

**Rebuilding, healing and accommodation :
facing the challenges in Canada**

/ by Scott Serson, Deputy Minister

Ottawa : Indian and Northern Affairs, 1997

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Rebuilding, Healing and Accommodation: Facing the Challenges in Canada

by

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May 27, 1997

1. Introduction: Reconciliation in the Canadian Context

Canada, the oldest parliamentary democracy among Britain's former colonies, is today a nation in transition, poised between a number of unresolved issues from the past and an exciting future as a modern, industrialized society entering the age of information technology. And Canadians, like Australians, very much wish to be part of a confident and harmonious nation as we approach the turn of this century.

In this regard, Canadians are faced with a twofold challenge: to come to terms with historical events that continue to colour much of our modern political and social discourse, and to harmonize the legacy of those events with Canada's current status as a multicultural federation evolving in directions still unknown. In my view, the efforts being made now in Canada to reconcile our differences, to recognize the unique place of Aboriginal peoples in our federation and to forge a renewed partnership between Aboriginal and non-Aboriginal Canadians will be key to meeting this twofold challenge.

Reconciliation is a word with many shades of meaning. The *Concise Oxford Dictionary*, for example, speaks of restoring a friendship after an estrangement, healing the effects of a quarrel, or harmonizing conflicting facts, statements or actions.¹ Although we have come to use somewhat different terminology, the thrust of our recent experience in Canada is in line with these dictionary meanings. There can be no doubt, for instance, that the original friendship between Aboriginal and non-Aboriginal societies reflected in Canada's history must be restored. Canadians call this "rebuilding" and have dedicated years of constitutional and other forms of discussion and negotiation to establishing the conditions and direction of the rebuilding effort, whether it be with respect to Aboriginal self-government as such, the renewal of the treaty relationship or the restoration of land and resources to Aboriginal peoples and communities.

But rebuilding means more than setting discussion agendas and devising goals and procedures. It also requires that all parties work to heal the emotional and spiritual effects of the decades of estrangement between them during which a climate of oppression and mistrust became an almost entrenched feature of the relationship. In Canada we use the term healing unashamedly to refer to the process of emotional and spiritual mending that needs to occur. A vital part of that process lies in harmonizing conflicting accounts of particular historical events,

¹ (Oxford University Press, 5th ed., 1964) at 1034.



actions taken by one party to the detriment of the other, or misplaced, odious or careless statements about the other's value or place in Canada's political and social landscape. In its recent report, the Royal Commission on Aboriginal Peoples notes that Aboriginal peoples have emphasized the importance of this aspect of reconciliation, and have called for "deliberate action 'to set the record straight.'"²

And as Canadians have begun to set the record straight, a theme not explicitly referred to in the dictionary definition - accommodation - has assumed increasingly important dimensions. For, as will be discussed later in this paper, setting the record straight reveals a history of mutual accommodation between European and Aboriginal societies that led to particular social, cultural and political relationships, unique institutions and mutual cultural adaptations and even to the birth of a new North American people, the Métis. Yesterday's accommodation also guides the reconciliation efforts being made today to accommodate cultural differences, for instance, by enhanced respect for the place of Aboriginal languages in the Canadian linguistic mosaic, or by rebuilding the political relationship on the basis of accommodating Aboriginal law-making powers and existing federal and provincial constitutional jurisdictions.

It also means accommodating the rights, needs and aspirations of all of Canada's First Peoples, not just those that have historically been recognized as entitled to special status under the *Indian Act* or other federal legislation. Nor is accommodation restricted to those Aboriginal peoples or communities that have maintained traditional languages, customs and lifestyles to the exclusion of all other influences. Nor again is accommodation restricted to Aboriginal peoples living in isolated rural or northern settings. The increasingly large numbers of Aboriginal peoples living in Canada's towns and cities too must be able to find their collective place in the Canadian federation. Creative measures will be needed to allow them to create a social, cultural and political space within which they may flourish.

As in Australia, rebuilding, healing and accommodation can only succeed if Canadians of all stripes and from every walk of life embrace these broad reconciliation efforts. This requires more than the enunciation of formal government policies, it requires education, good will, tolerance and time. Above all it requires an unremitting commitment to change coupled with a healthy dose of realism and patience. Canada's history is a long one, marked by many phases in the relationship between Aboriginal peoples and the newcomers from whom most of Canada's present population is descended. It took centuries to get to where we are now, and we will not bring about all the changes we know to be required overnight.

However, Canada has a strong recent history of public participation in national policy debates, one of the side effects of which has been a growing public awareness that changes in the relationship between Aboriginal and non-Aboriginal Canadians are required. This lends both

² Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, Vol. 1, *Looking Forward, Looking Back* (Ottawa, Ministry of Supply and Services, 1996) at 7.

public support and a sense of urgency to our national reconciliation efforts and allows us to proceed more confidently in the face of the many challenges before us.

2. Canada's Challenges

The Canadian Constitution³ mentions three Aboriginal peoples - the Indians, Inuit and Métis⁴ - and it is these peoples and the national reconciliation efforts being made at the present time that will be the focus of this paper. From a conceptual point of view, the challenging tasks now facing Canadians are to re-establish mutual respect, to foster greater trust between Aboriginal and non-Aboriginal Canadians, and to better enable Aboriginal peoples to participate in decision-making processes where their interests or aspirations may be affected.

The enormity of these challenges should not be underestimated. There exist many serious and long standing problems to be resolved and Canadians would be the last to claim to have all the answers or to have overcome the obstacles and frustrations of the past. Nonetheless, there is considerable cause for optimism. Aboriginal and non-Aboriginal Canadians have learned a great deal through their shared history about what does and does not work in their overall relationship. Much of what does not work has been imposed on Aboriginal peoples without their willing participation, and this is a lesson that Canadians have taken to heart.

Instrumental in imparting this lesson have been several generations of articulate and effective Aboriginal leaders and a series of important judicial decisions, academic studies and inquiry reports. Canadians are more aware than ever before of the importance of understanding and accommodating the often profound cultural and spiritual differences between Aboriginal and

³ The Aboriginal peoples of Canada are referred to in section 35 of the *Constitution Act, 1982*, R.S.C. 1985, Appendix II, No. 44 as follows:

35. (1) The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.

(2) In this Act, "aboriginal peoples of Canada" includes the Indian, Inuit and Métis peoples of Canada.

⁴ While clearly a misnomer, "Indians" refers to the original inhabitants of North America. Indians inhabit all regions of Canada except the far north and are divided into many distinct linguistic and cultural groups. Based on projections from available census data, federally registered ("status") and unregistered ("non-status") Indians are thought to number in total around 624,000 - 60% of whom reside on federally administered reserves - and are divided into 609 bands. The Inuit live in the most northerly regions and, while speaking a single language, are divided to some extent by different dialects and cultures and number around 42,500. The Métis people sprang originally from intermarriage between Indian people and fur traders, explorers and others. There is continuing controversy about who is entitled to be called "Métis". The term was originally reserved for the mixed blood people of western and northern Canada, but today, many groups in other parts of the country also self-identify as Métis. There may be as many as 152,800 Métis in Canada, in urban and rural settings. All population projections are drawn from the report of the Royal Commission on Aboriginal Peoples, *Looking Forward, Looking Back*, *supra* note 2 at 15-16. Based on these figures, in 1996 Aboriginal peoples made up 2.7% of Canada's population of 29,963,700.

non-Aboriginal societies and of moving forward in a new spirit of common enterprise. Ironically, this is in many ways a reflection of the original guiding spirit of the earliest recorded interactions between Aboriginal and non-Aboriginal societies in what is now Canada. The report of the Royal Commission on Aboriginal Peoples refers to this early period as one of "contact and co-operation," a time in our history they describe as "marked by increasingly regular contact between European and Aboriginal societies and by the need to establish the terms by which they would live together."⁵ In fact, with only slight modification this could also serve as a working definition of reconciliation in the modern Canadian context.

For several years one of the explicit goals of Canadian national policy has been to build a new partnership with Aboriginal peoples by proceeding in a pragmatic and focussed way on two tracks to look at how we may share the land, resources and enormous future possibilities of this country. The first track is to make progress on rights issues relating to the implementation of Aboriginal self-government and to the resolution of land claims. The second is to strengthen individual Aboriginal communities by improving their socio-economic conditions and by working with them in other ways to heal the spiritual and emotional wounds left from earlier periods in our history.

One important lesson we have learned from recent experience is that these tracks cannot be pursued in isolation from each other. Meaningful progress will be made only if the balance between them is maintained. Achieving that balance is perhaps the greatest challenge facing us in Canada, for it involves consulting regularly with Aboriginal peoples and their organizations on a vast range of initiatives, ensuring that federal government departments work in a coordinated way with each other and that all levels of government - federal, provincial and territorial and municipal - harmonize their efforts and avoid working at cross-purposes with each other.

It also requires a vast effort of good will, tolerance and continued commitment by Aboriginal and non-Aboriginal Canadians to the ideals of mutual respect and tolerance. Reconciliation must be a people's movement, whether one speaks of Australia, Canada or any other country in which indigenous and settler societies occupy the same territory. However, and as the earlier passage from the Royal Commission report suggests, in Canada we are fortunate in one respect. At the beginning and for a considerable period afterward, relations were animated by varying degrees of respect, tolerance and co-operation and by agreements in the form of shared understandings, joint commercial ventures and formal treaties and alliances. This gives Canadians a rich and largely positive early history to draw upon.

⁵ *Looking Forward, Looking Back, ibid* at 38.

3. Early Canadian History: Contact and Co-operation

The Royal Commission divides Canadian history into four periods: "separate worlds,"⁶ "contact and co-operation," "displacement and assimilation," and the modern era of "negotiation and renewal."⁷ During the co-operative period of early Canadian history, common interests led to a tradition of alliance, mutual tolerance and adaptation and joint effort in a variety of social, commercial and political areas as Aboriginal and non-Aboriginal individuals and societies came into increasing contact with each other. For both this was in many ways simply a continuation of their own prior traditions of trade ventures, exploration and treaty-making. In other significant ways, however, new procedures, institutions and peoples - the Métis - emerged as a result of this inter-societal contact. In the resulting new arrangements and shared understandings can be found the foundation for many of Canada's modern policies, practices and legal and constitutional ground rules.

4. Displacement and Assimilation

After the fall of New France to Great Britain in 1763 the growing population, economies and military strength of the settler societies was matched by a corresponding dramatic decline among the Aboriginal peoples in the settled portions of eastern and central Canada. By the mid-1800s interdependence had been replaced by a growing Aboriginal dependence fuelled by the loss of their traditional subsistence and trading economies. Original policies based on mutual assistance and co-operation were overtaken by harsh new approaches focussing on the eradication of Aboriginal culture and ultimate assimilation into colonial society. These new assimilating forces soon took on legislative form and were gradually imposed on unwilling and resistant Aboriginal communities.

At the same time the colonies began to assume more and more control over their own affairs. In 1860 the responsibility for relations with Aboriginal peoples was transferred to the legislative assembly of Canada and, with Confederation in 1867, it was established that henceforth the new federal government would exercise constitutional authority in this regard.⁸ National legislation in the form of the *Indian Act* built on the prior policies, explicitly empowering the federal government to regulate a number of aspects of Indian life such as land and resource management, education, health care, social welfare etc. that would otherwise fall under provincial constitutional jurisdiction. Through often well-intentioned but nonetheless

⁶ This was the period prior to 1500 when "Aboriginal and non-Aboriginal societies developed in isolation from each other" in different physical and social environments that "inevitably meant differences in culture and forms of social organization.": *Looking Forward, Looking Back, ibid* at 37.

⁷ *Looking Forward, Looking Back, ibid* at 36-40.

⁸ Constitutional jurisdiction over "Indians, and Lands reserved for the Indians" is enshrined in section 91(24) of the *British North America Act*, later renamed the *Constitution Act, 1867*, R.S.C. 1985, Appendix II, No. 5. While Inuit are considered to be "Indians" under Canada's Constitution (*Ref. re term "Indians"*, [1939] S.C.R. 104) the precise constitutional status of the Métis remains unclear.

misguided policies focussing on the suppression of their distinctive cultures and historical political autonomy, the seeds of many of many of the social and economic problems now confronting Aboriginal peoples were sown.

It was also during the immediate post-Confederation period that Canada's borders were extended west and north to include the lands occupied by the plains Indian tribes and the emergent Métis people. In the early twentieth century sustained contact began to be made with the more northerly Inuit whose hunting economies and singular culture were soon disrupted irrevocably.

5. Canada Awakens to the Legacy of History

Following the end of the Second World War Canadians began on a large scale to become aware of the injustices produced by the events of our history. Inspired by the significant contribution of Aboriginal servicemen and women to the Canadian war effort, a multi-year joint parliamentary committee hearing process was initiated in the late 1940s to review the *Indian Act*. Through the public hearings and consultations with Indian organizations and individuals, this important event also established the principle that Aboriginal peoples must have a voice in any national programs or policies developed with them in mind. Although beset by some false starts and disappointments, including an assimilative federal White Paper policy proposal in 1969⁹ and initial official reluctance to include Aboriginal peoples in the earliest rounds of national constitutional talks between the federal Prime Minister and provincial premiers, this principle was most strongly demonstrated by the active participation of the national Aboriginal organizations in a series of constitutional talks throughout the 1980s and early 1990s.

These talks were a watershed event in the evolution of Canada's reconciliation process. For the first time in modern Canadian history, national Aboriginal leaders sat at the same table with Canada's Prime Minister and Premiers to try resolve the thorny issues surrounding Aboriginal and treaty rights in Canada's constitutional framework. On another level, these talks also signalled to all Canadians that prior policies of assimilation had been abandoned.

In total, five constitutional conferences involving Aboriginal peoples were held following the adoption in 1982 of a constitutional provision recognizing Aboriginal and treaty rights.¹⁰ The first, in 1983, was televised across the country and saw the adoption of amendments to the Constitution explicitly equating land claims settlements with treaties and ensuring sexual equality by guaranteeing Aboriginal and treaty rights to Aboriginal men and women. The land

⁹ In *Statement of the Government of Canada on Indian Policy 1969*, the federal government proposed discussions on the elimination of special Indian constitutional status and ending the treaty relationship. As a result of Indian protests across Canada the proposal was withdrawn two years later. From that point on it has been federal policy to provide funding support to Aboriginal organizations to allow them to participate in regional and national level political activities and to advance policy issues on the national stage.

¹⁰ See note 3, *supra*.

claims provision was in direct response to the importance of the James Bay and Northern Québec Agreement of 1975, and the later Northeastern Québec Agreement of 1978¹¹ while the other reflected the concerns of Aboriginal womens' groups.

An amendment was also adopted strengthening the balance struck in the *Canadian Charter of Rights and Freedoms* between liberal individual rights and the traditional collective approach of Aboriginal peoples.¹² The last amendment adopted in 1983 was unusual and reflected our national commitment to move forward on these crucial matters, for it mandated additional constitutional meetings at which the unresolved issues surrounding Aboriginal and treaty rights would be discussed by Aboriginal and non-Aboriginal political leaders sitting around the same constitutional table.

The 1983 amendments were highly significant in modern Canadian constitutional history. In the first place, they were the last to result from multilateral negotiations in which the Prime Minister and all the Premiers agreed to a common set of constitutional changes. In the second place, they are the only constitutional amendments regarding the rights of Aboriginal peoples that we have been able to bring about in Canada. Aboriginal and treaty rights have proven to be difficult to define and, over the course of the subsequent constitutional conferences of 1984, 1985 and 1987 there developed a shared understanding that focus on the Aboriginal right of self-government could be the key to resolving the constitutional impasse.

¹¹ The land claim arose from the historic failure of the federal and provincial governments to negotiate the formal cession by the Cree, Inuit and Naskapi peoples of their traditional lands in the northern half of what is now the province of Québec - something that was done through the treaty process in other parts of Canada where Aboriginal peoples held their land under the common law form of land tenure described by the courts as "Aboriginal title." These agreements resolved the land claims, creating different categories of land ownership use, establishing novel programs such as an income security regime for Cree trappers, an environmental impact and review process, and providing for continuing federal and provincial programs to remedy the effects of displacing Aboriginal people from their traditional locations and occupations. The two Québec agreements are described in Evelyn Peters, "Federal and Provincial Responsibilities for the Cree, Naskapi and Inuit under the James Bay and Northern Quebec and Northeastern Quebec Agreements", in David Hawkes (ed.), *Aboriginal Peoples and Government Responsibility* (Ottawa: Carleton University Press, 1991) 173.

¹² The *Charter* is essentially a bill of rights enshrining western European and North American liberal democratic values. In section 25, an attempt is made to shield the collective Aboriginal and treaty rights guaranteed elsewhere in the Constitution from any undue diminution that might result from the application of *Charter* values to their collective rights. The 1983 amendment simply ensured that the provisions of present and future land claims settlements would benefit from the same shielding.

Since the failure of the 1992 draft Charlottetown Accord - one part of which dealt extensively with Aboriginal self-government¹³ - the federal government as a matter of policy has recognized that the Aboriginal right of self-government is a pre-existing inherent right, (*i.e.* derived directly from the Creator) that, through negotiated agreements must be put into concrete form and harmonized with the existing constitutional jurisdictions of the federal, provincial and territorial governments. There have been no further constitutional talks on Aboriginal issues since 1992. The approach of the current government, however, is to begin focussed negotiations immediately with willing groups. At the same time, comprehensive land claims settlements continue to be concluded.

With the advent of the *Constitution Act, 1982* with its specific reference to the constitutional rights of Aboriginal peoples, it would not be wrong to say that Canada entered into a new age of federal restructuring and national reconciliation. The Royal Commission on Aboriginal Peoples calls this the historical period of "negotiation and renewal," concluding that it began sometime after the rejection of the federal White Paper of 1969. Perhaps the most important conclusion to be drawn from this intense period of recent Canadian history is that things appear to have come full circle. At the beginning, Aboriginal and non-Aboriginal societies worked together - mainstream Canadian society did things *with* Aboriginal societies. For reasons having to do with the prevailing philosophies and attitudes of the time, there followed a shorter but destructive period during which Canadian society attempted to do things *for* Aboriginal peoples. As I will discuss below, Canada, its government, and the federal department I currently represent, the Department of Indian Affairs and Northern Development (DIAND), have returned to the lesson of past co-operation and are trying to do things in partnership with Aboriginal peoples once more.

Four important lessons were learned by this decade long experiment with high level constitutional talks. The first is that it is difficult, perhaps impossible, to discuss self-government issues in the abstract on the basis of historical claims and counterclaims but without contemporary working models from which to draw practical examples of what does and does not work in today's complex and interrelated world. The second is that the sheer variety of cultures, approaches and aspirations of Aboriginal peoples from vastly different regions and with different historically-derived constitutional and legal rights makes prescriptive constitutional definitions and formulae meaninglessly general. The third is that nothing will be achieved without strenuous, sincere and lengthy negotiations to permit us to pass through the thicket of unresolved historical misunderstandings to grapple with the difficult task of translating an abstract inherent

¹³ Aboriginal self-government is a well-known expression in Canada that does not have connotations of independence or secession. The first formal federal self-government policy as such - community based self-government - was announced in 1986 and led to the conclusion of agreements with First Nations in the Yukon Territory that were brought into force by federal legislation in 1994. Similar self-government agreements with the 9 Cree and Naskapi bands of northern Quebec were brought into force in 1984 and with the Séchelt Indian Band of British Columbia two years later. Under the inherent right policy, these prior agreements may be revisited and updated.

right into practical and enduring self-government arrangements.

The fourth lesson is perhaps the most important, if only because of its sobering effect and the fact that Aboriginal peoples themselves have known this for a long time. Self-government means very little unless Aboriginal peoples have the resources to make it work. This means, among other things, having the fiscal, territorial and natural resource base to become more economically self-reliant and capable of maintaining a governmental and administrative apparatus. It also means having a sufficient number of trained personnel to assume the functions currently discharged by federal, provincial and territorial public officials, safe and healthy communities, and coming generations of educated and committed children willing to assume the mantle of governance in their turn.

6. The Royal Commission on Aboriginal Peoples

A significant step in the reconciliation journey in Canada was taken in 1991 with the creation by the federal government of the Royal Commission on Aboriginal Peoples with a broad mandate to study Aboriginal issues and to make recommendations for change in all areas of Canadian national life. Four of the seven commissioners were Aboriginal and all commissioners came to the task before them with strong backgrounds of participation in Canadian national life. After several years of study during which it conducted four rounds of national consultations with Aboriginal peoples across the length and breadth of Canada, the Commission has issued a 5 volume final report, making 440 recommendations in total. The essence of these recommendations is to call for a change in the relationship between Aboriginal and non-Aboriginal peoples and a renewal of the original spirit of the relationship between them.

The Commission has recommended that the renewal of the relationship be based on four principles which it sees as key to restoring a sense of balance.¹⁴ The first, mutual recognition, calls on non-Aboriginal Canadians to recognize that Aboriginal peoples are the original inhabitants and caretakers of this land with distinctive rights and responsibilities flowing from that status. At the same time, Aboriginal Canadians must recognize that, by birth and adoption, non-Aboriginal people are equally part of this land, being bound to it by strong emotional ties.

The second principle, mutual respect, requires both sides to recognize the worth of the other's cultures and languages and to approach each other with courtesy, consideration and esteem on the basis that both Aboriginal and non-Aboriginal peoples and individuals have equal dignity and value. Mutual respect must be personal and institutional and should also be reflected in the public symbols of this country.

¹⁴ The discussion of these principles is derived to a considerable extent from the summary of this aspect of the Royal Commission report prepared by David C. Hawkes for "A Public Forum on the Final Report of the Royal Commission on Aboriginal Peoples" held at the Banff Centre, Banff Alta. On March 4-7, 1997. Mr. Hawkes is a former research director for the Royal Commission on Aboriginal Peoples. See also, *Looking Forward, Looking Back*, *supra* note 2 at 675-97.

The third principle, sharing or reciprocity, harkens back to Canada's origins in the giving and receiving of economic and social benefits for mutual advantage. Implementing this principle will require negotiations with Aboriginal peoples and communities to restore to them access to the lands and resources they will require to make self-government a reality. It will also require that non-Aboriginal Canadians assist Aboriginal communities to repair the social and economic damage incurred by their communities over the past decades in which poverty and alienation from the national economy became the norm.

The fourth principle, mutual responsibility, demands that both partners act from the highest motives, animated by good faith and respect for the other. The Royal Commission describes this as implying mutual obligations, what the courts in Canada have referred to from the perspective of the Crown's obligations as a "fiduciary relationship."¹⁵ One significant element of this principle is the concept of stewardship, responsibility for protecting the environment and sustaining the ecological balance, something that is of prime importance in Aboriginal philosophies.

This is a lengthy, serious and important document with profound ramifications for how government operates. It will not be implemented overnight. In fact, the Royal Commission calls for a full 20 year program of rebuilding in order that the many attitudinal, spiritual and structural changes to Aboriginal and non-Aboriginal societies that it calls for may be brought about. Many of those changes are already in process through the many reconciliation initiatives now under way in Canada. Obviously, there are many other changes that still need to be made in order to restore the once healthy relationship between Aboriginal and non-Aboriginal peoples.

7. Particular Reconciliation Efforts

Canada's efforts at confronting the challenges flowing from our long relationship with the First Peoples of this continent may conveniently be placed under three headings: political accommodation, territorial restoration, and historical, spiritual, socio-economic and cultural healing. All are integral to the overall reconciliation effort.

As the earlier portion of this paper has illustrated, efforts at political reconciliation have already borne fruit. In less than 50 years Aboriginal peoples have moved from being spectators to national policy debates about them to being participants in national talks concerning their place in Canada.

In terms of participation in decision-making, it is now policy and practice for government to consult with affected Aboriginal national and regional organizations, communities and special interest groups regarding policy initiatives that may touch their rights and interests. This reflects

¹⁵ See, for example, *Guerin v. The Queen*, [1984] 2 S.C.R. 335 and *R. v. Sparrow*, [1990] 1 S.C.R. 1075 where the Supreme Court discusses the application of this private law concept to Crown-Aboriginal relations.

not only a recognition in practice of their special constitutional status, it also reflects an enhanced awareness on the part of non-Aboriginal Canadians and their governments of the legitimate voice of Aboriginal peoples in debates about the values that will collectively guide us in the future. And this consultation has altered the course of national policy. The most well-known example of this occurred in the 1970s when a pipeline was *not* built along the Mackenzie valley corridor in northern Canada because of the concerns of the Indian, Inuit and Métis peoples of the Northwest Territories with the potential effect on natural habitat and the wildlife upon which they depended. On the other hand, we are still struggling in Canada to work out when and to what extent it is appropriate to include national Aboriginal leaders in formal federal/provincial/territorial meetings on issues other than constitutional amendments that directly affect them.

In keeping with a growing awareness that doing *for* Aboriginal peoples as opposed to acting with them has been the cause of many false steps in our overall relationship, it has been official policy to devolve many of the government Aboriginal services and programs to Aboriginal organizations and communities to deliver. Federal funds have been made directly available to Indian communities for these purposes since the late 1960s. About 25 years ago "core" funding was made available to Indian band councils for their own governance functions as well as to enable them to deliver some social and economic development programs, education services and to construct housing on reserves. Today, of the total budget of some \$3.6 billion spent by DIAND on Indian and Inuit programming, fully 82 per cent is directly administered by the communities themselves under a variety of financial agreements. Taking into consideration direct transfers to the provincial governments - which, due to proximity to the communities and economies of scale are more efficient than the federal government in some areas - DIAND administers only seven per cent of this budget.

I have already given the broad context for the self-government negotiations going on all across Canada under the federal government's inherent right policy. The effect of this approach will be to enable Aboriginal peoples to negotiate agreements recognizing their inherent right of self-government in areas that are internal to their communities, integral to their cultures, languages, identities, institutions and traditions and which relate to land and resources. Self-government will be exercised within the Canadian constitutional framework and will be subject, for example, to the *Charter* and our national system of criminal law. No single model of self-government is advocated, and provinces are directly involved in negotiations when matters affecting their jurisdiction are being discussed. Negotiations may be comprehensive or may only cover one sector such as education, child welfare, housing or some other area that the group or community concerned may feel to be a priority area for them.

Having concluded their comprehensive land claim, the Inuit of the Northwest Territories, for example, have opted for a public form of government under the name Nunavut, an Inuktitut word meaning "our land." The resolution of their land claim has led to the division of the Northwest Territories into roughly equal eastern and western portions. Federal legislation passed in 1993 will see the eastern portion become a territory in its own right by 1999, effectively

permitting the majority Inuit population¹⁶ to control a public government through the ballot box. Over time, this government will assume the legislative powers and administrative functions now being discharged by the federal and territorial governments. To assist in the transition to full territorial government status, an implementation commission has been created to advise governments and the Inuit organization that administers the land claim settlement on issues such as infrastructure needs, government design, election processes etc.

The Mi'kmaq people of Nova Scotia, on the other hand, have decided not to seek a comprehensive self-government agreement at this time. Instead they have opted to pursue education as a priority, and have recently concluded an agreement that will give them greater control over the type of instruction received by their children. All three partners, the federal and provincial governments and the Mi'kmaq chiefs in the province of Nova Scotia, have agreed that the Mi'kmaq should take control of primary and secondary education for Mi'kmaq students. Federal funding will enable the Mi'kmaq to design and deliver an education system that meets their priorities and to maintain and operate the facilities needed to do this.

Where Aboriginal groups or communities negotiate agreements in a sector such as education, they may return to the process to conclude agreements in other sectors. At the time of preparing this paper, there were more than 80 negotiation tables set up all across Canada to negotiate inherent right agreements. At this point it would be premature to speculate on the shape that final agreements might take in any particular case. One thing is clear. The negotiations will be long and tough. This is only to be expected, for there are difficult practical and jurisdictional issues to be resolved.¹⁷

Another way we are working to move forward and to demonstrate good faith towards our Aboriginal partners is to resolve long standing issues related to lands and resources. For nearly three decades it has been national policy repair the oversights of the past by negotiating two types of land claim settlements with Aboriginal peoples. Comprehensive claims, such as the James Bay and Northern Québec Agreement, involve those areas of Canada's land mass where the lands were occupied by Aboriginal peoples and may still be said to be unceded. This, of

¹⁶ At the moment, Inuit make up well over 80 per cent of the population of the region that will become Nunavut. Due to the extreme northern location of the new territory, it is not anticipated that non-Inuit will ever outnumber Inuit.

¹⁷ At the second session of the United Nations Working Group on the Draft Declaration (WGDD) in Geneva, Canada made a statement affirming that it accepts a right of self-determination for indigenous peoples that respects the political, constitutional and territorial integrity of democratic states. In keeping with Canada's domestic position, it was noted in addition that the exercise of this right involves negotiations between indigenous peoples and the states in which they live; such negotiations must reflect the jurisdictions and competence of governments and take into account the different needs, circumstances and aspirations of the indigenous peoples involved; and that the intention is to promote harmonious arrangements for self-government within sovereign and independent states and not to authorize the dismemberment of states with representative governments. It was also noted that this understanding would need to be reflected in the text of the Declaration.

course, is the same issue dealt with in the ground-breaking *Mabo* decision here in Australia. Federal funds are available to assist Aboriginal claimants to research, present and negotiate their claims. The goal is to replace claims based on relatively undefined Aboriginal rights with a clearly defined package of rights and benefits set out in a formal agreement. A number of comprehensive claims have been concluded since 1973, and approximately 70 negotiation tables are ongoing.¹⁸

The ten settlement agreements to date provide 49,000 Aboriginal people with ownership of more than 560,000 square kilometres of land - an area larger than France. And the Nisga'a people of British Columbia - whose land claim led to the court case that returned Canada to the negotiating table in 1973¹⁹ - have signed an agreement-in-principle and are presently negotiating a final settlement. When we are able to finally settle their century long land claim, it will be a testament to the patience and sheer courage of the Nisga'a and will be a singular achievement both for Canada and for the Nisga'a people.

The other form of land claim settlements are known as specific claims. They involve land transactions in which Canada has an outstanding lawful obligation towards a particular group or community. For example, in many cases Indian people may not have received the amount of land to which they believe themselves to be entitled under treaty, or may have lost lands reserved to them as a result of errors, doubtful transactions or even fraud.²⁰ Canada will undertake to negotiate a resolution where the First Nation is able to present cogent evidence of a lawful obligation on Canada's part. The fact that the claim may otherwise be time-barred in a court of law will not be considered. Thus, even claims going back to the pre-Confederation period - before Canada's formal existence as such - will be accepted. As with comprehensive claims, federal moneys are available to Aboriginal groups or communities to assist them to

¹⁸ Ten agreements have come into effect since 1973 in the province of Québec, the Northwest Territories or the Yukon. The latter are under exclusive federal constitutional jurisdiction. The settled claims are the James Bay and Northern Québec Agreement (1975) and the Northeastern Québec Agreement (1978); Inuvialuit Final Agreement (1984)(NWT); Gwich'in Agreement (1992)(NWT); Nunavut Land Claims Agreement (1993)(NWT); Sahtu Dene and Metis Agreement (1994)(NWT), and four Yukon First Nation agreements - Vuntut Gwich'in, Nacho Nyak Dun, Teslin Tlingit Council, and Champagne and Aishihik - all in 1994. These agreements involve large cash payments, ownership or possessory rights to certain specified areas as well as wildlife harvesting and other resource co-management rights of various kinds over adjacent areas. In some cases economic assistance and incentives (such as special tax regimes) are also part of the settlement package. The 70 ongoing negotiations include comprehensive claims as such as well as negotiations under treaty and other processes.

¹⁹ *Calder v. Attorney-General of British Columbia*, [1973] S.C.R. 313.

²⁰ Treaty Land Entitlement claims (TLEs) are a variant of specific claims involving claims of failure to provide the amount of land required under treaty. This is a particular problem in western Canada and requires the active participation of provincial authorities in their resolution since the lands at issue now fall under provincial jurisdiction. A landmark agreement was concluded with most of the TLE claimant bands in the province of Saskatchewan in 1992 involving cash compensation to enable the 25 settlement bands to purchase land to add to their reserve land base.

research, present and negotiate the claim. Since 1973, approximately 829 specific claims have been submitted, of which 421 have been dealt with by settlement or by other means. At the time of preparing this paper, 408 claims were in process, with 108 of these in negotiations.

In order to assist in the resolution of specific claims an arm's length commission was established in 1991 to investigate those that had been rejected because they did not meet Canada's criteria for acceptance for negotiation, to recommend solutions and to mediate in other cases where impasse may have been reached in actual settlement negotiations. The recommendations and new information provided by the inquiries have resulted in many formerly rejected claims being accepted for negotiation. At the present time, the mandate of this commission is being studied as part of an overall review of the specific claims policy itself with a view to making the process a more effective vehicle for remedying past errors and injustices.

Nor has the treaty-making process as such ended in Canada. For example, over 70 per cent of the 196 First Nations in British Columbia are currently in the trilateral (First Nations-Canada-British Columbia) treaty negotiation process. This is something long demanded by First Nations in that province and will correct the historic anomaly whereby British Columbia was largely left out of the original treaty land cession process. It will also enable British Columbia First Nations to develop self-government and resource sharing arrangements at the same time as the land ownership issues are being dealt with. In fact, at the time of preparing this paper, negotiations had already begun, with two dozen framework agreements having been signed, and several others under negotiation.

One challenge with which we are still wrestling involves the interpretation to be given to the historic treaties signed with First Nations across Canada. Canada is a country built on the many-layered foundations of French, British, colonial and Canadian legal and constitutional principles, and has inherited many privileges and obligations derived from historically distant treaty relationships entered into by its Imperial and colonial predecessors. Canada's courts have told us that these treaties are *sui generis*, in a category of their own, being neither contracts nor international instruments²¹ and that they ought to be construed liberally, with "doubtful expressions resolved in favour of the Indians."²²

Helpful as these pronouncements are, they do not take us all the way to reconciling the Aboriginal view of the spirit and intent of the treaties with the legal, constitutional and social framework of modern Canada. Nor do they assist us in reconciling the Crown approach of relying on the written text of the treaties with the approach of most First Nations that is based on Aboriginal oral traditions. To explore these issue we need real dialogue with treaty First Nations in the context of concrete situations. This is beginning now in the province of Saskatchewan

²¹ *Simon v. The Queen*, [1985] 2 S.C.R. 387 at 404.

²² *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29 at 36.

with the expansion of the mandate of the office of the Treaty Commissioner of Saskatchewan and the commencement of talks with other treaty groups in Canada to explore issues arising from the historic treaties. In Saskatchewan, almost every First Nation is in a treaty relationship with the Crown. The role of the commission in that province is to serve as keeper or guardian of the treaty process by creating and maintaining an atmosphere within which difficult issues may be discussed.

No matter how well we may do at resolving self-government, treaty and land claims issues, our efforts cannot be considered truly successful unless progress is made in the third main reconciliation area: historical, spiritual and socio-economic and cultural healing. It is here that the legacy of the broken partnership between Aboriginal and non-Aboriginal societies is most apparent and where action is most required. With respect to historical healing, one area in particular - the legacy of the residential schools - is of special concern and must be addressed.

In many ways, the approach of utilizing residential schools to educate Aboriginal children was a significant element in the policy of assimilation that coloured the relationship between Aboriginal and non-Aboriginal Canadians for over a century. Operated by religious orders for the most part, they were a combination of boarding and industrial schools and dealt with children from all three Aboriginal groups, Indian, Inuit and Métis. With the end of the era of co-operation in the mid-1800s began a time of displacement and assimilation that resulted in many Aboriginal communities being forced to make their children attend these schools. As recently as sixty years ago, 80 such schools were scattered across most regions of the country. Curriculae were expressly designed to instill Christian values, education and manual and other skills that would enable Aboriginal children to make their way in non-Aboriginal society.

The tragic result was that many Aboriginal children and young adults were deprived of their families and cultures and often badly educated, comfortable in neither Aboriginal nor non-Aboriginal society. In addition, it is clear now that some Aboriginal children were subjected to physical and sexual abuse at the hands of school staff. Some former residential school staff are being brought before the courts and some convictions have already been made. Many of the four churches involved have also issued formal apologies.

For Canadians, there is no pride in recounting this dark episode, and nowhere is the need for healing and reconciliation more urgent. Many Aboriginal people do not feel that enough is being done, a sentiment that is echoed by the report of the Royal Commission on Aboriginal Peoples with its call for an official "act of recognition and repudiation,"²³ and a full public inquiry into the issue, and compensation. It is too soon to say what the most appropriate vehicle for reconciliation in this area might be but the importance of addressing this issue properly cannot be overstressed, for failure to adequately come to terms with it may well hinder the other reconciliation efforts described in this paper.

²³ *Looking Forward, Looking Back*, *supra* note 2 at 382.

Another of the legacies of history involves the relocation of Aboriginal communities in the past. Inuit people from northern Québec, for instance, who were relocated to the high arctic in the 1950s, have now received a formal acknowledgment from the federal government that the planning and execution of the move by federal authorities was flawed and resulted in unnecessary hardship. As part of the reconciliation effort, the federal government has offered several million dollars in compensation for the suffering endured as a result of that move. In another case, the Innu people of Davis Inlet in Labrador are being moved, at government expense, to a new site where water and wildlife are more plentiful for their community and where their traditions may be maintained. Their earlier relocation to Davis Inlet led to years of health and social problems for the community, including a growing despondency among the young people that touched off a wave of concern among ordinary Canadians. It is clear that the return of these Innu people to their traditional lands has both a practical and a symbolic dimension, and it is hoped that this move will help to support the spiritual healing process underway within the community.

Given the sometimes sombre aspects of the history of relations between Aboriginal and non-Aboriginal societies described earlier, it is clear that healing must embrace spiritual matters. It is this area that real strides have been taken in recent years to make national reconciliation the type of people's movement referred to by the organizers of this conference. The most important symbolic gesture, of course, is the designation of June 21 in Canada each year as National Aboriginal Day - the time when the contribution of Aboriginal peoples to shaping Canada's unique culture is recognized. In this same vein, every year television carries the National Aboriginal Achievement Awards ceremony into homes across Canada and celebrates the contributions of outstanding Aboriginal persons from all walks of life.

A very powerful example of this type of reconciliation effort occurred recently under the leadership of Elijah Harper, an Indian member of Parliament with a long and positive history of involvement in national Aboriginal issues. In December of 1995 a four day Sacred Assembly supported by the federal government brought together spiritual leaders and individuals from both the Aboriginal and non-Aboriginal communities in Canada to start "a spiritual healing process, both within and between Aboriginal and non-Aboriginal communities, that links together people's hearts and minds."²⁴ Four themes were considered on successive days: sacred foundations, spiritual reconciliation, Aboriginal justice, and political responsibilities. Aside from its symbolic importance, this event brought together Aboriginal elders, national politicians, senior federal public servants and individuals from all walks of life in an atmosphere of dialogue, education and reconciliation. To ensure that national reconciliation is truly a peoples movement, more events like this will be crucial to maintain the healing momentum and to continue the process of public education upon which the success of national reconciliation ultimately rests.

²⁴ Elijah Harper, Canada, House of Commons Press Release, October 26, 1995.

Ensuring that Aboriginal individuals and communities have the human resources and the means to participate more fully in national life is yet another integral element of restoring the relationship between Aboriginal and non-Aboriginal Canadians. Education is one of the primary means of achieving this goal. One thing that is being done, aside from signing education agreements like that involving the Mi'kmaq and the province of Nova Scotia, is investing more heavily in Aboriginal students generally. Over the past few years the federal budget for Aboriginal post-secondary education has gone up by more than 25 per cent, and last year over 27,000 students were supported through this program. When one considers that in 1969 there were only 800 Aboriginal post-secondary students, it is clear that the challenge of securing the future leadership of Aboriginal communities is being met through a commitment to joint action in this vital area.

In terms of the Aboriginal economy as such, there are more than 18,000 Aboriginal-owned businesses in Canada now, 2/3 of which are in the services sector. The rest are in primary industries, construction or the manufacturing or food processing areas. Healthy communities and positive lifestyles depend, at least in part, on economic development of the kind demonstrated by the growing success of these businesses. As a spur to that success the federal government has an explicit strategy of reserving all contracts over \$5000 involving services to a primarily Aboriginal population for competition among Aboriginal businesses. In Canada the federal government spends about \$9 billion annually on goods, services and construction. It is hoped that, with the experience they gain in bidding and winning such contracts, Aboriginal businesses will be encouraged to grow through, for example, joint ventures with other Aboriginal and non-Aboriginal enterprises, both to increase their likelihood of success and also to foster expansion into commercial areas unrelated to government activities. This helps Aboriginal communities, government and the Canadian economy in general and reinforces the commercial and cultural links between Aboriginal and non-Aboriginal societies upon which the Canadian experiment was originally launched.

An important catalyst for developing the type of business links referred to above is exemplified by the latest in the series of "Business at the Summit" conferences in Vancouver British Columbia that brought Indian and non-Aboriginal business leaders together for face to face dialogue to address the challenges of working together in a business context. Inspired by the desire to forge better links of all kinds between Aboriginal and non-Aboriginal communities while tense and difficult treaty negotiations are underway and by the need to avoid disrupting the British Columbia economy during this time, the goal of these conferences is to create opportunities for joint ventures between Indian communities and a variety of British Columbia businesses. One anticipated social benefit is the potential to create a sense of partnership and a positive attitude of co-operation.

Which brings us back to where this paper began - the need in Canada to forge a reconciliation between Aboriginal and non-Aboriginal peoples by fostering just this sort of partnership and positive attitude of co-operation. We are not there yet, but progress is being made and encouraging signs are evident. One basis for further progress is the report of the Royal

Commission. All five volumes are now being studied in detail by government and discussed at all levels of Canadian society. There is no question that this report will have an important impact on the shape of the Canadian federation in the years to come. It raises profound challenges to how we can restructure the relationship with Aboriginal peoples, but also offers encouragement to continue on the path we have been following in recent decades in the areas described earlier in this paper. We have a solid basis in Canada now for rebuilding the relationship between Aboriginal and non-Aboriginal peoples and this report will undoubtedly serve as a touchstone for our rebuilding and reconciliation efforts in the years to come.

In fact, in this profoundly challenging report we in Canada may now have an agenda for discussion, guidelines for negotiation and the beginnings of a real blueprint for action. At the same time we have a standard against which to measure progress and a spur to meet the many challenges to re-establishing the kind of relationship between Aboriginal and non-Aboriginal peoples that we know to be needed. We welcome those challenges, for in reconciling with the past we inspire the present and assure the future.