and organizations actively pursuing the goal of successful social reintegration of Aboriginal offenders.[73]

The task force considered the legal context, the socio-economic context, and the spiritual context, emphasizing such factors as the equality provisions of *Canadian Charter of Rights and Freedoms*, the socio-economic disadvantages facing Aboriginal people, and their unique and deep-rooted culture and spirituality as factors requiring Aboriginal-specific programs and services to achieve equality of opportunity and equality of results for Aboriginal offenders. Based on its assessment of the situation of Aboriginal offenders and of the programs and services available to meet their needs, the task force made 61 recommendations with regard to data collection, case decision making, programs and services, and the interaction between the solicitor general's department and the Aboriginal community. The task force also considered the status of self-government discourse and recommended that the department continue to monitor the federal government's agenda in this area in terms of its implications for corrections.[74]

A short time later, *Creating Choices: The Report of the Task Force on Federally Sentenced Women* was published. Feminist analyses, Charter challenges and a series of tragedies at the Prison for Women prompted the Correctional Service, in conjunction with the Canadian Association of Elizabeth Fry Societies (CAEFS) to undertake this examination. The task force steering committee and working group were co-chaired by representatives of the Correctional Service and CAEFS and included members from government departments and agencies with an interest in

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73. *Final Report: Task Force on Aboriginal Peoples in Federal Corrections*, p. 5.

74. In September 1992, the solicitor general published the *Year-End Implementation Report, 1990-1991: Task Force on Aboriginal Peoples in Federal Corrections* to review the report's implementation. In general, it indicated that progress was being in implementing the recommendations.

federally sentenced women, as well as representatives of groups representing women, including the Elizabeth Fry Society, the Native Women's Association of Canada, the National Organization of Immigrant and Visible Minority Women, and Status of Women Canada.

The report focused largely on the concepts of partnership, empowerment and of voice. Partnership was evident in the composition of the task force itself, a partnership between government and agencies representing the interests of women generally and federally sentenced women more specifically:

> The Task Force was built on a strong commitment to partnership, and centred on the belief that together we could find solutions. It was co-chaired by the Canadian Association of Elizabeth Fry Societies and the Correctional Service of Canada. A wide variety of community and government interests were brought together to form a Steering Committee and Working Group. Aboriginal women, despite their reservations about the mandate and organization of the Task Force, agreed to participate because of a "deep felt concern for the many citizens of our many Nations who suffer daily at the hands of the criminal justice system".[75]

The empowerment of women was emphasized throughout the report. The Task Force "encouraged the empowerment of women throughout its work, and gained much insight because it valued the experiences of women". This approach was reflected in the composition of the task force and its steering and working groups, which included four men and 37 women. The task force's approach was to listen to federally sentenced women:

> Pain if often the precursor to change. This was very much the case for the Task Force on Federally Sentenced Women, whose vision for change is built primarily on descriptions and experiences of suffering. Task Force members listened as federally sentenced women spoke of their pain outside and within the criminal justice system.[76]

The goal of giving voice to federally sentenced women was clearly evident. The report relied heavily on excerpts from interviews and discussions with federally sentenced women. Specific attention was given to Aboriginal voice, as seen in a chapter entitled "The Voices of Aboriginal People". The chapter was written by the Aboriginal members of the working group to provide a perspective the task force found missing from earlier reports:

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75. *Creating Choices*, p. 1.

76. *Creating Choices*, p. 1.

> No previous task force or royal commission on corrections whether it was focused on Aboriginal Peoples, women, or prisons generally, has ever recognized the unique position of Aboriginal women. The Aboriginal voice has been relegated to a few pages of these previous reports or to several recommendations which were disconnected philosophically from the thrust of those works. This has effectively silenced our voice and trivialized our experience. Heading into the 1990s, we find that this report has not only acknowledged our voice and our experience, but this report respects our historical and founding position as the Original Peoples of Canada. It is our voice that helps to lead this new vision for women in corrections.[77]

The task force recommendations were intended to provide meaningful choices for women in the more immediate future, but the report was set in a context of long-term fundamental change in the criminal justice system's response to women in conflict with the law. The changes proposed were intended as significant steps toward the long-term goals of creating and using community-based, restorative justice options and an alternative Aboriginal justice system. To this end, the task force proposed a holistic approach embodying principles of empowerment, meaningful and responsible choices, respect and dignity, a supportive environment and shared responsibility. The recommendations had three primary components, which were considered a single recommendation in keeping with a holistic approach: establishment of five regional women's facilities to replace the Prison for Women at Kingston, Ontario; establishment of additional community release centres, including halfway houses designed to meet the needs of Aboriginal women more effectively; and, of particular importance to federally sentenced Aboriginal women, establishment of an Aboriginal healing lodge.[78]

In December 1989, the report of the Royal Commission on the Donald Marshall, Jr., Prosecution was released. Donald Marshall, Jr., a Nova Scotia Mi'kmaq, had been convicted of murder in 1971; 12 years later, following an investigation that revealed the actual murderer, he was released from prison. The commission's mandate was to determine why Donald Marshall had been wrongfully convicted and to make recommendations to ensure that such a miscarriage of justice would not happen again. The commission was chaired by Chief Justice T. Alexander Hickman and included Associate

77. *Creating Choices*, p. 20.

78. The report's recommendations concerning the regional centres and the healing lodge were accepted and implemented.

Chief Justice Lawrence A. Poitras and Gregory T. Evans, Q.C. as commissioners.

The commission examined several areas of the criminal justice system, focusing on how the wrongfully convicted are dealt with, the experiences of visible minorities, Nova Scotia Mi'kmaq, and Blacks in the system, the role and operation of the prosecution, and the effectiveness of policing. Thus, the situation of Aboriginal people was only one of many areas covered.

The commission held public hearings and workshops and commissioned a number of studies. Its findings on Aboriginal people and the criminal justice system revealed that Marshall's Aboriginal identity was a factor in his wrongful conviction and imprisonment. To support this finding, the commission examined two criminal investigations involving members of the Nova Scotia government, comparing their treatment with Marshall's to determine whether those with power and influence have different experiences:

> During our hearings, we examined the way in which the criminal justice system treated certain high profile individuals who were the subjects of criminal investigations. We compared their treatment with that accorded Donald Marshall, Jr. and used that examination as a basis to assess whether the system treats all citizens equally.[79]

To address the situation of the Mi'kmaq and the criminal justice system, the commission authorized a research study by Scott Clark.[80] Clark focused on three reserves in Nova Scotia, collecting information through interviews and a review of documents, statistics, and the literature. The study reviewed the situation of Aboriginal people and of the Mi'kmaq in general terms, then focused on the treatment of Mi'kmaq by the criminal justice system and on proposed responses to the problems. Particularly interesting was Clark's use of the term 'adverse effect'. While the commission found that Marshall's Aboriginal identity was a factor in his wrongful conviction, Clark examined the difficulty of establishing a causal relationship:

> The study employs the concept of *adverse effect* in recognition of the facts (a) that the intent to discriminate is very difficult to prove, and (b) that discrimination may be only one of several causes that

79. *Royal Commission on the Donald Marshall Jr., Prosecution: Digest of Findings and Recommendations*, p. 8.

80. Volume 3 of the commission's report was a study by Scott Clark, *The Mi'kmaq and Criminal Justice in Nova Scotia*.

result in adverse effects for Natives involved in the criminal justice system.[81]

Among Clark's findings was that Aboriginal people are affected adversely by the criminal justice system, largely because of systemic discrimination against Aboriginal people. Viewing poverty and external dependence as the underlying cause for Mi'kmaq involvement in the criminal justice system, Clark criticized the potential policies of 'indigenization' to satisfy the needs of Aboriginal people:

> Policies and programs based on cultural differences (indigenization) often treat criminal justice issues superficially, while failing to address the underlying causes of problems, the relations between Indian communities and the non-Indian system, and the specific needs of Indian communities. The RCMP option 3(b) program is an example.[82]

Clark recommended a phased approach to reform, with the establishment of an Aboriginal justice institute and a Mi'kmaq court worker program in the short term and longer-term solutions such as a community-based tribal justice system. Other recommendations for immediate action included a review of policing for the Mi'kmaq, regular liaison between lawyers and Aboriginal communities, an examination of sentencing, and the establishment of provincial courts in reserve communities. The commission's recommendations largely reflected those in Clark's study, including establishment of a community-controlled Aboriginal criminal court (administering the same law as applies to other Canadians) as a pilot project and an Aboriginal justice institute.

The government of Nova Scotia responded promptly to the report with the *Government of Nova Scotia Response to the Recommendations of the Royal Commission on the Donald Marshall, Jr., Prosecution* in February 1990. In this initial response, the government indicated that none of the recommendations would be rejected; the government accepted the basic intent of the commission's recommendations for an Aboriginal criminal court, an Aboriginal justice institute and an Aboriginal court worker program, while other recommendations, such as the use of Mi'kmaq interpreters, establishment of a tripartite forum on Aboriginal issues, and provincial courts on reserves were "accepted" or "endorsed".[83]

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81. *The Mi'kmaq and Criminal Justice in Nova Scotia*, p. vii.

82. *The Mi'kmaq and Criminal Justice in Nova Scotia*, p. 69.

83. The government also prepared further reports on implementation of the commission's recommendations. While the government accepted the intent of major recommendations concerning the Mi'kmaq and the criminal justice system, including the Aboriginal justice institute and the Aboriginal criminal court, it has

In January 1990, DIAND published the *Indian Policing Policy Review*. The review, begun in 1986, was conducted by a task force made up of representatives from interested federal departments and agencies under the chairmanship of DIAND. Its objective was to "give all concerned parties an outline of the current issues, problems and findings relating to the provision of policing services to Indian communities; to propose a series of principles and conclusions as a basis for discussion by all parties; and to provide guidance for the more detailed discussions and decisions that are required by the federal, provincial and territorial governments and Indian communities prior to the articulation of a clear federal policy for on-reserve Indian policing."[84] The task force did not undertake consultations but prepared the report with the understanding that it would be referred to all interested parties for review and comment on its completion.

In its review of on-reserve policing, the report indicated that "federal efforts to provide equitable and culturally sensitive policing services are being hampered by the lack of a coherent federal policy" and that "a key factor in this lack of coherence has been the issue of jurisdiction."[85] The report recommended that provincial and federal roles be addressed, if not defined:

> In trying to arrive at a basis for federal-provincial/territorial-Indian co-operation for the immediate future, it must be accepted that the issues of jurisdiction and legislative authority need not be conclusively resolved. It is sufficient to acknowledge that each party has a legitimate role to play. The principal impediment to improving and expanding the capacity to meet current law enforcement needs remains a lack of clarity of the issue of the jurisdiction of the federal, provincial and territorial governments. But this does not render the situation insurmountable. With the co-operation of the parties, appropriate and acceptable solutions can be found.[86]

Much of the report's discussion on jurisdiction relates to funding. From the outset, the task force acknowledged "the current period of fiscal

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not indicated how it intends to implement these proposals. The tripartite forum, however, which includes representatives from federal and provincial governments and three Aboriginal organizations (the Union of Nova Scotia Indians, the Native Council of Nova Scotia and the Confederacy of Mainland Mi'kmaqs) has been established.

84. *Indian Policing Policy Review*, p. 2.

85. *Indian Policing Policy Review*, p. 12.

86. *Indian Policing Policy Review*, p. 22.

restraints and the need to allocate available resources against clear government priorities". There was an extensive examination of expenditures for policing of Indian reserves, identified as "an area of particular concern to the federal government".[87] The task force noted in particular that a government's ability to spend money in a field or to deliver a service does not depend on having legislative authority in that field. Thus the division of responsibility for funding and delivery need not be, and was not, based directly on the division of legislative authority.

To identify solutions to the lack of policy clarity, the task force outlined a set of principles and conclusions based on the provision of culturally sensitive policing and increased Indian control:

> The Task Force's findings are premised on the simple notion that Indian communities are entitled to effective and culturally sensitive law enforcement services. Indian people can also legitimately expect to increase their control over their own future and be policed increasingly by Indians, irrespective of which policing program is responsible for providing the services in question.[88]

Following publication of the *Indian Policing Policy Review*, the Ontario Native Council on Justice organized a symposium on peacekeeping in November 1990. The resulting report was *Native Peacekeeping: Challenges and Opportunities of the 1990s*.[89] The symposium grew out of Aboriginal concerns that their perspective had not been heard at the Ontario Multicultural Policing Symposium in October 1988:

> Native delegates expressed grave concern that the unique position of Native people in Ontario's multicultural society was being largely unacknowledged and those issues of specific concern to Native people were being ignored.[90]

In response to these concerns, the province's deputy solicitor general offered support for a symposium on Aboriginal people and policing. The

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87. *Indian Policing Policy Review*, pp. 2, 5.

88. *Indian Policing Policy Review*, p. 22. In response to the report, the federal government established a new First Nations Policing Policy, to be administered by a new Aboriginal Policing Directorate in the Solicitor General's department. The policy was intended to improve policing services for Aboriginal communities by providing for tripartite policing agreements designed to meet the specific needs of individual Aboriginal communities.

89. A number of Aboriginal organizations are members of the Ontario Native Council on Justice, including the Ontario Federation of Indian Friendship Centres, the Union of Ontario Indians, the Ontario Native Women's Association, the Ontario Metis and Aboriginal Association, and the Native Law Students' Association.

90. *Native Peacekeeping: Challenges and Opportunities of the 1990s*, p. 1.

proposal for the symposium was developed by the Ontario Native Council on Justice in a manner that emphasized the value of consultation with representatives of the major Aboriginal organizations in the province:

> Both the design of the symposium format and the identification of the workshop topics to be addressed at the symposium were arrived at through the consultative process.[91]

There were 258 participants at the symposium, with representatives from First Nations, Aboriginal organizations and agencies, First Nations police, federal, provincial and municipal police forces, and federal and provincial governments. Fifteen workshops were held on themes such as community-based policing, recruitment and advancement, the traditional role of peacekeepers, and police complaints processes. Other workshops addressed issues relevant to the North, youth, alcohol, and victims of crime. The report lists 229 recommendations put forth at the symposium.

Also on the subject of policing, in February 1991, a commission of inquiry presented its report on policing of the Blood Tribe in Alberta, *Policing in Relation to the Blood Tribe: Report of a Public Inquiry*. The inquiry was appointed following concerns expressed by tribe members about several unexplained deaths and unsolved murders of tribe members. The inquiry's terms of reference were developed during a series of meetings between representatives of the government of Alberta and the Blood Tribe. Assistant Chief Judge C.H. Rolf of the provincial court was appointed commissioner "with the consent and concurrence of all parties involved."[92]

The commissioner heard evidence in three phases. The first phase examined several sudden deaths under circumstances considered suspicious or where tribe members thought the police investigation was unacceptable. The second phase examined a confrontation, generally referred to as the Cardston Blockade, that occurred in 1980 between the Blood Tribe and the government of Canada over outstanding land claims. The confrontation also involved the Royal Canadian Mounted Police and citizens of the town of Cardston. The third and final phase considered the sensitivity of federal and provincial policing policies and procedures to Aboriginal cultures and looked at the Blood Tribe's two attempts at self-policing.

The commission's recommendations were based on the principle that assigning blame is destructive and that its recommendations should be seen as an attempt to find constructive solutions. This principle is seen, for instance, in the commissioner's findings regarding the first phase of the Inquiry. According to the report, "At times during the investigations, police officers showed cultural insensitivity and paternalism towards the Indians.

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91. *Native Peacekeeping: Challenges and Opportunities of the 1990s*, p. 1.

92. *Policing in Relation to the Blood Tribe*, volume 2, p. 2.

The Commissioner believed that this was not a conscious bias on the part of police officers, but rather a basic lack of cultural knowledge about the Indians."[93]

The commission made 36 recommendations covering the three phases of examination. These included a number of measures to improve the relationship between Blood Tribe members and the police forces, such as cross-cultural sensitivity programs and a citizens' advisory group to reflect the community's perceptions of how it is being policed. The commissioner also recommended that the Blood Tribe's goal of developing an accredited stand-alone police force be supported by federal and provincial long-term funding under the auspices of the Blood Tribe Police Commission.

In December 1991, three years after the CBA's *Locking Up Natives in Canada*, another major contribution by a non-Aboriginal non-governmental actor appeared. The Law Reform Commission (LRC) published *Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* in response to a request from the minister of justice to examine the extent to which the *Criminal Code* and related statutes ensure that Aboriginal people and members of cultural or religious minorities have equal access to justice and are treated equitably and with respect. The work had two components: an Aboriginal justice review and a cultural or religious minorities justice review. This report addressed the first component.

The report marked a change in the approach of the Law Reform Commission. While the Commission had historically advocated "uniform, consistent and comprehensive" treatment by the justice system, this report proposed reforms specific to Aboriginal people. These special measures are justified on the basis of the history of disadvantage of Aboriginal peoples and of their unique constitutional position:

> Those who are familiar with the Commission's work and its orientation to the reform of the criminal process may feel that this Report marks a point of departure. Throughout our work we have extolled the virtues of a uniform, consistent and comprehensive approach to law reform. This Reference calls for us to examine, in specific detail, one group of persons and its interaction and unique difficulties with the criminal justice system. It asks us to propose reforms that will offset the sorry results of a history of disadvantage and suffering within the system... While we remain committed to the principles of uniformity and consistency, distinct treatment might be constitutionally justified on the basis of sections 25 and 35 of the *Canadian Charter of Rights and Freedoms*, which put Aboriginal peoples in a unique constitutional position with pre-

93. *Policing in Relation to the Blood Tribe*, volume 2, p. 4.

> existing legal rights, or else under the affirmative action clause of the Charter's equality provision.[94]

The report makes an important distinction between equal access to justice and equitable treatment and respect, emphasizing that for Aboriginal persons to be treated equitably and respectfully, equal access to justice must encompass greater recognition of the distinctiveness of Aboriginal peoples:

> "access to justice" is a broad term. It includes the simple ability to receive adequate services but, more importantly, it speaks of justice. Further, this Reference looks beyond equality, and talks of Aboriginal persons' being treated "equitably and with respect." Criminal law and procedure generally impose the same demands on everyone: in contrast, the concepts of equitable treatment and respect invite a recognition of differences between cultures. "Equitable treatment" raises questions of ultimate fairness. "Respect requires an acknowledgement that other values can be worthy of protection. In addition, the Reference seeks ways not merely to allow for such differences, but to "ensure" equitable treatment and respect: this wording imposes a high burden.[95]

The LRC report reinforced the idea that Aboriginal people see the criminal justice system is seen as remote, in terms of both physical separation and conceptual and cultural distance. This remoteness is apparent throughout the system, from the lack of recognition of customary law, to language problems and the absence of Aboriginal people working in the system.

The LRC proposed two tracks of reform. The first was short-term and did not address more fundamental issues; these recommendations included modifying the system to increase the number of Aboriginal persons working in it, overcome language and cultural barriers, and increase community involvement. The second track was long-term, based on Aboriginal communities opting for a variety of Aboriginal justice systems. Aboriginal communities identified by the legitimate representatives of Aboriginal people as being willing and able to establish Aboriginal justice systems should have the authority to do so, the LRC said. Finally, the commission recommended establishment of an Aboriginal justice institute, controlled by Aboriginal people, with a broad mandate to deal with anything concerning Aboriginal people in the criminal justice system.[96]

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94. *Aboriginal Peoples and Criminal Justice*, p. 1.

95. *Aboriginal Peoples and Criminal Justice*, p. 9.

96. There has been no direct implementation of any of the recommendations in the Law Reform Commission report. The Law Reform Commission itself was dissolved in 1992 as a result of budget cuts.

Following the LRC report came back-to-back provincial inquiries in Alberta, Manitoba, and Saskatchewan. The first of these comprehensive examinations was *Justice on Trial: Report of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta*, published in March 1991. The task force's mandate was to examine the extent to which Aboriginal people are treated differently by the criminal justice system, the extent to which they should be treated differently, and the alternative approaches to justice that might be considered for Aboriginal people. The task force examined all areas of criminal justice activity, including policing, legal aid, courts, corrections, socio-economic factors, jurisdiction, Aboriginal women, Aboriginal youth, and Aboriginal perspectives on justice. The task force was to "provide a report for the Solicitor General of Canada, the Attorney General of Alberta and the Solicitor General of Alberta, which identifies any problems and proposes solutions to ensure the Indian and Metis people receive fair, just and equitable treatment at all stages of the criminal justice process in Alberta."[97]

A joint undertaking by Canada and Alberta, the task force was chaired by Mr. Justice Robert Allan Cawsey. Three of the six other members were from the RCMP, Correctional Service Canada, and the Alberta department of the solicitor general. Of the three remaining, one was a member of the Indian Association of Alberta (IAA), another represented the Metis Association of Alberta (MAA), and the third was a lawyer in private practice. Although the IAA and the MAA appointed commissioners, the report noted that "the Aboriginal community felt that there should have been more Indian and Metis representation on the Task Force".[98]

The task force expressed confidence in the ability of the criminal justice system to adapt to the needs of Aboriginal people:

> The criminal justice system can be made more sensitive to the needs of Aboriginal people. However, no meaningful and lasting change can be made to the involvement of Aboriginal people with the criminal justice system without an integrated and comprehensive approach to improve the socio-economic factors which contribute to the problems.[99]

According to the report, "the consultative process set out by the Terms of Reference, the extent and complexity of the areas to be examined, and the one-year time limit shaped the format and content of the Task Force's

97. *Justice on Trial*, volume 1, p. 1-1.

98. *Justice on Trial*, volume 1, p. 1-3.

99. *Justice on Trial*, volume 1, p. 1-2.

report".[100] By contrast with a judicial inquiry, public inquiry or royal commission, its resources were limited, though funding was made available to the IAA and the MAA to support the preparation and presentation of briefs.[101] Individual bands, tribes and Metis settlements were also eligible for funding.

The task force's findings are based largely on "anecdotal information". The task force received submissions, heard oral presentations, and visited correctional institutions, Indian reserves, a Metis settlement, and other Aboriginal communities. Members also attended a number of cross-cultural training programs on Aboriginal and cross-cultural awareness, attended provincial court sittings and National Parole Board hearings involving Aboriginal inmates, and went on a 'ride-along' with the Edmonton police. A review of the findings of other major inquiries and a literature review were also conducted. This diversity of methods for gathering information perhaps indicates a willingness to look at issues at the street level and the community level, to gain an understanding of the day-to-day reality of Aboriginal people and the criminal justice system.

The study coincided with the "summer of Indian discontent". As a result, many Indian and Metis communities consulted by the task force were preoccupied and less willing to talk about issues exclusive to criminal justice:

> The events of the summer of 1990 consumed the time and attention of many of the Indian and Metis communities to such an extent that they were unwilling or unable to discuss with us the issue of the involvement of Aboriginals in the criminal justice system.[102]

Some of the key ideas and concepts in *Justice on Trial* include the presence of systemic discrimination, the need for balance and communication, and the importance of recognizing fiscal constraints. The task force emphasized the need for greater integration between the components of the criminal justice system, greater community involvement and responsibility, and the involvement of Aboriginal people at all levels of decision making and service delivery. the Task Force also recommended the greater involvement of Aboriginal elders and a shift in emphasis from incarceration to prevention based on addressing the socio-economic needs of Aboriginal people. The report also urged a higher priority for issues of youth and Aboriginal people in urban centres.

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100. *Justice on Trial*, volume 1, p. 1-3.

101. The task force relied on one full-time researcher, two consultants on contract, and the collective experience of the seven task force members.

102. *Justice on Trial*, volume 1, p. 1-4.

The task force conceded that many of its recommendations had been made by other task forces, commissions, inquiries or studies but not implemented fully or appropriately, so that they were still applicable. Recommendations were also made with deficits in mind:

> The Task Force has drafted recommendations with a full awareness of Government deficits. It is our opinion that many of the recommendations can be implemented by emphasizing prevention instead of incarceration and that funds can be reallocated accordingly.[103]

Finally, the task force considered legal pluralism and separate Aboriginal justice systems, describing the two points of view as follows:

> On the one hand, there is the trend toward Aboriginal people assuming greater control over criminal justice systems to achieve the stated aim of establishing Aboriginal justice systems based on traditional value and practices. On the other hand, there are the proponents of "one rule of law" who forward the idea of one justice system for all that is capable of responding to the needs of all.[104]

The task force clearly favoured the latter approach, as evident in the following passage:

> It is our position that numerous changes can be made relatively quickly to the existing criminal justice system to make it more sensitive to the needs of Aboriginal people. The first step in this process is the "indigenization" of the criminal justice system as discussed earlier. The Task Force recognizes that intensive indigenization of the criminal justice system, including flexible approaches to sentencing, can, in fact, go a long way toward meeting the wishes of some Aboriginal people.[105]

The task force expressed considerable hope for improvement in the situation of Aboriginal people relative to the criminal justice system:

> the Task Force senses a political will at the federal and provincial levels to address Indian and Metis concerns. The Marshall Inquiry and the early response by the Nova Scotia Government should encourage other inquiries and Task Forces. The appointment of the Aboriginal Justice Committee in Manitoba and the Blood Inquiry in Alberta, together with the establishment of this Task Force as a joint venture of Canada and Alberta, indicates a determination to

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103. *Justice on Trial*, volume 1, p. 1-5.

104. *Justice on Trial*, volume 1, p. 1-7.

105. *Justice on Trial*, volume 1, p. 1-7.

identify problems and seek solutions to the problems related to Aboriginal in the criminal justice system.[106]

The second provincial justice inquiry culminated in the *Report of the Aboriginal Justice Inquiry of Manitoba*, submitted to Manitoba's justice minister in August 1991. The Aboriginal Justice Inquiry (AJI) was established primarily in response to two disturbing events: the 1987 trial of two men for the 1971 murder of Helen Betty Osborne, a young Aboriginal woman, in The Pas, Manitoba, and the 1988 shooting death of J.J. Harper, an Aboriginal leader, following a confrontation with a Winnipeg police officer. What made the Osborne case so disturbing was that the identity of Osborne's murderers was widely known in the community, but still it took 16 years to bring to the case to trial. The public wanted answers, and the government of Manitoba responded by establishing the Public Inquiry into the Administration of Justice and Aboriginal Peoples, generally referred to as the Aboriginal Justice Inquiry. The inquiry was to look not only at the Harper and Osborne cases but also the general situation of Aboriginal people and the justice system.

Co-chaired by Associate Chief Justice A.C. Hamilton and Associate Chief Judge C.M. Sinclair, the inquiry visited Aboriginal communities and held community hearings across the province. Throughout the process, the commissioners made efforts to establish a process comfortable for Aboriginal people:

> All the community hearings were open to the public. Those who appeared before us were invited to express any and all of their concerns with the justice system. They were not required to submit written presentations, were not examined by Commission counsel, were not cross-examined and were not required to testify under oath.
>
> We took this approach after considerable deliberations. We believed that Aboriginal people already were alienated from, and intimidated by, the formal court system. We wanted to utilize a process that would encourage frank and open expressions of opinion.[107]

The information provided at community hearings was supplemented by research projects, visits to tribal courts in the United States, a symposium on tribal courts, and a conference of Aboriginal elders.

The report dealt not only with policing, courts and corrections systems, but also with the historical position of Aboriginal people, Aboriginal concepts of justice, and the development of Aboriginal and treaty rights. It

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106. *Justice on Trial*, volume 1, pp. 1-7, 1-8.

107. *Report of the Aboriginal Justice Inquiry of Manitoba* (AJI), volume 1, p. 5.

covered the unique circumstances of Aboriginal women, young offenders, and children. The report also addressed systemic discrimination and discussed proposals for a separate Aboriginal justice system, placing the concept in the context of the right of Aboriginal self-government and Aboriginal courts in other jurisdictions. Excerpts from the hearings figured prominently throughout the report, in keeping with the inquiry's philosophy that "for the general questions about how the justice system dealt with Aboriginal people, we decided it was critical to hear directly from Aboriginal people."[108]

The report contains some of the strongest criticism of the justice system in the documents to date:

> The justice system has failed Manitoba's Aboriginal people on a massive scale. It has been insensitive and inaccessible and has arrested and imprisoned Aboriginal people in grossly disproportionate numbers... It is not merely that the justice system has failed Aboriginal people; justice also has been denied to them. For more than a century the rights of Aboriginal people have been ignored and eroded. The result of this denial has been injustice of the most profound kind. Poverty and powerlessness have been the Canadian legacy to a people who once governed their own affairs in full self-sufficiency.[109]

The report's recommendations are consistent with this tone. It recommends recognition of Aboriginal self-government by federal and provincial governments, the establishment of Aboriginal justice systems in Aboriginal communities, beginning with the establishment of Aboriginal courts, and the development of mechanisms, such as a treaty land entitlement commission and an Aboriginal claims tribunal, to resolve outstanding issues concerning land rights. The inquiry also calls for an Aboriginal justice commission in Manitoba to implement its recommendations and an Aboriginal justice college to provide training and education to enable Aboriginal people to work in the justice system and to work toward Aboriginal justice systems. It also recommends change in the justice system to meet the needs of Aboriginal people living outside Aboriginal communities. Finally, the report called on federal and provincial governments to build a new relationship between Aboriginal and non-Aboriginal people and their governments:

> The time to act is at hand. Aboriginal people will be able to find their way out of the destructive labyrinth to which they have been consigned, but only if federal and provincial governments take

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108. AJI, volume 1, p. 5.

109. AJI, volume 1, p. 1.

> positive action to fulfil their historic responsibilities and obligations. In this manner, government can begin to build a new relationship with Aboriginal people based upon respect, understanding and good will.[110]

The province of Saskatchewan also examined Aboriginal people and criminal justice. The *Report of the Saskatchewan Metis Justice Review Committee* and the *Report of the Saskatchewan Indian Justice Review Committee* were published in January 1992. Both committees were chaired by Judge Patricia Linn, though their membership differed slightly. The Saskatchewan Metis Justice Review Committee included representatives of the Metis Society of Saskatchewan, Saskatchewan Justice, Justice Canada, and the federal Solicitor General. The Saskatchewan Indian Justice Review Committee included representatives of the Federation of Saskatchewan Indian Nations, rather than the Metis Society of Saskatchewan. The reports were identical in format and in scope, with the only difference being a discussion of treaty rights recognition in the *Report of the Saskatchewan Indian Justice Review Committee.*

The decision to treat Metis and Indian justice concerns separately reflects in part the strong sense of distinctiveness of treaty nations and the Metis Nation.[111] In addition, however, the treaty Indians and the Metis had different points of entry in the discourse. The *Report of the Saskatchewan Metis Justice Review Committee* noted the importance of this report for the Metis people of Saskatchewan. Given that they had not been part of the 1985 process for preparing *Reflecting Indian Concerns and Values in the Justice System,* "this report is a beginning for the Metis, and there is a strong voice among Metis people calling for this dialogue to continue in the months and years ahead."[112]

In response to problems of implementation that plagued earlier reports, the committees focused on practical changes that could be implemented easily:

> Although there have been numerous Canadian studies completed, and many recommendations made in recent years, implementation of recommendations is an often difficult process and meaningful change may seem slow in coming. Being aware of this, the Metis Justice Review Committee was given a short time frame to focus

110. AJI, volume 1, p. 674.

111. Part of that distinctiveness arises from the historical perception that treaties were signed by Indian First Nations with the federal Crown, thereby creating a special and exclusive relationship with the federal Crown. The Metis, on the other hand, were seen until recently as the responsibility of the provincial government.

112. *Saskatchewan Metis Justice Review Committee*, p. 2.

> on practical changes and initiatives that could be implemented almost immediately, or within a very reasonable period of time.[113]

As a result of this approach, the process was "very different from the inquiries recently completed in Manitoba and Alberta, which took a longer term approach to determining directions for change". In attempting to make "timely recommendations which are action-oriented", the committees consulted individuals, organizations and communities and held public hearings in Aboriginal communities following the release of their interim reports.[114]

The committees were given only six months for their reviews; as a result, the reports constituted only "a valuable beginning":

> On occasion, the Committee has been criticized by those who feel the time period from June 7th to December 7th, 1991, was inadequate to properly explore the working of the courts, corrections, police, and other parts of the justice system as it impacts on Metis people and the communities. The Committee understands these concerns and acknowledges that people and organizations sometimes had difficulty in submitting briefs in time for our consideration. We also acknowledge that we have only heard from a portion of the Saskatchewan public on these issues. However, we feel that a tremendous amount of work has been completed over the past six months, resulting in the practical recommendations contained in this report. In particular, we feel that this report constitutes a valuable beginning to focus discussions on changes required to the criminal justice system to ensure the respect and confidence of Metis people in Saskatchewan in the justice system.[115]

The report dismissed much of this criticism, focusing instead on the importance of its work in bringing Aboriginal and non-Aboriginal people together to discuss Aboriginal criminal justice:

> We hope that as our recommendations are implemented in the months ahead any criticism of our process will give way to encouragement and support in pursuit of our common goals. If there is one lesson to be learned from the many reports written over the last decade, it is that Canada's aboriginal and non-aboriginal people must talk to each other; listen to each other; and begin to

113. *Saskatchewan Metis Justice Review Committee*, p. 1.

114. *Saskatchewan Metis Justice Review Committee*, pp. 1, 4.

115. *Saskatchewan Metis Justice Review Committee*, p. 1.

> work together in a spirit of mutual respect for the rights of one another.[116]

The recommendations in the two reports are identical, with the exception that the Indian justice review committee called for the Federation of Saskatchewan Indian Nations to meet with federal and provincial corrections officials to review the application of treaty rights with regard to inmates who are treaty Indians. The recommendations encompassed youth justice, policing, legal representation, sentencing, court services, and corrections. The overarching concerns were racism, employment equity, community legal education, cross-cultural training, family violence, and holistic approaches to services. Recommendations focused on providing a basis for greater involvement of Aboriginal communities in the criminal justice system, including employment equity programs and committees to increase the number of Aboriginal people involved in the development of new programs. The reports also saw a need for continuing consultation to promote discussion of Aboriginal justice issues and to monitor implementation of the committees' recommendations.[117]

The final report in the document collection, also published in January 1992, returned to the focus on policing emphasized in earlier reports of this period. *"As We Were Told": A Report on Perceptions of Policing in Metropolitan Toronto's Aboriginal Community* was prepared by Mukwa Ode First Nations Consulting Incorporated for the Metropolitan Toronto Police Services Board. The report was precipitated by what the board saw as a sense of mistrust and misunderstanding between Toronto's Aboriginal and police communities:

> Every Native person in this city has a story of police brutality, false arrest, or some similar injustice. They may not be able to name a specific incident or even a specific individual that it has happened to but they know it has happened. This perception that Indian people have is symptomatic of a wide gulf of mistrust between the police and the Native community that will require some extraordinary efforts on the part of the police and extraordinary forbearance of the part of the Native community to bridge. Despite

116. *Saskatchewan Metis Justice Review Committee*, p. 4.

117. A number of specific programs and projects have been undertaken in Saskatchewan since the release of the reports, including an employment equity plan by the Regina police, cross-cultural training for provincial social services staff, and new programs for Aboriginal female offenders. In addition, provincial and regional Aboriginal organizations have been discussing a number of projects with Saskatchewan, including Peacemaker Circles, Indian policing options, and an Indian Justice of the Peace project.

> this it is a task which both parties have evinced a willingness to embark upon.[118]

The report saw open and frank communication between the Aboriginal community and the police community as essential in achieving understanding and dialogue:

> The Report on Perceptions of Policing in the Aboriginal Community is based on the perception that dialogue must be possible between communities when there is genuine will to achieve it... The Report has been titled "As We Were Told" as it is a compilation of the thoughts, wisdom and direction of the members of the Native community and the police who were interviewed. This is also a reflection of a common technique in Indian story telling which acknowledges that all of our knowledge is derivative – thus its value increases as it is the sum of many minds and lives.[119]

To achieve dialogue, the consultants gathered information on police perceptions of the Aboriginal community and on perceptions of police in the Aboriginal community. The consultants circulated a questionnaire to police and set up focus groups with survey participants to discuss the issues further. To examine perceptions of the police on the part of Aboriginal people, a series of talking circles was held. Talking circles were used to gather information in a way that was comfortable for Aboriginal people:

> The idea of a Talking Circle is to create an atmosphere where Native people feel free to talk about an issue, feel that they are in control of the agenda, and feel the process is one which is a validation of not only information given but of the culture as well.[120]

Key informant interviews were also conducted with individuals who by virtue of their jobs and experience had knowledge of Aboriginal policing. The report contains many quotations from those consulted through interviews, questionnaires, focus groups and talking circles.

The report was intended to facilitate understanding between the Aboriginal and police communities, but within these communities as well:

> This report tells a story as well of two communities struggling to come to terms with one another and with themselves at the same time. This is perhaps the most fascinating aspect of the report that the story is not just about native and police, but has much deeper

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118. *"As We Were Told"*, p. 3.

119. *"As We Were Told"*, p. 1.

120. *"As We Were Told"*, p. 20.

> undercurrents reaching into the very manner in which both communities define themselves. The police themselves are two different entities: the Police Services and the Police Force. These are often in conflict with one another and this conflict has serious ramifications for the ability of the Police Executive to implement recruitment and equity policies in all minority communities, as well as the Native community. The Native community likewise is not one homogenous community. In the community the range of opinion goes from "To tell the truth we don't want anything to do with them (the Police)". To "We need a separate Native police force". To "Let's work together to solve the problem." One thing that all Native people do agree on is that there is a serious problem with policing in the aboriginal community.[121]

Diversity and commonalities between the communities were also depicted in the report. The exercise was intended to allow both groups to speak openly:

> The report outlines police perceptions of Native people with regard to policing. It then flips the question around to the native community and details Native perceptions of the police. This juxtaposition will illustrate how far apart the two communities are on certain issues, yet also reveal the places where there is a commonality.[122]

The consultants found that many of the problems identified by the Aboriginal community concerning race, cultural understanding and communication were confirmed by the responses of police officers. Based on its findings, the report presented an extensive list of recommendations from the police and Aboriginal communities, all aimed at achieving greater cultural understanding and better communication, including such measures as community outreach, police participation in Aboriginal community events, and cross-cultural training for police officers. Taking into account their cost implications, the report divided the recommendations into four categories, according to the level of financial commitment required from the Metro Toronto Police. Finally, the report recommended that it be distributed to the Aboriginal and police communities for discussion and evaluation.

"As We Were Told" focused on communication, understanding and dialogue:

> It is the opinion of the consultants that dialogue is possible and that bridges can be built. However there is an urgency to this and the need for a genuine commitment on the part of both the police and

121. *"As We Were Told"*, p. 1.

122. *"As We Were Told"*, p. 7.

the Native community. Both communities need to assess their respective responsibilities and commit to them.[123]

ANALYSIS: 1988-1992

The period 1988-1992 was one of tremendous activity in the discourse on Aboriginal criminal justice, involving a number of participants, processes and ideas.

Participants

Concerning the participants in the discourse, perhaps the most obvious observation is the prominence of the legal profession. The profession's most direct contribution was the reports of the Canadian Bar Association and the Law Reform Commission. These documents — *Locking Up Natives in Canada* and *Aboriginal Peoples and Criminal Justice* — were prepared internally, with no attempt to represent other interests. The legal profession was also present in the person of judges who conducted public inquiries on the Blood Tribe in Alberta, the Donald Marshall, Jr. case, and the justice system in Manitoba. In other instances, judges and lawyers provided leadership, but representatives of other interests were included. This was the case, for instance, with the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta and the Saskatchewan Indian and Metis justice review committees.

In addition to inquiries sponsored by provincial governments, several federally sponsored initiatives published reports in this period, including the report of the Task Force on Aboriginal Peoples in Federal Corrections; *Creating Choices*, the report of the Task Force on Federally Sentenced Women; and *Indian Policing Policy Review* by DIAND. These documents focused on components of the criminal justice system that fell within the purview of particular federal departments rather than dealing with the entire system as the provincial inquiries had done.

Aboriginal participants were also involved in the discourse, though it was mainly provincial Aboriginal organizations that played a role in preparing and publishing documents. The Assembly of Manitoba Chiefs and the Ontario Native Council on Justice published documents in this period, and other Aboriginal organizations, especially in Alberta and Saskatchewan, were involved in provincial inquiries. Notably absent from the discourse were the national Aboriginal organizations, whose attention was focused on the Canada Round of constitutional negotiations.

During this period, some documents saw Aboriginal peoples as having concerns and experiences similar to those of multicultural and ethnic

123. *"As We Were Told"*, p. 46.

groups. This is evident, for instance, in the *Report of the Race Relations and Policing Task Force* and, to a lesser extent, in *Native Peacekeeping*, which was based on a symposium brought about by concern that the interests of Aboriginal peoples were being lost in general concerns about race relations. There was also evidence in the report of the Donald Marshall, Jr., inquiry that commissioners saw the needs of Aboriginal people as encompassed by those of visible minorities. While the report dealt with these issues separately, it also included a section on visible minorities in which it spoke of the two groups as having some common needs. The report's conceptualization of Aboriginal and Black people as members of visible minorities was evident in the following recommendation:

> To assist visible minority group members themselves to better understand their rights, we recommend that the Public Legal Education Society work with Native and Black groups to develop and provide appropriate materials and services.[124]

Despite some attempts to classify Aboriginal peoples as cultural minorities, other documents emphasized the diversity of Aboriginal peoples — in terms of their perspectives and opinions, their Aboriginal identity, and differences based on sex, age, and residence. Documents such as *"As We Were Told"* and *Aboriginal Peoples and Criminal Justice* emphasized diversity, the former by identifying the range of opinion in the Aboriginal community on Aboriginal/police relations, the latter by choosing to use the term 'Aboriginal', believing that it conveyed the diversity of Aboriginal peoples better than other terms:

> In this Report we have consciously employed the designation "Aboriginal" when referring to those persons encompassed by the terms of this Reference. Throughout our consultations, it was emphasized that words such as "natives", "members of first nations" or "Indians" would not reflect the diversity of peoples within Canada who are encompassed by the expression "Aboriginal peoples".[125]

Similar concerns were evident in the name of the Task Force on the Criminal Justice System and its Impact on the Indian and Metis People of Alberta and in the establishment of two committees in Saskatchewan to deal with Metis and Indian concerns.

Several of the documents dealt with concerns stemming from diversity within the Aboriginal community. *Creating Choices*, for example, looked at the concerns of federally sentenced Aboriginal women:

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124. *Royal Commission on the Donald Marshall, Jr., Prosecution: Digest of Findings and Recommendations*, p. 10.

125. *Aboriginal Peoples and Criminal Justice*, p. 2.

> Our distinct experience as Aboriginal women must be recognized. We cannot be either women only or Aboriginal only. Our race and our gender are integrally linked. Our identities as women flow from the teachings of our various Aboriginal Nations. That we are distinct must not be trivialized.[126]

The needs and concerns of Aboriginal youth and urban Aboriginal people were also isolated from broader concerns in *Justice on Trial*:

> Two areas of Aboriginal peoples' involvement with the criminal justice system have received little attention. They are: youth and Aboriginal people in urban centres. The Task Force recommends that these areas be given much higher priority.[127]

Other reports, such as those of the Aboriginal Justice Inquiry of Manitoba and the Saskatchewan Indian and Metis justice review committees, also spoke about the special needs of Aboriginal women and/or youth. Finally, *"As We Were Told"* addressed the policing concerns of urban Aboriginal people.

Process

Examining how participants engaged in the discourse raises questions about the forms of consultation used, efforts made to include Aboriginal people in the process, and the adequacy of funding for participation.

Consultation during this period was dominated by more formal structures, such as royal commissions, public inquiries and task forces, which are broad-based and formalized means of consultation. These bodies held public hearings, received oral and written submissions, and held symposiums and conferences. Groups, organizations and individuals with an interest in the situation of Aboriginal people in the criminal justice system were consulted and their input was sought. Documents prepared by non-governmental participants, including the Canadian Bar Association, the Law Reform Commission and the Assembly of Manitoba Chiefs, did not involve consultation but presented the opinions of the authors and/or the organizations they represented.

This period also saw several attempts to conduct consultation in a way that was sensitive to Aboriginal people. The process leading to *"As We Were Told"*, for instance, included talking circles intended to make Aboriginal people more comfortable presenting their views, and the Aboriginal Justice Inquiry of Manitoba encouraged Aboriginal people to present oral testimony in a non-confrontational setting. There were also efforts to incorporate the comments of those consulted in reports. Thus,

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126. *Creating Choices*, p. 15.

127. *Justice on Trial*, volume 1, p. 1-6.

Creating Choices, the report of the Aboriginal Justice Inquiry, and *"As We Were Told"* included extensive excerpts that avoided filtering (and possibly misinterpreting) the Aboriginal voice. The importance of this strategy is reflected in the following excerpts:

> We wish to offer special acknowledgement to the presenters who appeared before us. Their presentations were often disturbing and often poignant. They told us more about the state of the justice system and its effects on Aboriginal people than we would ever hope to have learned by any other means. Their words and their concerns provide the compass for our discussion of the issues.[128]

> Their words, as well as the word and commitment of countless others who care, provide the energy and creativity to help move us towards such a vision for change. And now, the words of some of those who care will speak for themselves.[129]

Earlier we discussed references in many of the documents to limitations on funding and time for inquiries. This was also evident in some of the documents published in the 1988-1992 period, particularly *Justice on Trial* and the reports of the Saskatchewan Indian and Metis justice review committees. The former report explained that its consultative process had been limited by its one-year time limit and that it had limited numbers of staff, while the Saskatchewan Indian and Metis justice review committees found themselves limited by their six-month time frame and because committee members carried out their work in addition to their other professional responsibilities. These factors were seen to limit the scope and the depth of the inquiry.

Ideas

It is evident from the documents that publicity surrounding several troubling incidents involving Aboriginal people and the criminal justice system motivated the preparation of many of these reports. As well, the ideas and the concepts espoused in the documents and the language used to express them can be linked to the proclamation of the *Canadian Charter of Rights and Freedoms*, to the movement toward self-government, and to the deficits that plagued provincial and federal governments during this period. We therefore discuss the ideas that characterized the documents in terms of these preoccupations.

Among the reports prompted by events were the reports of the Royal Commission on the Donald Marshall, Jr., Prosecution, the Aboriginal

128. AJI, volume 1, p. 7.

129. *Creating Choices*, p. 21.

Justice Inquiry of Manitoba, and the Task Force on Federally Sentenced Women, as well as *Policing in Relation to the Blood Tribe.* Others, such as *Justice on Trial*, were influenced by events in the summer of 1990, particularly the standoff at Oka.

These events, along with media and public response to them, inspired distinctive qualities in the discourse, particularly the focus on the need to listen and communicate and the sense that change was urgent. The importance of listening was raised in *Policing for Aboriginal Canadians: The RCMP Role* and in the *Report of the Saskatchewan Metis Justice Review Committee*:

> If there is one lesson to be learned from the many reports written over the last decade, it is that Canada's aboriginal and non-aboriginal people must talk to each other, listen to each other, and begin to work together in a spirit of mutual respect for the rights of one another.[130]

The importance of communication was noted in all the documents and formed the basis for reports such as *"As We Were Told"*, which saw open and frank discussion not as a means to an end but as an end in itself.

Many documents expressed a sense of urgency to implement change to improve the situation of Aboriginal people, including *Creating Choices*, *"As We Were Told"*, the report of the Aboriginal Justice Inquiry of Manitoba, and *Policing for Aboriginal Canadians: The RCMP Role*:

> It is the opinion of the consultants that dialogue is possible and that bridges can be built. However there is an urgency to this and the need for a genuine commitment on the part of both the police and the Native community. Both communities need to assess their respective responsibilities and commit to them.[131]

> We trust that the message of Aboriginal women is now clear. We ALL require ACTION NOW.[132]

> The problems are daunting and our proposals are far-reaching. But we believe that in the interests of justice, the process of transformation must begin immediately.[133]

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130. *Report of the Saskatchewan Metis Justice Review Committee*, p. 4.

131. *"As We Were Told"*, p. 46.

132. *Creating Choices*, p. 20 [emphasis in original].

133. AJI, volume 1, p. 2.

> The "*new* policing approach" stands out. It says that we must enter a new era of understanding and sensitivity, and 1989 is the year to begin.[134]

The Charter, particularly its equality provisions, also shaped the discourse of this period. References to the Charter were evident in the discussion of legal pluralism, racism, and the need for special programs to achieve equity for Aboriginal people in the criminal justice system.

The debate on legal pluralism began in *Locking Up Natives in Canada*, and throughout the period debate continued on whether the system could be adapted to the needs of Aboriginal people or whether a separate system was required. This discussion was summarized in a passage from *Justice on Trial*:

> On the one hand, there is the trend toward Aboriginal people assuming greater control over criminal justice systems to achieve the stated aim of establishing Aboriginal justice systems based on traditional value and practices. On the other hand, there are the proponents of "one rule of law" who forward the idea of one justice system for all that is capable of responding to the needs of all.[135]

Most of the documents lay somewhere along this spectrum. While *Locking Up Natives in Canada*, *Peace and Good Order*, and *Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* favoured separate systems, as did the Manitoba Aboriginal Justice Inquiry, others, such as *Justice on Trial*, favoured indigenization of the current system.

These arguments took place in the context of the tension between individual and collective rights and the need for equality based on the distinctiveness of Aboriginal peoples. This was particularly evident in *Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* which concluded that equal justice can be achieved only if Aboriginal people are treated differently. This would require separate programs and, eventually, separate systems to meet the needs of Aboriginal people.

Related legalism pluralism and equality are issues of racism. Most of the documents discussed racism, systemic discrimination and their adverse effects. We see this in almost all of the documents of this period. The following excerpt is one of many examples:

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134. *Policing for Aboriginal Canadians: The RCMP Role*, p. 272 [emphasis in original].

135. *Justice on Trial*, volume 1, p. 1-7.

> it is clear that Aboriginal people have been subject to [discrimination]. They clearly have been the victims of the openly hostile bigot and they also have been the victims of discrimination that is unintended, but is rooted in policy and law.[136]

Many of the reports struggled to define terms like racism, systemic discrimination, and adverse effect in a consistent manner:

> Part of the lexicon that has evolved around the subject is the use of word racism to define all negative police/native interaction. A climate has grown up over the years in which all incidents must be characterized in this way to be understandable.[137]

> It is of course difficult, if not impossible, to define racism, let alone combat it.[138]

> There is some questions as to the working definition of "discrimination" as it applies to the Canadian situation.[139]

> Racism, prejudice and discrimination are widely used terms in our society, and are generally well understood. However, each term has its own interpretation difficulties.[140]

Other reports, such as *Policing in Relation to the Blood Tribe*, explained the conduct of police officers in terms of a "lack of cultural knowledge", avoiding the terms racism and discrimination:

> The Commissioner observed in the evidence a cultural insensitivity and paternalism on the part of a number of police officers. This is not believed to be a conscious bias or a deliberate attempt to insult or show disrespect. It is due to a lack of cultural knowledge.[141]

Discussion of self-government also influenced the discourse during this period. This is evident in the discussion in some documents of the historical and unique constitutional position of Aboriginal peoples and of the need for separate systems in the context of the right of self-government. This might also have been a factor in the strategy, adopted in many of the documents, of presenting both short-term and long-term recommendations, with the former aimed generally at special programs to meet immediate needs and

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136. АЛ, volume 1, p. 101.

137. *"As We Were Told"*, p. 24.

138. *Report of the Saskatchewan Metis Justice Review Committee*, p. 64.

139. *Royal Commission on the Donald Marshall, Jr., Prosecution*, volume 3, p. 9.

140. АЛ, volume 1, p. 97.

141. *Policing in Relation to the Blood Tribe*, volume 1, p. 106.

the latter at more profound change, including the establishment of separate systems. This approach was evident, for instance, in *Creating Choices, Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice*, the report of Manitoba's Aboriginal Justice Inquiry, and the following excerpt from the volume 3 of the Marshall inquiry report:

> Significant changes are required in terms of access to and administration of justice for aboriginal people in Nova Scotia. However, innovative solutions that will have long-term benefits for the Micmac and ultimately for non-Native society will not occur overnight. Therefore Micmac and other governments should consider a phased approach to achieving their goals. In the short term, programs such as Micmac Court Workers can be implemented. At the same time, the design and implementation of long-term solutions such as a community-based tribal justice system must be ongoing.[142]

Finally, the documents showed evidence of awareness of the deficit position of governments. The *Indian Policing Policy Review*, for instance, was conducted partly because "federal, provincial and territorial governments have become increasingly concerned about the rapidly escalating costs associated with policing Indian reserves".[143] *"As We Were Told"* divided its recommendations into four categories, depending on the level of financial commitment required from the Metro Toronto Police. In *Justice on Trial*, the task force "drafted recommendations with a full awareness of government deficits".[144] The Aboriginal Justice Inquiry of Manitoba, however, emphasized the urgent need for governments to devote the necessary resources:

> We are mindful of the fact that the end result of our recommendations likely will be that additional resources will have to be found. We have refrained from costing out the recommendations, because we do not believe that a cost-benefit analysis is the way to approach the question of justice for Aboriginal people.[145]

These concerns, the prominence of the legal and judicial professions among policy participants, and the significant number of comprehensive provincial studies combined to make 1988-1992 a distinctive period in the discourse. In the next section we offer some reflections on how the

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142. *Royal Commission on the Donald Marshall, Jr., Prosecution*, volume 3, p. 70.

143. *Indian Policing Policy Review*, p. 1.

144. *Justice on Trial*, volume 1, p. 1-5.

145. AJI, volume 1, p. 672.

discourse evolved in the hope of discerning lessons for fostering discourse and inspiring dialogue in the future.

FINAL OBSERVATIONS

Our concluding observations cover the three periods of discourse examined:

- 1967-1978: The Beginning of Discourse
- 1978-1988: The Calm
- 1988-1992: The Storm

Given the large proportion of the documents that were published between 1988 and 1992, it is difficult to avoid some duplication of the analysis of the third period. We would direct readers to that analysis for a discussion of key themes and trends.

Our five observations concern the following issues:

- differences in the explanations offered for Aboriginal criminality and corresponding differences in the policy directions advocated;
- the relationship between recommendations and implementation;
- links between the development of criminal justice policy and governance and human rights policy;
- the impact of major events on the development of the policy discourse; and
- the influence of the legal profession and the judiciary and what this says about the possibilities for change.

Observation 1: Throughout the discourse, participants offered different answers based on different explanations of Aboriginal criminality.

Participants in the policy discourse generally offered one of two explanations for the high incidence of Aboriginal people in conflict with the law. Some reports explained the problems facing Aboriginal people by citing their disadvantaged social and economic situation. Some took the cause/effect relationship one step further, arguing that socio-economic disadvantage is a direct result of a history of colonialism. For the most part, was reports of Aboriginal and non-governmental organizations and task forces and inquiries with significant Aboriginal representation that took this position. *Wahbung Our Tomorrows*, the report of the Metis and Non-Status Indian Crime and Justice Commission, *Locking Up Natives in Canada*, *Peace and Good Order*, and the Aboriginal Justice Inquiry of Manitoba report all took this approach.

Reports that adopted this explanation tended to recommend parallel Aboriginal justice systems, on the basis that solutions must remedy the problem; that is, powerlessness and dependency resulting from the colonial experience must be reversed and self-determination restored. While some also advocated shorter-term changes in the existing system, the consensus

was that the real answer lay not in cosmetic changes and indigenization but in separate Aboriginal systems:

> The situation of aboriginal peoples and the justice system is an old problem that is not easily resolvable especially if the measures to resolve the problems are geared towards cosmetic changes within the system or to the system. Measures such as having more aboriginal people in the system to serve as lawyers, judges, courts workers or translators have not brought about significant improvement nor has bringing the system to the community.
>
> Our most basic recommendation is that aboriginal control of our own justice systems is necessary. Furthermore, our commitment and expectation in the long term is that the basis upon which aboriginal justice will be premised and established is through the inherent authority of self-governing peoples.[146]

Other reports pointed to the inability of the criminal justice system to respond to the unique needs of Aboriginal people, blaming design flaws, a lack of cultural knowledge among criminal justice professionals, an absence of community involvement, inadequate numbers of Aboriginal people working in the system, and inflexible approaches to sentencing. Participants offering this explanation were generally governments, and their reports based recommendations on the idea that the current system can be fixed to respond to Aboriginal people's needs:

> It is our position that numerous changes can be made relatively quickly to the existing criminal justice system to make it more sensitive to the needs of Aboriginal people. The first step in this process is the "indigenization" of the criminal justice system as discussed earlier. The Task Force recognizes that intensive indigenization of the criminal justice system, including flexible approaches to sentencing, can, in fact, go a long way toward meeting the wishes of some Aboriginal people.[147]

These two approaches dominated the discourse. For those who saw the roots of Aboriginal criminality in colonialism and socio-economic disadvantage, the answer lay in parallel Aboriginal-controlled justice systems. For those advocating adjustments in the existing system, the answer lay in changes aimed at increasing the system's responsiveness to Aboriginal people. Aboriginal and non-governmental participants generally advocate the former approach, while governments cling to the latter, and the problems of Aboriginal people in the criminal justice system continue.

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146. *Peace and Good Order*, pp. 13, 3.

147. *Justice on Trial*, volume 1, p. 1-7.

Observation 2: Frustration when recommendations are not implemented was evident in the discourse.

Many of the documents noted the failure of governments to implement the recommendations of earlier reports. This concern was expressed in the reports of the Metis and Non-Status Indian Crime and Justice Commission and the Saskatchewan Metis Justice Review Committee and in *Justice on Trial*. Other documents fashioned their recommendations for easy implementation; *"As We Were Told"*, for example, identified the recommendations that could be implemented quickly, while the Manitoba Aboriginal Justice Inquiry recommended processes and structures to implement its recommendations.

As for why participants felt compelled to make implementation easier for governments, the answer may lie at least in the part in the documents themselves: financial constraints, lack of interjurisdictional co-operation, and time limitations were identified as conditions under which they worked. These in turn constitute obstacles to implementation.

Some reports showed a preoccupation with tailoring recommendations to the financial situation of governments, but others, including the Aboriginal Justice Inquiry of Manitoba, insisted that social justice prevail:

> We are mindful of the fact that the end result of our recommendations likely will be that additional resources will have to be found. We have refrained from costing out the recommendations, because we do not believe that a cost-benefit analysis is the way to approach the question of justice for Aboriginal peoples.[148]

Related to issues of finance is jurisdiction. Several reports pointed to the need for inter-jurisdictional co-operation, particularly between federal and provincial governments. The *Report of the Task Force on Policing on Reserves*, *Native Peoples and Justice*, and *the Indian Policing Policy Review* highlighted this need and the need for cost sharing:

> Once we agree to principle on things here, we will have to go back to our own governments, our own departments and work out the details, to determine how many people are necessary to carry out the program, how much will it cost, who should pay for this part and who should pay for that part... I hope we can set up continuing mechanisms to make sure that what we start here will be carried forward.[149]

Finally, in trying to explain failure to implement recommendations, some of the documents alluded to the fact that there had been insufficient

148. AJI, volume 1, p. 672.

149. *Native Peoples and Justice*, p. 35.

time in which to develop comprehensive recommendations. *Reflecting Indian Concerns and Values in the Justice System*, *Justice on Trial*, and the report of the Saskatchewan Metis Justice Review Committee were three such reports. Time limitations on commissions of inquiry might imply that governments themselves have limited time to consider and/or implement any but the simplest recommendations.

The documents thus identified three related factors for lack of implementation: inadequate funding, insufficient jurisdictional co-operation, and time constraints. Later documents that recommend a phased approach to implementation (including *Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice*, the Aboriginal Justice Inquiry of Manitoba, and the Donald Marshall inquiry), or that divide them by the amount of financial commitment required (*"As We Were Told"*), demonstrated an awareness of how governments work and acted strategically to encourage governments to bring about policy change in the context of the political pressures under which they operate.

> **Observation 3**: The development of the discourse on Aboriginal people and criminal justice closely followed the discourse on Aboriginal governance and human rights.

The thinking on how to address the needs of Aboriginal people in the criminal justice system closely followed thinking about how to address governance issues. This was most obvious in shifts from addressing social and economic problems and recommending greater control at the community level, to developing special programs to address Aboriginal people's needs in the current system, to, finally, looking at justice issues through the prism of self-government. These ideas correspond to the pattern of the broader discourse on Aboriginal governance. Early documents, such as the Hawthorn report, examined the socio-economic situation of Indian people, while later reports focused on incremental change to enhance the role of Aboriginal people in decision making; examples include Aboriginal involvement in constitutional processes and joint committee structures and the transfer of control in certain areas to Aboriginal governments. Finally, governance issues, like criminal justice issues, began to be discussed by all participants in the context of Aboriginal self-government.

We also saw how the human rights discourse influenced the discourse on criminal justice. Earlier documents, including *Wahbung Our Tomorrows* and the report of the Metis and Non-Status Indian Crime and Justice Commission, talked about discrimination in the criminal justice system; following proclamation of the Charter in 1982 (particularly its equality provisions, which came into effect in 1985), the vocabulary of rights, racism, and equality entered the discourse. Central to this discussion was the tension between individual and collective rights, particularly in the

context of the viability of separate systems of Aboriginal justice. The Aboriginal Justice Inquiry of Manitoba explored this issue:

> One of the major challenges that will confront the establishment of an Aboriginal justice system...is resolving the tension between individual and collective rights.[150]

These issues were also examined in *Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice*, which examined the need to balance the rights and interests of the accused against the rights and interests of the community that chooses to operate under a separate system.[151] In this document, the Charter was identified as a key factor in shifting the Law Reform Commission from a position advocating a uniform, consistent approach to criminal justice to one that recognizes the distinctiveness of Aboriginal peoples.[152]

Governance issues and human rights policy therefore moulded the criminal justice discourse in particular ways. Given that self-government and equality rights continue to dominate the political landscape, developments in these areas will remain important in the future development of the policy discourse on Aboriginal justice systems.

> **Observation 4**: Many of the documents were written in response to widely publicized incidents or events; this distinguishes justice from other areas of policy discourse and introduces new dynamics to its development.

Several of the documents were prepared in response to incidents involving Aboriginal people and the criminal justice system. This distinguishes the discourse on justice from that on other policy areas. Developments in international law, for instance, were a significant impetus in development of the discourse on governance. Similarly, key court decisions on Aboriginal rights pushed the discourse on land and title forward. Furthermore, as discussed in Chapter 7, much of the discourse on Aboriginal education was motivated by growing pressure on governments to respond to disturbing statistics on drop-out rates and educational achievement among Aboriginal students.

The reports of the Marshall inquiry, the Manitoba justice inquiry, and the Blood Tribe inquiry reflect the use of royal commissions and judicial

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150. AJI, volume 1, p. 333.

151. *Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice*, p. 20.

152. *Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice*, p. 1.

inquiries to deal with the aftermath of disturbing incidents. In these instances, the members of the judiciary who investigated the events controlled the discourse and made recommendations based on their own perceptions. These structures generally excluded Aboriginal participants, however. They were among those consulted, but they were seldom among those who interpreted findings and/or drafted recommendations.[153]

The sense of urgency that characterized some of the documents was no doubt related to events as well — a response to the intensity of public outrage about miscarriages of justice and demands for action.

Such reports also inspired allegations of lip service — that the public outcry after these incidents resulted in attempts by government to quiet calls for action. Reports were therefore characterized as conspicuous political symbols that did little to promote system-wide change.[154]

Consider the Royal Commission on the Donald Marshall, Jr., Prosecution. Although the commission concluded that Donald Marshall's Aboriginal identity was a factor in his wrongful conviction, little solid evidence was offered in support of this finding. Indeed, one of the research studies accompanying the report acknowledged the extreme difficulty of making such a connection. The study, *The Mi'kmaq and Criminal Justice in Nova Scotia*, noted that "discrimination is a paradoxical phenomenon; it may be obvious, but it can be very difficult to prove. Traditionally, this has been a particular problem for the legal system wherein judgments are to be made on the basis of proof supported by substantive evidence".[155] The suggestion has been made that the public was demanding action, and a report that did not acknowledge racism and discrimination would not have been well received. As a result, the commission pinpointed racism but offered little evidence in support of this statement.

Thus, key events involving Aboriginal people and their treatment by the justice system influenced development of the discourse. They resulted in investigations conducted mainly by non-Aboriginal people and gave the discourse a sense of urgency. This also made government responses vulnerable to allegations of insincerity.

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153. An obvious exception was Associate Chief Judge C.M. Sinclair, who co-chaired the Aboriginal Justice Inquiry of Manitoba.

154. Kalinich and Banas, p. 63, argue that task forces and investigative committees legitimated the system instead of stimulating substantive criminal justice reform. They argue that use of these mechanisms implies that existing institutions — with some modifications in structures and with the application of the collective wisdom of commissioners — can solve the crisis.

155. *Royal Commission on the Donald Marshall, Jr., Prosecution*, volume 3, p. 6.

Observation 5: The prominent role of lawyers and judges was a key factor shaping the discourse on Aboriginal criminal justice policy.

This characteristic distinguished the discourse on Aboriginal criminal justice from that on other social policy areas, with important implications for Aboriginal voice and for the credibility of government.

The prominent role of non-governmental organizations raises issues of Aboriginal voice, given that development of the discourse was characterized by non-Aboriginal participants speaking for Aboriginal people. National and provincial Aboriginal organizations were part of the discourse on education (discussed in the next chapter); but Aboriginal participants did not shape the discourse on criminal justice as the National Indian Brotherhood (later the Assembly of First Nations) was able to do in *Indian Control of Indian Education* and *Tradition and Education*. By contrast, it was non-governmental organizations, judicial inquiries and royal commissions that stimulated the discourse on criminal justice.[156]

The role played by non-governmental organizations speaks not only to the lack of Aboriginal voices, but perhaps also to the inability of governments to generate enough action to satisfy demands for reform. This interpretation might see lawyers and judges as intermediaries, regulating the discourse between governments and Aboriginal people. A more likely explanation, might be a government strategy of deferring issues they consider unpleasant or difficult. The reports of the Canadian Corrections Association, the Canadian Bar Association, and the Law Reform Commission were written in response to government requests, and the judicial inquiries, royal commissions and task forces prominent in the discourse were given their mandates by governments. From this we might conclude that the prominence of these bodies in the discourse was attributable to conscious efforts by governments to deflect controversial issues and delay action. This interpretation is reinforced by repeated statements in the documents about the inability of these bodies to fulfil their mandates because of insufficient resources of money, time, and personnel.

CONCLUSION

In this chapter we travelled from 1967 to 1992 in search of insight into how the policy discourse on Aboriginal criminal justice developed and what lessons might be gleaned and applied to the future. We looked at 25 years of policy discourse, examining the ideas and events that influenced the discourse, considering who was involved and why, and how the discourse

156. For a fuller discussion of the role of public inquiries and royal commissions, see Pross, Christie and Yogis, *Commission of Inquiry*.

was moved forward. This examination, combined with that in earlier chapters, may provide useful lessons for charting the course ahead.

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Chapter 7
The Discourse on Education

ABORIGINAL EDUCATION HAS FIGURED PROMINENTLY in the policy discourse since the Hawthorn report. As Canadians became increasingly aware of the experiences of Aboriginal people, the legacy of residential schools, chronically high drop-out rates and persistent unemployment as stark illustrations of their treatment and of the need to meet Aboriginal people's needs better than had been done in the past.[1] The centrality of these historical events to the current situation of Aboriginal people was evident in the hearings and activities of the Royal Commission on Aboriginal Peoples. Education was identified as a key issue in determining the most effective course of action for the future.

Our premise is that much can be learned about the future from the past. As the Indian Tribes of Manitoba said in *Wahbung Our Tomorrows*,

> To deny the past and to refuse to recognize its implications is to distort the present; to distort the present is to take risks with the future that are blatantly irresponsible.[2]

Similarly, much can be learned about the evolution of policy by examining policy discourse and how it has developed. To understand the history of education policy as it affected Aboriginal people, we must understand the history of the policy discourse. This chapter traces the evolution of the policy discourse on education through a selection of documents produced in this field since 1967.

The examination is conducted in two parts. The first section provides a chronology of Aboriginal education policy, as traced through the documents. In the second section we present our observations about the discourse that are intended to inform future developments in this and other areas of Aboriginal policy.

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1. Under section 91(24) of the *Constitution Act, 1867*, the federal government has responsibility for Indian education as part of its responsibility for "Indians, and Lands reserved for the Indians". Provincial governments have constitutional responsibility for education and have asserted jurisdiction and responsibility for Métis education but not Indian education. They have, however, become involved in Indian education as delivery agents or contractors for the federal government.

2. *Wahbung Our Tomorrows*, p. ii.

DEVELOPMENT OF THE DISCOURSE THROUGH DOCUMENTS

The policy discourse on Aboriginal education can be divided into three periods: 1967-1982, 1982-88, and 1988-1992. These periods saw significant changes in participants, processes, and ideas, and it is on these factors that our examination centres.

The documents on which this chapter is based vary considerably, ranging from those that consider education in the context of a broader review of Aboriginal issues, to those dealing with one aspect of the education system, such as post-secondary education, to those touching on education issues indirectly by examining language, culture or employment development.

One of the most prominent characteristics of the documents was the dominant role of provincial departments of education and/or task forces and committees established by those departments. The large number of documents published by the provinces of Alberta and Saskatchewan was particularly noteworthy.[3]

Reports from Aboriginal organizations were also numerous. The National Indian Brotherhood (later the Assembly of First Nations) were particularly active, publishing major reports on education, language and literacy. A number of provincial Aboriginal organizations did likewise. Notably absent from the list of policy participants was the Department of Indian Affairs and Northern Development (DIAND).[4]

1967-1982: THE BEGINNING OF DISCOURSE

The policy discourse on education began in the midst of the activism and openness to change that marked the 1960s. Aboriginal issues gained prominence internationally with the rise of Aboriginal political organizations in many parts of the world, and similar changes were occurring in Canada. Indian political organizations were forming, the Hawthorn report raised public awareness of the situation of Aboriginal people, and the 1969 *Statement of the Government of Canada on Indian Policy* (the White Paper) initiated a controversy concerning the relationship

3. From the bibliography of more than 800 documents (published as volume 4 in this series), we see that 10 reports were published in Alberta and 8 in Saskatchewan. Four of the Alberta reports and five from Saskatchewan are included in the documents on which this chapter is based. British Columbia, Ontario, and New Brunswick also published reports on Aboriginal education in this period.

4. The only federal reports in our collection are those prepared by the Standing Committee on Indian Affairs and Northern Development. Other reports, however, such as *Tradition and Education*, relied heavily on federal funding.

between the federal government and Indian peoples.[5] Symbolic of the temper of the times, in September 1970, Blue Quills School at St. Paul, Alberta, became the first school in Canada to be administered entirely by Indian people. The debate and political struggles surrounding these events played a major role in stimulating the policy discourse in this area.[6]

Volume 2 of the Hawthorn report included a dismal portrait of Indian education and made extensive recommendations for improvement. The report recognized that education was central to governance, social well-being, and economic prosperity and saw it as a prerequisite for improvement in the lives of Indian people:

> The prime assumption of the Report has been that it is imperative that Indians be enabled to make meaningful choices between desirable alternatives; that this should not happen at some time in the future as wisdom grows or the situation improves, but operate now and continue with increasing range. But many of the desirable alternatives potentially open to Indians, and even more that will be open in the future, are open only to those educated for them. Consequently Indian children, and those adults who have the drive to attend classes, must find schools and proper programs ready to receive them... The background of the stress on schooling and its results is interwoven with needs for better employment, better

5. The White Paper proposed, among other things, to have the provinces assume complete responsibility for Indians. Before the release of the White Paper, the federal government had been promoting a policy of integration in the field of Indian education. They had initiated comprehensive education capital and tuition agreements with provincial governments without the involvement of First Nations or Indian parents. First Nations therefore saw the White Paper as the final step in transferring jurisdiction over Indian education (and other responsibilities) to provincial governments.

6. In the aftermath of the White Paper, the Indian Association of Alberta's Red Paper dealt extensively with Indian education. Following the Red Paper, the Indian Association of Alberta, in conjunction with the National Indian Brotherhood, entered into a series of discussions with the federal cabinet pressing for an extensive review of federal approaches to Indian education. While this process was under way, DIAND continued to reject requests for improvements in on-reserve schools, in part because of its financial commitments to schools operated by provinces in towns near reserves. It decided as well to close Blue Quills School without consulting the communities affected. The communities responded with a long and bitter school strike and occupation of the Blue Quills School until their educational concerns, including those related to Blue Quills, were addressed.

> health and livelihood, more capital for enterprise and a greater share in the governmental and political life of Canada.[7]

The report's recommendations contradicted previous policy, which had focused on assimilating Indian children by removing them from the influence of their parents and communities, as seen in the widespread use of residential schools. In the context of "citizens plus", Hawthorn advocated instead the "integration" of Indian children into provincial systems, defined as the "full participation" of Indians in Canadian society:

> By integration of the Indians, we mean their full participation in the economic and social life of Canada, together with the retention of some of their cultural characteristics such as pride of origin, knowledge of their history, passing on of their tradition and preservation of their language.[8]

Although the report did not recommend preservation of language and cultural traditions, it did recognize the need for remedial programs for Indian students, including remedial language programs and nursery school programs emphasizing the language arts and providing exposure to books, stories, records and similar materials that might not be available on reserves. The report also discussed the limitations of the provincial school system in accommodating the needs of Indian students:

> Until some compromises can be made by the school and the Indian and non-Indian communities, the impasse will remain and the sense of worth of the Indian student will remain low, inhibiting adequate academic achievement. The schools serving the majority cannot readily accommodate the children of minority groups but some provisions can be made through special classes, skilled teaching, and sensitive teachers which should enable every child to experience some success and maintain his sense of worth.[9]

The report also emphasized the importance of greater parental involvement and improved communication between the school and Indian communities, both informally between teachers and parents and more formally via provincial liaison officers, school committees and consultation with parents before the establishment of joint agreements. The existing consultation process was considered inadequate, and the report saw a need

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7. *Survey of the Contemporary Indians of Canada*, volume 2, p. 5.

8. *Survey of the Contemporary Indians of Canada*, volume 2, p. 28. The term 'citizens plus' refers to the idea, first expressed in the Hawthorn report, that in addition to full citizenship as Canadians and full access to basic public programs at any level of government, Indian persons have certain additional rights as charter members of the Canadian community.

9. *Survey of the Contemporary Indians of Canada*, volume 2, p. 130.

for greater communication with Indians communities: "The integration of Indian children into the public school system should proceed with due concern for all involved and after full cooperation of local Indians and non-Indians has been secured."[10]

The first post-Hawthorn contribution to the discourse from a federal body came from the Standing Committee on Indian Affairs and Northern Development, whose 1971 report, *Fifth Report of the Standing Committee on Indian Affairs and Northern Development* (the Watson report), like the Hawthorn report, emphasized participation by Indian parents and communication with Indian communities. The report was written in response to concerns about high drop-out and unemployment rates and was preceded by intense pressure and advocacy by Indian organizations to bring these problems to the federal government's attention. The committee heard testimony from a broad cross-section of witnesses concerned with Indian and "Eskimo" education, including students, representatives of Aboriginal organizations and government officials. The testimony was supplemented by visits to First Nations and Inuit communities and discussions with community leaders, parents, young people and students there.

The committee noted many deficiencies in the response of federal and provincial governments to the needs of First Nations and Inuit communities and recommended a variety of actions aimed at involving parents and communities through education committees and school board participation; making school curriculum and operations more reflective of the Indian experience; and addressing unemployment through vocational training programs and programs at the post-secondary level. The report made it clear that these recommendations were to be implemented in consultation with First Nations and Inuit communities.

The first provincial effort to tackle Aboriginal education issues was the *Report of the Task Force on Intercultural Education: Native Education in the Province of Alberta*, published by the Alberta Ministry of Education in 1972. The task force assembled and summarize data for use by the government as a basis for policies and practices to serve the educational needs of cultural minorities. This, its first volume, focused on the needs of Aboriginal people. The philosophy of the task force concerning cultural diversity was spelled out in the preface:

> Cultural understanding can develop only when diverse people see others not as imperfect reflections of themselves but as these people really are; when social behaviour is observed not to reinforce own's own biases but to promote objective analysis; when different cultural patterns are viewed not as evidence of backwardness but as

10. *Survey of the Contemporary Indians of Canada*, volume 2, p. 12.

> manifestations of a belief system that is worthy of Aboriginal the report which follows attempts to help the reader see and believe in Alberta's Native peoples.[11]

The task force did not consult directly with Aboriginal people, however, on their educational wants and needs, relying instead on past briefs and submissions by Aboriginal organizations. Other findings were based on the social sciences literature, statistics on Aboriginal education, findings in other reports, and a review of efforts in Canada and the United Stated to meet the educational needs of Aboriginal people. Its task was to pull together data that were already available, and its membership was limited to personnel from the Alberta Department of Education. Based on the information collected, the task force recommended that the Alberta government support Aboriginal and non-Aboriginal co-operative efforts to revitalize Aboriginal culture and tradition through the design of educational alternatives for Aboriginal people. The report also proposed greater communication between the school system and Aboriginal communities through representation on school boards, a provincial working committee of Aboriginal and non-Aboriginal personnel, and a larger staff of Aboriginal education consultants. The task force recognized the special needs of Métis people stemming from the absence of legal protection for their rights. Funding was also an issue; more funding for Aboriginal students and the expansion of post-secondary programs was recommended, as was a projected cost analysis of the report's recommendations.

This document stood in sharp contrast to the only other provincial document in our collection published during this period. The *Summary Report of the Task Force on the Educational Needs of the Native Peoples of Ontario*, published in 1976, was the product of a tripartite effort on the part of Aboriginal, federal and provincial officials to address the concerns of Aboriginal people using grassroots approaches that permitted considerable Aboriginal input. The task force included representatives from four treaty Indian organizations, as well as the Ontario Metis and Non-Status Indian Association. In gathering information, it conducted extensive interviews with Aboriginal leaders and Aboriginal people, received submissions from interested parties, and travelled to locations identified by the Aboriginal organizations represented on the task force as areas that would provide a good overview of the educational requirements of treaty Indians and Métis and non-status Indian people. Based on this process,

> The recommendations and views expressed in this report are not those of experts in the field of education, sociology, or

11. *Report of the Task Force on Intercultural Education: Native Education in the Province of Alberta*, p. iv.

> anthropology, but the views of the Native people themselves, for it was apparent from the outset that only the Native peoples of Ontario can truly identify their concerns regarding the education of their people.[12]

Aboriginal organizations were involved at every stage of the process; they chose locations for meetings, and meetings were chaired and hosted by the association most familiar with the Aboriginal people of that area. As a result of this process, the task force concluded, "this material genuinely reflects the 'Educational Needs of the Native Peoples' as they and their spokesmen perceive them."[13]

This report is interesting in its support for Aboriginal control of the education system:

> ...it was apparent that piecemeal changes, infusion of more money here and there, and the rectification of specific grievances will not do. What is needed is an alternative system....
> What sort of education system might best serve the needs of the Native people, especially the three mentioned above? Surely the obvious answer, and the only one acceptable in a country which believes in participatory democracy is a system which is largely controlled by the Native peoples themselves.[14]

The task force recommended establishment of a Council of Native Education to oversee an alternative system and to implement the findings of the task force. In its proposed cabinet submission on a Council of Native Education, however, the task force's conceptualization of control was defined in terms of input:

> The four recognized [status Indian] organizations...as well as the Ontario Metis and Non-Status Indian Association take the position that there should be 'native control of native education' in the sense of substantial input into the educational process from members of the native cultural communities.[15]

Aboriginal organizations also published a number of important policy documents in this period. *Wahbung Our Tomorrows* (1971) was a key

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12. *Summary Report of the Task Force on the Educational Needs of the Native Peoples of Ontario*, p. 2.

13. *Summary Report of the Task Force on the Educational Needs of the Native Peoples of Ontario*, p. 3.

14. *Summary Report of the Task Force on the Educational Needs of the Native Peoples of Ontario*, pp. 3-4.

15. *Summary Report of the Task Force on the Educational Needs of the Native Peoples of Ontario*, p. 8.

document, not only in its early portrayal of Aboriginal peoples' role within the Canadian polity, but also in its conceptualization of Indian education. Written by the Manitoba Indian Brotherhood in response to the federal government's White Paper (which called for the end of special status for Indian people), *Wahbung* portrayed education holistically, including not only the school system, but also the social, cultural and economic fabric of communities:

> The history of Indian education up to the present day reflects a definition of education in terms of schooling, a definition that reflects a very narrow approach to the entire question....
>
> In developing new methods of response and community involvement it is imperative that we, both Indians and Government, recognize that economic, social and educational development are synonymous and thus must be dealt with as a total approach rather than in parts.[16]

Wahbung emphasized the role of education in improving social and economic conditions and in realizing economic development through training and skills development. The report urged the federal government to redefine education in this way. It also recommended transferring control over education to reserves, recognizing Indian education as a federal responsibility and, as in previous reports, more parental involvement in the education of their children.[17]

Following *Wahbung*, in 1973 the National Indian Brotherhood published *Indian Control of Indian Education*, a document compiled from provincial and territorial associations' papers or statements on education and their delegates' discussion at a workshop in June 1972. The report called for a legislative change in jurisdiction to give Indian communities and parents control over the education of their children:

> The time has come for a radical change in Indian education. Our aim is to make education relevant to the philosophy and needs of the Indian people. We want education to give our children a strong sense of identity, with confidence in their personal worth and ability. We believe in education as a preparation for total living, as a means of free choice of where to live and work, as a means of enabling us to participate fully in our own social, economic, political and educational advancement. We do not regard the educational process as an "either-or" operation. We must have the freedom to choose among many options and alternatives. Decisions

16. *Wahbung Our Tomorrows*, pp. 109, xv.

17. *Wahbung* saw no provincial role in Indian education (p. 133).

on specific issues can be made only in the context of local control of education.[18]

Like *Wahbung, Indian Control of Indian Education* saw education in a broader, more holistic sense and emphasized the principles of parental responsibility, local control, and partnership between Aboriginal communities and the federal government. (This policy statement was later accepted as federal policy by the Indian affairs minister.) Local control was not defined in terms of input, as in the Ontario report, but in terms of authority over education:

> The past practice of using the school committee as an advisory body with limited influence, in restricted areas of the school program, must give way to an education authority with the control of funds and consequent authority which are necessary for an effective decision-making body. The Federal Government must take the required steps to transfer to local Bands the authority and the funds which are allotted for Indian education.[19]

Indian Control of Indian Education also continued the discourse on the concept of integration, begun by Hawthorn, and how Aboriginal and non-Aboriginal cultures can coexist:

> Integration viewed as Aboriginal one-way process is not integration, and will fail. In the past, it has been the Indian student who was asked to integrate: to give up his identity, to adopt new values and a new way of life. This restricted interpretation of integration must be radically altered if future education programs are to benefit Indian children.[20]

A year later, the Manitoba Indian Brotherhood (MIB) examined the treatment of Aboriginal people in school texts, in a publication entitled *The Shocking Truth About Indians in Textbooks*. Recognizing that "education is an important link for the improvement of inter-racial understanding and co-operation among all Canadians", the MIB used techniques such as content analysis and picture analysis to examine textbooks used by students in the provincial school system. The report concluded that "the main feature of the textbooks under review is their tendency to treat the Native as an impediment to be removed so that the goals of European 'progress' can be realized."[21] It recommended more balanced and carefully selected material

18. *Indian Control of Indian Education*, pp. 3-4.
19. *Indian Control of Indian Education*, p. 6.
20. *Indian Control of Indian Education*, p. 25.
21. *The Shocking Truth About Indians in Textbooks*, pp. i, iii.

in future textbooks and the development of new curriculum materials written by Aboriginal people.

It is not clear in the document what the distinction between 'Indian' and 'Native' is. This confusion in terminology is evident in many of the documents in the collection. While the study examined the content of "social studies textual materials for biased treatment of native people" and recommended that authors "show sensitivity and more awareness of descriptive words which offend native people", it also recommended that textbooks "emphasize the importance of the Indian role in Canadian history", and that "Indian people should be commissioned for the development of proper textbook material."[22] It is not evident whether the MIB used the terms interchangeably or attached different meanings to them. The following excerpt illustrates this confusion:

> Textbooks are needed which emphasize the importance of the *Indian* role in Canadian history. Provincial and Federal Governments must be willing to respond to the *native* people and support their legitimate wishes for improved texts.[23]

ANALYSIS: 1967-1982

The seven documents just reviewed were characterized by several factors that signal the beginning of a significant period in the development of discourse on Aboriginal education.

Participants

The discourse included Aboriginal and governmental participants at both the federal and provincial levels. This period saw the first attempts by provincial governments to deal with Aboriginal education, defined to include Indian, Métis and non-status Indian people. The federal contribution came in the form of the Hawthorn report and the Watson report, which focused generally on participation, consultation and the provision of remedial programs.

The prominence of Aboriginal organizations was particularly noteworthy in these years. Gaining strength after the when Indian political organizations first emerged, the Manitoba Indian Brotherhood, in *Wahbung Our Tomorrows*, and particularly the National Indian Brotherhood, in *Indian Control of Indian Education* helped jump-start the discourse on education

22. *The Shocking Truth About Indians in Textbooks*, p. i.

23. *The Shocking Truth About Indians in Textbooks* [emphasis added].

by presenting and redefining such concepts as control and integration.[24] This is significant, given that in other policy areas, it was non-Aboriginal participants who were influential in beginning the discourse.[25]

While the interests of Indian people were represented by Indian organizations, the interests of Métis were represented more loosely by provincial governments in their treatment of "Native" education, defined to include Indian, Métis and non-status people. Also interesting is that reports from Aboriginal organizations during this period saw education mainly as an issue involving the federal government and Indian governments; responsibility for education was seen as a matter of local control to be funded by the federal government, with provincial governments having only that authority conferred upon them by the federal government. This preferred bilateral approach was evident, for example, in the recommendations in *Indian Control of Indian Education*, which called for a task force with Indian and federal representation but did not specify a role for the provinces.

Also evident were difficulties in dealing with issues related to the diversity of Aboriginal peoples. Reports from provincial governments on "Native" education showed signs of struggling with questions about commonalities and diversity. The *Summary Report of the Task Force on the Educational Needs of the Peoples of Ontario* grouped the concerns of all Aboriginal people together. It found that "certain concerns are common to all Aboriginal peoples of Ontario, regardless of their status as Treaty, Metis or Non-Status Indians, or their location".[26] *Native Education in the Province of Alberta*, on the other hand, recognized explicitly the special needs of various Aboriginal groups, particularly Métis people:

> The educational needs of Native peoples vary according to their tribal background, geographic location, and legal status. Recognition of these differences is particularly important for the welfare of Alberta's Metis population. The Metis are not protected by legal rights; except for the few who live on colonies, they do not have land provided for them; their lack of cultural identity and

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24. The Federation of Saskatchewan Indian Nations (FSIN) was formed in 1961 and the National Indian Brotherhood in 1968. Both organizations were major players in the evolution of education policy. While not represented in the documents selected as the basis for this chapter, the FSIN published five reports on Indian education during the mid- and late 1970s (see *Public Policy and Aboriginal Peoples*, volume 4).

25. See, for example, the discussion of the legal profession in Chapter 6.

26. *Summary Report of the Task Force on the Educational Needs of the Native Peoples of Ontario*, abstract.

> community cohesiveness leaves them in a state of socio-cultural disintegration. Since Metis receive no special considerations by the Federal Government, the *interests of Metis people should be of particular concern to the Government of Alberta.*[27]

There was also a preoccupation with accountability and representation in some of the documents reviewed. For instance, each participant dealt only with Aboriginal groups in its sphere of responsibility: the Watson report, emanating from a standing committee of the House of Commons, dealt with Indian and Inuit education; provincial documents dealt with Indian, Métis and non-status Indian concerns; and Indian organizations represented strictly status or treaty Indian interests. Also interesting was the portrayal of Indian organizations as representative of Indian people. *Indian Control of Indian Education*, for example, was based on positions of the territorial and provincial associations that constituted the National Indian Brotherhood, and the policy was accepted in principle by the general assembly of the NIB. The NIB considered its report representative of the views of Indian people:

> The National Indian Brotherhood is confident that it expresses the will of the people it represents when it adopts a policy based on two fundamental principles of education in a democratic country: parental responsibility and local control.[28]

In *Native Education in the Province of Alberta*, a chapter entitled "What Do the Native People Want: A Survey" was based on submissions from Aboriginal organizations:

> The Task Force assumed that the views of the Native organizations are representative of the feelings of Native peoples and that the recommendations offered by them to government agencies are concurrent with the wishes of the majority of the Indian people.[29]

These documents reflected acceptance of the ability of Aboriginal organizations to communicate the wishes of those they represent.

Processes

Documents of this period also reveal how people participated in the discourse. Documents were prepared using a variety of methods for interaction and structures to gather information. There was a focus on

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27. *Report of the Task Force on Intercultural Education: Native Education in the Province of Alberta*, p. 159 [emphasis in original].

28. *Indian Control of Indian Education*, pp. 30-31.

29. *Report of the Task Force on Intercultural Education: Native Education in the Province of Alberta*, p. 98.

consultation, for example, in such documents as the Watson report and the Ontario task force report. Particularly in the Ontario report, extraordinary efforts were made to have Aboriginal interests represented at all stages of consultation and to ensure that the voices of Aboriginal people were heard. Other documents, however, particularly *Native Education in the Province of Alberta* and *The Shocking Truth About Indians in Textbooks*, relied on techniques such as literature reviews and content analysis.

There were few references to permanent institutions in this policy field. The only efforts to establish a formal structure for information gathering and discussion were seen in the Task Force on the Educational Needs of the Native Peoples of Ontario and the Task Force on Intercultural Education, though the latter was not representative, as it consisted solely of provincial government officials. The Standing Committee on Indian Affairs and Northern Development is a permanent body, but not one focused solely on education. Generally, then, these structures are neither permanent nor necessarily representative of the Aboriginal interests at stake in education. The tripartite Task Force on the Educational Needs of the Native Peoples of Ontario does stand out, however, as a model that would become more popular in later periods.

There was also evidence that the discourse was affected by concerns about funding. The Hawthorn report recommended that more funding be provided for the Indian affairs branch; *Wahbung Our Tomorrows* requested immediate funds for the Manitoba Indian Brotherhood to employ education consultants and specialists; *Native Education in the Province of Alberta* recommended that a projected cost analysis be conducted of the report's recommendations; and *Indian Control of Indian Education* emphasized the federal government's responsibility to fund education of all types and at all levels for all Indian people. It is also interesting that only the report written by government officials — *Native Education in the Province of Alberta* — focused on fiscal responsibility rather than funding expansion.

Ideas

This period witnessed a major change in how issues were conceptualized and expressed. There was a move from thinking of education as a means of assimilation to seeing it as a way of revitalizing Indian cultures and economies. The link between education and cultural preservation and promotion was apparent in many of the documents, particularly those of Aboriginal participants. In *Indian Control of Indian Education*, for instance, the National Indian Brotherhood's statement of values centred on culture:

> We want education to provide the setting in which our children can develop the fundamental attitudes and values which have an honoured place in Indian tradition and culture... We want the behaviour of our children to be shaped by those values which are

> most esteemed in our culture... it is important that Indian children have a chance to develop a value system which is compatible with Indian culture.[30]

This link with culture reflected a holistic view of education, a view prominent in the documents of Aboriginal organizations. *Wahbung Our Tomorrows*, for example, attacked residential schools for their

> disregard for the essential feature of education which is a total experience. Unrecognized were questions pertaining to Indian language, Indian culture, Indian life and customs, and the participation of the Indian parent in the shaping of education.[31]

Education was viewed more broadly to include adult education, substance and drug abuse education, pre-school, vocational education, cultural events and so on, not defined narrowly as kindergarten to grade 12.

The concepts of partnership, co-operation and joint responsibility were also introduced, acknowledging the need to establish harmonious relations between Indian and federal governments. This was generally characteristic of documents published by all policy participants, including provincial governments, Aboriginal organizations, and the federal government. *Native Education in the Province of Alberta*, for instance, recommended joint responsibility between Aboriginal and non-Aboriginal communities:

> Natives and Whites should join forces in cooperatively designing programs to fulfil the educational wants and needs of Alberta's Native peoples. Neither group should attempt to operate independently; nor should either group abdicate its responsibilities. The joint action should be carried forward with an eye to the future and avoid reference to past hostilities.[32]

Similarly, *Indian Control of Indian Education* spoke of the need for Indian parents to seek "participation and partnership with the Federal Government, whose legal responsibility for Indian education is set by the treaties and the Indian Act."[33] The Watson report recommended that the government establish "full consultation and partnership with the Indian and Eskimo people of Canada."[34]

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30. *Indian Control of Indian Education*, p. 2.

31. *Wahbung Our Tomorrows*, p. 106.

32. *Report of the Task Force on Intercultural Education: Native Education in the Province of Alberta*, p. 159.

33. *Indian Control of Indian Education*, p. 3.

34. *Fifth Report of the Standing Committee on Indian Affairs and Northern Development*, p. 27:5.

The principles of parental responsibility and local control were also prominent in the discourse, particularly in reports by non-governmental participants such as *Wahbung Our Tomorrows* and *Indian Control of Indian Education*. The discourse centred on the need to transfer decision-making authority to the local or community level to give parents and communities greater control over their children's education. A broad consensus emerged at this early stage of the discourse that greater control for communities and parents would make Indian education more effective.

The problem, however, was defining 'control'. At least one document (the Ontario task force report) defined it as 'input', while others, particularly *Indian Control of Indian Education* and *Wahbung Our Tomorrows*, saw it as complete or partial transfer of jurisdiction over education to the community level:

> Until now, decisions on the education of Indian children have been made by anyone and everyone, except Indian parents. This must stop. Band Councils should be given total or partial authority for education on reserves, depending on local circumstances, and always with provisions for eventual complete autonomy, analogous to that of a provincial school board vis-à-vis a provincial Department of Education.[35]

1982-1988: A CHANGE IN PARTICIPANTS, A CHANGE IN ISSUES

The years following publication of the Ontario task force report in 1976 were noteworthy for the relative absence of documents on Aboriginal education. This might be explained partly by preoccupation with constitutional processes, but the gap can be considered the calm before the storm, for between 1984 and 1987, 13 of the reports in our collection were published.

Provincial and territorial governments dominated the discourse of this period. They published a number of reports addressing the concerns of Aboriginal people and treating their concerns more broadly in the context of multiculturalism and education. The changes flowing from this change in participants and in the way Aboriginal education was addressed make this period distinct.

The gap in the document collection ended with publication of *Learning: Tradition and Change* by a special committee on education established by the legislative assembly of the Northwest Territories. The committee consisted of five members of the legislative assembly, including co-chairs Tagak Curley and Bruce McLaughlin. *Learning* was the product of public hearings held throughout the Northwest Territories in 1981 and 1982 and

35. *Indian Control of Indian Education*, p. 27.

included many excerpts from the hearings. The committee followed several governing principles: the importance of community decision making, individualized programs and innovative responses to local and regional needs, and a concept of learning not limited to the education system. The committee recommended local control of the educational system through devolution of administrative responsibilities to divisional boards. These boards would be responsible for ensuring that curriculum, language programs and staffing were responsive to local and regional needs. The special needs of Aboriginal people in the North were not recognized explicitly, though they were implied in discussions of the unique needs of northern communities.

New Brunswick also began to examine Aboriginal education in the mid-1980s. *Indian Education: Everyone's Concern* was the product of a study group made up of representatives from several provincial agencies. The group examined the factors associated with academic achievement and supplemented this work with meetings on reserves across the province to discuss education issues and concerns. The report focused on co-operation, greater community input, and communication between Indian and non-Indian people and their governments. The study group asserted, for example, that to be effective, a change process would require

1. a sharing of a single-mindedness of purpose on the need for change;
2. a mutual desire to achieve an end;
3. a cooperative effort.[36]

To this end, the report made recommendations to establish co-operation among all those involved in the education of Indian children:

> It is important that all participants in the education of Indian children – parents, teachers, education committees, school boards, and the Department of Education – share a set of common objectives if they are to establish a common purpose that will enable them to work together in the best interests of the children.[37]

This report was particularly interesting in that it focused on Indian concerns. This was unusual given the respective responsibilities of federal and provincial governments. Other provincial government documents, as we will see, focused more on broader concerns of Aboriginal people generally.

The province of Saskatchewan was a prominent participant in the discourse in the mid-1980s. Publication of *A Five Year Action Plan for Native Curriculum Development* by the Native Curriculum Review

36. *Indian Education: Everyone's Concern*, p. 1.

37. *Indian Education: Everyone's Concern*, p. 25.

Committee in March 1984 began a process of intense discussion in the province. Consisting of representatives from Aboriginal education programs and organizations involved in Aboriginal education, the committee developed its principles for curriculum development on the basis that "Native people must be presented as human beings having human societies."[38] The committee also emphasized the need for "dual priorities" -- that is, integration of Aboriginal curriculum development with provincial program development and development of special programs to meet the particular needs of Aboriginal students. In this way, the committee believed that the dual goals of educating Aboriginal students and educating non-Aboriginal students about Aboriginal people could be achieved. In addition to recommendations aimed at enhancing research, data collection, and evaluation of materials, the committee recommended that it be made a permanent committee, that its membership be expanded, and that two of its members join the program policy committee of the Department of Education.

The discourse in Saskatchewan continued with publication of three studies in 1985: a study of inner city drop-outs; *Reaching Out*, a report on consultations on Indian and Métis education; and *Education Equity: A Report on Native Indian Education in Saskatchewan*. The inner city drop-out study based its findings on a literature and file review, longitudinal study and case studies of drop-outs. While the report did not focus exclusively on Aboriginal drop-outs, Aboriginal youth figured prominently, given that their drop-out rate was found to be three times that of non-Aboriginal people. The study identified flexibility in schooling and the delivery of culturally sensitively programming as factors that would increase retention of Aboriginal students. To this end, the study recommended culturally differentiated programming for Aboriginal students, increased Aboriginal parental involvement in schools, more Aboriginal teachers, and projects to encourage Aboriginal student participation in school activities to make them feel part of the school community.

Reaching Out was published a month after the drop-out study, again by the Department of Education. The report was the product of a fact-finding grassroots consultation and outlined concerns and recommendations from all interested parties, including parents, educators, students, administrators, and organizations involved in education. The report made extensive recommendations in all areas of education but emphasized throughout that the main obstacle to better education for Indian and Métis students was the absence of open, honest, and clear communication. By reaching out, the report said, the schools and Indian and Métis parents would be better able

38. *A Five Year Action Plan for Native Curriculum Development*, p. 2.

to work together to improve the education of Indian and Métis children within the existing system:

> The theme "reaching out" was chosen for this report because the schools and Indian and Metis parents repeatedly said that, although they wanted to work together, they very often were not. It is time for initiatives to be taken. It is time for reaching out by both educators and Indian and Metis people. It is time to establish a process of working together. This process should begin at the school and community level since it is at that level that most of the positive impact must be felt.[39]

In April 1985, the minister of education issued a response to *Reaching Out*. In her action plan, the minister adopted the principles outlined in *Reaching Out* — full participation of Indian and Métis people in the education system, recognition of the distinctiveness of Indian and Métis cultures from those who established the school system, co-operation and consultation among all government and Indian and Métis authorities, and an emphasis on change beginning at the school-community level.

Following these two reports, the Saskatchewan Human Rights Commission published *Education Equity: A Report on Indian/Native Education in Saskatchewan*. Based on a review of previous reports and submissions, the commission concluded that students of Indian ancestry were not benefiting from the education system; it therefore prepared and distributed a discussion paper, accompanied by an invitation to participate in public hearings, to more than 500 individuals and groups. Submissions at the hearings indicated overwhelming support for proposals in the discussion paper, specifically the establishment of a comprehensive affirmative action program, based on a definition of equality as "equal benefit", in turn defined as a situation in which "persons of a group or class are not only given equal opportunity to enter into a system but that in addition, the system or institution will be examined to determine whether the minority group has achieved the expected proportionate representation."[40]

The only document in the collection published by an Aboriginal organization in this period was an education proposal by the Ontario Metis and Non-Status Indian Association. The purpose of the document was to determine the requirements of an educational plan and educational programs — based on "Native control of Native education" — needed to improve the

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39. *Reaching Out: Report of the Indian and Metis Education Consultations*, p. 47.

40. *Education Equity: A Report on Native Indian Education in Saskatchewan*. The report is interesting in its reliance on previous reports and studies; it provides an overview of 13 documents on employment equity, Indian and Métis education, and education in general, most of which were specific to the province of Saskatchewan.

education of Métis and non-status Indians.[41] The proposal criticized actions taken after the 1976 *Summary Report of the Task Force on Educational Needs of the Native Peoples of Ontario*, claiming that although some of the recommendations concerning status Indians had been implemented, those affecting Métis and non-status Indians had not. The proposal thus contributed to the discourse by voicing concerns about differential treatment of status Indians, non-status Indians, and Métis people.

The Alberta education ministry published two documents in this period, *Native Education in Alberta's Schools: Policy Statement on Native Education in Alberta*, and *Native Education in Alberta: Alberta Native Peoples' Views on Native Education*. The first was termed "a policy developed by and for Native people", based on the "partnership of Native peoples, schools boards, and the province".[42] It presented a government response to concerns expressed in *Native Education in Alberta: Alberta Native Peoples' Views on Native Education*, which were based on extensive consultations with parents, elders, associations and groups by the Native Education Project Team, made up of four officials of the education ministry. The team found consensus among Aboriginal people with regard to the purpose of education:

> The information obtained through analysis of submissions and through listening to individuals at public meetings indicates that there is a consistent Native view of the purpose of education. This view is that education should provide knowledge, skills and attitudes necessary to survive in today's society. This view also indicates clearly that schools should reflect the contribution made to Canadian society by Native cultures, and should provide opportunities for Native students to develop positive self-esteem and take pride in their Native heritage.[43]

The introductory letter from the minister of education announced the government's commitment to encouraging the "continued development of a culture that respects and cherishes individuality and individual initiative". The ministry committed itself to working with Aboriginal people and school boards to develop curriculum materials and programs that include and highlight Aboriginal culture and to encouraging more representation of

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41. *Education Proposal by the Ontario Metis and Non-Status Indian Association*, p. 4.

42. *Native Education in Alberta's Schools: Policy Statement on Native Education in Alberta*, p. 2.

43. *Native Education in Alberta: Native Peoples' Views on Native Education in Alberta*.

Aboriginal people as administrators, teachers, and language instructors. According to the policy statement, partnerships would be built by encouraging Aboriginal people to participate in decision making affecting the education of Aboriginal students, and consultation would ensure that Aboriginal people's views were considered at all levels of decision making:

> The partnership of Native people, schools boards and the Province of Alberta will ensure that we will be able to look to the education of Native children in this province with a sense of pride. Alberta leads the way in taking action to encourage Native people to work with school boards in improving Native education.[44]

The province's efforts to address Aboriginal education during this period were also reflected in the final report of a working group on education, training and employment for Aboriginal people, which consisted mainly of officials of provincial departments.[45] With a mandate to provide advice and recommendations to the appropriate ministers on how to remove barriers to education, training and employment facing Aboriginal people, the working group held discussions with government officials and representatives of private industry and considered issues emerging from a series of Métis regional workshops held to identify community priorities and concerns. It also reviewed and provided comments on the government's policy statement on education. The working group identified three themes to guide its recommendations on education, training and employment: the need for co-ordination and responsiveness; total community focus; and community responsibility for planning long-term development and growth.

The theme of partnership, emphasized in the Alberta government's policy statement, continued in a 1987 document published by the Yukon Joint Commission on Indian Education and Training, entitled *Kwiya: Towards a New Partnership in Education*. The report was a joint effort of the education minister and the Council for Yukon Indians to increase the involvement of Indian people in the Yukon education system:

> The theme of the Commission's report and recommendations 'Towards a New Partnership in Education' reflects the requirement to actively involve Indian people in the direction of education reform in Yukon.[46]

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44. *Native Education in Alberta's Schools: Policy Statement on Native Education in Alberta*, p. 2.

45. Only the names of the working group members appeared in the document, but later references in the report indicated that at least several were provincial government officials.

46. *Kwiya: Towards a New Partnership in Education: Final Report*, p. vi.

Among the commission's guiding principles was that "policy development is only effective when those most affected have input into that development". To this end, "Commissioners made every attempt to listen to what Indian people themselves had to say about education",[47] and their report included excerpts from transcripts of their community hearings. The commission recommended that Indian culture be recognized formally as part of Yukon society and that an Indian Education Commission be established to represent the interests of Indian people in reform. The report also emphasized that equality of opportunity in education for Indian people must be entrenched in law:

> The Commission observed that the adoption of the language of 'equality' by officials and politicians in the past had not led to equality of opportunity for Indian people, in practice. The Commission has recommended the entrenchment of the principle of equality of opportunity in education in law as an effective remedy.[48]

Later in 1987, the government of the Yukon released its report on education reform, *Report of the Education Act Task Force*, which was based on territory-wide public consultations with parents, students, teachers and principals, conducted by a steering committee with representatives from school committees, professional associations, and the Council for Yukon Indians. In enunciating its philosophy of education, the task force stated that "the education provided to a child must be appropriate to the individual learner", "the values, traditions and cultural experience of the Yukon's Indian people are a valued heritage to be shared by all Yukon children through its integration into the curriculum", and "the Education Act must provide mechanisms to ensure parental involvement in the education system".[49] Throughout the recommendations, legislative support for programs for Aboriginal students and participation by Aboriginal parents was emphasized, as was the need for community control of education to reflect local requirements:

> the Task Force recommends that the Education Act should allow communities the opportunity to progress through three different levels of control over education. These levels would progress from the School Committee level with the least amount of authority to the School Society level with wider local authority, and finally to the School Board level with the greatest degree of local control.

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47. *Kwiya: Towards a New Partnership in Education: Final Report*, p. v.
48. *Kwiya: Towards a New Partnership in Education: Final Report*, p. viii.
49. *Report of the Education Act Task Force*, p. 3.

> However, under no circumstances would an increase in authority be imposed of forced upon any jurisdiction. The Task Force recognizes that in many, if not all cases, local demands for increased authority will be met by granting additional School Committee powers, and by the development of the School Society concept. Nonetheless, since the new Education Act will, if judged by the lifespan of previous enactments, be with us for nearly a generation, a path to responsible development is required.[50]

The final report in the collection for this period is the report of the British Columbia Royal Commission on Education. *A Legacy for Learners* was the product of consultation with students, parents, teachers and school officials across the province:

> Royal Commissions on education are infrequent undertakings, in this province and elsewhere in Canada. They occur about once every generation and are generally regarded to be important educational milestones, events that signal a point of departure in our thinking about education and its importance in our lives. Such studies allow us to reappraise our educational efforts, to look backward and forward in time, to preserve what is good and enduring, and to consider the changes we can make to produce even more effective ways for people to learn... The Commission, through its analysis and recommendations, hopes to foster a new educational accord in British Columbia. This is indeed a compelling cause: to leave a legacy of value for our children and the future they represent.[51]

First Nations students did not figure prominently in the report; in a discussion of accessibility, the education of First Nations children was considered along with non-public schools, home schooling, and female learners. The report nevertheless recommended giving Aboriginal bands and councils appropriate authority and resources to support self-determination or shared responsibility in education, along with measures to "bridge Native and multicultural cultures".[52]

Participants

Provincial and territorial governments assumed a greater role in this period, particularly those of Saskatchewan, Alberta and the Yukon. Aboriginal organizations published less, although they participated in the development

50. *Report of the Education Act Task Force*, p. 21.

51. *A Legacy for Learners: Summary of Findings*, pp. 2, 3.

52. *A Legacy for Learners: Summary of Findings*, p. 58.

of many of the provincial documents.[53] This occurred at a time when constitutional preoccupations were raising the profile of provincial governments and changing ideas about the role of governments in providing services. Provinces were also being pressured increasingly to address multicultural education.

The federal government's adoption of a policy on "Multiculturalism within a Bilingual Framework" in 1971 transformed the role of formal education by encouraging the use of options for the teaching of languages other than English and French as well as the cultural subjects related to them.[54] From this, "the era of multicultural education was born amid great enthusiasm, and a plethora of educational initiatives sprang forth."[55] The reaction of provincial governments was seen in the earlier period, with the report of the Task Force on Intercultural Education in Alberta, for example, and given new life with the proclamation of the Charter and implementation of its equality provisions in 1985. It may have been in response to these events — occurring in a context of growing numbers of Aboriginal children in urban schools and growing recognition of social problems among the urban Aboriginal population particularly in the Prairies — that these provincial governments took on a more active role in the discourse.

Notably absent from the discourse in the early 1980s were the federal government and Aboriginal organizations. The absence of Aboriginal organizations is even more striking when we consider their high profile in earlier periods. Though the documents offer no explanation, the first ministers conferences on Aboriginal constitutional matters held during this time may have been the preferred forum for federal and Aboriginal participants at this time.

The change in participants also changed the focus of the documents. The concern of the 1970s — Indian education — in the 1980s became "Native" education, to use the language of the documents. Most made little distinction between the situation of Indian, Métis and non-status people, with a few notable exceptions. Certain provincial government reports, such as *Reaching Out*, referred to "Indian and Metis" consultations, while *Education Equity* was billed as a report on "Indian/Metis education" in Saskatchewan. These distinctions may reflect greater recognition, at least on the part of the government of Saskatchewan, of the diversity of Aboriginal peoples. This stands in sharp contrast to reports from the Alberta

53. Only one document in the collection, *Education Proposal by the Ontario Metis and Non-Status Indian Association*, was published by an Aboriginal organization.

54. Statement of the Prime Minister in the House of Commons, 8 October 1971.

55. Mazurek and Kach, p. 141.

government, which made no effort to differentiate "Native people" and indeed argued that there was a large degree of consensus among them. *Native Education in Alberta: Alberta Native People's Views on Native Education*, for instance, claimed to present "a consensus of the perspectives held by Aboriginal people of Alberta on ways to ensure that Aboriginal students have opportunities to obtain the high quality education enjoyed by all Alberta students".[56] Other provincial and territorial government reports, including those of the Yukon, British Columbia, and New Brunswick, focused on First Nations education, largely reflecting the composition (and perhaps the level of political mobilization) of the Aboriginal population in those jurisdictions.

Processes

The period also saw the development of more formal processes for interaction among policy participants. A heavy emphasis on consultation was evident in the documents. Many of the consultative processes, however, were conducted by provincial government officials.[57] Thus, while efforts were made to base reports on the views of Aboriginal people, communities and organizations, these views were incorporated in reports by government officials. Other reports, such as *Learning: Tradition and Change* and *Kwiya*, relied on excerpts from the consultations to allow the views of those consulted to be heard. The only document reviewed that went to great lengths to ensure representation was the report of the Native Curriculum Review Committee, *A Five-Year Action Plan for Native Curriculum Development*, drafted by a committee of representatives of a range of programs and organizations involved in Aboriginal education in Saskatchewan.

A Five-Year Action Plan also expressed support for more institutionalized processes of interaction and discussion. It recommended that the Native Curriculum Review Committee be made a permanent structure and that formal links be established between the committee and the provincial government through membership on the provincial policy committee. Another attempt to institutionalize the process was apparent in

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56. *Native Education in Alberta: Native Peoples' Views on Native Education in Alberta.*

57. This was the case, for instance, with *Indian Education: Everyone's Concern*; the *Inner-City Dropout Study*; *Reaching Out: Report of the Indian and Metis Education Consultations*; *Native Education in Alberta: Alberta Native Peoples' Views on Native Education*; and the final report of the Working Group on Native Education, Training and Employment.

Native Education in Alberta's Schools: Alberta Native Peoples' Views on Native Education, which recommended that

> four regional Native education councils should be established. A provincial Aboriginal education coordinating committee comprised of the chairman of each regional Aboriginal educational council, Ministerial appointees, and Alberta Education should be formed.[58]

Kwiya also called for an Indian Education Commission to represent the interests of Indian people:

> The Government of Yukon, in the past, has not responded to suggestions for reform in support of Indian education concerns. There is a need for the Government to demonstrate leadership by initiating new policy directions. These changes must be accompanied by a demonstrated willingness to work with the Indian community. The Commission has recommended the establishment of an Indian Education Commission to fulfil this immediate requirement.[59]

There were also attempts by provincial governments to sustain discussion of Aboriginal education. Particularly evident in Saskatchewan was the extent to which reports built on their predecessors. Later reports from Saskatchewan, such as *Education Equity*, built on the findings of previous reports; *Education Equity* reviewed and updated recommendations in several documents, published previously in the province and elsewhere, dealing with education equity and Aboriginal education.

Ideas

New ways of conceptualizing education issues emerged in this period. Many of the documents called for special remedial programs to deal with the unique needs of Aboriginal students, in keeping with the focus that emerged in this period on special programs for students of other cultures.

Many of the ideas prominent in the earlier period persisted in the documents of the early to mid-1980s. There was a continued focus on communication, for example, on the involvement and participation of parents and communities, and on their control of the system, that is, more community decision-making, local control, decentralized administrative structures rather than transfer of jurisdiction. Control continued to be a confusing concept, however. *Learning: Tradition and Change* defined control in terms of devolution of authority to division boards. This may have reflected the demographics of the Northwest Territories, where local

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58. *Native Education in Alberta: Native Peoples' Views on Native Education in Alberta.*

59. *Kwiya: Towards a New Partnership in Education: Final Report*, p. 38.

control could be exercised more easily in a manner that ensured Aboriginal control because the majority of the territorial population is Aboriginal. Emphasis on partnership and harmonious relations between Aboriginal and non-Aboriginal people and their governments also continued.

Also worthy of note was greater emphasis on issues of human dignity, seen, for example, in *A Five-Year Action Plan*, whose discussion of curriculum was based on the principle that "Native people must be presented as human beings having human societies".[60] This preoccupation was also evident in various conceptions of equality and rights. While *Education Equity: A Report on Native Indian Education in Saskatchewan* spoke of the need for "equal benefit" (defined as equal opportunity plus examination of results), other documents spoke of equality of opportunity versus equality of access and of the tension between equality, access, and affordability.

The emphasis on rights and human dignity that emerged in the documents of the 1980s takes on greater meaning when situated in the context of national events. The focus on equality can be traced in part to entrenchment of the *Canadian Charter of Rights and Freedoms* and its equality rights provisions. The education sphere responded by developing alternative systems of education, greater choice, and increasingly specialized programs.

In summary, the discourse of this period saw the emergence of provincial governments as prominent participants, a move toward more widespread and representative consultations, an emerging desire for institutionalized processes of interaction, the persistence of goals such as Aboriginal involvement and control, communication and partnership, and a new focus on human rights. Following this period, the discourse shifted to one altered significantly by a conceptualization of education in the context of the inherent right of self-government, which began with publication of *Tradition and Education* by the Assembly of First Nations.

1988-1992: TRADITION AND EDUCATION *AND ITS AFTERMATH*

Publication of *Tradition and Education: Towards a Vision for the Future*, by the Assembly of First Nations, in 1988 was a turning point in the discourse. Heavily influenced by the Penner report and the discourse on self-government it stimulated, *Tradition and Education* was the culmination of a four-year study and the most comprehensive report on Aboriginal education to that date.[61] *Tradition and Education* advanced the arguments

60. *A Five Year Action Plan for Native Curriculum Development: Report of the Native Curriculum Review Committee*, p. 2.

61. For our discussion of the Penner report, see Chapter 5.

presented in *Indian Control of Indian Education* with regard to extending to First Nations rights taken for granted by other Canadians, namely local control and parental responsibility. However, it did so in a way that reflected a clear shift from thinking about control in terms of authority and devolution to thinking about education in the context of self-government:

> Education is one of the most important issues in the struggle for self-government and must contribute towards the objective of self-government. First Nations' governments have the right to exercise their authority in all areas of First Nation education. Until First Nations' education institutions are recognized and controlled by First Nations' governments, no real First Nations' education exists. The essential principles are that each First Nation government should make its own decisions and arguments and apply its own values and standards rather than having them imposed from outside.[62]

Tradition and Education portrayed education as one component of the right of self-government. Consistent with the constitutional position of the Assembly of First Nations, the document extended arguments for First Nations control of First Nations education in the self-government forum, demanding a constitutional amendment or, at the very least, federal legislation explicitly recognizing the inherent right of self-government, including education. This legislation would

> recognize the right of First Nations to exercise jurisdiction over their education and mandate federal, provincial, and territorial governments to vacate the field of First Nations education. No delegation of authority over education to First Nations governments is acceptable as a substitute for aboriginal First Nations jurisdiction which is recognized and affirmed in the Constitution of Canada.[63]

Publication of *Tradition and Education* signalled a change in the way information was compiled. Its national review of First Nations education included comprehensive grassroots consultation with many First Nations communities across Canada. Information was gathered by three methods: a community survey program, a secondary research program, and a committee of inquiry. The national review also included a review of First Nations schools, a policy development program, and a legislative development program.

> The National Review of First Nations Education has fulfilled its mandate of gathering enough data on the four areas of jurisdiction, quality, management and resourcing of First Nations education to

62. *Tradition and Education: Towards a Vision of Our Future*, volume 1, p. 47.

63. *Tradition and Education: Towards a Vision of Our Future*, volume 3, p. 27.

> articulate a clear philosophy of First Nations education that can (drive) the change necessary to put into practice First Nations aims and objectives[64]

Changes in thinking about education centred on the concept of self-government. Discourse no longer emphasized local control over education or community-based change, but constitutional amendment to recognize the inherent right of self-government. *Tradition and Education* thus forged a vital link between education and self-government. These changes in thinking were reflected in such phrases as "sovereignty of First Nations", "the end of paternalism", and a "failed federal system". The term First Nations itself reflects a change in thinking with respect to the relationship between Aboriginal and non-Aboriginal people and governments.

The importance of *Tradition and Education* was recognized by DIAND, which asked James MacPherson of Osgoode Hall Law School to review the document. His review was submitted in September 1991. The three-year gap was not explained in the MacPherson report, despite its praise for DIAND's timely response:

> DIAND should also be complimented, first for providing substantial financial resources to support the research, consultations and publication of *Tradition and Education*, and secondly, for signalling that it wants to give serious and timely attention to *Tradition and Education*.[65]

The MacPherson report's interpretation of the history of Indian education and its future under self-government stood in sharp contrast to that presented by the AFN in *Tradition and Education. Tradition and Education* cited ineffective implementation of the 1972-73 policy of Indian control of Indian education as a major reason for the poor quality of Indian education,[66] while the MacPherson report was considerably less scathing:

> Since 1973 federal policy with respect to Indian education has, in theory, been driven by adherence to the goals and principles of *Indian Control of Indian Education*. Moreover, in practice there can be no doubt that major and useful steps consistent with this document have been taken. If one compared the 1991 and 1973 pictures in the field of Indian education, one would have to conclude, in fairness, that both parental responsibility for, and local

64. *Tradition and Education: Towards a Vision of Our Future*, volume 3, p. 28.

65. MacPherson report, p. 41.

66. The federal government accepted the National Indian Brotherhood's *Indian Control of Indian Education* as its new policy on Indian education less than two months after its publication.

> control of, Indian education are much more prevalent today that in 1973. So in that sense there is an element of 'success' about post-1973 developments... It is both logical and fair, in my view, to conclude that at least some of that success flows from the education policies put in place and pursued by the federal government in recent years.[67]

The documents also diverged on self-government. The MacPherson report seemed to accept the fundamental tenet of *Tradition and Education* that First Nations jurisdiction over education must be achieved in the context of self-government; but some aspects of his discussion of self-government reflected differences in his understanding of the concept. Not only did MacPherson avoid the term inherent right, but he compared what he called "Native self-government" to the self-governing professions. At the same time, however, he defined self-government as "native jurisdiction and control over and responsibility for the matters which affect the lives of Canadian natives":

> Native self-government should not be a scary concept for Canadian governments. If governments for decades have permitted, by legislation, professions like lawyers and doctors to be 'self-governing', and have allowed them real independence in the governance and operation of their affairs, and if conservative American administrations in the 1970s and 1980s have not choked on at least the theory of self-government for American Indians, then it should not be much of a leap of imagination for Canadian governments to accept, and genuinely implement, the concept of native self-government in Canada. We should not allow our pre-occupation with the place of Quebec in Canada or our political and legal thinking rooted in the concept and definition of federalism to lead us to the facile, but wrong, conclusion that self-government means independence or self-determination. Self-government does not mean these things. What it means is native jurisdiction and control over and responsibility for the matters which affect the lives of Canadian natives.[68]

This interpretation contrasts with that presented in *Tradition and Education*, where the AFN asserted not only that the inherent right includes the right to exercise local self-determination, but that Aboriginal/federal government relations must be conducted on a nation-to-nation basis:

> The recognition and reflection of the inherent right to be and to remain distinct First Nations and to exercise local self-

67. MacPherson report, p. 3.

68. MacPherson report, p. 42.

> determination over local education programs through self-government is at the heart of this *Declaration of First Nations Jurisdiction Over Education....*
>
> First Nations have an inherent aboriginal right to self-government... First Nations' inherent aboriginal right of self-government and treaties are the basis for government-to-government relationships between First Nations and the Government of Canada. Within Canada, First Nations are an order of government apart from the federal government and the governments of the provinces and territories.[69]

Some of the documents that followed *Tradition and Education* reflected its ideas and approach, but the *Report of the Task Force on Race Relations to the Board of Trustees of the Winnipeg School Division No. 1* did not. *Tradition and Education* referred to the sovereignty of First Nations; the task force report spoke instead of Aboriginal education in the sphere of race relations. Made up of trustees, administrators, parents, and representatives of communities and interested agencies, the task force was established to make recommendations to the board of trustees with respect to enhancing educational opportunities for all ethnic and racial groups in the Winnipeg school division. The task force held public meetings to receive presentations and facilitate dialogue. Aboriginal people were included among the 'ethnic and racial' groups examined by the task force, though some care was taken to treat them separately because of their historical experiences:

> The inclusion of separate recommendations related to Aboriginal education in the Division was not meant to preclude the applicability of other recommendations to Aboriginal groups, but rather, was a recognition by all Task Force members of the historical circumstances encountered by Aboriginal Peoples in their attempts to educate their young.[70]

The special recommendations included initiatives to recruit Aboriginal people, to establish an urban Aboriginal education advisory council, to include Aboriginal literary works at each grade level, to endorse existing programs in support of the education of Aboriginal students, and to establish Aboriginal language programs. Perhaps because it treated Aboriginal people in the context of race relations, the report did not cover self-government, as illustrated by a concluding passage, which emphasized integration, not self-government:

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69. *Tradition and Education: Towards a Vision of Our Future*, pp. 38, 1.

70. *Report of the Task Force on Race Relations to the Board of Trustees of the Winnipeg School Division No. 1*, p. 49.

> The needs of the various groups served by the Division vary. The aspirations are the same, the future well being and success of the children as integrated members of the community in which they live.[71]

The report also demonstrated adherence to principles of human dignity and equality. One of the task force themes was "the fundamental adherence to the principle of human dignity and equality. Any policy which ignores this cornerstone cannot begin to address the needs of our multicultural society. Through all recommendations, the intent of the committee has been to remain constant to this principle."[72]

Breaking Barriers: Report of the Task Force on Access for Black and Native People was another report that addressed Aboriginal education issues alongside those of other cultural minorities. In response to several race-related incidents, Dalhousie University saw a need to examine its role in the education of the region's indigenous Black and Mi'kmaq people:

> The high profile Marshall Inquiry hearings and the controversy surrounding racial incidents at Cole Harbour High School have raised the consciousness of Nova Scotians about the experiences of Blacks and Micmacs in this province. Indeed, the Royal Commission Report arising from the Marshall Inquiry is also expected to be tabled in the fall of 1989. The time seems right for recommendations for change.[73]

The Task Force engaged in consultation to bring out the views of the Black and Mi'kmaq communities:

> In an effort to avoid speaking for either Blacks or Micmacs, we attempt to incorporate the insights and wisdom that we have gained from the process of consultation. In an imperfect way, we have tried to emulate the inquiry model popularized by Tom Berger when he investigated the impact of a northern pipeline on Canada's Aboriginal and northern people. Few experiences in my [the chair's] first decade at Dalhousie have been so moving and valuable as going into the Black and Micmac communities and listening to their views. There are lessons of discrimination and

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71. *Report of the Task Force on Race Relations to the Board of Trustees of Winnipeg School Division No. 1*, p. 50.

72. *Report of the Task Force on Race Relations to the Board of Trustees of Winnipeg School Division No. 1*, p. 48.

73. *Breaking Barriers: Report of the Task Force on Access for Black and Native People*, p. viii.

> pain, but there are also lessons about the strength and resilience of the human spirit.[74]

There was some discussion of bias in the report. The chair felt it necessary to acknowledge the biases of the university community:

> While the Task Force was enriched by the participation of members from both the Black and Micmac communities, we must acknowledge some of the biases brought to this task by the white members of the university community such as myself.[75]

Breaking Barriers was notable for its emphasis on meaningful consultation and sensitivity to issues of representation. Indeed, a major section of the report was entitled "What We Were Told":

> Meaningful consultation with the Black and Micmac communities is vital to the credibility and success of any access programme. It is not enough to invite a few representatives of the communities to come to campus. The university's agents and emissaries must go into the communities and seek their members' opinions, on their own turn. This is not only a matter of courtesy and respect, but also an excellent way to build bridges to the university, and a way of getting fresh perspectives on problems. The insights of the people who spoke with us set the stage for the recommendations which follow.[76]

The report also mentioned frustration in the Black and Mi'kmaq communities with lack of progress in overcoming obstacles to their meaningful participation at the university level:

> It was also evident that people are tired of studies and recommendations that collect dust. They want to see action.[77]

To this end, the task force urged change based on its work:

> As a Task Force we challenge Dalhousie University not merely to take the pulse of the problem but to take steps to provide a partial cure. Anything less will be a betrayal of the trust that the Black and Micmac communities have placed in the Task Force and the

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74. *Breaking Barriers: Report of the Task Force on Access for Black and Native People*, p. i.

75. *Breaking Barriers: Report of the Task Force on Access for Black and Native People*, p. ii.

76. *Breaking Barriers: Report of the Task Force on Access for Black and Native People*, p. xxi.

77. *Breaking Barriers: Report of the Task Force on Access for Black and Native People*, p. xxi.

larger Dalhousie University community. It is indeed time to change the way we are together as communities of human beings.[78]

The report also urged continuation of the process started by the task force to ensure continued change:

...the process started by this Task Force and other initiatives referred to above must continue. This is necessary both to answer the many questions raised by the interested communities and to allow time for the difficult task of bringing about change at the University.[79]

Through recommendations for such measures as promoting Black and Mi'kmaq participation in undergraduate and professional programs, greater consultation between the university and its Black and Aboriginal student groups, and funding to implement recommendations, the task force hoped that access would improve and would continue to improve.

Another report dealing with post-secondary education during this period was a 1989 review of DIAND's post-secondary student assistance program by the Standing Committee on Aboriginal Affairs. The committee prepared its report in response to concerns and unrest stemming from changes in the program earlier that year:

The urgent nature of the post-secondary education issue evidenced by the student hunger strike, the many protests in the aboriginal community, and the encroachment of the 1989-90 academic year made the Committee feel it necessary to study and report on this matter as soon as possible.[80]

To investigate these incidents the committee invited major national groups and a small number of regional groups to appear before it and invited written submissions from other interested individuals and organizations. Aboriginal witnesses attached a great deal of value to post-secondary education as a means of achieving self-government and economic self-reliance:

Aboriginal witness groups perceived the goals of self-government, economic self-sufficiency and higher educational achievements among aboriginal people as interdependent. Self-government — specifically, increased control by aboriginal people over the education of their children and adults — was seen as a necessary

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78. *Breaking Barriers: Report of the Task Force on Access for Black and Native People*, p. 6.

79. *Breaking Barriers: Report of the Task Force on Access for Black and Native People*, p. 113.

80. *A Review of the Post-Secondary Student Assistance Program of the Department of Indian Affairs and Northern Development*, p. 25.

> means to improve educational standards and achievements. In turn, a substantial increase in the numbers of university educated Inuit and Indians was regarded as a necessary component for the successful implementation of self-government.[81]

Self-government is defined here in terms of increased control, a meaning different – in degree if not in direction – from that envisaged in *Tradition and Education*.

The committee's findings and recommendations emphasized consultation. Those appearing before the standing committee consistently criticized the consultation process that led to the March 1989 policy announcement:

> It was apparent to the Committee that there is a high level of mistrust of the federal government in the aboriginal community and that divergent views are held by the federal government and aboriginal people on what constitutes proper or adequate consultation.[82]

Although DIAND claimed that consultation had involved more than 500 bands, tribal councils and student groups, several witnesses said that "the policy outcome was determined before the consultation process began" and "many of the groups listed by the Department as having been consulted had simply indicated their rejection of the policy in total and that in return they received a form letter acknowledging their communication with the Department."[83]

In response to this perceived lack of good faith, some Aboriginal groups felt a need to define what they considered genuine consultation:

> Some aboriginal groups hold the view however that true consultation involves more than an exchange of views and they suggest that a process of consensus or agreement with aboriginal representatives is required. The President of the Nuu-chah-nulth Tribal Council stated (Issue 9:28): 'Consultation means sitting down and having meaningful dialogue about the thing you are talking about. The problem is that it has not happened. I think what Indian people are saying is if the minister wants to find something that is agreeable to Indian people, they get the Indian people, the

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81. *A Review of the Post-Secondary Student Assistance Program of the Department of Indian Affairs and Northern Development*, p. 26.

82. *A Review of the Post-Secondary Student Assistance Program of the Department of Indian Affairs and Northern Development*, p. 38.

83. *A Review of the Post-Secondary Student Assistance Program of the Department of Indian Affairs and Northern Development*, pp. 39-40.

> legitimate elected people, around the table and talk, and come to some consensus about what it is we are trying to do.'[84]

Controversy over the consultation process resulted in calls from students and in the majority of Aboriginal submissions for a moratorium on policy change, pending completion of a bilateral consultation process. It was believed that a moratorium would both restore good faith and ensure that meaningful consultation process took place:

> a moratorium will produce many positive results such as restoring trust between the federal government and the First Nations; lessen the sense of frustration and powerlessness; encourage constructive and meaningful dialogue on the issue... without a moratorium, there is a fear that any bilateral process will be meaningless; a moratorium is necessary to ensure a healthy, honest, bilateral process.[85]

The committee responded by recommending full and meaningful consultation between the federal government and Aboriginal people to reach consensus on post-secondary education policies and guidelines.

The preoccupation with post-secondary education continued with the 1990 publication of the *Report of the Provincial Advisory Committee on Post-Secondary Education for Native Learners* in British Columbia. Co-chaired by a band chief and the president of a post-secondary institution, members included students and representatives of programs, institutions, governments and communities with an interest in Aboriginal post-secondary education. The committee circulated a consultation paper compiling and summarizing recommendations from First Nations in previous provincial consultations, commissions and studies, then held meetings throughout the province to receive public input.

The report's significance lay in its recognition of the right of self-government. It supported the arguments of the Assembly of First Nations *Tradition and Education*:

> This report is to be read in the context of the following statement issued by the National Indian Brotherhood. '...deficiencies in existing federal, provincial and territorial legislation, policies, administrative practices, and programs which affect the education of First Nations students require changes to be consistent with First Nations self-government. Any proposed changes to legislation,

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84. *A Review of the Post-Secondary Student Assistance Program of the Department of Indian Affairs and Northern Development*, p. 29.

85. *A Review of the Post-Secondary Student Assistance Program of the Department of Indian Affairs and Northern Development*, p. 43.

policies, procedures and practices must have the approval of First Nations'.[86]

Also evident is continuing use of the partnership concept: the report speaks of "partnerships in community based delivery" of program and support service resources and of First Nations seeking "full partnership in Canadian society".[87]

Unity and diversity among Aboriginal people was also discussed. While recognizing the distinctiveness of First Nations, the committee also saw some ground for commonality:

> Obstacles to access are exacerbated by the unique needs of each of British Columbia's First Nations. The unique history, culture, values and traditions of each nation and their learning needs pose a special challenge to the provincial post-secondary system...
>
> First Nations throughout British Columbia speak with one voice regarding the future of post-secondary educational policies and practices. They want to be consulted, listened to, and be active participants in the decision making process.[88]

The committee presented two sets of recommendations, one consisting of priority recommendations to be implemented in the next fiscal year, the other of recommendations to be implemented within a five-year period. Cost estimates were provided. Priority recommendations included funding for Aboriginal post-secondary institutions, greater support services for Aboriginal people, bridging and literacy programs, Aboriginal language training, and establishment of a tripartite committee to deal with cross-jurisdictional issues.

The province of Saskatchewan also participated in the discourse in this period, building on earlier reports with *Partners in Action: Action Plan of the Indian and Metis Education Advisory Committee*. The Indian and Metis Education Advisory Committee succeeded the Native Curriculum Review Committee, which had recommended in its 1984 report, *A Five Year Action Plan for Native Curriculum Development*, that the committee become permanent. The new committee included representatives of Aboriginal and non-Aboriginal educational programs and institutions. The report was written as a follow-up to the *Five Year Action Plan* and to the Indian and Metis Education Policy from K-12 adopted by the provincial government in

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86. *Report of the Provincial Advisory Committee on Post-Secondary Education for Native Learners*, p. 10.

87. *Report of the Provincial Advisory Committee on Post-Secondary Education for Native Learners*, pp. 33, 19.

88. *Report of the Provincial Advisory Committee on Post-Secondary Education for Native Learners*, p. 29.

April 1989.[89] *Partners in Action* reviewed both documents and commented on what had been achieved and what remained to be accomplished. The committee found that recommendations in the 1984 action plan concerning mechanisms to increase the involvement of Indian and Métis peoples in curriculum development had largely been implemented.

The committee emphasized principles of co-operation and partnership in education, referring to "commitment on a common vision" based on "the importance of co-operation among the partners in education".[90] These principles were also evident in the committee's recommendations to enhance curriculum to reflect the Indian and Métis experience and for continued partnership among those involved in Indian and Métis education in implementing policy, research initiatives, and program development and evaluation.

New Brunswick's contribution to the discourse took the form of two documents: *Closing the Gap: The Native Indian Students' Achievement Study*, by a professor and director of the Micmac-Maliseet Institute at the University of New Brunswick, examined the academic performance of First Nations students attending New Brunswick schools relative to that of non-Aboriginal students and recommended improvements to help Aboriginal students. The report was based on a literature review, an analysis of student records, and interviews with students, graduates and drop-outs. The second document, *Excellence in Aboriginal Education: Improving Aboriginal Education in New Brunswick*, remarked on the earlier report's findings:

> To date, the educational experiences of the Aboriginal students within the provincial schools have not been successful compared to those of their non-Aboriginal counterparts. The final report of the Aboriginal student achievement study entitled 'Closing the Gap' paints a depressing and gloomy picture of Aboriginal Education in New Brunswick. The findings would seem to suggest that the education system has failed to provide equality of educational opportunity to all members of our pluralistic society. A comparison of achievement levels between Aboriginal and non-Aboriginal students obviously demonstrates inequality of results.[91]

Closing the Gap recommended better communication between schools and Aboriginal parents, procedures for identifying and dealing with at-risk

89. The policy emphasized principles of full participation, recognition of different learning styles and perspectives, the need for co-ordination among all Aboriginal and non-Aboriginal authorities, and an emphasis on improving conditions through efforts at the school and community level.

90. *Partners in Action*, p. 22.

91. *Excellence in Aboriginal Education*, p. 2.

and talented Aboriginal students, and treatment of Aboriginal student achievement in pre-service teacher education programs.

Excellence in Aboriginal Education was written in response to an issues paper prepared by the commission on excellence in education, established by the government of New Brunswick to seek improvements in the public education system. *Excellence in Aboriginal Education* reviewed the applicability of the commission's guiding principles to the educational needs of Maliseet and Mi'kmaq students. The report criticized the commission for not acknowledging the province's multicultural character and argued for greater co-operation and partnership to improve the situation of Mi'kmaq and Maliseet students in New Brunswick:

> The issues paper maintains that a Commission on Excellence in Education is required to 'identify strengths and weaknesses and opportunities' in the New Brunswick educational system. A review of Aboriginal education reveals a number of major weaknesses in the system as demonstrated by the report entitled 'Closing the Gap'. Improvement in Aboriginal education will require an institutional commitment to equality in terms of consequences of the school for individuals of various ethnic/racial backgrounds. It will also require cooperation, collaboration and effective partnerships among the Aboriginal, French and English founding fathers.[92]

The report also noted that Mi'kmaq and Maliseet students come from different linguistic communities and that some leaders had suggested establishing two Aboriginal school boards. It called on the commission on excellence in education to support a policy statement on Mi'kmaq and Maliseet education, to recognize the Aboriginal and multicultural nature of New Brunswick, to support the development of an employment equity strategy to recruit Mi'kmaq and Maliseet teachers, and to support the recommendations of *Closing the Gap*.

In addition to documents devoted to education, this period saw numerous documents on language and literacy. While reports on language had been published in the 1980s, it was the International Year of Literacy in 1990 that brought the issue to the attention of the Standing Committee on Aboriginal Affairs, which published *You Took My Talk: Aboriginal Literacy and Empowerment*.[93] This report, and the response of the Assembly of First Nations, *Towards Linguistic Justice for First Nations*,

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92. *Excellence in Aboriginal Education*, p. 10.

93. One of the earlier reports was D.L. Tlen, *Speaking Out: Consultations and Survey of Yukon Native Languages: Planning, Visibility and Growth*, published jointly by the government of the Yukon and the Council for Yukon Indians in 1986.

stimulated discussion of language and literacy. Many of the reports that emerged during this period spoke of the need for community-based and community-controlled programs to address the language needs of Aboriginal peoples. This was evident, for instance, in *Voices of the Talking Circle*:

> The home and the community must be the primary basis and location for language preservation, development and enhancement efforts... Elders and families are re-thinking the effectiveness of school-based language programs which operate in isolation from family and community language learning and cultural development. They understand that family and community teaching and learning activities must be the foundation of any institutional programs.[94]

Also noteworthy was criticism of the standing committee's report for not recommending the commitment of federal funds in support of community-based programs. This was reflected in a quotation from an Ontario elder, Rose Fox, highlighted at the beginning of *Towards Linguistic Justice for First Nations*:

> 'This is what it is all about – towards linguistic justice. The federal government has funding for *You Took My Talk* and now, the federal government must have funding to put back our talk.'

ANALYSIS: 1988-1992

The period 1988-1992 was one of change, reflected in shifts in the nature of the policy discourse. More specifically, this period witnessed shifts in the participants involved in the discourse, the processes they used, and the concepts that framed the discourse.

Participants

Aboriginal and federal governments emerged once again as prominent participants. The framing of education issues in the context of self-government and increasing recognition of the relationship between higher education, self-government and economic self-reliance may have sparked renewed interest in education.

Also interesting was the absence of documents from provincial Aboriginal organizations and from national organizations other than the Assembly of First Nations. The AFN appears to have become heavily involved in education, language and literacy. Its mandate derives from First Nations, however, so it could be argued that the interests of Inuit, Métis

94. Yukon Aboriginal Languages Conference, *Voices of the Talking Circle*, p. 30.

and non-status Indians were not adequately represented in the policy discourse.[95]

A number of the documents treated Aboriginal people in the context of race relations. In part, this may have been a reaction to adoption of the *Multiculturalism Act* in 1988, particularly on the part of provincial governments.

Related to this was continuing attention to the unity and/or diversity of Aboriginal peoples. Several documents emphasized the diversity of Aboriginal peoples. There was also language that embraced commonalities, however, perhaps to strengthen arguments about the situation of Aboriginal education, but more likely to simplify the process of discussion and consultation for non-Aboriginal governments.

Processes

In *A Review of the Post-Secondary Student Assistance Program of the Department of Indian Affairs and Northern Development*, the federal government's consultation process for developing policy was seen as so inadequate that Aboriginal communities insisted on a moratorium on policy changes. The documents of this period placed continued emphasis on the value of consultation, with increasing demands for a definition of what constitutes sincere and meaningful consultation, as evidenced in such documents as *Breaking Barriers* and *A Review of the Post-Secondary Student Assistance Program of the Department of Indian Affairs and Northern Development.*

Thus the period was characterized by attempts to define process. A common thread in these changes was frustration about lack of progress and a trend toward greater precision and definition promote a quickened pace of development. Fuelled by growing frustration over the lack of progress, this period saw several incidents that manifested this anxiety. *A Review of the Post-Secondary Student Assistant Programs of the Department of Indian Affairs and Northern Development* and *Breaking Barriers* were both spurred by disturbing incidents.[96]

Looking beyond the education sphere, several factors may have exacerbated this frustration, including failure of the constitutional conferences and exclusion of self-government provisions from the Meech

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95. We know that work was being done by Aboriginal organizations and groups at the community level during this period, but this is not reflected in the documents selected for this project or in the bibliography from which the documents were chosen.

96. *A Review of the Post-Secondary Student Assistance Program of the Department of Indian Affairs and Northern Development*, p. 25; *Breaking Barriers*, p. viii.

Lake Accord. Also important during this period was the federal government's decision to cap spending on post-secondary education for Aboriginal people and the public demonstrations that followed. A recession and reduced public spending no doubt also contributed to the lack of fundamental change and fuelled this frustration, as did problems in the discourse, including the ambiguity of ideas presented and the lack of understanding and genuine communication between participants. In response, reports began to provide greater precision and detail, in hopes of generating change. The tendency for documents to specify what constitutes meaningful consultation and to define precise strategies for implementing their recommendations suggests that government action had been unsatisfactory.

Ideas

The emphasis on greater precision and definition was also evident in some of the ideas that emerged during this period. Documents of the late 1980s and early 1990s offered increasingly specific recommendations. The *Report of Provincial Advisory Committee on Post-Secondary Education for Native Learners*, for instance, recommended appropriate staff and database requirements, as well as a Tripartite Committee to implement its recommendations. Similarly, *Tradition and Education* proposed a detailed, five-stage implementation strategy. The use of priority recommendations in the *Report of the Provincial Advisory Committee on Post-Secondary Education for Native Learners*, indicated a low level of confidence that recommendations would be implemented.

There was also change in the scope of issues addressed. Post-secondary education became prominent in the document collection, perhaps as a by-product of growing recognition of the interrelatedness of self-government, economic self-reliance and higher education. This was evident in such documents as the *Report of the Provincial Advisory Committee on Post-Secondary Education for Native Learners*. This may in some way reflect the impact of *Tradition and Education* in conceptualizing education in the context of the inherent right of self-government.

FINAL OBSERVATIONS

We isolated and examined three periods of discourse in the documents on Aboriginal education:

- 1967-1982: The Beginning of Discourse
- 1982-1988: A Change in Participants, A Change in Issues
- 1988-1992: *Tradition and Education* and its Aftermath

In this section, we highlight observations that emerge from the history of discourse on education that might inform future discourse and policy decisions. The observations address the following issues:

- links between the development of discourse on Aboriginal education and the discourse on governance;
- the impact of ideas and policies of multiculturalism;
- the distinctiveness of the discourse in each province and territory;
- preoccupation with issues of peaceful coexistence;
- the movement toward more effective forms of consultation; and
- confusion over the meaning of key concepts used in the discourse.

Observation 1: The development of policy discourse on Aboriginal education closely followed the development of discourse on Aboriginal governance. This was particularly evident in documents published by the federal government and by Aboriginal organizations.

Discussion of Aboriginal education issues was linked closely to discussions on governance; in particular, the way the relationship between Aboriginal and non-Aboriginal governments was envisaged in the discourse on governance was reproduced in the discourse on education. The centrality of education in governance and Aboriginal policy in general was reflected in many of the documents. The following excerpt from *Legacy for Learners* is but one example:

> Many debates about education and schooling are really debates about larger philosophical and ideological issues concerning such matters as the role government should play in peoples' lives, the rights of the state versus the rights of the individual and the relationship between private interests and public good.[97]

There was considerable movement in the way the relationship between Aboriginal and non-Aboriginal peoples and their governments was reflected in the sphere of education; this was seen in the assimilationist paradigms that dominated both governance and education policy in the pre-Hawthorn period and in the influence of documents such as the Hawthorn report and the Penner report.

In the pre-Hawthorn period, policies centred on assimilation, as seen, for example, in the establishment of residential schools. The later influence of documents such as the Hawthorn report and *Wahbung Our Tomorrows* stimulated the discourse on governance, through concepts such as integration, local control and transfer of authority, which also became the focal points for discourse on education. The emergence of a discourse on Aboriginal self-government also shaped the discourse on Aboriginal education. The Penner report, for instance, which endorsed self-government, was cited as a stimulus for *Tradition and Education*, a report that tied

97. *A Legacy for Learners: Summary of Findings*, p. 5.

education definitively to constitutional recognition of the inherent right of self-government and shifted the discourse on Aboriginal education accordingly.

These shifts in the relationship between Aboriginal and non-Aboriginal peoples in the sphere of education were thus related to broader issues. From assimilation to integration, to local control, to self-government, these concepts signify the changing relationship between peoples and how such a relationship might be established and sustained in a just and equitable manner.

It should be noted, however, that documents emphasizing the links between education and governance were published mainly by the federal government and Aboriginal organizations. Provincial governments focused largely on establishing and enhancing remedial programs and special initiatives, for their preoccupation was not so much governance as multiculturalism and human rights.

Observation 2: Policy discourse on Aboriginal education developed in concert with discourse on multiculturalism and multicultural education. This was particularly characteristic of documents published by provincial governments.

Adoption of a policy of multiculturalism within a bilingual framework by the federal government on 8 October 1971 – fuelled largely by negative reactions from ethnic groups to the mandate of the Royal Commission on Bilingual and Biculturalism in the 1960s – touched many parts of our social structure; schools were among the institutions profoundly affected. The policy stimulated legislation and the establishment of human rights commissions at the provincial level, and at the federal level these principles were later reinforced in section 15 of the *Canadian Charter of Rights and Freedoms*.[98] The 1971 policy was given the force of law with passage of the *Multiculturalism Act* in July 1988. The act sets out a multiculturalism policy intended to preserve and enhance Canada's multicultural heritage while working toward equality of all Canadians in economic, social, cultural and political life. This is a notion of equality aimed at ensuring that all individuals receive equal treatment and equal protection under the law, while respecting and valuing their diversity. It was in this context that the policy discourse on Aboriginal education evolved.

The impact of multiculturalism on development of the discourse was not acknowledged explicitly in the documents. Nevertheless, we see clear links between ideas and events in the spheres of multiculturalism and

98. For a full discussion, see Mazurek and Kach, *Multiculturalism, Society and Education*.

Aboriginal education. Links are evident in a preoccupation with special programs, seen in many of the documents that appeared after the 1971 policy; in the emphasis on rights and equality that emerged after the Charter's equality provisions came into effect; and in the shift in the post-1988 documents toward treating Aboriginal people in the context of race relations and multiculturalism.

In the specific context of the school system, the 1971 multiculturalism policy touched off a series of programs and policies. "The era of multicultural education was born amid great enthusiasm, and a plethora of educational initiatives sprang forth... Multicultural education is one of the spectacular growth areas within public schools."[99] This was part of the context for discourse on Aboriginal education, and numerous documents emerged, particularly from provincial governments, in support of special measures to address the unique culture and experiences of Aboriginal peoples. It was also in this context that programs intended to address the special needs of ethnic groups emerged - instruction in heritage languages and English as a second langauge; curriculum revision to include a multicultural focus; teacher training in the contributions of different cultures; liaison between educational and ethnic communities to develop cultural programs and curriculum; appointment of consultants and advisory groups on multicultural education; and formal policies on multicultural education. Similar initiatives were the subject of many of the recommendations in documents on Aboriginal education.[100]

Following passage of the *Multiculturalism Act* in 1988, there was a shift in provinces' conceptualization of Aboriginal educational issues, from those focusing on Aboriginal and/or Indian and Métis concerns, to those that include these concerns in the broader sphere of racial and cultural minorities. This was evident in *Breaking Barriers* and the *Report of the Task Force on Race Relations to the Winnipeg School Division No. 1*, published soon after the act was passed, and earlier in *Native Education in Alberta: Report of the Task Force on Intercultural Education*, published shortly after the 1971 changes.

In documents published around the time section 15 came into effect (1985), there is emphasis on equality and, more generally, rights and human dignity. This is evident in *Education Equity*, *Kwiya*, and *A Legacy for Learners*, which struggle with ideas of equality, and in the *Inner City Drop-*

99. Mazurek and Kach, p. 141.

100. Extensive recommendations for programs and policies of this nature are found in such documents as the *Summary Report of the Task Force on the Educational Needs of the Native Peoples of Ontario*; the *Inner City Drop-Out Study*; *Reaching Out*; *Indian Education: Everyone's Concern*; and *Learning: Tradition and Change*.

out Study and *A Five Year Action Plan For Native Curriculum Development*, which spoke of the need to recognize and respect fundamental notions of human dignity.

Responsiveness to developments in multiculturalism and multicultural education was most clearly evident in documents by provincial and territorial governments. Whereas federal and Aboriginal actors were preoccupied with the applicability of governance issues to education, provincial and territorial governments appeared to be more concerned about establishing programs to meet the needs of Aboriginal people and ethnic groups as distinct communities with distinct needs.

> **Observation 3**: The development of discourse on Aboriginal education at the national level and at the provincial level did not always proceed in tandem. The discourse developed in ways that reflected the experiences of each province and territory.

The prominent role of the provinces in the discourse reflects their constitutional authority but complicates attempts to trace the evolution of the discourse from a national perspective. Discourse in each province and territory proceeded at its own pace, influenced in many instances by ideas and events originating within its boundaries. This produced some interesting variations in the development of the discourse.

The prairie provinces produced a multitude of documents during the 1980s. Saskatchewan, in particular, emerged as a forerunner, with 1984 and 1985 being particularly noteworthy for the number of documents published. These were followed closely by documents originating in Alberta. Our collection includes no documents from the government of Manitoba, but Aboriginal education in Manitoba was the subject of documents from the Manitoba Indian Brotherhood.[101]

Documents from the government of New Brunswick did not emerge until the late 1980s and early 1990s. The New Brunswick documents are interesting for their focus on Indian – as opposed to Indian and Métis, or Aboriginal – concerns. Other documents, particularly from the prairie provinces use the term "Native" or, in some cases, "Indian and Metis" to reflect the make-up of their Aboriginal populations. The New Brunswick documents, however, focused on Indian, and more specifically Mi'kmaq and Maliseet concerns, reflecting the composition of their own population.

British Columbia's attention to Aboriginal education also came late by comparison with other provinces. In addition, the documents from British Columbia do not form a comprehensive picture of the state of Aboriginal education in the province, as documents from Alberta and Saskatchewan do.

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101. *Wahbung Our Tomorrows*; *The Shocking Truth About Indians in Textbooks*.

Instead, the collection includes a report on post-secondary education for Aboriginal people and a report on education that deals with all residents of the province, Aboriginal and non-Aboriginal alike.[102]

In the Yukon and Northwest Territories there appears to have been a preoccupation with language and literacy, as seen in *Speaking Out, Voices of the Talking Circle,* and *Report of the Task Force on Aboriginal Languages*. In addition, documents from the territories tended to focus on general education issues, rather than those specific to Aboriginal people; in part this may be because Aboriginal people constitute a large enough portion of the population to special treatment unnecessary and because they have been more involved in territorial political processes.

The other provinces published few documents, if any. Our collection contains no documents from Newfoundland or Prince Edward Island, and Nova Scotia and Ontario are represented by only one document each. Quebec dealt with education issues only indirectly, through the publication of the Departmental Policy on Aboriginal Cultural Development.

Several of the provincial government documents made an effort to build on earlier reports. In Saskatchewan, for instance, *Partners in Action* reviewed progress in implementing recommendations from *A Five Year Action Plan for Native Curriculum Development*, and *Excellence in Aboriginal Education* referred to information presented in *Closing the Gap* and called for implementation of the earlier report's recommendations.

Provincial government documents did not refer to work done in other provinces, however. There was no evidence in the documents, for example, that one province had studied another's efforts and built on its experiences. Instead, the discourse seems to have developed in isolation in each province and territory.

Observation 4: There was a preoccupation in the documents with peaceful coexistence, particularly the ability to achieve peaceful coexistence by institutionalizing co-operation.

This preoccupation was evident in the connections drawn between education and governance and multiculturalism, as participants grappled with issues of Aboriginal/non-Aboriginal relations, as well as in recommendations for increasingly formal and representative structures for interaction.

From a governance perspective, coexistence was portrayed in different ways at different times. The period saw a shift from assimilationist policies to recommendations for integration of Aboriginal students in provincial

102. *Report of the Provincial Advisory Committee on Post-Secondary Education for Native Learners*; *A Legacy for Learners: Summary of Findings.*

system, to emphasis on local control, and finally to the conceptualization of education in the context of the inherent right of self-government.

Similarly, the influence of multiculturalism was evident in the focus on special remedial programs and on concepts of equality and human dignity. All of these efforts were aimed at achieving peaceful coexistence, not in terms of governmental interaction but in terms of mutual respect and recognition of human dignity. This emphasis was reflected in the use of words and phrases such as partnership, building bridges, co-operation, and communication.

We also noted an emphasis in many of the reports on establishing formal structures for interaction between the parties. This can be seen, for instance, in *A Five Year Action Plan for Native Curriculum Development*, which called for two members of the Native Curriculum Review Committee to become members of the program policy committee of the Saskatchewan Department of Education; in *Kwiya*, which recommended establishment of an Indian education commission; and in the recommendation for an urban Aboriginal education advisory council representing the Aboriginal and educational communities in *The Report of the Task Force on Race Relations to the Board of Trustees of Winnipeg School Division No. 1.* These recommendations reflect the desire for a more sustained, institutionalized approach to coexistence.

Observation 5: There was a push toward more meaningful forms of consultation.

There was a push by Aboriginal participants for explicit and genuine negotiations and a preoccupation with processes of policy discussion and consultation. A high value was attached to consultation throughout the period. This was evident in the extensive consultation processes used in preparing many of the reports. Documents such as *Summary Report of the Task Force on the Educational Needs of the Native Peoples of Ontario* and *Breaking Barriers* were particularly sensitive to the need to assure meaningful consultation.

In addition, in one case, Aboriginal groups insisted on a moratorium on policy changes because proposed changes had been the result of a process they considered insincere (see discussion of *A Review of the Post-Secondary Student Assistance Program of the Department of Indian Affairs and Northern Development*). This experience reflects the intensity of the preoccupation with meaningful consultation evident in the documents.

Observation 6: Progress in the discourse on Aboriginal education was jeopardized by an inability to establish common meanings for key concepts.

There were several instances in the discourse when different participants adopted different meanings for key words, including control, local and consultation. This bred frustration among participants and contributed to a failure to achieve meaningful dialogue.

Consider, for instance, the varied meanings of 'local', as opposed to 'Indian' control. *Indian Control of Indian Education* focused on the principle of local control, defined as control by a band:

> The Band itself will determine the relationship which should exist between the Band Council and the School Committee: or more properly, the Band Education Authority. The respective roles of the Band Council and the Education Authority will have to be clearly defined by the Band, with terms of reference to ensure the closest co-operation so that local control can become a reality.[103]

By contrast, *Learning: Tradition and Change*, published by the government of the Northwest Territories, defined local control in terms of devolution to divisional boards; local control might resemble Indian control is many N.W.T. settings, but this would not always be the case, particularly given that there are relatively few reserves in the Northwest Territories. In many communities, 'local' could be defined in ways vastly different from those intended in *Indian Control of Indian Education*. For instance, in the discussion of curriculum development in *Kwiya*, there are indications that 'local' may not be interpreted as 'Indian':

> Indian culture has been incorporated within the definition of local content. It has been blended in with other elements of local learning materials, such as books on placer mining and environmental science. In this context, the concept of 'Indian curriculum' has little relevance to the Indian community.[104]

Tradition and Education was critical of how 'control' had been defined in implementing the policy of Indian control of Indian education, criticizing "the Government of Canada which has consistently defined *Indian control* to mean merely First Nations participation and administration of previously developed federal education programs".[105]

The MacPherson report also recognized that there has been considerable confusion in these areas. In his review of the problems identified by various commentators with the policy of Indian control of Indian education,

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103. *Indian Control of Indian Education*, p. 6.

104. *Kwiya: Towards a New Partnership in Education: Final Report*, pp. 23-24.

105. *Tradition and Education*, p. 13.

MacPherson included problems in defining control and problems with equating Indian control with local control.[106]

We also saw evidence that different ideas of what constitutes consultation stymied policy discussion processes. In the late 1980s and until late 1990, frustration about lack of results was evident in the documents, and this led Aboriginal communities to become increasingly specific about how consultation had to be defined to be meaningful.[107]

These examples illustrate the dangers of imprecision in language, which can threaten the achievement of dialogue. In using words to convey ideas, it is important to ensure common understanding of their meaning.

CONCLUSION

We have traced the evolution of policy discourse on Aboriginal education through selected documents from the post-Hawthorn period. We have extracted what we believe to be the salient observations about who the participants in the discourse were, how they participated, and what ideas they expressed. In addition, we have made some observations that may be helpful in ensuring more effective dialogue in the future. The result is new perspectives on policy discourse that we hope will inform future discourse in ways that are meaningful and that promote genuine dialogue.

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106. MacPherson report, pp. 3-4.

107. See the description of such documents as *A Review of the Post-Secondary Student Assistance Program of the Department of Indian Affairs and Northern Development* and *Breaking Barriers*.

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Chapter 8
Reflections on the Discourse

THIS CHAPTER CONTINUES THE PROCESS OF ASSESSING what we can learn from the past. It builds on the observations in the preceding four chapters and takes into account our understanding of the broader context of the past 40 years and the fundamental ideas on which our analysis is based. The observations in this chapter arise from the documentary evidence and other sources. In some cases, it was necessary to use additional sources to explore or revisit particular events, such as the first ministers conferences of the mid-1980s and the events surrounding the 1969 White Paper. Doing so helps develop our observations about the documents' place in history and their role in informing policy discourse now and in the future.

This chapter is structured around the three questions that guided our exploration in earlier chapters: who was involved in the discourse; how the various participants were engaged; and what was said. The observations that emerge sometimes show remarkable similarities in the evolution of discourse in the four policy areas reviewed. In other cases, important lessons emerge from differences in the way the discourse developed.

WHO PARTICIPATED?

Over the period, the central group of participants in the discourse on Aboriginal affairs become larger. In part, this change may result from the ascent of Aboriginal issues to a prominent position on the public policy agenda.

From the Aboriginal perspective, perhaps the most important development was the emergence of national Aboriginal organizations as central participants, beginning in the early 1980s. Although the National Indian Brotherhood existed at the time the 1969 White Paper was released, the main documents refuting the White Paper and asserting the Indian position (*Citizens Plus* and *Wahbung Our Tomorrows*) were prepared by provincial organizations. Provincial organizations were central participants in advancing land and title issues in this period as well. Particularly in the Yukon and Northwest Territories, organizations such as the Council for Yukon Indians, the Dene Nation and the Committee for Original Peoples Entitlement advanced land claims on behalf of members from many communities in their territory.

One might expect provincial Aboriginal organizations to be active in policy areas such as education and justice, where provinces have a central policy and program role. This would mirror the general pattern of interest

representation traditionally emerging from the Canadian federal system.[1] In the early period covered by our analysis, however, this was only partly supported by the documentary evidence. Indeed, with publication of *Indian Control Over Indian Education* by the National Indian Brotherhood in 1972, we see action at the national level to parallel action by some provincial or territorial Aboriginal organizations.[2] To the extent that there was activity in the discourse on criminal justice in this early period, however, provincial or territorial Aboriginal organizations provided the dominant Aboriginal voice.

The central question is why national organizations representing Aboriginal people were relatively uninvolved in the discourse until the early 1980s. We suggest two explanations. First, the fundamental struggles associated with the patriation process were not yet engaged. These struggles brought the interests of all Aboriginal people, not just people subject to the *Indian Act*, into the national debate, beginning with Prime Minister Trudeau's proposal for patriation in January 1977.

Earlier constitutional struggles over Aboriginal issues had been characterized by struggles between provincial or territorial Aboriginal organizations and the federal government. The patriation process drew in the provinces, however, as provincial governments developed institutions and policies to guide their involvement in constitutional reform. After 1982, section 35 (recognizing the Aboriginal peoples of Canada) reaffirmed the role of Canada-wide organizations, just as the negotiations leading to patriation strengthened their position, by providing funding and regular media coverage. National Aboriginal organizations became prominent, and their provincial counterparts adopted a more issue-specific role, focusing on issues such as education, criminal justice and culture, rather than the broader issues discussed at the constitutional table.[3]

The second explanation relates to the nature of issues prominent in the discourse before the early 1980s. In the context of land and title, this period witnessed Aboriginal groups with particular interests advancing their claims

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1. See Kwavnick, "Interest Group Demands", pp. 69-86.

2. Documents such as *Wahbung Our Tomorrows*, and *The Shocking Truth About Indians in Textbooks* attest to the involvement of provincial organizations. The Federation of Saskatchewan Indian Nations was also heavily involved in Indian education, though this is not reflected in the document collection on which this monograph is based.

3. The participation of provincial or territorial Aboriginal organizations in issues such as education and criminal justice is evident in their involvement in and submissions to provincial committees and task forces as much as in their own reports.

through the courts or under the terms of the 1973 claims policy. These claims were independent of each other (although they sometimes overlapped), despite similarities in the difficulties experienced by claimants in gaining acceptance of claims from the federal Crown or provincial or territorial governments. The preoccupation with launching claims in this early period and the still nascent patriation process may have muted the voice of national Aboriginal organizations in making rights-based arguments concerning land and title.

In the case of education and criminal justice, the nature of the issues may have been a factor in focusing Aboriginal involvement primarily at the provincial or territorial level. The Hawthorn report and other early documents, such as the 1976 Ontario report of the Task Force on the Educational Needs of Native People, *Indians and the Law* (1967), and *Report of the Metis and Non-Status Indian Crime and Justice Commission* (1977), made evident objective facts about the difficulties Aboriginal people were experiencing with the education and criminal justice systems. These issues could sometimes be addressed by provinces and territories without direct reference to the larger questions of Aboriginal rights and treaty entitlements being debated at the federal level.[4]

In addition to changes in the relative prominence of particular participants, we also see changes in the number of groups and organizations engaged in the policy discourse. In the early 1980s, many new organizations representing Aboriginal people emerged on the national stage. In some cases, such as the Assembly of First Nations and the Native Council of Canada, these organizations had existed in the earlier period but now achieved greater prominence. In other cases, however, such as the Metis National Council and the Native Women's Association of Canada, they emerged as substantially reformed or new organizations.[5] The emergence of these organizations in the policy discourse can be linked to the heightened intensity of patriation debates and, in the case of NWAC, to achieving common cause with other national women's organizations, such

4. One notable exception to the absence of national Aboriginal organizations in sectors such as education and criminal justice was the role of the National Indian Brotherhood in the discourse on education in this period. This can be explained largely by the division of powers, which places schools operated on-reserve under the authority of the federal government and makes this aspect of education a national issue. *Indian Control Over Indian Education* focused specifically on the control of education in Indian communities and schools run by the Indian affairs department.

5. NWAC was founded in 1978 and, in part, grew out of a national association, Indian Rights for Indian Women. See Jamieson, p. 127.

as the National Action Committee on the Status of Women, on the issue of rights for Aboriginal women.[6]

Federal funding also played an important role in permitting national organizations to engage in policy discourse. It was central, for instance, to the highly structured first ministers conferences on Aboriginal constitutional matters of the mid-1980s. The FMC process confirmed that the national Aboriginal organizations had a role that would extend beyond patriation and would be, at times, institutionalized. Although it thrust these organizations into the public limelight, they produced few documents during the FMCs that linger in the public consciousness. This is particularly striking when we reflect on the intensity of discussions about Aboriginal rights and governance over the 1984-87 period when the FMCs occurred.

Undoubtedly, there are voluminous unpublished materials in the archives of Aboriginal organizations and the individuals who participated in the FMCs on their behalf. However, the absence of primary documents on rights and governance in our collection from this period illustrates the closed nature of much of the process and the importance of the electronic media in providing a legacy for public consumption.

There are also interesting observations about the role of governments in the last quarter-century. In the period immediately following the Hawthorn report, the federal government was by far the most prominent governmental actor. This stands in stark contrast to the Aboriginal domain, where participants were generally more active at the provincial than at the national level.

The exception was in education, where provincial governments were the dominant governmental participants in the discourse. As noted in Chapter 7, the focus of provincial documents varied considerably, with some concentrating on Aboriginal education, some on multicultural education, and others dealing with Aboriginal education issues through the prism of more general educational reform.

Although the federal government had responsibility for on-reserve education over the entire period, few prominent documents on education and status Indians emerged from that source, with the exception of the Watson report (1971) and the Nielsen task force report (1985). The latter examined Indian education programs and funding of post-secondary education for Aboriginal people as part of a broad mandate for program review. Some of the Nielsen recommendations concerning the post-secondary student assistance program and the capping of funding available through that program in the mid-1980s finally forced the federal

6. Jamieson, p. 129.

government to confront its policy direction in Aboriginal education in 1989.[7] The government responded with cutbacks to funding, arousing public outrage that led in turn to reconsideration of the changes by the Standing Committee on Aboriginal Affairs, which published *A Review of the Post-Secondary Student Assistance Program of the Department of Indian Affairs and Northern Development* (1989). As suggested in Chapter 7, this approach to dealing with a major education policy issue resulted in as much, if not more, emphasis on the need to consult as on pushing through substantive recommendations.

In the case of land and title, governance, and criminal justice policy, it was only in the early 1980s that other governments began to join the federal government in the discourse. An obvious crucial factor bringing this about was patriation and the ensuing first ministers' conferences. Other factors, however, may have expanded the scope and intensity of provincial concerns related to Aboriginal people. By this time, for instance, successive court decisions on land and title and Aboriginal rights more generally made it evident that issues related to land and governance were not going to go away.[8] Many of the initiatives associated with resolving them had a direct provincial interest, particularly the resolution of claims issues that involved the disposition of provincial Crown land.

A third factor that may have prompted provincial activity was the Nielsen task force report. Clearly, the thrust of Nielsen's recommendations was to curtail federal financial commitments and direct federal involvement in programs for Aboriginal people, particularly status Indians. The likely effect of pursuing this course would be an increased burden on provincial (and local) government coffers. This prospect may well have caused provincial governments to devote more attention to the Aboriginal portfolio.

In considering the composition of government participants, it is also important to consider who is representing the government. Do public servants have the same authority to bring about change as cabinet ministers or first ministers? This question has important implications for process. In the sphere of land, for instance, we must answer this question to judge the effectiveness of land claims processes relative to the courts or the constitution in gaining recognition of Aboriginal rights and title. Each process is characterized by a different level and type of government representative, and this may affect the outcome.

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7. See Standing Committee on Aboriginal Affairs, *A Review of the Post-Secondary Student Assistance Program of the Department of Indian Affairs and Northern Development* (June 1989.

8. See Morse, Chapter 3, for a discussion of the court decisions.

A final observation about the composition of policy participants concerns the involvement of non-governmental organizations, task forces and commissions, particularly in the field of criminal justice. The majority of documents in this field came from these two sources. Why might this have occurred?

One explanation might be that criminal justice issues have been seen, until the most recent period, as rooted in specific problems: there are too many Aboriginal people treated unfairly by police, too many in prisons and so on. It therefore makes sense to have task-oriented teams attempt to develop solutions. Perhaps because the issues were seen as problem-based, rather than grounded in political debates about Aboriginal rights, there was a greater use of inquiries, task forces and commissions and a more frequent pattern of involvement by Aboriginal people and other experts or interested parties in their work.

A second contributing factor may be the experience and relative prominence of the legal profession in Aboriginal affairs. The Canadian Bar Association's 1988 *Report on Aboriginal Rights in Canada* was something of a tour de force, as this extra-governmental organization attempted to stake out the high policy ground on a range of Aboriginal rights issues, including justice, land and governance. Its recommendations for separate Aboriginal justice systems extended beyond the terms of reference of many of the other groups established to examine criminal justice. Lawyers and judges have long been on the front line of legal actions undertaken by Aboriginal peoples in defence of their rights – as well as legal action taken against Aboriginal people who break the law.

UNITY OF VOICE

Did Aboriginal people and governments speak to each other in a unified manner, or did fundamental differences in perspective between and among actors became unsurmountable obstacles? Our analysis of the documents makes it clear that there was no pan-Aboriginal voice. Differences in cultural heritage, objective circumstances and past relations with the federal Crown and other non-Aboriginal governments resulted in different starting points for Aboriginal participants and predisposed them to advocate different paths toward a better future. The common foundation was Aboriginal rights. The elements of this common foundation are different, however, for Métis, treaty Indian, non-treaty peoples and for Inuit.

The question that follows from this observation is whether governments recognized and accommodated differences between Aboriginal peoples in their own discourse and policies. Our review suggests that over time this has been increasingly the case. Secondary accounts of the first ministers conferences of the 1980s point to the pressure governments placed on Aboriginal representatives to speak with one voice. It has been suggested

that this insistence contributed to the failure of the process. In more recent years, however, the documents show more explicit recognition of the distinctiveness of Inuit, Indian and Métis peoples. This is particularly true in the federal documents reviewed, although the distinction between Indians and Métis is increasingly explicit in documents from the prairie provinces, as seen, for instance, in the separate, but parallel work of the Saskatchewan Indian and Métis justice review committees in 1992.

One obvious influence on this development was the explicit reference to Indian, Inuit and Métis peoples in section 35 of the *Constitution Act, 1982*. The participation of various national organizations representing Aboriginal peoples in the post-1982 constitutional discussions may also have prompted governments to acknowledge the differences between them in policy documents. Outside the prairie provinces, however, documents from provincial governments tended to use the broader term 'Native' or, more recently, 'Aboriginal'.

THE ISSUE OF REPRESENTATION

Release of the Hawthorn report was followed shortly by another study that dissected Canada's social system and laid bare the predominant pattern of Canadian political life – government by elite accommodation. That study was John Porter's *The Vertical Mosaic*. Since that time, events and ideas have challenged the notion that governing elites have the role of trustee, to act on our behalf and define some broad 'public interest' as they deal with affairs of state. Aside from the turbulence of the 1960s and '70s, discussed in Chapter 2, we have seen the rise of public opinion polling and its role in decision making. The increased prominence of interest group politics, politics as a media event, and pressures for more direct accountability of politicians were also contributing factors.

The question raised by our analysis is the extent to which these processes are evident in the discourse on Aboriginal policy, particularly the extent to which elites representing both Aboriginal and non-Aboriginal constituencies practise elite accommodation. Resolution of this question goes beyond the mandate of this study.

HOW DID DISCOURSE OCCUR? GOVERNMENTS, PROTO-GOVERNMENTS AND INTERGOVERNMENTAL RELATIONS

Perhaps the most basic observation about the process over this the period is that it became more formalized and institutionalized. Several factors likely contributed to this development.

First, we must consider the legacy of the 1969 White Paper. The consultation process leading to the White Paper, along with the fact that the document was the antithesis of the needs and interests expressed by those consulted, taught those involved, particularly chiefs across Canada, that they

must press ever more diligently to make their voices heard. Although few formal mechanisms for interaction were in place in the period immediately following the White paper, pressure for interaction was there.[9]

Three developments in the early 1970s appear to have initiated formalization of interaction. The first was extensive consultations undertaken by public inquiries – Berger, Lysyk and Drury. Their public hearings emphasized informality and accessibility from a procedural perspective, but they also entrenched the requirement of consultation with Aboriginal people by governments and their agents.

Also beginning in the 1970s, many of the inquiries and consultations on education and criminal justice recommended establishment of more formal or permanent consultative structures to implement or monitor improvements or new directions in these fields. The legacy of these recommendations may be particularly important in the relationship between Aboriginal people and provincial governments, since many of the documents, particularly in education, were provincially oriented.

The third factor was the development of sectoral policies setting out formal rules for engagement. Perhaps most notable in the early period was the federal government's 1973 claims policy, which provided for staged and formal negotiations between Canada and Aboriginal groups recognized by the government.

Institutionalization of interaction came into full bloom following patriation of the constitution. The first ministers conferences of the mid-1980s revealed the nature of relations between Aboriginal organizations and Canadian governments as increasingly mirroring Canada's tradition of federal/provincial conferences. Commentaries on the style and substance of the conferences attribute strategy and tactics to all parties involved in a manner analogous to analysis of classic federal/provincial struggles. The funding of Aboriginal organizations during the FMC process and subsequent constitutional discussions enabled them to support a permanent and increasingly recognizable leadership, sometimes occupying centre stage in policy discussions affecting all Canadians. Funding also enabled the hiring of staff and advisers, some of whom played crucial roles in shaping policy debate. The significant distinction between federal/provincial and federal/Aboriginal interaction lies in the constant insistence by Aboriginal organizations that they return to their people to consult on proposed changes in direction.

While processes for the conduct of policy discourse became more formalized and institutionalized, processes resulting in the preparation of

9. One formal mechanism for interaction during this early period was the Joint Cabinet-National Indian Brotherhood Committee referred to in Chapter 4.

documents were also quite varied. We discern three basic processes: consultation, negotiation and inquiry.

To achieve effective consultation, three conditions must be present: information must be transferred; opinions must be sought on the basis that there is a possibility of acting on the advice given; and there must be a willingness to act on the ideas that emerge. Virtually throughout the period, there was considerable emphasis on consultation with Aboriginal constituencies by Aboriginal organizations and governments. Documents produced by Aboriginal organizations generally emphasized the process of consultation associated with preparation of the document and the need to share the final product with Aboriginal people; the Metis National Council's *Metis Nation On the Move* is an example. Perhaps the best known example of extensive consultation from a non-Aboriginal source was the Berger inquiry on the proposed Mackenzie Valley Pipeline. In almost every such document reviewed, however, there was explicit reference to a process of consultation with the Aboriginal constituency affected.

As discussed at points in the discourse on land and title, governance, and education, Aboriginal people were often dismayed by the consultation processes used by non-Aboriginal governments. Criticism focused on three areas: first, government consultations have been cursory and rushed; on occasion, consultation has been a government-initiated exercise requiring Aboriginal organizations to consult with their own constituencies. Second, not everyone affected by the policy under review has been consulted. Finally, documents emerging from government consultations have not reflected Aboriginal perspectives or concerns. The latter criticism is perhaps a legacy of the White Paper, but it was also seen in other documents, such as *A Review of the Post-Secondary Student Assistance Program of the Department of Indian Affairs and Northern Development* (1989). The dissonance between positions advocated in Aboriginal documents and those in government documents in the same policy field provide further evidence.

Discussions of consultation in documents produced by government departments, as compared to reports from commissions or task forces, suggest another interesting aspect of consultation. These documents refer to consultation with Aboriginal constituencies but are generally silent on whether discussion with non-Aboriginal constituencies took place in developing the document. Perhaps government officials considered themselves as representing non-Aboriginal interests. This perspective yields some interesting possibilities in reviewing the discourse in more recent years.

Some progress was arguably achieved on fundamental issues of land and title and governance during the Canada Round of constitutional discussions. Although the discussion was ultimately between designated Aboriginal organizations and Canadian governments, the positions of both

were informed by a variety of public consultations, the like of which had never attended previous constitutional discussions. The involvement of non-Aboriginal and Aboriginal people in these forums, particularly in the FMCs on Aboriginal constitutional matters, suggests a somewhat greater desire to understand and treat seriously Aboriginal paradigms concerning the basis of rights and governance than was reflected in much of government policy. Certainly, the Charlottetown Accord and related documents show significant movement on the part of Canadian governments.

Finally, we see indications of a shift on the part of governments and other non-Aboriginal actors to mirror the Aboriginal approach to consultation more closely. Throughout the period, Aboriginal documents placed considerable emphasis on letting the people speak for themselves. Beginning with the Berger report, but taking on major importance in more recent government reports, there is evidence of greater willingness to accept this as the basis for analysis, rather than rely on 'experts' as interlocutors.[10]

In other instances, documents emerged from negotiation and were intended either to move a negotiation forward or reflect its conclusion. There were three types of negotiation: episodic negotiation, such as that associated with the claims process; institutionalized negotiations occurring within a framework (such as that facilitated by the Indian Commission of Ontario) that is open-ended and includes a measure of equal footing between the three parties; and constitutional negotiations, in which time constraints are imposed on the process.

An obvious question is whether the nature of the negotiating process influences the tone or substance of documents that emerge. This is difficult to assess, in part because extent and nature of the documentary evidence varies and is not always robust. If anything can be said, it is that the Indian Commission of Ontario, as the main example of institutionalized negotiation, has published documents that do show evidence of coming to a considered opinion after weighing the positions of participants. If this represents balanced discourse, then the Indian Commission model may be instructive in other contexts.

Perhaps the most interesting process to consider is the use of inquiries to deal with Aboriginal policy matters. The collection contains numerous reports of royal commissions, commissions of inquiry and task forces. The commissions were all established by governments, while most, but not all, of the task forces received a mandate from a government.

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10. Perhaps the most outstanding recent example of this approach is *Creating Choices: The Report of the Task Force on Federally Sentenced Women* (1991).

Inquiry reports tended to have one of three purposes. Some were mission- or task-driven reports, as was the case with the Nielsen task force report and the reports of many of the education inquiries. Others were the work of an interlocutor – an individual or commission that tried to interpret what Aboriginal and other interested parties were saying about a particular issue and working from that to generate a vision of the future. The Berger, Lysyk and Drury inquiries were examples. No less important were inquiries whose role was fact finding in response to troubling events, perhaps to bring about closure. Two examples were the Marshall inquiry and the Westbank inquiry.

Taken together, the inquiry reports made a major contribution to public understanding of Aboriginal issues and differing perspectives on the future direction of Aboriginal policy, whether in specific contexts, such as how best to deal with urban development pressures on Indian reserves (the Westbank inquiry) or in very broad terms, such as the future course of constitutional development for the Northwest Territories (the Drury report).

One characteristic of many inquiry reports that distinguished them from government documents was direct and extended criticism of public policy and assertive recommendations for the future. These documents were characterized by argumentation, rather than simple assertions about the course of action to be taken. The momentum of the inquiry process and the often stark evidence that inquiries confronted no doubt contributed to this characteristic. The fact that those conducting inquiries would not have responsibility for implementing recommendations could also be an influence, as could the fact that inquiry recommendations are not binding.

In summary, process has evidently become more important to all parties since the Hawthorn report. This has contributed making processes of interaction more formalized and inclusive. The availability of government funding for Aboriginal participation in policy deliberations, particularly since patriation, has been significant. Furthermore, the assertion of voice and recognition of the voices of a wider array of organizations, including those of the Native Women's Association of Canada and the Métis National Council, for example, made the discourse increasingly complex and nuanced.

Another important aspect is that much of the discourse reviewed in this volume has been perceived as Aboriginal groups and governments talking back and forth. Indeed, this characterized much of what occurred. However, there were some examples of consociational efforts to achieve consensus. The distinction between these efforts and the more common approach to government/Aboriginal dialogue is that the parties tried to work together to achieve consensus concerning the best way ahead; this contrasts with situations in which Aboriginal people make representations to government that are accepted or rejected. Documents resulting from the work of

constitutional alliances in the Northwest Territories, from the Indian Commission of Ontario, and the Charlottetown Accord are cases in point.

WHAT WAS SAID: PARADIGMS OF DISCOURSE

The term paradigm has been used in this volume to refer to the dominant pattern of discourse. Thinking in terms of paradigms allowed us to develop models of the substance of discourse in documents produced by various participants and to trace changes in the nature of discourse over time.

In Chapter 3, we outlined four dominant policy paradigms that were prominent in the discourse on Aboriginal policy. Historical accounts of public policy on Aboriginal peoples have tended to characterize the intent of Canadian policies as 'assimilationist' intended to move Aboriginal people into the 'mainstream' of Canadian society. Indeed, many of the developments discussed in Chapter 2 support this.

Taking the Hawthorn report as a baseline, there are interesting contradictions in Hawthorn and in others' interpretations of its intent and effect on subsequent policy, particularly the 1969 White Paper.[11] We see the Hawthorn report as the bridge between two of the dominant paradigms in non-Aboriginal sources over the period. The report has elements of an assimilationist orientation, but it also advances elements of the second dominant paradigm in the discourse, that of Aboriginal people (particularly status Indians) as 'citizens plus'. The elements of this status are embedded in the special relationship between Indian people and the federal Crown. For Hawthorn and others it meant that efforts to pull Aboriginal people into the mainstream of Canadian society should be paralleled by special programs that recognize their unique status. Hawthorn's vision of Indian local self-government, discussed in Chapter 5, exemplifies this approach. Indian communities were to be integrated in the provincial municipal framework but also to have a political structure rooted in the *Indian Act*.

The third dominant paradigm is rights-based. The foundation of rights-based arguments in the context of Aboriginal policy is that Aboriginal people have a right to determine their own destiny and fulfil their obligations to the Creator to tend the land and live in harmony with nature. From an Aboriginal perspective, these rights have various sources, with different traditions placing somewhat different emphasis on the origins of rights. Rights are asserted as flowing from the Creator, from treaties between the Crown and First Nations, from conceptions of Aboriginal peoples in international law,[12] and from the particular laws affecting Aboriginal peoples passed by Canadian legislatures.

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11. See Weaver, pp. 83-89.

12. See Davies, especially pp. 19-24.

A fourth paradigm can also be distinguished. This 'sovereigntist' paradigm arises from the indigenity of Aboriginal peoples and what they see as a nation-to-nation relationship with Canada. This paradigm is seen most prominently in the documents of provincial treaty Indian organizations reviewed in Chapters 4 and 5, which who assert not the rights of First Nations within the Canadian federation, but the inherent status of First Nations as separate 'nations' outside Canada.

Identifying these paradigms helps us assess how the substance of discourse changed over the period. We find two significant trends. First, the dominant paradigms evident in the documents from Aboriginal sources are rights-based and sovereigntist. This carries forward from the very early documents, such as *Wahbung Our Tomorrows* (1971) and *Indian Government* (1977). As noted in Chapter 5, the Indian Association of Alberta's *Citizens Plus* (1970) used the concept of special rights of Indian people as "charter members" of the Canadian community, advanced in Hawthorn as the basis of its arguments against the 1969 White Paper. This paradigm is much less evident in subsequent documents, however, which assert the continued sovereignty or nationhood of Aboriginal peoples and nation-to-nation concepts of the relationship between Canadian governments and Aboriginal peoples.

If the documents from Aboriginal sources have been remarkably consistent, equally remarkable has been the shift in documents emanating from governments and other non-Aboriginal sources from an assimilationist to a 'citizens plus' to a rights-based paradigm. This shift is particularly evident in documents pertaining to governance and criminal justice.

From the mid-1960s to the early '70s, the predominant paradigm in the governance field was assimilation. The assimilationist aspects of Hawthorn's recommendations have already been discussed. The oft-cited archetype of this approach was the White Paper. Similarly, in the criminal justice field, we see the early approach to Aboriginal policing in the *Report of the Task Force on Policing on Reserves* (1973). As discussed in Chapter 6, it indicated a strong preference among RCMP officials for integrating policing on reserves with existing police forces rather than establishing separate forces.

Moving into the 1980s, we see a shift in the non-Aboriginal discourse toward the paradigm of citizens plus. In the governance field, we see provincial governments begin to alter their thinking about the Aboriginal/ Canada relationship in this direction, as illustrated by New Brunswick's *Proposal for a Provincial Policy Framework on Aboriginal Affairs*. In criminal justice, we see a host of documents supporting 'indigenization' of the criminal justice system through special programs to meet the needs of Aboriginal peoples within existing structures.

Finally, in the late 1980s and into the '90s, rights-based language begins to emerge in documents from non-Aboriginal sources. Adoption of this paradigm has been somewhat tenuous, however. The most prominent use of rights-based approaches has been in some of the legislative committee reports attending constitutional discussions, such as the Select Committee on Ontario in Confederation (1992). This has been parallelled by continuing use of the citizens plus concept; a full shift in the dominant paradigm has not yet been achieved.

In terms of rights-based approaches to criminal justice, the most dramatic examples come from outside government. These include the 1988 report of the Canadian Bar Association, *Locking Up Natives in Canada*, and the Law Reform Commission's *Report on Aboriginal Peoples and Criminal Justice: Equality, Respect and the Search for Justice* (1991), which examined criminal justice issues in the light of legal pluralism and the establishment of separate Aboriginal criminal justice systems in the context of recognition of the right of self-government.

There were increasing numbers of references to Aboriginal rights in the discourse of governments over the period, possibly as a result of section 35 of the *Constitution Act, 1982* and the judicial decisions that were shaping policy. Hesitation was also evident, however, in using the concept of rights and sovereigntist paradigms as starting points for policy development. Although governments have been pushed into using the language of rights, their conception of the nature of Aboriginal rights and the policy that resulted have obviously varied.

This observation compels us to distinguish the language of documents from the policy paradigms hidden beneath the language. Language can express or mask the paradigm of a policy participant. We suggested in Chapter 2 that Canadian governments have tended not to make their views about government/Aboriginal relations transparent in policy documents. Our review of the documents did not enable us to identify hidden agendas or motives of any type (nor was it intended to do so), it did permit some observations about the precision of language.

First, the meaning attached to key terms remained undefined or vague, particularly in documents from non-Aboriginal sources. 'Ownership', 'partnership', 'trust' and 'title' are used often and without explanation or definition. Readers do not know whether meanings have been shared when common language has been used. Most often, the documentary evidence does not reveal whether there has been genuine dialogue. We must look to context and events to give us that sense.

Tension is also apparent in the language used to define such concepts as self-government, particularly among non-Aboriginal participants. In Chapter 5 we pointed to an apparent duality in the provinces' rhetoric about

self-government, as it shifted to rights-based language but maintained a 'citizens plus' interpretation.

In other cases, words have continued to be used but meanings have changed. With self-government, for example, there was a shift from applying the term strictly to Indian bands to including governance for other Aboriginal peoples. There has also been a shift from thinking of self-government as delegated responsibilities, much like those of municipal governments, to including other functions, such as health care, education and cultural affirmation. Furthermore, self-government has been defined at various times in terms of control, authority, jurisdiction and increased involvement resulting in a frustrating ambiguity of language.

Among Aboriginal policy participants there are notable differences in the meaning of key terms. Perhaps the starkest contrast is between Inuit and other Aboriginal peoples. Inuit have envisaged exercising self-government by establishing public governments in their traditional territories, where they form the majority of the population. This contrasts with the concepts of citizenship and self-government held by other Aboriginal peoples. It also illustrates the need to be sensitive to such differences in speaking about policy.

Finally, to what extent does the assimilationist paradigm lives on in policy discourse? It is never referred to explicitly, but the objective may be inherent in the nature of policy proposals. Among the documents emerging in the latter half of the period under review, the 1985 Nielsen task force report came closest to this approach. Its support for reduced federal involvement with Aboriginal people and increased provincial involvement has commonly been interpreted as cutting Aboriginal people loose from the arrangements that would exist if a rights-based or citizens plus paradigm guided policy development.

The issue of finance brings us to our final observations about the substance of discourse. It deserves special attention because of concerns about the cost of Aboriginal policy initiatives in the past and arguments about the financial burden associated with resolving outstanding issues in the future. Governments and other non-Aboriginal participants have tended to highlight cost arguments, for example, in discussions about land claims settlements and self-government. Aboriginal people, on the other hand, often argue that governments have avoided their full financial obligations. Difficulties in implementing the James Bay and Northern Quebec Agreement are a case in point.

Most evident in the discourse is that governments have dealt with financial issues exclusively in terms of financial management and accountability. There is no evidence in government documents of any attention to establishing a system of fiscal relations with Aboriginal peoples analogous to fiscal federalism. The emphasis has been on accountability for

public funds by ministers and by Aboriginal governments and organizations that have received government funds.

In Chapter 1 we suggested that the nature of discourse on education and criminal justice was somewhat different from that in the other two areas reviewed. This is also evident when funding issues are considered. In the discourse of education and criminal justice, the early period was characterized by Aboriginal and non-Aboriginal demands for more resources. More recent documents have shown greater emphasis on costing recommendations, and recommendations are made with explicit recognition of financial constraints and realities. Explanations for these distinctions are not clear cut. They may, however, be rooted in the problem-based approach to education and criminal justice alluded to earlier in this chapter. In the case of post-secondary education, the fact that the federal government gave its expenditures a high profile in the context of its push for fiscal restraint may also have been significant.

CONCLUSION

In this chapter we have attempted to draw together some of the common patterns and important variations that emerged from the analysis of policy documents in the four fields reviewed. We have highlighted major changes in the broadening of Aboriginal voice and in the formalization and increasing complexity of the processes associated with policy discourse.

To this point, what we can say about the substance of discourse is more tentative. This is somewhat ironic because we are taught to think of words as tools of communication. In this case, however, words and concepts used commonly often remain obscure in meaning. We can identify various paradigms underlying the discourse, but they do not always come through as clearly as they might in the documents. This is particularly the case as we examine government documents.

Finally, there is the question of whether the discourse of the past quarter-century has constituted soliloquy, dialogue or both. This is the question addressed in Chapter 9.

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Chapter 9
The Path Toward Dialogue

IN THIS CHAPTER WE RETURN TO FUNDAMENTAL CONCEPTS introduced earlier in the book in light of what we now know about the development of the policy discourses on land and title, governance, criminal justice and education. In particular, we consider the extent to which soliloquy and dialogue have characterized policy discussions, with the goal of identifying factors that influence the achievement of dialogue.

THE ACHIEVEMENT OF DIALOGUE

In Chapter 3 we provided a definition of dialogue based on three essential characteristics:

- commensurate participation by all those affected by decisions;
- establishment of a process for sustained discussion that recognizes different starting points and preferences in style of communication and that focuses on problem solving; and
- evolution toward a common vision of what is to be discussed, based on frank exchanges.

Given our analysis in the preceding chapters, we now look at several points in the discourse on land and title, governance, criminal justice and education that illustrate what can be accomplished when dialogue is achieved and, conversely, what can be lost when soliloquy prevails.

We examine three types of situations: instances in which dialogue was realized; instances in which the discourse showed some promise of dialogue but ultimately failed; and instances of soliloquy which held little promise of dialogue. Examples of each of these situations can be drawn from our research.

Dialogue can be achieved when the right policy actors are present, the process is sustained, frank and respectful of differences, and there is a common vision of what is to be discussed. Examples of this situation include the discourse on the Northwest Territories constitutional process (discussed in Chapter 5); the negotiations leading to the Alberta Metis Settlements Accord (Chapters 4 and 5); and the situation described in the 1974 report, *Native Peoples and Justice: Report on the National Conference and the Federal-Provincial Conference on Native Peoples and the Criminal Justice System* (Chapter 6). These instances do not necessarily embody perfect dialogue, but they represent some of the best efforts to date.

Constitutional development in the North and the 1992 document, *Working Towards A Common Future*, are discussed in Chapter 5. The

document was published by the Commission for Constitutional Development, established after nearly two decades of intense constitutional debate in the Northwest Territories, including discussions and consultation through the Nunavut Constitutional Forum and the Western Constitutional Forum. The Commission for Constitutional Development was established to draft a new constitution for the western Northwest Territories after division of the territory in 1999.[1] Members of the commission included individuals nominated by the Inuvialuit Regional Corporation, the Dene Nation, the Metis Nation, the Sahtu Tribal Council, the government of the Northwest Territories, and western members of the territorial Legislative Assembly. According to the report, these individuals "have the trust and confidence of the distinct elements of society in the New Western Territory".[2] The commission chair was chosen by consensus of the political leaders. The inclusion of all interested parties and the consensus decision on the chair largely fulfil the first precondition for dialogue – commensurate participation of all those affected by decisions.[3]

The process initiated by the commission showed elements of frankness and respect for differences in points of view. The report recounts the views expressed by all segments of the population in the new western territory, including First Peoples, francophones, black Canadians, youth, people with disabilities, seniors, organized labour, municipalities, environmentalists, political parties and individuals. Given this diversity, "there were many contradictory views about many issues."[4] The following excerpt reflects the goals of the process and the ultimate objective of achieving a workable and lasting constitution:

> When the constitutional development process is finished, the people of the New Western Territory will know a little better who they are and who their neighbours in this territory are. The people will have said what they think they can reasonably expect from each other and their governments. The members of the Commission for Constitutional Development believe this process will lead to a workable, and lasting, constitution for the New Western Territory.[5]

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1. The constitutional form for the new eastern territory, Nunavut, has already been decided.

2. *Working Towards A Common Future*, p. 1.

3. The federal government chose not to participate in discussions and to await the commission's conclusions.

4. *Working Towards a Common Future*, p. 6.

5. *Working Towards a Common Future*, p. 7.

In outlining the principles for a new constitution, the commission identifies the common values shared by residents of the western territory – values such as the importance of balance with the land, the desire to restore harmony among all peoples in the territory, and respect for distinct cultures, traditions and languages. This reflects an evolution toward a common vision of the fundamental values on which the new constitution must rest and satisfies the third precondition for dialogue.

A second example of dialogue can be found in the process leading to the Alberta Metis Settlements Accord. In Chapters 4 and 5, we discussed the exchange between provincial and Métis participants that led to the accord. The MacEwan Joint Metis-Government Committee set out on the path toward dialogue. It sought commensurate participation by those affected by its decisions. It consisted of equal numbers of representatives from the government of Alberta and the Federation of Metis Settlements and a chair, Dr. Grant MacEwan, approved by both parties. The committee navigated in an environment of mistrust to resolve problems associated with the existing legislative framework provided by the *Metis Betterment Act*.

The process described in the MacEwan report indicates that there was effective communication and that the committee's ideas evolved as a result of dialogue:

> In preparing its Report the Committee was guided by a number of assumptions, or underlying principles, that evolved from its dialogue with the Metis settlement people in the course of its work. These principles provide a framework for approaching the task of revising legislation and developing Government policy. We do not presume to tell the Government what it should do in these areas, but feel that our dialogue has given us a perspective that should be communicated.[6]

This statement reflects openness to the perspectives of the Metis settlement people with whom it consulted and the consequent movement toward common principles. The committee reached consensus that any proposals for a new act should place the major responsibility for the political, social, economic and cultural development of the settlements firmly with the settlements themselves.

The process set in motion by this report led to the Alberta government's *Resolution Concerning an Amendment to the Alberta Act*, which in turn provided the impetus for the 1986 report of the Alberta Federation of Metis Settlements, *"By Means of Conferences and*

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6. *Foundations for the Future of Alberta's Metis Settlements: Report of the MacEwan Joint Committee to Review the Metis Betterment Act and Regulations to the Honourable J.G.J. Koziak, Minister of Municipal Affairs*, p. 59.

Negotiations" We Ensure Our Rights. Through this document, the federation proposed the *Metis Settlements Act* as a compromise between provincial legislative control and more substantial Métis control over the settlements. The federation pointed to the strengths of the approach of "conferences and negotiations" used by the Métis and the government of Alberta – an approach "combining energy, a practical focus and the long-standing commitment to work things out by negotiation". As a result, "the history of their travel together can be a shining example to Aboriginal people, federal, provincial and territorial governments across Canada."[7] The result was the *Alberta-Metis Settlements Accord*, published in 1990 and signed by the province and by representatives of Métis settlements. From the documentary record, then, it appears that dialogue was realized. The parties achieved this by according equal status to both parties, by engaging in frank and open discussions and negotiations, and by reaching consensus on the need for the settlements to have greater responsibility over their own affairs.

A final example of dialogue is reflected in the 1975 document, *Native Peoples and Justice: Report on the National Conference and the Federal-Provincial Conference on Native Peoples and the Criminal Justice System*, discussed in Chapter 6. We see evidence in this document of all three criteria for dialogue. Representation at the National Conference on Native Peoples and the Criminal Justice System included federal and provincial government representatives – both officials and ministers, and Aboriginal participants representing Indian people, both status and non-status, Métis, Inuit, women, and criminal justice agencies working with Aboriginal people. There were high expectations and a focus on understanding and solving common problems. This was evident in a statement by Warren Allmand, then Solicitor General of Canada:

> Our expectation of this conference are high, and so they should be. The right people are here. We share a determination to gain a better understanding of the problems we have and to move towards their solution.[8]

A process for sustained work was also established. Ministers decided that a tripartite Canadian Advisory Council on Native Peoples and the Criminal Justice System would be created to ensure that actions agreed on at the conferences would be followed up. The success of the conferences is evident not only in the establishment of the council but also in the many

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7. *"By Means of Conferences and Negotiations" We Ensure Our Rights: Background and Principles for New Legislation Linking Metis Aboriginal Rights to "A Resolution Concerning an Amendment to the Alberta Act"*, p. 74.

8. *Native Peoples and Justice: Report on the National Conference and the Federal-Provincial Conference on Native Peoples and the Criminal Justice System*, p. 3.

programs for Aboriginal people in the criminal justice system that followed, including court workers and special constables.

There were also instances in the discourse where the prospects for dialogue looked promising but were undermined by failure to meet one of the preconditions. Examples include the discourse on establishing the British Columbia Treaty Commission, the operation of the Berger inquiry, and the response to the Assembly of First Nations report, *Tradition and Education* in the MacPherson report.

In the *Report of the British Columbia Claims Task Force* we learn that the policy actors with an interest in the outcome participated in an equitable fashion, and the process for claims resolution recommended by the task force was supported by all parties. The dialogue was undermined, however, by failure to achieve a common vision of what was to be discussed and negotiated.

The task force consisted of three members appointed by First Nations leaders and two members each representing the federal and provincial governments. It argued that land claims issues in British Columbia must be settled through voluntary negotiations in which First Nations, Canada, and British Columbia were engaged as equal participants and in which parties could bring to the negotiations any issues they deemed important in establishing a new relationship.

The federal government's response to the task force report, *Building a New Relationship with First Nations in British Columbia*, accepted all the task force's recommendations. But some of the nuances of the response undermined the achievement of dialogue. The task force recommended that any significant issue be discussed at the negotiation table, but the response in *Building a New Relationship* was that only issues covered by the federal comprehensive claims and self-government policies would be available for negotiation. Thus, while all the policy actors accepted the process outlined in the task force report, participants failed to achieve a common vision of what issues could be discussed and what claims could be facilitated by the British Columbia Treaty Commission.

The Berger report, *Northern Frontier, Northern Homeland* (1977), presents an interesting and complex case. The inquiry involved extensive consultation with organizations and individuals and provided financial support for research and the preparation of submissions. It held community hearings that enabled northerners to contribute more easily and focused on solving a particular problem. Mr. Justice Berger's overall recommendation was to delay pipeline development for ten years until Aboriginal land claims were settled. Further, Berger's analysis of the northern economy and his approach to public consultation have been influential at both the federal and territorial levels. Despite concerns and opposition raised by the inquiry,

however, the United States and Canada signed an agreement to build the pipeline.

Thus, despite commensurate participation and effective communication between Berger and interveners at the hearings, the federal government (to which Berger's recommendations were addressed) did not adopt a common vision with those who contributed to the inquiry and subsequent report. Economic pressure to exploit northern resources prompted the government to act in a way that favoured pipeline development over the settlement of land claims.

In the sphere of education, the publication of *Tradition and Education* by the Assembly of First Nations in 1988 also showed some promise of beginning a dialogue. The report was the culmination of a four-year effort, funded by the federal government and involving extensive grassroots consultation, to articulate the AFN's position on education. The central theme of the report was recognition of Indian self-government and Indian jurisdiction over Indian education, preferably by constitutional amendment but failing that, through federal legislation.

It could be argued that the federal government's commitment to resolving problems of Indian education was evident in its funding for the project. In fact the *MacPherson Report on Tradition and Education: Towards a Vision for Our Future* noted DIAND's commitment to consider the document seriously in a timely manner. What undermined dialogue was a fundamental mismatch in the visions of self-government and Indian jurisdiction held by the AFN and the federal government. These concepts were accepted in the MacPherson report, but the report's treatment of them showed a fundamental lack of understanding of the AFN position:

> Native self-government should not be a scary concept for Canadian governments. If governments for decades have permitted, by legislation, professions like lawyers and doctors to be 'self-governing' and have allowed them real independence in the governance of their affairs...then it should not be much of a leap of imagination for Canadian governments to accept, and genuinely implement, the concept of native self-government in Canada. We should not allow our preoccupation with the place of Quebec in Canada or our political and legal thinking rooted in the concept and definition of federalism to lead us to the facile, but wrong conclusion that self-government means independence or self-determination. Self-government does not mean these things. What it

means is native jurisdiction and control over and responsibility for the matters that affect the lives of Canadian natives.[9]

The comparison of "native self-government" to the self-governing professions and the report's definition of self-government offer definitive evidence of the absence of a common vision of what was to be discussed. It should be also noted that MacPherson did not purport to speak on behalf of the federal government. The fact that the response to *Tradition and Education* was prepared by a third party with no ability to act or determine policy played a role in undermining the dialogue.

Finally, there have been instances of no movement at all toward dialogue. Policy participants have talked to themselves; no one else was listening. This situation characterizes the post-White Paper sequence of documents, particularly *Citizens Plus* (1970), *Wahbung Our Tomorrows* (1971), and *Indian Government* (1977). These documents present ideas that have never elicited a direct response from government. They put forth a common vision of Indian government based on principles of local control, restructured treaties, and respect for the trust relationship. The federal government did not engage in this discourse. As a result, all those affected by the discourse did not participate, there was no structured process for sustained discussion, and no common vision emerged.

Lack of government commitment and participation in the discourse, narrowly defined processes for interaction, and misunderstanding of key concepts can frustrate fulfilment of the preconditions for dialogue, with negative consequences for policy. The obstacles to dialogue are more complex, however, as many factors affect the possibility of dialogue. Based on this research, we now offer some observations about the complexity of these factors. Some of the observations are didactic – intended to provide a sense of the underlying conditions that must be in place before participation, meaningful discussion and a common vision can be achieved. These observations concern the distribution of power, institutionalization of processes and the impact on representation, the importance of timing, the evolution of concepts and paradigms, and the influence of the courts on the achievement of dialogue.

POWER RELATIONSHIPS

The fundamental power relationships in society may undermine efforts to achieve dialogue. First, in terms of the prevailing public philosophy, we must ask who can and cannot foster dialogue. The federal government is still the dominant power in the government/Aboriginal relationship. What

9. *MacPherson Report on Tradition and Education: Towards a Vision of our Future*, p. 42.

means do Aboriginal peoples have to initiate dialogue that would compel governments to participate? The controlling party can choose who participates, how they participate, and what options are available. This is particularly evident in the claims process discussed in Chapter 4. Aboriginal groups are left to react to and cope with this process, recommend changes that the government is in no way compelled to consider, and if time and money permit, seek redress through the courts.

The power relationship also dictates funding. We have seen several instances where government funding to Aboriginal groups determined what issues were researched and became priorities. Money given to the Assembly of First Nations, for instance, for its research leading to *Tradition and Education*, sponsored one of the few major projects undertaken by Aboriginal groups in the mid-1980s. Other Aboriginal resources, it could be suggested, were diverted into the first ministers conferences on Aboriginal constitutional matters held during this period. During the constitutional negotiations of the late 1980s, it was the national Aboriginal organizations that received funding to prepare their constitutional positions, leaving provincial organizations with less to do and few independent opportunities for research, travel and consultation. Patterns of funding clearly have a major impact on the ebb and flow of dialogue.

Finally, the power relationship has important repercussions for policy implementation. Consensus reached as a result of a dialogue would be lost if the dominant actor chose to delay action or to implement only certain aspects of an agreement. The only recourse available to Aboriginal groups in this situation, aside from civil disobedience, is the courts. In Chapter 4 we looked at why the courts, though effective at times, are not an ideal means of redress.

INSTITUTIONAL AND STRUCTURAL RELATIONSHIPS

The institutional and structural relationship in which discourse is situated also affects the achievement of conditions for dialogue. In Chapter 8 we discussed the trend toward institutionalization of processes for interaction. The resulting structures – for example the British Columbia Treaty Commission, first ministers conferences, the Indian Commission of Ontario – led to the expansion and formalization of Aboriginal organizations and the promise of discussing issues of mutual concern in forums that allow for equitable participation by Aboriginal groups.

Institutionalization of the process has affected the realization of dialogue. While institutionalization has created opportunities for participation, it has also meant that Aboriginal people have often had to respond very quickly to opportunities for dialogue. At times, these opportunities have also channelled and limited the terms of discourse. This is the situation, for instance, with the claims process, which limits the

claims acceptable for negotiation and limits negotiation to certain issues. Finally, establishment of these structures has generated problems of representation; when only one Aboriginal voice (or two or three) is allowed during tripartite negotiations, who has the authority to represent that constituency? This issue appears repeatedly in the documents, for example, as some questioned the ability of the Native Council of Canada to represent their interests in the early 1980s, as the majority of Indian people voted against the AFN-endorsed Charlottetown Accord, and as evidence emerges that many Canadians support the positions of Aboriginal people rather than those of the federal government, which purports to represent the interests of all Canadians.

THE TIMES AND TIMING

In Chapters 4 through 7, we remarked on the fact that preparation of many of the documents in the collection was rushed and that they expressed a sense of urgency about change. Given these pressures and calls for urgent action, it is surprising how little has changed. Older documents, such as *Wahbung Our Tomorrows* are curiously contemporary.

Iterative processes seem most likely to produce change. This is evident, for example, in the failure of the first ministers conference on Aboriginal constitutional matters and the White Paper and the success of the Nunavut Constitutional Forum and the Alberta Metis Settlements Accord. In these instances, iteration – as opposed to negotiations from hard and fast positions – appears to have produced more positive results.

A major source of the problem appears to be dissonance between the need for Aboriginal leaders to consult effectively with their constituencies and the speed with which windows in the policy process open and close. Aboriginal communities are diverse in their approaches to decision making and in their positions on issues. Abrupt consultations do not permit reflection and resolution of these differences, nor do they promote greater understanding.

Timing was a prominent concern in much of the discourse, particularly that on criminal justice. We saw in Chapter 7 that most reports in this field were written in response to highly publicized events involving Aboriginal people and police, courts and correction systems. The wrongful conviction of Donald Marshall, Jr. resulted in two royal commissions; the deaths of Helen Betty Osborne and J.J. Harper prompted a province-wide inquiry; and a series of suicides by Aboriginal women at the Prison for Women resulted in intense efforts to deal with the disadvantaged circumstances of federally sentenced Aboriginal women. These incidents created a sense of outrage among Canadians and resulted in an explosion of activity.

The sense of urgency stems from the reactive nature of the discourse. A tragedy occurs; people demand action. In other areas, such as education,

where the discourse was propelled by more general statistics, the sense of urgency was not as great; as a result, the windows on the policy process remained open longer, allowing more sustained discussion. The discourse displayed slow and steady movement in the context of good will and harmony between Aboriginal and non-Aboriginal participants. Such progress may be lost at times in areas that rely on outrage to promote action.

CONCEPTUAL PROGRESSION

The popularity of certain concepts and terms used in the discourse raises interesting questions. The words that are capable of being interpreted differently by different people appear to have been most resilient. Concepts such as partnership, self-government, and Aboriginal rights have been used consistently in different periods, by different people talking about different issues. It seems clear that the words really do mean different things to different people. At various points in the discourse, self-government was described in terms of increased control, transfer of jurisdiction, and constitutional recognition of the inherent right. It was compared to the authority of municipal governments, sovereign nations, and self-governing professions.

Concepts that are less ambiguous, such as sovereignty and extinguishment, appear less consistently over the course of the discourse. Sovereignty is used often by Aboriginal people to describe their situation but it is used rarely by governments. Sovereignty is, of course, *sine qua non* of effective statehood and is a loaded term because of Canada/Quebec relations. This lends credence to the argument that in the evolution of the policy discourse on Aboriginal issues, certain terms have been popular because they can be interpreted in different ways. These terms may not, however, contribute to achieving dialogue.

PARADIGMS

This discussion of multiple meanings raises the role of paradigms in fostering or thwarting dialogue. Different paradigms allow words to be interpreted in different ways. Canadian governments and Aboriginal policy participants have adopted different paradigms. Before publication of the Hawthorn report, Canadian governments generally used an assimilationist paradigm. This changed after Hawthorn, and the citizens plus paradigm gained prominence as governments struggled to introduce programs that acknowledged the distinctiveness of Aboriginal peoples within Canadian governing structures. Finally, governments have also used a rights-based approach at times, supporting, for instance, the right of self-government. As articulated by governments, however, these notions have been interpreted

conservatively. By contrast, Aboriginal participants have consistently used a right-based or a sovereigntist paradigm.

Problems arise, however, when two key policy participants talk about different things using the same words. This dissonance frustrates efforts to achieve a common vision and ultimately undermines dialogue.

THE ROLE OF THE COURTS

Depending on the circumstances, the courts can move the discourse toward dialogue or steer in the opposite direction. In the sphere of land and title, for instance, the courts have played a catalytic role in bringing the parties together. In other cases, however, an adverse precedent may set discourse back. Either way, court decisions appear to be among the few factors that prompt government action, however incremental it may be. Thus, the courts may have an important role in determining government action.

The pitfalls of relying on legal processes are well documented, in this volume and elsewhere. If we consider the three preconditions for dialogue, it is apparent that courts, by their nature, preclude commensurate participation; the fact that participants need copious amounts of time and money favours governments at the expense of Aboriginal claimants. In terms of process, courts recognize neither different starting points nor diverse styles of communication. Instead, there is one starting point – legal precedent; one form of communication – confrontation; and one form of language. Finally, there are no frank exchanges based on respect for difference. On the contrary, both sides try to present the other's position in the worst possible light. Thus, if court action is the only way to induce government action, dialogue seems bound to elude participants.

CONCLUSION

In Chapter 1, we remarked that the challenge for the future is to move from soliloquy to dialogue. In this final chapter, we have highlighted cases in which this movement has occurred and cases where it has not. We looked at the factors and situations that undermine dialogue – the power structures governing our society and the institutionalization of processes for interaction, as well as timing, language, choice of paradigms, and the courts. Perhaps the lessons of the quarter-century since the Hawthorn report will not fall on deaf ears, and participants in the policy discourse will reject soliloquy and move instead toward dialogue.

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period. In these years, the constitutional and land claims processes developed simultaneously; changes in claims policies, set out in *In All Fairness* and *Outstanding Business*, coincided with Prime Minister Trudeau's efforts to patriate the constitution in the late 1970s and early '80s.

The constitutional status of Aboriginal peoples' rights was uncertain, as they were first ignored, then included, then removed, and finally restored to the constitutional patriation package in late November 1981. This uncertainty, together with the threat or promise implicit in the constitutional process, led many Aboriginal organizations to focus on influencing the outcome. A number of documents appeared during the negotiations, designed to explain, define, protect and defend Aboriginal rights.

The concerns of Aboriginal peoples regarding patriation were reflected in several documents. The Union of British Columbia Indian Chiefs argued in a 1980 position paper, *Indian Nations: Self-Determination or Termination*, against patriation on the grounds that severing the British trust relationship would mean the end of Aboriginal rights, loss of their lands and resources, and assimilation of Indian people into Canadian society.

Shortly thereafter, the Metis and Non-Status Indian Constitutional Review Commission of the Native Council of Canada (NCC) produced *Native People and the Constitution of Canada* (1981). Although more temperate in tone, the underlying unease with which Aboriginal groups contemplated the consequences of patriation was clear:

> We can truly empathize with the Metis who expressed alarm over the process of patriation and amendment. If the government of Canada could do what it did when it lacked the authority to amend the constitution, they say, think of what it could do when it gains the authority to amend the constitution.[78]

The report was prepared using core funding provided to the NCC by the federal government. The commission sought the views of Métis and non-status Indian people, as well as those of non-Aboriginal academics and political leaders, on the effects of patriation. The purpose was to use the findings to inform participants in the constitutional process.

The commission returned to fundamental principles and positions concerning Aboriginal rights and the relationship of Aboriginal peoples with Canadian society. It saw Aboriginal rights as "the collective rights which Native peoples possessed before the coming of the Europeans to North American soil. They include the right to land, its resources, language, culture and political self-determination". Perhaps the most fundamental recognition of these rights is recognition of Aboriginal title to the land:

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78. *Native People and the Constitution of Canada*, p. 66.

> Aboriginal title is based on the occupancy and use of the land and its resources by Native peoples since time immemorial. It is a heritage and a right, passed from one generation to the next.[79]

Views were varied on the question of Aboriginal rights to land and use of its resources. The report noted that the Inuit Tapirisat of Canada had called for exchanging Aboriginal rights based on land use and occupancy for new legal rights related to Inuit lands, traditions and customs. Métis and non-status Indians speaking at meetings and conferences held by the commission stated that their rights to land and resources should be entrenched through partnership arrangements with resource corporations and governments and guaranteed representation on boards and agencies that control resource development and management. The Commission situated these views in the context of Aboriginal title, asserting that "historical and legal evidence confirms the applicability of aboriginal title to Metis and Non-Status Indians."[80]

The report then focuses on some of the underlying principles of land claims and how they relate to the lives of Métis and non-status Indian people, including the link between land claims agreements and economic development, natural resources and the recognition of Aboriginal rights:

> The architects of land claims agreements in Canada purport to promote non-renewable resource development while protecting Native lifestyles at the same time. Through the agreements Native peoples are expected to extinguish aboriginal title to the land in exchange for cash, some land and hunting, fishing and trapping rights. Native peoples take a different view; they insist that in any settlement their rights should be recognized, not extinguished.[81]

The commission drew from previous agreements and claims proposals, citing *Our Land, Our Culture, Our Future*, the 1977 proposal of the Metis Association of the Northwest Territories, as the "most developed" of the proposals. The commission also noted "deep-seated opposition" to the two land claims agreement precedents — the James Bay and Northern Quebec Agreement and the Committee for Original Peoples Entitlement agreement in principle in the western Arctic — based on the fact that both agreements

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79. *Native People and the Constitution of Canada*, pp. 17, 18.

80. *Native People and the Constitution of Canada*, p. 18. In support of this position, the document cites the Half-Breed Adhesion to Treaty No. 3 in Ontario, dealt with in the *St. Catherine's Milling* case of 1889; the James Bay and Northern Quebec Agreement, which included non-status Indians and Inuit; the Yukon claims, which include Métis and non-status Indians; and the *Manitoba Act* of 1870 and subsequent federal legislation, which recognize Métis rights to land.

81. *Native People and the Constitution of Canada*, p. 80.

were premised on extinguishing Aboriginal title in exchange for compensation and both effectively excluded Aboriginal peoples from sharing the benefits of resource development.

The report urged the federal government to eliminate the distinction between comprehensive and specific claims and to expedite the resolution of Métis and non-status Indian claims.[82] The wide range of the inquiry forced it to examine all available mechanisms for achieving their goals:

> We agree wholeheartedly with those who insisted that the new constitution cannot be just if it is built on gross injustice. Therefore, we believe that the resolution of the Metis and other Native claims should proceed in tandem with the constitutional discussions affecting aboriginal rights.[83]

The commission noted problems, however, with the claims process as a means to this end, pointing to international examples of bodies and tribunals established and used effectively to resolve land claims:

> It is most important that a new body be created for the settlement of Native claims, a body which is familiar with the issues and is divested of the racial and cultural biases of the precedents that have already been established. Other countries have created special tribunals to deal with the land claims of indigenous peoples. In New Zealand there is a Maori Land Court and there are also special tribunals in Papua, New Guinea, Fiji and in Northern Australia.[84]

The commission recommended that a Court of Aboriginal Claims be established as a permanent division of the Federal Court of Canada. Appointments would be by the governor in council on the recommendation of Aboriginal peoples.

The Metis and Non-Status Indian Constitutional Review Commission operated in a context of important constitutional processes. At this time, Aboriginal peoples were represented at the federal level by the National Indian Brotherhood (later the Assembly of First Nations), the Native Council of Canada, and the Inuit Tapirisat of Canada and as such were funded by the federal government. While the commission held its consultations, all three national Aboriginal organizations were lobbying at Westminster to persuade the British Parliament to reject patriation unless it contained adequate provisions on Aboriginal rights.

Constitutional entrenchment of Aboriginal rights was finally secured in January 1981, but at a first ministers meeting in November of that year, the

82. *Native People and the Constitution of Canada*, p. 82.

83. *Native People and the Constitution of Canada*, p. 66.

84. *Native People and the Constitution of Canada*, p. 67.