

Opening the Door

THIS REPORT of the Royal Commission on Aboriginal Peoples concerns government policy with respect to the original historical nations of this country. Those nations are important to Canada, and how Canada relates to them defines in large measure its sense of justice and its image in its own eyes and before the world. We urge governments at all levels to open the door to Aboriginal participation in the life and governance of Canada.

The approach proposed in this report offers the prospect of change in both the short and the long term. Broad support can be expected in Canada for policy changes that better the life conditions of Aboriginal people, that lead to the enhancement of educational and economic opportunities, and that help to establish healthier and happier neighbourhoods. Aboriginal people can be expected to welcome changes that assist individuals and communities to gather strength and renew themselves. But our approach extends beyond these changes.

In the Commission's public hearings, Aboriginal people explained to us that their various nations have distinct cultures, with unique knowledge and understandings of the world around them. Across the globe, there is a growing awareness that cultural diversity is of critical importance for the survival of humanity. An appreciation of the uncertainty of the future carries with it an appreciation of the value of unique cultural insights. The preservation of distinct cultures is important to Canada, therefore, not only in the interests of the various cultural groups, but as a matter of enlightened Canadian self-interest.

Justice demands, moreover, that the terms of the original agreements under which some Aboriginal peoples agreed to become part of Canada be upheld. Promises ought to be kept. Undertakings ought to be fulfilled. Solemn commitments ought to be honoured.

Equality and security require the majority population of Canada to accommodate the distinct cultures of all its historical nations. Individuals are born into these cultures, and they secure their personal identity through the group into which they are born. This is their birthright, and it demands the recognition and respect of all Canadians and the protection of the state.

Aboriginal peoples anticipate and desire a process for continuing the historical work of Confederation. Their goal is not to undo the Canadian federation; their goal is to complete it. It is well known that the Aboriginal peoples in whose ancient homelands Canada was created have not had an opportunity to participate in creating Canada's federal union; they seek now a just accommodation within it. The goal is the realization for everyone in Canada of the principles upon which the constitution and the treaties both rest, that is, a genuinely participatory and democratic society made up of peoples who have chosen freely to confederate.

Canada's image of itself and its image in the eyes of others will be enhanced by changes that properly acknowledge the indigenous North American foundations upon which this country has been built. Aboriginal people generally do not see themselves, their cultures, or their values reflected in Canada's public institutions. They are now considering the nature and scope of their own public institutions to provide the security for their individual and collective identities that Canada has failed to furnish.

The legitimate claims of Aboriginal peoples challenge Canada's sense of justice and its capacity to accommodate both multinational citizenship and universal respect for human rights. More effective Aboriginal participation in Canadian institutions should be supplemented by legitimate Aboriginal institutions, thus combining self-rule and shared rule. The Commission's proposals are not concerned with multicultural policy but with a vision of a just multinational federation that recognizes its historical foundations and values its historical nations as an integral part of the Canadian identity and the Canadian political fabric.

Historically, the door has not been open for the just participation of Aboriginal peoples and their representatives in Canada. The Commission heard about misunderstandings concerning the treaties and about federal policies that ignored solemn commitments made in these treaties once the newcomers were settled and assumed control. Federal legislation, we find, has unilaterally defined 'Indians' without regard to the terms of the treaties and without regard to cultural and national differences among Aboriginal peoples. The participation of Aboriginal people as individuals, generally on the margins of society, has not met the standards of justice that Commissioners believe Canadians would wish to uphold.

History also shows how ancient societies in this part of North America were dispossessed of their homelands and made wards of a state that sought to obliterate their cultural and political institutions. History shows too attempts to explain away this dispossession by legally ignoring Aboriginal peoples, in effect declaring the land *terra nullius* — empty of people who mattered. This is not a history of which most Canadians are aware. It is not a history of democratic participation, nor is it a history that reflects well on Canada or its sense of justice. It is essential to recognize and respect the common humanity of all people — to recognize and respect Aboriginal people as people who do matter and whose history matters, not only to them but to all Canadians.

This Commission concludes that a fundamental prerequisite of government policy making in relation to Aboriginal peoples is the participation of Aboriginal peoples themselves. Without their participation there can be no legitimacy and no justice. Strong arguments are made, and will continue to be made, by Aboriginal peoples to challenge the legitimacy of Canada's exercise of power over them. Aboriginal people are rapidly gaining greater political consciousness and asserting their rights not only to better living conditions but to greater autonomy.

Opening the door to Aboriginal peoples' participation is also a means of promoting social harmony. The unilateral exercise of federal authority to make and implement policy can

no longer be expected to attract enduring legitimacy; it must be discarded in favour of the principle of participation. It is vital for Canada to be seen as legitimate by all its inhabitants. The strength of a geographically vast and culturally diverse country like Canada rests on the commitment and mutual respect of its peoples. The true vision of Canada is that of a multinational country, strengthened by the commitment of individuals to their natural and historical ties and to a federal union that promotes the equal security and development of all its partners.

Federal policy toward Aboriginal people has its roots in a power set out in the constitution of 1867. Since early British colonial times a legislative power has been reserved to the central government to protect the interests of Aboriginal peoples, first from local settler interests and, since 1867, from provincial interests. This unique feature of Canadian federalism has continuing significance today, since it includes the means to carry out positive obligations owed to Aboriginal peoples. In this report we explain that constitutional, legal, and political obligations proscribe the unilateral and arbitrary exercise of this federal power. It must be exercised in furtherance of the interests of Aboriginal peoples and not in derogation of those interests. This is a basic principle of the constitution supplemental to the principle of participation.

Contemporary Canadians reject the paternalism of yesterday and recognize that Aboriginal people know best how to define and promote their own interests. This report makes a number of recommendations to ensure that the principle of participation is the basis of future federal policy.

The federal obligation to act in the interests of Aboriginal peoples is now being recognized and implemented by the courts through the concept of fiduciary duty. This concept requires governments to acknowledge Aboriginal people as people who matter, not only in history but in real life today, and who have rights at common law and in the constitution that it is the federal government's duty to protect.

The concept of fiduciary duty and the principle of participation are intimately connected. Whenever governments intend to exercise their constitutional powers to legislate or make policies that may affect Aboriginal peoples in a material way, particularly in an adverse way, they would be wise to engage first in a process of consultation. The constraints imposed by the common law and the constitution on the exercise of arbitrary governmental power would seem to require no less.

The courts have also begun to probe the nature of Aboriginal peoples' rights, including the relationship between Aboriginal individuals and groups and Canadian institutions. Commissioners believe that the door to Aboriginal group participation in Canada has been opened by recognition of an inherent right of self-government in the common law of Aboriginal rights and in the treaties. This right of peoples to be self-governing affords a solid legal foundation on which governments in Canada can enter into agreements with Aboriginal peoples to establish appropriate working relationships. There is no further need, if indeed there ever was a need, for unilateral government action. The treaty is still Aboriginal peoples' preferred model.

Where treaties have already been made, they establish a unique legal and political relationship that the federal government is bound to preserve and maintain. New and renewed treaties can serve the same purpose.

The role of the courts is limited in significant ways. They develop the law of Aboriginal and treaty rights on the basis of a particular set of facts before them in each case. They cannot design an entire legislative scheme to implement self-government. Courts must function within the parameters of existing constitutional structures; they cannot innovate or accommodate outside these structures. They are also bound by the doctrine of precedent to apply principles enunciated in earlier cases in which Aboriginal peoples had no representation and their voices were not heard. For these reasons courts can become unwitting instruments of division rather than instruments of reconciliation.

We learned from our hearings and from the research we commissioned that Aboriginal peoples share strongly held views of the relationship between their nations, their lands, and their obligations to the Creator. The concept of Aboriginal title as developed in English and Canadian courts is at sharp variance with these views, as are the courts' interpretations of some of the historical treaties. It is crucial that judicial decisions on such fundamental issues be made on the basis of full knowledge and understanding of Aboriginal cultures and spiritual beliefs. To do otherwise is to attribute to people perceptions and intentions that are repugnant to the very essence of their being.

Participation in the courts requires Aboriginal people to plead their cases as petitioners in a forum of adversaries established under Canadian law. There is a certain irony in this, since in many instances the adversary they face is also the fiduciary that is obligated to protect their interests. The situation is, to say the least, anomalous, and it would appear that the courts cannot really substitute for a political forum where Aboriginal representatives can develop their own visions of political autonomy within Canada.

There are other, broader considerations to assess in considering the nature of Aboriginal participation in the institutions of Canada. In 1982 the constitution was amended to recognize and affirm the Aboriginal and treaty rights of the Aboriginal peoples of Canada. Those amendments contained a promise to amend the constitution further to determine the nature and scope of those rights. The constitutional promise was not fulfilled in the first ministers conferences conducted for that purpose, and the basic constitutional promise of 1982 is still outstanding.

There have been important changes in recent years in the nature of Aboriginal peoples' participation in statecraft in Canada. Since the white paper proposal to eliminate the distinct status of 'Indians' and the prime minister's refusal in 1969 to recognize the treaties, Canadian society has developed a greater willingness to include Aboriginal peoples as partners in the Canadian enterprise. This has been shown by the participation of Aboriginal representatives in first ministers meetings on constitutional reform, among other changes. With increased participation, Aboriginal peoples anticipate that they, and their voices, will matter more in the Canada of the future. In a sense, participation in the Canadian polity has created a more just image of Canadian society, but that image will

remain what it is — an image — until participation succeeds in achieving a full measure of justice for Canada's First Peoples.