The Power of a Single Feather: Meech Lake, Indigenous Resistance and the Evolution of Indigenous Politics in Canada

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The summer of 1990 was a pivotal moment for Indigenous peoples in Canada. That summer, Indigenous peoples expressed their resistance to colonialism through their key role in the defeat of the Meech Lake Accord and through direct action at Oka, Quebec. The effects of these events were felt in the inclusion of Indigenous organizations in the negotiation of the Charlottetown Accord, the recognition of the inherent right to self-government, the establishment of the Royal Commission on Aboriginal Peoples, and the regular inclusion of representatives of national Indigenous organizations in meetings with premiers and first ministers today. As the memory of that period faded in the public consciousness, so too did the momentum to address Indigenous aspirations for greater inclusion in the structure of the federation. This article explores how the Meech Lake Accord provided a trigger for a wave of Indigenous resistance to the colonialism of Canadian constitutional politics and the implications of that resistance for national politics and Aboriginal policy. It also explores how the momentum of that period faded and raises the question of what could lead to a renewal of the momentum that existed in the aftermath of the summer of 1990.

L'été 1990 fut un moment central pour les Autochtones du Canada. Cet été-là, le peuple autochtone a manifesté sa résistance au colonialisme par le biais du rôle clé qu'il a joué dans l'échec de l'Accord du lac Meech et son action directe à Oka (Québec). Les effets de ces événements se sont fait sentir dans l'inclusion d'organisations autochtones lors des négociations entourant l'Accord de Charlottetown, la reconnaissance du droit inhérent à l'autonomie gouvernementale, la création de la Commission royale sur les peuples autochtones ainsi que l'inclusion régulière de représentants d'organisations autochtones nationales aux rencontres des premiers ministres. Cependant, au fur et à mesure que le souvenir de cette période s'effaça de la conscience publique, l'élan à aborder les aspirations autochtones à une meilleure inclusion dans la structure de la fédération s'effaça également. L'auteur examinera la façon dont l'Accord du lac Meech a déclenché une vague de résistance autochtone au colonialisme de la politique constitutionnelle canadienne ainsi que les implications de cette résistance pour la politique nationale et autochtone. L'auteur examinera également comment le dynamisme de cette période s'est effacé et soulèvera la question suivante : qu'est-ce qui pourrait mener à un regain du dynamisme qui existait à la suite de l'été 1990?

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Introduction

Indigenous peoples had no formal role in the negotiation of the Meech Lake Accord, and yet they played an important role in determining its fate. One of the iconic images of the national debate on the Meech Lake Accord, and its eventual defeat, is that of Manitoba MLA Elijah Harper, a member of the Red Sucker Lake First Nation, standing in the Manitoba Legislative Assembly with a single feather in his hand, refusing consent to hold a vote on a resolution to ratify the Meech Lake Accord.

Although it occurred after the deadline for ratification of the Meech Lake Accord had passed, another key event of that summer of 1990 involving Indigenous resistance to colonialism also had a profound effect on Canadian politics in the 1990s. The blockade and armed standoff between Mohawks of Kanesatake and, first, the Sûreté du Québec and, later, the Canadian Forces at Oka, Quebec, also produced its share of iconic images and put Indigenous claims squarely in the eye of the Canadian public. When combined with Elijah Harper's resistance to the passage of the Meech Lake Accord and the high-profile activism of other Indigenous leaders, the events at Kanesatake placed Indigenous issues directly onto Canada's constitutional agenda. As Olive Dickason stated, "The First Nations' rising profile in the Canadian scene today has transformed national politics in some unexpected ways."[1]

Just as Indigenous resistance to colonialism and, specifically, their exclusion from the process of reforming the Canadian constitution changed constitutional politics, the period of the Meech Lake Accord and its immediate aftermath altered the place of Indigenous peoples in the federation. Indigenous advocacy in Canada was by no means new. Elijah Harper's action, the effective advocacy of George Erasmus, Ovide Mercredi, Matthew Coon-Come, Phil Fontaine, Zebedee Nungak and other Indigenous leaders who participated in the public debate over the Meech Lake Accord, and the events at Oka helped raise the profile of Indigenous leaders and increased the political salience of Indigenous issues, such as the settlement of outstanding land claims and self-government. As Deborah Simmons commented, "The military confrontation at Oka, along with the crucial intervention of Aboriginal people in the ill-fated Meech Lake constitutional debates, arguably marks a turning point in the struggle for Aboriginal self-determination in Canada."[2] The implications

1 Olive Patricia Dickason, "Canadian Aboriginal Saga: A People and a Dream" (2003) 33 Am Rev Can Stud 261 at 261.

2 Deborah Simmons, "After Chiapas: Aboriginal Land and Resistance in the New North America" (1999) 19 Can J Native Stud 119 at 120-1.

of Indigenous resistance were subsequently felt in the inclusion of Indigenous organizations in the negotiation of the 1992 Charlottetown Accord, its recognition of the inherent right to self-government, the establishment of the Royal Commission on Aboriginal Peoples, the federal government's Inherent Right Policy, and the regular inclusion of representatives of national Indigenous organizations in meetings with premiers and first ministers today.

Thus, the summer of 1990 was a pivotal moment for Aboriginal peoples in Canada, as important in its own way as 1969, when Indigenous resistance led to the shelving of the federal government's White Paper, *The Statement of the Government of Canada on Indian Policy* (Indian Affairs and Northern Development, 1969),[3] 1973, when the Supreme Court of Canada decided the *Calder* case,[4] 1977, when the *Report of the Mackenzie Valley Pipeline Inquiry* gave voice to Indigenous peoples' concerns over natural gas development,[5] and 1982, when Aboriginal and treaty rights were recognized in the text of the Constitution of Canada.[6] As Jeffrey Simpson observed in 1991, "No matter how Canada evolves in the years ahead, the grievances of aboriginal Canadians and their demands for quasi-autonomous status within Canada have now been placed squarely on the agenda."[7] As the memory of that period faded in the public consciousness, so did the momentum among governments and the public to address Indigenous issues and aspirations for greater inclusion as equals in the structure of our constitution and in our politics. This article explores how the Meech Lake Accord provided a trigger for a wave of Indigenous resistance to the colonialism of Canadian constitutional politics in the late 1980s and the implications of that resistance for national politics and Aboriginal policy. It also explores why the momentum of that period has subsequently faded and raises the question of what circumstances could lead to a renewal of the momentum to address Indigenous issues in Canadian politics that existed in the aftermath of the Meech Lake Accord.

3 Indian Affairs and Northern Development, *The Statement of the Government of Canada on Indian Policy* (Ottawa: Queen's Printer, 1969).

4 *Calder v Attorney General of British Columbia*, [1973] SCR 313, 34 DLR (3d) 145.

5 *Northern Frontier, Northern Homeland: The Report of the Mackenzie Valley Pipeline Inquiry* (Ottawa: Minister of Supply and Services Canada, 1977) ch 11.

6 The words "Aboriginal", "Indigenous", and "Indian" all appear in this article and refer to Indigenous peoples in Canada. As the *Constitution Act, 1982* uses the term "Aboriginal", and as it is the term more commonly used in government documents in Canada, I use the term "Aboriginal" where I refer to Canadian constitutional provisions and the rights of Indigenous peoples in Canada. Where I specifically refer to a class of Indigenous persons created by the *Indian Act*, I use the term "Indian". In other circumstances, I use the more current term "Indigenous".

7 Jeffrey Simpson, "The Two Canadas" (1991) 81 Foreign Policy 71 at 81.

Hopes Raised, then Dashed: 1982 to 1987

To understand the intensity of Indigenous resistance to the Meech Lake Accord, one must look to the advances made by Indigenous peoples in the constitutional amendments of 1982.[8] Along with the inclusion of section 35, which recognizes the existing Aboriginal and treaty rights of the Indigenous peoples of Canada, the *Constitution Act, 1982* also made provision for a constitutional conference of first ministers that would include constitutional matters that directly affected the Indigenous peoples of Canada within a year of it coming into force of the new Act.[9] The section that provided for that conference, section 37, also provided that representatives of the Indigenous peoples of Canada were to be invited to participate in the discussion of Indigenous issues at the conference.

The Canadian government held the required constitutional conference in March 1983, and one of the chief outcomes of this meeting was agreement to a number of constitutional amendments establishing new processes to address Indigenous constitutional issues. These amendments, which formed the *Constitution Amendment Proclamation, 1983*, contained two key commitments to Indigenous peoples: a commitment to at least two additional constitutional conferences that had agenda items covering the issues that directly affected the Indigenous peoples of Canada and that included representatives of Indigenous peoples as participants in these discussions;[10] and a commitment in principle to holding a constitutional conference, with the participation of representatives of the Indigenous peoples of Canada, before the federal government made any future amendments to any provisions of the constitution that specifically mentioned Indigenous peoples.[11] In all, there were three additional constitutional conferences on Indigenous issues—March 1984, April 1985, and March 1987.

8 Of course, the history of Indigenous-Crown relations did not start in 1982. The Crown and Indigenous peoples had negotiated treaties to define their relationship as early as the 17th century, with the last of the numbered treaties in Western Canada being concluded in 1921. In addition, there were several occasions on which Indigenous peoples engaged in significant political activism in Canada in the 1960s and 1970s, as noted above. Nonetheless, the amendments to the constitution made in 1982 to recognize Aboriginal and treaty rights can be considered a watershed moment, as it was the first time that the existence of the rights of Indigenous peoples in Canada were explicitly recognized in the constitution.

9 *Constitution Act, 1982*, s 37, being Schedule B to the *Canada Act 1982* (UK), 1982 c 11 [*Constitution Act, 1982*].

10 *Ibid*, s 37.1.

11 *Ibid*, s 35.1. It is also important to note that the *Constitution Amendment Proclamation, 1983, SI/84-102*, added a new subsection to s 35, subsection (4), which guaranteed the Aboriginal and treaty rights, recognized and affirmed equally to male and female persons.

This degree of access for Indigenous peoples to the pinnacle of Canada's mechanisms of intergovernmental relations was unprecedented. Though the three additional conferences achieved no substantive progress on Indigenous constitutional issues, much to the disappointment of national Indigenous leaders, they did encourage the four national Aboriginal organizations to coalesce and define their objectives publicly.[12] More importantly, they added legitimacy to the Indigenous organizations and their goals, as Canadians, whose image of Indigenous people was more likely to be formed by movie and television representations of "Indians" than any interaction with modern Indigenous leaders, saw Indigenous leaders articulating their people's concerns and aspirations eloquently and intelligently within the norms of political discourse.[13]

Indigenous issues came to be seen by Canadians as a major and urgent task to complete, as demonstrated through press commentary and public opinion polls both before and after the negotiation of the Meech Lake Accord.[14] By 1987, 61 percent of respondents to a Decima poll supported the idea of the right of Indigenous peoples to govern themselves.[15] These conferences also prompted governments and citizens to realize that Indigenous self-government could be compatible with the principles of Canadian government and Canadian political practices. Henceforth, governments began to negotiate self-government and land claims settlements with Indigenous peoples.[16]

The First Ministers Meeting that resulted in the Meech Lake Accord occurred in April 1987, little more than a month after the last of the constitutional conferences to address Indigenous issues ended. The irony was not lost on Indigenous peoples themselves. They had demanded inclusion in all constitutional negotiations, even if they only had a potential or indirect impact on Aboriginal rights,[17] but they were not involved in the Meech Lake negotiations. As well, five years of discussion of Indigenous issues in four major constitutional conferences resulted in disappointment for Indigenous peoples, as no further constitutional amendments to add substance to section 35 of the *Constitution Act, 1982* were reached. Yet, in a single day of consultation, the first ministers were able to agree on a significant set of constitutional amendments to address Quebec's concerns with the *Constitution Act, 1982*. That the

12 Kathy Brock, "The Politics of Aboriginal Self-Government: A Canadian Paradox" (1991) 34 Can Pub Admin 272 at 281 [Brock, "The Politics of Aboriginal Self-Government"].

13 *Ibid.*

14 Louis Bruyere, "Aboriginal Peoples and the *Meech Lake Accord*" (1988) 5 Can Hum Rts YB 49 at 52.

15 Brock, "The Politics of Aboriginal Self-Government", *supra* note 11 at 282.

16 *Ibid* at 282-3.

17 *Ibid* at 275.

first ministers had so quickly reached a consensus behind closed doors was a particular affront to Indigenous peoples.[18] Thus, setting the stage for an exercise in Indigenous resistance to the colonialism of national politics in Canada that was unprecedented since 1969. As the events of 1987 to 1990 revealed, Indigenous issues were simmering just below the surface of Canadian political discourse and Indigenous peoples were not prepared to tolerate constitutional changes that could negatively affect their rights and status.[19]

Indigenous Resistance Takes Hold: 1987 to 1990

Indigenous opposition to the Meech Lake Accord consisted of both procedural objections to the exclusion of Indigenous peoples from the First Ministers Conference that led to the Accord and substantive objections that the constitutional changes in the Accord could threaten the Aboriginal rights so recently recognized in the constitutional text. As Joel Bakan and Danielle Pinard described in 1989, the Accord had the effect of making invisible, for constitutional purposes, Aboriginal groups, among others, an outcome that Bakan and Pinard viewed as, "nothing short of an outrage for Aboriginal peoples who were here long before the French and English arrived, and who were victims of French and English imperialism."[20] The reaction of Indigenous leaders, especially to the "distinct society clause", was therefore predictable.[21]

For many Canadians, the first time they ever understood some of the struggles of the First Nations peoples in Canada was when Elijah Harper said "no" to the Meech Lake Accord, as noted by Mary Ellen Turpel and Patricia Monture (1990: 347-8).[22] Although Elijah Harper is probably the most famous Indigenous opponent of the Meech Lake Accord, Indigenous opposition began early. The Assembly of First Nations, the Inuit Committee on National Issues, and the Native Council of Canada (now the Congress of Aboriginal Peoples) all expressed their concerns with the accord in appearances before the Special Joint Committee of the Senate and the House of Commons on the 1987 Constitutional Accord (commonly known as the Tremblay-Speyer Committee) in 1987, with the Inuit expressing their concern

18 Bruyere, *supra* note 14 at 52.

19 Brock, "The Politics of Aboriginal Self-Government", *supra* note 12 at 284.

20 Joel Bakan & Danielle Pinard, "Getting to the Bottom of Meech Lake: A Discussion of Some Recent Writings on the 1987 Constitutional Accord" (1989) 21 Ottawa L Rev 247 at 257.

21 J. Anthony Long, "Federalism and Ethnic Self-Determination: Native Indians in Canada" (1991) 29 J Commonwealth & Comp Pol 192 at 204.

22 Mary Ellen Turpel & Patricia Monture, "Ode to Elijah: Reflections of Two First Nations Women on the Rekindling of Spirit at the Wake for the Meech Lake Accord" (1990) 15 Queen's LJ 345 at 347-8.

that the distinct society clause would impinge or violate the Inuit's own distinctness and their desire to be recognized as such.[23] George Erasmus, chief of the Assembly of First Nations, categorically rejected the claim by the committee that Indigenous peoples were adequately represented by the first ministers of governments they helped to elect.[24] Later, he wrote that the recognition of Quebec as a distinct society,

> perpetuates the idea of a duality in Canada, and strengthens the myth that the French and the English peoples are the foundations of Canada. It neglects the original inhabitants and distorts history. . . . The amendment fails to give explicit constitutional recognition to the existence of the First Nations as distinct societies that also form a fundamental characteristic of Canada.[25]

Erasmus commented further that, "we were told for five years that governments are reluctant to entrench undefined self-government of Aboriginal people in the Constitution, yet there is an equally vague idea of distinct society, unanimously agreed to and allowed to be left to the courts for interpretation."[26] Other Indigenous groups, at both the national and provincial levels, also expressed their opposition to the accord. As well, in a study done by David Hawkes in 1988, most respondents from the national Indigenous organizations and some government officials thought that the Meech Lake Accord would negatively affect Indigenous peoples.[27]

Of course, Indigenous peoples were not the only opponents of the Meech Lake Accord. Others, too, challenged both the legitimacy of the process that led to the Accord and its substance. As Roger Gibbins noted, the difference between 1982 and 1987 was the standards used by Canadians to judge the legitimacy of the constitutional-making process; the new "Charter Canadians" were now stakeholders in the constitution and were less willing than before to entrust constitutional change to first ministers.[28] Several criticisms of the Accord thus became widely repeated. The first was that the Accord constituted an attempt by governments to advance their agendas at the expense of the citizenry through a process that was exclusive and unrepresentative of the

23 Joyce D Burnside, "Implications of Quebec's 'Distinct Society' as Recognized in the Meech Lake Accord" (1988) 13 Queen's LJ 29 at 46-7.

24 Alan C Cairns, "Citizens (Outsiders) and Governments (Insiders) in Constitution-Making: The Case of Meech Lake" (1988) 14 Canadian Pub Pol'y S121 at S125.

25 Bakan & Pinard, *supra* note 20 at 257.

26 *Ibid* at 258.

27 David C Hawkes, *Aboriginal Peoples and Constitutional Reform: What Have We Learned* (Kingston: Institute of Intergovernmental Relations, 1989) at 50.

28 Roger Gibbins, "Canadian Federalism: The Entanglement of Meech Lake and the Free Trade Agreement" (1989) 19 Publius: The J of Federalism 185 at 192-3.

interests of Indigenous peoples, women, ethnic minorities, and the disabled, among others.[29] The second issue centered on the lack of information on the negotiations and the justification for the result, which raised suspicions about the substance of the Accord.[30] A third, related criticism was that the political leaders involved were arrogant, argumentative, weak, and self-interested.[31] Bakan and Pinard summed up these concerns, "In both the process leading to the Accord and in its substance, the Accord should cause concern for those who take seriously the idea of democratic participation in self-government."[32] The process was elitist, secretive, and excluded just about everyone, a situation compounded by the presentation of the Accord as a *fait accompli*.[33]

Immediately after the negotiation of the Accord, public opposition was negligible, but opponents to it swiftly gained momentum and became increasingly widespread after former Prime Minister Pierre Trudeau voiced his opposition to the Accord. Bakan and Pinard observed that, "While debate was conspicuously absent from the process leading up to the Accord, there was much discussion in its wake."[34] Moreover, the decision of then Quebec premier Robert Bourassa to use the "notwithstanding clause" of the *Constitution Act, 1982* to continue the requirement that outdoor commercial signs in Quebec be only in French after the Supreme Court of Canada declared this law unconstitutional in *Ford* v *Quebec (Attorney General)*[35] exacerbated complaints about unfairness in the relative treatment of anglophone minorities in Quebec and francophone minorities elsewhere in Canada and stirred up anti-French and anti-Quebec sentiments among some anglophone groups.[36]

By the time of the 1988 federal election, support for the Meech Lake Accord was beginning to unravel.[37] The concerns of Indigenous peoples provided a key platform for those seeking amendment to the Accord.[38] From this began to arise a greater understanding of Indigenous claims among the public and sympathy for their constitutional aspirations. Thus, when Elijah Harper stood up against the passage of the Meech Lake Accord, he was strongly

29 Kathy Brock, "Learning From Failure: Lessons From Charlottetown" (1993) 4 Const Forum 29 at 29.

30 *Ibid.*

31 *Ibid.*

32 Bakan & Pinard, *supra* note 20 at 248.

33 *Ibid* at 248-50.

34 *Ibid* at 248.

35 *Ford v Quebec (Attorney General)*, [1988] 2 SCR 712, 54 DLR (4th) 577.

36 John Edwards, "Language Policy and Planning in Canada" (1994) 14 Ann Rev Applied Ling 126 at 129.

37 Gibbins, *supra* note 28 at 185.

38 Bruyere, *supra* note 14 at 71.

backed by not only Indigenous groups, such as the Assembly of Manitoba Chiefs (who provided Harper with direct support and encouragement), the Assembly of First Nations, the Inuit Tapirisat of Canada, the Native Council of Canada, and the Dene Nation but also by many Canadians who applauded his action and viewed him as championing their own dislike of the Accord.[39] As Michael Burgess noted,

> In the minds of many Canadians in [the rest of Canada], its [the Meech Lake Accord's] rejection by [Elijah] Harper is fitting, given the neglect of Aboriginal concerns in the whole package, and public opinion outside Quebec seemed to register as much wide-spread disenchantment with the process of constitutional reform as it did with the content of the Accord.[40]

Premiers who were elected subsequent to the negotiation of the Accord also articulated concerns about it, most notably Frank McKenna in New Brunswick, who was elected in October 1987, and Clyde Wells in Newfoundland, who was elected in April 1989. As well, in the wake of Quebec premier Bourassa's decision to use the notwithstanding clause to preserve Quebec's sign law, Manitoba premier Gary Filmon, who was leading a minority government after his election in May 1988 with a Liberal Official Opposition that was opposed to the Accord, declared that he would not bring the Accord forward to the Manitoba legislature unless substantial changes were made to it.[41] Between challenges to the Accord from new premiers and growing public opposition to the Accord, it became clear by the spring of 1990 that something had to be done to secure acceptance of the Accord in the three provinces that had not yet approved it.[42]

Several provinces, including Manitoba, New Brunswick, Newfoundland, and Ontario, struck committees to study the Meech Lake Accord during this period. All shared concerns about the exclusion of Indigenous peoples, among others. In an effort to move beyond the impasse that had developed over the Accord, McKenna introduced a "companion resolution" to the Accord in the New Brunswick Legislative Assembly on 21 March 1990, as a strategy to address concerns about the Accord and secure the necessary support to allow its

39 Edwards, *supra* note 36 at 130.

40 Michael Burgess, "Constitutional Reform in Canada and the 1992 Referendum" (1993) 46 Parl Aff 363 at 370.

41 Gibbins, *supra* note 28 at 190.

42 In fact, the Newfoundland Legislature had approved the Meech Lake Accord during the term of Premier Brian Peckford's government, but after the election of the Wells government this approval was rescinded.

passage in the New Brunswick, Newfoundland, and Manitoba legislatures.[43] On 27 March 1990, the government of Brian Mulroney decided to study this option with the establishment of the Special Committee to Study the Proposed Companion Resolution to the Meech Lake Constitutional Accord, commonly known as the Charest Committee.

The Charest Committee tabled its report on 17 May 1990. The report generally agreed with the content of the New Brunswick companion resolution and recommended its adoption.[44] On the treatment of Indigenous issues, the committee recommended that the companion resolution provide for a separate process of constitutional conferences every three years, beginning no later than one year after the companion resolution came into force, and that first ministers recognize Indigenous peoples in the body of the constitution, building on the "Canada clause" proposed by Manitoba.[45]

With the results of the Charest Committee and the provincial studies in hand, the Mulroney government called a final First Ministers Conference for 3 June 1990, principally to discuss the companion resolution and secure the concurrence of the premiers of the non-consenting provinces to introducing a motion in their legislatures to approve the Accord. This conference lasted for six days, but the outcome was an agreement by all premiers to secure passage of the Accord and the companion resolution by the 23 June 1990 deadline. Among other elements, the agreed-upon companion resolution contained a commitment to future constitutional conferences on Indigenous issues. The commitment to future discussions instead of addressing Indigenous issues directly in the companion resolution, however, generated a negative reaction among Indigenous leaders, who argued that it continued the "two founding nations" myth and the hierarchy of recognition contained in the Meech Lake Accord itself.[46] Indigenous leaders also protested their exclusion from the June 1990 First Ministers Conference.[47]

Three days after the conclusion of the June 1990 First Ministers Conference, Premier Filmon attempted to introduce a resolution to approve the Accord into the Manitoba legislature, but Elijah Harper refused to provide the necessary unanimous consent to introduce the motion. Four days later,

43 See *Report of the Special Committee to Study the Proposed Companion Resolution* (Ottawa: Department of Supply and Services, 1990) at 69-71.

44 *Ibid* at 6-9.

45 *Ibid* at 8, 11.

46 Long, *supra* note 21 at 205.

47 Susan Delacourt, *United We Fall: The Crisis of Democracy in Canada* (Toronto: Viking, 1993) at 302-3.

on June 16th, the Assembly of Manitoba Chiefs made public its intention to defeat the Meech Lake Accord.[48] The following day, Prime Minister Mulroney sent Senator Lowell Murray and others to negotiate with the Assembly of Manitoba Chiefs in an attempt to persuade them to end their efforts to defeat the Accord, but to no avail.[49] Although Premier Filmon eventually introduced the motion to approve the Accord on June 20th, there was insufficient time for the legislature to approve it prior to a scheduled adjournment on June 22nd.[50] With passage in Manitoba impossible, Premier Wells adjourned the Newfoundland House of Assembly for an indeterminate period on June 22nd, thereby cancelling the proposed free vote on a motion to approve the Meech Lake Accord and ensuring the Accord's defeat.

To add emphasis to the power of Indigenous resistance to colonialism, Mohawks from Kanesatake established a barricade at Oka, Quebec, later that summer, to protest the proposal of the municipal government to turn lands that the Mohawks claimed as theirs into part of a municipal golf course. In some ways, the standoff at Kanesatake can be viewed as a logical outcome of the failure to reach agreement on the Meech Lake Accord; the empowerment that Indigenous peoples felt at the rejection of the Accord and that one Indigenous legislator did what several premiers could not do emboldened Indigenous peoples and strengthened their resolve to demand that their constitutional concerns and aspirations be addressed.[51] On the other hand, coming hard on the heels of the debate over the Meech Lake Accord, the "Oka crisis" heightened tensions and increased the level of anxiety for the future of the country among all Canadians.[52] Doubtless, some of the anger felt by Quebecers over the defeat of the Accord also found its way into the conflict at Oka (Hall, 1991: 58).[53]

In early June, members of the Mohawk Warrior Movement from other territories began to arrive at Kanesatake.[54] The blockade became an armed standoff on July 11th, when the mayor of Oka asked the Sûreté du Québec to intervene. Despite an attack on the barricade by the Sûreté, in which one

48 Library of Parliament, *The Constitution Since Patriation: Chronology*, online: Parliament of Canada <http://www2.parl.gc.ca/parlinfo/compilations/constitution/ConstitutionSincePatriation.aspx>.

49 *Ibid.*

50 *Ibid.*

51 Bruce P Elman & A. Anne McLellan, "Canada After Meech" (1991) 2 Const Forum 63 at 65.

52 *Ibid* at 64.

53 Tony Hall, "Blockades and Bannock: Aboriginal Protests and Politics in Northern Ontario, 1980-1990" (1991) 7 Wicazo Sa Rev 58 at 58.

54 Linda Pertusati, *In Defence of Mohawk Land: Ethnopolitical Conflict in Native North America* (Albany: State University of New York Press, 1997) at 89.

Sûreté officer was killed, the Mohawks refused to take the barrier down. They were instead joined at the barricades by Indigenous peoples from across North America, as the police attack had engendered an enormous display of Indigenous unity across Canada and the United States.[55] Mohawks from Kahnawake also established a blockade on the Mercier Bridge in Montreal in support of the protest at Kanesatake. As David Bedford and Thomas Cheney observed, with the blockade of the Mercier Bridge on 11 July 1990, the question of Mohawk land claims occupied the centre stage of Quebec and Canadian politics.[56] This resistance of the Mohawks to oppression contributed to the larger pressure that motivated Canadian officials to include Indigenous peoples in the next round of constitutional reform.[57]

At Kanesatake, Sûreté members were replaced first by Royal Canadian Mounted Police officers and then, at the behest of the Quebec government, members of the Canadian Forces were sent to the barricades on August 20th. Three layers of roadblocks were established at Kanesatake, with the army closest to the Mohawks. The buzz of military aircraft, the razor-wire, the cannons aimed at the community, the occasional use of tear gas, and the regular military manoeuvres created a climate of anxiety, while the occasional interdiction of food shipments left people fearful of starvation.[58] As well, at the Mercier Bridge, non-Aboriginal crowds regularly harassed doctors and patients as police stood by.[59] In one of the most extreme events at the Mercier Bridge, a non-Aboriginal crowd stoned a convoy of sick and elderly, who needed to be removed from Kahnawake, as they drove across the bridge, leading to one death and twelve injuries.[60]

The Oka standoff enormously increased the visibility of Indigenous issues in Canada.[61] Images such as a Mohawk warrior standing atop an overturned Sûreté du Québec vehicle and a member of the Canadian Forces standing nose to nose with a masked Mohawk warrior became iconic images of the resistance. Within Quebec, though, the government and the mainstream press

55 *Ibid* at 105.

56 David Bedford & Thomas Cheney, "The Kahnawá:ke Standoff and Reflections on Fascism" (2010) 6 Socialist Stud 125 at 126.

57 Pertusati, *supra* note 54 at 132, 137.

58 Bedford & Cheney, *supra* note 56 at 127-8. Bedford and Cheney also note that Quebec Cabinet Minister Claude Ryan later confirmed that all of this was part of provincial government policy, though the government denied it at the time.

59 *Ibid* at 129.

60 *Ibid.*

61 Jennifer SH Brown, "Doing Aboriginal History: A View from Winnipeg" (2003) 84 Can Hist Rev 613 at 619.

constructed Indigenous peoples as outlaws who posed a danger to law and order.[62] Part of the anger and the efforts by the Quebec press to discredit the Mohawk Warrior Society likely stems from a sense that Indigenous peoples represented a competing national identity that interfered with the Quebec nationalist project.[63] The resort to armed soldiers to manage a political dispute and the racial hatred leveled against the Mohawks by non-Indigenous Quebecers, however, became a source of embarrassment for Canadians and fed concern elsewhere in Canada over the commitment of Quebec society to equality and inclusiveness, which had been one of the reasons for opposition to the Meech Lake Accord. Sympathy blockades and vigils sprung up across Canada in the days and weeks that followed; some of these involved non-Indigenous people, who became involved in Indigenous activism to an unprecedented extent.[64] The racism and violence that epitomized the events at Kanesatake shocked not only Canadians but also the international community; criticism of Canada over the mishandling of the situation and international embarrassment suddenly tarnished Canada's reputation as a protector of human rights.[65]

An interesting question is why opposition to the Meech Lake Accord in Canadian society translated into support for the Indigenous opponents of the Accord and for those Indigenous people seeking the recognition of their rights through armed resistance at Oka. Clearly, all governments recognized Indigenous resistance as an important source of opposition to the Accord that had to be addressed, as witnessed by the role that Indigenous issues played in McKenna's companion resolution of March 1990 and the June 1990 First Ministers Agreement. The unusual display of militancy by Indigenous peoples in the summer of 1990 certainly drove home the message that Indigenous peoples were serious about, and impatient with, the normal political processes, and were determined to resist colonialism.[66]

At some level, the articulation of Indigenous issues and the need for these issues to be addressed may have genuinely moved Canadians; by October

62 Rita Dhamoom & Yasmeen Abu-Laban, "Dangerous (Internal) Foreigners and Nation-Building: The Case of Canada" (2009) 30 Int'l Pol Sci Rev 163 at 176.

63 Bedford & Cheney, *supra* note 56 at 133.

64 Hall, *supra* note 53 at 59.

65 Deborah McGregor, "Aboriginal/Non-Aboriginal Relations and Sustainable Forest Management in Canada: The Influence of the Royal Commission on Aboriginal Peoples" (2009) 92 Journal of Environmental Management 1 at 1.

66 Radha Jhappan, "Inherency, Three Nations and Collective Rights: The Evolution of Aboriginal Constitutional Discourse from 1982 to the Charlottetown Accord" (1993) 7-8 Int'l J Can Stud 225 at 231.

1990, 55 percent of Canadians polled thought that governments were not doing enough to settle land claims.[67] Also, a likely explanation is that the discomfort of Canadians over the harm that the images of the Oka standoff did to Canada's reputation as a protector of human rights played into their willingness to address Indigenous issues, as noted later by the Citizens' Forum on Canada's Future.[68] In addition, the exclusion of Indigenous leaders from the Meech Lake negotiations provided a potent symbol of the illegitimacy of executive federalism to those who opposed the Meech Lake process for their own reasons. Lastly, one cannot discount the possibility that some tactically supported Indigenous peoples as a way to express their opposition to Quebec nationalism, even if they would not otherwise have supported Indigenous nationalism and the desire of Indigenous peoples for self-determination.

Responding to the Resistance: Indigenous Issues on the National Political Agenda, 1991 to 1996

Whatever the reasons behind it, after the summer of 1990, governments could not deny the strength and political salience in Canadian society of the Indigenous resistance to colonialism. From 1990 on, the strategy of Indigenous leaders was to compare their complaints and aspirations to those of Quebec and to make it clear that they would not stand in line behind Quebec for constitutional recognition.[69] Thus, when efforts began anew to secure Quebec's consent to the *Constitution Act, 1982* and defuse the rise in separatist sentiment in Quebec that occurred in the aftermath of the defeat of the Meech Lake Accord, it quickly became evident that the aspirations of Indigenous peoples for the settlement of land claims and self-government would have to be addressed.

As well, Indigenous leaders remained outspoken as the constitutional reform process resumed. In the fall of 1991, Assembly of First Nations chief Ovide Mercredi took the position that nothing less than the recognition of Indigenous self-government as an inherent right would be acceptable to Indigenous peoples; each of the national Indigenous organizations insisted that the inherent right should be enshrined without limitations.[70] Mercredi went so far as to tell Quebec's Belanger-Campeau Commission that, "Unless

67 Elman & McLellan, *supra* note 51 at 65.

68 *Citizens' Forum on Canada's Future: Report to the People and Government of Canada* (Ottawa: Minister of Supply and Services, 1991) at 78 [*Citizens' Forum on Canada's Future*].

69 Delacourt, *supra* note 47 at 303-4.

70 Jhappan, *supra* note 66 at 235-6.

the self-determination of the First Nations is fully acknowledged and respected by the National Assembly, there can be no legitimate self-determination for French Quebeckers. To deny our right to self-determination in the pursuit of your aspirations would be a blatant form of racial discrimination."[71] He then suggested that Quebec, being made up of a wide range of racial and ethnic groups, was not "a people" and, therefore, did not have a right of self-determination in international law.[72]

Indigenous issues remained on the national agenda due in part to the ability of Indigenous leaders to have their claims heard by the public through the media. Interestingly, in a 1988 study conducted by Hawkes on the 1983 to 1987 constitutional conferences, one respondent concluded that Indigenous peoples must learn to harness public opinion in their favour,[73] and yet by 1992, perhaps no group was better at employing the media as a means of negotiating than the Indigenous leaders. They were ultimately able to participate in the negotiations because their grievances and concerns and their exclusion from the Meech Lake process had received extensive media coverage, making it impossible for governments to ignore the agenda of Indigenous peoples.[74]

The newfound political salience of Indigenous issues prompted major government initiatives. One of the first initiatives was the decision of the federal government to establish, in response primarily to the "Oka crisis", the Royal Commission on Aboriginal Peoples on 26 August 1991. The government launched two other undertakings in citizen consultation, both of which highlighted the importance of addressing Indigenous issues. The Citizens' Forum on Canada's Future (known as the Spicer Commission), established on 1 November 1990, engaged citizens in a dialogue, seeking a consensus on Canada's future;[75] while the Special Joint Committee of the Senate and the House of Commons on the Process to Amend the Constitution of Canada (known as the Beaudoin-Edwards Committee), established May 1991, studied both the amending formulae in the constitution and what would be required to make the process for constitutional amendment legitimate in the eyes of citizens. The Spicer Commission Report noted that, "Forum participants were highly concerned and virtually unanimous in their discussion of aboriginal

71 Delacourt, *supra* note 47 at 305.

72 *Ibid* at 306.

73 Hawkes, *supra* note 27 at 34.

74 David Taras, "The Mass Media and Political Crisis: Reporting Canada's Constitutional Struggles", online: (1993) 18:2 Can J Comm (at 3)<http://www.cjc-online.ca/index.php/journal/article/view/741/647>.

75 Citizens' Forum on Canada's Future, *supra* note 68 at 15.

issues."[76] Forum participants viewed the history of Indigenous-settler relations as appalling and requiring rectification, placing the settlement of land claims as a top priority (with a remarkable consensus on this matter noted in the report), but also recognizing that while they supported the principle of Indigenous self-government, the participants lacked the knowledge necessary to take a final position on the matter.[77] In response, the Report of the Citizens' Forum on Canada's Future stated that, "Failure to deal promptly with the needs and aspirations of aboriginal peoples will breed strife that could polarize opinion and make solutions more difficult to achieve."[78] It thus recommended a prompt, fair settlement of the territorial and treaty claims of First Nations people, stated its support for Indigenous self-government and the active involvement of First Nations people in defining and implementing the concept, and recommended that Canada officially recognize the history and contributions of Indigenous peoples as the First Nations of Canada.[79] For its part, the Beaudoin-Edwards Committee recommended that any constitutional amendment directly affecting Indigenous peoples require their consent, that representatives of Indigenous peoples be invited to participate in all future constitutional conferences, and that the constitution provide for a process of biennial constitutional conferences to address the rights of Indigenous peoples, the first of which would occur within a year of amendments coming into force.[80]

Both the Spicer Commission and the Beaudoin-Edwards Committee reported in June 1991, and, with these reports in hand, the federal government issued a series of constitutional proposals, titled *Shaping Canada's Future Together*, in September 1991. These recognized the urgency of addressing Indigenous issues and included proposals to have Indigenous peoples participate in the upcoming round of constitutional reform, to constitutionally recognize a right of self-government (with a period for the negotiation of self-government arrangements before the recognition of the right could be subject to judicial decisions), to have the constitution provide for a constitutional process on Indigenous issues, to guarantee Indigenous peoples representation in a reformed Senate, and to recognize Indigenous peoples as historically self-governing and the holders of Aboriginal and treaty rights in a so-called "Canada

76 *Ibid* at 74.

77 *Ibid* at 75, 80, 82.

78 *Ibid* at 120.

79 *Ibid* at 127-8.

80 *Report of the Special Joint Committee of the Senate and the House of Commons on the Process for Amending the Constitution* (Ottawa: Queen's Printer, 1991) at 17.

clause" on the fundamental aspects of the Canadian identity.[81] The government also established the Special Joint Committee of the Senate and House of Commons on a Renewed Canada (commonly known as the Beaudoin-Dobbie Committee). In the wake of controversies that seriously damaged the credibility of the Beaudoin-Dobbie Committee, the federal government also held six "Renewal of Canada" conferences, including one on Indigenous issues. All six conferences involved a number of Canadians who were not affiliated with any particular organization along with government representatives and stakeholder groups.[82] One of the most striking moments at these conferences occurred during the opening plenary of the Toronto conference, when Zebedee Nungak displayed a map of Quebec in which approximately one-half of the territory was identified as Indigenous lands which could secede from Quebec if Quebec seceded from Canada.[83]

At the end of this process, the Beaudoin-Dobbie Committee issued a report that dealt extensively with Indigenous issues, as one of the key issues to be addressed in the planned round of constitutional reform. The report recommended that the status of Indigenous peoples should be recognized as the first peoples and that their inherent rights and their right and responsibility to protect and develop their "unique" cultures, languages, and traditions also be recognized in a "Canada clause" in the constitution. The committee noted that there was a strong consensus that the right of self-government should be described as inherent and that this right should specifically be entrenched in the constitution, but that the modern implementation be achieved through negotiations with federal, provincial, and territorial governments.[84] The report also recommended that there be a constitutional conference on self-government within two years of a new constitutional amendment, that the federal government respond to Métis calls for access to a land base, and that Indigenous peoples be guaranteed representation in a reformed Senate, if they wish, with the details of Indigenous representation to be negotiated

81 Canada, *Shaping Canada's Future Together: Proposals* (Ottawa: Supply and Services, 1991) at 6-10. See also Canada, *Aboriginal Peoples, Self-Government, and Constitutional Reform* (Ottawa: Supply and Services, 1991). This was a background paper that was published along with the government's proposals.

82 At the time, the Committee was known as the Castonguay-Dobbie Committee, as the original Senate Chair was Senator Claude Castonguay. Despite not being responsible for the problems that plagued the committee, he resigned over the controversy and was replaced as Senate Chair by Gerald Beaudoin.

83 Jhappan, *supra* note 66 at 241.

84 *Report of the Special Joint Committee of the Senate and the House of Commons on a Renewed Canada* (Ottawa: Queen's Printer, 1992) at 24, 28-31, 34.

with Indigenous peoples.[85] Every province and territory also held legislative hearings or established commissions to investigate legislative issues during the period between the summer of 1990 and the spring of 1992, and Indigenous issues figured prominently in those reports, as well. It appears that, by early 1992, the concept of the inherent right of self-government and the idea of three founding peoples, rather than two founding nations or equal provinces, had penetrated the Canadian psyche.[86]

With the work of these committees completed, governments re-entered a process of intergovernmental constitutional negotiations, though initially at the level of ministers, rather than first ministers. The government of Quebec, however, refused to participate in an intergovernmental process, insisting that it would only negotiate as one of two parties once it received a constitutional reform "offer" from "Canada."[87] The provinces, led by Ontario, insisted on an extensive round of intergovernmental negotiations, thereby becoming the format of the so-called "Canada round", albeit initially without Quebec's participation.

One of the most significant innovations in this round of negotiations from an Indigenous perspective was the inclusion of delegations from four national Indigenous groups at the negotiation table. As Gurston Dacks noted, the role that Indigenous peoples played in the defeat of the Meech Lake Accord compelled first ministers to include Indigenous participants in the negotiation of what came to be known by August 1992 as the "Charlottetown Accord", which in turn led to several breakthroughs for Indigenous peoples.[88] This innovation, however, was also spearheaded within the intergovernmental discussions by Ontario premier Bob Rae, as part of his plan for full-blown intergovernmental negotiations.[89] This was the first time that representatives of Indigenous peoples were included in all aspects of a high-level discussion of constitutional reform as equals with the federal and provincial governments.[90]

85 *Ibid* at 31-3, 52.

86 Jhappan, *supra* note 66 at 237-8.

87 Burgess, *supra* note 40 at 370.

88 Gurston Dacks, "The Social Union Framework Agreement and the Role of Aboriginal Peoples in Canadian Federalism" (2001) 31 Am Rev Can Stud 301 at 305.

89 Delacourt, *supra* note 47 at 309.

90 The then two territorial governments were also included at the negotiation table as equals for the first time, though this too did not have the full concurrence of the federal delegates. The territorial delegates also proved their capacity to act as equals in national political processes and have since been included in such processes. Given the large Indigenous populations of the territories, this was also an important contributor to making progress on Indigenous issues in the Charlottetown Accord negotiations.

Even though their participation was certainly controversial in some quarters, at the negotiation table the Indigenous delegates demonstrated their ability and willingness to contribute to the overall constitutional negotiations, thereby establishing their credibility as participants in national political processes. Whereas the leaders of the national Indigenous organizations do not participate in all aspects of the premiers or first ministers meetings as equals of federal, provincial, and territorial leaders today, it has become common practice for premiers or first ministers to meet with national Indigenous leaders in advance of their meetings in a special session on Indigenous issues. This practice was established soon after the conclusion of the Charlottetown negotiations, at least partly as a consequence of the effectiveness with which Indigenous groups used their right of participation in those negotiations.

As a result of Indigenous participation, significant changes to the constitution to recognize the inherent right of self-government became part of the Charlottetown package.[91] As Matthew Coon Come commented in 2003, in 1992 Canadians and their governments began to behave as though they genuinely wanted and intended to make space for Indigenous peoples and to share the country; it quickly became clear through the Charlottetown process that the nation's business could occur without difficulty when Indigenous peoples were fully involved and honourably treated.[92] In the view of Radha Jhappan, the participation of Indigenous organizations in all facets of the negotiations has changed Canadian constitutional discourse irreversibly.[93]

As well as constituting a significant victory for the inclusion of Indigenous peoples in the processes of intergovernmental collaboration, the Charlottetown Accord constituted a significant substantive victory for Indigenous peoples. The provisions on Indigenous self-government and Métis issues, in particular, remain the "high-water marks" in the willingness of governments to address Indigenous issues in Canada. As an example, the Métis Nation Accord, developed in conjunction with the Charlottetown Accord, was a significant political achievement for the Métis, with six provincial or territorial jurisdictions and the federal government willing to adhere to it.[94] In another victory, the Indigenous self-government provisions of the Charlottetown Accord referred

91 Mary Ellen Turpel, "Indigenous Peoples' Rights of Political Participation and Self-Determination: Recent International Legal Developments and the Continuing Struggle for Recognition" (1992) 25 Cornell Int'l LJ 579 at 594.

92 Matthew Coon Come, "Charlottetown and Aboriginal Rights: Delayed but Never Relinquished" (2003) 24:2 Policy Options 70 at 71.

93 Jhappan, *supra* note 66 at 252.

94 Robert K Groves & Bradford W Morse, "Constituting Aboriginal Collectivities: Avoiding New Peoples 'In Between'" (2004) 67 Sask L Rev 257 at 290-1.

to Indigenous governments as a third order of government, which implies that Indigenous governments would be equal in status to the federal and provincial governments and sovereign in their own spheres of jurisdiction.[95] The Accord would have established, for the first time, a firm legal and policy framework for the negotiation of self-government and provide for the constitutionalization of the negotiated agreements—a truly innovative feature.[96] It also would have included a "context clause" that defines in the constitution the purpose of the inherent right of self-government as being,

> To safeguard and develop their languages, cultures, economies, identities, institutions and traditions; and develop, maintain and strengthen their relationships with their lands, waters and environments, so as to determine and control their development as peoples according to their own values and priorities, and ensure the integrity of their societies.[97]

The most popular part of the Charlottetown Accord package was the part that dealt with Indigenous self-government.[98] Surveys conducted by one Indigenous organization immediately after the defeat of the Accord suggested that some 60 percent of Canadians supported the constitutional changes that had been proposed to address Indigenous issues and that one-half of those surveyed were supportive of governments giving a high priority to Indigenous self-government.[99]

The rejection of the Accord in the 1992 referendum was a particularly bitter blow for the political and constitutional agendas of Indigenous peoples, as the Accord had, at last, recognized and addressed their real concerns; thus, the reaction to its defeat was probably sharpest from Indigenous peoples.[100] The recognition of the inherent right of Indigenous peoples to be self-governing in the Charlottetown text, however, led several governments that were involved in those negotiations to re-affirm their recognition of the "inherent right" even after the defeat of the Charlottetown Accord. Federally, the Liberal government, elected in 1993, adopted the position that the inherent right already existed within the framework of the Canadian Constitution and went so far as to publish its Inherent Right Policy in 1995.[101] Although there are many valid

95 Peter W Hogg & Mary Ellen Turpel, "Implementing Aboriginal Self-Government: Constitutional and Jurisdictional Issues" (1995) 74 Can Bar Rev 187 at 191.

96 *Ibid.*

97 *Ibid* at 193.

98 Burgess, *supra* note 40 at 377.

99 John H Hylton, *Financing Aboriginal Justice Systems* (Saskatoon: University of Saskatchewan, 1994) at 157.

100 Burgess *supra* note 40 at 378-9.

101 Audrey D Doerr, "Building New Orders of Government: The Future of Aboriginal Self-

reasons to criticize the federal Inherent Right Policy and its implementation, the fact remains that it established a negotiating mandate for Indigenous self-government agreements that was premised on the recognition of the inherent right of Indigenous peoples to be self-governing, a position that one can trace back to the Charlottetown Accord.

As noted above, the other major outcome of the expression of Indigenous resistance to colonialism in the summer of 1990 was the establishment of the Royal Commission on Aboriginal Peoples. The Meech Lake debate and the events at Oka prompted calls from the House of Commons Standing Committee on Aboriginal Affairs and the Canadian Human Rights Commission for the government to set up a Royal Commission (RCAP).[102] The Royal Commission issued its report in 1996. Its research and recommendations were extensive, to say the least; at five volumes, it is the largest single treatment of the historical relationship between the Crown and Indigenous peoples in Canada. As John Borrows observed, the RCAP Report: recognized that Indigenous nations should be able to pursue a different mode of life, if this is their choice; made recommendations to limit state intrusion into the lives of Indigenous nations; made it clear that the Crown needed to implement historic treaties and establish new ones where none exist; and argued that Indigenous peoples require a larger land base and the recognition of Aboriginal title.[103]

Both the extent and the depth of the consideration of Indigenous issues by RCAP was of such a magnitude that an undertaking of this sort is unlikely to be repeated in the near future; as such, RCAP is a keystone document on Aboriginal policy in Canada.[104] The RCAP Report is a significant document, and in Borrows' description is unsurpassed in depth and breadth of coverage of Indigenous issues.[105] As Robert Groves and Bradford Morse noted, it has also had a major impact on the decisions of the Supreme Court of Canada, if not the federal government.[106]

Government" (1997) 40 Can Pub Admin 274 at 275.

102 Jill Wherrett, "The Research Agenda of the Royal Commission on Aboriginal Peoples" (1995) 38 Canadian Public Administration 272 at 273.

103 John Borrows, "Domesticating Doctrines: Aboriginal Peoples After the Royal Commission" (2001) 46 McGill LJ 615 at 619-20.

104 McGregor, *supra* note 65 at 2. While some commentators have criticized the Royal Commission Report, for example for the difficulty of implementing it, these criticisms do not take away from the significance of the report.

105 Borrows, *supra* note 103 at 659.

106 Groves & Morse, *supra* note 94 at 291.

All of these developments on the status of Indigenous peoples in the processes of political decision making in Canada and the approach of governments to Indigenous issues can be traced, in various ways, to the Indigenous resistance to the Meech Lake Accord and the actions of Mohawks at Oka in the summer of 1990. The events of that dramatic spring and summer set in motion a series of fundamental changes that affect Canadian political discourse and public policy to this day.

The Momentum Wanes: 1996 to the Present

Although Indigenous resistance to the Meech Lake Accord and the Mohawk resistance at Kanesatake led to a flurry of activity on Indigenous issues in the early to mid-1990s, as the national unity crisis faded into history, the sense of urgency for governments to address Indigenous claims and aspirations waned. Following the defeat of the Charlottetown Accord and the subsequent collapse of public support for broad constitutional initiatives, governments retreated from what Joyce Green describes as the "transformative politics of decolonization."[107] By 2004, only 53 percent of people thought that land claims should be settled and Indigenous peoples given self-government.[108] The gains of Indigenous peoples may have evaporated with the defeat of the Charlottetown Accord, but they were not forgotten by Indigenous peoples themselves.[109]

For a time after the 1993 election of the Jean Chrétien government, the federal government appeared to be preparing to make a decisive break with the past and move away from a paternalistic relationship with Indigenous peoples, but the government has not lived up to this early promise.[110] Some early initiatives included the effort to dismantle the Department of Indian Affairs in Manitoba in 1993–1994 and the establishment of an Office of the Treaty Commissioner and an Exploratory Treaty Table in Saskatchewan, to study the treaty relationship and guide self-government negotiations. Unfortunately, the effort to dismantle the Department of Indian Affairs in Manitoba foundered after 1995, depleting much of the government's energy to reform the

107 Joyce Green, "Self-Determination, Citizenship, and Federalism: Indigenous and Canadian Palimpsest" in Michael Murphy, ed, *Canada: The State of the Federation 2003—Reconfiguring Aboriginal-State Relations* (Kingston: McGill-Queen's University Press, 2005) 329 at 338.

108 Julián Castro-Rea, "*La Nation, C'est Moi*: The Encounter of Québec and Aboriginal Nationalisms" (2005) 14 Const Forum 65 at 73.

109 Dacks, *supra* note 88 at 306.

110 Michael Murphy, "Looking Forward Without Looking Back: Jean Chrétien's Legacy for Aboriginal-State Relations" (2004) 9 Rev Const Stud 151 at 152.

Indian Affairs bureaucracy, and the negotiations to establish a province-wide First Nations government in Saskatchewan ground to a halt by the summer of 2003. In the later years of the Chrétien administration, the federal government lost much of the initial momentum for lasting change, as Chrétien returned to his instincts for smaller-scale, piecemeal reform.[111] Today, there are still several self-government negotiations ongoing in Canada, but other processes have ceased with no results and there have been relatively few self-government agreements signed in the intervening twenty years. Indeed, one of Chrétien's Indian and Northern Affairs ministers, Robert Nault, threatened, in October 2002, to shut down as many as thirty stalled negotiating tables and began to do so by that November.[112] The Chrétien Liberals were keenly aware that although Canadians are generally supportive of Indigenous peoples and cultures, they do not have much sustained interest in, or commitment to, Indigenous issues.[113]

The Nisga'a agreement is almost certainly the best known of Canada's self-government agreements, and yet its content falls far short of the fundamental restructuring of the relationship between the Crown and Indigenous peoples envisioned by the Charlottetown Accord and the RCAP. Probably the most significant set of self-government agreements to come from the post-1990 period was the Yukon Framework Agreement and the individual self-government agreements between Yukon First Nations and the federal and territorial governments; unfortunately, some of the conceptual breakthroughs contained in these agreements have never been replicated in other self-government agreements in Canada.[114] Despite the number of self-government and treaty negotiations that have been undertaken across Canada since 1990, the vast majority of First Nations in this country remain under the governance regime of the *Indian Act*. A similar story can be told on the settlement of Indigenous land claims. Thus, while the RCAP Report was a significant document, follow-through on RCAP has been lacking.[115] The overall reaction to the RCAP

111 *Ibid* at 152, 162.

112 *Ibid* at 163.

113 *Ibid* at 167.

114 Those negotiating a self-government agreement between the Federation of Saskatchewan Indian Nations, the federal government, and the Saskatchewan government attempted to replicate some of these innovations. They did indeed include some of the innovations in the draft Agreement-in-Principle, but this negotiation came to an end before the parties approved the draft Agreement-in-Principle.

115 Murphy, *supra* note 106 at 152. As noted above, the Royal Commission Report has been subject to some criticism over the practicality of implementing its recommendations; the issues identified in these commentaries may have contributed to the lack of follow-through on the commission's recommendations, though the waning political salience of Indigenous issues among the broader

Report, from both Canadian governments and citizens, has been lukewarm at best, leading to serious doubts about the prospects for its implementation.[116] Claude Denis concluded that Canadians are favourable to Indigenous claims so long as they do not affect them and so long as they can be used as a strategy against Quebec nationalism.[117]

Confronted by slow progress or inaction of governments, Indigenous peoples have been left to advance their political and policy agenda through the courts, in litigation to define either their Aboriginal rights or the meaning of the equality rights in the constitution as they apply to Indigenous peoples. Reliance on the courts, however, has also been a less than satisfactory approach to addressing the claims and aspirations of Indigenous peoples. Whereas Canadian courts have, on occasion, provided Indigenous peoples with significant victories, in cases such as *Haida Nation* v *British Columbia (Minister of Forests)*[118] and *Taku River Tlingit First Nation* v *British Columbia (Project Assessment Director)*,[119] the courts have also provided them with a number of painful defeats and have only rarely questioned the legitimacy of the fundamental legal underpinnings of colonialism, such as the assumption of Crown sovereignty. As well, even when litigation has resulted in important victories for Indigenous peoples, the litigation process itself is slow and expensive and the victories are generally incremental, requiring further litigation to clarify and expand the meaning of Aboriginal rights.

Another concern that stems from the failure of the Charlottetown Accord is the resultant weakening of the ability of pan-Canadian Indigenous organizations to exercise leadership.[120] Rifts between the "Indigenous grassroots" and Indigenous political elites have likely never been so clearly exposed to the Canadian public as after the defeat of the Charlottetown Accord.[121] Whereas all but one Inuit community voted for the Accord, 62 percent of status Indians voted against it.[122] The Blood Chiefs in Alberta, for example, served notice

public must also be considered a contributing factor.

116 Claude Denis, "The Nisga'a Treaty: What Future for the Inherent Right to Aboriginal Self-Government" (2002) 7 Rev Const Stud 35 at 51.

117 *Ibid* at 52.

118 *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 SCR 511.

119 *Taku River Tlingit First Nation v British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] 3 SCR 550.

120 Denis, *supra* note 116 at 46.

121 Jo-Anne Fiske, "The Womb is to the Nation as the Heart is to the Body: Ethnopolitical Discourses of the Canadian Indigenous Women's Movement" (1996) 51 Stud Pol Econ 65 at 67-8.

122 Jhappan, *supra* note 66 at 226. Many First Nations leaders were clear that their recommendation to vote "no" in the referendum was a request for more time to consider the proposals, rather than an outright rejection of the Accord. Nonetheless, "no" votes were interpreted by the political leaders of

during the Charlottetown referendum campaign that the Assembly of First Nations did not represent them and that they would not be bound by any agreement negotiated by the Assembly.[123] Neither had the chasm between the male-dominated national Indigenous organizations and Indigenous women been so explicit as after the Native Women's Association of Canada's challenge in the Federal Court to the federal government's decision to invite and fund four national Indigenous organizations, but not the Native Women's Association, to participate in the Charlottetown Accord negotiations.[124] In the absence of national leadership, progress on Indigenous issues has been piecemeal and inconsistent, often driven more by the interests of federal and provincial governments than those of Indigenous peoples.

Is There a Way Back to the Promise of the Early 1990s?

It is interesting and, for Indigenous people, critical that we ask the question of what circumstances could lead to a renewal of the momentum to address Indigenous issues that we saw in the early 1990s, in the aftermath of the defeat of the Meech Lake Accord. Certainly, the events of this period hold some lessons, but the period may well also have given rise to circumstances and opportunities that are unlikely to be replicated in the foreseeable future.

Obviously, one way to put Indigenous issues back into the public spotlight would be for Canada to endure once again the type of threat to national unity and the resultant major constitutional negotiations that in some ways defined Canadian politics in the 1980s and the early part of the 1990s. In this period the views of Indigenous peoples had the power to influence the course of public discourse on our national politics because of the importance of, and challenges in, governments securing public legitimacy to amend the constitution to address Quebec's demands for recognition as a distinct society and for other reforms to the federation consistent with this recognition. Indigenous claims for justice received significant public sympathy at the time, largely as a counterpoint to Quebec's claims for recognition as a distinct society, that is, responding to Indigenous peoples became important to the central intergovernmental project of addressing Quebec's grievances. Although making a meaningful response to Indigenous calls for justice critical to the advancement of a broader national agenda could certainly be a valuable strat-

the day as a rejection of the Accord, whether meant as such or not.

123 Sharon Venne, "Treaty Indigenous Peoples and the Charlottetown Accord: The Message in the Breeze" (1993) 4 Const Forum 43 at 43.

124 Fiske, *supra* note 121 at 67-8.

egy today, it is difficult to see where Indigenous peoples will again have an opportunity to play this sort of role in our national politics. One could go so far as to suggest that Canadian politics today has no major issue that engages both the public and their governments in a national project of the sort that constitutional reform was in the 1980s and early 1990s. Given the apparent desire of Canadian governments to avoid re-entering the constitutional fray and the relative quiet of the national unity issue over the last number of years, achieving the aspirations of Indigenous peoples through what has been labeled "mega-constitutional politics" does not appear to be a serious option.[125]

The events at Oka in the summer of 1990, as well as Indigenous protests at Ipperwash, Ontario, in 1995 and Caledonia, Ontario, in 2006, suggest that there is also a place for direct action or civil disobedience in raising the profile of Indigenous calls for justice. The effects of direct action on economic activity, in particular, often make responding to the underlying claims that led to the action politically important. One of the risks with direct action, though, is that the validity of the underlying Indigenous claims may be lost if the broader public views the Indigenous protest as an illegitimate challenge to law and order. As well, there is the obvious risk of injury or even death of protestors, public officials, or bystanders, outcomes that presumably all involved would prefer to avoid.

This is not to say that Indigenous political advocacy, legal challenges, and even direct action are hopeless, but the question of what approach to highlighting Indigenous calls for justice could generate sufficient commitment to addressing Indigenous claims and aspirations among the broader Canadian public and their political leadership lacks an obvious answer. Green and Ian Peach have previously suggested some strategies that could serve to secure a social consensus in favour of a major transformation, such as the acceptance of Indigenous self-government. Although the different strategies they identify are not mutually exclusive, they do provide a framework to think about approaches to Indigenous advocacy. Unfortunately, each strategy also has its own barriers to success, often rooted in the obvious advantages colonialism provides to the colonizers.

125 Yet it is possible that the issue of Senate reform could develop into a major intergovernmental issue that leads to constitutional reform discussions. In this case, there may be an opportunity for Indigenous calls for justice to be heard, especially in the context of claims for guaranteed Indigenous representation in parliamentary institutions, but it is not yet clear that the federal government's Senate reform proposals will lead the country down the road of constitutional reform discussions.

Even in the absence of a general national unity crisis, such as that experienced in the period between 1987 and 1992, it is possible that an appeal to Canadians' sense of justice could generate public support for Indigenous claims; as Green and Peach observed, though, such an appeal on its own is unlikely to overcome the cultural myths that uphold White privilege without a sustained effort on the part of political leaders to lead public opinion.[126] A hard fact of political life is that successful political leaders adopt an issue either when they see a political advantage in doing so or when they have a moral commitment to addressing an issue and judge that doing so will not be a significant political liability. It is an open question whether any current political leader sees addressing Indigenous issues in these terms.

An appeal to enlightened self-interest would similarly require a sustained effort of political leadership to make the case for how society as a whole would be better off if the dominant society were to sacrifice some of its privileges for the overall social good; this, too, would meet with resistance from those concerned only about their immediate self-interest and those with a limited concern for social harmony.[127] It may be, though, that the increased leverage of Indigenous peoples over economic development, and resource extraction in particular, arising from the duty of the Crown to consult Indigenous peoples and, in some circumstances, accommodate their interests could place Indigenous peoples in an increasingly powerful position as governments seek to encourage economic growth and diversification. Thus, the appeal to enlightened self-interest in responding to Indigenous claims in a meaningful way may become increasingly evident in the coming years, making it easier for governments to exercise political leadership on Indigenous issues.

A third strategy would be to appeal to respect for the rule of law and to argue for the realization of the historical commitments to respect and autonomy that settler society in previous generations made to Indigenous peoples; unfortunately, appeals to historical commitments have, in the past, been dismissed in the face of appeals to the "universal" ideals of liberal individualism and equality.[128] A fourth possible option is to appeal to shared norms and principles of governance, such as federalism and the protection of minorities, but such an appeal presupposes that the shared norms and principles are, indeed,

126 Joyce Green & Ian Peach, "Beyond 'Us' and 'Them': Prescribing Postcolonial Politics and Policy in Saskatchewan" in Keith Banting, Thomas J Courchene & Leslie Seidle, eds, *The Art of the State III: Belonging? Diversity, Recognition and Shared Citizenship in Canada* (Montreal: Institute for Research on Public Policy, 2007) 263 at 278.

127 *Ibid* at 278-9.

128 *Ibid* at 279.

widely distributed throughout society; such assumptions cannot be taken for granted.[129] In all cases, changing public attitudes toward Indigenous rights will require political leaders and other prominent social actors to bring members of settler society and Indigenous peoples together in a serious deliberation and to sustain their commitment to that deliberation until social transformation is achieved.[130]

The moment for Indigenous voices to be heard by the broader Canadian population and for Indigenous claims for justice to be addressed is potentially near, as the Indian Residential Schools Truth and Reconciliation Commission draws us into a serious national process of reconciliation. If the Truth and Reconciliation Commission were to become a high-profile national process, effectively engaging non-Indigenous, as well as Indigenous, Canadians in a period of critical self-reflection and reconciliation, it could have a significant impact on moving Canada beyond colonialism to reconciliation. Regrettably, its low profile to date within Canadian society as a whole is a cause for concern that its potential will not be realized. Whatever the outcome of the Truth and Reconciliation Commission, political courage will be required to take reconciliation from a promise to a reality.

Ultimately, the demographics of Canada may lead Indigenous issues to rise up the national political agenda. The Indigenous population is the fastest-growing portion of the Canadian population and is, therefore, becoming an increasing proportion of the Canadian population.[131] As well, Indigenous people are more and more part of our urban centres and one can hope that this demographic change will lead to growing interactions with non-Indigenous Canadians in multiracial, multicultural urban milieus as neighbours and colleagues.[132] These circumstances may make Indigenous voices a stronger part of Canadian political discourse, but reliance on demographics means that achieving justice for Indigenous peoples will very much be a long-term project. A sustained commitment to social transformation to address Indigenous issues in the short term would require a significant degree of political courage; such political courage is a rare commodity, especially outside an atmosphere of national existential crisis such as that which existed twenty years ago.

129 *Ibid.*

130 *Ibid* at 279-80.

131 Statistics Canada, *Projections of the Aboriginal Populations, Canada, Provinces and Territories, 2001 to 2017* (Ottawa: Minister of Industry, 2005), online: Statistics Canada <http://www.statcan.gc.ca/pub/91-547-x/91-547-x2005001-eng.pdf>.

132 *Fact Sheet–Urban Aboriginal population in Canada*, online: Aboriginal Affairs and Northern Development Canada <http://www.ainc-inac.gc.ca/ai/ofi/uas/fs/index-eng.asp>.

The effect that Indigenous resistance to the Meech Lake Accord, and settler state colonialism generally, had on the course of Canadian politics in the early 1990s is a remarkable and unprecedented chapter in our political history. The challenges in replicating the progress made in the political discourse on Indigenous issues during that time within the political environment of today are significant; there is no apparent "formula" that will easily return Indigenous issues to the level of political salience that they had in the 1990s. If Canadians are serious about reconciliation between Indigenous peoples and settlers, however, the spirit of that immediate post-1990 period needs to be renewed within Canadian society as a whole, that is, for it to be more than just an anomaly in our political history.