

6



Conclusion

IN THIS VOLUME WE HAVE ADDRESSED the political and economic dimensions of the relationship between Aboriginal peoples and the Crown and how they can be restructured to resolve the unfinished business of Confederation and to achieve the full participation of Aboriginal peoples in Canadian society.

We are persuaded that the organizing principle around which this restructuring should occur is the recognition that Aboriginal peoples constitute nations; that they were nations when Europeans arrived on these shores and entered into alliances with them; that they were nations when treaties were made to provide for the sharing of lands and resources; and that they constitute nations today. Since the first contact with non-Aboriginal people, Aboriginal peoples have demonstrated the enduring will to remain distinct peoples with their own laws, cultures and identities, despite persistent attempts to control and assimilate them.

Historical fact and contemporary preference are not the only public policy grounds for looking to the Aboriginal nation as the core around which this Commission's recommendations are built. What leads us to this approach is the evidence that the road back from economic and political marginalization and social despair has undeniable features:

- For Aboriginal individuals, association with their various peoples as collectivities is central to individual and community identity.
- Aboriginal culture and values are distinct and often sharply at variance with those of the dominant culture.
- Those values and that sense of collective identity are vital to restoring health and effectiveness to individuals and communities.
- After almost a century and a half of treating Aboriginal peoples as wards of the state, mainstream institutions must make way for them to design their own solutions and institutions.

- To be effective, many of these Aboriginal institutions will require the resources, size, and checks and balances that come from being organized at the nation level rather than the community level.

Aboriginal peoples are not impoverished racial minorities whose interests need to be served better by the Canadian state. They are political entities that, because of their treaties, the recognition of their rights in Canada's constitution, and the nature of their social and cultural cohesion, need to be recognized as nations, negotiated with as nations, and thereby empowered to implement their own solutions within a flexible Canadian federation.

1. An Act of National Intention

We began this volume with a discussion of the treaties that, from early contact, were the defining instruments in the relationship between Aboriginal peoples and the newcomers to this continent. While still using treaties to gain peaceful access to lands for settlement, however, imperial and later Canadian governments unilaterally transformed the relationship by implementing what later became the *Indian Act*. This political act imposed wardship and dominance in place of partnership between autonomous peoples. All subsequent efforts to deal with 'the Indian problem' have stopped short of honouring the original treaty relationship, thereby demonstrating an unwillingness to regard Aboriginal peoples as nations and accord them the respect they are due as distinct political entities.

Canadian governments must break with this past. We propose that this be done through a major act of national intention: the promulgation by Her Majesty the Queen of a royal proclamation that will indicate to all Canadians the nature of the new relationship to be created, the principles that support it, the processes envisaged for its establishment, and the government of Canada's intention to give the relationship a legislative base through companion legislation.

We recommend that this be undertaken by the Queen in her role as Canada's head of state and because the monarch has been seen by Aboriginal peoples for more than 200 years as embodying the Crown's protection and good faith. We refer the reader to the opening chapter of Volume 5 of this report, where we recommend what the proclamation should contain.

The approach we propose would do much to bring the importance of this renewed relationship home to Canadians and would help to restore hope among First Peoples. On its own, however, this gesture will not achieve the intended result, given the history of dashed expectations and broken promises. For that reason, and to inform all parties of the nature of the road ahead, the proclamation should be accompanied by a companion act indicating the government of Canada's intention to propose the following legislation for parliamentary review and approval:

1. An Aboriginal Treaties Implementation Act setting out the processes by which existing treaties, particularly the historical treaties, would be clarified, reinterpreted or modernized and new treaties, agreements or accords entered into; defining the institutions to govern the treaty process, that is, the treaty commissions to oversee the treaty negotiations; and providing guidelines for federal policies with respect to the negotiation of lands and resources for Aboriginal nations.

2. An Aboriginal Lands and Treaties Tribunal Act as the instrument to deal with specific claims and as the body to which parties to the treaty negotiations can turn, if necessary, to seek fair and impartial implementation of the treaty process; initially the tribunal would implement federal jurisdiction in the field but over time would be accorded similar authority by provincial governments.

3. An Aboriginal Nations Recognition and Government Act requiring the government of Canada to support Aboriginal peoples seeking to assume the responsibilities of nation status, that is, setting out the criteria and process the government would use to recognize an Aboriginal nation; acknowledging that, once recognized, Aboriginal nations can exercise on their existing territories the law-making capacity they deem necessary in the transition period with respect to the life and welfare of their people, their culture and identity; indicating that the federal government would vacate its relevant legislative authority under section 91(24) of the *Constitution Act, 1867* with respect to these core powers; indicating which additional federal powers the Parliament of Canada is prepared to acknowledge as being core powers to be exercised by Aboriginal governments; and indicating the manner in which these responsibilities would be financed in the interim period before the conclusion of renewed or new treaties.

4. An Aboriginal Parliament Act to give Aboriginal peoples and nations an effective presence at the federal level that supplements representation in the House of Commons; the parliament would be a consultative body until such time as its role in decision-making processes in the Canadian federation could be implemented by constitutional amendment.

5. An Aboriginal Relations Department Act and an Indian and Inuit Services Department Act to create new federal departments to discharge federal Crown obligations to recognized Aboriginal nations and peoples and replace the Department of Indian Affairs and Northern Development.

The process of developing this proclamation and legislation should be undertaken in close consultation with national Aboriginal organizations and provincial and territorial governments. A constitutional amendment is not required for either the royal proclamation or its companion legislation. Consultations to prepare the way for the proclamation and its companion legislation should be the first item of business for the forum that we recommend be established by first ministers and national Aboriginal leaders to negotiate a Canada-wide framework agreement on Aboriginal treaties and governance.

The government of Canada should do all it can to encourage a collaborative process, involving provincial and territorial governments and national Aboriginal organizations, for reaching consensus on the royal proclamation as an act of national political will. In the end, because of its primary responsibility for Aboriginal affairs, it should move to implement these measures with the agreement of as many parties as possible.

2. Negotiating a Canada-Wide Framework

The forum for negotiating a framework agreement would be the next major initiative of the government of Canada following the royal proclamation and enactment of the companion legislation. This forum would have the vital task of providing the means for provincial and territorial governments to join representatives of Aboriginal peoples and the federal government in determining the main parameters of their relationship. Implemented effectively, this forum could save much time and expense in the subsequent treaty negotiations with individual Aboriginal nations. It could also provide a means for smaller nations to receive equitable treatment in their negotiations.

The forum would be commissioned by first ministers but conducted by federal/provincial/territorial ministers of Aboriginal relations along with the leaders of national Aboriginal organizations. It would provide an opportunity for the following matters to be discussed and, it is hoped, settled:

1. principles to guide the treaty processes;
2. principles to guide the negotiations leading to the allocation of lands and resources;
3. principles to govern the negotiation of interim relief agreements to take effect before the conclusion of treaties;
4. the full extent of the jurisdiction to be exercised by Aboriginal governments after treaty processes have been concluded;
5. co-operative agreements to handle areas of co-jurisdiction;
6. fiscal arrangements among the three orders of government; and
7. an interim agreement setting out the core powers that Canadian governments are prepared to acknowledge Aboriginal nations can exercise once they are recognized.

This forum would respond to a work plan authorized by first ministers and national Aboriginal leaders and would report annually to them. The forum would be staffed by a secretariat and would seek to reach comprehensive agreement on these issues among as many governments as possible by the year 2000. Unanimity would not be needed, and regional variation would be encouraged where all the relevant parties agreed. By the same token, while this forum would be a means of advancing understanding and consensus on these issues, Aboriginal nations seeking to enter a treaty negotiation would

not have to wait until agreement is reached in the forum on the issues those nations wished to negotiate.

3. Rebuilding Aboriginal Nations

In Chapter 3 of this volume we set out a process by which Aboriginal nations can begin to reconstitute themselves as nations and create institutions with the breadth and capacity to exercise self-government. This will not be accomplished easily. It will take time to overcome patterns established by the practices imposed by the *Indian Act*. Effective governance will require structures that are consistent with a people's culture and heritage and that, at the same time, encompass sufficient numbers of people to exercise the full authority of effective governance.

We believe that the inherent right of self-government can be exercised only by peoples and nations and not by individual communities, except as part of a larger nation. Ensuring this requires a process by which Aboriginal governments can be recognized by the government of Canada. Access to enhanced financial resources for self-government and the means to negotiate intergovernmental arrangements should also be regulated by the recognition process established under the Aboriginal Nations Recognition and Government Act we propose.

We envisage an intense, and at times complex, process of nation rebuilding before recognition. Many Aboriginal peoples are already well on their way to recapturing their sense of historical identity. But even they are likely to encounter some problems as they determine the effective allocation of power between the nation and its communities. Institutions do not readily share authority, particularly where they have fought so long and hard to acquire it. For Aboriginal peoples, the vision of recapturing their strength and pride as nations, and the recognition that they will be able to accomplish so much more operating as a whole nation rather than as fragmented communities, will, we believe, be persuasive in time.

It is of paramount importance to eliminate the barriers created by the *Indian Act* that prevent nations from coming together. Membership in these nations should be governed by criteria related to heritage, association and acceptance that are defensible by international human rights standards. This is why access to participation in nation building by all those with a reasonable claim to citizenship should be a central criterion for recognition under the Aboriginal Nations Recognition and Government Act. It is particularly vital for decisions about a nation's fundamental law and its citizenship code.

The government of Canada will be concerned that expanding the membership of Aboriginal nations will increase its financial obligations. We propose that the cost of Aboriginal self-government and the delivery of related programs be financed as provincial programs are now under federal-provincial fiscal arrangements — taxation by each jurisdiction of its own resources along with fiscal transfers based on per capita formulas that take into account fiscal capacity and need.

Treaty entitlements, as a separate category of financial or resource transfer, would be negotiated in the treaty process and would become obligations of the government of Canada to the relevant treaty nation rather than to its members. Whether, and to what degree, these entitlements would be determined by membership numbers would be subject to negotiation, but treaty payments would not be counted as resources of the nation government in determining fiscal capacity and need.

4. A Legislative Process for Treaties

In the transition between formal recognition as a nation and the conclusion of a new or renewed treaty, federal government payments (whether they are treaty entitlements or transfers governed by policy) would constitute financing commensurate with the agreed scope of the jurisdiction exercised by the Aboriginal nation in core areas and would help it prepare for treaty negotiations. Funds would be paid to the nation government, to be distributed as the nation considers appropriate.

Following recognition, Aboriginal nations would obtain a mandate from their citizens to enter into a new treaty process with other Canadian governments to encompass an expanded land base, co-jurisdictional arrangements over other lands and resources, and the full extent of their self-governing jurisdiction.

All parties need the confidence that their agendas will be addressed in an open, fair and impartial manner in this treaty process. While recognizing that such negotiations will take many years to complete for all Aboriginal nations, the procedures used must ensure effective resolution of long-standing misunderstandings and grievances. For these negotiations to function effectively and at the least financial cost, trust in the process will be essential. To date, negotiations over land have been governed entirely by policies devised within and approved by the federal bureaucracy and cabinet. This has provided maximum flexibility for ministers and officials, and minimum stability and predictability for Aboriginal and other parties with an interest in the outcome. It has also shielded the policies and procedures from legal challenge.

The fact that these procedures have been governed by policy rather than law has contributed to the inordinate amount of time it has taken to resolve these claims and the hugely wasteful expense involved in their negotiation. If treaty making and land allocation are to become effective means of defining the new relationship, applicable policies and procedures must be subject to the discipline of legislation and to the effective operation of the treaty commissions and the Aboriginal lands and treaties tribunal, which, while appointed by governments, will operate at arm's length from them.

The treaty commissions' tasks would be to provide primarily a framework for the negotiations, to facilitate and monitor the negotiations, to develop a body of expertise with respect to the subject matter on the table and the procedures for arriving at agreement, to offer alternative dispute resolution processes, and to report on progress to the Parliament of Canada and the provincial legislatures.

The lands and treaties tribunal's principal function would be to resolve specific claims over land and other issues where the Aboriginal party did not wish to await resolution within a renewed treaty process. The tribunal would also play a critical role at points in the treaty processes to encourage fairness in the allocation of financial resources to Aboriginal parties and to provide a means of adjudication in the event of deadlock. An arm's-length tribunal to determine the outcome of issues in dispute will undoubtedly reinforce fair dealing.

The tribunal would also be an effective instrument for achieving interim relief where the resources of a territory subject to treaty negotiation were being depleted for the benefit of third parties or government. In those circumstances, the Aboriginal party would be able to have a role in regulating the development and in benefiting from its proceeds. We foresee an effective role for the tribunal in encouraging settlements that are just and timely for all parties. With respect to interim relief agreements, we propose that any party to the negotiation may choose to take a matter to the tribunal for resolution. This must be so because third parties with interests in developing the resource, and the communities that often rely on this activity for their livelihood, have as legitimate an interest in resolving the matter as the Aboriginal party does. The intent is a fair accommodation of all interests.

While these institutions will play a vital part in treaty processes, in the end treaties must be political agreements entered into freely and acceptable to all parties and their constituencies. Ratification of a treaty or agreement by the political bodies of the Aboriginal nation and by the Parliament of Canada and the provincial/territorial legislature involved should therefore be required. Ratification of a treaty by an Aboriginal nation would be viewed as a self-determining act signalling its willing participation in the Canadian federation. Once ratified, a treaty would have the protection of section 35 of the *Constitution Act, 1982*.

5. Redistributing Lands and Resources

We have made the case, in the strongest possible terms, for a new deal with respect to sharing the country's lands and resources. Aboriginal self-government would be a sham without a reasonable basis for achieving economic self-reliance. Depending primarily on outside sources of revenue, even if the nation has the right to decide how to spend those resources, is not acceptable. Responsible government requires raising a substantial amount of the revenue needed for government operations from the nation's own people and resources. This in turn requires the capacity to generate income and levy taxation. The location of some Aboriginal nations is such that their members can earn significant incomes away from the territory, but most nations are highly dependent on territorial-based activity such as forestry, fishing and tourism. The opportunity for employment income and for wealth generation from effective business activity will depend directly on ownership of a more extensive land and resource base as well as revenue sharing on other traditional lands.

In the chapters on treaties and lands and resources in this volume, we made the case for a redistribution of lands between the Crown and Aboriginal nations based on the following factors:

1. compelling evidence that Aboriginal peoples could not have intended to surrender all connection with their traditional territories and their ways of governing when they entered into the historical treaties with the Crown to share these lands with newcomers;
2. the requirement to reinterpret legal treaty documents in the light of the spirit and intent with which treaties were entered into, as understood by the Aboriginal party and as evident in the words Crown officials used in the negotiations;
3. the fact that as much as two-thirds of the territory put aside in treaties for the exclusive use of the Aboriginal party has over the years been removed from reserve status; and
4. the requirement for a modern accommodation defined not by disputed terms of an agreement drawn up in an entirely different age, but by the stated desire on all sides that fair compensation for past wrongs and the means for self-reliance for the future be made available.

Before Canadians can expect to see an end to the enormous waste in human and financial resources that accompanies the economic and social marginalization of Aboriginal peoples, they must come to terms with a redistribution of this country's land and resource base. This will entail defining, through legislation, the nature of Aboriginal title — a process that can be initiated by the courts but requires legislative completion — and reallocating lands and resources. That reallocation would see significant expansion, determined by rational criteria, of lands wholly owned and controlled by Aboriginal nations and a share in the jurisdiction of and benefits from a further portion of their traditional lands, as determined in treaty negotiations.

6. Meaningful Work and Sustainable Wealth

The final pillar in the structure supporting a renewed relationship (the first three being treaties, governance and lands) is economic development — the means by which meaningful work and sustainable wealth are created.

Many forms of work and wealth can be envisaged, each embodying values and choices. We propose that Aboriginal people who choose to retain or return to a traditional lifestyle — where many of life's requirements for sustenance are harvested from the land — supplemented by periodic wage employment, be helped to do so. Healthy, sustainable communities that create the conditions for a rounded life are infinitely preferable to forced emigration to the margins of an essentially alien urban environment. Even if such communities have to be subsidized in the long term to give their citizens access to standards of health and education equivalent to those of other Canadians, the costs, both social and financial, are likely to be significantly less than those occasioned by a rootless urban existence. Innovative uses of the resources that now flow so unproductively into

these communities in the form of social assistance could contribute to changing standards of living and quality of life.

Given the choice, however, most Aboriginal people and communities will likely want to participate in the market economy. Such activity gives them the chance to choose careers and lifestyles as most Canadians do. They want to be able to do that and also to retain their values and collective identity. They are struggling to reshape the way they participate in commerce and professional activity to make their participation compatible with those values.

The reality is that a large percentage of Aboriginal people today face a bleak economic future. Their prospects for breaking out of the cycle of dependency and despondency are slim unless methods of education and skills acquisition undergo significant changes, and unless business and economic development efforts are greatly improved. The fundamental reforms in education we call for in the next volume are a vital component of these changes. The approach to employment training and placement recommended in the previous chapter is essential to achieving any real breakthrough in youth unemployment. A sustained supply of equity capital and enhanced access to business management skills are also critical ingredients in maintaining momentum toward economic development and self-reliance.

7. Equipping for Self-Government

In Volume 5, Chapter 2, we analyze the present and future costs of the remedial measures necessitated by the social and economic marginalization of Aboriginal people — social assistance and unemployment insurance, health care, child and family services, counselling, policing and correctional services, and so on. We also examine the current and projected income losses that occur when Aboriginal people lack the opportunity to be as productive as other Canadians. The cost to Canada of these remedial measures and lost income is immense. The human cost of disrupted and unfulfilled lives is incalculable.

This situation cannot continue. With the tools set out in this volume and the awakening of confidence among Aboriginal people, fundamental change is possible. We believe that the regenerative capacity of individuals and communities will transform the lives of Aboriginal people.

Early in the next millennium, we see Aboriginal communities organized into nation governments, responsible for most aspects of their economic, social and legislative affairs. An expanded land base and the acquisition of management and professional skills will give them the possibility of a return to self-reliance for the first time in well over a century. We see Aboriginal governments raising more and more of their own revenues over time and being assisted — as other Canadian governments with lower than average resources are — through fiscal agreements.

Many of their citizens will live outside their nation territory for a period, contributing to the larger economy and paying taxes to federal and provincial governments and returning

periodically to contribute to their home communities. Other Canadians will respect the territories of Aboriginal nations and will abide by their laws when they choose to live, do business, or vacation therein. Canadians will honour the treaty entitlements they have negotiated with Aboriginal nations, recognizing that wealth that has flowed to them as a result of the sharing of this country's lands and resources.

Aboriginal peoples will influence the culture and lifeways of this country in myriad subtle and profound ways, and Canada will have a richer identity and a more just and vibrant society because of Aboriginal peoples' role in national life.

The restructuring of the relationship proposed in this volume is attainable. Its achievement will depend certainly on the readiness of Canadians at large to embrace change, but far more will depend on Aboriginal peoples being equipped for the tasks ahead. It is to this endeavour we turn in the next volume.