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**PEACE AND GOOD ORDER:
A TREATY RIGHT TO PARLIAMENTARY
REPRESENTATION?**

by

Kiera L. Ladner

**A Thesis Submitted to the Faculty of Graduate Studies and
Research in partial fulfillment of the requirements for the
degree of Master of Arts in Canadian Studies**

**Carleton University
Ottawa, Ontario**

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of Graduate Studies and Research acceptance of the thesis

"Peace and Good Order: A Treaty Right
to Parliamentary Representation?"

submitted by Kiera Ladner, B.A., M.A.
in partial fulfilment of the requirements for
the degree of Master of Arts

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ABSTRACT

This thesis explores the idea that guaranteed representation can be construed as a Treaty right using the 'peace and good order' clause which appears in each of the Numbered Treaties. The analysis presented in this thesis demonstrates that the 'peace and good order' clause could be construed so as to suggest a right to Parliamentary representation, among other possibilities. Moreover, it also demonstrates that such a right does not constitute a substantial departure from Canadian political traditions, electoral law, and the Charter of Rights and Freedoms. Nevertheless, it remains questionable as to whether or not such a right should ever be implemented.

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Notwithstanding the assistance I have received from a number of individuals and organizations, I would like to extend my great appreciation to my supervisor, Professor Maureen Davies, my Committee members (especially Professor Pauline Rankin), and the School of Canadian Studies at Carleton University. I also wish to acknowledge James (Sakej) Youngblood Henderson for introducing me to the implications of the 'peace and good order clause' during my studies at the University of Saskatchewan. Although he merely intended to help me with a presentation on electoral reform, he actually provided me with a plethora of unanswered questions which have been burning in my soul ever since. I thank him for his inspiration and support, and for showing me that a lot of good (read: my thesis) resulted from my year in Saskatoon.

I would also like to express my gratitude to those people who provided me with the information and guidance necessary to complete this project. Although most of the Elders go unmentioned in the thesis, I truly appreciate the stories they shared with me about the Treaties and the political implications of the 'peace and good order clause.' I hope that I have done their stories justice. Nonetheless, I take full responsibility for any mistranslations, misinterpretations or misunderstandings. *Meegwetch*

In addition, I would like to thank the many people (both past and present) who have seen me through this adventure in academia. I particularly wish to honour those people who have walked this road before me, and in doing so have shown me the way and provided me with much inspiration. A special note of appreciation goes to those people who have stood by me during the writing of this thesis and who have provided me with much needed encouragement. I am truly indebted to Greg Hill, Sue-Ellen Gerritson, Christopher Paci, Jennifer Gibson, Rhonda Bradley and Clara Wildcat.

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DEDICATION

This thesis is dedicated to my grandparents Paul and Rose Martin who, with my mother Bonnie Ladner, have provided me with more knowledge and understanding than a lifetime of university ever could. I thank my grandfather for sharing with me his dream of going to University. His vision has seen me through a lot of sleepless nights and stressfull days. I wish to acknowledge them for teaching me not only how to dream, but how to make my dreams a reality.

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INTRODUCTION

Since receiving the federal franchise in 1960, status Indians have been part of the Canadian electoral process, and several people of Aboriginal ancestry have been elected to the House of Commons and to provincial and territorial legislatures. Several individuals of Aboriginal ancestry have even served as provincial and territorial cabinet ministers.¹ Moreover, on occasion Aboriginal members have been able to exercise influence over a legislative body, a government, or a government initiative as a result of their 'Aboriginality.'²

Nonetheless, political scientist Roger Gibbins argues that

there is little question that the existing electoral system does not provide an effective bridge between Aboriginal communities and the broader political community. Voter participation rates are often low, sometimes very low, the system provides very limited opportunity for the election of Aboriginal members to the House of Commons and, more generally, it fails to enable Aboriginal communities to exercise significant leverage on the political process.³

¹ In 1994 Mike Cardinal was the Minister of Social Services in Alberta, while in Saskatchewan, Keith Goulet was the Associate Minister of Education, Training and Employment, and the Minister responsible for Saskatchewan Government Insurance.

² Elijah Harper exemplifies this point; he was able to stop the passing of the Meech Lake Accord in the Manitoba Legislature because unanimity was required and he, as an Aboriginal person with an Eagle feather in hand, said 'NO'.

³ Roger Gibbins, "Electoral Reform and Canada's Aboriginal Population: An Assessment of Aboriginal Electoral Districts", in Robert A. Milen ed., Aboriginal

Furthermore, once elected, Aboriginal legislators often find themselves constrained by parliamentary rules, conventions, party discipline, and by the fact that they are not elected solely by Aboriginals, and therefore must represent all of their constituents.⁴ Thus, even when there are Aboriginal legislators, Aboriginal people may not necessarily be represented. As a result, it may be necessary to develop a system of particularistic representation for Aboriginal peoples to ensure that Aboriginal peoples receive representation. Despite the fact that it has been argued previously that such a system of representation would be unconstitutional, this thesis will prove that particularistic representation is not unconstitutional by demonstrating that it could be construed as a Treaty right.

A system of particularistic representation may be required to increase representation because since receiving the right to vote, status Indians have, to a great extent, remained outside the Canadian electoral process. Although status Indians have had the franchise for more than 35 years, representation remains quite limited, as does electoral participation in general. Participation varies from place to place, from nation to nation, and with time or different elections. For example, while "only one Akwesasne [Mohawk] person has ever voted in a Canadian election,"⁵ in Hobemma (a Cree reserve in Alberta) over 1000

People and Electoral Reform in Canada, (Toronto: Dundurn Press, 1991), p. 153.

⁴ Ibid. In this article Gibbins discusses the situation faced by Progressive Conservative Member of Parliament Wilton Littlechild during the crisis at Oka. Gibbins suggests that Littlechild was unable to speak out because of the aforementioned constraints.

⁵ Michael Mitchell, "Akwesasne: An Unbroken Assertion of Sovereignty", in Boyce Richardson ed., Drum Beat: Anger and Renewal in Indian Country, (Toronto: Summerhill Press, 1989), p. 111.

people (approximately 55 percent) voted in the 1988 election when Wilton Littlechild (a Cree lawyer from Hobemma) ran whereas the usual rate of participation prior to and since 1988 has been approximately 100 people (12.5 percent).⁶

According to V. O. Key, examining rates of electoral participation is important. As he explains:

examination of popular participation in the political process may suggest crucial insights into the nature of the political order. Variations in the act of voting may serve as indicators of fundamental characteristics of the state as may quantitative differences in voting. An extremely small turnout may reflect lack of faith in the democratic process among those that stay at home.⁷

Voting rates do offer critical insights into the nature of the politics and the way in which politics are viewed in the nation state. Not only do the rates of participation among Aboriginal peoples reflect a lack of faith in the political process, but this failure to use legislatures in an organized or sustained way has other explanations, among which is the predominantly held belief that “[Natives] are not and never have been part of the Canadian government, [as it is] a mechanism for immigrants.”⁸ Moreover, Metis scholar Howard Adams, says this inactivity can be interpreted through a Marxist analysis as well:

⁶ Gibbins, p. 159. Also see: Wilton Littlechild, Interview, (Hobemma, Alberta, August 18, 1995).

⁷ V. O. Key, Politics, Parties and Pressure Groups, (New York, New York: Thomas Crowell & Co., 1966), p. 575.

⁸ James (Sakej) Youngblood Henderson, “All is Never Said”, in Richard Gosse, James Youngblood Henderson, & Roger Carter ed. Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice, (Saskatoon: Purich Publishing, 1994), p. 424.

"[legislatures are] an instrument of the ruling class and [their] main purpose is to support and protect the ruling class."⁹ Furthermore, according to Adams, "a conquered people learns to shun the politics of the conqueror ... [and] all governments regardless of their political affiliations have discriminated against native people and denied them their rights as full citizens."¹⁰

Regardless of the reasons for the lack of Aboriginal influence over and participation in Canada's Parliamentary system, there exists a problem of under representation and powerlessness. However, these are not problems that have arisen since the federal franchise was granted over thirty years ago. Rather, under-representation and powerlessness are the result of colonization. While many academics and members of the dominant society attempt to explain the lack of Aboriginal voter participation by referencing the misconceived notion that First Nations had no political traditions prior to the onslaught of European 'civilization' on Turtle Island, most also cite reasons associated with colonialism.¹¹ Furthermore, colonialism is the factor underlining the aforementioned reasons given by Henderson and Adams. This is demonstrated by the fact that most Native peoples have a consciousness as a member of an Aboriginal collectivity (be it Cree, Inuit, Metis or Mohawk), and not as a Canadian. While this may not be the result of

⁹ Howard Adams, Prison of Grass: Canada from a Native Point of View, (Saskatoon: Fifth House Publishers, 1989), p. 172.

¹⁰ Ibid.

¹¹ David Bedford & Sidney Pobiushchy, "Aboriginal Voter Participation", (unpublished paper, presented at Calgary: Canadian Political Science Association Annual Meeting, June 12, 1994), p. 25.

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annihilation, ostracization, fragmentation, alienation, differentiation, exclusion and forced assimilation of Indigenous peoples through both domination and oppression.

Domination and oppression continue to exist in the Canadian consciousness, as Eurocentrism still forms the heart of Canadian society. This is evident if one looks at Parliament. Parliament is still encapsulated by, and an expression of, a Eurocentric way of being which denies the existence and excludes the participation of Aboriginal collectivities as nations within Canada. Individuals can participate but they must participate as Canadians, and participate in a manner which is Eurocentric and which denies and ostracizes different cultural practices, different political traditions, and languages which are not considered one of the 'two founding languages.' The political institution and the laws which guide it deny and exclude the existence of difference. Representation in a Parliamentary system dominates and oppresses differences. Even if Natives are elected to Parliament, as Wilton Littlechild was, they are not necessarily representing Aboriginal peoples or a specific First Nation.¹⁵ Rather, they are members of a political party, maybe even the government, and they are the representative of their entire constituency regardless of differences such as race, sex, income, sexual orientation, ethnic background or education. As Wilton Littlechild, the first Treaty Indian elected to Parliament stated, "I, as a Member of Parliament ... was viewed as non-Indian government representative and not as an Indian representative. ... With the current structure, the way it is, we're not represented, and I can say that from

¹⁵ Littlechild, 1995.

experience, we're just not represented."¹⁶

A paradigm of colonialism, therefore still exists in Canada. This paradigm or context, like most others, is an artificial state of being. Although it is man-made, this artificial context of colonialism has become entrenched in our consciousness as if it were a natural order.¹⁷ Although Canada continues to exist within and be governed by an artificial paradigm characterized by domination and oppression,

Canadian society is attempting to create an innovative post-colonial consciousness and nation. As a part of the supreme law of Canada, it has already affirmed existing Aboriginal and treaty rights at every level of Canadian society. This constitutional reform is an attempt to end the legacy of colonization and create a new vantage point for Canadian thought and society.¹⁸

However, while a paradigm shift has been articulated in the Canadian Constitution, it has yet to occur in government and society (thus remaining the vision of those Aboriginal peoples who fought vigorously to have Aboriginal and Treaty rights included in the Constitution). Real decolonization has yet to occur and thus post-colonialism merely exists as a vision of Canada that has not been embraced and advanced by Canadians and Canadian institutions.

The process of de-colonization is a complex and multifaceted process, for which there is no one path, and possibly no one unifying

¹⁶ Littlechild, 1995.

¹⁷ Henderson, 1995 draft, pp. 5-7. Also see R. M. Unger, Social Theory: Its Situation and Its Task, A Critical Introduction to Politics, A Work in Constructive Social Theory, (Cambridge: Cambridge University Press, 1987), pp. 16-31.

¹⁸ Henderson, 1995 draft, p. 1.

goal. Some see the goal as “recapturing an almost lost tradition,”¹⁹ while others strive to “replace the sameness of universality with the concepts of diversity, complementarity, flexibility and equity or fundamental fairness.”²⁰ For me, decolonization represents the process by which we attempt to address our present state of existence, brought about by over 500 years of occupation and colonization of Turtle Island. Decolonization means attempting to end the paradigm paralysis Canada is currently experiencing, putting a stop to the colonization of Indigenous peoples and their collectivities, and deconstructing and then reconstructing Canadian society and Canadian institutions to reflect and embrace Aboriginal nationhood.

The fact that Canada has yet to attain the status of a post-colonial state is evident in that Aboriginal collectivities continue to be oppressed and dominated, and in the fact that they are unable to interact with and within Canadian institutions (and even Canadian society) in a manner reflective of their status and history as nations. Several scholars have attempted to offer ways in which to overcome this paradigm paralysis by theorizing new paradigms, such as seen with the numerous volumes conceptualizing self-government. Iris Young’s book entitled Justice and the Politics of Difference,²¹ offers such a solution involving electoral reform which would end the injustices of institutionalized oppression and domination, while creating a new form

¹⁹ Bedford, 1994, p. 28.

²⁰ Henderson, 1995 draft, p.91.

²¹ Iris Marion Young, Justice and the Politics of Difference, (Princeton: Princeton University Press, 1990).

of justice which would emancipate 'minorities' through democratic pluralism.²² However, while Young's vision of democratic pluralism strives to emancipate minorities from institutionalized oppression and domination, she recognizes that First Nations are not minorities, they are Indigenous peoples with rights and obligations which reflect their status and history as such. As a result, I think that there is an easier way to alleviate the institutionalized domination and oppression of Natives which exists in Canada's political system. The Canadian Constitution offers the tools to decolonize Parliament and to create the post-colonial state, as it recognizes and affirms existing Aboriginal and Treaty rights which could be utilized in creating this new paradigm.²³ To do so would require that Aboriginal peoples receive a voice reflective of their status as nations within Parliament. Furthermore, the Indigenous populace would have the ability to participate in a manner reflective of their different ways of being and seeing, different visions of the future, different rights and responsibilities and different political traditions and languages.

My thesis contends that guaranteed representation for Aboriginal peoples is a Treaty right for those peoples whose ancestors signed the

²² Young, 1990, p. 163-184.

²³ Section 35 of the Constitution recognizes and affirms existing Aboriginal and Treaty rights. Treaty rights refer to the obligations which were incurred as a result of the signing of peace, friendship, and land Treaties throughout this country between the Crown and First Nations. Meanwhile Aboriginal rights are best explained by Michael Asch as "encompassing a broad range of economic, social, cultural and political rights ... These rights flow, first of all, from the fact that the aboriginal peoples were in sovereign occupation of Canada at the time of contact, and secondly from the assertion that their legitimacy and continued existence has not been extinguished by the subsequent occupation of Canada by immigrants." Michael Asch, Home and Native Land: Aboriginal Rights and the Canadian Constitution, (Toronto: Methuen Publications, 1984), p. 30.

Numbered Treaties in western Canada between 1871 and 1921.²⁴ That is, my thesis attempts to create a conceptual framework of guaranteed representation based on Treaty rights, which would in turn decrease and possibly end the institutionalized oppression and domination of Aboriginal peoples (those who signed the Numbered Treaties) in Canada's political system.

This thesis contends that guaranteed representation may be viewed as a Treaty right with reference to the 'mutual clause'. This clause appears in the Numbered Treaties which were signed in western Canada following Confederation. The 'mutual clause' or the peace and order clause places a responsibility on the 'Indian Tribes' to maintain peace and order both on and off reserve for as long as the sun shines and the rivers flow. For example, in Treaty Six, the clause states:

They [the Chiefs and Headmen] promise and engage that they will in all respects obey and abide by the law, and they will maintain peace and good order between each other, and also between themselves and other Tribes of Indians, and between themselves and others of Her Majesty's subjects, whether Indians or whites, now inhabiting or hereafter to inhabit any of the said ceded tracts ...²⁵

According to the current interpretation of this clause, based mainly on historical evidence, and political and legal theory, the maintenance of peace and order occurs through the legislative process. Therefore, I am arguing that a Treaty right to guaranteed electoral representation exists.

²⁴ This is not limited to those peoples considered 'Treaty Indians' by the federal government, rather I suggest that a more inclusive and less colonial definition of Treaty descendants be used.

²⁵ Western Treaty No. 6, (Ottawa: National Archives), GAD reference numbers: IT296, IT297, & IT328.

This interpretation of the mutual clause might seem plausible and might be construed so as to suggest a right to Parliamentary representation. However, the interpretation of the meaning of this clause has changed a number of times since the Numbered Treaties were signed in western Canada. In fact, neither party to the Treaties has ever agreed on the exact meaning of the clause. Furthermore, one might say that the interpretation of this clause has shifted continuously to reflect the needs and desires of the signatories to the Treaties.

In order to establish if a right to guaranteed electoral representation exists, this thesis will explore whether guaranteed representation exists as a Treaty right, and then attempt to rationalize the existence of such a right within the Canadian political structure. In pursuing this goal, the perspective that I have utilized is interdisciplinary, drawing from (but not limited to) anthropology, history, law, political science, and sociology.

Making a case for guaranteed representation as a Treaty right requires the employment of several research methods. This is due to the fact that the research at hand is multifaceted. While Treaties are archival documents, governments continue to interpret Treaties in legislation. The history and understanding of these agreements have also been kept alive in the oral traditions of the First Nations. In attempting to establish whether guaranteed representation could be viewed as a Treaty right, my research has included archival studies, legislation and policy searches, interviews, and a literature review. In

conducting this research, I questioned if there is any basis on which to consider guaranteed representation a Treaty right.

In short, the hypothesis states that guaranteed Parliamentary representation may be viewed as a Treaty right. In developing this hypothesis, my research has focused on several distinct areas. In order to establish if anything in the Treaties is suggestive of a right to guaranteed Aboriginal representation, I have begun with an examination of the Treaties. My research has been limited to the Treaties Number Six and Seven that were signed in present day Saskatchewan and Alberta. However, as it is not enough to merely examine the written text, I have also read the accounts of the Treaty negotiators and conducted interviews with Elders, notable historians, and Native academics to see if anything in the Treaties may be so construed as to support the idea of guaranteed electoral representation. As guaranteed representation has been discussed during previous constitutional negotiations, I have examined how this issue has been framed and articulated in the past.

This hypothesis will be developed in the following manner. The first chapter examines both the written and the oral tradition pertaining to this subject matter. Specifically, this chapter addresses the limitations of the written text in dealing with such matters as Treaties, and the necessity to investigate and account for the oral traditions of Native peoples. I also look theoretically at the uses and limitations of the oral tradition of Native peoples. This chapter explores the difficulties involved in researching this topic, and demonstrates how

these difficulties were dealt with through a discussion of the methodology utilized.

The second chapter examines the intentions of the parties to the Treaties and early interpretations of the mutual clause. That is, this chapter seeks to offer an understanding of what the intentions of the signatories were, and how the clause was originally interpreted. The chapter provides a historical examination of the evolution of a particular clause that occurred in each of the Numbered Treaties. For the most part, I am not advancing a definitive understanding or a mediated reality of what the 'mutual' clause actually means in this chapter, rather I am presenting the perspectives of both parties as they have been recorded in history, be it oral or written. However, in concluding this chapter, I discuss whether guaranteed representation can be framed as a Treaty right, based on current interpretations of the western Treaties. This is achieved by investigating current interpretations of this clause, and possible ways in which this clause could be interpreted based on the historical perspectives presented.

The third chapter will examine and analyze existing electoral rights legislation, the Canadian Charter of Rights and Freedoms, and the judicial interpretation of this legislation and the Charter. This will be done in order to contextualize my research within the existing literature and to determine whether guaranteed Aboriginal representation could be fit into the existing system of electoral representation. I will also look at other ways in which guaranteed representation could be framed within the existing political system

which would increase Aboriginal participation while limiting or putting an end to the institutionalized oppression and domination of Aboriginal peoples in Parliament.

The final chapter of this thesis explores important issues surrounding guaranteed Aboriginal electoral representation. This chapter addresses concerns that have been raised by both academics and Native peoples concerning possible consequences and problems associated with a system of particularistic representation. Moreover, this chapter will question whether such a system of representation is desirable.

CHAPTER 1:

WAYS OF KNOWING & CREATING A WAY OF KNOWING

INTRODUCTION

At the present time, literature discussing guaranteed electoral representation as a Treaty or an Aboriginal right does not exist. Moreover, there exist very few sources which are directly related to this topic, or even indirectly related. As a result of the limited nature of the relevant literature, and the fact that much of this literature is problematic, one must look to other sources of knowledge about Treaty and Aboriginal rights.

To this end, it is not sufficient to merely examine the historical methods of this society, namely the written tradition. Rather, an examination of oral tradition is also required. As such, this chapter problematizes the written tradition, and then examines the nature of the oral tradition, some of the problems associated with oral tradition, and how and why the oral tradition should be utilized in academia, particularly in regards to this study. In doing so, this chapter develops and articulates the methodology utilized in my forthcoming attempt to create an understanding about the meaning of the peace and good order

clause which appears in the Numbered Treaties. Thus, this chapter provides the reader with an understanding as to how the research for this thesis was conducted and how the research was utilized to construct an understanding of the mutual clause both past and present.

THE WRITTEN TRADITION

Traditionally, written history, like all products of the Eurocentric paradigm, has claimed an accentuated universalism.¹ Moreover, the written history of this society, as well as the supporting archival documents, has been both looked upon and viewed as the truth, a truth which was seldom questioned, and a truth which was believed to be all encompassing.

Although this has been changing, only recently did a shift begin to occur from this Eurocentric paradigm of universal truths to a newer paradigm in which history is being revisited, re-examined, and rethought. While this newer paradigm of social history, ethnohistory and historical revisionism is characteristic of the majority of scholarly material being produced today, it is not reflected in the written history of the past.

¹ Henderson, 1995 draft, pp. 5-8.

Prior to this incomplete paradigm shift, history, like most meta-theories of Western thought, claimed universalism. Yet, this history included only that which was documented and written down; done according to disciplinary standards of objectivity, subjectivity and established research methods. Thus, history is, by definition, his story; a story told from an individual's perspective, usually that of a white middle to upper class male, who chooses what should be included or excluded from his 'official' version, and who remains at least one person removed from the actual event.

Thus while written history claims to be the universal truth, it is written from an individual's point of view and is reflective of the society which he is part of. Typically, written history did not recognize or accept difference of interpretation. Rather, it seems to suggest that the stories of all of the actors in history are being told. This is demonstrated with Alexander Morris' account of the Treaties of western Canada, as it reads as though the perspectives of all parties to the Treaties have been included in his memoirs.² However, it has been demonstrated that the perspectives of the Indian signatories to the Treaties are not truly or fully articulated in Morris' written account, nor are they accurately represented in the text of the Treaties themselves.³

It was assumed until recently that written history was "the growing together of new beliefs and old ... [as] a way of encoding the

² Alexander Morris, The Treaties of Canada With the Indians of Manitoba and the North-West Territories, (Toronto: Belfords, Clark & Co., 1971).

³ Edward Yellowhorn, Interview, (Peigan Reserve, Alberta, July 28, 1995).

values of a conquered culture within a dominant culture.”⁴ This, however, is not true. Written history has not traditionally encoded the values, experiences and memories of First Nations peoples and their collectivities. Rather, as Mohawk artist Louis Hall Karaniaktajeh suggests, written history is actually “twistory” as it is “written in such a way that you think they [the colonizers] are heroes. They’re out there plundering Indian land and looting, but it’s their right, their God-given right ... and the Indians are not supposed to do anything about it, they’re supposed to like it.”⁵ This is a fundamental problem with historical research and a major shortcoming of the written tradition. If one was to merely read historical accounts and texts on the Treaties of western Canada only an incomplete picture would be achieved. This problem is demonstrated in the following statement by John Snow Jr. He states that, “the literature detailing and analyzing the notions of Aboriginal rights and Indian [Treaties] in Canada is prolific and one-sided. Few, if any, Indian writers have attempted to project the Indian viewpoint concerning these two concepts.”⁶

Apart from being incomplete (yet claiming completeness), another shortcoming of the written tradition (that is traditional historical accounts) is that history is recorded by and for a specific society. Thus,

⁴ Ronald Wright, Stolen Continents: The 'New World' Through Indian Eyes, (Toronto: Penguin, 1992), p. 150.

⁵ Louis Hall Karaniaktajeh, quoted in Georges E. Sioui, For an Amerindian Autohistory: An Essay on the Foundations of a Social Ethic, (Montreal: McGill-Queens University Press, 1992), p. 40.

⁶ John D. Snow Jr., “Understanding Aboriginal Rights and Indian Government”, in John W. Friesen ed., The Cultural Maze: Complex Questions on Native Destiny in Western Canada, (Calgary: Detselig Enterprises, 1991), p. 135.

history excludes or gives less mention to certain aspects while obscuring or highlighting other aspects. Of course official versions of history try to conceal certain events, as this is looked upon as being in the interest of the general good. For example, Canadian written history has traditionally excluded (with the help of the government) many of the problems in dealing with First Nations that occurred prior to the 'civilizing' of the Indian. The exclusion of certain facts has been to the benefit of the Canadian government, and Canadian society in general. This exclusion or augmentation goes hand in hand with the perspective from which history is written.

In his book, Gabriel Dumont Speaks, Michael Barnholden discusses the dichotomy which exists between the official written versions of history and the other versions that for so long have gone unwritten. In cautioning readers to be aware of the context in which history is written (even when written by the same person) he states:

When we compare the edited history with the later, more private account, we discover discrepancies between the two that manifest a dichotomy of belief - a comfortable acceptance of officially-sanctioned history versus a deep-rooted suspicion that we can't believe everything we read, particularly if it is endorsed by the authorities.⁷

Furthermore, written accounts of the Treaty making process, as well as the Treaties themselves, are riddled with a particular slant or perspective. In light of this, there exists a problem in doing historical

⁷ Michael Barnholden, Gabriel Dumont Speaks, (Vancouver: Talonbooks, 1993), p. 14.

research and a major shortcoming with the written tradition as "we are limited to assessing the documents left by the skewed perspective of the European colonizer."⁸ This, along with many other major limitations such as the fact that written history does not reflect the values, experiences and memories of First Nations peoples and their collectivities, demonstrates the need to look for and at sources of information other than the written history of the dominant society.

This is not to suggest that traditional written accounts of Canadian history, and the supporting archival material, are not crucial and invaluable sources of information. Rather, I am merely suggesting that they are incomplete and biased, and thus other sources must be examined. As Hugh A. Dempsey suggests, written history and archival documents are not wrong, they are just different from the history of the First Nations, and thus, they have to be examined critically, and along side the oral traditions of Native peoples.

THE ORAL TRADITION

Oral tradition is the way of the Aboriginal people. However, it is not only Aboriginal peoples who have this long standing tradition, as all

⁸ Russell Smandych & Gloria Lee, "Women, Colonization and Resistance: Elements of an Amerindian Autohistorical Approach to the Study of Law and Colonialism", in F. Laurie Barron ed., Native Studies Review, volume 10 number 1, (Saskatoon: Native Studies Department, University of Saskatchewan, 1995), p. 37.

people have an oral tradition, recognized or otherwise. All of the original inhabitants of Turtle Island (North America) have similar traditions, which have existed from time immemorial. As Penny Petrone suggests, "Canada's Indian peoples, however, do not share a common literary heritage. Tribal literatures [or oral traditions] are culturally specific to each of the five cultural groups in Canada ... [and] their oral cultures reflect this great diversity in their histories and literatures."⁹ Moreover, as John Snow Jr. writes, "the oral history of the Redman in North America is intimately tied to the distinct knowledge systems of a tribe or nation of Indians."¹⁰

Nonetheless, the nature of the oral tradition is similar among all of the people of Turtle Island. The oral tradition is representative of a process of socialization or acculturation for each Aboriginal collectivity. Socialization and acculturation in each society occurs through experiencing oral tradition. That is, oral tradition contains in it the ways of the people, and their culture, history and traditions. This knowledge is passed from generation to generation through stories, songs, ceremonies, and orations.¹¹

In most societies, not everyone has the ability to tell stories, sing songs, perform ceremonies or give orations. Although oral tradition

⁹ Penny Petrone, Native Literature In Canada: From the Oral Tradition to the Present, (Toronto: Oxford University Press, 1990), p. 9.

¹⁰ Snow, 1991, p. 136.

¹¹ Joseph E. Couture, "The Role of Native Elders: Emergent Issues", in John W. Friesen ed., The Cultural Maze: Complex Questions on Native Destiny in Western Canada, (Calgary: Detselig Enterprises, 1991), pp. 201-214

belongs to the community, it is the property of those who hold it. That is, the oral tradition has been bestowed upon certain individuals by others, or through their dreams, visions or experience. Only these people have the right to convey their oral tradition to others, or to give a song, story or ceremony to another individual.¹² This ensures that the oral tradition is maintained in an appropriate state, and that only those who have the necessary qualities have the ability to socialize and maintain the traditions, and thus society.

Like all cultures, Aboriginal collectivities are dynamic and not static. Cultures change over time. Oral tradition is didactic in nature, and it is a negotiated reality or truth. A negotiated reality means that it was continuously revised, adapted and expanded through experience, community input, and interpretation.

As Thomas King suggests, "there is a strong misconception that Native oral literature [or the oral tradition] is an artifact, something that vanished as an art form in the last century. Though virtually invisible outside a tribal setting, oral literature remains a strong tradition."¹³ It has remained a strong tradition in many Aboriginal communities (and even households) despite the fact that the colonization and modernization processes have consistently tried to destroy both the oral tradition and the language in which it is

¹² Daniel David Moses & Terry Goldie eds., An Anthology of Canadian Native Literature In English, (Toronto: Oxford University Press, 1992), p. xx.

¹³ Thomas King ed., All My Relations: An Anthology of Contemporary Canadian Native Fiction, (Toronto: McClelland & Stewart, 1990), p. xii.

conferred.¹⁴ However, one must not forget that oral traditions of many cultures have been destroyed or virtually eliminated. This has occurred because of the annihilation of nations such as the Beothuk, or through government policies aimed at ending the speaking of Indian languages in order to 'civilize' and assimilate the Indian.¹⁵

Although one could justifiably state that the oral tradition continues to exist in most Aboriginal collectivities, it is not the same as it was in pre-colonial times. The colonial experience has taken its toll on oral tradition, as languages have been lost or nearly eliminated, and facets of the oral tradition (particular songs, stories, or ceremonies) have not been conferred on subsequent generations. Moreover, just as the oral traditions of the Aboriginal collectivities were constantly developing in pre-colonial times, they have continued to develop and adapt throughout the colonial experience.

Today, as in the past, oral traditions have expanded to include not only stories, songs, ceremonies, and orations that are pre-colonial in origin. As a result, there exists songs, stories, ceremonies and orations that encompass such issues and events as the demise of the buffalo, Treaties, residential school, and first encounters with Europeans. The dynamic nature of the oral tradition is best exemplified in the following statement by Penny Petrone:

¹⁴ Basil H. Johnston, "One Generation From Extinction", in W. H. New ed., Native Writers and Canadian Writing, (Vancouver: University of British Columbia Press, 1990), p. 14.

¹⁵ Ibid, pp. 14-15.

Oral traditions have not been static. Their strength lies in their ability to survive through the power of tribal memory and to renew themselves by incorporating new elements. ... As a consequence [of the colonial experience], narratives of more recent origin have adapted and absorbed European folktales, Christian legends, historical accounts, contemporary reserve and urban stories and jokes.¹⁶

Just as the content of the oral tradition of any particular society changed and evolved, since the commencement of the colonial experience, so to has its form. Oral tradition is no longer strictly oral. That is, it has come to be conferred on an audience using a multitude of different mediums. Traditional stories, songs, ceremonies and orations have been appropriated, written down, and published (by such people as Missionaries, Anthropologists, government officials, Historians, and authors) since the start of the colonial experience.¹⁷ Not only have these traditional stories, ceremonies, and songs been written down historically, but they have also been documented utilizing all forms of cultural reproduction including film, visual art, and dramatization.¹⁸

Apart from this historical appropriation of the oral tradition which continues today, "in recent years there has been a resurgence of Native pride in oral storytelling"¹⁹ and Aboriginal culture in general.

¹⁶ Petrone, 1990, p. 17.

¹⁷ Such writings include The Jesuit Relations, and Medicine River by Lynn Andrews.

¹⁸ Such cultural productions include the film Legends of the Fall, and the 1994 song Indian Outlaw by Tim McGraw.

¹⁹ Petrone, 1990, p. 17.

The result has been the transformation and the resurgence of oral tradition. It has been transformed in the sense that non-sacred stories and songs have been transformed into cultural commodities that are easily accessed by people regardless of their ethnicity, the readiness to know, and their ability to understand and comprehend in a respectful manner both the subject matter and the culture from which the commodity originates.

ORAL HISTORY

With our overemphasis on mental activity we are apt to think that the Indian, without any written language, lacks something important or necessary in not possessing a scholastic or dialectic doctrinal presentation [of history].²⁰

However, this is untrue as,

The history of Indian people in North America, is part of each separate tribe's knowledge system. Knowledge concerning Indian existence has been handed down through the oral tradition for generations and this practice continues today.²¹

Although oral history (a facet of oral tradition) is similar in many respects to the written history of Euro-Canadians, oral history is reflective of the cultural reality and the society from which it emerged,

²⁰ J. E. Brown, The Spiritual Legacy of the American Indian, (New York: Crossroads, 1982), p. 31.

²¹ Snow, 1991, p. 138.

as was demonstrated in the previous section dealing with oral tradition in its entirety. Thus, while I stated previously that written history has traditionally been Eurocentric, oral history is also ethnocentric (for example, Creecentric) as it tells the story of a particular people, from the perspective of that people, and is reflective of the traditions of that people.

Unlike written history, oral history tends to be circular in nature not linear, and is spatially oriented rather than time dependent. According to Native American philosopher Vine Deloria Jr., "the western preoccupation with history as a chronological description of reality was not a dominant factor in any tribal conception of either time or history."²² Oral history (and for that matter symbolic history) represents the memory of past experiences; experiences important to that particular society; experiences recounted, retold, and passed down from one generation to another orally.

For the most part, oral history is void of chronology in the sense of time. Oral history is not a linear history, rather it is the story of interrelated yet separate events and experiences. While there is some understanding as to when the event occurred, such information is not the focus of attention in oral history. Time is not important in the Indigenous world view. Even now with the influence of the western sense of time and space, oral history has changed minimally.

²² Vine Deloria, Jr., God is Red: A Native View of Religion, (Golden Colorado: Fulcrum Publishing, 1994), p. 98.

While history in the western tradition has had as one of its foundations the notion of time, the precise date of an event (or for that matter even a general idea of when) is not as important in oral history as is knowledge of such things as who, where, why and how. That is, oral history is the story of a people in their territory, a story which has no exact beginning, middle or end, merely events and experiences. Individual events and experiences which are not separate and segmented from the community and the territory, but intertwined and interdependent parts of the circle, combine together to form the circle of life, the life of the people.

The fact that the nature of oral history is so different from written history with respect to what is told and how it is told, makes doing academic research extremely difficult. The academic mindset is so different than the Aboriginal world view that translating between the two, or understanding oral tradition from the confines of academic training, can be an arduous journey. Thus, like the written tradition, oral tradition is also problematic. However, the difficulties caused by the very nature of oral tradition are furthered by the existence of language barriers, different cultural norms and traditions.

In order to access oral tradition, one must first find an elder or a story teller who has the knowledge that is sought. This can be a difficult and arduous process as not everyone knows or has the ability to tell every particular story. Furthermore, there may exist differing accounts of the same story which have to be accounted for, and reconciled academically. This is because, historically (at least) "differing

tribal accounts were given credence because it was not a matter of trying to establish power over others to claim absolute truth,"²³ and the stories were to be internalized and discussed.

However, the difficulties in using oral history in academic research do not ease with finding a story teller and coming to terms with a different view of history. Researchers have to respect and adhere to cultural norms and traditions. Every society has its own norms regarding the transfer of knowledge, and norms regarding its acquisition. For example, in Euro-Canadian society we have institutions which were established to transfer knowledge, and there are norms and laws that govern such transfers. There is no difference in Native society. There are institutions and protocols, such as ceremonies, which must be respected to enable the transfer to occur.

This makes doing intra-cultural research difficult as norms and traditions are learnt and understood within the cultural reality of a particular society, and may not be easily translated, understood or provided to or by an outsider. However, even when these difficulties are overcome by the researcher there is potentially a language barrier. For even if the story teller is speaking in the same language as the listener, the different world view which is contained in the language may not be easily transmitted, and knowledge may be lost in the translation. This is demonstrated in the following statement by Wilton Littlechild regarding traditional interpretations of Treaty Six, and the barrier that

²³ Ibid, p. 100.

language creates. He states that,

what has been missing, unfortunately, in Canada and elsewhere is the Indian interpretation of the Treaty. And when I listen to my people, the Elders and so on, talk about how they understood the Treaty, they make sense to me, especially if it is explained in our own language. I have difficulty translating that, or getting that particular view out of the Treaties. I just don't see that interpretation reflected in the Treaty text because it may have been difficult to translate it to English, and then from English to sort of a legal context.²⁴

James Youngblood Henderson further problematised the difficulties associated with translation, or caused by a language barrier, in suggesting that even today if you take a copy of a Treaty, "you can just look at it, every noun is not going to work [in a Native language] as these words don't exist in their environment."²⁵

As one can infer from the discussion thus far, there exists several foreseeable problems or difficulties in researching oral history. Nonetheless, just as it is not justifiable to toss traditional written accounts of history out the window, oral history is a extremely beneficial source of knowledge about such topics as the Treaties. Moreover, as we strive to decolonize history, and academia in general, it is necessary to begin to understand and accept different ways of knowing and different knowledge claims in their own right, and not according to such theoretical frameworks as the scientific method.

²⁴ Littlechild, 1995.

²⁵ James (Sakej) Youngblood Henderson, Interview, (Saskatoon, Saskatchewan, July 19, 1995).

Oral history can be an extremely beneficial, yet untapped, source of knowledge about the Treaties, as seen in the previous statement by Wilton Littlechild. In short, oral history contains within it the understanding of the people who signed the Treaty, an understanding which for the most part does not appear in the text of the Treaty or the written history surrounding the Treaty. As well, oral history can be utilized to clarify discrepancies in interpretation, and to rectify problems caused by mistranslation.²⁶ Oral history can also be utilized to create a more holistic and detailed picture of the Treaties. This ability is demonstrated by elder Dila Houle's ability to recall intricate details surrounding the making of Treaty Number Seven in 1877, such as the nervousness expressed by Laird as his hands were trembling and the paper shaking (causing a rattling sound) as he read what the government would offer the people.²⁷

UTILIZING WRITTEN AND ORAL TRADITIONS

Recreating a history in which all voices are understood and represented is difficult, especially since the disciplinary knowledge of history does not provide the necessary canons to conduct such research, and articulate such knowledge. However, there are several methodologies or theoretical constructs which can be used as

²⁶ Eddie Yellowhorn, 1995.

²⁷ Dila Houle, Interview, (Peigan Reserve, Alberta, July 8, 1995).

guidelines, as can interdisciplinarity in general. Cree elder Rick Lightning suggests that in order to create a truthful understanding of the Treaties, one must first understand the context of the Treaties, and the context of each interpretation both then and now. That is, one must comprehend the reasons for which both parties entered into the Treaties, and how they view the Treaty in the context of that point in time and space, as well as how the Treaties are viewed in light of past and present contexts.²⁸

Kainai (Blood) scholar Leroy Little Bear expressed similar ideas when he stated that, "to understand the Treaties, you have to understand the historical situation."²⁹ He also states that to do so, you have to look at both sides, and understand the situation faced by both sides. According to James Youngblood Henderson the courts have also expressed similar criteria. He states that, "the courts have told us that in viewing the written documents you have to know the context, the historical context ... of both sides so that you can figure out maybe what the words mean ninety percent of the time."³⁰ He also states that to deal with the lack of a historical methodology,

the Courts have come up with a canon of construction that says that if you can't figure out what the intent of the Crown was and you can't figure out what the Indian's intent was, then as a judicial value ... of interpretation you have to give a broad, fair and liberal interpretation to

²⁸ Rick Lightning, Interview, (Calgary, Alberta, September 1, 1995).

²⁹ Leroy Little Bear, Interview, (Calgary, Alberta, August 29, 1995).

³⁰ Henderson, July 19, 1995.

the words from the vantage point of the Indians at the time of signing.³¹

This canon of construction, known as the Dickson Doctrine in academic circles, developed out of the *Nowegijick* case, and has become the methodology used not only in the legal arena, but has become widely used in the academic world.³²

This doctrine is both compatible with and a foundation for a recent methodology developed by Huron philosopher Georges E. Sioui in his book, For an Amerindian Autohistory: An Essay on the Foundations of a Social Ethic.³³ Although Sioui's 'ethical approach to history' is mainly concerned with the influence of indigenous cultures on Euro-Canadians (both past and present), and with the persistence of Aboriginal cultures, values, and traditions, his approach is of great benefit to this study.³⁴ According to Sioui, "the goal of Amerindian autohistory is to assist history in its duty to repair the damage it has

³¹ Ibid.

³² In the Supreme Court decision of *Simon v. The Queen* (1986) Chief Justice Dickson stated: "Such an interpretation accords with the generally accepted view that Indian treaties should be given a fair, large and liberal construction in favour of the Indians. This principle of interpretation was most recently affirmed in this Court in *Nowegijick v. The Queen* (1983) ... I had the occasion to say the following ... 'It is legal lore that, to be valid, exemptions to tax laws should be clearly expressed. It seems to me, however, that treaties and statutes relating to Indians should be liberally construed and doubtful expressions resolved in favour of the Indian. In *Jones v. Meehan* (1899), it was held that Indian treaties must be construed not according to the technical meaning of their words, but in the sense that they would naturally be understood by the Indian.'" *Simon v. The Queen*, in Bradford W. Morse ed., Aboriginal Peoples and the Law: Indian, Metis and Inuit Rights in Canada, (Ottawa: Carleton University Press, 1991), p. 821.

³³ Sioui, 1992.

³⁴ Ibid., p. 21

traditionally caused to the integrity of Amerindian cultures.”³⁵ This is achievable using Amerindian autohistory as it is “Native history written in accordance with Amerindian values.”³⁶ That is, it is a historical approach which recognizes that the colonial experience was viewed differently by the colonized, than it was by the colonizer and that both views (particularly that of the Aboriginal participants) have to be understood within the context of that particular society and understood as they were likely interpreted at the time.

While the ideas of Lightning, Little Bear, Henderson and Sioui offer methodological guidelines for the study of the Treaties, and the recreation of history surrounding the Treaties, one can also look to interdisciplinarity for such guidelines. This is because, “new scholarship movements are interdisciplinary in the sense that the problems they address cannot be dealt with through the frameworks or methods of any single discipline.”³⁷ That is, disciplines, and thus disciplinary methodologies and knowledge claims, are Eurocentric and are experiencing a paradigm paralysis whereby knowledge that originates outside the particular discipline is dominated, discredited and discarded.³⁸ Meanwhile, as Vickers suggests, interdisciplinarity is a “political mission involved in de-colonizing disciplinary approaches

³⁵ Ibid., p. 37.

³⁶ Bruce G. Trigger, “Forward”, in Georges E. Sioui, For an Amerindian Autohistory: An Essay on the Foundations of a Social Ethic, (Montreal: McGill-Queens University Press, 1992), p. x.

³⁷ Jill Vickers, “Where is the Discipline in Interdisciplinarity”, Working Papers of ACS, (Montreal: Association for Canadian Studies), p. 22.

³⁸ Henderson, 1995, pp. 17-23.

since most disciplines are European in origin and their theoretical paradigms developed in response to European social realities."³⁹ Furthermore, as Greg Hill observes, interdisciplinarity is "an inclusive process where a non-traditional knowledge base (read: non-western) is accorded the same amount of respect and recognition that an esteemed 'academic' would enjoy."⁴⁰

Thus, as a methodology for researching and reconstructing history, interdisciplinarity offers the scholar an unfettered ability to create knowledge outside the confines of a discipline by borrowing from, bridging, synthesizing, and consolidating various ways of knowing (disciplinary and otherwise). It is a methodology concerned primarily with the process of doing such research, a process which varies from scholar to scholar, and from project to project (regardless of the individual).⁴¹ Although the interdisciplinary process has been of interest to many academics, there remains no canon of thought and no agreement on the nature of the process and what it entails or requires. For instance, while Julie Klein focuses her discussion on problems associated with borrowing and argues that "borrowers must assume the core responsibility of borrowing,"⁴² Danielle Boutet concentrates on the

³⁹ Vickers, 1991, p. 19.

⁴⁰ Kiera L. Ladner, Greg Hill and Christopher Paci, Interdisciplinarity and the Teaching of Canadian Studies: From the Perspective of the Products, unpublished conference paper, 1995, p. 6.

⁴¹ Ladner *et al.*, 1995.

⁴² Julie T. Klein, Interdisciplinarity: History, Theory and Practice, (Detroit: Wayne State University Press, 1990), p. 85.

generative process and the need to evaluate interdisciplinary work using the conceptual framework created by said work.⁴³

Regardless of this lack of consensus over the meaning of interdisciplinarity and what it entails, it is in itself a methodology for researching and reconstructing oral and written history. This is because interdisciplinarity provides the foundation for bridging and consolidating such diverse ways of knowing while trying to respect and view each way of knowing from within the respective knowledge system. Thus, oral and written histories can be viewed and understood within their own contexts, and knowledge which is ascertained from both can be brought together, combined, integrated and used to create a more holistic and realistic view of the history surrounding the Numbered Treaties, as discussed in this thesis. Furthermore, this is not a restrictive approach and thus, the ideas of thinkers such as Sioui and Little Bear can be used in conjunction with interdisciplinarity to rethink and reconstruct history using both oral and written traditions in such a manner that allows all voices to be heard without discrediting their account in totality.

⁴³ Danielle Boutet, "Interdisciplinarity in the Arts", in Harbour, Vol. 2:2, (1993), pp. 70-72.

CONCLUSION

Despite the fact that there exist several problems associated with oral and written accounts of the history surrounding the signing of Treaties Six and Seven, this chapter concluded that neither account can be discredited and tossed aside in its totality. Rather, each story (written or oral) must be examined critically in light of the other, and with the difficulties and intricacies surrounding each version of history in mind. Each version should be examined, compared and contrasted in a manner which allows all voices to be heard without discrediting their account in totality.

Furthermore, the process of recreating such a history, in which all voices are understood and represented, should be done in accordance with the ideas and theoretical constructs of the likes of Sioui, Lightning, Little Bear, and Henderson. This reconstruction should be done in an interdisciplinary manner which responsibly and respectfully⁴⁴ relocates knowledge from its originating site (disciplinary or otherwise) in order to create a more inclusive and holistic knowledge by bridging, synthesizing, combining, and integrating the various ways of knowing.

⁴⁴ Ladner, Hill and Paci suggest that interdisciplinary research should be contingent upon the test of 'responsibly and respectfully' which is a modification of Jill Vickers' test of 'respectfully and respectably' (See: Vickers, 1991.). They suggest that while interdisciplinarians have the responsibility to challenge disciplinary boundaries, this must be done responsibly and respectfully. They argue that, "responsibly forms the basis of understanding phenomena through the relocation of ideas, theories and facts outside the disciplines. Responsibly demands awareness of our processes within academic pursuits. With respectfully, as discussed by Vickers, we agree that researchers must know the discipline; its language and its nature prior to borrowing. ... For successful borrowing to occur, researchers must evaluate the usefulness of each borrowing as an obligation, and not as a revolutionary act ..." Ladner *et al.*, 1995, pp. 2-3.

Thus, while the ideas of scholars such as Sioui form the foundation of the way in which I reconstruct history, the process through which I attempt such a re-thinking of history in the following chapters is that of interdisciplinarity. That is, although I collect data and gather stories by reading written accounts and listening to oral accounts, I utilize the interdisciplinary method in combining the accounts to reconstruct and revisit history. This approach to scholarly research thus becomes the methodology utilized in my examination of oral and written accounts of history regarding Treaty Six and Treaty Seven, as well as for this thesis in its entirety. Thus, this thesis will draw from and borrow knowledge and theories from an array of sources (including, but not limited to, oral history, history, anthropology, political science, ethnohistory, and law) in an interdisciplinary manner, using interdisciplinarity as the underlying methodology.

CHAPTER 2: CREATING AN UNDERSTANDING OF GUARANTEED ELECTORAL REPRESENTATION AS A TREATY RIGHT

INTRODUCTION

This thesis is an attempt to establish guaranteed Parliamentary representation as a Treaty right based upon the peace and order clause which appears in the, so called, 'Numbered Treaties.' While the next chapter illustrates that such a right is compatible with Canadian electoral and Parliamentary traditions, this chapter examines how the peace and order clause can be used to construct a right to guaranteed representation. To reiterate, in Treaty Seven (as in all of the 'Numbered Treaties') the peace and order or mutual clause reads, in its entirety, as follows:

And the undersigned Blackfeet, Blood, Piegan [sic] and Sarcee Head Chiefs and Minor Chiefs, and Stony [sic] Chiefs and Councilors on their own behalf and on behalf of all other Indians inhabiting the Tract within ceded do hereby solemnly promise and engage to strictly observe this Treaty, and also to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen. They promise and engage that they will maintain peace and good order between each other and between themselves and other tribes of Indians, and between themselves and others of Her Majesty's subjects, whether Indians, Half Breeds or Whites, now inhabiting or hereafter to inhabit, any part of the said ceded tract; and that they will not molest the person or property of any

inhabitant of such ceded tract, or the property of Her Majesty the Queen, or interfere with or trouble any person, passing or traveling through the said tract or any part thereof, and that they will assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulation of this Treaty, or infringing the laws in force in the country so ceded.¹

Because it is impossible to examine the mutual or peace and order clause in each of the western Treaties, I have chosen to focus on Treaties Six and Seven.² Briefly, Treaty Six (south central Alberta and Saskatchewan) was negotiated and signed by Lieutenant-Governor Alexander Morris, and leaders of the Woodland Cree, the Plains Cree, some Assiniboiné and Saulteaux at Fort Carlton and Fort Pitt in late summer, 1876. Meanwhile, Treaty Seven (southern Alberta) was negotiated and signed by Lieutenant-Governor David Laird, Lieutenant-Colonel James MacLeod, and representatives of the Blackfoot, North Peigan, Blood, Sarcee, and Stoney First Nations at Blackfoot Crossing in September, 1877. While these two Treaties are discussed in their entirety, my primary research (archives and interviews) has focused on the Plains Cree of Treaty Six, and the Blackfoot Confederacy (composed of the Blackfoot, North Peigan and Blood First Nations) of Treaty Seven.³

¹ Western Treaty No. 7, (Ottawa: National Archives), GAD reference number IT313.

² These two particular Treaties were selected for a variety of reasons including the fact that I had previous knowledge of both prior to commencing this project, and because I had the opportunity to do primary research (albeit limited) within several Treaty Six and Treaty Seven communities during the months of July and August, 1995.

³ Much like my selection of Treaties, these First Nations were selected due to the availability and the accessibility of both written and oral accounts of history.

In attempting to establish guaranteed representation as a Treaty right this chapter examines not only the written word (of the Treaty), but the intentions and understanding of each party (federal government, Plains Cree, Blackfoot, Peigan, and Blood) to the Treaty as well. This is important as it provides a fuller understanding of what was meant by this clause in the Treaty. Likewise, this is especially important considering the fact that all of the historical documents have been written by one party to the Treaty (that party being the one that had the most to gain in the writing of such documents). This is also crucial because of problems in translating or articulating an 'Indian' understanding of the Treaties within the text of the Treaties themselves.

In examining the perspectives (intentions and understandings) of the signatories to the Treaties, I have utilized not only written sources, but oral sources of history as well. This is because I have attempted to present the perspectives of all parties involved as they have been recorded in history, and because all written and oral accounts of the Treaty making process (and the Treaty itself) are riddled with a particular slant or perspective, as was discussed in the previous chapter. Furthermore, as Taylor explains,

the commissioners' understanding [of the Treaty] and that of the government are well described in the written text of the treaties [and in archival records], ... it is much more difficult to ascertain the Indian understanding of the treaties. ... The archival evidence leaves many questions unanswered about the Indian understanding of the treaties. As it is mostly official or semi-official in nature, and Euro-Canadian in origin. Whatever Indian material it does contain reaches us at one remove.⁴

⁴ John Leonard Taylor, "Two Views on the Meaning of Treaties Six and Seven", in Richard Price ed., The Spirit of the Alberta Indian Treaties, (Toronto: Institute for Research on Public Policy, 1979), pp. 39-40.

Moreover, using either source of history can be difficult due to lack of information and adequate sources.⁵ Thus, I have relied heavily on those sources available, often to the extent that my discussion of the understanding of all parties to Treaties Six and Seven (both prior to and during the negotiations) is based solely on one source.⁶

THE PRE-TREATY UNDERSTANDING

By July 15, 1870, when the government of Canada assumed sovereignty over the Northwest Territories its Indian policy had long since been established. That is, the Crown (represented first by the Colonial authorities, and then by the government of the Dominion of Canada) had been negotiating various kinds of Treaties with Aboriginal collectivities in North America for over two hundred years and had established, in law, the conditions by which the Indians were to be dealt with, and their lands obtained. In the Royal Proclamation of October 7, 1763, the British Sovereign, King George III declared that all land held

⁵ For example, many people I attempted to interview for this thesis had no knowledge of the mutual clause, even though they had immense knowledge about the Treaties. This could be because, as Dila Houle suggests, the emphasis in understanding the Treaties has been placed upon the clauses which provide for the survival of the people, for this has been the primary concern since the signing of Treaty Seven. Houle, 1995.

⁶ Although problematic, the fact that I have had to rely heavily on Lieutenant Governor Alexander Morris' account does not invalidate my study, as all previous (and accepted) studies of the Treaties have relied on the same source. Furthermore, throughout my research I have continuously questioned the reliability of Morris' account, and I have attempted to use both oral history and archival sources to bring new light (and add credibility) to the following discussion.

by or reserved for the 'Nations or Tribes of Indians,' could only be 'ceded or purchased' by the Crown. Thus, the Royal Proclamation set in motion the Treaty making process by which the government secured ownership to the land, a process which was well established by the 1870s when the Dominion of Canada commenced with Treaty negotiations in western Canada. The Royal Proclamation states that, "if at any time any of the said Indians should be inclined to dispose of said Lands, the same shall be purchased only for Us, in our Name, at some public Meeting or Assembly of the said Indians, to be held for the Purpose."⁷

Whereas the government was obliged to negotiate Treaties in the west under the terms of the Royal Proclamation, Treaty negotiations were also necessitated by other driving forces. Although the Dominion of Canada had purchased the Northwest Territories from the Hudson's Bay Company, their 'control' of the territories was being threatened by American Manifest Destiny, namely expansionism. At the end of the American Civil War in 1865, Canada was faced with an extremely well armed neighbour, which was expanding westward at an alarming rate, and whose citizens were "eyeing the fate of the Red and Saskatchewan River districts with interest."⁸ As Leroy Little Bear explains,

The United States was expanding very rapidly westward, and Canada and Britain were trying to slow that expansion down, and they were trying to limit the United

⁷ Royal Proclamation of 1763, in David W. Elliott, "Aboriginal Title", in Bradford W. Morse ed., Aboriginal Peoples and the Law: Indian Metis, and Inuit Rights in Canada, (Ottawa: Carleton University Press, 1991), pp. 53-54.

⁸ George Brown & Ron Maguire, Indian Treaties in Historical Perspective, (Ottawa: Research Branch, Department of Indian and Northern Affairs, 1979), p. 29.

States as much as possible. So when the United States was expanding westward, Canada had to run westward, so to speak, and secure British Columbia so that British Columbia would not join or be annexed by the United States. ... In the race westward, of course, the 'come on' item for British Columbia joining Confederation was the building of the rail road. But then the government says, 'hey we forgot about those Indians out there. We have to secure the peace and goodwill of those Indians.'⁹

However, not only did the government have to secure peaceful relations with the Aboriginal collectivities in the west for this plan to succeed, they needed their land; land upon which to build the railway and their 'national dream'. Thus, the Treaties were negotiated to enable the building of the Canadian Pacific Railway, and to "enable the Government to throw open for settlement any portion of the land which might be susceptible of improvement and profitable occupation."¹⁰

Nevertheless, despite the fact that the government viewed the Treaty process mainly in terms of securing title, asserting their control over the land, and clearing the way for anticipated colonization, there existed the ever present threat of potential conflict and thus, the need to negotiate Treaties of 'Peace and Friendship' (as had been done in the rest of Canada). Thus, while the major impetus behind the negotiation

⁹ Little Bear, 1995.

¹⁰ Morris, 1880, p. 44. Negotiating a Treaty with the Plains Cree to enable the building of the Canadian Pacific Railroad and to open the land for settlement was further necessitated by the fact that a message sent to Morris from a council of Cree Chiefs (via Reverend G. McDougall) stated that "though they deplored the necessity of resorting to extreme measures, yet they were unanimous in the determination to oppose the 'running of lines or the making of roads through their country' until a settlement between the Government and them had been effected." George McDougall to Alexander Morris, October 23, 1875, in Alexander Morris Papers, (Winnipeg: Provincial Archives of Manitoba), MG12B1 #1136.

of the Treaties was securing geographic unity and the furthering of MacDonald's 'national dream', the government also wanted to secure peaceful relations with the Aboriginal collectivities of the Northwest Territories. The necessity to establish such relationships became apparent to the government not only because of the Indian wars occurring in the United States at the time, but also because of the warnings received from missionaries such as Reverend George McDougall about the escalating violence towards whites, the Riel Rebellion in 1869, the Cypress Hills Massacre in 1873, the arrival of Sitting Bull and his followers in the Cypress Hills following the defeat of Custer in 1876, and because of the discussions that were occurring between the Dakota and the Indians of southern Alberta and Saskatchewan regarding the formation of an alliance.¹¹ The influence of these events on the pre-Treaty mindset is demonstrated in an 1876 letter from Father Constantine Scollen to Morris regarding the urgency in negotiating a Treaty with the Blackfoot as "the Sioux Indians, now at war with the Americans, have sent a message to the Blackfeet Tribe, asking them to make an alliance offensive and defensive against all white people in the country."¹²

¹¹ Walter Hildebrandt & Brian Hubner, The Cypress Hills: The Land and Its People, (Saskatoon: Purich Publishing, 1994), pp. 91-105. Also see: John McDougall, George Millward McDougall, the Pioneer, Patriot and Missionary, (Toronto: William Briggs, 1888), p. 198. Also see: Hugh A. Dempsey, Crowfoot: Chief of the Blackfeet, (Edmonton: Hurtig Publishers, 1972), pp. 92-93.

¹² Constantine Scollen to Alexander Morris, September 8, 1876, in Alexander Morris, The Treaties of Canada with the Indians of Manitoba, the Northwest Territories and Kee-Wa-Tin, (Toronto: Willing and Williamson, 1880), p. 248. Also see: Alexander Morris to Constantine Scollen, October 24, 1876, in Scollen Papers, (Edmonton: Provincial Archives of Alberta).

Historian John Leonard Taylor states that for the government, the Treaties offered an alternative to the American experience, that is settlement "without the danger of the Indian wars experienced in the United States."¹³ Taylor found that "events in the United States provided an [negative] example of what settlement could mean to Indians. Destruction of game, loss of territory, disease, and wars with American troops made the period a desperate one for the Indians of the Western United States."¹⁴ Canadian Indians knowledge of this hardship, coupled with their knowledge of the events which had occurred in the Red River settlements in 1869, worsening fur trade relations, and declining resources caused the government to enter into Treaty negotiations with some sense of urgency in 1871, to avoid any chance of similar confrontations or destitution.¹⁵

Briefly then, there were a multitude of factors influencing the government's decision to enter into Treaties in the west, including the desire to establish and maintain peace and order, and the fact that they were required to do so under the terms of the Royal Proclamation. Despite the existence of these various factors, the government's main

¹³ John Leonard Taylor, "Canada's Northwest Indian Policy in the 1870s: Traditional Premises and Necessary Innovations", in Richard Price ed., The Spirit of the Alberta Indian Treaties, (Toronto: Institute for Research on Public Policy, 1979), p. 3. (Hereafter, Taylor, 1979a).

¹⁴ Taylor, 1979a, p. 11

¹⁵ This sense of urgency remained constant until Treaty Numbers Six and Seven were negotiated, as the government was continuously warned and advised about the need to negotiate these Treaties as soon as possible. For example, the turning back of the Geological Survey in September, 1875 by a 'group' of Cree (actually one warrior) as it entered their territory served as a warning, as did a letter by Reverend McDougall stating: "one thing is quite clear, that if no treaty should be made with the Crees next summer there will be trouble." George McDougall to Alexander Morris, September 13, 1875, in Alexander Morris Papers, (Winnipeg: Provincial Archives of Manitoba), MG12B1 #1109.

goal was to get the title to the land for as little as possible, to bring the Indians under their control on reserves where they would not wreak havoc on the government's plans to settle the west, and so that they could be "instructed, civilized and led to a mode of life more in conformity with the new position of this country, and accordingly [made into] good, industrious useful citizens ... [who would] do without assistance from the government."¹⁶ Thus, the government was seeking to establish peace and order in Western Canada, and to begin the process of 'civilizing' the Indians that was already underway elsewhere in Canada. This desire to establish peace and order is evident in a 1875 letter to Reverend George McDougall from Lieutenant Governor Morris requesting McDougall to proceed in telling the Crees about the upcoming Treaty negotiations, and to urge them to establish peace with other Indians and whites.¹⁷

Just as the government wanted to negotiate a Treaty with the Indians of the Northwest, most of the Aboriginal (Indian and Metis) inhabitants also wanted to negotiate a Treaty with the Crown. According to Alexander Morris, "the Crees had, very early after the annexation of the North-West Territories to Canada, desired a treaty of alliance with the government."¹⁸ In fact, the Crees not only desired that a Treaty be negotiated, but as early as 1871 they employed the

¹⁶ J. A. N. Provencher, Indian Commissioner, December 31, 1873, in George Brown & Ron Maguire, Indian Treaties in Historical Perspective, (Ottawa: Research Branch, Department of Indian and Northern Affairs, 1979), p. 34.

¹⁷ Alexander Morris to Reverend George M. McDougall, August 9, 1875, in McDougall Family Fonds, (Glenbow Museum & Archives), M732 Box 1 Folder 2.

¹⁸ Morris, 1880, p. 168.

assistance of traders, policemen, missionaries, and government employees to actively lobby for a Treaty.¹⁹ However, while a Treaty was requested and promised at that time, the government's response was slow, possibly because officials such as Chief Factor W. J. Christie suggested that the Indians were in no hurry to negotiate a Treaty.²⁰ According to Taylor, "the slow and gradual pace favoured by the government produced tension amongst the Indians to the west of the treaty areas as they wondered whether the Queen's government would help them before it was too late."²¹

From the lobby effort for a Treaty, engaged in on behalf of the Chiefs, one can ascertain the reasons for which the Cree leadership wanted a Treaty, and what they wanted in the Treaty.²² In the correspondence from W. J. Christie, Chief Factor for the Hudson's Bay Company in the Saskatchewan District, Chief Sweet Grass reminded the government that, "we heard our lands were sold and we did not like it; we don't want to sell our lands; it is our property and no one has a right to sell them."²³ Unlike the government, the Cree leadership did not

¹⁹ *Ibid.*, p. 168-175. Also see: John McDougall, Opening The Great West: Experiences of a Missionary in 1875-1876, (Calgary: Glenbow-Alberta Institute, 1970), pp. 47-49. Also see: Canada, North West Mounted Police Records, (Ottawa: National Archives, 1873 - 1877), RG18 series.

²⁰ W. J. Christie to Richard Hardisty, July 26, 1875, in Hardisty Family Fonds, (Calgary: Glenbow Museum & Archives), M477 #678.

²¹ John Leonard Taylor, Treaty Research Report: Treaty Six (1876), (Ottawa: Treaties and Historical Research Centre Indian and Northern Affairs Canada, 1985), p. 2.

²² Although these documents are useful indicators of the desires of the Cree leadership, one can not assume that they are totally accurate portrayals, as they are written by individuals (agents of the larger society) who had a vested interest in the Treaty making process. As such, they must be read and interpreted with this in mind.

²³ W. J. Christie to A. G. Archibald, April 13, 1871, in Sessional Papers of

desire or view the Treaty process as a mechanism through which to sell their land. In fact, they seem to be suggesting the contrary; they would not sell their land, as no one had the right to do so.²⁴

Instead of focusing upon the issue of land, the Cree leadership presented a very different view of what the Treaty was to encompass. According to Christie's letter, Sweet Grass established what he wanted in the Treaty, and seemed to be suggesting that a Treaty was needed because, as he stated

Our land is getting ruined of fur-bearing animals, hitherto our sole support, and now we are poor and want help - we want you to pity us. We want cattle, tools, agricultural implements, and assistance in everything when we come to settle - our country is no longer able to support us.

Make provisions for us against years of starvation. We have had a great starvation the past winter, and the small pox took away many of our people, the old, young and children.

We want you to stop the Americans from coming to trade on our lands, and giving firewater, ammunition and arms to our enemy the Blackfeet.

Canada, (Ottawa: 1872), No. 22.

²⁴ Gordon Oakes, interview, (Medicine Hat, Alberta, August 5, 1995). This view is not only evident in archival documents written by non-Natives, but it is a predominant part of the oral tradition. The reason for which no one had the right to sell the land is related to the Aboriginal view of the land, and ownership of their land. As Little Bear explains, "...if one attempts to trace the Indian's source of title, one will quickly find the original source is the Creator. The Creator, in granting land, did not give the land to human beings only but gave it to all living beings. ... An observation about Indians' concept of land includes a reference back to the basic philosophy. Indian property concepts are holistic. Ownership does not rest in any one individual, but belongs to the tribe as a whole, as an entity. The land belongs not only to the people living but it belongs to past generations and to future generations. Past and future generations are as much a part of the tribal entity as the living generation." Leroy Little Bear, in David W. Elliott, "Aboriginal Title", in Bradford W. Morse ed., Aboriginal Peoples and the Law: Indian Metis, and Inuit Rights in Canada, (Ottawa: Carleton University Press, 1991), p. 50.

We made a peace this winter with the Blackfeet. Our young men are foolish, it may not last long.²⁵

This message to Governor Archibald of Manitoba, is demonstrative of the thinking of the Cree leadership of the time.²⁶ They did not want to sell their land. Instead, they were asking for help in settling down when the time came, and help in maintaining peace and order within their territory between themselves, the Americans and the Blackfoot. In other words, the Cree leadership wanted the government to keep out the American traders so that peace and order could be maintained internally without the interference of alcohol, and so that external peace could be more easily maintained with a less well armed Blackfoot Confederacy, especially with the assistance of the government.

This interpretation of the Cree leadership's requests is further demonstrated in an 1875 letter concerning both the desire for and the terms of the Treaty, from Methodist missionary George McDougall to Lieutenant-Governor Morris. G. McDougall states,

The topics generally discussed at their council and which will be brought before the Commissioner are as follows in their own language. 'Tell the Great Chief that we are glad the traders are prohibited [from] bringing spirits into our country ... Ask for us a strong law, prohibiting the free use of poison (strychnine). It has almost exterminated the animals of our country, and often makes us bad friends with our white neighbors. We further request, that a law be made, equally applicable to Half-breed and Indian, punishing all parties who set fire to our forest or

²⁵ Christie, 1871. This is likely an accurate portrayal of Chief Sweet Grass's message, as many of the issues raised in Christie's letter were raised by Sweet Grass during the Treaty negotiations. See: Morris, 1880, pp. 190-191.

²⁶ Christie, 1871. Also see: Morris, 1880, pp. 168-171.

plain. ... We would further ask that our chiefships be established by the Government. Of late years almost every trader sets up his own Chief and the result is we are broken up into tiny parties, and our best men are no longer respected.'²⁷

From this letter, one can infer that the Cree leadership was requesting the assistance of the government in maintaining peace and order both internally and externally. Thus, these two examples of correspondence from the Cree leadership preceding the Treaty illustrate the Cree leadership's perception of why a Treaty was necessary to maintain peace and order within their territory, as well as how this could be done.

Similarly, the Blackfoot Confederacy also wanted, in some respect, to negotiate and sign a Treaty with *ninawak*.²⁸ However, just as I am certain that not every Cree leader was an avid supporter of negotiating a Treaty with the Crown prior to 1876, or for that matter even considered any sort of Treaty, the same can be said about the leaders of the Blackfoot Confederacy. For instance, Peigan Elder and son of the last traditional chief, Edward Yellowhorn, spoke of how when the North West Mounted Police first arrived in Blackfoot territory they wanted to negotiate a treaty, but Bull Head (Chief of the Peigan who, according to Yellowhorn, died that winter) refused and told the North West Mounted

²⁷ George McDougall, October 23, 1875, MG12B1 #1136; (copy of letter available at Calgary: Glenbow Museum & Archives), M732. Again it is questionable as to whether the letter was influenced by McDougall's personal ideas and goals. However, the fact that similar letters exist suggests that these really were Sweet Grass' words, especially if one considers a letter to Morris sent by an unnamed translator in Fort Walsh from a group of Cree Chiefs in April of 1876. In that, the letter sends a similar message, yet it is most likely not from a 'religious' source. Ouskawapis, Littlechild, Little Black Bear (*ne-eata-nek-maswak*) and Black Bone to Alexander Morris, April 20, 1876, in Alexander Morris Papers, (Winnipeg: Provincial Archives of Manitoba), MG12B1 #1247.

²⁸ *Ninawak*, meaning the Chief woman, or the Queen.

Police that he would not give them any of his land, and that they would only be permitted to winter in his territory that year.²⁹

Nonetheless, both oral and written accounts attest to the warm welcome that the North West Mounted Police received, and the allowances made by the Blackfoot Confederacy to facilitate their help in maintaining peace and order.³⁰ Subsequent to the establishment of good relations with the North West Mounted Police, the majority of the Blackfoot leaders (particularly Crowfoot) agreed to "stop killing each other and not to kill white people that came into their territory."³¹ However, after a few 'fairly peaceful' years, the situation began to worsen as the buffalo population declined, traditional enemies (such as the Cree) encroached upon Blackfoot territory, and Euro-Canadians trickled in and settled on their lands.³² As Leroy Little Bear suggests, the problem was quite simple, diminishing buffalo and territorial intrusions (by both the Blackfoot and the surrounding First Nations), meant

there is more chances you're going to run into your enemy. Which would mean that there is sure to be battles, there is sure to be fights because they are going to want to protect their territory. What do we need to do?

²⁹ Edward Yellowhorn, 1995. While there is no evidence that the North West Mounted Police were offering to negotiate a treaty similar to the so called 'Numbered Treaties' at this time, they were in fact attempting to get the leaders of all First Nations to agree or promise to abide by the law, and not to fight with other First Nations. Such a promise in accordance with Blackfoot traditions would constitute a treaty, and as such is referred to as a treaty today by many elders.

³⁰ W. McKay to Richard Hardisty, September 1874, in Hardisty Family Fonds, (Calgary: Glenbow Museum & Archives), M477 # 550.

³¹ Dempsey, 1995.

³² Dempsey, 1972, pp. 81-82.

Make peace. See, so the Indian mind was talking about peace and good order and so on.³³

As a result, the Blackfoot chiefs (at all levels of the Confederacy) looked towards the North West Mounted Police and the Queen they represented for assurances that past promises would be kept and that peace would be maintained. To that end, numerous discussions were held with the North West Mounted Police, missionaries, and the commander of the Canadian Militia about the problems arising in their territory, and the desire to negotiate with the Queen restricted access to said land and matters concerning peace and justice.³⁴

Meetings of the entire council (government) of the Blackfoot Confederacy were held to discuss the worsening situation, and possible remedies (including both the warpath, and a treaty). As a result of one such meeting, a petition was drawn up and sent to Lieutenant Governor Morris on their behalf by Jean L'Heureux.³⁵ The petition addresses the grievances of the Blackfoot, requests that the all people be kept out of their territory until a treaty is made, and urges the representatives of the Queen to negotiate a treaty with them which would limit "the invasion of our Country" and keep traditional enemies and Americans

³³ Little Bear, 1995.

³⁴ McDougall, John, Opening the Great West: Experiences of a Missionary in 1875-1876, (Calgary: Glenbow-Alberta Institute, 1970), pp. 14-16. Also see: E. Selby Smyth, "Report to the Minister of Justice", in Sessional Papers of Canada, 1876 No. 7, p. xxix. Also see: Canada, North West Mounted Police Records, (Ottawa: National Archives, 1873-1877), RG18 series.

³⁵ Jean L'Heureux to Alexander Morris, March 20, 1876, in September 13, 1875, in Alexander Morris Papers, (Winnipeg: Provincial Archives of Manitoba), MG12B1 #1265

out, so as to ensure the maintenance of peace in the territory.³⁶ This petition, according to Dempsey, illustrates that the Blackfoot were, "more concerned about Crees and Metis slaughtering buffalo in Blackfoot hunting grounds and white men building in their best wintering grounds than they were about the need for a treaty."³⁷ These concerns about territorial intrusion and depleting resources continued to be echoed in correspondence and discussions between missionaries (such as Priest Constantine Scollen) and government officials (particularly Morris and Laird) well after the negotiation of Treaty Seven in September, 1877.³⁸

Such correspondence demonstrates the fact that the Blackfoot (like the Cree) were seeking assistance in maintaining peace and order in their territory as it speaks of a promise (or treaty) that had been made previously by the North West Mounted Police, as was referred to by E. Yellowhorn. Although the willingness on the part of the Blackfoot to share or even cede their land is mentioned in some of this correspondence, the accuracy of these 'histories' is questionable as they contradict other written accounts, and much (if not all) of the Blackfoot oral history.³⁹ Thus, I believe that the Blackfoot sought to negotiate a treaty with the government which would facilitate the maintenance of peace both within Blackfoot society, and within Blackfoot territory in its

³⁶ Ibid.

³⁷ Hugh A. Dempsey, Treaty Research Report: Treaty Seven, (Ottawa: Treaties and Historical Research Centre, Indian and Northern Affairs Canada, 1987), p. 35.

³⁸ Morris, 1880, p. 249.

³⁹ Dempsey, 1987, pp. 34-41.

entirety, as undesirables (settlers, enemies and American traders) would be kept out by the North West Mounted Police.

THE TREATY PERIOD: TREATY NUMBER SIX

One can see from the discussion thus far that while the government entered into the Treaty negotiations in 1876 to obtain a land surrender, the majority of the Indians had no intention of surrendering any of their land, but desired assistance with the problems they were facing.⁴⁰ However, while the true intentions and the understandings of both parties to the Treaty will continue to be questioned, negotiated and mediated, the Treaty was, in the words of Reverend J. McDougall,

a most notable event pregnant with far-reaching consequences. [Notwithstanding the intentions and interpretations of each] the aboriginal man with his traditions unchanged through the centuries met face to face representatives of another old but ever-changing race to negotiate in peace and friendship their future relations in this new land.⁴¹

According to Taylor, "the government view of the treaty was that of an instrument of land surrender with provisions for a *quid pro quo* in terms of annuities, reserves of land, and other traditional items."⁴²

⁴⁰ G. McDougall, 1875.

⁴¹ J. McDougall, 1970, p. 58.

⁴² Taylor, 1979, p. 40.

Government sources (those written by agents of the government) place very little emphasis on the peace and order clause. In fact, most archival accounts of what was told to the Cree at the negotiations at Fort Carlton do not even mention the 'mutual clause.'⁴³

Nonetheless, at least according to Morris's published recollections, while there appears to have been no mention of it at the negotiations at Fort Carlton, the clause was discussed at length at Fort Pitt. Morris wrote that,

Chiefs ought to be respected, they ought to be looked up to by their people; they ought to have good Councilors; the Chiefs and Councilors should consult for the good of the people; the Queen expects Indians and whites to obey her; she expects them to live at peace with other Indians and with the white man; the Chiefs and Councilors should teach their people so, ...

The Chiefs and head men are not to be lightly put aside. When a treaty is made they become servants of the Queen; they are to try and keep order amongst their people. We will try to keep order in the whole country.⁴⁴

These statements could be construed so as to suggest that the government expected the Chiefs⁴⁵ to keep peace and order on the reserve,

⁴³ Morris, 1880, pp. 185-195. Furthermore, this clause is not mentioned in the recollections of scribe and witness John Andrew Kerr, or translator Peter Erasmus. John Andrew Kerr, "The Indian Treaties of 1876", in Dalhousie Review, (Halifax, July, 1937), pp. 187-195. Also See: Peter Erasmus, Buffalo Days and Nights, (Calgary: Glenbow Museum, 1976), pp. 241-258.

⁴⁴ Morris, 1880, p. 206.

⁴⁵ The government viewed chiefs as authoritative rulers who were agents of the government, and responsible to the government. This view, demonstrated in the Indian Act of 1876, is inconsistent with the way in which Chiefs were viewed in Cree society. This is reflected in the manner in which chiefs are referred to. Traditional chiefs, those responsible to and respected by the people are *Okimaw* (the one the people chose), whereas those who act as agents of the government, or who are elected under the Indian Act, are typically referred to as *Okimahkan* (the one the government, and not the people, chose or the pretend chief).

and between themselves and other Indians, as well as with non-Natives.⁴⁶ Meanwhile, the government would be responsible for keeping peace and order in the entire country. Furthermore, Morris' statements allude to the establishment of a relationship of peace and friendship, which is consistent with the majority of correspondence which occurred prior to the negotiation of the Treaty.⁴⁷

Thus, these statements, as well as others, could be construed so as to suggest that the Treaty was a promise of peace, among other things. This is consistent with the reasons for which the government wanted to negotiate a Treaty with the Cree, that were eluded to previously. Furthermore, this view is also supported by the symbolic images of the Treaty. For instance, the Treaty medals which the government gave to each of the Chiefs who signed the Treaty, "carries the image of a treaty commissioner grasping the hand of an Indian. The clasped hands and the buried hatchet suggest that a common understanding had been reached between red man and white."⁴⁸ Although it seems evident that the government gave the impression that both the Indians and the government would be partners in maintaining peace and order in Western Canada, it is evident that this was not the

⁴⁶ Although this is inconsistent with government policy, and what actually occurred, it is what is recorded in the archival records concerning the Treaty.

⁴⁷ For example, in a letter about the North West Mounted Police and the forthcoming Treaties, Morris addresses the need to get the Indians to establish peaceful relations amongst themselves and others, as well as the need to establish alliances "...for any military purpose the force is sent for the purpose of imposing the good will of the Queen and for her care of Her Indian subjects..." Alexander Morris to Richard Hardisty, June 19, 1874, in Hardisty Family Fonds, (Calgary: Glenbow Museum & Archives), M477 # 546.

⁴⁸ Taylor, 1979, p. 9.

government's true intention, contrary to what was stated at the Treaty negotiations. Instead the government intended to colonize the west, and to pursue the 'protection', 'civilization' and 'assimilation' of the Indian.⁴⁹

Meanwhile, from what I can ascertain about the Cree understanding of the Treaty at this time, the Cree also viewed the Treaty as an agreement of friendship and peace. This is evident not only in written and oral sources of history, but in the actions taken in the making of the Treaty itself. That is, negotiations surrounding the Treaty began with the traditional treaty making practices of the Cree, a demonstration that the Cree warriors were willing to make a lasting agreement of peace and friendship, followed by the Pipe Stem Dance and Ceremony, and a Pipe Ceremony. By accepting the Pipe Stem and participating in the Pipe Ceremony "the Governor and Commissioners accepted the friendship of the tribe"⁵⁰ and demonstrated their willingness to negotiate in good faith, promises that would be honoured by both parties. This is significant, as it demonstrates the intentions of the Cree, and how they viewed Treaty Six along the same lines as the traditional treaties of peace and friendship which they had been

⁴⁹ According to John L. Tobias, "protection, civilization and assimilation have always been the goals of Canada's Indian policy. These goals were established by governments which believed that Indians were incapable of dealing with persons of European ancestry without being exploited. Therefore, the government of Canada had to protect the person and property of the Indian from exploitation from the European, ... Eventually, through training [civilizing] the Indian identity and culture would be eradicated, and the Indian would be assimilable." John L. Tobias, "Protection, Civilization and Assimilation: An Outline of Canada's Indian Policy", in J. R. Miller ed., Sweet Promises: A Reader in Indian-White Relations in Canada, (Toronto: University of Toronto Press, 1991), p. 127.

⁵⁰ Morris, 1880, p. 198.

negotiating with other Nations throughout their history as a people.⁵¹

Accounts of the Treaty negotiations themselves also reflect the Crees' intent to establish peaceful relations (among other things) with the Queen and the Government of Canada. According to Morris, the Crees' continuously emphasized peaceful relations and cooperation to solve the problems they were experiencing and anticipating. His written recollections, as well as those of Peter Erasmus, are reflective of these feelings, and intentions. This is illustrated in his account of a comment made by Chief Sweet Grass, who stated, "may the white man's blood never be spilt on this earth. I am thankful that the white man and the red man can stand together. When I hold your hand and touch your heart, let us be as one."⁵²

However, by establishing such a relationship and accepting assistance to enable them to survive in and adapt themselves to the changing reality, the Cree were not giving up their sovereignty:⁵³ "Instead, they granted some of their powers to the Crown in exchange for certain benefits and rights."⁵⁴ This is not only a view that has emerged in recent years, or that was incorporated into the oral history of the Cree after the fact, as even Morris recounts that he continuously

⁵¹ Dempsey, 1995.

⁵² Morris, 1880, 191.

⁵³ Littlechild, 1995.

⁵⁴ Delia Opekokew, The First Nations: Indian Government and the Canadian Confederation, (Regina: Federation of Saskatchewan Indians, 1979), p. 10.

told the Cree that the government promised "that we would not interfere with Indian's daily life except to assist them in farming."⁵⁵

The fact that this view existed at the time of the Treaty negotiations is also demonstrated by the actions of Chief Big Bear. Big Bear, who had not been present during Treaty negotiations at Fort Pitt, refused to sign the Treaty until discussing it with his people, who were out on the land. According to Morris, Big Bear's major concern was his fear of hanging, and he refused to sign the Treaty due to the fact that the government would not promise that no Indian would ever fall victim to capital punishment.⁵⁶ This interpretation of Big Bear's words, actions and intentions is incorrect, and is demonstrative of the problems of mistranslation and misrepresentation associated with most non-Native archival material. According to Hugh A. Dempsey, Big Bear did not speak of having a fear of hanging at the negotiations, but rather, he was mistranslated by Reverend John McKay who spoke Swampy Cree and not Plains Cree and thus had difficulties translating the words of Big Bear.⁵⁷ Thus,

when Big Bear spoke about having a rope around his neck, he was not talking about a fear of being hanged, as the interpreter indicated. Rather he was using a common expression on the plains that denoted a person giving up his freedom. It was analogous to a wild horse having a rope placed around his neck so that it could no longer wander unfettered and free, making it a prisoner of the one who held the rope. ... Presumably, Big Bear's

⁵⁵ Morris, 1880, p. 193.

⁵⁶ Dempsey, 1995.

⁵⁷ Hugh A. Dempsey, Big Bear: The End of Freedom, (Vancouver: Douglas & McIntyre, 1984), p. 74. For a discussion of translation problems, also see: Erasmus, 1976, p. 241.

interpreter had confused the term *ay-saka-pay-kinit* (lead by the neck) with *ay-hah-kottit* [sic] (hanged by the neck).⁵⁸

Big Bear's misgivings about the Treaty relate readily to the topic at hand, as it demonstrates his reluctance to allow the government to interfere in the lives of his people, and thus, the importance that he placed on remaining sovereign. Furthermore, it seems to be suggestive of Big Bear's unwillingness to be limited to a *skunkun* or a small 'roped off' piece of land called a reserve, and his desire to retain Cree sovereignty and authority over all of the traditional territory, even that which is being shared with the white settlers.⁵⁹

Accordingly, the peace and order clause may be construed so as to have meant that the two parties to the Treaty would co-exist peacefully as two sovereign entities. This interpretation is predominant in accounts of oral history, and has been taken by many to imply a similar status of co-existence as that which is described at length in the Two Row Wampum Treaty.⁶⁰ Thus, according to the Cree view of the Treaty (particularly the 'mutual clause') both the government and the Cree would remain quite separate, acting as sovereigns within their own realm of influence or jurisdiction, and as co-sovereigns in shared or

⁵⁸ Dempsey, 1984, p. 74.

⁵⁹ According to oral tradition, and even the written record, the Cree signatories agreed to share their land (specifically the top soil) with the Crown so that they could survive as white settlers could then farm and ranch. Oakes, 1995. Also see: Lazarus Roan, "Interviews With Elders", in Richard Price ed., The Spirit of the Alberta Indian Treaties, (Toronto: Institute for Research on Public Policy, 1979), pp. 115-117. Also see: John Buffalo, "Interviews With Elders", in Richard Price ed., The Spirit of the Alberta Indian Treaties, (Toronto: Institute for Research on Public Policy, 1979), pp. 1118-122.

⁶⁰ Littlechild, 1995.

mutual jurisdictions (much like federal and provincial governments do today). The view presented is not only evident in the written accounts of the government agents, but it is also consistent with, and even inherent in the oral tradition.⁶¹

THE TREATY PERIOD: TREATY NUMBER SEVEN

"The making of this treaty, which completed the series of treaties extending from Lake Superior to the slopes of the Rocky Mountains,"⁶² was basically seen as a land surrender by the Dominion Government in 1877. Thus, the government viewed the terms of Treaty Seven, and the Treaty process itself, in the same manner as was discussed in the previous section dealing with Treaty Number Six, with the exception that there seems to have been more emphasis placed on the cost of both negotiating and adhering to the said agreement.⁶³ Nonetheless, despite the fact that the majority of the discussion focused on what the government would give the Indians if they were to give up their traditional territories, the representatives of the Crown at least mentioned (and explained rather ambiguously) the mutual clause to their Indian counterparts.

⁶¹ Dempsey, 1995. Henderson, 1995. Littlechild, 1995. Oakes, 1995.

⁶² Morris, 1880, p. 245.

⁶³ Ibid, pp. 261-262.

According to Morris, who using primarily Laird's first hand experience created the most notable written account of the negotiation of Treaty Seven, the Commissioners explained to their 'captive' Indian audience that they

... could not agree to exclude the Crees and Half-breeds from the Blackfoot country; that they were the Great Mother's children as much as the Blackfeet and the Bloods, and she did not wish to see any of them starve. Of course the Crees and Half-breeds could be prosecuted for trespassing on their reserves. In this the Indian Act secured them. The local government had passed a law to protect the buffalo. It would have a tendency to prevent numbers from visiting their country in the close season. But to altogether exclude any class of the Queen's subjects, as long as they obeyed the laws, from coming into any part of the country, was contrary to the freedom which she allowed her people, and the Commissioners would make no promise of this kind.⁶⁴

With this, the Commissioners, at least according to written history, excluded from the Treaty all that the Blackfoot were seeking and aspiring to resolve.⁶⁵ Moreover, this statement provides a good indication as to what the peace and order clause did not mean to the representatives of the Crown.

Whereas the Blackfoot sought protection of their lands and their lifestyle, the government (supposedly) negated and instead offered up the same peace and order clause which appeared in the previous Numbered Treaties. As Laird explained, this Treaty made the whites and Indians

⁶⁴ *Ibid*, p. 258.

⁶⁵ Hugh A. Dempsey, "One Hundred Years of Treaty Seven", in Ian A. L. Getty & Donald B. Smith eds., One Century Later: Western Canadian Reserve Indians Since Treaty 7, (Vancouver: University of British Columbia Press, 1978), p. 21.

'brothers'; 'brothers' under the same law.⁶⁶ Laws which had to be obeyed by both if they wished to remain as 'brothers' and if they wished to keep the North West Mounted Police as friends and not foes.⁶⁷ Lieutenant-Colonel MacLeod made similar comments which alluded to the meaning of this particular clause, and exactly what each of the respective parties were promising. He stated, as he often had in the past, "the police will continue to be your friends, and be always glad to see you. On your part you must keep the Queen's laws, and give every information to them in order that they may see the laws obeyed and offenders punished."⁶⁸

From what I can ascertain, for the Dominion government this clause was a promise of peace and friendship (or 'brotherhood'). This interpretation is consistent with the reasons for which the government wanted to negotiate the Treaty, as was discussed earlier in this chapter. Yet, the idea of peace and friendship that was advocated by the Queen's representatives, was extremely different than that which was articulated by the Blackfoot prior to the negotiation of the Treaty. That is, instead of viewing 'peace and good order' in terms of 'protecting' the Blackfoot and their territory, the government saw peace in terms of colonization and law; laws which were made by Parliament, applicable to all, and

⁶⁶ In 1877 when the Treaty was negotiated the language used was extremely patriarchal. Although I have chosen to utilize the same language in reconstructing the meaning of the mutual clause, I use 'brother' as an inclusive term as I believe this interpretation to be consistent with the manner in which the words would have been interpreted by the leaders of the Blackfoot Confederacy (albeit contrary to the manner in which the words would have been expressed and interpreted by Laird).

⁶⁷ Ibid, p. 267.

⁶⁸ Ibid, p. 275.

enforced by the North West Mounted Police, possibly with the assistance of the Blackfoot (when required).⁶⁹

On the other hand, although it is recorded in written history that the Blackfoot understood and agreed to the terms of the Treaty in full, this is not so. Morris claims that the majority of the Chiefs spoke of the gratitude which they felt for the North West Mounted Police and their desire to have their friends the Mounted Police stay in their territory and continue as they had in the past. It is questionable, even when one consults written history, as to whether the Blackfoot were conveying a similar understanding of the clause (or of the Treaty in its entirety).

In a letter to Colonel A. G. Irvine of the North West Mounted Police, Father Scollen questioned the Indian understanding of Treaty Seven: "Did these Indians, or do they now, understand the real nature of the treaty made between the Government and themselves in 1877? My answer to this question is unhesitatingly negative, and I stand prepared to substantiate this proposition."⁷⁰ This lack of, or discrepancy in, understanding the Treaty was due in part to problems of

⁶⁹ Whereas it seems as though this was the government's viewpoint in 1877, this had not always been the view point articulated by government officials. Rather, in an 1874 letter to Morris, David Laird, Minister of the Interior, suggests that while a force is required to police the area and better relations need be established with the Aboriginal collectivities, the Metis (in particular) should be allowed to form a government, so long as they do so 'within reasonable limits' and they 'treat everyone fairly.' David Laird to Alexander Morris, March 28, 1874, in Alexander Morris Papers, (Winnipeg: Provincial Archives of Manitoba), MG12A1 #G-4(NM).

⁷⁰ Constantine Scollen to A. G. Irvine, April 13, 1879, (Ottawa: Indian Affairs Archives), No. 14924.

translation, a lack of knowledge or comprehension of such matters as a square mile, and the fact that the Blackfoot had a completely different world view. This may also be due to the fact that the Treaty Seven Commissioners were not completely clear or truthful about their intentions, as can be seen in the following statement by Laird which suggests that life will go on as is even if the buffalo were to vanish: "In a very few years the buffalo will probably be all destroyed, and for this reason the Queen wishes to help you live in the future in some other way. ... The Commissioners would strongly advise the Indians to take cattle ... at least as long as you continue to move about in your lodges."⁷¹ This is also evident in the following statement by Blackfoot political scientist, Andrew Bear Robe,

the Treaty 7 negotiations of 1877 between the treaty commissioners and the Indian nations that signed that treaty talked about the need for peaceful co-existence and secondly, to let the Queen's white children come live on Indian lands. There was no talk about ending 'the Indian way of life' which surely included the continuation of some form of Indian sovereignty and jurisdiction.⁷²

While it might be said that 'white man's law', Indian sovereignty, jurisdiction over Blackfoot territory, and paternalistic government practices and structures were not discussed by members of the Blackfoot Confederacy, this is because they were not viewed as important matters which had to be reconciled with the Queen's representatives.⁷³ These

⁷¹ Morris, 268-269.

⁷² Andrew Bear Robe, Treaty Federalism - A Concept for the Entry of First Nations into the Canadian Federation, (Gleichen: Siksika Nation Tribal Administration, 1992), p. 19.

⁷³ Dila Houle, 1995.

were not issues, as it was assumed that they would continue to live in accordance with the way they had lived since time immemorial. Thus, in signing a Treaty of peace and friendship, the leaders of the Blackfoot Confederacy agreed to live in 'peace and good order,' whereby all people would live in peaceful co-existence, respecting the other's way of doing things. As such, white people would have to respect the 'Indian way of life' as the Blackfoot had not given up their sovereignty, nor their control of their respective territories. Thus, many Chiefs expected white settlers to respect and adapt to their ways, just as the Blackfoot had to Euro-Canadian ways when the new way did not contradict or hobble their own way.⁷⁴

The Blackfoot also saw the promise to maintain 'peace and good order' and to abide by the Queen's laws as a continuum with the past.⁷⁵ It was merely a continuation of the promise that had been made with the North West Mounted Police upon their arrival in Blackfoot territory. That is, the Chiefs of the Blackfoot Confederacy promised that they would obey and abide by the Queen's law; a promise which was made even though they had no understanding as to what this law was.

⁷⁴ This way of thinking is evident in both written and oral accounts of history. According to Morris, Blood War Chief Medicine Calf (or Button Chief) asked Laird to add to the Treaty a clause that would require all inhabitants of their territory (including the North West Mounted Police) to pay for the timber that they used; a practice well established in Blackfoot customs by 1877 (although the North West Mounted Police had never obliged). Morris 1880, p. 270. Also see: Dempsey, 1972, pp. 99-100.

⁷⁵ According to Edward Yellowhorn it was the North West Mounted Police that offered up this clause at the Treaty negotiations, and it was with them that they agreed to establish and maintain 'peace and good order.' Edward Yellowhorn, 1995. This idea was also echoed in other interviews, particularly by Dorthy Yellowhorn who suggested that this promise in the Treaty had been broken many times by the North West Mounted Police. Dorthy Yellowhorn, Interview, (Peigan Reserve, Alberta, July 28, 1995).

However, while such a promise was made, their understanding was that they never agreed to stop living by their own laws and thus, they never supplanted their own traditions with those of the incoming society.⁷⁶ Rather, as Dempsey suggests the Blackfoot merely respected Canadian laws when they were compatible with and not contradictory to Blackfoot traditions.⁷⁷ This may be seen in terms of combining two laws, an adaptation or a development that occurred with little objection, so long as the laws were compatible.⁷⁸

Thus, to the leaders of the Blackfoot Confederacy who had no (real or accurate) understanding of Canadian Government or law, signing the Treaty meant that they would continue to live as they had since the North West Mounted Police arrived; co-existing by respecting and adhering to both laws (but only when it would not entail dismissing tribal law). Furthermore, according to Father Scollen it was because of this friendly relationship of mutual co-existence with the Blackfoot benefactor's, the North West Mounted Police, that the Blackfoot leaders decided to sign the Treaty. As Scollen states, "It may be asked: If the Indians did not understand what the treaty meant, then why did they

⁷⁶ The Blackfoot understanding is evident in an 1875 letter from Assistant Commissioner James McLeod to Lieutenant Governor Morris. McLeod emphasises that whereas the North West Mounted Police have been very successful at stopping the whiskey trade, the Blackfoot continue to disobey the police and live as they see fit; trading with whomever they wish and stealing horses, as is their custom. James McLeod to Alexander Morris, March 15, 1875, in Alexander Morris Papers, (Winnipeg: Provincial Archives of Manitoba), MG12B1 #962.

⁷⁷ Dempsey, 1995.

⁷⁸ When laws which were not compatible, such as those surrounding horse raiding and polygamy, were broken it was (and continues to some extent to be) seen not as a matter of defying or breaking Canadian law, but rather as upholding tribal law. Dempsey, 1995.

sign it? Because previous to the treaty they had always been kindly dealt with by the Authorities, and did not wish to offend them..."⁷⁹ With this in mind, in no way can it be stated that the Blackfoot, much like the Cree, promised in this clause to give up their right to live in mutual co-existence according to their own ways, or for that matter control their territory. Rather, the 'mutual clause' may be construed so as to have meant that the two parties to Treaty Seven would co-exist peacefully as sovereign entities with their own independent spheres of jurisdiction, assisting the other in maintaining peace when required and permitted by their own traditions.

UNDERSTANDING THE TREATIES

From the discussion thus far, one can see that it may be justifiably stated that peace and order clause in Treaties Six and Seven meant something different for all parties involved.⁸⁰ That is, regardless of what was stated or inferred by the government agents at the negotiations, the government did not view the mutual clause (and the entire Treaty) in the same manner as the Aboriginal collectivities. Rather, the government viewed the Treaties as the first step in settling the west, and in 'protecting', 'civilizing' and 'assimilating' the Indians.⁸¹

⁷⁹ Scollen, 1879.

⁸⁰ While there are some major differences with these two interpretations, there are similarities in the way in which the two sides viewed (or suggested they viewed) the Treaty at the time it was signed. For instance, both the government and the Cree viewed the Treaty as a means to guarantee peace and friendship.

⁸¹ Tobias, 1991, pp. 127-144.

The 'mutual clause' merely represents the Indian's promise to remain peaceful, obey the law, and to allow the government to exercise its authority and jurisdiction over the entire country using the North West Mounted Police as they had been established for this purpose (albeit long after this clause was drafted and included in the text of Treaty Number 1).⁸²

On the other hand, the Cree and the Blackfoot did not know of the government's intentions, and they viewed their respective Treaty as a continuation of past relations, as a means of securing government assistance in dealing with problems they were facing (for example, declining buffalo populations), and as a means of getting trade goods,⁸³ helping them adjust to a new way of life, and sharing their land with farmers and ranchers. Thus, the Indians did not view the Treaties as a surrender of their land in exchange for recognition of 'Treaty rights'. Rather, from what I can ascertain, both the Cree and the Blackfoot tended to view the clause, and the Treaty, as a promise of peace and friendship, and not as a means of relinquishing their sovereignty (or land). They would establish (most likely through treaties) peace with all others, and they would share their territory (with the very few white people expected) in accordance with their ways, while respecting and abiding by the Queen's ways wherever possible.

⁸² Alexander Morris, Nova Britannia or Our New Canadian Dominion Foreshadowed: Being a Series of Lectures, Speeches and Addresses, (Toronto: Hunter, Rose & Co., 1884), p. 170.

⁸³ In speaking of the Blackfoot Treaty, Scollen suggested that "although they had many doubts in their mind as to the meaning of the treaty, ... they hoped that it simply meant to furnish them plenty of food and clothing, and particularly the former, every time they stood in need of them." Scollen, 1879.

Although it can be justifiably stated that all sides viewed the 'mutual' or peace and order clause in different ways, no collectivities' interpretation seems to suggest a right to guaranteed electoral representation (in fact, the idea of guaranteed representation did not emerge in Canadian politics until quite recently). Rather, the evidence presented in this chapter seems to suggest that the government would maintain peace and order in the whole country, as Morris alluded to this at the negotiations at Fort Pitt.⁸⁴ However, this way of viewing the Treaties contradicts what has been recorded in the oral histories of the Aboriginal collectivities discussed in this thesis, and to some extent goes against actions taken by the Dominion government in 1885 (as Natives were to play a role in maintaining peace and good order in their respective territories).

Furthermore, during the Treaty negotiations, a right to guaranteed representation was not alluded to in the way in which Treaty Six and Treaty Seven (and the clause) were viewed by either the Cree or the Blackfoot.⁸⁵ Moreover, for the most part, it seems that the Indigenous collectivities intended to retain their sovereignty, and not interfere with the government or settlers, so long as they did not interfere with them.⁸⁶

⁸⁴ Although this was not (at least according to both written and oral history) mentioned elsewhere, this seems to have been the government's intent. Morris, 1880, p. 206.

⁸⁵ While there was in fact a plurality of voices, and to some extent even competing voices, no one eluded to guaranteed Parliamentary representation.

⁸⁶ This notion of mutual sovereignty was continuously expressed by those interviewed for this thesis, and is well grounded in both the Cree and Blackfoot philosophical tradition. On several occasions it was compared to the Two Row Wampum Treaty which basically states that the Iroquois Confederacy and the 'white nation' will remain separate and that neither shall interfere with the other. Little Bear, 1995. Also see: Oakes, 1995.

Thus, the clause represents a promise for the Cree, Blackfoot, Peigan, and Blood to uphold peace and order within their own territory (including the territory that they agreed to share), and between themselves and others, whereas the government promised to maintain peace and order in the remainder of the country while respecting their laws and their ways of being and seeing.⁸⁷ Moreover, while the Treaties established a relationship of peace and friendship and made promises of government assistance, neither party denounced their sovereignty and the leaders of the Blackfoot Confederacy and the Cree accepted the responsibility for maintaining peace and order in the territory which they agreed to share. This is very important, as it gives the leaders of these peoples the added responsibility to "maintain peace and good order between ... themselves and others of Her Majesty's subjects, whether Indians or whites, now inhabiting or hereafter to inhabit any of the said ceded tracts ..."⁸⁸

Although it is disputable as to whether or not any Cree, Peigan, Blood or Blackfoot, or for that matter any Indian, attempted to uphold peace and order within their traditional territory, they had the right to do so. Furthermore, the government of Canada recognized this responsibility during the Northwest Rebellion in 1885, when they contemplated, and then attempted, to have specific Aboriginal

⁸⁷ The fact that many Blackfoot present at the signing of Treaty Seven still expected the government and any settlers to use resources according to their customs (for example, pay the Blackfoot for wood) demonstrates the commonly held belief that non-Natives were to respect, obey and abide by Blackfoot traditions, just as the Blackfoot live under the Queen's law (insofar as they did not interfere with their own ways).

⁸⁸ Western Treaty No. 6, (Ottawa: National Archives), GAD reference numbers: IT296, IT297, & IT328.

collectivities fight against the 'rebellious' Cree and Metis. During the Rebellion, both the government and segments of the Canadian public openly contemplated enlisting the assistance of the Blackfoot Confederacy and the Sarcees in restoring and maintaining peace and order in the Northwest.⁸⁹

However, except for using several Sioux and Sarcee as scouts, runners, and informants, the government did not allow the Indians (particularly those of Treaty Number Seven) to stop the Cree and Metis resistance.⁹⁰ This was because Prime Minister MacDonald was unsure if "a body of Blackfeet [sic] under white command [could] be trusted."⁹¹ Furthermore, he was concerned about the fear that would be sparked in the west if large numbers of well armed Indians were allowed to leave their reserves and roam freely across the plains. This was also deemed impossible because although they were enemies of the Cree, the Blackfoot Confederacy was divided as to where they stood with regard to the Rebellion.⁹²

⁸⁹ According to Little Bear, this occurred "basically because the Blackfoot have agreed not to go out and fight but we [the government] may need them to go and fight. Because the Crees are their traditional enemies, lets let them fight against eachother. We'll tell them that it won't effect your Treaty. That's the thinking behind that. ... When they're looking at peace and order, they're looking at the larger picture. And saying that we've signed an agreement, and in that agreement we both said that we were going to keep peace and order. Those guys there are not behaving, so you have a responsibility." Little Bear, 1995.

⁹⁰ R. Burton Deane, "Report of Superintendent Deane, NWMP - Headquarters, December 31, 1885", in Report of the Commissioner of the North West Mounted Police, 1885, (Ottawa: MacLean, Roger & Co., 1886), p. 63.

⁹¹ John A. MacDonald to Edgar Dewdney, April 10, 1885, in CPR Telegrams Relating to the Riel Rebellion: March - April 1885, (Calgary: Glenbow Archives), p. 105.

⁹² Dempsey, 1995. Also see: Dempsey, 1972, pp. 164-193.

As a result, all the government could do was have the Indians not involved in the Rebellion either pledge their loyalty to the Queen, or station soldiers on their reserves so as to ensure their non-involvement in the uprising.⁹³ The government justified both of these actions by referencing the Treaties, as did the Chiefs that pledged their loyalty.⁹⁴ However, Hugh A. Dempsey notes that it is unlikely the Chiefs were actually pledging their devout loyalty to the Crown, rather, "at all times [Crowfoot] was unswervingly loyal, not to the government, but to his own people. This was the only reason for remaining at peace."⁹⁵

It may be justifiably stated that the 'mutual clause' was utilized by the government in 1885 to get the Indians to "maintain peace and good order between ... themselves and others of Her Majesty's subjects, whether Indians or whites ..."⁹⁶ However, I believe that this is the only time in history that the clause was interpreted this way, or invoked to give Indians a role in re-establishing and maintaining peace and order off their reserves. Regardless, the fact that this clause was interpreted to provide Aboriginal collectivities with a role in maintaining peace and order is significant. Moreover, just as Henderson suggests, I believe that it represents the government's attempts to resolve the Northwest Rebellion as quickly and as cheaply as possible, and without the loss of

⁹³ Deane, 1886, p. 64.

⁹⁴ Crowfoot to Sir John A. McDonald [sic], April 11, 1885, in CPR Telegrams Relating to the Riel Rebellion: March - April 1885, (Calgary: Glenbow Archives), p. 107.

⁹⁵ Ibid., p. 193.

⁹⁶ Western Treaty No. 6, (Ottawa: National Archives), GAD reference numbers: IT296, IT297, & IT328.

lives.⁹⁷ That is, the lives of Canadians and not the lives of Indians, for they were already a 'dying breed'.

However, the Indians were not a 'dying breed' as had been predicted, and they continue to exist today in a paternalistic and colonial paradigm. Moreover, the Treaties which were signed in 1876 and 1877 are still working agreements, agreements which have yet to be fully understood and implemented. Yet, an understanding of these agreements is extremely difficult to ascertain (as has been demonstrated), especially if one tries to establish the type of understanding required under the Dickson Doctrine, as was discussed in the previous chapter. On the other hand, as I have demonstrated previously, these agreements are equally difficult to understand according to a federal government publication which states that, "to obtain a proper appreciation of Indian Treaties, one should read them in historical context."⁹⁸ Regardless of the methods used to understand the Treaty provisions, if one understands the historical context, and attempts to ascertain the 'Indian interpretation', I believe that the result will be quite similar (at least as at the lowest level of understanding).⁹⁹

⁹⁷ Despite the fact that there is a lack of information about the origins of this clause, Henderson suggests that this clause, the most important clause in the Treaty, was evoked in the spirit intended by the Colonial Office of the Imperial Government when it was envisioned (prior to the establishment of the North West Mounted Police). That is, it gave the responsibility of controlling the territory willingly to the Indians so as to ensure that they remained as allies against the Americans. At the same time, the Indians offered a less costly, and possibly more efficient, way of controlling a (unoccupied) territory than those utilized by the United States and the Hudson's Bay Company. Henderson, 1995.

⁹⁸ Brown & Maguire, 1979, p. 34.

⁹⁹ Methods including those of Henderson, Little Bear, Lightning and Sioui discussed in the previous chapter.

As was demonstrated in this chapter, neither the Cree nor the Blackfoot Confederacy believed that they were ceding their land, their control over their territory, or their sovereignty. Regardless of what the government had intended and what policies and practices were implemented subsequent to the signing of Treaties Six and Seven, the Cree and the Blackfoot Confederacy retained their sovereignty, their ability and right to govern themselves according to their laws while respecting those of the Crown, and they accepted the added (shared) responsibility of maintaining peace and good order throughout their traditional territory.¹⁰⁰

While it is questionable as to whether the peace and order clause was ever really explained fully at any of the Treaty negotiations (Fort Pitt, Fort Carlton and Blackfoot Crossing), or if any of the Indian leaders understood the clause (possibly due to problems of translation), the wording of the clause is, for the most part, compatible and consistent with the Indian view. In both Treaties, there was a promise to make and keep peace with all others living within the collectivities' traditional territory. This promise is consistent with the view that the Treaties were peace Treaties negotiated to ensure peaceful relations between 'friends' or 'brothers' that would share land, trade goods, and responsibilities but not sovereignty. There were also promises (especially in the case of the Blackfoot) to 'obey and abide by the law.' But such promises have to be understood in the context of the negotiations and

¹⁰⁰ While it might be claimed that Indians never exercised these powers or responsibilities to any great extent (largely due to a changing economic-survival reality), the government did recognize them in part during the North West Rebellion.

the reality of the time in question. According to oral history, the Indian signatories did not understand the immense white law or the idea that their laws would be supplanted by it. Rather, it was felt that they would respect the Queen's law whenever possible (as they had been doing) and that the 'aliens' to their territories would respect their laws. Moreover, both collectivities also promised to help enforce that law ("they will assist the officers of Her Majesty in bringing to justice and punishment any Indian"); promises which are consistent with the view that the Indians shared the responsibility of maintaining peace and order with the North West Mounted Police (the governing agency in the Northwest Territories).

Determining exactly what this understanding means today is problematic as the wording of the 'mutual clause' (and the Treaties in their entirety) may not be conducive to such an understanding. Articulating such an interpretation is even more difficult considering the fact that the federal government has stated that, "if the Treaty promises are read as symbolic promises of more comprehensive services to be adapted to changing circumstances, they take on a very different meaning than if they are read as plain statements meaning precisely and exactly what they say."¹⁰¹ However, while the government might well like to claim and assert that the Treaty is merely that which appears on the page, and that it has to be interpreted in such a manner, this is not the Indian view of the Treaty nor is it that of the Supreme Court of Canada.

¹⁰¹ Brown & Maguire, 1979, p. 34.

Most of the people interviewed for this thesis reported that the Treaties were never finalized (this will be addressed momentarily), and despite the fact that these promises could never be retracted or lessened, the promises were dependent upon the situation at the time and should continue to adapt to changing realities. This idea was articulated and continues to be articulated in discussions surrounding the Treaties in the statement: "so long as the sun shines, [grass grows] and the rivers flow"¹⁰². According to Henderson, this statement is representative of Indian reality and their philosophical traditions. It is the "natural context that they are talking about; they knew and experienced that. ... Those aren't metaphors, those were the actual ways that they talked for the environment ... and themselves - living with nature and not making a distinction, a theory, of self."¹⁰³

The Indian spokespeople were speaking from their own reality, their own understanding of the world around them, one very different from the western ways of the whites. By understanding this statement within the context of Indian philosophy, a case can be made for updating or modernizing the Treaties. While the 'Indian speakers' spoke of a river, their understanding of that river was not as a constant, but as something in an ever changing cycle of life. The water that they saw

¹⁰² Although this statement does not appear in the Numbered Treaties, it appears continuously in the discussions, being brought up by Indians and non-Indians alike. Furthermore, this statement appears in the Treaty between the Blackfoot Confederacy and the United States in 1855. Dempsey, 1987, p. 35-36. George F. G. Stanley, "As Long as the Sun Shines and Water Flows: An Historical Comment," in Ian A. L. Getty & Antoine S. Lussier eds., As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies, (Vancouver: University of British Columbia Press, 1983), p 11. Also see: Morris, 1880, p. 208.

¹⁰³ Henderson, 1995.

in it one moment was not the same the next moment. Some years it was dry and the river was shallow while in other years it flooded. What was constant in this ever changing river is that it continued to flow and modify or adapt itself, as was needed, to a changing reality.¹⁰⁴

This is the manner in which the Treaties were discussed, and the manner in which they continue to be viewed by many Cree, Blood, Peigan, and Blackfoot. Much like the river, the Treaty continues to exist, and will continue to exist for as long as can be envisioned. What is important is the fact that it continues to exist (even though many promises have never been lived up to; for the promises, like the rivers have been dammed). But like the river the Treaty should change with time to meet the needs of the people, the same people (human and non-human beings) for which this land was created. Thus, promises such as that concerning the keeping of peace and good order have to be interpreted to reflect the situation today; a situation where the North West Mounted Police are no longer viewed as being solely responsible for maintaining peace and order on the Prairies; a situation where the traditional territories of the Blackfoot and Cree are 'occupied' by 'settlers' who do not respect traditional laws, traditional ways of being, or the sovereignty of First Nations.¹⁰⁵

¹⁰⁴ At the time of the Treaties, Indians had no knowledge of Dams, and it was thought that no person could make a river do something that it did not want to do. Even today, when rivers in Southern Alberta are dammed up, many elders have said that you can not make a river do what it does not want to do. Thus, the 'flood of 1995' came as no surprise to many 'Indian thinkers' as the rivers were just asserting themselves; choosing their own paths in life.

¹⁰⁵ Other clauses in the Treaties have been 'modernized' in the spirit of the Treaties. Take for example, the medicine chest clause which appears in Treaty Six. Today, this clause has been interpreted to mean free health care, and as such not only Treaty Six status Indians receive free health care (including prescriptions and dentistry) but, all status Indians across Canada receive free

At the same time, whereas the 'river analogy' provides a basis for change, the belief that the Treaty was never finalized provides a strong foundation for updating the Treaty promises. The view that the Treaty was never finalized is predominant throughout 'Blackfoot Country'. It is in part because Crowfoot never actually signed the Treaty by marking an 'X'.¹⁰⁶ The belief that the Treaty was never finalized is also related to the fact that the Numbered Treaties merely allow for the sharing of Indian lands and resources, while they are silent on most other matters. Thus, the existing Treaties could either be modernized to deal with such issues as the sharing (or imposition) of jurisdiction and sovereignty (for example through guaranteed Parliamentary representation), or new Treaties could be entered into to deal with such issues.¹⁰⁷

Nonetheless, as Bear Robe states, even without the Treaties being revisited, they are still living documents which hold within them rights that can be utilized although they have laid dormant previously (as is the case with self-government).

Since the Indian treaties in Canada are all silent as to the matter of continuing political and sovereign relations between the Indian Nations and the British sovereign, the contemporaneous right to First Nation [Parliamentary representation] may be an 'existing' treaty right pursuant to section 35 of the Canadian Constitution.¹⁰⁸

health care, regardless of Treaty.

¹⁰⁶ According to both written and oral history Crowfoot purposely failed to touch the pen as the Treaty Commissioners marked his 'X'. Houle, 1995. Also see: Scollen, 1879.

¹⁰⁷ Bear Robe, 1992, p. 11.

¹⁰⁸ Ibid, p. iii.

Thus, even though the peace and order clause is silent about particularistic representation, it does not mean that there is not a Treaty right to guaranteed representation. This is similar to the commonly articulated argument that the peace and order clause can be construed so as to suggest a Treaty right to self-government as there is no mention of the Dominion government supplanting the sovereign governments of the Indian collectivities.¹⁰⁹ Thus, while there is no mention of guaranteed representation, there is mention of a responsibility to maintain peace and good order throughout their traditional territories; a responsibility which at present is carried out by the federal and provincial governments and agencies of said governments (implicitly excluding First Nations).

CONCLUSION

As was suggested previously, neither the Cree nor the Blackfoot Confederacy viewed the Treaty as relinquishing their sovereignty or their jurisdiction within their traditional lands. Rather, they viewed the Treaty in terms of sharing, and as a means of securing help in surviving in, and adapting to, the changing reality (for example the demise of the buffalo and the sharing of parts of their territories).¹¹⁰

¹⁰⁹ When questioned about this Wilton Littlechild stated that, "If you fine comb the Treaty, especially in this case Treaty Six, there is no specific surrender of a right to govern ourselves [and our territory]. So because of that, there is also a principle that says, what you have not given up specifically you have retained for yourself." Littlechild, 1995.

¹¹⁰ For many, including Crowfoot, Big Bear and Sweet Grass, the Treaty offered hope for the future, a vision of the future which was different than the

While it is easily concluded that the Blackfoot Confederacy agreed to share responsibility to maintain peace and good order with the North West Mounted Police, demonstrating a similar promise in Treaty Six is difficult, however it can be done. According to both oral and written history the Cree never gave up their sovereignty or their jurisdiction. However, their request for assistance in maintaining peace and order in their territory (for example, in keeping whisky traders out, and in disallowing the use of strychnine) demonstrates that the Cree leaders either intended to or had accepted the fact that they would be sharing with the representatives of the Queen (i.e. the North West Mounted Police) the responsibility of maintaining peace and order in their territory (in accordance with their laws as well as those of the whites).

James Youngblood Henderson reiterated the importance of this last clause when he stated,

its very important that you understand that in the oral tradition its the last thing that you agree upon [that] is most important. Because none of the other agreements are binding if you don't agree with the last clause. So if you're a literate person in English you go - what's number one? ... But in an oral tradition, its the last story that you agree to that bundles the whole negotiations up. And that last thing that they, [the Indians], agreed to is that they'd be in control of all the ceded territory. So their governments would remain just like they were, except they would have a little more responsibility, then they would ordinarily have, over their people. ... And there is nothing in the Treaties about how the white people are

starvation predicted by many elders. It was a dream; and like a river it was a dream of adapting and a dream of survival as the Queen would look after them and teach them her ways. But as Garth Brooks reminds us, this vision of the future has to be viewed as a dynamic process of change and adaptation as, "... a dream is like a river always changing as it flows. And dreamer's just a vessel that must follow where it goes." Garth Brooks, "The River", on The Hits.

going to govern themselves. ... They aren't going to govern anything - if you just read the Treaties.¹¹¹

While many would argue that this interpretation of the mutual clause does not seem to be compatible with the government view of the Treaties presented thus far, others would argue that the government view could be construed so as to support this conclusion. That is, in the early 1870s (both prior to and after the creation of the North West Mounted Police) the Dominion of Canada was searching to establish peace and good order in their newly acquired and 'unoccupied' resource rich hinterland. The Dominion of Canada wanted to do so in a manner different than that which had occurred in the United States or under the Hudson's Bay Company, and with minimal cost. They proceeded in doing so by entering into Treaties of 'mutual' peace, friendship, land surrender and assistance with the Indigenous collectivities.

According to Henderson, such Treaties not only offered a mechanism through which to secure peaceful relations with the Native populous, but they were also an attempt to keep the peace in the 'uninhabited' territory at minimal cost. Thus, while the prime objective was to ascertain promises of peace and land surrender from the First Nations (so as to avoid 'Indian wars'), the clause was also part of a bigger plan to get the Natives to control the land, people and resources so as to assert Canadian sovereignty, access resources easily, and in time make it inhabitable. That is, Henderson claims that (most likely)

¹¹¹ Henderson, interview, 1995.

the Colonial Office of the Imperial Government "devised a prototype of all colonial documents, that also is no less of authority in British law than the grants to the House of Commons, the House of Lords or the Courts."¹¹² Therefore, based on both accounts of history, it is quite easily suggested that the government agreed to have the Chiefs, Minor Chiefs and Headmen to either share the responsibility of, or be solely responsible for, maintaining peace and good order, if only among their own peoples and most likely as a temporary measure.

Thus it can be suggested that the leaders of the Cree, Blood, Peigan and Blackfoot nations had the shared responsibility of maintaining peace and good order throughout their 'ceded' (shared) territories. This responsibility was 'granted' by the Crown (presumably as a temporary measure) and was possibly meant to be shared with the North West Mounted Police and, to a small extent, the federal government.¹¹³

However, like a river, the prairies have been changed and altered. Settlement occurred, colonial governing structures created, the North

¹¹² Thus, this may be viewed as being similar to the Peace Order and Good Government (Indians according to oral history already had Good Government) clause in the British North America Act of 1867, as both are overriding clauses which provide the foundation upon which to govern and maintain peace and order (especially in cases of emergency such as the North West Rebellion and the F.L.Q. Crisis). However, as Littlechild points out, this may be read or argued as Indians agreeing to abide by Canadian law and as coming under the federal Peace Order and Good Government clause. Notwithstanding that, he states that "our people will still say no, we agreed to obey and abide by our law." Littlechild, 1995.

¹¹³ According to Henderson, "when the King says that he's going to recognize that the Chiefs and Headmen are going to control this territory, he's given them a grant that's equal to anything they have in England, and anything that any of the colonies have." Henderson, 1995.

West Mounted Police disbanded and recreated as the Royal Canadian Mounted Police, Treaty promises broken, and the federal government's Indian policy implemented. Nonetheless, this clause still holds true, even though it has been long tossed aside and forgotten. Chiefs, Minor Chiefs and Headmen still retain the responsibilities (according to their interpretation of such responsibilities) outlined in the Treaties. Therefore, they retain the responsibility to maintain peace and good order in their traditional territories, and continue to argue that much of what the government has done has been illegal (against the spirit of the Treaties).¹¹⁴

Despite the fact that the promise outlined in the last clause in Treaties Six and Seven was never fully implemented, the Blackfoot and Cree retain their sovereignty and their responsibility to maintain peace and good order in their respective traditional territories. Given the altered reality (for example, their lands are now 'occupied', and the North West Mounted police is no longer responsible for the maintenance of peace and good order), this promise can not be viewed as it was at the time of the Treaty. Nonetheless, the promise still stands, even though its exact implications are questioned in light of this altered reality.

¹¹⁴ Several of the people interviewed for this thesis volunteered information regarding the Constitutionality and validity of the provincial governments (Manitoba, Saskatchewan, and Alberta). For instance, (Treaty Four) Cree Elder Gordon Oakes spoke of how the Treaty was signed between two nations with no provincial involvement or mention of provinces. The Cree leaders never agreed to provinces, nor did they agree to give them any rights or powers. Accordingly, the federal government had no right to create the provinces, as the Cree leaders never agreed to share in their traditional jurisdiction, nor their added responsibility to maintain peace and good order. Oakes, August 5, 1995.

As a result of such discrepancies in meaning and implementation, "it has been an important political goal for First Nations to have treaty grievances addressed by the Canadian government, but the government has given little indication that it is open to discussion."¹¹⁵ Yet as National Chief Ovide Mercredi argues, "disagreements on what the treaties mean and how they should be implemented are not an excuse for Canada to avoid fulfilling its treaty obligations. It is a duty of the Canadian government to sit with our people and reach a consensus on what the terms of the treaties mean and how they should be implemented."¹¹⁶ Short of this, Mercredi has recently suggested that First Nations should begin to unilaterally assert their rights and to protect their jurisdictions.¹¹⁷ However, while this may or may not be the manner in which to proceed in rectifying broken Treaty promises, one must first know the direction in which one must go. That is, one must understand what these promises mean today, and the possible alternatives for implementation.

In terms of the promise made by leaders of the Plains Cree and the Blackfoot Confederacy to maintain peace and good order, there are, in actuality, two predominant promises and not just one. The first is in regards to the keeping of sovereignty, while the second is a promise that the Chiefs, Minor Chiefs and Headmen will share in the responsibility to maintain peace and order. While the first of these two (predominant)

¹¹⁵ Ovide Mercredi and Mary Ellen Turpel, In The Rapids: Navigating the Future of First Nations, (Toronto: Penguin Books, 1993), pp. 63-64.

¹¹⁶ Ibid, p. 165.

¹¹⁷ Ovide Mercredi, speech, (Ottawa: annual meeting of the National Aboriginal Forestry Association, October 24, 1995).

promises has often been construed to represent a Treaty right (and thus a recognition of an inherent right to self-government), the promise entails more than that. As was demonstrated in this chapter, the promise is a recognition of sovereignty, and a recognition (at least on the part of the Indigenous signatories) that they would go on living according to their laws, customs and traditions without interference from the Queen, except in so far as to help them adapt to a new way of life, and to assist them wherever required.

Thus, this right could be construed to mean more than just self-government, as the Aboriginal collectivities retain (to this day) sovereignty within the confines of the *skunkun* (as outside the confines of the reserve sovereignty and jurisdiction was limited by promises made in the Treaties).¹¹⁸ Furthermore, self-government is viewed by many as either recognition of or a step in recognizing that they are sovereign entities within the Canadian nation-state, it is just that "following the treaty-making process, historically independent Indian tribes found themselves within the borders of an alien state - Canada - where Canadian legislators and courts proceeded [wrongly and against the will

¹¹⁸ According to Henderson, "The chiefs and headmen delegated limited authority to the proper legislative authority or federal government over alcohol and to the 'Government of the ceded country' in harvesting of natural resources in the shared or ceded land. ... [The hunting, trapping and fishing rights] section shows that First Nations knew how to delegate authority to other governments. Lacking such affirmative language, no implied authority exists in the Crown. As the treaties illustrate, the imperial Crown authority over First Nations and the shared territory is derivative, not inherent." James (Sakej) Youngblood Henderson, "Implementing the Treaty Order", in Richard Gosse, James Youngblood Henderson, & Roger Carter eds., Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice, (Saskatoon: Purish Publishing, 1994), pp. 54-55.

of Indians] in the name of the Crown to enforce sovereignty over them."¹¹⁹

While the 'mutual clause' may be seen as a recognition of sovereignty and the right to self-government (possibly on and off reserve), this is only half of the equation represented in the clause. The second part of the promise entails promises to share in the responsibility to maintain peace and good order throughout the ceded or shared territories. While this chapter has thoroughly examined what this meant to the signatories to the Treaties in 1876 and 1877, the exact meaning of the clause today is difficult to determine because so much has changed since the Treaties were signed. Whereas in the past it was taken to mean that the Chiefs, Minor Chiefs and Headmen would assist the North West Mounted Police, and that the traditional ways of the Blackfoot Confederacy and the Plains Cree would be respected, this is not the case today nor is it plausible.

Nevertheless, the mutual clause represents a right and a responsibility to maintain peace and order both on and off reserve. Although this could be viewed in a variety of ways, basically it is a right to share in maintaining peace and good order; a right which is held by the respective nations, yet exercised by the leaders. Similar to the promise regarding sovereignty, this Treaty right could be implemented in a plethora of ways, many of which are unfathomable given today's reality. Yet whereas this clause could be construed so as to represent a

¹¹⁹ Menno Boldt, Surviving as Indians: The Challenge of Self-Government, (Toronto: University of Toronto Press, 1993), p. 87.

variety of rights, implementation must adhere to the nature of the right, the spirit and intent of the promise, as well as the Treaty in its entirety.

Therefore, whereas the establishing of a bilateral nation-to-nation relationship between the Crown and the leaders of the Blackfoot Confederacy and Plains Cree (among others) to share in the maintenance of peace and good order would be the ultimate manner in which to implement said right, this is highly unlikely, as is allowing the leaders of the Indigenous collectivities to enforce traditional laws (with respect to the use of land) amongst the non-Native populous (or even amongst their own peoples). The most plausible alternative, in my mind, would be the construction of a system of particularistic representation which respects the (nature of the) nation-to-nation relationship, and the spirit and intent of the Treaty.¹²⁰

In this regard, it is not so much a right to guaranteed Parliamentary representation as it is the right and responsibility of the Cree and Blackfoot to share in the maintenance of peace and order. Thus, it is not mere electoral representation which is guaranteed and recognized as a right within today's understanding of the mutual clause. Rather, although referred to as a right to guaranteed Parliamentary representation, it is really providing a mechanism through which the leaders of the respective communities can share in the aforementioned

¹²⁰ In suggesting that this is the most plausible way to implement the Treaty right to share in the maintenance of peace and good order, I am not suggesting that this be done to the exclusion of other possible avenues of recourse. Rather, like Henderson, I view the clause as a multifaceted promise that has many possible manifestations (including developing a partnership in the administration of justice as this is consistent with the manner in which the Indian signatories viewed the clause). Henderson, 1994, pp. 52-62.

responsibility.¹²¹ It is a mechanism which provides for the representation of the leaders (Chiefs, Minor Chiefs and Headmen) of the Plains Cree, Blackfoot, Blood, and Peigan, and facilitates the sharing of said responsibility between these nations and the Canadian nation-state.

Parliamentary representation is desirable because, whereas in the past the responsibility was shared with the North West Mounted Police, today it must be shared with the true governing body; the federal government (and likely the provincial governments). Furthermore, since it would be unlikely that the dominant society would respect the laws or ways of the Indigenous peoples today (as was suggested in the early interpretations of the Treaties) a new relationship has to be constructed to maintain peace and order which respects and enhances the voice and ways of the Indigenous populous.

Although some might argue that participation in an 'alien' Parliament is contrary to the promise of sovereignty, and a nation-to-nation relationship, this does not have to be the case, nor is it for even sovereign nation states have been known to participate in shared structures of governance.¹²² Rather, a system of differentiated

¹²¹ This could also be achieved through the creation of a separate Parliament, or the re-creation of the Senate as a representative body of signatories to the Numbered Treaties (and possibly all Aboriginal people). While, potentially, either of these Parliamentary bodies could act in combination with the House of Commons to maintain peace and order, this is unlikely to happen in the near future. Furthermore, unlike particularistic representation (which is compatible with the current system of representation and the Constitution), the creation or re-creation of a House of Parliament would require major constitutional reform.

¹²² The participation of sovereign nations in 'alien' systems of government is not a revolutionary idea. This is evident if one considers the fact that there are numerous examples of political confederacies (including the Blackfoot

Parliamentary representation could be structured so as to respect and enhance the attainment of nationhood within Canada, and the re-establishment of a nation-to-nation relationship with the Canadian nation-state. This is achievable not only because such a system of representation would be based on the representation of nations within Parliament, but because it is a partial realization of the search for a new nation-to-nation relationship with Canadians; a relationship which would complement and not detract from the separate and distinct goal of self-government, and the achievement of said goal.¹²³

In other words, by constructing a system which recognizes the existence of nations and whereby the leaders of the Cree, Blackfoot, Blood, and Peigan could share in the responsibility of maintaining peace and order, particularistic representation would be a reflection of, and thus not a detraction from Treaties Six and Seven. In constructing such a system of representation the recognition of nationhood and shared responsibility must be the underlying and inherent principles or foundations upon which such a system of guaranteed representation is built.

Confederacy and the Iroquois Confederacy) that existed long before colonization, and the fact that sovereign nation-states such as Britain participate in various forms of 'alien' governmental structures including the European Parliament, the United Nations and the Commonwealth.

¹²³ For a detailed discussion of the search for Aboriginal nationhood within Canada see: Kiera L. Ladner, When Rights are not Enough: The Search for Aboriginal Nationhood, unpublished M.A. thesis, (Saskatoon: University of Saskatchewan, 1995).

Although this thesis does not attempt to suggest how such a system of representation could be constructed, the implementation of the right to share in the maintenance of peace and order would entail the representation of each of the signatory nations as nations which share in said responsibility.¹²⁴ Thus, the Treaty right requires a mechanism or a system of representation based not on territory or population but nations, shared powers or jurisdiction and the agreement to live as 'brothers under the same law' (as was suggested by Laird at the negotiations of Treaty Number Seven) while respecting the traditions, customs and laws of the other. Using guaranteed representation as a vehicle through which to realize the Treaty right to share the responsibility of maintaining peace and good order is not about enhancing the representation of Aboriginal people in Parliament. Rather, it is concerned with the construction of a 'new' relationship between the respective First Nations and the Canadian state and the establishment of a mechanism which facilitates the implementation of the promise to share in the responsibility of maintaining peace and good order on and off reserve.

In conclusion, a Treaty right to share in the responsibility of maintaining peace and order exists and may be construed as a right to particularistic representation. Although I believe such an interpretation (or modernization) of the Treaty is justified, as it merely follows in the path of a changing river, many may argue that a new Treaty is required to establish such a right, that any such right is unconstitutional, or

¹²⁴ Although this thesis is not concerned with the implementation of a system of representation based on the mutual clause, further details about what such a system would entail are provided in chapter five.

that such a right could not be reconciled with the status quo (that is the governing apparatus of the Canadian State). These issues, among others, will be addressed in the following chapter.

CHAPTER 3: GUARANTEED REPRESENTATION - ARTICULATIONS AND JUSTIFICATIONS

INTRODUCTION

In the previous chapter, it was established that all of the signatories to Treaty Six and Treaty Number Seven retain a shared and mutual responsibility to govern (through the establishment and maintenance of peace and good order) within the territories ceded by said Treaties. The fact that today, peace and order are maintained by Parliament (and provincial legislatures) suggests that if the mutual clause were to be implemented, then the Indian signatories could exercise their shared responsibility with Parliament, possibly as delegates from the respective nations to Parliament. In other words, this thesis has demonstrated that a Treaty right to share in the responsibility of maintaining peace and order exists in Treaties Six and Seven and that such a right could possibly be interpreted or argued as a Treaty right to Parliamentary representation (among other possibilities such as self-government and participation in the administration of justice).

Despite this fact, such an argument has never been cited or used as a justification for Parliamentary representation in any publication. Instead, claims have been advanced which suggest the opposite; that Parliamentary representation can only be justified on the basis of tradition (Canadian Parliamentary traditions) and democratic ideals not Treaties or Aboriginal rights. Accordingly, Canadian political scientist Roger Gibbins argues that:

Treaty rights will not, in final analysis, determine the representation of people within Parliament and within provincial legislatures. Parliament has the right to set its own terms of representation, and while one might argue that Treaty rights provide a basis for the non-representation of Aboriginal peoples, they cannot determine the form that ... positive representation might take. ... I think that this is the case, [because] there is such a strong tradition and democratic ethos on the Parliament's side, and there is just not room for a lot of give.¹

Partially in response to the above assertion, this chapter seeks to establish whether Gibbins is right in suggesting that Treaty rights have no bearing on Parliamentary representation. While the previous chapter established that the assertion made regarding Treaty rights not providing a basis for representation (only non-representation) is incorrect, this chapter will attempt to demonstrate that the claim in its entirety is incorrect. This will be illustrated by examining the idea that the particularistic representation (Treaty or otherwise) of Aboriginal people is consistent with Canadian democratic traditions, electoral law, and Charter of Rights and Freedoms, and by illustrating that a Treaty

¹ Roger Gibbins, Interview, (Calgary, August 25, 1995).

right to guaranteed representation is constitutionally entrenched and enforceable.

While the idea that guaranteed representation could be viewed as a Treaty right under Treaty Numbers Six and Seven is extremely innovative, the desire to increase the representation of Aboriginal peoples in Parliament is not of recent origin, nor is the effort to articulate it in a political forum. As a result of the articulation of this issue in the national political forum (often linked with self-government), the development of new theoretical conceptualizations of democratic representation, and the creation of the Parliamentary Committee for Aboriginal Electoral Reform, there has been an attempt to reconcile the status quo with guaranteed Aboriginal representation academically and, to some extent politically, despite the claim that such reconciliation is impossible.

These articulations and justifications, or attempts at constitutional reconciliation, provide a strong foundation for the development of an argument asserting the constitutionality of a Treaty right to guaranteed representation, as well as the reconciliation of particularistic representation with the present system of Parliamentary representation (the status quo). Before proceeding to discuss how a Treaty right to guaranteed representation may be viewed as reconcilable and even compatible with the Canadian system of Parliamentary representation, this chapter will provide a cursory examination (through a literature review) and an analysis of how guaranteed Aboriginal representation has been conceptualized and argued previously, and how

democratic rights have been conceived of previously by the judiciary (through an examination of specific cases). In doing so, this chapter will illustrate the fact that particularistic representation is compatible (and even a part of) Canadian electoral traditions and moreover, despite what has been argued previously by academics such as Gibbins Parliamentary representation can be influenced by, if not based upon, the existence of a Treaty right to share in the maintenance of peace and good order.

PREVIOUS CONCEPTUALIZATIONS: ACADEMIC AND POLITICAL

Although there have been several studies and articles completed about guaranteed Parliamentary representation for Aboriginal peoples, none have examined or justified this particularistic representation using Treaty rights. Rather, the focus of these studies has been increasing Aboriginal Parliamentary representation through the pre-existing structures, while disregarding the existence of Aboriginal Nationhood, Treaty rights and Aboriginal rights (thus treating Natives as individual Canadians and not as 'citizens plus' who are members of Nations). Each of these publications develops their own logic or argument either in support of, or in opposition to, particularistic representation for Aboriginal people, and many have even developed working models for such a system of representation. Iris Marion Young has developed such an argument in support of particularistic representation, a theorization

which has been appropriated and used by most scholars studying this, and related, subject matters.

In her book, Justice and the Politics of Difference, Young presents the reader with an analytical and a theoretical conceptualization of justice. Yet, rather than focusing her discussion on distributive notions of justice, Young focuses much of her discussion on two predominant forms of injustice, those being oppression and domination. She argues that in order to create the institutional conditions necessary for the realization of justice, society (and its institutions) must recognize that certain groups have particular rights and differences. In other words, Young criticizes traditional definitions of justice which tend to see "liberation as the transcendence of group difference."² According to Young this is mere assimilation, whereas a truly just and equal society would facilitate an "emancipatory politics that affirms group difference"³.

It is as a result of this rationalization of justice that Young advocates particularistic representation or the participation and inclusion of all groups (facilitated by differentiated treatment). Because ignoring differences has oppressive consequences, Young proposes radical democratic pluralism (also referred to as the politics of difference and democratic cultural pluralism). Radical democratic pluralism "acknowledges and affirms the public and political significance of social group difference as a means of ensuring the participation and inclusion

² Young, 1990, p. 157.

³ Ibid, p. 157.

of everyone in social and political institutions ... [without forcing individuals] to assimilate to dominant norms and the abandonment of group affiliation and culture."⁴

Such a system of representation requires members of the dominated or oppressed social groups (not interest groups or ideological groups) to have dual rights. A dual system of rights implies "a general system of rights which are the same for all, and a more specific system of group-conscious policies and rights."⁵ Dual rights, she claims, are not a revolutionary idea as recognized Indian tribes in the United States have special rights which do not preclude them from full participation in American society. In part, these dual rights entail the specific representation of oppressed or dominated social groups in political institutions which is not necessarily limited by proportional representation, and the existence of institutional mechanisms which provide specific social groups with the ability to generate policy initiatives as well as a group veto in special situations.⁶

Although Young is not solely or specifically addressing the issue of guaranteed representation for Aboriginal peoples in Canada, she does provide a theoretical argument in favour of such representation, an argument based upon an emancipatory model of justice and citizenship and differentiated group representation. While Young's conceptualization is not revolutionary in the least, it is reflected in

⁴ Ibid, p. 168.

⁵ Ibid, p. 174.

⁶ Ibid, pp. 184- 189.

rather revolutionary work surrounding the creation of differentiated group representation for Aboriginal people, specifically through Aboriginal Electoral Districts.⁷

Not only has much of the writing on Aboriginal Electoral Districts been revolutionary, but the source of such scholarship is, to some extent, quite revolutionary. For instance, the major contributors to the current knowledge of Aboriginal electoral reform are the Royal Commission on Electoral Reform and Party Financing, and its Committee for Aboriginal Electoral Reform.

The Committee for Aboriginal Electoral Reform was established in May of 1991 by the Royal Commission on Electoral Reform and Party Financing (hereafter RCERPF) in response to a submission regarding Aboriginal Electoral Districts (hereafter AEDs) from Native Senator Len Marchand. The Committee was established to "... increase the participation and representation of Aboriginal people in the process of Canadian electoral democracy."⁸ To obtain this goal, and to curtail or put an end to the under representation of Indigenous peoples the Committee recommended the creation of AEDs.

In attempting to remedy the structural inequalities faced by

⁷ In light of the fact that New Zealand has had a system of 'democratic cultural pluralism, (whereby the Maori are guaranteed representation) since 1867, Young's ideas are definitely not revolutionary in nature. Furthermore, given the fact that Canadian law requires that electoral boundaries respect 'communities of interest,' Young's ideas may actually be seen in part as a reflection the changing visions of democratic representation in Canada, and abroad.

⁸ Committee for Aboriginal Electoral Reform, 1991, p. 237.

Natives within the current electoral system, the Committee proposed, in part, a system of radical democratic pluralism as advocated by Young. They conceived AEDs as separate electoral districts which were set aside for the (geographically dispersed) Native population. These Members of Parliament would be the representatives of a totally Aboriginal electorate; an electorate to whom they would be directly accountable. Specifically, the Committee proposed the creation of 12 AEDs (four percent of the total number of Members of Parliament); a number which directly corresponds with the percentage of the population which Aboriginal people constitute.

The Committee justifies its proposal in a number of ways, all of which respond to the claim asserted at the outset of this chapter, as they are based on the premise that AEDs not only comply with the Canadian electoral law, but that they complement Canadian electoral traditions as well. First, it provides an elaborate discussion as to why such a system is required, placing particular emphasis on the fact that the present system of electoral representation has failed Aboriginal peoples. Second, the Committee emphasizes that their proposal is merely trying to establish equality for Aboriginal peoples within the political process, and that the Courts have recognized that "identical treatment may frequently produce inequality."⁹ Third, the argument for AEDs is made by suggesting that such a system of representation would facilitate the 'effective representation' of Aboriginal people (as is guaranteed under federal law), as an Aboriginal MP would understand their "constituents, their rights, interests, and perspectives on the full

⁹ Ibid, p. 248.

range of national public policy issues.”¹⁰ Lastly, the Committee suggests even though Aboriginal people are not a ‘community of interest’, AEDs coincide nicely with the federal requirement that ‘communities of interest’ be respected in the drawing of electoral boundaries.

For the most part, the recommendations of the Committee for Aboriginal Electoral Reform were accepted by the Royal Commission on Electoral Reform and Party Financing. Briefly, the RCERPF recommended in its final report to Parliament that: a process for establishing AEDs be created; that a maximum of eight AEDs be established; that AEDs be created by Elections Canada Boundary Commissions whenever there is a sufficient number of voluntarily ‘registered’ Aboriginal voters who chose to ‘be counted’ and vote as AED constituents; that the drawing of the AED boundaries reflect the diversity of Aboriginal people and their communities whenever possible; and that it be guaranteed (written in the Canada Elections Act) that AEDs do not derogate from or abrogate any Treaty or Aboriginal right.¹¹

The Royal Commission's Report highlights a number of issues and determining factors which led them to recommend that AEDs be established. For instance, the fact that according to the 1991 Census, the Aboriginal population (933,395 or 3.48 percent) was larger than any of the four Atlantic provinces, but had only elected twelve Members of Parliament since Louis Riel was first elected in the 1870s. The fact that

¹⁰ Ibid, p. 247.

¹¹ Royal Commission on Electoral Reform and Party Financing, “Equality and Efficacy of the Vote”, in Reforming Electoral Democracy, Vol. 1 (Ottawa: Minister of Supply and Services Canada, 1991), pp. 186-189.

the existing system could not be dramatically altered to remedy the systematic under-representation of the Indigenous populace, was also discussed at length in the Royal Commission's final report. This was viewed as problematic by the Commission which offered two possible remedies, either make the Electoral Boundary Commissions create AEDs, or allow Aboriginal people to choose whether or not they wished to be represented as an Aboriginal person or as a 'Canadian.' The Commission also claimed that the idea of Aboriginal constituencies merely expanded upon the Canadian tradition of accommodating both individual and collective rights.¹² Moreover,

given the Canadian traditions of respecting collective rights and other efforts to secure the effective representation of various groups in Parliament, the cabinet and government generally, the idea of Aboriginal constituencies, although an innovation in direct representation, would not be contrary to the basic spirit of the federal political process.¹³

Meanwhile, RCERPF suggests that the 'special constitutional position' that Aboriginal peoples have as a result of Sections 25 and 35 may in itself provide the basis to create a system of direct representation, or at least allow such a system to survive a court challenge based on equality rights. Finally, the Commission advocates what it refers to as the 'four compelling reasons to establish AEDs from a non-Aboriginal perspective.' These include the unique constitutional status of Aboriginal peoples, the collectivities' desire to preserve their separate identity, the fact that Parliament retains the special responsibility for

¹² Charles Taylor, quoted in *Ibid.*, p. 178.

¹³ Royal Commission on Electoral Reform and Party Financing, 1991 Vol. 1, p. 182.

Indians under Section 91(24) of the Constitution, and lastly the need to promote effective and equal representation.

While the Royal Commission on Electoral Reform and Party Financing and the Committee for Aboriginal Electoral Reform provide a tremendous amount of insight as to how, Young's idea of, differentiated group representation could work for Aboriginal people in Canada, many academics have also attempted to address similar issues of requirements, rights, and reconciliations. Augie Fleras is one such academic who has written on the topic of guaranteed Parliamentary representation for the Native populace. His article, "Aboriginal Electoral Districts for Canada: Lessons from New Zealand," is cautiously optimistic about the creation of AEDs in Canada, in light of the experiences encountered by the Maori of New Zealand with a similar system of guaranteed representation. Even so, Fleras warns that such a system of representation is not the 'be all and the end all' but rather, "a system of AEDs is fundamentally sound and workable, provided it is considered in conjunction with a comprehensive range of mutually agreed upon initiatives for political, social and economic self-determination."¹⁴ Much like Young, Fleras demonstrates that particularistic representation fits easily with our current system of democratic representation, and provides examples of such representation in both Parliamentary and Presidential democracies.¹⁵

¹⁴ Augie Fleras, "Aboriginal Electoral Districts for Canada: Lessons from New Zealand", in Robert A. Milen ed., Aboriginal Peoples and Electoral Reform in Canada, (Toronto: Dundurn, 1991), p. 68.

¹⁵ For example, the state of Maine provides for legislative representation from the largest tribes in the state, whereas in Zimbabwe twenty percent of the seats are reserved for whites (0.5 per cent of the population). Ibid, p. 84.

Even so, like RCERPF, Fleras warns that the introduction of a system of racial representation (in this case AEDs) is a very contentious issue, and as such it has to be balanced with and amenable to Canada's political values.

Although his article, "Aboriginal Constitutional and Electoral Reform," deals with the history of the topic of Aboriginal electoral reform at the constitutional level, Robert Milen also examined the reconcilability of AEDs and the existing system of representation. Milen strongly favours the adoption of AEDs in Canada, calling for Parliament to (unilaterally) enact legislation, pursuant to its powers under Section 42 of the Constitution, establishing such a system of representation. As has been suggested, establishing AEDs is not problematic as Parliament has the right to enact such legislation, and because collective representation is part of the Canadian electoral experience. This is evident if one considers previous discussions (such as that regarding the Fleras article) of the compatibility of Indigenous representation and the Parliamentary system of government which Canada utilizes. Furthermore, Milen seems to imply that providing Aboriginal peoples with a right to participate in Parliament is comparable to their non-territorial based collective right to participate in (certain) constitutional negotiations, as was guaranteed in the 1982 Constitution.

Despite the fact that none of the aforementioned articles or reports discuss guaranteed Parliamentary representation for Aboriginal people as a Treaty right, all offer insight as to how and why differentiated representation can be viewed as being complementary and

not contradictory to the existing Canadian system of representation. That is, regardless of the existence of a Treaty right, all of articles demonstrate that guaranteed representation, albeit based on population and not Aboriginal Nationhood or rights, is compatible (or could be viewed as being compatible) with Canadian democratic traditions, the Canadian Constitution, and Canadian electoral law.¹⁶ Nevertheless, while (similar) arguments favouring AEDs have been advanced by a variety of authors, others have dismissed such a conceptualization of representation, embracing more traditional (and perhaps archaic) notions of citizenship and democratic representation instead.

For instance, in his article for the Royal Commission on Electoral Reform and Party Financing entitled "Enhancing Aboriginal Representation Within the Existing system of Redistricting," David Small outrightly rejects the notion of differentiated representation for Aboriginal peoples, or for that matter anyone, in Canada. He does so because as he suggests, the idea of special representation has been rejected by both the general public and the Canadian political process.¹⁷ Moreover, although he agrees that increasing the representation of Aboriginal peoples in Parliament would be beneficial, he disagrees with any attempt or suggestion to do so using anything other than that system which is utilized by all Canadians presently. He advocates

¹⁶ The compatibility of guaranteed Aboriginal representation with Canadian electoral law, Canadian democratic traditions, and the Canadian Constitution will be examined in more detail in a forthcoming section of this chapter.

¹⁷ David Small, "Enhancing Aboriginal Representation Within the Existing system of Redistricting," in David Small ed., Drawing the Map: Equality and Efficacy of the Vote in Canadian Electoral and Boundary Reform, (Toronto: Dundurn, 1991), pp. 307-309.

enhancing Aboriginal political participation and influence by readjusting electoral boundaries to respect the existence of Native communities, so as to ensure that where ever possible 'their vote' is not divided between constituencies. According to Small's proposal, Aboriginal people would have some ability to wield influence in ten electoral districts as they would constitute anywhere from twenty to seventy per cent of the population of said districts, and as a result would stand a greater chance of electing either 'one of their own' (or at least a candidate which they as a group supported).¹⁸

Meanwhile, Tim Schouls also criticizes the idea that group differentiation (through the establishment of AEDs) can be used to create or enhance the democratic integration of Aboriginal peoples, yet he does so in a manner much different than Small. Schouls favours the idea of increasing Aboriginal representation in principle, as it would deepen the Aboriginal experience of Canadian citizenship thus, creating closer ties between Aboriginal people and the state. Furthermore, unlike Small, Schouls recognizes that universal citizenship does not in itself produce or guarantee equality, but that in order to guarantee equality, citizenship, does at times, have to be enhanced by way of providing structural assurances that allow all members of a society to flourish.¹⁹

However, while Schouls seeks to increase the Parliamentary representation of Aboriginal people, he feels that the most advantageous manner in which to do so is not through the creation of a separate and

¹⁸ Ibid, pp. 338-339.

¹⁹ Ibid, p. 4.

distinct electoral system (for example, through AEDs) but rather, through a system of proportional representation or the creation of an Aboriginal Parliament such as that which exists in both Finland and Norway.

He favours the creation of an Aboriginal Parliament, or at least the introduction of a system of proportional representation in Canada, as differentiated representation within the existing Parliamentary system would not be conducive to a non-homogenizing form of group representation given the small, geographically spread out, Aboriginal population. Such a system would be homogenizing as it would not respect the extreme diversities within the Aboriginal population, it would foster a relationship among citizens instead of the nation-to-nation relationship Aboriginal people are seeking, Aboriginal people want self-government and not closer ties with the government, and because of structural problems inherent in such a system as representation (for example, the enormous size of electoral districts). Furthermore, he rejects the idea of differentiated group representation (as Young proposed) using Aboriginal Electoral Districts despite the fact that he states that they "are fully consistent with Canadian electoral democracy and so stand a good possibility of surviving a Charter challenge."²⁰ Meanwhile the author also states that "although AEDs would introduce a new form of constituency within Canadian electoral politics, the rationale for their creation remains consistent with the

²⁰ Ibid, p. 8.

long-standing Canadian inclination to recognize the importance of representing communities of identity.”²¹

Roger Gibbins' article, "Electoral Reform and Canada's Aboriginal Population: An Assessment of Aboriginal Electoral Districts," addresses the potential of, and possible problems, associated with modifying the electoral system to allow for guaranteed Parliamentary representation for Native people. While Gibbins recognizes that such a system would be advantageous (and even goes so far as to design a model of AEDs), as the electoral system fails to "provide an effective vehicle of political interaction or influence for Aboriginal peoples,"²² he claims that the law, and more particularly, the Constitution do not provide sufficient or compelling rationale for particularistic representation. This is because, as he suggests, the Constitution does not create a legal framework or basis for the creation of AEDs, the Charter may be construed so as to prohibit the creation of racially based, non-territorial electoral districts, and because AEDs may be construed as infringing on both voting and equality rights.

Although much of what Gibbins, Small, and Schouls claim is inherently contradictory to the assertions made in the articles favouring AEDs discussed earlier in this chapter, none can justifiably be tossed aside. Rather these three academics demonstrate that a number of problems or flaws exist in the manner in which the others suggested

²¹ Ibid, pp. 11-12.

²² Roger Gibbins, "Electoral Reform and Canada's Aboriginal Population: An Assessment of Aboriginal Electoral Districts," in Robert A. Milen ed., Aboriginal People and Electoral Reform in Canada, (Toronto: Dundurn Press, 1991), p. 156.

that guaranteed Aboriginal representation fit with the Canadian political tradition and our ideals of democratic representation. Despite these inconsistent or mixed messages regarding the compatibility of AEDs and Canadian electoral traditions and electoral law, each of the articles is a worthy and informative explanation of a complicated issue, and each is useful to this study.

However, each of the articles discusses Aboriginal Parliamentary representation in a manner which is very distinct from that presented in this thesis. While all of the articles concern themselves with fitting Aboriginal representation into the existing electoral apportionment scheme, this thesis does not. This is because, I do not perceive the issue solely in terms of increasing the political participation of Native individuals based upon proportional representation. But rather, I view guaranteed Aboriginal representation as the right of those collectivities who signed Treaties Six and Seven regardless of population or past political histories as they have a shared responsibility to maintain peace and order in their traditional territories. Nonetheless, many of the justifications and arguments presented previously in this chapter, which favour AEDs, can be used to demonstrate and assert the reconcilability of a Treaty right to representation with Canadian politics, and thus to nullify the concern discussed at the outset of this chapter. This will be examined in a forthcoming section, later in this chapter.

PREVIOUS CONCEPTUALIZATIONS: CONSTITUTIONAL LAW

While Gibbins may be right in suggesting that there is no legislative basis for the establishment of AEDs, and more particularly guaranteed Aboriginal representation in general, no such argument can be asserted regarding the constitutionality of such a system of representation. Based upon the existing jurisprudence surrounding the constitutionally entrenched democratic rights an argument can be made regarding the compatibility of particularistic representation with the Canadian electoral tradition. That is, regardless of the arguments presented by Small, Schouls and Gibbins, I believe that the two (particularistic representation and our current system of representation) are actually reconcilable, and even compatible. The most efficient way in which this compatibility can be considered is through an examination of the jurisprudence surrounding the issue of electoral rights and their interaction with the Charter. This chapter will proceed in this manner as the two existing cases provide a strong foundation upon which to develop an argument (later in this chapter) asserting the legality and constitutionality of a Treaty right to differentiated Parliamentary representation.

The first of the two electoral rights decisions to be considered in this thesis is that of Dixon v. the Attorney General of British Columbia, 1989 (hereafter Dixon). At issue in this case, brought about by the British Columbia Civil Liberties Association, was the provincial government's proposed electoral boundary scheme which constituted a violation of Sections 2b (freedom of expression), 3 (democratic rights), 6

(mobility rights), 7 (legal right to liberty), and 15 (equality rights) of the Charter. The planned redistribution, established under Section 19 and Schedule 1 of the British Columbia Constitution, allegedly violated the Charter of Rights as it created extreme inequalities in an individual's voting power, and as such it was viewed as being contrary to the rights guaranteed under Section 3.²³

This allegation was based on the fact that the government's initiative gave "relatively greater weight to non-urban votes than urban votes."²⁴ It did so by establishing separate categories of representation, each with its own voting district population quota) based upon the location of the voter (mainland or Vancouver Island) and the type of community in which the voter lived (metropolitan, suburban, urban-rural, interior-coastal, or remote). In essence, this created seven different population quotas on the same electoral map, most of which deviated from the maximum twenty-five per cent which is admissible by law in the drawing federal electoral boundaries. The effect of this redistricting scheme was, at the extremes, Atlin with a voting population of 5,511 (86.6 per cent below the equal population norm), and Surrey-Newton whose voting population was 68,347 (63.2 per cent above the population quota):²⁵ "Put in terms of voter parity, the vote of a

²³ Section 3 of the Canadian Charter of Rights and Freedoms reads as follows:
 3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein. Canada, 1989, p. 59.

²⁴ Dixon v. Attorney General of British Columbia, in Western Weekly Reports, (1989), p. 399. (hereafter Dixon)

²⁵ Norman J. Ruff, "The Right to Vote and Inequality of Voting Power in British Columbia: The Jurisprudence and Politics of the Dixon Case", in John C. Courtney, Peter MacKinnon & David E. Smith eds., Drawing Boundaries:

citizen in Atlin is worth 12.4 times the vote of a citizen in Surrey-Newton.”²⁶

As a result of these extreme discrepancies in voter equality, the British Columbia Civil Liberties Association launched a legal challenge in 1986, and again in March, 1988 (as the government never eliminated nor decreased the disparities in their redistricting). The case was finally heard in January, 1989 by Chief Justice McLachlin, and was decided that April, following McLachlin's appointment to the Supreme Court of Canada and the tabling of the Fisher Commission's report on electoral redistricting in the Legislative Assembly of British Columbia.

Although McLachlin ruled in favour of Robert Dixon (representing the British Columbia Civil Liberties Association), she did not interpret Section 3 of the Charter (democratic rights including the right to vote) as requiring absolute equality of voter power. Rather, she asserted that while population is the dominant consideration in the determining of electoral boundaries, deviations are permissible when they are justifiable on the grounds that they contribute to 'better government.' Whereas the Supreme Court of British Columbia suggested that deviations are allowable when they “contribute to better government of the populace as a whole, giving due weight to regional issues within the populace and geographic factors within the territory governed,”²⁷ the Court did not

Legislatures, Courts and Electoral Values, (Saskatoon: Fifth House Publishers, 1992), p. 129.

²⁶ Dixon, p. 400.

²⁷ Ibid, p. 414.

accept the justifications for enhanced rural representation given by the Attorney General.²⁸

Despite the decision that population is the most important consideration in determining electoral boundaries, this case is important for a multitude of reasons, all of which support the notion of the constitutionality and justifiability of a Treaty right to guaranteed representation. Although I will refrain from elaborating upon the constitutionality of a Treaty right to guaranteed Aboriginal representation until the second judicial decision regarding electoral rights has been discussed, the significance of the Dixon case in constructing such an argument will receive brief mention at this time.

In enunciating that "the proper purpose of the guarantee of the right to vote in s. 3 of the Charter can only be understood in the context of an historical consideration of what the right to vote has meant in Canada," Justice McLachlin is merely confirming that the Charter is not simply an Americanization of individual rights and freedoms within Canada. The Charter is not introducing a new conceptualization of the right to vote but rather, merely a continuation of democratic history and the evolution of the right to vote in Canada (and in Britain historically). Democracy in Canada is not solely rooted in a tradition of equal representation or the notion of 'one person-one vote.' It is a

²⁸ The Attorney General cited the following five reasons as justification for the deviation or discrepancy in voter parity. "1. Special interests of rural residents, ... 2. Difficulties in communicating with electors scattered throughout large rural areas; 3. The wider range of problems with which rural members are required to deal; 4. Lack of access to media in rural areas; and 5. Limited availability of resources and advisors in rural areas." Ibid, p. 401.

evolutionary tradition of progressive enfranchisement which continues to accommodate deviations from ideals of equal representation. Historically, absolute representation by population was 'tempered by other factors,' as is seen in the following statement made by Sir John A. MacDonald as he introduced the Representation Act of 1872.

In determining the mode of distributing the new seats, the Government took into consideration the principles which have guided the establishment of the elective system in the Provinces ever since they have been provinces; and it will be found that, in them all, while the principle of population was considered to a very great extent, other considerations were also held to have weight; so that different interests, classes, and localities should be fairly represented, that the principle of number should be only the one. This was established in 1791 with respect to the Provinces of Upper and Lower Canada, where there were certain proportions of rural constituencies established, and a certain number of counties, so that the agriculture population might be fairly represented and also the manufacturing and commercial and town populations.²⁹

In her decision, Justice McLachlin, clearly demonstrated that deviation from absolute proportional representation in electoral apportionment is not only part of Canada's democratic tradition but it continues today (and justifiably so). As stated previously, McLachlin argued that deviation was justifiable for reasons of geography, regional interests, and better government. Apart from these, there also exist several constitutional foundations for such departures. Notwithstanding Section 42 of the Constitution, which guarantees a certain level of proportionate representation of provinces in the House of

²⁹ John A. MacDonald, in Parliamentary Debates, (February 15, 1872 - June 15, 1872), pp. 926-927, cited in Dixon, p. 410.

Commons, Section 1 of the Charter can also be used to justify disparities in electoral districting so long as the departure (the means) can be objectively and appropriately justified as contributing to the attainment of a valid objective (the ends), which in itself does not constitute an unfounded infringement of rights and freedoms guaranteed in the Charter.³⁰

Whereas it could be justifiably stated that Dixon may be construed as providing a foundation for an argument concerning the justifiability of guaranteed Aboriginal representation (by utilizing both Section 1 and Section 3 of the Charter and assuming that Aboriginal representation would lead to better government on the whole), the second decision to be discussed provides an even stronger basis for deviating from absolute representation by population to allow for the particularistic representation of Natives. That is, the Supreme Court of Canada's decision of the reference case, Reference re Provincial Electoral Boundaries, 1991 (the case was heard as Carter v. the Attorney General of Saskatchewan), demonstrates a substantial number of ways in which absolute (or as near as possible) proportionate representation can be disregarded.

Reference re Provincial Electoral Boundaries was referred to the Saskatchewan Court of Appeal in 1990 before it was appealed to the Supreme Court of Canada in 1991. Similar to Dixon, at issue in the case was the constitutionality of the proposed provincial electoral boundaries, and the legislation upon which they were based. The

³⁰ Ibid, pp. 419-420.

legislation, the Representation Act, 1989, required the independent boundary commission to define and establish 66 provincial constituencies, of which two were to be northern, twenty-nine were to be urban, and thirty-five rural. According to Duff Spafford,

By specifying the number of urban and rural seats at 29 and 35 respectively, the Act ensured that on average, a rural constituency would contain fewer electors than an urban one. The Act left the way open for rural [and northern] voters, taken in aggregate, to exercise electoral power disproportionate to their numbers. Because in the 1986 provincial election political support tended to divide between the New Democratic Party and the Progressive Conservative Party along urban-rural lines, the distribution of urban and rural seats was a politically sensitive matter.³¹

As a result of the population discrepancies, and the perceived gerrymandering, the Society for the Advancement of Voter Equality (hereafter SAVE) was established to lobby the Saskatchewan government to revisit the legislation or to allow the Saskatchewan Court of Appeal to hear a reference case on the constitutionality of the Representation Act, and the subsequent redistribution. In July, 1990, SAVE (founded in part by members of the Faculty of Law at the University of Saskatchewan) got its wish, as the province submitted to the Court two questions regarding compliance with the Charter, which were to be considered.

Because the Court of Appeal unanimously ruled on March 6, 1991, that the electoral redistricting scheme violated the Section 3 of

³¹ Duff Spafford, "Effective Representation: Reference re Provincial Electoral Boundaries", in Saskatchewan Law Review, (Volume 56, 1992), pp. 200-201.

the Charter and (with the exception of the Northern ridings) could not be justified using Section 1, the decision was appealed by the Government of Saskatchewan to the Supreme Court of Canada.³² Heard in April, 1991, the Supreme Court of Canada, submitted its six to three decision favouring the Saskatchewan government on June 6, 1991. Writing for the majority, Justice McLachlin (now with the Supreme Court of Canada), expanded on many of the ideas present in the Dixon v. the Attorney General of British Columbia decision. Broadening the idea that deviation from absolute representation by population is justifiable if it provides for 'better government', McLachlin determined that "the purpose of the right to vote enshrined in s. 3 is not equality of voting power per se. but the right to 'effective representation'."³³

In explaining what is meant by 'effective representation', Justice McLachlin explains that, "ours is a representative democracy. Each citizen is entitled to be represented in government. Representation comprehends the idea of having a voice in the deliberations of government as well as the idea of the right to bring one's grievances and concerns to the attention of one's government representative."³⁴ Facilitating 'effective representation' usually requires the relative parity of voter power, except in situations where such parity would detract

³² In its decision, the Saskatchewan Court of Appeal ruled that Section 3 required electoral districts of substantially equal voter population as, "the idea of equality, as expressed in the principle of 'one person - one vote,' is inherent in the right to vote and is the guiding ideal in evaluating electoral distribution schemes." Reference re Provincial Electoral Boundaries, in Western Weekly Reports, (1991a), p. 593.

³³ Reference re Provincial Electoral Boundaries, in Western Weekly Reports (1991b), p. 2.

³⁴ Ibid, p. 12.

from the achievement of effective representation. Furthermore, "factors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic."³⁵ Nevertheless, recognition of an individual's cultural and group identity and attempts to enhance the participation of certain individuals in the political process need not mean the undue and unjustified dilution or debasement of the democratic rights of others.

Based upon this notion of effective representation, the Supreme Court upheld both the electoral apportionment scheme and Saskatchewan's Representation Act. This is because both the disparities between rural, urban and northern constituencies were thought to be "justified on the basis of valid considerations,"³⁶ and thus they were not found to be in violation of Section 3 of the Charter of Rights. As such, the Court deemed it unnecessary to consider whether deviation was justifiable under Section 1.

For the purposes of this thesis, this case is significant in several ways. First it illustrates that population is not the sole, nor the primary, consideration in electoral redistricting. Thus, deviations are permissible. Second, justifications for deviating from relative parity in voter power include community of interest, history, and cultural and group identity. These justifications may be construed to suggest that a rationale for debasing absolute representation by population may be the

³⁵ Ibid, pp. 12-13.

³⁶ Ibid, p. 17.

simple existence of an Aboriginal community of interest, an Aboriginal cultural and group identity, a distinct history, and a tradition of low political participation which could be enhanced through affirmative gerrymandering. Add to this the idea that deviation is permissible (under Sections 1 and 3) when said deviation lends itself to the better government of the whole, and a conclusion is easily attained. A constitutional foundation exists not only for the establishment of AEDs, but for the recognition and implementation of a Treaty right to Parliamentary representation, as will be demonstrated in the following section of this chapter.

PUTTING THE PIECES TOGETHER

While the court cases demonstrate that Gibbins is unjustified in stating that there is no constitutional foundation for the establishment of AEDs and that the creation of AEDs is not consistent with Canada's democratic traditions, the question that remains to be answered concerns the reconcilability of a Treaty right to guaranteed representation and Canada's electoral tradition (particularly as it is defined in electoral law and in the Constitution). That is, while no such argument has been forcefully articulated in reviewing the material, the majority of the literature on AEDs (and the decisions of the judiciary, for that matter) suggest the compatibility of AEDs, electoral law, and constitutional law, and thus the fact that even within a system governed by tradition and democratic ethos there is room to maneuver

and to implement AEDs. Given the distinctiveness of the perceived Treaty right to guaranteed representation (not based on population, historical under representation, territory, or traditional constituencies) from Aboriginal Electoral Districts, and communities of interest (as discussed in the Provincial Electoral Boundaries case), the focus of attention must necessarily shift to creating an argument about the constitutionality (and compatibility) of implementing the Treaty right to share in the responsibility to maintain peace and good order using Parliamentary representation. In doing so, this discussion will both draw from and be based upon the literature and the court cases presented thus far in this chapter.

Apart from Iris Young, who presents the reader with a theoretical and philosophical rationalization in support of differentiated representation, the remainder of the authors (who favour AEDs) justify their arguments by referencing Canada's political traditions, electoral law, and the Constitution. In so doing, these authors have suggested possible ways in which a Treaty right to representation may be grounded within the Canadian experience. For instance, while David Small emphasizes that the idea of special representation has been rejected by the general public and in Canadian politics, Tim Schouls, Robert A. Milen, Augie Fleras and the Royal Commission on Electoral Reform and Party Financing all profess to the contrary. To differing degrees, each views AEDs as consistent with the Canadian traditions of electoral representation. However, while their claims are based upon the theoretical construct of AEDs, the traditions highlighted by the authors and the Courts can be appropriated and used to construct a case which

proves that using guaranteed representation to execute the Treaty right to maintain peace and order is both compatible with, and can be fit into, the existing system of electoral apportionment (the terms of representation which have been set at utilized by Parliament).

As was illustrated in the discussion of Dixon v. the Attorney General of British Columbia previously, the Canadian electoral tradition is not a static tradition based solely upon absolute representation by population. Rather, it is an evolving tradition based upon an ideal of representation which places great emphasis on the 'fair representation' of such factors as different interests, classes and localities.³⁷ According to John C. Courtney,

Although 'rep. by pop.' was the sine qua non of the Confederation bargain for many upper Canadians, neither it nor its more recent first cousin, 'one person-one vote,' has ever matched the appeal generated by the constitution, federal-provincial relations and other matters now so much a part of the Canadian political fabric.³⁸

This notion of fair representation has been deeply entrenched in both the political system, and in the legislative and constitutional basis of said structure. To a great extent, fair representation has meant that, "Canadians have been represented in the House of Commons in part as individuals entitled to vote; in part as residents of a particular province

³⁷ John A. MacDonald, 1872, pp. 926. For a discussion of the history of this tradition, and what this tradition entails see: J. Patrick Boyer, Political Rights: The Legal Framework of Elections in Canada, (Toronto: Buttersworth, 1981).

³⁸ John C. Courtney, "Parliamentary Representation: The Unfinished Business of Electoral Redistributions", in Canadian Journal of Political Science, (December, 1988), p. 673.

or territory; and in part as residents of a particular community represented as a riding.”³⁹ The most obvious manifestation of the ideal of fair representation is inter-provincial electoral distribution, that is in the manner in which individuals are represented as residents of particular provinces or territories.

To ensure that all provinces and territories are ‘fairly represented’ within the House of Commons several safeguards have been put in place, safeguards which have, themselves, in time become part of our democratic traditions. Since Confederation, there have been several Constitutional provisions which guarantee specific provinces a certain number of Parliamentarians regardless of their population and their proportion of the national population. This tradition of differentiated provincial representation extends back to Confederation and Section 51 of the Constitution Act, 1867, which guaranteed Quebec sixty-five seats while all other provinces were assigned seats based on proportional representation.⁴⁰ Subsequent to this, the Constitution was revised several times to allow for several deviations from absolute representation by population. For instance, in 1915 Section 51A was added to the Constitution to ensure that no province had fewer Parliamentarians representing it than it had Senators representing it. This occurred because of increasing political pressures and judicial action taken by less populated provinces seeking more ‘equitable’

³⁹ Kent Roach, “One Person, One Vote? Canadian Constitutional Standards for Electoral Distribution and Districting”, in David Small ed., Drawing the Map: Equality and Efficacy of the Vote in Canadian Electoral and Boundary Reform, (Toronto: Dundurn, 1991), p. 3.

⁴⁰ Canada, The Constitution Acts 1867 to 1982, (Ottawa: Department of Justice Canada, 1989), p. 14.

representation. Although amended several times since, the Constitution basically provides the same representation guarantees today, as it did in the past, with the exception that a provinces' level of representation can never fall below that which it had prior to 1982 and that the Northwest Territories is entitled to two representatives.⁴¹

As differentiated representation is not only part of our democratic experience but, part of our Constitution as well, how could it be logically argued that guaranteed Aboriginal representation violates or contradicts our electoral tradition? Simply put, guaranteed provincial representation does not contradict our electoral tradition, it is an inherent part of it. Guaranteed Aboriginal representation would not deviate substantially from that tradition. Recognizing and implementing a Treaty right to Parliamentary representation would merely expand upon an existing tradition of recognizing the importance of 'collective rights' and providing for the 'fair representation' of such constitutionally recognized collectives. However, recognition of a non-population based Treaty right to guaranteed representation under Section 51 of the Constitution would require a constitutional amendment despite the fact that it is easily concluded that said representation is compatible with our political traditions.

As was pointed out by several of the authors discussed earlier in this chapter, AEDs are compatible with Canadian electoral law, as is a Treaty right to particularistic representation (whereby the signatories of Treaties Six and Seven exercise their responsibility to maintain peace

⁴¹ Ibid, pp. 18

and order). For example, according to the Committee for Aboriginal Electoral Reform, AEDs are allowable under Canadian electoral law as AEDs facilitate 'effective representation' and they fit well with representation of 'communities of interest,' which is entrenched in the Electoral Boundaries Readjustment Act of 1985 (the means by which Parliament set its terms of representation).

The Electoral Boundaries Readjustment Act sets out in law the manner in which electoral redistricting occurs in Canada. The Act states that federal electoral apportionment is to be completed in every province by independent commissions. Each commission, established according to the guidelines laid out in the Act, draws the electoral boundaries of the particular province in accordance with the stipulations and terms of reference enunciated in the Act. Section 15 of the 1989 Act states that in drawing boundaries the commissions must abide by the following rules:

- (1)(a) the division of the province into electoral districts and the description of the boundaries thereof shall proceed on the basis that the population of each electoral district in the province as a result thereof shall, as close as reasonably possible, correspond to the electoral quota for the province, that is to say, the quotient obtained by dividing the population of the province as ascertained by the census by the number of member of the House of Commons assigned to the province ...; and
- (b) the commission shall consider the following in determining reasonable electoral district boundaries:
 - (i) the community of interest or community of identity in or the historical pattern of an electoral district in the province, and (ii) a manageable geographic size for districts in sparsely populated; rural or northern regions of the province.
- (2) The commission may depart from the application of the rule set out in paragraph (1)(a) in any case where the commission considers it necessary to depart therefrom

(a) in order to respect the community of interest or community of identity in or the historical pattern of an electoral district in the province, or
 (b) a manageable geographic size for districts in sparsely populated; rural or northern regions of the province.
 but in departing from the application of the rule set out in paragraph (1)(a), the commission shall make every effort to ensure that, except in circumstances viewed by the commission as being extraordinary, the population of each electoral district in the province remains within twenty-five per cent more or twenty-five per cent less of the electoral quota for the province.⁴²

While Courtney points out that (at least, prior to 1988) electoral commissions generally tried to construct boundaries which were reflective of an absolute representation by population ideal,⁴³ and while Roach and Andrew Sancton would like us to believe that the Act (and such deviations from proportional representation) would be ruled unconstitutional if there were a Charter challenge,⁴⁴ I believe it to be consistent with Canadian traditions, and the Constitution (as demonstrated by the Saskatchewan electoral distribution Supreme Court Case). I also view the legislation as proof that guaranteed Aboriginal representation could be construed as being consistent with, and admissible under federal electoral law. Moreover, a Treaty right to guaranteed representation can be reconciled with our existing electoral

⁴² Canada, "Electoral Boundaries Readjustment Act", in Statutes of Canada, (Ottawa: Department of Justice, 1993), Chapter E-3, Volume V, pp. 5-6.

⁴³ "Only three commissions ceased the opportunity in 1987 to go beyond the 25 per cent limit, and at that they designed a total of only five seats whose boundaries were justified on 'extraordinary' grounds. In all, less than two dozen of nearly 300 constituencies created in 1987 were assigned populations more than 20 per cent above or below the provinces average." Courtney, 1988, p. 681.

⁴⁴ Andrew Sancton, "Eroding Representation-by-Population in the House of Commons: The Representation Act, 1985", in Canadian Journal of Political Science, (September, 1990), pp. 441-457.

law, as both are compatible, even complementary. Therefore, unlike Gibbins assertions, a Treaty right could determine the representation of the signatories to Treaties Six and Seven in the House of Commons, as such a right could easily be construed as consistent with the terms of representation that Parliament has established for itself in the Electoral Boundaries Readjustment Act.

According to the Committee for Aboriginal Electoral reform, "the primary reason for Aboriginal under-representation in Parliament stems from the failure of current electoral laws to recognize the Aboriginal community of interest."⁴⁵ Although correct in asserting that the Aboriginal 'community of interest' is not explicitly recognized in the legislation, the Electoral Boundaries Readjustment Act provides a substantial foundation for the creation of Aboriginal constituencies. Albeit not self-defined as a 'community of interest' or a 'community of identity', Natives could be looked upon as such in the drawing of electoral boundaries. This would facilitate increased representation, especially if deemed an 'extraordinary circumstance,' as this would allow for extremely small populations to be represented according to the present territorial based system.

While implicit or explicit recognition of the Aboriginal 'community of interest' would address the present inequalities inherent in our current electoral redistribution scheme, it says nothing of special rights, particularly Treaty rights. However, recognizing that there is a Treaty right to representation could cause a reinterpretation or expanded

⁴⁵Committee for Aboriginal Electoral Reform, 1991, p. 242.

interpretation of the Act to allow for the implementation of such a right. This is because a Treaty right to representation could be construed as an 'extraordinary circumstance,' as it is extremely extraordinary given the fact that it is a constitutionally entrenched collective right held only by the nations which signed the Numbered Treaties. Thus, a Treaty right to Parliamentary representation is compatible with existing electoral law, to the extent that it may even be couched in terms of this law. Furthermore, it is likely that the legislation (the terms of representation which Parliament set for itself) may even, under 'extraordinary circumstances,' allow representation on a non-territorial basis as the Act does not say otherwise. This would enhance Treaty representation, as it would allow for the representation of the nation by 'Chiefs and Headmen,' and not the representation of reserve or urban populations by elected individuals, *per se*.

Similarly, in the two judicial decisions regarding electoral rights considered in this thesis the Courts have suggested several constitutional bases for implementing the Treaty right to share in the maintenance of peace and order using guaranteed representation. This conclusion has also been reached, for the most part, by the authors discussed earlier in this chapter in relation to Aboriginal Electoral Districts. Even Tim Schouls who disagrees completely with AEDs, admitted that AEDs are consistent with Canadian electoral traditions, and as such they stand a good chance of withstanding a legal challenge under the Charter. Despite the fact that none of the articles, nor either of the court cases, discuss the constitutionality of a Treaty right to guaranteed representation, such a right is, nonetheless, compatible with

the electoral rights imbedded in the Charter. This is evident if one examines Sections 1, 3 and 15 of the Canadian Charter of Rights and Freedoms.

The Royal Commission on Electoral Reform and Party Financing insist that, "the equality of the vote of non-Aboriginal voters should not, and need not, be undermined in order to secure the equality of the vote for Aboriginal people."⁴⁶ Although this may not be the case, deviation from population is compatible with the Constitution. Looking back to Justice McLachlin's decision of Dixon v. the Attorney General of British Columbia one will remember that she ruled that deviation from relative voter parity was permissible if it provided for 'better government' and could be justified as doing so by the government whose electoral districting scheme was being questioned. Better government could be achieved through the recognition and implementation of a Treaty right to particularistic representation.

Furthermore, as is required under Dixon, the objectives for such a departure from absolute 'rep. by pop.' could be clearly and demonstrably justified by both Aboriginal people and the Canadian government by merely referencing past promises (the Treaty) and the obligations and responsibilities incurred in said promises. The objectives of such deviation could also be justified politically through such things as the increased credibility that the federal government will have among Natives, the 'enhancement' of the political discourse that will occur

⁴⁶ Royal Commission on Electoral Reform and Party Financing, (1991, Volume 1) p. 187.

once Natives are at very least proportionately represented, the fact that it recognizes the necessity of having a diversity of voices (a mosaic) heard in order to create better government, and because it would recognize that equal treatment does not necessarily mean equality. Furthermore, implementing this Treaty right would facilitate the better government of the territories included in Treaty Six and Seven as it would allow the First Nations to assert their shared responsibility, add a very different tradition of politics to Parliament, and give Natives a say in the governing of their traditional lands.

With so many ways to justify a departure from voter parity, deviation would surely be permissible using Section 1 of the Charter, especially given the Treaty right. Moreover, the compatibility of a Treaty right to representation and the Constitution is further evident if one considers the interpretation of Section 3 of the Charter provided by Justice McLachlin in the Saskatchewan reference case. McLachlin interpreted Section 3 in a manner very similar to the guidelines provided to electoral commissions in the Electoral Boundaries Readjustment Act discussed earlier in this chapter. Just like the Act, McLachlin indicated that such factors as (but not limited to) community history, geography, minority representation and community interests have to be taken into consideration in the drawing of boundaries, and that said factors are grounds for deviating from population in electoral redistribution as they facilitate and enhance 'effective representation' of our social mosaic. Although Law professor Katherine Swinton argues "against fixed seats for groups on the basis of a shared characteristic, which ignores the

insists that this is far from McLachlin's intent or any acceptable interpretation of Section 3. Others, such as Murray Rankin, concede that this might be a plausible conclusion, particularly if the group in question is a First Nation.⁴⁸ Although debatable, guaranteed representation might be viewed as a Charter right for Aboriginal peoples based upon McLachlin's decision alone. However, add to this my discussion of Canada's electoral law, and the conclusion becomes evident, as extreme variations in voter distribution are admissible in 'exceptional circumstances;' and a Treaty right is one such circumstance.

Nevertheless, while territorial based guaranteed representation is justifiable under both the Charter and Canada's electoral law, Treaties Six and Seven encompass extremely large territories with the descendants of the signatories dispersed throughout. Thus, Treaty representation would necessarily entail a non-territorial (read: non-constituency) system of particular representation whereby all descendants of the signatories could participate regardless of their place of residence. Although the New Zealand experience with guaranteed Maori representation demonstrates that such a non-territorial system of

Legislatures, Courts and Electoral Values, (Saskatoon: Fifth House Publishers, 1992), p. 31.

⁴⁸ Murray Rankin, "Commentary", in John C. Courtney, Peter MacKinnon & David E. Smith eds., Drawing Boundaries: Legislatures, Courts and Electoral Values, (Saskatoon: Fifth House Publishers, 1992), pp. 44-47.

representation is compatible with a Parliamentary system, one has to ask if such a system is justifiable within Canada.

The answer is yes, non-territorial representation of nations is compatible with Canada's electoral tradition (based on New Zealand's experience), and the right to vote as guaranteed under Section 3 of the Charter of Rights and Freedoms. This is evident in the following passage discussing the Supreme Court's decision in Reference re Provincial Electoral Boundaries by Robert G. Richards and Tomson Irvine.

The language chosen by McLachlin J. also suggests that the Court may look charitably on special representation regimes based on linguistic or other considerations. She noted that, 'factors like geography, community history, community interests and minority representation may need to be taken into account to ensure that our legislative assemblies effectively represent the diversity of our social mosaic.' She also said that '... the need to recognize cultural and group identity and to enhance the participation of individuals in the electoral process and society requires that [concerns other than voter parity] also be accommodated.' Those views indicate that it may be possible for a legislature to create a special kind of representation for members of a particular group in society who are inadequately represented under an existing electoral system. The unique constitutional and legal position of Aboriginal peoples, combined with the fact that they are almost completely absent from legislative assemblies, suggests that the Supreme Court would be inclined to accommodate some kind of guaranteed representation for them under section 3 of the Charter.⁴⁹

Furthermore, as Schouls points out, this argument is even more

⁴⁹ Robert G. Richards & Tomson Irvine, "Reference Re Provincial Electoral Boundaries: An Analysis", in John C. Courtney, Peter MacKinnon & David E. Smith eds., Drawing Boundaries: Legislatures, Courts and Electoral Values, (Saskatoon: Fifth House Publishers, 1992), p. 61.

admissible when the argument that, “without such differentiated representation, the group would be unable to enjoy the ‘effective representation’ the Charter guarantees as its right under section 3.”⁵⁰ is advanced.

Similarly, according to Kent Roach, in his article “Chartering the Electoral Map into the Future,” the Saskatchewan electoral boundaries decision could (potentially) “lead to a more robust form of compensatory antimajoritarianism”⁵¹ in electoral apportionment. Like Roach, Spafford argues that the decision ‘opens the door’ for ‘protected’ or ‘flagged’ constituencies where considerations, other than voter parity, are the basis for determining, and hence protecting, electoral districts through affirmative gerrymandering.⁵² Although present in Justice McLachlin’s interpretation of Section 3, these ideas about the constitutionality of affirmative gerrymandering and protected constituencies are fully enunciated in more recent interpretations of the right to vote under Section 15 of the Charter.⁵³

⁵⁰ Schouls, 1995, p. 11.

⁵¹ Kent Roach, “Chartering the Electoral Map into the Future”, in John C. Courtney, Peter MacKinnon & David E. Smith eds., Drawing Boundaries: Legislatures, Courts and Electoral Values, (Saskatoon: Fifth House Publishers, 1992), p. 209.

⁵² As Spafford points out, this vision of the right to vote has already been accepted by Nova Scotia, which in 1992 accepted and entrenched the practice of affirmative gerrymandering in the drawing of constituencies to enhance the effective representation of certain groups. Spafford, 1992, p. 207.

⁵³ Section 15 of the Charter of Rights and Freedoms reads as follows:

15 (1) Every individual is equal before and under the law and has the right to equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

(2) Subsection (1) does not preclude any law, program or activity that has as its objective the amelioration of conditions of disadvantaged individuals or groups including those that are disadvantaged because of

That is, differentiated representation has been advanced as being compatible with (even guaranteed under) Section 15, so long as a group can demonstrate discriminatory effects of the current electoral system in order to justify affirmative action under Section 15(2). Regardless of the 'unequal' repercussions, Section 15 could be used to justify particularistic representation for the peoples of Treaty Six and Treaty Seven because the Courts have recognized in interpreting this section that equal treatment does not necessarily produce equal results. Thus, even though "strict equality of voting power would not tolerate the notion that some people, in particular vulnerable minorities, can legitimately be accorded preferential treatment from that received by the majority,"⁵⁴ if done to ameliorate conditions of disadvantaged groups it is constitutional.

This, coupled with the fact that affirmative districting will not work for all disadvantaged groups (particularly the geographically dispersed Native population) may be grounds enough for the creation of other mechanisms or systems of representation (such as a non-territorial constituency premised on the recognition of nationhood). Furthermore, according to Roach, "Canada may be heading in the direction of separate seats and the Court's decision in the Saskatchewan case suggests that the courts might defer to such legislative attempts to facilitate minority representation."⁵⁵ Thus, it may

race, national or ethnic origin, colour, religion, sex, age or mental or physical disability. Canada, 1989, p. 61.

⁵⁴ Roach, 1991, p. 17.

⁵⁵ Roach, 1992, p. 214.

be concluded that a system of differentiated representation for the Plains Cree and Blackfoot Confederacy, which is not based on territory or the adherence to the ideal of representation by population, is also compatible with Section 15 of the Charter. This is especially the case considering the disadvantages incurred by the people of Treaty Six and Seven by not having their Treaty right and responsibility to maintain peace and order in their respective territories recognized historically.

Thus far in this chapter I have demonstrated that notwithstanding the allegations presented at the outset, a particularistic system of representation for the peoples of Treaty Six and Treaty Seven is compatible (and to a great extent even consistent) with the 'strong traditions and democratic ethos' which exist within Canada. Treaty rights may in fact influence (if not determine) Parliamentary representation as such a right is consistent (and arguably part of) the terms of representation that Parliament has both set for itself (democratic traditions, and electoral law) and those which have been set for Parliament in the Canadian Charter of Rights and Freedoms. Furthermore, the fact that in her decision of Dixon Justice McLachlin forced the government of British Columbia to take remedial action to reconcile their legislation and electoral redistribution scheme with the Charter, suggests that the courts (using the Charter) might influence or force Parliament to recognize and implement a Treaty right to representation in electoral apportionment. Therefore, by utilizing traditions, electoral law and the Charter, Treaty rights could (albeit unlikely) in fact determine the representation of Aboriginal peoples in Parliament.

However, after all this, even if using guaranteed representation to realize the Treaty right to maintain peace and order throughout the 'ceded' territories is determined to be inconsistent with the democratic rights guaranteed in Section 3 and unjustifiable on the grounds of either Section 1 or 15 of the Charter, it does not mean that such a right is unconstitutional or unable to influence (even determine) the Parliamentary representation of the Cree and Blackfoot. In other words, while Roger Gibbins might be considered right in suggesting that there is no legal framework or compelling Constitutional rationale for the establishment of AEDs (despite my attempt to provide a constitutional rationale), no such argument can be justifiably asserted about a Treaty right to particularistic representation.

This is because, as was demonstrated in the previous chapter, under the terms of Treaties Number Six and Seven, there exists a responsibility to establish and maintain peace and good order within the entire 'ceded' territory; a responsibility shared by the signatories to the Treaties (the Blackfoot and Cree represented by their Chiefs and Headmen, and the representatives of the Crown). It has been suggested in this thesis that this mutual responsibility could be looked upon, in the context of today, as a right to Parliamentary representation (among other possibilities) as this would ensure Aboriginal participation in the governing of their traditional lands. This responsibility to maintain peace and good order is one of many rights or obligations promised in the western Treaties (particularly Six and Seven); promises which are referred to today as Treaty rights.

As Treaty rights are constitutionally entrenched, Gibbins would have a very difficult time arguing that the Constitution does not provide a compelling rationale for differentiated (Aboriginal) representation or that such representation would be prohibited by the Canadian Charter of Rights and Freedoms. This is because the Constitution not only recognizes and affirms Aboriginal and Treaty rights in Section 35, but it also states in Section 25 that the Charter "... shall not be construed so as to abrogate or derogate from any aboriginal, treaty or other rights or freedoms that pertain to the aboriginal people of Canada ..."⁵⁶ This is important as it not only recognizes that the Indigenous population are 'citizens plus' as they have 'special' rights, but it also shields those rights from the dominant society, in general. Even Roger Gibbins recognizes this, as he admits that if framed as an Aboriginal or a Treaty right, guaranteed Aboriginal representation would be constitutionally allowable and justified.

Although a Treaty right to Parliamentary representation (actually the right or responsibility to maintain peace and order in each nation's traditional territory) is not explicitly recognized in the Constitution, such recognition is inherent in the text of the document as it is merely a reference to the multitude of Treaties which exist throughout Canada. Thus, particularistic representation is a constitutional right for the descendants of Treaty Six and Treaty Seven.⁵⁷ As such, the Charter of

⁵⁶ Canada, 1989, pp. 64-67.

⁵⁷ As this clause appears in each of the Numbered Treaties and similar clauses appear in most other Treaties, Henderson has suggested that Parliamentary representation would necessarily be a constitutional right for all Treaty Indians. Henderson, 1995. Moreover, like health care, such a right could be implemented universally among Status Indians, regardless of Treaty entitlement. On the other hand, this right could be construed as a right which is held by all Aboriginal

Rights and Freedoms has no bearing on the matter, as Section 25 removes Aboriginal and Treaty rights from the Charter's sphere of influence, and thus eliminates any fear regarding the compatibility of Aboriginal representation and the Charter. Furthermore, the existence of such a constitutional right could force (possibly as a result of judicial action) Parliament to acknowledge that Treaties Six and Seven determine the representation of the leaders of the Plains Cree, Blackfoot, Peigan and Blood nations within Parliament; this could quite easily occur (as was demonstrated in the Dixon decision) despite the fact that Parliament retains the right to set its own terms of representation.

CONCLUSION

Based upon the conceptualization presented in this chapter, it can be justifiably stated that a Treaty right to Parliamentary representation is constitutionally permissible, as it is a constitutionally entrenched right. This conclusion is not revolutionary or unsubstantiatible as several scholars and all of the national Aboriginal political organizations have made assertions that differentiated representation is an Aboriginal right. Even the RCERPF attempted to construct such an argument when they reported that,

people regardless of the aspirations of the colonizer, and the divisions imposed by the Indian Act.

Since Section 25 of the Charter places Aboriginal people in a special constitutional position, there is no valid reason to believe the establishment of such a right to direct representation through a well crafted process whereby they could vote in Aboriginal constituencies would not survive any challenge in the courts that sought to demonstrate that this right had a negative impact on the equality rights of other Canadians.⁵⁸

Even though a Treaty right to Parliamentary representation is constitutionally entrenched for the descendants of Treaties Six and Seven, as they agreed to share the responsibility for governing their traditional territories with the Queen, an argument can be made regarding the compatibility of such a right with our democratic traditions, electoral law, and the Canadian Charter of Rights and Freedoms. That is, regardless of the fact that such a right exists outside the influential reach of Canadian electoral law and the Constitution, I have demonstrated that the two (particularistic representation and our current system of representation) are actually reconcilable, and even compatible. Furthermore, it has been demonstrated that major population discrepancies in electoral apportionment are justifiable under the Charter, as are non-territorial constituencies comprised of nations; both of which deviations from the norm are critical to the construction and implementation of a special system of representation for the Indians of Treaty Number Six and Treaty Number Seven. Thus, despite the fact that claims have been advanced suggesting that there is no constitutional foundation for such a system of representation, that there is no room for particularistic representation within the Canadian

⁵⁸ Royal Commission on Electoral Reform and Party Financing, 1991 Vol. 1, p. 183.

Parliamentary system as such a system violates Canada's democratic traditions and ethos, and that Parliamentary representation cannot be determined by Treaty rights, I have demonstrated otherwise.

Despite the fact that I have demonstrated what I set out to demonstrate at the outset of this thesis, several issues loom in the distance which must be addressed, if only in brief. In other words, although I have demonstrated that there is a Treaty right to representation in both Treaties Six and Seven and that this right is not only constitutionally entrenched but compatible with our current electoral system, many questions remain unanswered. As a result, the following chapter will consider the surrounding issues; issues regarding such matters as nationhood, the desirability of particularistic representation, and some foreseeable consequences and difficulties associated with Aboriginal representation.

CHAPTER 4: THE CIRCLE CLOSES AS QUESTIONS ARE ANSWERED

INTRODUCTION

Given the fact that the descendants of Treaties Six and Seven have the shared right and responsibility to maintain peace and order in their 'ceded' territories, it has been argued that this could constitute a right to guaranteed Parliamentary representation, among other things (such as self-government). Although I have demonstrated, previously, that particularistic representation is compatible with our current system of representation and that a Treaty right to representation is constitutional, many questions remain unanswered.

As a result, this chapter will briefly address some of the questions and concerns that have yet to be discussed. Questions and concerns lifted from the existing literature and raised in many a conversation or interview on this topic. Questions and concerns about the desirability and foreseeable effects of such a system of representation.

DESIRABILITY

The most commonly articulated concern raised during the writing of this thesis dealt with the desirability of a system of particularistic (Treaty) system of representation. Although raised in a plethora of ways (as will be demonstrated in this chapter), the desirability of creating a system of representation based on the Numbered Treaties was often questioned in relation to sovereignty; specifically the compatibility of Parliamentary representation and the sovereignty of the respective nations which would be participants in such an electoral system.

As was alluded to in Chapter Two of this thesis, guaranteed representation does not replace, nor does it necessarily detract from a nation's sovereignty. This is the case because the promise to maintain peace and good order which appears in Treaties Six and Seven, is a promise that was made between two sovereign nations which would continue to exist as sovereign nations within the same territory. Any implementation (Parliamentary representation or otherwise) of the responsibility to maintain peace and order has to respect the nature of said promise, as well as the reality in which we exist today. Therefore, if implemented utilizing Parliamentary representation as a mechanism through which the Plains Cree and the Blackfoot Confederacy could exercise their responsibility, representation would necessarily entail the representation as nations since it was the nations which entered into the Treaties, and it is the nations which hold the responsibility to maintain peace and good order. The sovereignty of the respective nations is not disregarded nor intruded upon, for Parliamentary representation

could be construed as a recognition of Nationhood, and a recognition that the representatives (Chiefs, Minor Chiefs, Headmen, or otherwise) of these nations have the right to participate and share in the governing of their 'shared' territories.

Furthermore, guaranteed representation does not deviate from or interfere with the sovereignty of the nations which signed Treaties Six and Seven and it could be construed as being consistent with the way in which Nationhood and sovereignty are being conceptualized and asserted today. In other words, by redefining the relationship between Parliament and the peoples of Treaties Six and Seven as one based on Nationhood, responsibilities and rights rather than Canadian citizenship, Parliamentary representation becomes consistent with the aspirations of First Nations to re-assert their Nationhood and sovereignty within Canada (as well as internationally).¹ This is because, for the most part, the Aboriginal leadership has viewed the sovereignty of their nations, as sovereignty within the confines of Canada (as nations within).

Their struggle has focused on the reassertion of their sovereignty or Nationhood within Canada, and the re-establishment of a nation-to-nation relationship with the Canadian state.² Whereas this struggle has

¹ Since 1960 First Nations have actively re-asserted their status as nations using a variety of mechanisms (including intergovernmental relations, and international nations). Although the struggle for recognition as nations within predates 1960, the struggle was rekindled in the 'rebirth', 'cultural renaissance', 'resistance', 'quiet revolution', 'resurgence' and 'red explosion' of the 1960s. Harold Cardinal, The Unjust Society: The Tragedy of Canada's Indians, (Edmonton: Hurtig, 1969). For a discussion of the struggle to re-assert Aboriginal Nationhood see: Ladner, 1995.

² "Aboriginal people assume the politically self-conscious stance of 'nation' when they go a step beyond identifying themselves as the 'original' occupants of a land who wish to preserve and protect their cultural heritage. This additional step

not been played out previously in Parliament "... not only because it fails to recognize the special place of Aboriginal peoples as other than ordinary Canadian voters, but also because it does not fully accord with First Nations political traditions and practices,"³ this could change with the implementation of a system of representation which facilitates the sharing of the responsibility to maintain peace and good order between the representatives of the respective nations and Canadians, while at the same time alleviating the aforementioned concerns that First Nations people currently hold.

While Parliamentary representation is not exactly a nation-to-nation relationship with the Canadian government, it is a step in that direction (albeit a relationship between the representatives of the Canadian people and the representatives of the respective nations). It is a step based on the realization that the sharing of the responsibility to maintain peace and order requires the establishment of a new relationship between the respective First Nations and the Canadian state which facilitates the representation of nations which have the right and the responsibility to share in the governing of their traditional territories.

consists in their assertion that they have a special relationship with the state based on a unique set of entitlements. These entitlements typically involve the inherent right to some sort of self-government and an acknowledgment of sovereignty" Augie Fleras & Jean Leonard Elliott, The Nations Within: Aboriginal-State relations in Canada, the United States, and New Zealand, (Toronto: Oxford University Press, 1992), p. 1.

³ Mercredi & Turpel, 1991, p. 231.

Moreover, while it is a step towards the paradigm advocated by many Native leaders in their struggle to re-assert their Nationhood within Canada and to establish a new relationship with the Canadian nation-state premised on the recognition of sovereignty (or Nationhood) rather than the colonization of a so-called 'inferior race,' representation is also consistent with the manner in which the paradigm shift is viewed by the colonizing nation-state. This paradigm shift, also being driven by changing policies within the Department of Indian Affairs, has been articulated at a theoretical level by Sally Weaver in a manner consistent with the conceptualizations provided by such Native leaders and academics as Ovide Mercredi and Mary Ellen Turpel.⁴ According to Weaver, this new paradigm is a complex of interrelated ideas and policies which are the result of and a response to the demands of Aboriginal leaders and Aboriginal communities (and the development and implementation of new government policies).

The first and perhaps most basic idea in the new paradigm [related to the topic at hand] is the notion that the relationship between First Nations and the state (Canada) is a *permanent organic relationship*, one that will prevail into the distant future. The relationship is an ongoing and growing one, not a convergent one where the two political entities are expected to meld into a unitary form. Rather, it is cast as a parallel political forces flowing down through time, the key feature being that each force adjusts to the other and the environment in which they both operate. ... The second new paradigm notion is that the relationship between the state and the First Nations will exist at many levels, but one of these will be the very important level of *sanctioned rights*. By this phrase I mean rights that are recognized by the state

⁴ Sally M. Weaver, "A New Paradigm in Canadian Indian Policy for the 1990s", in Canadian Ethnic Studies, (Vol. XXII, No. 3, 1990), pp. 8-18. Also see: Mercredi & Turpel, 1993.

as justified claims against its behaviour and resources. ... The third idea new in the paradigm thinking relates to culture ... This idea holds that First Nations cultures, like all cultures, change and evolve over time as they respond to internal innovations and external forces. Consequently new paradigm thinking sees First Nations as sustaining a cultural co-existence with the Euro-Canadian cultural system. ... The idea of *jointly formulated policies* is also part of the new paradigm thinking. ... [T]his notion holds that the more policies can be mutually shaped to the satisfaction of both parties the, the more effective they will be in securing public legitimacy and in addressing the needs as defined by the First Nations people. ... Often associated with wildlife management topics is another idea in the new paradigm thinking. This idea holds of the importance of *aboriginal knowledge* and perceptions in their own right, and the belief that they should be used in the relationship between the state and First Nations people.⁵

The conceptualization of this new paradigm provided by Weaver demonstrates that Parliamentary representation premised on and defined by the promises made in Treaties Six and Seven is compatible, even consistent, with the new paradigm being advocated by the federal government, as well as the aspirations of First Nations (which are reflected in the new paradigm). Thus, concerns regarding the desirability of particularistic representation in relation to the compatibility of sovereignty and participation in Canadian parliament are alleviated, if only partially. This is because representation could be (if implemented correctly) viewed in part as a step towards the realization of a new relationship between Native peoples and the Canadian state that is premised on the recognition of Aboriginal Nationhood and the development of a new paradigm. This idea of convergence or

⁵ *Ibid.*, pp. 11-14.

compatibility will be discussed in greater detail throughout this chapter, particularly in responding to concerns related to Aboriginal self-government.

In relation to self-government, many issues were commonly expressed, all of which relate to the perceived desirability of increased Parliamentary representation. This is because, self-government is seen, and justifiably so, as the priority of the Aboriginal leadership and the collectivities which they represent. As Tim Schouls suggests, self-government is the priority of Aboriginal peoples:

the issue of Aboriginal group representation is complicated by the fact that the avenue many Aboriginal peoples want to utilize for their incorporation into Canada is that of self-government. ... Consequently, what many Aboriginal peoples claim is not more effective representation within Parliament but the transfer of powers to enable their own governments to act as their representatives within Canada.⁶

What Schouls, and others, fail to understand is that it is not an issue of either self-government or increased Parliamentary representation. The two are not mutually exclusive. Rather, while the realization of one does not facilitate the achievement of the other, according to the Royal Commission on Electoral Reform and Party Financing, "Aboriginal representation was seen generally as complimentary, not contradictory, to the goal of self-government."⁷ This

⁶ Schouls, 1991, p. 6.

⁷ Royal Commission on Electoral Reform and Party Financing, "On Effective Representation", in What Canadians Told Us: Public Hearings and Written Submissions, Vol. 4, (Ottawa: Minister of Supply and Services Canada, 1991), p. 49.

is most evident in the following rationale provided by the Committee on Aboriginal Electoral Reform: "... in Europe the citizens of sovereign states elect their own representatives to the European Parliament. Representatives from each sovereign state speak to matters of common interest and deal with issues that cut across state boundaries."⁸

The two are complimentary, despite the fact that many have argued (wrongly) that self-government and guaranteed representation are based on separate and distinct principles. It has been suggested that, unlike Parliamentary representation, the ideal of self-government is premised on the recognition of nations, differentiated citizenship, increased independence, separate spheres of power and influence, and a nation-to-nation relationship. While such an argument might be deemed plausible in relation to AEDs, this nonetheless, is not the case with respect to a Treaty right to Parliamentary representation.

Recognition and implementation of a Treaty right to Parliamentary representation is based on the recognition of nations; nations which entered into nation-to-nation relationships with the Crown through the signing of Treaties; nations which continue to exist within Canada; nations comprised of people who are recognized as being different from, and having different rights than, Canadian citizens. Furthermore, as the Treaty speaks of shared power and responsibility, and because Treaty Parliamentarians will be representatives of their respective nations (not as individuals in a community of interest or a community of identity),

⁸ Committee for Aboriginal Electoral Reform, 1991, p. 287.

there is little difference between the ideals upon which self-government is premised and the ideals upon which a Treaty right to guaranteed representation is premised. They are not separate and distinct or mutually exclusive, just different mechanisms that can be used in the construction and implementation of a new and decolonized relationship between First Nations (including the Metis and Inuit), the Canadian nation-state, and the citizenry of said nation-state. Thus, just because self-government is the primary goal of most Native leaders, it does not mean that guaranteed Parliamentary representation is not desirable, especially if conceptualized as a Treaty right, it merely reflects the fact that representation is not a priority at the present.

While both the RCERPF and the Committee for Aboriginal Electoral Reform found there to be a growing desire for guaranteed Parliamentary representation amongst the Aboriginal leadership, as well as the individuals and communities who made submissions, the form of this representation is often questioned. As was discussed in the previous chapter, most of the existing literature advances a system of Aboriginal Electoral Districts as the most favourable and viable form of particularistic representation. While such a system does indeed take enormous strides in the right direction, the manner in which it has been conceived does not reflect the goals and aspirations of most Aboriginal people, nor the way in which they perceive themselves. Thus, Schouls is right in arguing that using AEDs as a means of integrating Aboriginal peoples into Parliament is problematic.

AEDs are problematic for a variety of reasons. First, "because AEDs are cast within a larger framework of democratic equality ... the plethora of representational problems that emerge are potentially paralyzing."⁹ Second, AEDs are problematic as they tend to homogenize Aboriginal peoples rather than respecting and reflecting the diversity. Third, AEDs have, for the most part, been framed using the community of interest or community of identity principle. Fourth, AEDs ignore the existence of nations, and the movement towards the re-establishment of nation-to-nation relations with the Canadian nation-state. Thus, in short, AEDs are a far cry from the realization of the ideals associated with a Treaty right to Parliamentary representation (and self-government), articulated previously in this chapter.

Similarly, many of the alternatives to AEDs advanced in the literature are also extremely problematic and thus not a viable means of Parliamentary representation for Natives. Take for example the alternative to AEDs proposed by David Small. Small claims that the way to proceed is by enhancing Aboriginal influence and participation within the existing electoral system through the creation of majority-influenced and minority-influenced electoral districts (whereby Aboriginal peoples would constitute at least twenty per cent of the population). While this proposition fails to realize the goals and aspirations articulated in conjunction with the discussion of self-government, it would also fail to secure any substantial change in representation. Furthermore, "the measures would fall short of what is required to overcome the symbols of

⁹ Schouls, 1995, p. 20.

exclusion of the past and restore the legitimacy of the House of Commons in the eyes of Aboriginal people.”¹⁰

Neither of these proposed forms of representation is totally viable given the aspirations of the Aboriginal leadership to construct and implement a new and decolonized relationship with the Canadian nation-state. Furthermore, neither are consistent with the idea of a Treaty right to share in the maintenance of peace and order in the area encompassed by Treaty Number Six and Treaty Number Seven. This is because the implementation of such a right demands the sharing of power between nations, and neither proposal fully recognizes the existence of Treaties, nations or the need for a non-population and non-territorial based form of representation. Thus, a new conceptual framework of particularistic representation would have to be developed. In order to be considered desirable, this conceptualization would have to respect the aspirations of Native peoples, and the existence of a constitutionally entrenched Treaty right to guaranteed representation which facilitates the sharing of the responsibility of maintaining peace and good order among the heads of nations (those being the representatives of the Crown, and the Chiefs and Headmen of the respective First Nations).

During the course of my research I have often been questioned (both directly and indirectly) about the desirability of a system of differentiated representation given the New Zealand experience. Briefly,

¹⁰ Royal Commission on Electoral Reform and Party Financing, 1991, Volume 1 p. 173.

since the passage of the Maori Representation Act in 1867, the Indigenous people of *Aotearoa* (New Zealand), collectively referred to as the Maori, have had guaranteed representation in the New Zealand Parliament (the House of Representatives). Originally only meant to last five years, Maori representation has changed little since its inception in 1867. In 1867 the Maori were systematically divided into four non-territorial and non-population based electoral districts, in which only 'half- or full-blooded' Maori could vote, and in which only 'full-blooded' Maori could seek election. Today, however, there are still only four Maori designated seats and ninety-seven general seats despite the fact that they constitute approximately 12.5 per cent of *Aotearoa*'s population.¹¹ Furthermore, Maori are currently permitted to choose as to whether they would like to be registered as voters (and potentially as candidates) in either a Maori or in a general constituency. The result has been a declining voter participation in Maori constituencies, to the point that only forty per cent of Maori voters are registered on the Maori voters list.

As Gibbins points out, "it seems to be an open question whether Maori representatives and Maori people have been served well, either by this alliance or by the system of Maori seats."¹² This is because, as Fleras claims,

on the one hand, Maori seats have taken on a considerable aura over time and are widely regarded as integral to Maori status as the *tangata whenua o aotearoa* (indigenous occupants of New Zealand). On the other hand, the system of separate representation has been

¹¹ Fleras, 1991, pp. 68-70.

¹² Gibbins, 1991, p. 162.

accused of sabotaging Maori aspirations beyond the symbolic level.¹³

Many New Zealanders and Maori alike believe that the system of particularistic representation should be abolished for a variety of reasons, including the fact that it institutionalizes under-representation, causes the political sidestreaming of Maori issues, constitutes discrimination, racism, paternalism and it is undemocratic. Nevertheless, many view the system as worth keeping, although maybe in a reformed state, for a variety of reasons including the fact that the seats are often viewed as an essential part of Maori identity and *mana* (power and status), and because Maori representatives (especially those who have served as the Minister Responsible for Maori Affairs) have played a intrinsic and very influential role in both the innovative restructuring of Maori-government relations and in transforming Maori activism.¹⁴

Regardless of the problems inherent in New Zealand's system of guaranteed representation, guaranteed representation remains desirable in Canada. Just because Maori representation is viewed by many as being problematic (and in need of either abolition or reform), it does not necessarily detract from the desirability of such a system in Canada; especially if the system is constructed differently and lessons are learned from the situation in New Zealand. Even without substantial changes, the *Aotearoa* model was whole heartedly endorsed in a multitude of submissions by Native individuals, collectivities, and political

¹³ Fleras, 1991, p. 67.

¹⁴ Fleras, 1991, pp. 82-84.

organizations to the RCERPF.¹⁵ Despite this overwhelming support and enthusiasm, I believe that New Zealand is but a model to be learned from in the construction of a model guaranteeing Treaty representation in Parliament. Meanwhile, Fleras reminds us that Parliamentary representation is only desirable so long as it facilitates the reaching of the goals and aspirations held by Native people. In that he states,

The concept of separate Maori representation provides a useful departure point for designing a viable system of AEDs in Canada. ... Foremost in terms of lessons from New Zealand is the acknowledgment that [guaranteed seats] constitute but one component in the overall drive to entrench Aboriginal rights through Aboriginal self-determination along political, social, economic and cultural fronts. An equally important lesson is the necessity to have Aboriginal input in the design and implementation of a new electoral process. ... Finally, AEDs must be established in the spirit of power sharing, not as a conflict-management device with public relations overtones¹⁶

Given Fleras' statement, the New Zealand experience does not detract from the desirability of guaranteed Aboriginal representation. This is especially the case when such a system respects and reflects the aspirations and realities of Aboriginal peoples and their leaders, and when such a system does not merely constitute an attempt to enhance representation regardless of the existence of Treaties and nations. Thus, questions regarding the desirability of a system of particularistic

¹⁵ Royal Commission on Electoral Reform and Party Financing, "On Effective Representation", in What Canadians Told Us: Public Hearings and Written Submissions, Vol. 4, (Ottawa: Minister of Supply and Services Canada, 1991), pp. 46-51.

¹⁶ Fleras, 1991, p. 98.

representation based on Treaties Six and Seven have been put to rest. This does not, however, mean that the Parliamentary representation which is both premised on and consistent with the promises made in the Numbered Treaties and the recognition of Aboriginal Nationhood is entirely desirable as I have merely suggested that the desirability of such a system of representation is not impeded by the concerns raised in this section.

POSSIBLE CONSEQUENCES & FORESEEABLE PROBLEMS

As Professor Roger Gibbins justifiably suggests, "there are some very important political and strategic issues that are all tangled up in this, that ultimately may be more important than the legal basis from which the arguments start."¹⁷ That is, although this thesis contends that representation is a Treaty right under Treaties Six and Seven premised on the promise to share in the responsibility of maintaining peace and order it is as much a political issue as it is a legal, or a historical issue. As a result, the following section addresses some of the non-legal and non-historical concerns surrounding the idea of particularistic representation for Native people.

Even though I demonstrated the compatibility of guaranteed representation and Canada's democratic tradition, electoral laws, and

¹⁷ Gibbins, 1995.

the Charter, I argued in the previous chapter that representation was first and foremost a constitutionally entrenched Treaty right which according to Section 25 can not be abrogated or derogated from using the Charter. I concluded that even if particularistic representation was deemed contradictory to the Charter (or our electoral law), Sections 25 and 35 could be used to sidestep these issues or barriers either through negotiation or judicial action. Nonetheless, even though a legal argument can be made for particularistic representation based upon the historical contextualization provided in Chapter Two, it has been argued that this is not a good idea as removing Aboriginal people from the application of the Charter may have major political, social and strategic consequences.

According to Gibbins the consequences of stepping outside of the Charter are extensive because Natives would be,

... stepping outside conventional understandings of Canadian citizenship. The risk involved in that is they cut themselves off from any shared community responsibility ... and so to cut yourself off from that larger sense of citizenship is to remove the larger society from any sense of responsibility or obligation and it allows the non-Aboriginal community to simply wash its hands and say 'well this is no longer our responsibility because these people have put themselves outside our community'.¹⁸

Side stepping the application of the Charter has such an enormous potential because the Charter has, according to Alan Cairns, become the a fundamental part of Canadian citizenship and a focal point of the

¹⁸ Ibid.

national identity.¹⁹ Thus, for Gibbins, using Section 25 is synonymous with declaring that those Natives who removed themselves from the interference and influence of the Charter no longer consider themselves, nor are considered to be, Canadian citizens or members of the larger political community.

Alan Cairns has also expressed similar concerns. Although speaking on self-government, Cairns suggests that 'parallelism' or the assertion of Aboriginal nationhood, the search for greater control and independence, and the reconstruction of Aboriginal-government relations as 'nation-to-nation partnerships' will have the same consequences as using Section 25 does for Gibbins. For Cairns the result is a Canadian citizenry that views Native collectivities and individuals like 'strangers;' strangers for whom there would be a lack of concern as they would not be part of the 'constitutional community' for they would be the 'other' and Canadians the 'we.'²⁰ Unlike Gibbins, Cairns offers a solution as well as a problematization of the situation that would be created by both using Section 25 and institutionalizing a differentiated, yet parallel, system of Parliamentary representation for the people of Treaty Six and Treaty Seven. Cairns suggests that what is needed is the creation of a

¹⁹ According to Cairns, "the Charter was always more than an instrument to protect the rights of Canadians against their governments. The larger political purpose, ... was to strengthen national unity by providing constitutional support to a new definition of Canadians as a rights-bearing citizenry regardless of location. These rights, enforceable against both orders of government, were intended to strengthen the Canadian component of civic identity by being uniformly available and by limiting the capacity of federalism to generate diverse treatment of citizens as demarcated by provincial boundaries." Alan Cairns, Charter versus Federalism: The Dilemmas of Constitutional Reform, (Montreal: McGill-Queens' University Press, 1992), pp. 49-50.

²⁰ Alan Cairns, "Aboriginal Nationhood: The Search for Accommodation", lecture given at Carleton University, Ottawa, October 27, 1995.

constitutional and institutional arrangement which would "nourish Aboriginality while also nourishing positive bonds of common citizenship."²¹

One possible way in which to do this is by incorporating Natives into the political system through guaranteed representation. As Schouls states:

the matter of parliamentary participation is made particularly urgent against the background of Aboriginal peoples' more focused attempts to secure various forms of political autonomy from the Canadian state through self-government. It is undeniable that the language of self-government encourages the restoration of traditional nation-to-nation relationships and thus a considerable degree of Aboriginal self-empowerment. Yet the rhetoric of self-government neglects the possibility that Aboriginal self-empowerment might also be enriched by a deepened experience of Canadian citizenship. The challenge Canadians confront then is to provide a counter-weight to the divisionist proclivities of Aboriginal self-government initiatives. Greater Aboriginal participation within the electoral and parliamentary life of Canada could well provide the counter-weight. Through parliamentary participation, Aboriginal peoples could be encouraged to nurture their identities as both Aboriginal peoples and Canadians.²²

Whereas Schouls rejects the idea that AEDs offer a plausible means in which to incorporate Natives into Parliament because they fail to reflect the diversity of the population, he feels that the creation of a separate Parliament could nurture a common feeling of citizenship through institutionalized relations between the two bodies. If that is the

²¹ Ibid.

²² Schouls, 1991, p. 1.

case, I believe that Parliamentary representation based on the promises made in Treaties Six and Seven could alleviate Cairns concerns, if not those enunciated by Gibbins. This is because, guaranteed representation could be used as a mechanism to draw Natives back into the Canadian community and to re-establish and re-build that shared sense of community that would, according to Gibbins, inevitably be lost in sidestepping the Charter (either for matters of representation or self-government).

Another concern regarding the potential political and strategic problems that needs consideration deals with the compatibility of a Treaty right to representation with electoral and political norms and structures. In other words, the introduction of a differentiated system of representation could cause a multitude of foreseeable problems within the electoral and Parliamentary systems as they exist presently. As I have stated previously, if the Treaty right to share in the maintenance of peace and good order in the territory encompassed by Treaty Six and Treaty Seven were implemented using Parliamentary representation, it would imply a true sharing of power between those parties who signed the Treaty. As such, representation would not be based on population or territory (constituency) but rather, the representation of the respective nations who would then share in the responsibility of maintaining peace and good order.

While this raises questions about who gets to vote, and what constitutes the signatory nation (especially in the case of the Cree, as most 'bands' signed separately), these concerns should be dealt with by

the people involved, and are too massive to be dealt with in this thesis. Nevertheless, there exist foreseeable operational problems which are associated with this form of representation that must be dealt with. Given the fact that there are some "fairly legitimate questions about how well conventional forms of electoral politics work in terms of the internal political structures [and traditions] of Aboriginal communities"²³ it is questionable as to whether or not there will be a desire to use conventional forms of electoral politics. If conventional electoral politics are not utilized then a separate method of 'electing' representatives has to be found and implemented by each respective community. This may or may not result in a complexity of operational problems in the electoral system as collectivities may 'elect' representatives on their own and thus remove themselves totally from traditional electoral politics.²⁴

However, if conventional electoral politics are used a number of difficulties emerge. The creation of a differentiated system of representation would result in a number of operational problems for those who administer elections. For example, besides the foreseeable difficulties involved in creating electoral lists, "it would be impossible, pending extensive technological changes, to use Aboriginal voter lists to determine if an Aboriginal had already voted ..."²⁵ This is because the same electoral lists would have to be available at a multitude of voting

²³ Gibbins, 1995.

²⁴ This would likely require the use of Section 25, as the electoral rights guaranteed in the Charter may be jeopardized by the implementation of a separate electoral system, especially if traditional methods are utilized or the 'Indian Act electoral method' is used.

²⁵ Gibbins, 1991, p. 178.

stations to ensure that all members of a First Nation could vote regardless of their place of residence. Nevertheless, with some creativity and ingenuity (such as the use of voting cards which are exchanged at the polling station for a ballot) I believe the operational problems that would emerge in using conventional electoral politics could be dealt with. Thus, the potential difficulties associated elections should not jeopardize the creation and implementation of particularistic representation for the people of Treaties Six and Seven.

The introduction of a Treaty right to guaranteed representation could also, potentially, result in a multitude of political and strategic problems within the Parliamentary system. For instance, the Treaty refers to (Chiefs and Headmen) sharing in the responsibility for maintaining peace and good order, however can an actual sharing of power occur given the nature of our Parliamentary system of government? For this to occur Treaty representatives would have to be part of Cabinet as this is where policy and planning decisions are, for the most part, made. As well, Treaty Members of Parliament would have to, at the very least, either be represented in the governing political party or constitute such a large voting block so as to hold the balance of power and thus the ability to substantially influence decisions. This happening is very unlikely, unless levels of representation increase so as to mirror non-Aboriginal representation, and unless Native representatives actively participate in the party structure.

This issue raises the question as to whether or not Native Members of Parliament will participate in the political system in the same manner

as other parliamentarians, and thus the most predominant and pressing of the potential political and strategical consequences associated with implementing particularistic representation. Although it has often been suggested (by individuals, the RCERPF, and the Committee on Aboriginal Electoral Reform) that Members of Parliament elected through a particularistic system of representation would continue to actively participate like 'traditional' Members of Parliament (for example, they would be partisan), others have suggested that they would not.²⁶

Many of the Elders and people interviewed for this thesis reminded me that they have their own traditions, and that although they need to begin to use the Canadian system so that changes can be made in the way in which they and their land are governed, they need to do so according to their own traditions, customs and laws.²⁷ Thus, it is questionable as to whether Native representation in the House of Commons would occur in accordance with Parliamentary norms and political traditions. Rather, guaranteed representation may introduce (willingly or otherwise) new political traditions to the House of Commons, thus enabling Aboriginal people to fully represent their

²⁶ For a discussion of how Natives would exist as 'regular' MPs see: Committee for Aboriginal Electoral Reform, 1991, pp. 262-265, and pp. 287-291.

²⁷ While Dila Houle spoke of people bringing forth the views and traditions of the sovereign Blackfoot Confederacy in Parliament so that changes could be made, both Dorothy and Edward Yellowhorn spoke of the need for their leaders to fight the government using their laws and institutions. Both ideas are not conducive to the form of Parliamentary democracy currently utilized as partisanship would hinder the ability of Blackfoot representatives to express their concerns and attempt to change the government and its laws in a manner which reflects the terms and spirit of Treaty Seven, and the Blackfoot way of knowing and seeing. Houle, July 27, 1995. D. Yellowhorn, 1995. E. Yellowhorn, 1995.

constituents while respecting their traditions but in doing so, causing some major political and structural upheavals or problems.

Furthermore, in several of my interviews an interpretation of the Numbered Treaties similar to the Two Row Wampum Treaty was presented, suggesting that First Nations and the Queen's people would remain separate, each living by their own customs and laws. This view of the Treaties brings to question the whole idea of Native representation in Parliament, as the First Nations that signed the Numbered Treaties are sovereign entities within the boundaries of an 'alien' nation. This is because participation in a domestic Parliament could be viewed as an inherent contradiction to their status as sovereign entities, and because the Treaty was a promise to remain as separate sovereign entities each living by their own laws, customs and traditions.

Nonetheless, while this way of thinking forms the foundation upon which the Indian view of the Treaty is based, the Treaty is also viewed as the beginning of a relationship; a relationship between two peoples that continues to grow and develop, much like a successful marriage between two separate people.²⁸ Furthermore, because it is impossible for people to share in the maintenance of peace and good order without some 'participation' in non-Native society, the relationship entered into with

²⁸ Leroy Little Bear uses the analogy of a marriage to explain the western Treaties. He states that for Indians, the "Treaty is just the beginning of a relationship" much like a "marriage is just the beginning of a relationship. And that's what a marriage is all about, a wedding is just the beginning of a relationship, and you have to work on it, you have to nurture it, you have to be affirming and reaffirming the relationship all the time." Little Bear, 1995.

the signing of the Treaty has to continue to develop and flow along the path of the river for 'as long as the sun shines and the rivers flow'.

The idea of Parliamentary participation need not be tossed aside, rather it should be looked upon as the development and nurturing of a promise made in the Treaties to maintain peace and order both on and off reserve, and as a mechanism through which a relationship between equal partners can be developed and sustained. Furthermore, it need not mean interference, nor assimilation into the other cultures' traditional practices of governance. According to James (Sakej) Youngblood Henderson, this could be accomplished through the sending of delegates from each nation represented in the Treaty. He states that,

those delegates should be received under the Treaties and under the Constitution as the equivalent of any other person who is elected by 'strangers' in riding systems. But they shouldn't be belonging to a party because they have a Constitutional right. And they should be in the Senate, if the Senate survives. And the Senate should not survive unless it is made up just of Aboriginals who have a veto.²⁹

These delegates from the respective nations could speak from their traditions and from the perspectives of their people, adding to and creating a new form of dialogue in the House of Commons.³⁰ By

²⁹ Henderson, July 19, 1995.

³⁰ "Because indigenous peoples retain a highly localized sense of identity and are often concerned with matters that do not readily correspond with the larger political agenda of the nation-state" it is questionable as to whether these delegates would wish to assert their jurisdiction in matters which do not explicitly pertain to their traditional territories. Nevertheless, I do not believe that these delegates should be restricted in their involvement within the Parliamentary system. Rather, I think that they should have the unfettered ability to act on behalf of their people on all matters that could potentially affect their territories or the people living within their territories. On the other hand,

introducing a new form of dialogue, Henderson claims that much like we saw in the Charlottetown Accord, Aboriginal people will continue to obtain increased amounts of power and influence because, "they can handle the dialogue and they are rational people and they cut deals not out of their own self-interest, but what they see as best for all the land and all the country."³¹ Furthermore, it is argued that a delegate system should be used because party affiliation results in the representation of the party and not the people (thus nullifying the benefits and purpose of having Aboriginal representation), and that delegates should always bring forward (like a spokesperson) the views of the nation (thus, combining Parliamentary traditions and Native traditions whereby a delegate is merely a spokesperson of the people not a decision maker). Moreover, a system of 'delegate democracy' is reflective of the status of First Nations as sovereign entities, as it is not merely an incorporation of individuals into the Parliamentary structure, but the development of a relationship between the delegates of nations and the representatives of Canadians.

former President of the Indigenous Bar Association Don Worme alludes to a more limited role when he states: "These treaties establish the rules of the sharing of our territories and our respective jurisdictions. Make no mistake that our treaty jurisdiction includes the right to maintain 'peace and good order' among ourselves and everyone else in the shared territory. ... That is the meaning of the peace and good order clause of the treaties signed with the Crown. I interpret this clause to signify not only our continuing role in peace and justice, but also to mean that we should have treaty delegates in provincial and federal governments to protect our constitutional rights and to make sure that those statutes do not conflict with our Aboriginal and treaty rights. This is preventative justice." Noel Dyck, "Aboriginal Peoples and Nation-States: An Introduction to the Analytical Issues", in Noel Dyck ed., Indigenous Peoples and the Nation-State: Fourth World Politics in Canada, Australia and Norway, (St. John's: Institute of Social and Economic Research, Memorial University of Newfoundland, 1989), p. 7. Don Worme, "First Nations Perspective", in Richard Gosse, James Youngblood Henderson & Roger Carter eds., Continuing Poundmaker and Riel's Quest: Presentations Made at a Conference on Aboriginal Peoples and Justice, (Saskatoon: Purich Publishing, 1994), p. 78.

³¹ Ibid.

Stepping outside of Parliamentary traditions results in several foreseeable strategical and political problems for Aboriginal people and their representatives (albeit an MP who brings along 'cultural baggage', or a delegate who must act on behalf of the community in question). Any deviation from Parliamentary norms will likely cause problems for both the system (structural and organizational) and the representative (lack of power, lack of a homogeneous community to represent); problems which can not even begin to be resolved or conceptualized in this thesis. While offering no solution, Roger Gibbins contextualized the situation rather nicely when he stated that:

you can have Aboriginal representatives outside the party system ... in theory, any Member of Parliament can act on that basis as a delegate. Nothing prevents people from acting non-partisan. ... But when the whole system of government is based on partisanship and where cabinet representation is more important than anything else, how do you plug people in? And how do you have representatives in Cabinet who are not part of that party system? What do you do about conventions of Cabinet government in terms of collective solidarity, its consensus, and so on. ... [Thus] if you're outside that system you're really outside, outside any power, outside the ability to orchestrate, publicize or raise public awareness.³²

Whereas it can be justifiably stated that a lack of incorporation or deviation from Parliamentary norms and procedures will cause political and strategical problems within the political system, it can also be stated that incorporation into the political system could result in political and strategical problems within Native communities. Finding a balance could be difficult if particularistic representation were to be

³² Gibbins, 1995.

implemented. Yet, achieving a balance, or reforming the system to allow for a 'real' sharing of responsibility in maintaining peace and good order is not, in my opinion, impossible (albeit impossible in this thesis).³³

CONCLUSION

Previous chapters have established that the Treaty right to share in the responsibility to maintain peace and good order throughout the shared or 'ceded' territory may be construed and implemented as a right to guaranteed representation and that such a right is compatible with Canadian electoral traditions, law and the Charter of Rights and Freedoms. This chapter has demonstrated that the implementation of such a right is not as easy nor as straight forward as was the creation of a legal or a historical argument. Nevertheless, while many issues regarding the desirability and foreseeable effects of implementing a particularistic system of representation, this chapter has articulated and responded to, what I believe are, the most pressing concerns.

This chapter has illustrated that such a system of representation could be part of the effort to redefine Aboriginal-government relations and re-establish or re-assert sovereignty or Aboriginal Nationhood domestically, that particularistic representation is compatible with, but

³³ If the experiences of past and present Native MPs are any indication, reaching that balance may not be so difficult. As Wilton Littlechild continuously spoke of his positive experiences as a Progressive Conservative Member of Parliament, and the influential and beneficial role that he played as a 'Tory' backbencher (invited to meet with Cabinet) during the 'Oka Crisis.' Littlechild, 1995.

not an alternative to, self-government, and that it is a desirable mechanism to increase Aboriginal Parliamentary representation regardless of the problems inherent in New Zealand's system of guaranteed Maori representation. Furthermore, the differentiated representation of Natives remains desirable despite the foreseeable operational and structural problems in the electoral and political systems, which may or may not be easily reconciled in a manner agreeable to all (without major institutional reform or restructuring). Thus, this chapter has demonstrated that despite a complexity of political and strategic concerns, a Treaty right to share in the responsibility of maintaining peace and good order could be implemented using guaranteed Parliamentary representation, but with far reaching consequences.

CONCLUSION

The hypothesis raised at the outset of this thesis stated that guaranteed representation is a Treaty right for those Indigenous people whose ancestors signed the Numbered Treaties in western Canada. Although I have not proven the sustainability of this contention in absolute terms, I have established that a Treaty right to share in the responsibility of maintaining peace and good order throughout the 'ceded' territories exists, and that such a right could be implemented using guaranteed Parliamentary representation. Furthermore, while this responsibility could be construed as a Treaty right to self-government, it could also be conceived of as a Treaty right to guaranteed representation, among other possibilities. While the actual right contained in Treaties Six and Seven pertains to the Chiefs, Minor Chiefs, and Headmen's responsibility to maintain peace and good order, this right could currently be interpreted to mean a Treaty right to differentiated representation.

Despite the fact that a Treaty right to guaranteed representation was not established as an absolute, this thesis demonstrated that such a electoral apportionment scheme is compatible and even consistent with Canada's democratic traditions and ethos, electoral law, and the

Canadian Charter of Rights and Freedoms. Add to this the fact that a Treaty right to share in the responsibility of maintaining peace and good order is a constitutionally entrenched right, and it becomes evident that despite claims advanced to the contrary, guaranteed Parliamentary representation is a viable possibility. Moreover, not only could Treaty rights influence or determine Parliamentary representation, but even without the existence of such a right, there is plenty of room to maneuver around the terms of representation set by Parliament and to establish a system of particularistic representation for Aboriginal peoples which is not based on territory or proportional representation.

This thesis has demonstrated that although a variety of political and strategical problems exist, these problems could potentially be rectified (although it is beyond the scope of this thesis) by tailoring the existing system to reflect the intent and the spirit of the Treaties, and the existence of Aboriginal Nationhood and sovereignty. Moreover, it was demonstrated that despite foreseeable political consequences, and concerns regarding the compatibility of particularistic representation, sovereignty and self-government, implementing the Treaty right to share in the responsibility of maintaining peace and order utilizing a system of particularistic representation is not undesirable, so long as such a system goes beyond that which exists in New Zealand and that which has been advanced previously in Canada (Aboriginal Electoral Districts).

By establishing that a right to guaranteed representation could possibly exist and that the implementation of such a right is not unconstitutional I have realized my own objectives in doing this

research. From the outset of this project I wanted to prove that guaranteed Parliamentary representation for Aboriginal peoples is compatible with the Canadian political system and that such a system of representation is not unconstitutional despite the fact that many academics have suggested otherwise. Thus, I chose to investigate Parliamentary representation as a Treaty right in order to demonstrate that the inconsistencies which exist in the literature on Parliamentary reform and Aboriginal peoples could have been eliminated if the authors would have examined representation as a right and not merely as a means of rectifying past injustices and incorporating Aboriginal peoples into the governing structures of the dominant society. I also wanted to bring new light to the stagnant manner in which academics and government officials have interpreted and analyzed Treaties and Treaty rights, and to expand upon the non-existent research surrounding the meaning of the peace and good order clause of the Numbered Treaties.

Regardless of the fact that I have realized my own objectives, there exist issues that this thesis must still address, if only in brief. For instance, although I have suggested that the construction of such a system of representation is possible, this thesis has yet to consider whether such a system of representation is the best possible mechanism through which the peoples of Treaty Number Six and Treaty Number Seven can exercise their right to share in the responsibility of maintaining peace and good order throughout their respective traditional territories. Furthermore, this thesis has not addressed substantially the equally important issue as to whether such a system of representation should be implemented.

It is interesting to note that all of the Indigenous people interviewed for this thesis responded favourably when asked what they thought about guaranteed Parliamentary representation, and that most asserted that such a system of representation would be desirable. However, while this may provide answers to the remaining questions, the fact that the interview pool was quite limited suggests further examination of this issue is required.

It may be suggested that the implementation of a system of guaranteed representation could result in an increased rate of Aboriginal voter participation. This is because people may be more likely to participate in electoral politics if there is an Aboriginal candidate for whom to vote. Thus, the implementation of particularistic representation could remedy the extremely low rate of Aboriginal voter participation (as was discussed in the introduction to this thesis). This in turn would lend legitimacy to Parliament, as Aboriginal participation would increase (at all levels) and the First Nations would be able to share in the governing of their traditional territories.

The fact that people would be participating within the Canadian political system as Natives, and as members of their respective nation (both in terms of voting and representing) is very significant. This is not only because such participation would lend legitimacy to the Parliamentary system, or because such a system of representation would be premised on a recognition of Aboriginal Nationhood and Treaty rights, but because it does not necessarily lead to the assimilation of Aboriginal

people and their traditions in Parliament nor does it entail their domination and oppression.

Rather, such a system of representation is consistent with (and possibly a recognition of) the idea of Indians surviving as *Indians*. What is meant by this, according to sociologist Menno Boldt, is that the survival of Indians as anything other than a legal group is dependent on their survival and well-being as *Indians* in a cultural context.¹ Boldt suggests that without a revitalization of traditional philosophies and principles (read: a modernization), Indians will cease to exist culturally and will merely exist as a legal group (as defined by the Indian Act). The idea that Native people must retain and revitalize their traditions while interacting in Canadian politics, economics and society is widely accepted and asserted throughout 'Indian Country.' In other words, Native people must be allowed to retain and maintain their 'Indianness' or 'Aboriginality' while interacting with and participating in the dominant society (politically, economically, educationally and socially).

Although a model for guaranteed Parliamentary representation was explicitly constructed in this thesis, the idea of surviving as *Indians* is an inherent part of the system of differentiated representation discussed to in this thesis. As was suggested, any implementation of the Treaty right to share in the responsibility for the maintenance of peace and good order by way of a Treaty right to guaranteed representation must be premised on the recognition of nations and it must embrace the spirit

¹ Boldt, 1993, pp. xiii-xx.

and intent of the Treaty promise. Moreover, such a system of representation must respect and accentuate the cultural differences and traditions of both the dominant society and the First Nations through a restructuring of electoral politics and Parliamentary norms (as was suggested in Chapter Three).

While it might be argued that such a system of representation respects 'Aboriginality' and the existence of Nationhood, however, it still entails the incorporation or assimilation of Aboriginal peoples into the dominant society and the institutions of the colonizer. Despite the fact that such a system would substantially alter Aboriginal participation in Canada's electoral and political system, this may not be the best mechanism through which to implement the Treaty right to share in the responsibility to maintain peace and order.

Guaranteed representation may not be the best mechanism through which to facilitate the sharing of the responsibility to maintain peace and order for a variety of reasons (including, but not limited to the following). The fact that "Canadian Indians in the aggregate constitute a subordinated minority whose political demands and aspirations far exceed the formal political power at their disposal"² leads one to question whether the representatives of the respective First Nations will be able to share in the responsibility outlined in the mutual clause of the Numbered Treaties. Despite my insistence that representation would not be dependent on population, the fact remains that it is unlikely that

² C. Radha Jhappan, "Indian Symbolic Politics: The Double Edged Sword of Publicity", in Canadian Ethnic Studies, (Volume XXII, No. 3, 1990), p. 19.

Aboriginal representation will ever reach the level necessary to exercise a true sharing of said responsibility between the signatory nations. This unequal representation ratio would not only make a real sharing of power unreachable, but it may also have a substantial impact on the ability of Indigenous representatives to hold true to their own traditions. This in turn could result in the assimilation and subordination of Treaty representatives into the Canadian political process and Parliamentary traditions.

Notwithstanding the possible oppression and domination of individual Aboriginal representatives within the House of Commons, it could be argued that such a system of representation does not go far enough to alleviate the political domination and oppression of Aboriginal individuals and their respective collectivities. That is, such a system represents an incorporation of First Nations into a colonial institution, rather than the development of a new institution or a new relationship between the respective nations. Whereas the model alluded to in this thesis is premised on respecting nationhood and traditions, any implementation of particularistic representation represents a combining or incorporation of traditions and a nation-to-nation relationship into an existing structure of government which may or may not be conducive to such extreme changes.

Furthermore, while such a system of representation goes a long way in realizing the aspirations of Native peoples and in recognizing the existence of Treaty rights, guaranteed Parliamentary representation may not go far enough in the direction of decolonization, or in establishing a

relationship based on Treaties and Aboriginal Nationhood. Although representation would differ from that which exists presently, as would Parliament as a whole, Parliamentary representation would still entail participation within a structure of colonizer and not a structure of their own making or for that matter of their liking. It is the same structure that has exercised control over 'Indians and lands reserved for Indians' for more than 125 years, the same structure that has had as its goals the 'protection,' 'civilization' and 'assimilation' of Aboriginal peoples, and the same structure which practiced cultural genocide as it seemed fit.

This coupled with the fact that throughout the colonized world it remains questionable as to whether you can deconstruct the house of the master using the masters' tool (or fight the master with the masters' tools) problematizes the utilization of guaranteed representation as a means through which to implement the right enunciated in the mutual clause of the so called Numbered Treaties. While one can not simply toss the idea of guaranteed Parliamentary representation aside, as it does have potential, one can not simply accept it either. Other mechanisms, such as the creation of a separate Parliament or the re-creation of the Senate as an Aboriginal body, have to be found or constructed and then effectively implemented. Only after such a thorough examination of options has been completed and after the respective communities have been consulted, will the best mechanism be determined.

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