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The work presented in this thesis is, to the best of my knowledge and belief, original and my own work, except as acknowledged in the text. The material has not been submitted, either in whole or in part, for a degree at this or any other university.

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Abstract

In this dissertation I examine whether the First Ministers’ Conferences (FMCs) and political accords negotiated at these meetings from 1983-1987 assisted in transforming Canadian constitutionalism. During the period 1983-1987 four FMCs were held to consider Aboriginal peoples’ place in a new Constitutional order. These meetings renegotiated the relationship between indigenous and non-indigenous peoples in Canada by reconsidering some of the assumptions permeating Canadian constitutionalism. The FMCs involved direct dialogues between heads of federal government, provincial governments and the four main Aboriginal organisations. Political accords were used in these FMCs to direct the dialogues and to identify when mutually acceptable constitutional associations had been achieved.

Tully’s reconceptualisation of constitutionalism will be used to evaluate the extent to which Canadian constitutionalism was transformed. He argues that constitutionalism is an activity or process of ongoing dialogues between diverse cultures. He further suggests that three conventions operate to enable these intercultural dialogues to recognise and accommodate cultural diversity. These conventions are mutual recognition, consent and cultural continuity.

In order to identify whether constitutionalism was transformed, I consider whether the relationship between indigenous and non-indigenous peoples was altered to further recognise and accommodate cultural diversity. This will be demonstrated by examining whether Tully’s three conventions were adopted and advanced during the FMCs between 1983-1987. I conclude that the FMCs and the negotiation around political accords adopted and promoted Tully’s three conventions thereby further recognising and accommodating indigenous Canadians and thus transforming Canadian constitutionalism.
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Thank you!
Chapter One: Introduction

In the annual Lingiari lecture Malcolm Fraser (2000) urged that Australia has much to learn from Canadian processes in renewing the relationship between non-indigenous and indigenous peoples. He said that ‘in the last 20 years of the last century, Canada leapt ahead and has adopted policies and approaches which some people still don’t even want to think about in Australia’ (Fraser 2000). Australian academics have called for Canadian experiences to be considered in renegotiating the relationship between indigenous and non-indigenous peoples (Brown 2000: 13; Pritchard 1999:23). Aboriginal spokespersons have called for processes like those used in Canada, for example, accords or framework agreements (Dodson 2000a: 2; Dodson 2000b: 272; Yu 2000:13). Foremost among Canadian advances has been a commitment to a new constitutionalism. This dissertation analyses these developments.

In particular this dissertation examines the role of First Ministers’ Conferences (FMCs) and political accords in Canadian constitutionalism between 1983-1987. FMCs are forums where first ministers, that is, the prime minister and premiers, address constitutional concerns and negotiate acceptable forms of constitutional association. However, prior to the 1983 FMC, Aboriginal representatives were never included in these meetings. A series of FMCs took place between 1983-1987 and discussed the constitutional status of indigenous peoples. Indigenous leaders were invited as participants and negotiated a series of political accords. Not only were Aboriginal peoples invited to participate in the 1983-1987 FMCs, but accords were used to shape
essential dialogues on indigenous rights. The governments recognised indigenous peoples as political communities with whom to consult and negotiate a new constitutional order.

1.1 Central Research Questions

This dissertation addresses four main research questions: first, in the period 1983 to 1987 how were the FMCs initiated?; second, how can constitutionalism be transformed?; third, was Canadian constitutionalism transformed during this period? and fourth, did the FMCs and negotiation surrounding the political accords assist this transformation?

There are two important concepts informing this thesis, namely constitutionalism and political accords. Constitutionalism refers not to a single formal document, but to an ongoing and dynamic ‘series of contracts and agreements’ that are the result of ‘inter-cultural dialogues’ (Tully 1997b: 26). Tully (1997b:30) proposes that if a modern constitution is to recognise and accommodate cultural diversity three conventions\(^1\) must operate for mutually acceptable ‘forms of association’ to exist. These are mutual recognition, consent and cultural continuity. These three conventions allow for the recognition and accommodation of culturally diverse participants in Canadian constitutionalism. Tully (1997b:183) argues that ‘constitutions are not fixed and unchangeable agreements reached at some foundational moment, but chains of continual intercultural negotiations and agreements in accord with, and violation of the conventions of mutual recognition, continuity and consent’. For instance, reforming Australian

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\(^1\) Tully uses the term ‘convention’ to challenge assumptions that constrain constitutionalism as an activity between culturally diverse participants (1997b:181-182). Tully uses it to contest its limited meaning in law to ensure that constitutionalism is a continuous and inclusive process. In this dissertation I will not use the term ‘constitutional convention’ as it is understood in constitutional law, but as Tully employs it.
constitutionalism would not be limited to amending Constitutional sections and preambles, or drafting a 'bill of rights', but would include a fundamental renegotiation of relations between indigenous and non-indigenous peoples. Canada offers a range of experience in such constitutional reform. In working towards a renewed relationship between indigenous and non-indigenous peoples Canada initiated a series of dialogues in 1979, climaxing with the FMCs in the period 1983-1987. The FMCs and the use of political accords were central to this process.

Political accords are formal or informal agreements that set out shared objectives. They are negotiated agreements that can include a broad range of participants or signatories and can be formally entrenched in a Constitution or left as legally non-enforceable agreements. Political accords have been less common in Australia than in Canada. This thesis will examine a particular set of political accords in Canada. However, the principles may be of interest in Australia.

1.2 Methodology

The central research questions will be examined through an exploration of accords negotiated and used in the four FMCs on Aboriginal Constitutional Matters held in Canada between 1983 and 1987. The first FMC of 1983 was initiated pursuant to section 37 of the Constitution Act, 1982. Canada had been struggling to gain control of its own Constitution independent of British rule since the nineteenth century. The Constitution Act, 1982 was the first time Canada succeeded in securing an independent Constitution. Section 37 of the Constitution Act, 1982 was itself part of an Accord reached between
indigenous leaders, the federal government, and the all-party parliamentary committee on
the Constitution. This Accord was first made on January 30, 1981, and was a condition
for indigenous peoples’ agreement to a package of constitutional reforms which became
the Constitution Act, 1982. When provincial premiers forced abandonment of indigenous
clauses in November 1981, an indigenous political campaign and a national furore forced
their restoration. As a requirement of the Constitution Act, 1982, an FMC was scheduled
for March 1983 with all federal, provincial and Aboriginal leaders present. This included
the prime minister, the premiers of each province, the two territory leaders and
representatives from the four main Aboriginal organisations (Assembly of First Nations,
Native Council of Canada, Inuit Committee on National Issues and Metis National
Council). This first FMC reached agreement on an Accord, the 1983 Constitutional
Accord on Aboriginal Rights. As the title suggests, it was constitutionally entrenched and
committed all parties to three more FMCs to address Aboriginal Constitutional concerns.

Four accords were debated at these FMCs – the 1983 Constitutional Accord on
Aboriginal Rights, the 1984 Constitutional Accord on Aboriginal rights of the Aboriginal
Peoples of Canada, the 1985 Accord Relating to the Aboriginal Peoples of Canada and
the 1987 Proposed Constitutional Accord. Debate on these accords did not always lead to
agreement or the signing of an accord. The 1984, 1985 and 1987 Accords, all recognised
the right of Aboriginal peoples to self-government, but failed to gain the necessary
support to be constitutionally entrenched and so all were left as unsigned proposals.
This dissertation first examines transcripts of the FMCs held from 1983-1987 to identify the form and nature of the political debate. Second, it interviews key players and commentators (Jull 2000b; Russell 2000b). Third, it scrutinises secondary literature interrogating the FMCs and accords. This thesis interprets constitutionalism as a relationship resulting from 'intercultural dialogues', which is founded in James Tully's reconceptualisation of constitutionalism in *Strange Multiplicity: Constitutionalism in an Age of Diversity* (1997). This book, together with other material recognises the importance of cultural diversity in relation to constitutionalism. Other important commentators are indigenous academics and/or activists such as Mick and Pat Dodson (1995;2000a;2000b), and Peter Yu (1999). Non-indigenous writers include Peter Jull (1980;1991a;1991b), Paul Patton (1995;1996), Sarah Pritchard (1999), Peter Russell (1995;1997) and John Ralston Saul (1997;2000). The use of political accords in promoting constitutional reform has only been considered by a few academics (Jull 1998a; 1999a; Morse 1989; Russell 1993; 2000a; Turpel 1993).

This thesis aims to thoroughly explore the role that FMCs and political accords played in transforming Canadian constitutionalism in the period 1983-1987. The resources indicated above enable the identification of the main events and sources of debate. I then go on to evaluate and ascertain whether Canadian constitutionalism was transformed. Tully (1997b:30) proposes three conventions as necessary for recognising cultural diversity. That is, mutual recognition, consent and cultural continuity. The FMCs and political accords negotiated in 1983-1987 will be evaluated against Tully's three conventions.
1.3 Central Argument of the Dissertation

The central argument of this thesis is that Canadian constitutionalism was transformed in the period 1983-1987, a process that was assisted by the FMCs and negotiation around the political accords.

It has been claimed that the FMCs and the political accords negotiated at these meetings failed to realise any achievements (Turpel 1992:118). However, this failure is argued to have resulted because the last three FMCs did not secure any constitutional amendments. The FMCs are not only useful for building consensus and securing constitutional amendments, but they provide a means of negotiating important issues to achieve cooperation and co-existence between indigenous and non-indigenous peoples. This research provides insights as to whether the FMCs and political accords facilitated the transformation of Canadian constitutionalism by considering in detail historical instances in which they were implemented to further recognise and accommodate cultural diversity.

1.4 Chapter Outline

Chapter Two examines important theoretical issues. First, I define constitutionalism and identify the relationship between indigenous and non-indigenous peoples within this framework. Second, I examine the concept of power operating within this relationship. Third, I consider the historical events that have led to an imbalance of power between indigenous and non-indigenous peoples. Finally, I investigate how Canadian constitutionalism can be transformed through renegotiating this relationship between
indigenous and non-indigenous peoples by considering two forms of constitutionalism – Burkean constitutionalism and Tully’s reconceptualisation of constitutionalism.

Chapter Three examines in detail the negotiation and use of political accords in the four FMCs held during the period 1983 to 1987. It traces the establishment of the FMCs, the main debates at each FMC and the specific negotiations that occurred in relation to the political accords.

Chapter Four demonstrates that the FMCs and political accords of the period 1983-1987 assisted in the transformation of Canadian constitutionalism. Tully’s three conventions of constitutionalism – mutual recognition, consent and cultural continuity – are utilised in this demonstration.

Chapter Five is a conclusion and summarises the main arguments.
Chapter Two: Theoretical Context of Transformations in Canadian Constitutionalism

1983-1987

The difficult task of redressing persistent inequalities between indigenous and non-indigenous peoples has been undertaken in Canada largely by interrogating indigenous politics as a form of intercultural politics. Conceptualising indigenous politics wholly in terms of the formal policies initiated and conducted by the federal government fails to recognise the complexity of indigenous-white relations. That is, it fails to examine indigenous politics as an intercultural activity. Policies of assimilation, integration, segregation and paternalistic guardianship are essential to understanding the general approaches of dominant white society to indigenous people, but a focus on these may obscure the underlying plethora of influences that construct indigenous-white relations.² There is a tendency to assume that indigenous peoples' more vocal and visible participation in Canadian political forums in the 1960s represented a 'coming out' of indigenous politics. However, since the colonisation of Canada through resource extraction, trade and white settlement, indigenous and white peoples have shared a multi-layered existence. Indigenous-white relations are the result of a wealth of intercultural experience and dialogues. What requires further exploration is how this relationship is structured and with what power relations in play. It is this relationship that has left modern Canada with a legacy of injustices against indigenous peoples (Tully 1997a:2-4). Studying aspects of constitutionalism in Canada enables a critical analysis of this relationship.

This chapter has four parts. In the first part I examine the theoretical framework of constitutionalism and identify the relationship between indigenous and non-indigenous peoples within this framework. In the second part of the chapter I consider the concept of power operating within this relationship and how it is an imbalance of power. In the third part the historical events that have led to this imbalance of power will be analysed. Finally, the fourth part of this chapter considers Burkean constitutionalism and Tully’s reconceptualisation of constitutionalism. Burkean constitutionalism was the form of constitutionalism adopted by the founders of Canada at Confederation that enabled the negotiation of a mutually acceptable form of constitutional association. Both Burkean and Tully’s constitutionalism will be examined to demonstrate that Canadian constitutionalism can be transformed through renegotiating the relationship between indigenous and non-indigenous people. However, Tully’s reconceptualisation of constitutionalism as a multitude of intercultural relationships exposes strategies for contesting the assumptions of modern constitutionalism operating in Burkean constitutionalism that inhibit the recognition of cultural diversity. Therefore, Tully’s reconceptualisation is a more appropriate approach to use when considering whether Canadian constitutionalism has been transformed.

2.1 Constitutionalism and Rights

Tully (1997b:30) has proposed a reconceptualisation of constitutions and constitutionalism:

A constitution should be seen as a form of activity, an intercultural dialogue in which the culturally diverse sovereign citizens of contemporary societies negotiate
agreements on their forms of association over time in accordance with the three conventions of mutual recognition, consent and cultural continuity.

The first of these three conventions, mutual recognition, involves appreciating that one culture should not be dominant, that not all cultures can be recognised 'in the same constitutional form' and finally, that cultural differences and similarities exist both between and within cultural groups (Tully 1997b:7-14). Tully (1997b:123) argues that the second convention of consent is dependent on the degree of mutual recognition. If a dominant cultural group fails to acknowledge or recognise different cultures the dominant culture continues to impose its will without seeking the consent of others. However, if there is mutual recognition between different groups they will each want the consent of the other in matters that directly affect their interests. The final convention of cultural continuity, Tully argues (1997b:124-125), occurs where 'the mutually recognised cultural identities of the parties continue through the constitutional negotiations and associations agreed to unless they explicitly consent to amend them'.

Tully's conceptualisation of constitutions and constitutionalism as an activity or process of dialogues and agreements transforms its potential. Perceiving constitutionalism as an activity helps re-orient discussions that perceive constitutional change as merely amending documents and views it as an ongoing process. Tully (1997b:7) argues that this process of constitutionalism allows members of diverse cultures to impact upon the terms by which they relate in an ongoing manner. Conceptualising constitutionalism as an activity makes it possible to begin to renegotiate between and within diverse cultural groups. In so doing, it can redress severe inequalities and injustices experienced by
indigenous peoples by initiating processes that recognise and accommodate cultural diversity (Tully 1997b:99).

Within Tully's constitutionalism and these attempts to recognise and accommodate cultural diversity, the concept of rights is not a 'natural' or inherent feature as classical liberal theorists, such as Locke, maintained. Locke (1995:396) argues that in the state of nature all persons have inherent rights to preserve their 'life, health, liberty or possessions'. For in this state of nature all persons have property in themselves and it is each individual's right to act to meet the needs and ensure the safety of their property (Locke 1995:397). However, Locke (1995:403) argues that to ensure self-preservation individuals consent to submit themselves to government. It is under government that individuals' inherent right to preserve their property 'stands as an eternal rule to all men' and all laws made by government must conform to these inalienable rights (Locke 1995:404). However, other theorists have argued that rights are not inherent, but socially constructed (Patton 1995:118; Tully 1997b:173). Rights are not absolute entities that can or should stand alone, but can only be understood in relation to others in intercultural experiences (Tully 1997b:173). Tully asserts that if rights are understood as abstract and universal this 'shackles the ability to understand and causes us to dismiss as irrelevant the concrete cases which alone can help to understand how the conciliation is actually achieved' (1997b:173). Of primary concern then is how individual and group rights operate together so that cultural diversity can be recognised and accommodated.
2.2 Relationship of Power

Utilising a Foucauldian conception of power, Nicholas Rose (1999:94) has reconceived the way power is exercised by arguing that a complex web of power relations form the basis of interpersonal relations. Hindess (1996:100) argues that a Foucauldian conception of power operates on those individuals in a position to exercise choice and power functions to influence those decisions. He observes that ‘on this view, power – and the resistance and evasion that it provokes – must be regarded as a ubiquitous feature of human interaction’ (Hindess 1996:100). That is, power is prevalent in all human relations, operating to influence, constrain or alter individual actions and thoughts.

This dynamic understanding of power underpins Tully’s re-evaluation of constitutionalism. Constitutionalism is a manifestation of these power relations. Tully (1997b:183) observes that the ‘diversity of criss-crossing and contested narratives’ permit citizens to participate in challenging the existing forms of association or the exercise of power operating to constrain the recognition or accommodation of distinct cultural identities. Therefore, constitutionalism moves beyond being an object singularly held or embodied in one source (Tully 1997b:26). Instead it reflects the activity of ‘intercultural dialogues’ and of relationships (or power relations) permanently changing through contestation and renegotiation.

The concept of power not only exposes the heterogeneous nature of constitutionalism but also highlights the fact that the activity of constitutionalism is not between two homogeneous groups. As Tully (1997b:9) says, modern constitutionalism has been
interpreted in conjunction with the unified concept of the nation-state. He further asserts that ‘cultural diversity is … not a panopticon of fixed, independent and incommensurable world views in which we are either prisoners or cosmopolitan spectators in the central tower’ (Tully 1997b:11). Within each group there is not ‘a bounded, coherent identity which can be expressed as the one voice’ (Yeatman 1992:3). Rather, within each there are a complex array of interests and voices struggling for recognition and perpetually renegotiating the power relations functioning among them. Yeatman (1992:2) argues that liberal understandings of group identity construct groups as if they were individuals asserting that ‘just as with the liberal’s “natural” individual, the group is accorded a clearly bounded integrity and the coherence of a monorational willing agency’. The challenge is then to ensure that these internal differences and similarities are negotiated both between and within cultures to promote recognition of cultural diversity.

This reconceptualisation of power informs the core of indigenous politics and the essence of constitutionalism because there are a multiplicity of power relationships operating between indigenous and non-indigenous groups. However, indigenous politics in Canada functions on a basis of an imbalance of power. This imbalance exists because of the lack of recognition and accommodation of indigenous Canadians as diverse cultural identities. From first white settlement two classical liberal theoretical arguments justified the limited adoption of the three conventions – mutual recognition, consent and continuity – in recognising indigenous Canadians’ cultural differences (Tully1997b: 72). First, utilising the liberal concept of linear progress, Aboriginal peoples were perceived by the colonisers as primitive humans still living in a state of nature. The second argument
derived from the first, is that they are at the first stage of economic development (Tully 1997b:72). It was therefore believed not possible for indigenous peoples to hold property in the land on which they hunt and gather (Tennant 1990:30). These claims justified the displacement of Aboriginal peoples and the imposition of new forms of governance upon them without their consent. While these justifications inhibited the recognition and accommodation of indigenous cultures at settlement they have had long term implications for structuring the relationships between indigenous and non-indigenous peoples. They have led to an ongoing reluctance to recognise indigenous peoples’ rights to express their identities and determine their own futures. This lack of control or choice in Aboriginal peoples’ lives manifests itself in disproportionate rates of youth suicide, unemployment, higher risks of infant mortality and lower life expectancies. It is the imbalance in power that political accords and other attempts at negotiation seek to redress. In an opening address to the first FMC in 1983 Chief David Ahenakew (FMC transcript 1983: 13) said:

Imagine what it is like to watch your brothers and sisters lured away to the cities to face unemployment, to face welfare, alcoholism and dependency, to lose their dignity and their pride and imagine what it is like to know that you, your brothers and sisters and your children, face the highest infant mortality rates in Canada, shortest life expectancy, highest incarceration rates, highest rates of violent death, highest suicide rates, the highest rate of death in fires and somebody else’s governments are in charge. Yet, we are here. Why? Notwithstanding the pressures, something about us, our identity, our sense of who we are, our sense of our place in this nation has survived and it won’t go away, we won’t go away. Regardless of what you may decide, whether you recognize us or not, whether you establish a relationship with us or not, we won’t go away and the core of our existence in this nation won’t go away, it will continue to grow.

It is these inequalities between indigenous and white people that need to be overcome by renegotiating intercultural relationships and ensuring that it is a mutually acceptable ‘form of association’ (Tully 1997b:7).

While there are inequalities between indigenous and white people, individuals and groups are able to challenge their position because they are both constrained and enabled through
power relations. They are able to contest existing structures because they are both subjects and agents (Rose 1999:95). This is an important conceptual framework to establish because it acknowledges that there is potential for change. It recognises that there is opportunity for individuals to act against regulating forces. Rose (1999:95) argues that individuals are not powerless against the systems operating to govern their conduct. He emphasises that ‘our history has produced a creature with the capacity to act upon its limits’ (Rose 1999:95). This suggests individuals’ capacity to contest power relations (including constitutionalism) and renegotiate to gain stronger or more equitable positions of power. Indigenous peoples are therefore able to actively contest the inequalities they are subject to and to work to transform constitutionalism so that it includes them as distinctive peoples.

This process of transforming constitutionalism is also about understanding how modern indigenous identities are themselves dynamic and changing. Contemporary Aboriginal peoples construct their own identities as contemporary peoples. For whites to negotiate with indigenous peoples and amend imbalances of power it is important that Aboriginal identities not be precluded from moving outside ‘traditional’ activities and ways of life. White people cannot regulate how indigenous peoples understand themselves by imposing limits on what activities are perceived as legitimate indigenous practices. While whites acknowledge that indigenous peoples should be permitted to hunt and gather, they often insist that if indigenous peoples use modern tools this is no longer ‘traditional’ culture. Tennant (1990:15) argues these limitations imposed on indigenous identities result in the denial not of Aboriginal rights having existed, but the ability of modern
indigenous peoples to claim these rights. He cites the example of a land claims case in which the government, trying to disprove the existence of Aboriginal title, ‘were at pains to establish that the Indians eat pizza, watch television, and drive motor cars’ (Tennant 1990:15). He argues that ‘this approach assesses continuity of identity, and thus of rights, by the criteria of racial purity and persistence of culture elements’ (Tennant 1990:15). In this manner whites continue to dictate the terms of constitutionalism thereby undermining any genuine attempt to renegotiate this relationship. Similarly, it is important that traditional activities be respected. The essence of this relationship is mutual recognition and respect for cultural diversity. Therefore, renegotiating this relationship of power within the framework of constitutionalism requires that indigenous identities not be imposed or arbitrarily limited. They should not be precluded from practicing their indigenous identities or from re-conceptualising these as modern indigenous peoples based on a dynamic indigenous identity.

Canadian constitutional scholar Peter Russell (2000b) has argued that Canada has two options in trying to redress indigenous peoples’ position within this power play. Either, white settlers continue to impose their will on Aboriginal peoples and refuse to adjust their structures to promote greater recognition of cultural diversity or, a treaty may be used to structure the relationship by some form of mutual agreement. These, he argues, are the only two paths that can be taken. If the latter is chosen, Russell observes (2000b), ‘it is never a perfect agreement, always a compromise, but it is crucial to come back to the fact that it is a negotiated agreement’. This need for dialogues and a willingness to contest the basis for existing relations enables inappropriate and unjust forms of
association to be overcome. However, these dialogues need to be ongoing and the notion that imbalances of power can be ‘remedied’ does not acknowledge that there is an absence of finality to the processes. Constitutionalism is dynamic thus it is inappropriate to claim that imbalances of power can be ‘resolved’. Rather, these are ongoing dialogues and processes.

2.3 Historical experiences structuring the relationship

The nature of this ongoing and developing relationship embodied in constitutionalism suggests that constitutionalism involves a complex history. This undermines the assumption that indigenous politics can be characterised by singular or simplistic policy initiatives. Rather, the present conditions are the result of historical experiences. For example, the Royal Proclamation of 1763 deemed Indians to be separate nations (Milen 1991:4). Thus, since the establishment of British rule, Canada’s indigenous peoples have constituted a unique and distinct part of the nation-state. However, they were not treated as ‘nation-states’, and were not considered to be equals with other nation-states within the British Empire. While the Royal Proclamation recognised Aboriginal peoples as political communities and granted special rights accordingly, the Royal Proclamation ‘both affirmed and limited Aboriginal title and sovereignty’ (Foster 1999:355). That is, it recognised special rights to land for Indians while simultaneously determining that these rights were subject to the courts’ interpretation. The courts then proclaimed these rights to be merely personal and usufructuary and they were accordingly ‘treated as more “celestial” than legal’ (Foster 1999:336). Further, Aboriginal peoples at this time were ‘treated as subjects, rather than citizens’; that is, their consent was never sought or
attained and white settlers continued to define the interests of Aboriginal peoples and to declare how they were to be governed (Russell and Jones 1997:3).

However, from the beginning of British rule in Canada there lingered a tense relationship between francophone, anglophone and indigenous communities. Aboriginal peoples played strategic roles in fighting with white Canada against the common enemy of both francophones and Anglophones, the United States. It has been argued that ‘the necessity for military alliances meant that the Aboriginal nations were treated diplomatically as powerful nations whose favour had to [be] curried in pursuit of European goals’ (Fleras and Elliot 1992:40). Miller (1989:87-88) has argued that while mutual respect prevailed during the war of 1812, it is the subsequent period, from the end of the War in 1815 to the 1960s that posed the greatest difficulties for the relationship between indigenous and non-indigenous peoples. It was during this time that the perceived importance of Aboriginal peoples diminished and they were no longer seen as necessary allies (Jull 2000a:221). It is within this long period that the government enacted protectionist laws for Aboriginal peoples designed to shield them as much from themselves and their own ‘inferior’ cultures, as from attacks from the white community (Fleras and Elliot 1992:41).

In the 1969 White Paper, under the guise of seeking full and equal rights for all Canadians, the government argued that protection of indigenous peoples would be best assured by assimilation. Between the late 1940s and early 1960s Aboriginal children were taken away from their families and communities and placed in residential schools. Recent court cases have exposed the physical and psychological abuse endured by
Aboriginal people under the care of their ‘guardians’ (Valpy 2000:8). Further, this practice of cultural integration has been exposed as undermining traditional culture. On returning to their communities Aboriginal children experienced previously unknown sensations of cultural distance from their families and communities. Also they were left with a lack of crucial skills (such as fishing and hunting) not taught in residential schools. On returning home, then, many of these children found it difficult to assist their families in providing the necessities of life (Irwin 1989:4-5).

Major developments in recognising indigenous peoples as participants in Canadian constitutionalism were made from the mid-1960s with the release of policy reports examining the status of indigenous peoples in Canada. In 1969, Prime Minister Trudeau launched the *Statement of the Government of Canada on Indian Policy* (the 1969 White Paper). This document set out a new course for indigenous politics by proposing to dismantle the paternalism of indigenous-white relations that was a direct result of the *Indian Act*. Hence, it sought to undermine the special status of Indian people set out in section 91(24) of the *Constitution Act, 1867* which gave the federal government legislative responsibility for status Indians (Fleras and Elliott 1992:43). Trudeau promoted this reform on the basis of individualistic liberalism insisting that the recognition of group-specific rights was the source of inequality. This document pushed for formal ‘equal’ rights as opposed to the recognition of ‘special’ rights. It also sought to transfer some federal responsibility for indigenous peoples to the provinces. It maintained that issues of self-government were within the jurisdiction of the provincial government and could be adequately dealt with at this level.
Indigenous people rejected this White Paper and the government abandoned its proposals. As Fleras and Elliott (1992:44) have argued the formal, individual equality that the White Paper offered 'was not equivalent to real equality, for it overlooked the bias inherent in cultural differences and the unequal distribution of power and resources'. The White Paper seemed not to recognise first, that Aboriginal peoples were distinctive participants in Canadian constitutionalism and second, that indigenous peoples should be seen as necessary partners in renegotiating mutually acceptable forms of association that recognise cultural diversity.

2.4 Burkean Constitutionalism

The complex intercultural experiences of Canadian constitutionalism were assisted by the form of constitutionalism adopted at the time of Confederation. As Saul (1997:107) observes, Canada's founding partners 'were people who had come to terms with the complex, contradictory, even incomplete nature of their new home' and that 'in place of abstract theories of nationhood, a much more practical approach towards place and partnership emerged'. Due to all these historical contingencies and the culturally diverse nature of Canada's settlers, modern Canada was founded on Burkean compromise (Russell 1993:10-11). The Burkean approach adopted in Canada maintained that the social contract was not between individuals but between societies and generations, the 'product of collective wisdom' (Russell 1993:10). They sought therefore to build their new nation-state through ongoing negotiations between the partners of federation. In comparison, the United States pursued a Lockeian constitutionalism, aspiring towards a
Constitution at federation that could embody the guiding conventions and limitations of
government and articulate the rights of individuals. The founders of Canadian
constitutionalism rejected these abstract ideals. The United States’ approach relied on
imposing a sense of commonality via citizenship so that ‘the people’ would consent to
government. However, aware of the need to keep the diverse members of the federation
content, there has been consistent movement in Canada towards consensus building
rather than merely relying on the notion of citizenship to bind all members of the nation-
state (Kymlicka 1999:163). Russell (2000:80) has asserted:

That first step in the Lockean social contract, whereby all consent to form a single sovereign people to be
governed by an agreed upon political authority, has not been and may never be taken [in Canada]. In a
setting such as this, attempts at grand constitutional settlements are much more likely to exacerbate than to
resolve societal conflict.

Tully (1997b:140-141) implicitly recognises this Burkean form of constitutionalism as
assisting in the recognition and accommodation of cultural diversity within Canada. He
argues that Canadian Confederation in 1867 was a process of ‘conciliation’ between the
culturally diverse provinces because they first, recognised ‘each other as autonomous,
self-governing constitutional associations’ and second, were able to reach consensual
agreement through three years of debate and negotiating an acceptable form of national
association (Tully 1997b:141). Both Burkean constitutionalism and Tully’s
reconceptualisation of constitutionalism as an intercultural dialogue emphasise
constitutionalism as an activity. They also both emphasise the need for ongoing processes
to negotiate and renegotiate forms of association between the diverse participants in
constitutionalism. Constitutionalism as a negotiated activity recognises intercultural
exchanges as occurring outside formal constitutional amendments. Concepts such as
consent, sovereignty and self-determination can be challenged and thereby transformed through dialogues among the culturally diverse founders of Canadian society. Promoting strategies, such as the FMCs, where this relationship can be discussed and negotiated ensures that it is a continual process and that ongoing attempts are made to ensure that the indigenous peoples of Canada are recognised and accommodated.

However, as Tully’s arguments imply, Burkean constitutionalism is limited by its foundation in modern constitutionalism. As a result it employs conventions that constrain constitutionalism’s capacity to be transformed through intercultural dialogues. Tully (1997b:64) argues that modern constitutionalism defines itself ‘in contrast to an ancient or historically earlier constitution’. These ‘ancient’ forms of constitutionalism were seen to be at a lower ‘stage of development’ and irregular causing instability and uncertainty (Tully 1997b:64). Consequently, European forms of modern constitutionalism came to be seen as superior to and as having evolved beyond any forms of association existing in ‘primitive’ conditions like those of Aboriginal societies (Tully 1997b:65). Burkean constitutionalism was unable to break from the modern conventions that inhibited the recognition and accommodation of cultural diversity.

Tully’s reconceptualisation of constitutionalism is a more appropriate model to use when undertaking an evaluation of whether Canadian constitutionalism has been transformed. The primary advantage is that he explicitly identifies those conventions of modern constitutionalism that have inhibited the recognition of cultural diversity (Tully 1997b:62-70). Tully thereby attempts to comprehensively contest these assumed
conventions so that cultural diversity can be recognised and accommodated. It is this process of challenging assumed conventions and historical experiences inhibiting the recognition of cultural diversity that enable the relationship between indigenous and non-indigenous peoples to be renegotiated and thus transformed.

Conclusion

Indigenous politics cannot, by virtue of its very nature, be 'resolved' or 'solved'. Rather, in Canada there has been a commitment to re-examine the founding conventions adopted through various documents drafted at the beginning of British rule and interpreted at different stages and with different implications for indigenous politics. Through the recognition of constitutionalism as a dialogue and ongoing relationship between cultures, including the three founding nations of Canada – English, French and Aboriginal – Canada from the mid-1970s recognised that indigenous politics was a national issue that needed intense debate, discussion and diversity of views. Canadians have set about to improve this relationship and to debate how best to recognise indigenous peoples’ position of power so that the injustices they experience could be overcome. Saul (2000: 4) has argued that 'compromise is a Canadian virtue; that compromise has got us through the difficult situation of our complex population, complex internal geography and complex foreign relations'. It is this dedication to complexity through forums of negotiation that has produced a nation celebrating its culturally diverse federation. Through the use of FMCs and the implementation of political accords, forums have been established in Canada that enable constitutionalism to remain responsive to this complexity.
Chapter Three: First Ministers’ Conferences and Political Accords

The Calder\textsuperscript{3} decision of the Supreme Court of Canada in 1973 established that in principle, Aboriginal title had existed. This decision, together with indigenous and non-indigenous reaction to the 1969 White Paper and other indigenous debates and processes,\textsuperscript{4} encouraged indigenous organisations to secure their position as distinct peoples with special rights. Following Calder and abandoning the white paper, Prime Minister Trudeau acknowledged that Aboriginal peoples had special rights that were legally enforceable (Russell 1993:94). A process of negotiation was instituted to define indigenous peoples’ rights rather than allowing the courts exclusively to determine these rights (Asch 1999:452).\textsuperscript{5} Direct dialogues between the government and indigenous peoples ensured that the negotiated outcome would be mutually acceptable and encourage long term objectives that would be collectively pursued. This negotiation around indigenous Canadians’ position in the Constitution ensured that dialogues between the diverse partners in constitutionalism continue. This series of inter-cultural dialogues, with formal meetings between federal and provincial government representatives and Aboriginal delegates, used political accords to further advance their relations.

In this chapter I first consider how the FMCs came about. I then examine each of the four FMCs of 1983, 1984, 1985 and 1987 and the use of political accords within these

\textsuperscript{3} Calder et al. v. Attorney General of British Columbia (1973) 34 DLR (3d) 145.
\textsuperscript{4} For example, during this time the federal government was involved in negotiations with the Nunavut Constitutional Forum and Nunavut Tunngavik to create a new territory, Nunavut.
\textsuperscript{5} This does not mean that Aboriginal peoples forfeited their right of appeal to the courts.
meetings. I will demonstrate how these accords promoted essential dialogues and furthered negotiations so that the imbalances of power within Canadian constitutionalism were redressed.

3.1 New Beginnings: Moving Towards Rights

Since the early 1970s Canadian constitutional reform has had two objectives. First, to free the Canadian Constitution from the British Parliament and second, to consolidate a Constitution embodying Canada's governing principles. The federal government initiated a dialogue with the provincial governments from February 1971 to draft a revised Constitution. In February 1979, Prime Minister Trudeau secured an agreement to hold multipartite discussions with Premiers and indigenous Canadians to deal with constitutional matters (Jull 1980:51). Indigenous and some government leaders saw this as an opportunity to amend the Constitution and to ensure that 'a new understanding and productive relationship will develop and one which will make progress easier on all concerns of native people in Canada' (Jull 1980:52-53).

During this time, Prime Minister Trudeau launched the 'people's package' guaranteeing individual rights. This package included amending mechanisms for the Constitution and also a Charter of Rights. Trudeau turned his back on federalist structures and obligations by taking his proposals directly to the public (Russell 1993:111). Failing to gain the consent of the provinces, he pledged instead that he would hold a referendum if necessary and allow the people to decide the form of their new Constitution. In doing this he was undermining the traditional relationship of consensus building through elite negotiation between the provinces and federal government. He was turning away from the Burkean
form of constitutionalism to a more Lockean model where the individual was the exclusive source of legitimacy (Russell 1993:111).

Continuing to direct his reform package to the people, public hearings of the Joint Committee of the Senate and the House of Commons were held through late 1980 into early 1981. These Special Joint Committee meetings were televised daily and nationally. Through this widespread exposure the meetings made Canadians aware, perhaps for the first time, that they did not have ‘rights’ that could be relied upon to protect their freedom. With their geographical and psychological closeness to the United States, many Canadians believed their freedoms were explicitly guaranteed. However, these hearings dramatised that ‘rights’ did not exist in a positive constitutional form and had been infringed, for example, during the Second World War. Minority groups within Canada had suffered abuse of basic rights precisely when the nation had been fighting for the freedom of oppressed minority groups in Europe. Japanese Canadians were forced from their homes, had all their property seized by the government and were placed in internment camps in remote regions of Canada (Sunahara 1996:85). John Ralston Saul (1997:31) has observed that for Canadians ‘the clarity of these and a few other violent acts become overwhelming in our imagination… they were small acts by international standards, but by our own standards they were enormous’. These experiences demonstrated not only the need for discussions founded on rights, but Canadians felt that their freedom could only be ensured if there were a Charter explicitly guaranteeing their rights.
For non-indigenous people, this realisation that rights were an important means of protecting freedom and thus ensuring that power relations were not abused became an important framework for understanding indigenous demands for justice. On 30 January 1980, the Joint Committee agreed with the leaders of the three national Aboriginal organisations to ‘recognise and affirm Aboriginal and treaty rights in a new constitutional resolution’ (Milen 1991:8). However, the content of these rights was largely unknown at the time. Consequently, section 37 of the proposed Constitution Act, 1982 set out that conferences were to be held to further identify and define these rights and Aboriginal representatives were to be involved in this process. Section 35 stated that ‘existing Aboriginal and treaty rights of the Aboriginal peoples of Canada are hereby recognised and affirmed’. Section 37 stipulated that a first ministers’ conference was to be held within one year of the new Constitution coming into effect and was to include federal, provincial and Aboriginal representatives to address Aboriginal constitutional concerns.

These events prior to the first FMC in 1983 reinforced indigenous demands for the recognition of their rights. In directing reform policies at the people, Trudeau altered the course of Canadian constitutionalism by opening national dialogues that engaged the public in discussions over what rights should mean and how they should be used in Canada to work towards a more inclusive and just society. These processes helped indigenous rights to be seen as needing national debate and discussion.

3.2.1 FMCs: The First Conference

Ministerial and officials’ meetings were held before the 1983 FMC to determine the agenda. The four Aboriginal peak groups were included in these meetings – the
Assembly of First Nations (AFN), Native Council of Canada (NCC), the Inuit Committee on National Issues (ICNI), and Metis National Council (MNC). Unlike previous FMCs, the Northwest Territories and the Yukon were invited by the Prime Minister to participate in the first FMC.

The first FMC was held on 15-16, March 1983. The first day was largely spent on opening addresses by the seventeen participants. After each party had set out constitutional concerns and ambitions for the conference, Prime Minister Trudeau focused attention on the agenda items at hand (see Appendix A). The first item set out for discussion was Aboriginal people’s place in the Charter of Rights. This included section 35 and what ‘existing’ treaty rights were. The final agenda item was to consider a ‘statement of the particular rights of Aboriginal peoples’ and a ‘statement of principles’ (see Appendix A). The agenda reflected the extent to which the constitutional meeting would concentrate on indigenous peoples’ rights.

At an early stage of the conference it was accepted that an accord was the common goal. The participants sought to consolidate progress in a formal agreement that would be constitutionally entrenched and legally enforceable. Framing the agenda in terms of rights eased the task of working towards this accord. From the beginning of the FMC it appeared that all parties were committed to realising a final accord and that agenda item six relating to ongoing processes would be included in this accord. This represented a formal acknowledgment that an adequate rights-based dialogue could not be established in the two days of the FMC. The issues involved were complex and required large amounts of time, energy and dialogue if misunderstandings were to be overcome. The
agenda clearly set out areas where all parties agreed rights existed and the purpose of the meetings were then to define these rights and gain a fuller understanding of their scope and meaning. The agenda assisted the process of achieving consensus by adopting a rights approach and thereby moving parties forward in recognising that these rights existed but lacked clear meaning.

The afternoon session of the first day was spent discussing indigenous people’s interpretation of ‘aboriginal title’. This process gave the federal and provincial ministers opportunity to listen first hand to indigenous peoples’ conceptions of their own rights. James Gosnell, Nisga’a chief from the British Columbia Region of the Assembly of First Nations, maintained that Aboriginal title was the founding principle from which all Aboriginal rights flowed (FMC transcript 1983:114-115). Gosnell espoused a broad interpretation of indigenous rights claiming that ‘aboriginal title is our ownership of this land…lock, stock and barrel’ (FMC transcript 1983:115). Trudeau responded by maintaining that while these rights were seen as the basis of all other rights, they still required identification (FMC transcript 1983:118).

Schwartz (1985:96) states that intensive efforts to consolidate the different approaches and opinions as to how these rights could be defined and implemented occurred in a closed meeting on the evening of March 15. There was pressure to reach a mutually agreeable outcome and to mark this in a political accord. Securing an accord would establish clear grounds of progress on some issues while indicating those requiring further deliberation and negotiation. While conditional on the approval of the first
ministers the essential point of these meetings was to resolve issues and concerns through *negotiation*, rather than through the judicial system, and thereby implicitly continue the Burkean form of constitutionalism (FMC transcript 1983:161, 211). The drafting of a political accord was a major step in this process of negotiation as it formally identified shared concerns and established a framework through which these could be further expounded and consolidated.

The second day was spent discussing agenda item three – Aboriginal rights to exercise self-government. The relative ease with which the concept was integrated into the discussion as a distinct right of indigenous peoples relates to the way indigenous groups had used the term (Russell 2000b). Indigenous peoples had insisted on being recognised as distinct peoples and accordingly, when the larger community recognises that indigenous peoples are distinct peoples 'why then wouldn't they have the right to self-government? When did they lose it? '(Russell 2000b). However, Canada is still struggling with the absolute nature of the concept of sovereignty, realising that this concept competes with another founding doctrine of Canadian constitutionalism, that is, the accommodation of cultural diversity through consensus building (Russell 2000:80). The idea of sovereignty as exclusively embodied in the Crown has left Canada trying to understand how to resolve the seemingly contradictory and thereby incompatible claims of indigenous peoples' right to self-government with existing forms of governance. Sovereignty is considered as absolute, entirely vested in the Crown. Indigenous rights to self-government potentially challenge this absolute concept and the legitimacy with which it was applied to the entire nation-state during colonisation. The FMCs were
forums of negotiation where concepts, such as sovereignty, could be discussed and the inappropriate legal fictions created during colonialism discarded or reconceptualised to recognise cultural diversity.

Peter Russell claims that the practice of negotiating a mutually acceptable form of constitutional association between indigenous and non-indigenous peoples had become irreversible in Canada following the FMCs of the 1980s (2000b). They forced difficult concepts, like sovereignty, to be reconceptualised to accommodate otherwise excluded groups. Once Aboriginal peoples have been invited to participate the government cannot then abandon its approach and declare it was a mistake to include them (Russell 2000b). That is how it becomes an ongoing process and how these assumptions can be contested and constitutionalism transformed. Once indigenous peoples are recognised as part of Canadian constitutionalism there is no other response but to include them in all discussions and debates directly affecting them (Russell 2000b).

Importantly, the parties agreed to hold future conferences and to entrench that commitment in the Constitution. Schwartz (1985:113) has observed that in a Constitution ‘you don’t expect to find a requirement that several discussions must take place over the next few years, especially when the discussions need not reach any particular conclusions’. However, the inclusion of this agreement at a constitutional level was valuable as it recognised at the most authoritative level that indigenous peoples are political communities. This assisted in transforming Canadian constitutionalism as it strengthened national dialogues with these political entities and recognised that this is an
ongoing process. The participants agreed to include a section providing for three more conferences to take place before April 17, 1987. The 1983 Accord was proclaimed on June 21, 1984 as the *Constitution Amendment Proclamation, 1983* (see Appendix B).

### 3.2.2 FMCs: The Second Conference

A significant event preceding the second FMC was the release in late 1983 of *Indian Self-Government in Canada: Report of the Special Committee on Indian Self-Government* (the ‘Penner report’). It recommended that the right of Indian peoples to exercise self-government be ‘expressly stated and entrenched in the Constitution of Canada’ (quoted in Schwartz 1985:154). It envisaged Aboriginal government as a ‘third tier of government’, that is, as a distinctive new order of government (Graham et al. 1996:157). This document clearly set out that the right to self-government should be fully supported and that therefore the FMCs would present an opportunity to elaborate how this right may be exercised.

At a meeting prior to the 1984 FMC the Minister of Justice, adopted the recommendations put forward in the Penner Report and established that the government would support two alternate approaches to constitutionally entrenching the Aboriginal right to self-government (Schwartz 1985:155-156). One approach was for the 1984 FMC participants to agree to a statement of principles outlining a list of viable forms of self-government any of which could be implemented immediately if Aboriginal organisations so chose. The second approach was for ‘accelerated negotiations’, that is, a series of meetings and discussions to be held between the 1984 and 1985 conferences with selected Aboriginal representatives and government delegates. These meetings would not
only work out appropriate models of self-government but also implement them. After a period of time with these models of self-government operational Aboriginal groups would present their experiences of them to the 1985 conference for wider discussion and negotiation. From these studies it would be possible to make informed decisions as to which types of self-government should be entrenched in the Constitution.

The 1984 FMC dealt comprehensively with these issues and others surrounding indigenous self-government. However, the Prime Minister's draft constitutional amendment on Aboriginal self-government embodied in an accord tabled at the end of the first day of the 1984 FMC and debated throughout the second, failed. The draft amendment had set out to recognise Aboriginal peoples' right to self-government (FMC transcript 1984:14). Divisions emerged among participants as Nova Scotia, Manitoba and Ontario would agree to an accord that recognised self-government as a viable objective for Aboriginal people but that was non-justiciable. Aboriginal groups continued to maintain that they would only agree to a legally enforceable accord containing constitutional amendments recognising their right to self-government (FMC transcript 1984:293). They did not want to support any other type of accord that would appear to make the conference a success when they firmly believed that no progress had been made (Schwartz 1985:157).

Despite this inability to secure formal agreement to initiate reform, the consensus building through the use of accords – even through discussions as to why accords should be used at all – assisted in transforming constitutionalism. In the 1984 FMC, while the
parties did not agree to constitutional amendments formally recognising the right of Aboriginal peoples to self-government, there was unanimous commitment to a consideration of how self-government could be realised. That is, all parties agreed self-government was a necessary right for Aboriginal peoples. The value of recognising self-government as a common goal assisted in building momentum for transforming constitutionalism by acknowledging that indigenous peoples should control their own lives and determine their own futures.

3.2.3 FMCs: The Third Conference

In September 1984 a Conservative government was elected. Prime Minister Brian Mulroney committed the government to taking the process in a new direction to try and entrench an accord (Milen 1991:25). The third conference began on April 2, 1985. Mulroney observed that: ‘the real question is how to blend the desire of the Aboriginal people for Constitutional entrenchment of the right to self-government with the desire of governments for sufficient definition of those rights’ (FMC transcript 1985: 98).

As they had done in the 1984 FMC, provincial ministers continued to argue that they could only agree to a legally non-enforceable agreement recognising the Aboriginal right to self-government. After the Prime Minister tabled a proposed accord containing ‘provisions designed to be more attractive to the more resistant provinces’, the AFN rejected the federal accord maintaining that it could only accept the constitutional entrenchment of the right to self-government (Milen 1991:27). Subsequently, no accord was signed. The conference ended in frustration and growing disillusionment for both sides on the value of FMCs.
3.2.4 Final FMC

The last conference was again dedicated to a right to self-government for indigenous peoples in Canada. On March 27, 1987 the final day of the conference, the federal government proposed a final accord to constitutionally entrench the right to self-government that would be non-justiciable subject to conditions (FMC transcript 1987:176). The first condition was that the ‘specific jurisdictions and powers of aboriginal governments would be determined and defined in accordance with negotiated agreements [with government]’ (FMC transcript 1987:181). Second, governments would commit themselves to discussing the ‘scheduling, nature, and scope, of negotiations’ with representatives of Aboriginal people (FMC transcript 1987:183). Third, these agreements would be negotiated outcomes with Aboriginal representatives (FMC transcript 1987:183). The final condition included a provision requiring a further FMC to be held within ten years of the 1987 agreement being constitutionally entrenched (FMC transcript 1987:185). The same problems that had stalemated the previous conference surfaced again and as a result, no consensus could be reached supporting the proposed accord. Governments continued to demand that the right to self-government be defined before any legally enforceable amendment was included while Aboriginal groups maintained that these rights had to be constitutionally recognised before any negotiations continue. The federal government’s proposed accord therefore failed to meet the requirements of the Aboriginal delegates and was seen to gratify only the demands of the provinces.

While the provincial governments refused to support the inclusion of any provision explicitly recognising the right to self-government in the Constitution, research
conducted at the time showed that a strong majority of the Canadian people (and many governments) actually supported the inclusion of this right in the Constitution (Russell 1993:131). Even Prime Minister Mulroney (FMC transcript 1987:176) was prepared to acknowledge 'the explicit recognition in the Constitution of the right to aboriginal self-government' and stated that 'rights are not negotiable and should not therefore be contingent'. However, this argument that rights need definition before they can be recognised is at odds with liberal democratic approaches to rights. No right is ever definable. The function of courts is to interpret these rights only in relation to other rights. Adopting Tully's (1997b:100) conception of rights, this relationship between rights can be negotiated in courts of law or in other sites of agreement (including the FMCs) to ensure that this relationship recognises and accommodates cultural diversity. Therefore, it is not possible to universally describe what the right to self-government is, but it is important to understand its value in relation to Aboriginal peoples' lack of consent to imposed forms of governance and their inability to determine their own futures.

Conclusion

These FMCs were 'most notable for the variety of participants, the variety of processes, and the variety of ideas emerging in the discourse on Aboriginal governance' (Graham et al. 1996:171). These processes demonstrated that the previously exclusionary approaches of the FMCs prior to 1983 were rejected as inappropriate for a model of federalism that achieved accommodation of cultural diversity through consensus building. Through
direct dialogues between the parties, the FMCs openly discussed and debated and thereby challenged existing power relations.

While the last two conferences, and particularly the 1987 conference, failed to reach agreement over specific Constitutional amendments, the use of political accords assisted in consolidating progress, channelled the FMC participants' efforts in a productive manner and created sites where the relationship between indigenous and white people could be renegotiated. It promoted the re-examination of previous approaches to Canadian constitutionalism that had excluded indigenous peoples.
Chapter Four: Canadian Constitutionalism Transformed

In this chapter I examine whether the FMCs and political accords negotiated in the period 1983-1987 assisted in transforming Canadian constitutionalism. The usefulness of accords in transforming constitutionalism will be evaluated according to the three constitutional conventions Tully (1997b:116) promotes as necessary for recognising and accommodating cultural diversity. Tully (1997b: 117) argues that if the three conventions ‘guide constitutional negotiations, the negotiations and the resulting constitutions will be just with respect to cultural recognition’. These are mutual recognition, consent and cultural continuity. The FMCs will be evaluated in terms of their ability to adopt and further these three conventions.

This chapter has three parts. The first part examines Tully’s convention of mutual recognition and evaluates whether this convention was adopted and promoted by the FMCs and the political accords. According to Tully, mutual recognition has three features. These are, first, that societies are constituted by a diverse range of cultures and that each culture must be recognised and accommodated in constitutional dialogues; second, that these diverse cultures each require different forms of recognition within the framework of constitutionalism; third, that societies are ‘intercultural’ not ‘multicultural’. This last feature is important as it acknowledges that cultures are not self-contained, but interrelated. From this perspective constitutionalism is a process of negotiating between diverse cultural identities’ similarities and differences (Tully 1997b:11). These three features of mutual recognition were adopted and furthered in the FMCs and through the
debate and negotiation of political accords, thereby aiding the transformation of Canadian constitutionalism.

The second part of the chapter examines the convention of consent. Like mutual recognition, Tully's convention of consent is a continuing convention of constitutionalism. Therefore, I evaluate whether the FMCs and the use of political accords in these meetings furthered the convention of consent.

The third part of this chapter examines Tully's convention of cultural continuity. I argue that this convention was adopted in the FMCs and furthered by political accords in two ways. First, indigenous peoples were recognised as having the pre-existing and continuing right to determine their own future; second, the diverse dialogues of constitutionalism practiced by indigenous participants in the FMCs were recognised as continuing rights and were accommodated during the process of negotiation. The main argument of this chapter is that through the adoption and promotion of these three conventions Canadian constitutionalism was transformed. A transformation has occurred when conditions are changed to advance the recognition and accommodation of cultural diversity and when ongoing processes are initiated that are committed to furthering the recognition of cultural diversity. The FMCs and the negotiation of political accords assisted this process. As all three of Tully's conventions were advanced in the 1983-1987 FMCs and in the political accords negotiated at this time, I conclude that Canadian constitutionalism was transformed in this period. Transformation does not imply a completed process but a new and clear commitment to cultural diversity.
4.1 First Convention: Mutual Recognition

According to Tully the first convention necessary for recognising and accommodating cultural diversity is mutual recognition. He argues that this convention has three features (Tully 1997b:7-14). The first is that societies are constituted by many cultures and each culture must be recognised within the framework of constitutionalism. Tully (1997b:63) argues that classical liberalism denies Aboriginal diversity within colonised nation-states. Classical liberalism represents the first form of association reached in modern constitutionalism and ‘the people are taken to be a society of equal individuals in a state of nature’ (Tully 1997b:63). Thus, it uses formal individual equality to dismiss the recognition of group rights or cultural diversity as a necessary part of constitutionalism. Conventions of formal equality guide many contemporary theorists yet they continue to adopt these without considering their origins and implications (Tully 1997b:81). For example, doctrines of formal equality are usually accompanied by Locke’s theory of property. As Aboriginal peoples did not engage in European forms of agriculture they were not seen to be improving the land by cultivating it. Thus, under Locke’s theory of property white settlers ‘legitimately’ took their lands. Tully (1997b:75) argues that:

Even theorists who believe that Aboriginal peoples have some rights in their territories, contrary to Locke, often argue that they are nevertheless more than compensated for their loss of land by the material abundance and greater productivity of the commercial societies which had displaced theirs.

The inability of white theorists and settlers to recognise and respect indigenous ‘ownership’ of land led to widespread displacement and dislocation. Thus, an extension of formal equality to indigenous peoples fails to adequately account for these past
injustices. Tully argues that doctrines of formal equality have to be rejected if constitutionalism is to recognise cultural diversity.

Tully’s second feature of mutual recognition is an acknowledgment that different cultures require different forms of constitutional recognition. Thus, there is a need to move beyond traditional Western forms of constitutional dialogue to include direct negotiations with Aboriginal peoples (Tully 1997b:119). These negotiations have to be ongoing processes occurring across diverse sites and to encompass diverse forms of constitutionalism. Tully (1997b:121) observes that ‘Aboriginal peoples did not have European-style states, representative institutions, formalised legal systems, prisons and independent executives’. Rather, they engaged in ‘conciliar and confederal forms of government, consensus decision making, rule by authority rather than coercion, and customary law’ (Tully 1997b:121). Therefore, furthering mutual recognition requires the recognition of these diverse understandings of constitutionalism.

Tully’s third feature of mutual recognition is that societies are ‘intercultural rather than multicultural’ and therefore, ‘cultural diversity is a tangled labyrinth of intertwining cultural differences and similarities’ (Tully 1997b:11 emphasis in original). This third feature suggests that the different cultures within a ‘nation-state’ are not unrelated; they share both similarities and differences. Tully (1997b:131) argues:

The aim of negotiations over cultural recognition is not to reach agreement on universal principles and institutions, but to bring negotiators to recognise their differences and similarities, so that they can reach agreement on a form of association that accommodates their differences in appropriate institutions and their similarities in shared institutions.
In order to assess whether Tully’s first convention of mutual recognition was adopted and promoted during the 1983-1897 FMCs and political accords I now consider these three features of mutual recognition in turn.

4.1.1 Multiplicity of cultures

The FMCs and the debate surrounding the political accords adopted and promoted the first feature of mutual recognition by acknowledging that societies are comprised of a diverse range of cultures and by rejecting the concept of formal equality. Debate surrounding all four political accords recognised that indigenous peoples were distinct participants in Canadian constitutionalism with distinct rights including the right to determine their own position in the constitution. This is evident in the inclusion of representatives from Aboriginal organisations who negotiated directly with heads of government and collaborated to secure mutually acceptable forms of recognition and accommodation.

Kymlicka (1999:153) offers an alternative approach to equality more suitable to a post-colonial era. In his view, the concept of differentiated citizenship recognises diversity while creating conditions needed to ensure the accommodation of this diversity. In addition, differentiated citizenship recognises that within the peoples of a nation-state there are inherent differences and these differences should not be suppressed but celebrated. Anglophone, Francophone and indigenous peoples within Canada each share different cultural backgrounds and cultural practices. Each has different systems of law, governance and language. Through the use of political accords in the FMCs this concept
of differentiated citizenship was used to facilitate the recognition of indigenous peoples as distinct peoples. It did this by involving Aboriginal peoples in a process that recognised their right to determine their own position in a new constitutional order. Political accords further developed strategies for creating more appropriate forms of association by asserting their right to determine their own future and enabling indigenous peoples to gain greater control over their lives through an in principle agreement on the right to self-government. While a formal agreement could not be reached to entrench this right explicitly, the debate surrounding the political accords assisted in building consensus nation-wide and among governments to recognise self-government as a right of Aboriginal peoples in Canada.⁶

Each of the FMCs addressed this issue and there was unanimous support in principle for the idea that Aboriginal peoples had a right to self-government. This was an important advance vital to establishing a framework from which dialogues could advance. However, a further step was required – an acknowledgment that Aboriginal peoples’ right to self-government must be formally recognised in a political accord and entrenched in the Canadian constitution. Indigenous peoples refused to agree to an accord in the last three FMCs that did not entrench this right. They declared that in this process of mutual recognition, their right to self-government must be recognised as independent of government. The first feature of mutual recognition was adopted as indigenous Canadians were fully acknowledged as distinctive nations. The FMCs affirmed the existence of indigenous nations within Canada and all parties worked towards a mutually acceptable

⁶ This right was formally recognised by the Chretien government in 1995 as an 'existing aboriginal right recognised and affirmed under the Canadian Constitution' (Department of Indian Affairs and Northern
form of association between these nations and existing forms of governance. However, the inability of provincial governments to agree to formally entrench these nations’ rights to self-government demonstrated that the recognition of cultural diversity was not fully achieved at this time. Further processes and dialogues were needed between the parties to ensure that their relationship would be based in future on a mutually acceptable form of association and on the formal entrenchment of indigenous peoples’ right to self-government.

4.1.2 Different forms of recognition

The FMCs and the use of political accords adopted and furthered the second feature of mutual recognition by implementing different forms of constitutional recognition for indigenous peoples. This occurred by initiating direct dealings between indigenous peoples, the prime minister and other first ministers; by promoting diverse sites where this could occur; and by a general broadening of what is understood as ‘constitutional’ and what could thereby be included in these processes and institutions of negotiation.

Through the use of accords in the FMCs, indigenous concerns became recognised as constitutional matters requiring direct dialogue between government and Aboriginal representatives. Where previously these had been regarded as issues to be ‘solved’ by governments making policy recommendations, the existing injustices were now realised to be fundamental inadequacies of Canadian constitutionalism. Further, being able to discuss indigenous matters directly with heads of government enabled issues to be taken

Development 1995).

7 Indeed, such agreement was reached and signed in the Charlottetown Accord 1995.
to a level outside local or provincial politics. Not only were these matters recognised as constitutional concerns, but as needing national attention. For example, the inclusion of Aboriginal title to land as a constitutional concern signalled that any single Aboriginal nation’s right to specific land was not to be negotiated solely on a case by case basis with the federal government. For the second feature of mutual recognition to be advanced, that is, recognition of diverse forms of constitutionalism, the fundamental concept of Aboriginal title and of Aboriginal peoples’ rights to land and water must be recognised.

The 1983 Accord negotiated at the first FMCs employed different forms of recognition not only by entrenching agreements to structure the relationship in a mutually acceptable way, but to constitutionally entrench the different sites and processes needed to negotiate the relationship. As a form of agreement political accords can embody objectives such as agreements to further negotiations and can also set out the agenda for these dialogues. For example, the first Accord of the 1983 FMC (see Appendix B) set out that the parties would hold three more FMCs addressing Aboriginal constitutional concerns. It included an agreement to address the final agenda items that had not been sufficiently discussed during the 1983 conference. This type of process may seem trivial in the grand scale of constitutional law but is central to providing strategies for promoting a working relationship between groups. Thus, issues that are misunderstood can be addressed. This process is central to overcoming stalemates arising from mistrust and frustration over past failures.

Tully (1997b:140-141) observes that modern constitutional conventions associate uniformity with stability and security. Irregularity within constitutionalism is feared as it
is seen to cause division and conflict. However, the different processes and sites set up to negotiate indigenous Canadians’ position within Canada’s constitution and the efforts undertaken to amend unacceptable forms of association demonstrate the stabilising effects of ensuring a multiplicity of dialogues and processes. Mistrust and misunderstandings were overcome during the meetings thus strengthening the relationship between governments and Aboriginal peoples.

The use of political accords in the FMCs and the wider subject matter included in the negotiation process resulted in a broadening of the issues conceptualised as ‘constitutional’. Accords were a way of activating the highest level of the political system so that diverse indigenous issues became recognised as ‘constitutional’. What white people insist are constitutional matters often differ from what indigenous Canadians regard as issues of constitutional concern (Jull 2000b). Indigenous Canadians maintain that the basis of constitutional negotiations should be addressing their marginalised position resulting from existing political processes (Jull 2000b). It is not only a question of renegotiating constitutionalism to gain a better formal position but to fundamentally reconceptualise the terms of constitutionalism so that indigenous peoples are able to exercise their own forms of self-government. This involves revisiting those assumed concepts such as sovereignty and consent so that it is possible to more accurately understand indigenous Canadians’ role in Canadian constitutionalism. The FMCs of the 1980s did this by creating sites where government and indigenous peoples could directly address and re-define their different concerns. As a result, these meetings did not exclusively or even primarily achieve concrete outcomes. Rather, they transformed constitutionalism by broadening understandings of what is considered ‘constitutional’,
thereby broadening and promoting the first convention of mutual recognition of cultural diversity. Issues such as Aboriginal title to land and water, the importance of Aboriginal consent to agreements and the value of ongoing processes are often considered 'social justice issues' and not as 'constitutional concerns'. However, these matters were recognised as constitutional concerns in the Accord agreed at the end of the 1983 FMC (see Appendix B). They were also entrenched as constitutional matters to be negotiated at each of the following three FMCs. This demonstrates how the use of accords assisted in transforming constitutionalism by broadening understandings of what constitutes 'constitutional' issues. Through acknowledging the importance of different forms of recognition through broadening conceptions of the 'constitutional' the second feature of mutual recognition was advanced.

4.3 'Intercultural rather than multicultural'

The FMCs adopted and pursued the third feature of mutual recognition – that societies are intercultural rather than multicultural – by formally recognising each parties' common goals without ignoring differences. This is evident in the commitment to listen to, and also to negotiate, as partners, mutually viable outcomes. Thus all parties became aware of the failures of the existing approach even if final agreement could not be reached to constitutionally entrench an accord. For example, at the last three FMCs Aboriginal representatives refused to sign the proposed accord. This made all participants and the wider public aware of the inadequacies of the existing approach. Indigenous people signalled that their right to self-government could not be represented as a concession made by government, but must be recognised as a pre-existing and continuing
right of all Aboriginal peoples. Saul (1997:91) argues that 'to get an accurate picture of what is happening, you must search out the long view rather than the little close-ups of modern analysis and current affairs'. This implies appreciating that the failure of the accords proposed in the final FMCs in 1984-1987 does not invalidate their importance or their ability to transform constitutionalism. As the 1983 Accord formally established mutual recognition by committing to further negotiations and dialogues, similarly, the failure of the later accords became a means for indigenous peoples to make the prevalent lack of recognition a national issue and constitutional concern.

4.2 Second Convention: Consent

According to Tully (1997b:123), the second convention necessary for recognising and accommodating cultural diversity is consent. He argues that 'the form of consent should always be tailored to the form of mutual recognition of the people involved' (Tully 1997b:123). Tully (1997b:124) cites the example of the treaty negotiations undertaken between indigenous nations and the Crown during white settlement to demonstrate how mutual recognition and consent operate together. He argues that these agreements were 'expressly designed not only to recognise and treat the Aboriginal people as equal, self-governing nations, but also to continue, rather than extinguish, this form of recognition through all treaty arrangements over time' (Tully 1997b:124). It is the continuing nature of mutual recognition that requires ongoing consent. If consent to existing relations is withdrawn then parties must come together and renegotiate a mutually acceptable form of constitutional association. Consent is necessary not only to structure mutually acceptable forms of association and recognise cultural diversity, but also to secure the legitimacy of
non-Aboriginal peoples' continuing forms of governance and relations to land (Tully 1997b:124).

Tully's second constitutional convention of consent was recognised as crucial to securing mutually acceptable outcomes by the participants of the FMCs, thereby transforming constitutionalism. As Tully (1997b:123) argues, if the participants recognise that indigenous peoples have the right to exercise self-government then their consent is crucial in determining what this right is and how it will be implemented. If Aboriginal peoples do not consent to the accords proposed in the FMCs and governments continue to implement the agreement then governments continue to impose their will on indigenous peoples and constitutionalism has not been transformed.

The first Accord implemented in the 1983 FMC received consent by Aboriginal representatives and was constitutionally entrenched (see Appendix B). However, the subsequent three Accords tabled in the FMCs of 1984-1987, dealing with Aboriginal rights to self-government, did not gain the necessary support either to be constitutionally entrenched or accepted as legally non-enforceable agreements. The extent and nature of mutual recognition was that the First Ministers would recognise Aboriginal peoples as nations with rights to self-government. However, some first ministers were uncertain of the extent and nature of self-government to be exercised by Aboriginal nations. Therefore they refused to agree that an accord recognising this right should be constitutionally entrenched.
The continuous nature of mutual recognition enabled consent to be withdrawn to identify when agreements were unacceptable or inappropriate. Therefore, despite this failure to agree to an accord and to gain the consent of Aboriginal peoples, the negotiations that occurred in trying to secure these, enabled indigenous peoples to make their demands clear. That is, they refused to allow their interests to be subservient to parliament and party politics asserting that the right to self-government was a right that required constitutional entrenchment. They withdrew consent from the proposed Accords and their non-consent was respected. The governments did not enforce accords that were unacceptable to Aboriginal peoples.

It can be said, then, that by furthering Tully's second convention of consent the political accords assisted in transforming constitutionalism. They did this by strengthening working relations between government and Aboriginal organisations by building trust. The first ministers' response was not to proceed with their own amendments, recognising that it would be inappropriate to implement an accord without Aboriginal peoples' consent. Previously, first ministers' had gone ahead with their decisions. The 1981 FMC agreed to an Accord (which was the proposed Constitution Act, 1982) which abandoned all constitutional provisions relating to aboriginal issues. Aboriginal peoples' consent was not sought or attained and the first ministers proceeded with this proposed new Constitution that ignored indigenous rights entirely. However, public outrage that Aboriginal peoples had their interests compromised caused governments to reassess their approach. It was public pressure that forced the government to restore the Constitutional provisions recognising Aboriginal rights (Russell 1993:121). Therefore, this example of
respect for non-consent during the 1983-1987 FMCs demonstrates the transforming
effects of the meetings and negotiations around the political accords through the
promotion of the convention of consent.

4.3 Third Convention: Cultural continuity

Tully's third convention for recognising and accommodating cultural diversity is cultural
continuity. Tully (1997b:125) argues that cultural continuity is the recognition that
diverse cultural identities have pre-existing and continuing capacities to practice their
identities. For cultural diversity to be recognised and accommodated the existing
relationship – which denies Aboriginal nations as distinct cultural identities with
continuing rights – must be abandoned. Tully (1997b:129) argues that during
constitutional negotiations that attempt to recognise these continuing cultural identities
‘each negotiator participates in his or her language, mode of speaking and listening, form
of reaching agreement, and way of representing the people, or peoples for whom they
speak’. There are two ways this convention was adopted and promoted in the FMCs: first,
by recognising Aboriginal peoples’ right to determine their own futures; second, by
recognising the rights of Aboriginal peoples to practice diverse forms of constitutional
dialogue.

4.3.1 Self-determination

Within the FMCs and the negotiation surrounding the accords there was a clear
recognition of Aboriginal peoples’ right to determine what their interests were and how
these interests were to be pursued – in other words, their right to self-determination. This
right to self-determination requires a break from the colonial relationship of guardian and
ward which justified the implementation of policies such as segregation and assimilation.

For constitutionalism to be transformed there must be a discontinuation of the paternal relationship ‘that is trust-like in nature’ where indigenous peoples are seen as dependent on the state protecting their interests and acting on their behalf in an appropriate and acceptable manner (Macklem 1993:26). This renegotiated relationship relies on both parties negotiating as equal partners and acting sincerely. That is, it requires a ‘true partnership’ between indigenous and non-indigenous peoples where each participant acts in good faith (RCAP 1996:689) and where indigenous peoples are recognised as having the right to self-determination.

The recognition of Aboriginal peoples’ right to self-determination was evident in the FMCs in the partnerships fostered between federal, provincial and Aboriginal representatives and in the participants’ commitment to act in good faith in working towards the realisation of their shared ambitions. During the opening addresses of the final FMC in 1987, Premier Getty of Alberta (FMC transcript 1987: 80) commented that ‘the meetings during the past four years have heightened the awareness of federal and provincial governments and all Canadians about the circumstances of the Aboriginal people and their aspirations’. Political accords were instrumental in encouraging the articulation of what the parties’ differences and similarities were and thereby recognising the cultural diversity of the participants. Government Leader of the Yukon, Tony Penikett (FMC transcript 1987: 163-164) argued:

We believe aboriginal rights should be as enforceable in the courts as any other rights. They ought not to be contingent. They should not be second-class rights. They should not depend on the quirks of history or the goodwill of politicians... While we recognize the need for a stand-alone right, we believe it is infinitely preferable for parties to work co-operatively through negotiations to establish self-government rather than resort to the courts...where parties are willing to negotiate, there is no
need to fear an explicit right... The political obligation to negotiate, no less than the right itself, must be binding on all parties.

While no agreement was finally reached on the goal of Aboriginal self-government, the commitment to negotiate outcomes directly with Aboriginal representatives still demonstrates a transformation in intercultural dialogues founded on the convention of cultural continuity. The previous exclusion of Aboriginal peoples from determining their interests and how they could be pursued was transformed through the FMCs and the use of political accords. As a result of these meetings and in working towards objectives through debate and negotiation, Aboriginal peoples have been recognised as participants in constitutionalism. The awareness of the pre-existing and continuing rights of Aboriginal nations to determine their own futures within this partnership has transformed Canadian constitutionalism. The FMCs and the debate surrounding the political accords made all participants and the Canadian public aware that when issues directly effect Aboriginal peoples, the only just response is that they are included in working towards mutually acceptable outcomes.

This right to be involved in decision-making that directly effects them includes 'the capacity to delegate to, or share various powers of self government' with provincial or federal governments (Tully 1997b:128). Tully (1997b:128) notes that this is an important feature of cultural continuity as 'it enables each Aboriginal nation to work out by mutual consent the degree of self government appropriate to their population, land base and particular circumstances, without fear of subordination or discontinuity'. This aspect of self-determination was promoted through discussions surrounding proposed accords to include provisions identifying the types of self-government to be pursued and
implemented. It was understood by the participants that Aboriginal peoples had the
capacity to select the models of self-government they thought most appropriate and felt
capable of administering. Further, they were acknowledged to have the ability to delegate
certain powers to federal government while retaining the option of resuming those
powers when they wanted.

4.3.2 Diverse forms of constitutional dialogue
Like Tully, Russell (2000b) argues that constitutionalism involves a reciprocal
commitment by non-indigenous and indigenous peoples to understand and respect each
other’s conceptions of constitutionalism. That is, it includes an awareness of each other’s
different understandings of ‘constitutional concerns’ and the different approaches to how
these concerns could be addressed. A commitment to recognise and accommodate
cultural continuity is evident in the commitment to ongoing processes and dialogues in
order to begin to understand differences as well as common goals and aspirations. The
first example of this was the political accords used in the FMCs to articulate these
common goals and provide a framework for ongoing processes by committing parties to
endeavour to initiate new levels of understanding. The three political accords tabled at the
FMCs from 1984-1987 failed to secure the necessary support for constitutional
entrenchment. However, that the parties continued to meet and discuss agenda items
agreed to by Aboriginal peoples as of constitutional concern exemplifies the adoption and
promotion of the third convention of cultural continuity. Further, that the first ministers
continued to listen to Aboriginal peoples’ conceptions of their own rights is evidence of
this recognition of cultural continuity. All participants had implicitly recognised the pre-
existing and continuing right of Aboriginal peoples’ to pursue their different conceptions of constitutionalism.

A second example of the FMCs adopting and promoting cultural continuity is the joint pursuit of both written and oral constitutional dialogue. John Ralston Saul (1997:208) argues there are benefits and limitations in placing too much importance in one form of constitutional dialogue. He asserts that ‘the oral at its best is a force of creativity and change; at its worst, one of disorder. The written at its worst is a force of control, even repression; at its best, of stability and responsible organization’ (Saul 1997:208). The constitutional meetings and negotiation around the accords involve a balance of written and oral communication and this was a reflection of the commitment in Canada to both traditions. This was achieved during the FMCs in the different ways each cultural group participated in their own language and their diverse forms of speaking and listening. These culturally diverse participants were able to communicate within and between the groups by expressing themselves in traditional languages. The FMCs facilitated these diverse forms of expression as the FMCs were forums of debate and discussion. Where each participant in Canadian constitutionalism was reliant upon different forms of expression a delicate balance was established during the FMCs between these groups. The accommodation of their differences occurred not only by recognising the value of making a constitutional amendment, but also by realising the value and importance of speaking and listening to the diverse modes of expression among the participants in Canadian constitutionalism.
A third example of the FMCs adopting and promoting cultural continuity through accommodating the diverse forms of constitutional dialogues is by ensuring these processes were ongoing. That is, they were not one-off occurrences, but ongoing dialogues taking place over a period of years. The dialogues of the FMCs lasted for over five years. These processes were evolving long-term dialogues. Further, between each FMC there were meetings and conferences being held by the diverse participants with their communities and constituencies. As Tully (1997b:130) observes, these types of negotiations require participants to 'turn to their diverse constituents, explain what has transpired, listen to their objections in their terms, reach agreement in the appropriate way on an acceptable response, and then return to the negotiations'. At each stage Aboriginal groups engaged in traditional practices of reaching and affirming agreements within their communities. They used traditional ceremonies and procedures to discuss and negotiate agreements. Aboriginal peoples also brought some of these diverse cultural practices to the national FMCs. For example, at the beginning of each FMCs Indians held prayer ceremonies while Catholic and Protestant participants said the Lord’s Prayer in both English and French.

**Conclusion**

It is clear that a transformation in Canadian constitutionalism occurred in relation to the 1983-1987 FMCs and accords. Each of Tully’s three conventions was employed to transform previous conditions that had hierarchically structured the relationship between indigenous and non-indigenous peoples and inhibited the recognition of cultural diversity. Tully identifies three features of the first convention, mutual recognition. The
FMCs and the debate and negotiation surrounding the political accords transformed Canadian constitutionalism by adopting and promoting these three features. That is, the FMCs successfully recognised indigenous Canadians as distinctive participants in Canadian constitutionalism, by employing different forms of recognition and finally, this process reflected the *intercultural* nature of a transformed constitutionalism. The FMCs and political accords that enabled consent to be withheld, thereby making the governments aware of the unacceptable forms of association currently existing promoted the second convention of consent. These processes made governments aware that to continue without Aboriginal peoples’ consent would be unjust and therefore unacceptable. The third convention of cultural continuity was promoted by recognising indigenous peoples’ pre-existing and continuing right to self-determination and furthermore, the importance of engaging in diverse constitutional dialogues.

However, the adoption and promotion of the three conventions did not result in a mutually acceptable form of constitutional association. An important aspect of mutual recognition – acknowledging indigenous peoples’ right to self-government – failed to be entrenched. Some government leaders refused to recognise this right without first defining it and knowing how it would be implemented. As no definition or strategy for implementation was agreed upon, the governments refused to support an agreement that could be constitutionally entrenched. Similarly, the proposed Accords dealing with the right to self-government failed to gain the consent of Aboriginal peoples. Both these failures demonstrate that these conventions are ongoing. They must continue to operate to
expose inadequacies that continue to exist and current relationships between indigenous and non-indigenous peoples that are not mutually acceptable.

Merely because these meetings did not result in a mutually acceptable form of association being entrenched in a constitutional accord (in only five years of negotiation) does not undermine their value and importance. The FMCs attempted to renegotiate a relationship of inequality and injustice that had been in place for five hundred years. The three conventions are continuous. The failure to entrench a mutually acceptable agreement does not mean that a transformation in Canadian constitutionalism did not occur. A transformation is not a single event that changes Canadian constitutionalism from one definable state to another. It does not mean that constitutionalism has had problems that are now remedied and that Canadian constitutionalism may be said to be complete or flawless. A transformation has taken place when conditions are altered to further recognise and accommodate cultural diversity and when ongoing processes are initiated that are committed to furthering the recognition of cultural diversity. Tully's three conventions were adopted and promoted in the FMCs through the debate and negotiation surrounding the political accords to assist in the recognition and accommodation of indigenous Canadians. Canadian constitutionalism was thereby transformed and is engaged in an ongoing process of transformation.
Chapter Five: Conclusion

One of the things we have to do as First Nations peoples is to create a balance in our relationships with the other governments and the Canadian people. We cannot find balance if we are dominated by the other society. We cannot find harmony when we are threatened with choices like 'take this policy or nothing else.' No balance can be found unless we can do it as equals. The constitutional amendments could require that we be treated as equals; to tip the scales toward a more balanced relationship. Only then will we be able to build relationships with the other governments and the Canadian people based on respect, recognition of our inherent and collective right of self-government and our identity as distinct peoples (National Chief Ovide Mercredi quoted in Turpel 1992:117).

Reconceptualising constitutionalism as an intercultural dialogue between indigenous and non-indigenous peoples has provided a framework for renegotiating this relationship as one between equal partners. The identification of this relationship and its permanently changing and fluid nature serves to facilitate strategies for addressing the imbalances of power operating within this framework. Concepts such as sovereignty and consent were used during white settlement to justify the widespread physical and social displacement of indigenous peoples throughout Canada. These conditions led to newly imposed structures of governance impinging upon Aboriginal peoples’ ability to continue their own forms of governance and thereby to determine their own futures. However, in the period 1983 to 1987 the Canadian government was engaged in a process of furthering the recognition of indigenous peoples as distinct peoples and promoted new and essential dialogues between indigenous and non-indigenous people.

In this dissertation I have evaluated the role of the FMCs and political accords between 1983-1987 in transforming Canadian constitutionalism in relation to Tully’s three constitutional conventions of mutual recognition, consent and cultural continuity. The first convention of mutual recognition was advanced during the FMCs and assisted
through the use of political accords through the adoption of the three features of mutual recognition. The FMCs first, recognised indigenous Canadians’ as distinct nations; second, they employed different forms of recognition; third, they sought to renegotiate indigenous and non-indigenous peoples’ relationship based on their shared similarities and differences. Tully’s second convention, consent, was advanced during the period 1983-1987 through the debate and negotiation surrounding accords, forcing governments to recognise that the consent of Aboriginal peoples had to be obtained if a mutually acceptable form of association was to be reached. The third convention of cultural continuity was adopted during the FMCs and assisted through the use of political accords as these processes of negotiation recognised Aboriginal peoples’ pre-existing and continuing right to self-determination and the diverse constitutional dialogues of the participants. However, a mutually acceptable form of constitutional association was not arrived at. Some provincial governments would not fully acknowledge Aboriginal peoples’ right to self-government. They argued instead that this right was contingent upon government agreeing to a definition before it could be constitutionally entrenched. This demonstrated the continuing nature of mutual recognition and the need to continue the processes of negotiation and debate to ensure that the right to self-government is recognised and constitutionally entrenched and that a mutually acceptable form of constitutional association is achieved.

Despite this inability to fully recognise the right to self-government, Canadian constitutionalism was transformed during the period 1983-1987 as the conditions that existed at the beginning of these meetings were broadened to further recognise and
accommodate cultural diversity. Tully’s three conventions were adopted and advanced to transform the relationship between indigenous and non-indigenous peoples by recognising differences and similarities and by initiating processes that negotiated new forms of association that would be mutually acceptable.

The reconceptualisation of constitutionalism Tully has identified as a series of intercultural dialogues facilitates a broader appreciation of what can be achieved when nation-states are grappling with injustices suffered by indigenous peoples. If outcomes are sought that will remedy these inequalities and redress the imbalances of power operating between indigenous and non-indigenous peoples it is this relationship that must be transformed. The use of political accords in the FMCs from 1983-1987 in Canada was one strategy used to transform this relationship, but as this relationship is fluid and constantly changing ongoing activities are required to ensure that cultural diversity is always recognised and accommodated. This Canadian example offers much to Australia as well as to other nation-states, such as Sweden and Norway, each trying to work towards a more just relationship between indigenous and non-indigenous peoples. The Canadian experience exemplifies how the foundations of constitutionalism were used in the past to justify the subordination of indigenous peoples to dominant cultures. If the resulting imbalances of power are to be overcome, these foundations have to be reconceptualised. Promoting sites where these can be reconceptualised through dialogue, such as the FMCs and through the use of accords, facilitated the transformation of Canadian constitutionalism. Through employing different sites constitutionalism can
continue to be transformed as these relationships change and as new forms of constitutional association are required.

It has been claimed that the FMCs and the political accords negotiated in this period were 'abysmal failures in terms of effecting actual change' (Turpel 1992:118). However, Turpel claims that 'actual change' means securing constitutional amendments which had failed to eventuate during the last three FMCs. Rather, 'actual change' or a 'transformation' does not only occur with express constitutional amendments. 'Actual change' or a 'transformation' can be more subtle. A transformation occurs when conditions are altered to promote the recognition and accommodation of cultural diversity. The relationship between indigenous and non-indigenous peoples was transformed when it further recognised and accommodated indigenous Canadians by initiating ongoing processes of negotiation that worked towards mutually acceptable forms of constitutional association. This occurred in the FMCs in the period 1983-1987 with the adoption and promotion of Tully's three conventions. The FMCs represented a unique expression of Canada's commitment to renegotiate indigenous peoples' relationship with non-indigenous peoples. The FMCs and the debate surrounding political accords assisted in transforming Canadian constitutionalism into a more mutually acceptable and balanced relationship between indigenous and non-indigenous peoples.
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Appendix A

First Ministers' Conference
On Aboriginal Constitutional Matters

Ottawa

March 15-16, 1983

Final Agenda

1. Charter of rights of the Aboriginal peoples (expanded part II) including:
   - Preamble
   - Removal of 'existing', and expansion of section 35 to include recognition of modern treaties, treaties signed outside Canada and before confederation, and specific mention of 'Aboriginal title' including the rights of Aboriginal peoples of Canada to a land and water base (including land base for the Metis)
   - Statement of the particular rights of Aboriginal peoples
   - Equality
   - Enforcement
   - Interpretation

2. Amending Formula Revisions, Including:
- Amendments on Aboriginal matters not to be subject to provincial opting out (section 42)
- Consent Clause

3. Self-government

4. Repeal of Section 42(1)(e) and (f)

5. Amendments to part III, including:
   - Equalisation
   - Cost sharing
   - Service delivery

   Resourcing of
   - Aboriginal
   Governments

6. Ongoing processes, including further FMC’s and the entrenchment of necessary mechanisms to implement rights
Appendix B

First Ministers’ Conference

On

Aboriginal Constitutional Matters

1983 Constitutional Accord On Aboriginal Rights

Federal

Ottawa

March 15-16, 1983

Whereas pursuant to section 37 of the Constitution Act, 1982, a constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces was held on March 15 and 16, 1983, to which representatives of the aboriginal peoples of Canada elected representatives of the governments of the Yukon Territory and the Northwest Territories were invited;

And whereas it was agreed at that conference that certain amendments to the Constitution Act, 1982 would be sought in accordance with section 38 of that Act;
And whereas that conference had included in its agenda the following matters that directly affect the aboriginal peoples of Canada:

Final Agenda ...[See Appendix A]

And whereas that conference was unable to complete its full consideration of all the agenda items;

And whereas it was agreed at that conference that future conferences be held at which those agenda items and other constitutional matters that directly affect the aboriginal peoples of Canada will be discussed;

NOW THEREFORE the Government of Canada and the provincial governments hereby agree as follows:

1. A constitutional conference composed of the Prime Minister of Canada and the first ministers of the provinces will be convened by the Prime Minister of Canada within one year after the completion of the constitutional conference held on March 15 and 16, 1983.

2. The conference convened under subsection (1) shall have included in its agenda those items that were not fully considered at the conference held on March 15 and 16, 1983,
and the Prime Minister of Canada shall invite representatives of the aboriginal peoples of Canada to participate in the discussions on those items.

3. The Prime Minister of Canada shall invite elected representatives of the governments of the Yukon Territory and the Northwest Territories to participate in the discussions on any item on the agenda of the conference convened under subsection (1) that, in the opinion of the Prime Minister, directly affects the Yukon Territory and the Northwest Territories.

4. The Prime Minister of Canada will lay or cause to be laid before the Senate and the House of Commons, and the first ministers of the provinces will lay or cause to be laid before their legislative assemblies, prior to December 31, 1983, a resolution in the form set out in the Schedule to authorize a proclamation to be issued by the Governor General under the Great Seal of Canada to amend the Constitution Act, 1982.

5. In preparation for the constitutional conferences contemplated by this Accord, meetings composed of ministers of the governments of Canada and the provinces, together with representatives of the aboriginal peoples of Canada and elected representatives of the governments of the Yukon Territory and the Northwest Territories, shall be convened at least annually by the government of Canada.
6. Nothing in this Accord is intended to preclude, or substitute for, any bilateral or other discussions or agreements between governments and the various aboriginal peoples and, in particular, having regard to the authority of Parliament under Class 24 of section 91 of the Constitution Act, 1867, and to the special relationship that has existed and continues to exist between the Parliament and government of Canada and the peoples referred to in that Class, this Accord is made without prejudice to any bilateral process that has been or may be established between the government of Canada and those peoples.

7. Nothing in this Accord shall be construed so as to affect the interpretation of the Constitution of Canada.