

RECOGNITION, RECONCILIATION AND HEALING

Paper prepared for the Aboriginal Justice Implementation Commission

by

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Introduction and Overview

In recent years governments throughout Canada have recognized various aspects of their relationship with Aboriginal people. But what does it mean for the government and for the Aboriginal people or group when the government “recognizes” them or some aspect of the relationship with them? This paper will address that question by discussing both the technical and common meanings of the term “recognition”.

This paper will also mention a number of the recognition vehicles that already exist in Canada in the form of constitutional provisions, federal and provincial legislation and recognition and reconciliation statements issued by government and other institutions. Finally, the paper will propose and briefly assess a number of ways in which the existence, history and contributions of the Aboriginal people of Manitoba could be recognized by the Manitoba government.

RECOGNITION: WHAT IS IT?

The term “recognition” has been used in a variety of public policy contexts in Canada. Most prominently, Aboriginal and treaty rights are “recognized and affirmed” in s. 35 of the *Constitution Act, 1982*. In this vein, the 1991 *Report of the Aboriginal Justice Inquiry of Manitoba* (AJI) made a number of recognition recommendations: that the Northern Flood Agreement be recognized as a treaty; that Métis people be recognized as being under *Constitution Act, 1867* s. 91(24) jurisdiction over “Indians”; that wild rice and timber harvesting rights be recognized; that rights to water and beds of water be recognized, etc. Similarly, in its 1996 final report, the Royal Commission on Aboriginal Peoples (RCAP) recommends, among other things, that all Canadian governments recognize that Aboriginal peoples are vested with the inherent right of self-government. These forms of recognition have evident legal implications.

The term “recognition” is also used in a more political sense that may or may not have

significant legal implications. The 1985 Resolution of the Assemblée Nationale du Québec, for example, recognizes not only the existence of a variety of Aboriginal nations within that province, but also recognizes the rights set out in the James Bay and North-eastern Québec Agreements. In 1991, the government of Ontario issued a Statement of Political Relationship in which it recognized that First Nations in Ontario have an inherent right to self-government within the Canadian Constitution. In a similar way, as part of a broader federal policy thrust the federal Minister of Indian Affairs and the Interlocutor for Métis and non-status Indians issued a Statement of Reconciliation in 1998 recognizing that past federal policies of assimilation were wrong.

In other official statements by the federal government and by many of the churches, past actions affecting groups such as Japanese-Canadians and Aboriginal and non-Aboriginal students in residential schools have been recognized and acknowledged to have been wrong. Apologies or statements of regret have been also issued in conjunction with these statements. These various statements have an apparent and avowed reconciliation and healing goal. Often, they were explicitly designed to avoid or minimize potential legal consequences.¹

Following a similar approach, RCAP calls in its final report for official acknowledgment of, for example, the wrongness of certain Aboriginal law doctrines, of the fact that certain relocations were human rights violations, and that Aboriginal servicemen and women contributed to the war effort. RCAP also calls for a renewed national reconciliation effort involving mainstream Canadian society and governments and Aboriginal peoples, and proposes an approach based on acknowledging past wrongs and promoting forgiveness and healing the relationship between Aboriginal and non-Aboriginal Canadians.

In summary, it seems clear that the term “recognition” has many shades of meaning depending on who recognizes whom, in what context, and for what purpose. Some meanings import legal consequences while others are political and yet others lead directly to related concepts such as reconciliation and healing. It may therefore be useful to “unpack” the history

and uses to which the term “recognition” has been put before identifying potential applications in the Manitoba public policy context.

(1) Recognition: Formal Acknowledgment as Legally Distinct

(a) The Origin: International Law Principles

The primary meaning of the term “recognition” is to acknowledge the character, claims or existence of someone or something.² This notion is closely related to the technical meaning in international law. Recognition in the international context refers to a political act with legal consequences: one entity with what is known as “international legal personality” acknowledges that another entity also has international legal personality. Recognition of the legal personality of another in the international system is important because it gives the recognized person, group or entity the legal right or capacity to carry out actions and enter into agreements with other recognized entities within the international system. Being recognized, therefore, means having an identity derived from, and based on, the international legal system.

The contemporary international system is largely concerned with the actions of states because they have the highest level of international legal personality. For a state to be recognized as a state by other states, it is necessary that it have the following characteristics: (1) a permanent population; (2) a defined territory; (3) a government; and (4) the capacity to enter into relations with other states.³ That being said, entities other than states may also have international legal personality. The United Nations, or non-governmental organizations that are recognized by the United Nations or by other states, for example, also have international legal personality. However, they have less international legal personality than states.

Given the interaction of politics and law in the international arena, the international system is fairly flexible and the degree of international personality that an entity is recognized as having may vary along a spectrum. The more international personality an entity has, the more

international rights and duties it has and the greater standing it has to act within the system.

(b) The Application: North American Recognition Practice

The flexibility of the international recognition system was imported into the North American context at the time of first contact between Europeans and Aboriginal peoples. This explains why the colonizing European powers were able to recognize Aboriginal nations and groups as having some form of international legal personality short of statehood. Through treaties and other forms of government-to-government relationships, the acknowledgment by Imperial and colonial authorities of the nation status of Aboriginal peoples were political acts with legal implications that were equivalent in their spirit to international acts of recognition. This is why in both the United States and Canada recognized Aboriginal entities are referred to as “nations”.

An example is found in the *Royal Proclamation of 1763* with its recognition of “the several Nations and Tribes of Indians with whom We are connected, and who live under Our protection...”. The “nations” referred to were seen as less than fully autonomous since they were described as being under Crown protection. The Supreme Courts of both the United States⁴ and Canada have acknowledged the applicability of international recognition practice to the domestic North American context. The Supreme Court of Canada stated it as follows: “[B]oth Great Britain and France felt that Indian nations had sufficient independence and played a large enough role in North America for it to be good policy to maintain relations with them very close to those maintained between sovereign nations.”⁵

In the United States the term used since the 1830s has been “domestic dependent nations”.⁶ This terminology reflects the fact that this form of recognition only applies domestically and does not allow an equal legal status between the parties.⁷ The Supreme Court of Canada has taken pains to make a similar point. In *Sparrow, Delgamuukw* and other decisions the Court has noted that Crown sovereignty remains intact in the face of Aboriginal and treaty rights, but that exercises of that sovereignty must be justified according to a constitutional

standard.⁸ In other words, Canada's recognition of Aboriginal and treaty rights has not in Canada's view diminished its own sovereignty or raised Aboriginal peoples to the same level as the Crown.⁹ These recognized Aboriginal entities then, do not in the eyes of Canada and the United States possess *international* legal personality, despite the fact that at one time they appear to have enjoyed this status in the eyes of the colonizing European powers.

(c) Recognition in the Canadian Constitutional System

The Canadian and American legal systems are based on liberal democratic notions that generally militate against the recognition of groups having any sort of special group status. Evidently, given the special protections in Canada's Constitution for religious and linguistic groups, this statement is less true for Canada than for the United States. Nonetheless, in both countries, individuals, not groups, are recognized as being legal equals and the primary rights-bearers.

However, due to this inheritance from international law principles, recognition vehicles already exist that acknowledge the legal existence of Aboriginal groups as such as a matter of Canadian and American law. As mentioned, in Canada s. 35 of the *Constitution Act, 1982* has "recognized and affirmed" Aboriginal and treaty rights. Canada has thus acknowledged not only the validity of certain historically based claims by Aboriginal peoples, it has also implicitly recognized the special group status of the Aboriginal peoples who advance them. The Supreme Court is presently engaged in the process of identifying, fleshing out and circumscribing the rights claimed - including inherent rights to self-government - in the cases now coming before it.

Since this acknowledgment takes place within Canada's domestic legal system and not within the international legal system, it is a limited form of recognition. Aboriginal group "domestic legal personality" is not equivalent to the international legal personality of the recognizing entities - Canada and the provinces. The issue of the precise status of Aboriginal peoples has been at the heart of constitutional discussions and Aboriginal litigation over the past two decades. The phrase "inherent right of self-government" refers only to the source of the

capacity of Aboriginal peoples to govern themselves and does nothing to answer the question of what their status would be vis-a-vis Canada and the provinces. In short, it tells us nothing about their “domestic legal personality”.

Another type of constitutional recognition occurs in the *Constitution Act, 1867* reference in s. 91(24) to “Indians and Lands reserved for the Indians.” This provision singles out those people over whom federal power is to be exercised. This is also an implicit recognition of their separate group identity within the Canadian constitutional system. However, it does not accord them legal status equivalent to Canada and the provinces. Similarly, in the *Manitoba Act (Constitution Act, 1870)* the Métis are constitutionally identified and singled out under the now abandoned term “half-breed” in recognition of their status as a people in possession of “Indian title” (now referred to as “Aboriginal title”) and entitled to special treatment as a result.

Federal law provides a direct form of domestic recognition through the *Indian Act*. It implements the constitutional law-making power referred to in *Constitution Act, 1867* s. 91(24) and identifies those over whom it will operate. In this way it recognizes both “Indians” and “bands” for purpose of federal administration. The parallels between the criteria for statehood in the international system mentioned earlier and the band system established under the *Indian Act* are easy to see:

- (1) permanent population - a band is defined in the *Act* as a “body of Indians”;
- (2) defined territory - “for whose use and benefit in common lands... have been set apart”;
- (3) government - recognized bands operates through a “council of the band”;
- (4) capacity to enter into relations with other states - federal (and provincial) administrative and funding arrangements and the evolution of the common law have made it clear that, through their band councils, bands also have the capacity to enter into legally binding contractual and other relations with other recognized government entities such as the federal, provincial and municipal governments.

The analogy is not complete, because bands are not the equivalent of the other government actors in the Canadian federal system. A further measure of their lesser legal personality within the Canadian federal system lies in the fact that the federal government also controls band “citizenship” by defining “Indian” fairly narrowly in sections 6 and 7 of the *Indian Act*. In the international system, states normally do not take any interest in how another state defines its own citizens. It is enough if they are citizens according to the internal rules of that other state.¹⁰

Provincial law offers an example of a domestic recognition vehicle operating within provincial constitutional jurisdiction: Alberta’s 1990 *Metis Settlements Act* (which replaced the earlier *Metis Betterment Act* that dated from 1938). One effect of this legislation is to acknowledge the domestic legal personality of the recognized groups within the provincial legal system. Originally the *Act* defined Métis by way of exclusion from federal jurisdiction over “Indians”, but it now refers to lifestyle and self-identification.¹¹ The scheme of the *Act* is to recognize eight Métis “settlements” and to allow the settlement councils to make membership decisions based on the whether or not the applicant is a “Metis” within the meaning of the *Act* and whether he or she meets the other criteria (past membership in a settlement or a settlement association or residence in Alberta for 5 years). Thus, the separate Aboriginal status of the Métis settlements is recognized along with their ability to control their own membership.

This legislation assumes for constitutional purposes that Métis people do not fall within federal s. 91(24) jurisdiction over “Indians”. Should a court decision rule otherwise, or should the federal government extend its s. 91(24) jurisdiction to include Métis, the *Metis Settlements Act* might well be found to be invalid for having invaded federal jurisdiction.

(2) Recognition: Renewing Relationships

(a) Knowing Again

Recognition has a secondary meaning that does not necessarily import legal consequences. It means “to know again, identify as known before.”¹² In short, it means recalling

or acknowledging a time when the parties knew each other or were in some sort of relationship. This is the aspect of recognition with which most Canadians are familiar since it reflects attempts by Aboriginal peoples to have their original identities confirmed by government and by non-Aboriginal Canadians by such means as referring to themselves as “First Nations” or as “historic” or “original” nations and by asserting their constitutional status as self-governing treaty signatories or as Aboriginal rights holders. This meaning of recognition also connotes official policies in favour of renewing the perceived original relationship between Aboriginal peoples and Canadian governments. That is why, for instance, the RCAP report called for a re-establishment of Aboriginal “nations” (albeit along flexible lines)¹³ and why recent federal policy proposals refer conspicuously to “partnership” notions.¹⁴

(b) Reconciling the Past and Present

Given the varying degrees of autonomy of Aboriginal peoples recognized under international and colonial law during earlier periods in Canadian history, it is clear that the common and the technical meaning of “recognition” overlap in the North American Aboriginal context. This is something the AJI seems to have had in mind in its analysis of the justice problems faced by Aboriginal people in Manitoba:

For more than a century the rights of Aboriginal people have been ignored and eroded. The result of this denial has been injustice of the most profound kind. Poverty and powerlessness have been the Canadian legacy to a people who once governed their own affairs in full self-sufficiency. This denial of social justice has deep historical roots.... social and economic inequality is unacceptable and that only through a full recognition of Aboriginal rights - including the right to self-government - can the symptomatic problems of over-incarceration and disaffection be overcome.¹⁵

The overlap between the technical and common meanings of recognition introduces an element of risk that government could attract unwanted legal consequences to any recognition acts or statements it may make. This explains why federal and provincial governments have been so careful in their attempts to craft recognition instruments, be they constitutional self-government arrangements or simple statements of the types mentioned earlier.

The modern Canadian social, political and economic reality does not allow Canadian governments to simply recognize or “to know Aboriginal groups again” solely on the basis of their former autonomy and to deal with them on the basis of principles derived from international law. Aboriginal groups or nations, no matter how large or where located, no longer exist apart from the broader fabric of Canadian society. This adds a dimension of reconciliation to the meaning of recognition, a concept that the Supreme Court has embraced as the lens through which it focuses the “recognition” of Aboriginal and treaty rights in the Constitution:

...what s. 35(1) does is provide the constitutional framework through which the fact that Aboriginals lived on the land in distinctive societies, with their own practices, traditions and cultures, is *acknowledged and reconciled with the sovereignty of the Crown*. The substantive rights which fall within the provision must be defined in light of this purpose: the Aboriginal rights recognized and affirmed by s. 35(1) must be directed towards the reconciliation of the pre-existence of Aboriginal societies with the sovereignty of the Crown.¹⁶ (emphasis added)

Reconciliation is itself a term with multiple but related meanings appropriate to the context of this discussion: restoring a friendship after an estrangement, healing the effects of a quarrel and harmonizing conflicting facts, statements or actions.¹⁷ In light of the large number of international reconciliation processes currently under way, the term “reconciliation” has also acquired a broader meaning: to “balance radical reforms with a process based on consensus”.¹⁸

From one perspective, most of Canada’s recent constitutional history has been devoted to this task through constitutional discussions and negotiation to establish the conditions for the restoration of the original relationship with Aboriginal peoples through restructuring the Canadian federation to accommodate their renewed political status. Reconciling the recognized constitutional status of Aboriginal peoples with the interlocking nature of Canadian political, social and economic reality is the challenge facing all governments and institutions in Canada.

(c) Healing Conflicts and Misunderstandings

As the previous discussion indicates, reconciliation connotes a healing component. Many of the official government and church acknowledgments and apologies noted earlier took healing

as their central goal. In the church apologies, for example, there was often considerable dialogue with affected groups beforehand to ensure that the eventual statement would reflect their genuine concerns and would not exacerbate the problem.¹⁹ Where that dialogue was lacking, the apologies were not accepted or were not accepted fully.²⁰

In this regard, studies of national reconciliation efforts have shown that to successfully heal a relationship between two groups that have been in conflict they must be able to engage in constructive communication free of stereotypes and negative emotions derived from past painful experiences with each other. In order to create the conditions for such dialogue and healing, the following elements are necessary:

- (i) joint analysis of the history of the conflict;
- (ii) official acknowledgment of the injustice and historic wounds; and
- (iii) official acceptance of moral responsibility where due.²¹

In a similar vein, and after four rounds of consultations with Aboriginal peoples, RCAP offers in its final report a broad strategy for healing the historic relationship between Aboriginal peoples and mainstream Canadian society that reflects this model. That strategy envisions three main elements:

- (i) a jointly developed, balanced view of Canadian history:

“The starting point for renewing the relationship [must be] deliberate action to set the record straight" regarding violations of treaty promises, residential schools, relocation of communities, Aboriginal veterans, the *Indian Act* administration etc. (Vol. 1, p.7) in the form of an Aboriginal history series project (Rec. 1.7.1 & 2.). As part of the process, inquiries are called for in the case of residential schools (Rec. 1.12.1.), some relocations (Rec. 1.11.2 *et seq.*) and an effort at public education is called for (Rec. 5.4.1. *et seq.*);

- (ii) an acknowledgment of the injustice and historic wounds:

A "sincere acknowledgment by non-Aboriginal people of the injustices of the

past... " is recommended (Vol. 5, p. 4) including a disavowal of discredited legal doctrines and policies based on them (Rec. 1.16.2.), along with acknowledgment that some relocations were violations of human rights (Rec. 1.11.1), and acknowledgment of the contributions of Aboriginal servicemen (Rec. 1.12.1);

(iii) and acceptance of moral responsibility and commitment to a new relationship:

This would include "a genuine desire to make reparations..." (Vol. 5, p. 4) and "a profound and unambiguous commitment to establishing a new relationship for the future...." (Vol. 5, pp. 4 & 5).

RECOGNITION IN THE MANITOBA CONTEXT

As the preceding survey has shown, recognition acts or statements may accomplish a variety of purposes and attract differing legal implications, depending on the goal or intention of the recognizing party, the vehicle chosen and the context in which the act or statement occurs.

What is it that the AJI calls for in terms of "recognition"? The AJI recommendations on recognition are as follows:

(a) in conjunction with the federal government, Manitoba would

- recognize the Northern Flood Agreement as a treaty;
- recognize existing Aboriginal rights to waters and to beds of water;
- recognize that the Métis people fall under federal s. 91(24) jurisdiction;
- recognize that Aboriginal people have the right to establish justice systems as part of their inherent right of self-government;

(b) without federal concurrence, Manitoba would

- recognize wild rice harvesting as an Aboriginal right;
- recognize timber harvesting as an Aboriginal and treaty right;
- recognize the right of such Aboriginal courts to have extra-territorial jurisdiction;
- amend the *Provincial Police Act* to recognize any police commission or

committee established in a Manitoba Aboriginal community.

There are other recommendations that are tantamount to recognition in that they call for actions that would acknowledge Aboriginal people or their rights. Some of these recommendations are:

- the federal and Manitoba governments each issue a public statement regarding how they intend to carry out their respective fiduciary obligations;
- the federal and Manitoba governments take measures to ensure that the rights of Aboriginal people regarding the northern flood area are respected;
- agreements should be concluded with Aboriginal people who may be negatively affected by natural resource developments;
- the province ought to develop a policy respecting the role of Aboriginal people in the management and conservation of their traditional territories;
- timber harvesting co-management agreements need to be concluded with Aboriginal people where timber is harvested in their traditional territories;

Purpose

In the face of all these recommendations for recognition or recognition-like action, the government may wish to first ask: What does it wish to achieve by any such statement or action?

Does it seek to provide Aboriginal people with legally actionable rights?

Does it wish to give Aboriginal people political leverage against itself or against the federal government or both?

Does it wish to give symbolic recognition to Aboriginal people as distinct nations with legal standing and rights within Manitoba in lieu of recognizing their inherent right to establish Aboriginal justice systems as recommended by the AJI?

Does it wish to establish processes by which Aboriginal people may be involved in government decisions affecting them in the areas outlined by the AJI?

Does it wish to demonstrate good faith in a symbolic way while undertaking discussions with Aboriginal people in connection with implementing the AJI recommendations or developing processes for inclusion in important decisions affecting them?

Does it wish to gain time for further study or public consultation by showing a commitment to the principles of the AJI recommendations?

Does it wish to signal its commitment to a process of healing and reconciliation that could serve as the springboard for further, more concrete actions in the future?

Does it wish to do the minimum required to avoid the criticism that the government has done little to implement the AJI recommendations?

Does it wish before undertaking anything that may arouse public suspicion or hostility to begin the process of raising public awareness of the issues while at the same time signaling to Aboriginal people that the government's intentions are fair and honourable?

Means

There are a number of ways by which the government could recognize Manitoba's Aboriginal people or their achievements and contributions to Manitoba. They are limited only by the imagination and by the purpose for which the government may wish to take such a step.

1) Government announcement of publicly funded historical project to focus on the past and present contributions of Aboriginal people to Manitoba.

This might be an “Aboriginal history series project” of the type proposed by RCAP in which Aboriginal and non-Aboriginal historians would collaborate to produce a more balanced history of the province in which Aboriginal people could see their experiences and perspective reflected. This is the type of project envisaged in a variety of international contexts²². As mentioned above, it is also one that is sanctioned directly by RCAP in a reconciliation context. It is also indirectly sanctioned in the AJI report: “This denial of justice has deep historical roots, and to fully understand the current problems we must look to their sources.”²³ The justification for such a project might be to begin the new millennium on a new footing, for instance.

Given that the AJI report acknowledged but gave somewhat cursory treatment to Aboriginal perspectives on the shared history of Aboriginal and non-Aboriginal Manitobans, it could be argued that a joint history project would serve to underpin a fuller understanding of the issues and recommendations set out in the AJI report. This type of project could therefore be introduced to Aboriginal people as a way of exploring many of the issues raised in the AJI report and might be presented to the public as a modernizing of Manitoba history in light of the historical research being carried on across Canada regarding Aboriginal issues in the claims, litigation and related contexts.

From this perspective Manitoba could be argued to be getting out ahead of the “revisionist” historians whose perspectives might be influenced by who their clients may be by undertaking a truly academic, neutral and balanced approach to the history of the province that gave rise to the historic Métis Nation and which was the first place where Canada began its own separate history of treaty-making through the “numbered treaties”.

The advantage of this type of project is that it is pan-Aboriginal, would require months or years to complete (allowing the development of a longer-term government strategy) and would

involve non-Aboriginal historians and specialists. It could be linked to an education agenda as well as to the rights agenda set out in the AJI report and could serve as an ongoing method of raising public awareness.

In addition, this type of project could easily include generally uncontroversial and relatively inexpensive actions that could be carried out immediately. This could include, for example, erecting historical monuments, plaques or other signs attesting to the significance of a place or event in Manitoba's history and the presence in that place or participation in that event of Aboriginal people. It might also include choosing a date on which the contribution of the Aboriginal peoples to Manitoba's history and culture could be acknowledged in an official way, or according a spot in the Legislature where the flags and other insignia of Aboriginal peoples could be displayed in an honourable way.

The disadvantages are that it could dissolve into acrimony between the parties if academic and other differences of opinion on sensitive topics were not well handled. It could also direct public attention to sensitive matters such as the Métis land settlement question now being litigated in *Dumont* and on treaty interpretations and doubtful land transactions involving First Nations that are either in the federal specific claims process or in litigation or both. It could also lead to charges from Aboriginal organizations that it is simply another way of delaying implementation of the AJI report and could be used by the opposition of other groups to erode public support for Aboriginal initiatives.

2) Meeting between Government and Aboriginal people to discuss possible courses of action to heal the relationship, reconcile opposing views of history etc.

There are many possible variations of this theme. One variant would see the government participating in a Sacred Assembly of the type organized by the churches and Aboriginal organizations in 1995 in Ottawa that was chaired by Elijah Harper. The federal government was not involved (except to the extent that Elijah Harper was a sitting government member of Parliament), although individual ministers attended. At that Assembly a statement of the

Principles and Priorities for a new Relationship was issued by the organizers. That statement emphasized healing and reconciliation and called upon the federal government to do certain things, including taking responsibility for past actions.

The advantage of this type of gathering is its obvious spiritual and healing tone and the chance for government and Aboriginal people to meet somewhat informally and to open a constructive dialogue in an ostensibly non-political setting. Another advantage would be that a former NDP member of the Manitoba Legislature (who is himself a historic figure for his role in the Meech Lake constitutional proposals) might be persuaded to participate. The disadvantage is the non-involvement of government in planning the agenda and the fact that there is little or no chance for government to be other than the recipient of information as opposed being able to make statements as a government.

Another variant of this theme would see a conference jointly planned and implemented by government and Aboriginal organizations at which the government might be able to make a statement. The advantage of this type of conference is the ability to influence the agenda and to have a forum that will attract press attention, but without the same weight as if the government was to make a statement in the Legislature. The disadvantage is that the planning or implementation could dissolve into acrimony if the goals of government and Aboriginal organizations are too dissimilar or if insurmountable differences arose between them during the conference.

3) Announcement of Government-sponsored reconciliation-type action and invitation to Aboriginal people to participate.

One possible model for this type of action might be the all-party agreement in the Australian Parliament in 1991 to begin a ten year process to heal the relationship between Aboriginal and non-Aboriginal Australians through the formation of a 25 member (13 Aboriginal and 12 non-Aboriginal) Council of Reconciliation to guide the process and help build national consensus. A five-step procedure was envisaged:

- developing a national understanding and acceptance of the shared experience of Aboriginal and non-Aboriginal Australians in the creation of modern Australia;
- fostering respect for Aboriginal cultures and identity;
- recognizing the past injustice continues and gives rise to present injustices;
- identifying other actions that should be taken to promote national reconciliation;
- revaluing how Aboriginal people and the larger Australian society can live together;

This model could be adapted and scaled down for Manitoba since there are two key differences between Manitoba and Australia: in Manitoba Aboriginal people already have constitutional and legal rights as well as a political presence that is absent in the Australian Aboriginal context; and, Aboriginal people have been prominent contributors to building Manitoba from the outset and, arguably, have not suffered from the same degree of neglect and indifference as have Aboriginal people in Australia.

The advantage of this type of approach is its obvious healing and reconciliation component and the fact that it may be staged over several months or years so as to minimize its impact on day to day life in the province. It may also serve a useful educational function and, if the appropriate people were chosen to lead it, such an undertaking might help to forge some degree of consensus.

The disadvantages are that it could become the source of discord as it has done in Australia where right-of-centre political parties and a portion of the non-Aboriginal population reject this type of approach. In addition, it would likely require consultation beforehand with Aboriginal organizations and might encounter difficulties if questions arose as to its funding,

mandate, duration and binding authority to bring about the type of changes for which Aboriginal organizations may be looking. It might also be viewed generally as an inadequate response to the AJI and the many other commissions of inquiry that have come up with concrete proposals for government action.

4) Government statement in the Manitoba Legislature.

The rules of the Manitoba legislature would permit a minister to make a statement in the House on Aboriginal matters.²⁴ This type of action would be largely political and without any necessary legal consequences as it is simply a statement of what the government (or a department or ministry) intends to do. However, if such a statement were crafted to refer to Aboriginal people, nations or groups as such and if it were to indicate that they had some type of group status in Manitoba, this would amount to a form of recognition as such. That being said, this type of recognition already exists in the form of policies, protocols and other devices through which First Nations, urban Aboriginal organizations and Métis organizations and communities are recognized as separate entities for program and service delivery.

The advantage of this type of approach is that it would occur in the Legislature, thereby enhancing the recognition element since it would occur in a formal political setting that is open to the media and the public. The government could make whatever commitments it may wish to make according to whatever timetable it may wish to set. It could be a sort of “wish list” of what it hoped to accomplish and the opposition would have very little scope in the Legislature to use it for partisan political purposes since no debate is permitted at that time. If the announcement were crafted beforehand with the input of Aboriginal political leaders, if they were present in the Legislature at the time of the announcement, and if the announcement were to be accompanied by some other action (such as a history project, spiritual or other type of gathering etc.) there might be some political cachet to it that could deflect the charge that it is merely symbolic.

Given that it is a statement without necessary legal consequences, the government could even venture into territory that would otherwise have legal consequences. It could state (as it did

already done with regard to recognizing the Northern Flood Agreement as a modern day treaty), for instance, that henceforth it would recognize the existence of the historic Métis Nation and deal with Métis people on that basis, or that it would act as if other AJI recommendations regarding Aboriginal, treaty and other rights were law. Since there is little the government can do to affect how the courts interpret the evolving law of Aboriginal and treaty rights in the absence of a cabinet-approved provincial policy, such statements of intention could not be used in court in any meaningful way.

The clear disadvantage of this type of approach is the lack of commitment (beyond the purely verbal) or accountability (beyond political) to follow through on the statement in any particular way. Without more, a simple announcement might attract the charge that it is an empty and cynical gesture. If the statement went farther than the opposition and ordinary Manitobans were prepared to go, it could also become a lightning rod for popular and political opposition. It is also worth noting that any political statement about how the government may intend to deal with Aboriginal or treaty rights would likely not affect the positions taken in Aboriginal and treaty rights and related prosecutions since the Attorney General is in legal theory independent from purely political considerations and his or her role is to apply the law in a neutral fashion in the interests of justice.

5) Government Resolution in the Manitoba Legislature.

If the risks were high that government would be pilloried for its statements in the Legislature, there may be some advantage to making a stronger statement in the form of government resolution²⁵ as this might attract a greater degree of Aboriginal and academic support and could also be used by the Manitoba government as a way of exerting pressure on the federal government.

Government resolutions are commonly used to introduce appropriations, but may also serve to introduce statements of principle. The procedure would be for the appropriate minister to introduce a statement of principle and then move that it be adopted by the Legislature.²⁶ In the case at hand, the principle could be that certain matters (for example, the recognition of the

continuing existence of the historic Métis Nation, the treaty status of the Northern Flood Agreement etc.) would henceforth be understood, interpreted or handled, in a certain way. A resolution is obviously a much stronger way for the government to go on the record on a particular matter than a mere statement. In short, it is a way of taking a stand and being judged in the political and public arena for that stand, but without necessarily incurring legal consequences.

This type of procedure has been used in the past in Manitoba for symbolic reasons or to put pressure on the federal government or to highlight federal actions in some areas.²⁷ This procedure also has been used in the explicitly Aboriginal context in Québec. In 1984 the Parti Québécois government of René Levesque introduced a motion in the Assemblée Nationale that was adopted in March the following year. In it the government resolved that it “recognizes the existence of the Abenaki, Algonquin, Attikamek, Cree, Huron, Micmac, Mohawk, Montagnais, Naskapi and Inuit nations in Québec” and also that “recognizes existing aboriginal rights and those set forth in The James Bay and Northern Québec Agreement and The Northeastern Québec Agreement.” Among other things it also committed the Assemblée to consider these and future agreements as treaties and urged the government to work with Aboriginal people to identify and define these rights and to negotiate self-government and related agreements with willing Aboriginal nations in then province.

On its face, this was a noble enterprise. However, the Resolution was not supported by Québec’s Aboriginal organizations because it was drafted without their direct input and introduced without their explicit consent. At that time the provincial government was meeting in an *ad hoc* way with the Aboriginal Peoples of Québec Task Force on the Constitution which was seeking Québec’s support for its position at the (then) ongoing constitutional meetings called for by s. 37 of the *Constitution Act, 1982*. A letter from the Task Force to the Premier in 1982 contained 15 principles advocated by the Task Force as reflecting its constitutional position. These 15 principles were accepted by the Québec government and reference to them found its way into the Resolution that was ultimately adopted in 1985 by the Assemblée Nationale.

The bone of contention for Aboriginal peoples was the failure by the government to fulfill its promise that the contents of any resolution would be the result of discussion and negotiation with them. The draft resolution tabled and adopted by the Assemblée Nationale did not reflect the draft then under discussion with the Task Force. The Task Force members as well as every opposition member of the Assemblée opposed the resolution as drafted and adopted.

Subsequent commentators²⁸ are of the view that the actions of the Parti Québécois government were cynically designed to demonstrate to other governments, domestic and foreign, that an independent Québec would respect the rights of the Aboriginal people within its borders. They were not designed to further the aspirations of Aboriginal people within Québec or to establish better relations between them and the Parti Québécois government. The subsequent actions of the government of Québec in raising arguments before the Supreme Court of Canada in the *Adams* and *Coté* cases to the effect that Aboriginal people within Québec had virtually no *Constitution Act, 1982* section 35 rights also serves to emphasize the extent to which this gesture was a hollow one for purely external political purposes.

This experience has lessons for Manitoba or for any government engaged in an attempt to improve relations or to recognize Aboriginal people by resolution or otherwise: the more serious and significant the statement or action, the greater the corresponding need for consultation and even negotiation with the groups, nations or people affected. This lesson has also been borne out by the experience of the apologies contained in the church statements and in the federal government Reconciliation Statement. In all cases where the apology was not preceded by consultations, there has been a failure to obtain a significant “buy-in” from the affected Aboriginal groups.²⁹

The case of the federal Reconciliation Statement also shows another pitfall to be avoided in taking this type of action: lack of clarity about why the statement is being issued. Although the federal statement was not in the form of House Resolution, it was issued outside the House in much the same way and with much the same fanfare. Aside from the fact that some Aboriginal

organizations refused to accept and others did so only reluctantly, there was also some confusion about the impact it might have on the ongoing litigation in connection with residential schools. Only two weeks after it was issued by (then) Indian Affairs Minister Jane Stewart, she was forced to clarify that any federal government apology for residential schools was not intended as an admission of legal liability. This is another example of the fact that this type of statement, being political in origin and context, would not likely have legal consequences. It would be important nonetheless to avoid misinterpretation.

The advantages of a resolution are that it is a clear statement of the government's moral and political commitment to engage in a certain course of action. It would also serve to put some pressure on the federal government if it encompassed AJI recommendations relating to joint federal and provincial recognition. It would be contained to the political arena and would have little or no legal consequences. Being introduced in the Legislature and requiring debate, it also obliges the Opposition to be open in their views. A resolution is also a sign of good faith that might give the government some credibility with Aboriginal communities and groups with which it is now in discussions, negotiations or even litigation.

One disadvantage is that, as a political act, it is subject to the charge that it does not give legal weight to the AJI recommendations. Another disadvantage is that a resolution could narrow the government's range of concrete options as a resolution is enforceable in the court of public opinion and would likely be used by Aboriginal groups to put pressure of the government in ongoing discussions and negotiations. The government will want to avoid Jane Stewart's dilemma whereby she was forced to clarify what she meant by her apology and her commitments in the federal Reconciliation Statement. In either event, there will be some pressure for follow-up based on what is committed to in the resolution. Another potential disadvantage lies in the fact that both the federal government³⁰ and the province of Québec have used this type of resolution in the past to deal with contentious issues. The Manitoba government may wish to avoid copying their precedents.

6) Cabinet-approved statement of Manitoba Government policy.

In 1998 the federal government largely muted the accusation that its Reconciliation Statement was a symbolic exercise by introducing it in the context of a broader federal policy statement, *Gathering Strength*. This policy statement was ostensibly in response to the RCAP recommendations and intended to give the impression that progress was being made in meeting the aspirations of Aboriginal people as articulated in the RCAP report. Aside from the allocation of significant amounts of money to this policy exercise, *Gathering Strength* has also set in motion a series of processes designed to meet the four goals of the federal policy: renewing partnerships, strengthening Aboriginal governance, developing a new fiscal relationship, and supporting strong communities, people and economies.

Although these processes may well be simply restatements of ongoing federal programs, services and policy, clothing them in new verbal garb and issuing a Reconciliation Statement and Statement of Renewal in this context has allowed the federal government to recognize a number of aspects of its relationship with Aboriginal people and to reinvigorate discussions that had been tarnished by the failure of constitutional meetings in the 1980s and early 1990s and by the corrosive relationship between the AFN and the Department of Indian Affairs in the 1990s. It also enabled the federal government to gloss over the fact that it had not consulted the Aboriginal organizations in drafting and releasing its Reconciliation Statement.³¹

The approach Canada took in the face of the pressure to respond to RCAP was not to examine and respond to each recommendation. Instead, it was to examine them individually and then group them in terms of a number of broad categories with a view to fashioning a response that would reflect the essence of the RCAP approach, but melded with some of the federal government's traditional policy concerns and areas Aboriginal program and service delivery.

Manitoba might consider taking a similar approach to the vast number of recommendations in the AJI report, crafting its response so as to respond to the essence of the many rights-oriented recommendations, but without necessarily or fundamentally altering existing government program and service delivery or creating new institutions immediately. For

example, there are many apparent “all or nothing” recommendations in the AJI report that lend themselves to a process as opposed to a substantive response.

In addition, a large number of recommendations have to do with the historical, social and economic factors that the AJI saw as contributing to the high incidence of contact between Aboriginal people and the Manitoba justice system. Leaving aside the issue whether these recommendations belong in a report that purports to deal with justice issues as such, they all involve broader rights issues that are entangled in federal jurisdiction or are subject to the evolving nature of Canadian jurisprudence. Whether now is the time for the Manitoba Government to take action or to stake out legal positions that might hasten the evolution of Aboriginal jurisprudence would certainly be a factor in deciding whether or not to take a process-oriented approach of the type being discussed here.

Processes with Aboriginal organizations could be initiated in the context of a broader renewal of relationships in light of the emerging guidance from the cases. In fact, there is one specific recommendation that could be implemented without legal consequences: creation by government of a special committee to begin a review of provincial legislation for its accommodation of Aboriginal and treaty rights. In keeping with the AJI recommendation it would be comprised of senior government officials and representatives of the Assembly of Manitoba Chiefs and the Manitoba Métis Federation. The AJI recommendation implies that special committee recommendations would be advisory in nature. Thus, the special committee could be structured like the Law Reform Commission to offer reasoned, well-researched advice for the government’s consideration.

Committees like this could be one way to recognize the validity of the AJI recommendations, validate the participation of Aboriginal organizations and groups in the assessment of the AJI recommendations. If any Manitoba policy were to include other special joint projects such as a spiritual gathering or the history project mentioned earlier, a complete package of processes could be crafted that acknowledge the existence of Aboriginal people

within Manitoba's borders, their past contributions and their potential to continue to contribute to Manitoba's evolution as a multi-cultural province at the geographic and historic center of Canada and the need to overcome the legacy of past policies and actions that have affected them.

The advantages of a policy underpinning for any statements or actions that Manitoba may wish to take are threefold. First, it substantiates the statement or action with a clear policy shift on the part of the government. Second, by initiating joint processes it allows time for relationships to mature and for common ground to be found at working levels while at the same time developing a longer term strategy to address the AJI report. Third, it maintains legal flexibility as the independence of the Attorney General would be maintained and Aboriginal and treaty rights law would continue to evolve through the courts.

The disadvantages are also clear. This may be seen as simply postponing the inevitable day of reckoning with the impact of the AJI recommendations. In addition, the assessment and grouping of AJI recommendations for policy development purposes takes time. A policy initiative of this type will also require a financial outlay to support whatever processes may flow from this type of exercise. Moreover, processes raise expectations that the recommendations of committees will ultimately be heeded and that substantive action will follow. In addition, joint processes are unpredictable and may lead to a new set of calls for action.

7) Protocol with Aboriginal organizations.

In 1991 the NDP government of the province of Ontario entered into a political relationship with the First Nations within Ontario borders, issuing a Statement of Political Relationship reflecting the agreement between them. This was, in effect, a protocol between the government of Ontario and the governments of the First Nations in which the Ontario government accepted that First Nations exist "as distinct nations" and recognized "that its relationship with the First Nations are to be based on the aboriginal rights, including aboriginal title, and treaty rights..." as set out in s. 35 of the *Constitution Act, 1982*. The Ontario

government also recognized that “First Nations have an inherent right to self-government under the Canadian Constitution” and agreed to work with them to articulate and implement it.

The practical impact within government was substantial at the time: the Ontario Native Affairs Secretariat was enlarged, given a new name and provided with broader influence within government, Ontario became more willing to enter with good faith into land claims settlement negotiations with First Nations and the federal government, and the groundwork was laid for legalized Indian gaming (that eventually led to the casino at Rama) which has generated considerable income for First Nations. One of the disappointing aspects for First Nations was that Ontario’s prosecution of Indian wildlife harvesting offences continued unabated. It was also a disappointment to them that the new Progressive Conservative government has declined to act on the basis of the Statement or to enter into a new protocol with them.

That being said, there may be some advantage to the Manitoba government to consider a similar protocol and statement. It would recognize Aboriginal people and nations as governments, provide them with indirect access to government policy making and policy-interpretation if the Aboriginal and Northern Affairs Department were given broader, horizontal influence in government, and would largely avoid legal consequences since it is a statement of political relationship. The backdrop of a broad protocol, properly crafted and accompanied by other meaningful gestures, might allow the Manitoba government and Aboriginal people to enter into fruitful negotiations regarding the contentious issue of wildlife and natural resource harvesting rights that figured so prominently in the AJI report and which are the subject of much of the ongoing Aboriginal and treaty rights litigation.

The disadvantage is that the Manitoba government already has protocols in place with different Aboriginal organizations for different purposes and this might be seen as simply another and not very important one. This criticism might be mitigated if the protocol were to contain the broad type of language used in Ontario, if it made reference to the AJI recommendations and if it were accompanied by some other measure such as the formation of special committees to review Manitoba policies and laws of the type discussed earlier or if it were to be announced as part of a

broader policy thrust or a joint history project or a commitment to enter into meaningful negotiations on harvesting rights etc.

Another disadvantage is that protocols raise expectations that substantive actions will follow. In Ontario, Indian gaming has been a success, but Manitoba has already established a relatively harmonious relationship with First Nations in this area. It is not known how Manitoba's relatively well-organized and politically astute Aboriginal organizations would react to a lack of harmony between their political relationship with the government and the fact that wildlife harvesting prosecutions might continue undiminished pending the conclusion of agreements. Yet another disadvantage is that protocols of this type rarely outlast the governments that enter into them.

8) Legislation - either substantive or procedural.

Aside from seeking a constitutional amendment, legislation is the most powerful step the Manitoba government could take to recognize Aboriginal people and their contributions. Legislation is law and must be passed under one of the heads of provincial power in s. 92 of the *Constitution Act, 1867*. This should be no problem. The potential constitutional issue would be whether it also trenches on federal jurisdiction over "Indians" in s. 91(24) of the *Constitution Act, 1867*. Under the current federal interpretation of s. 91(24), the Métis do not fall within federal jurisdiction. However, the leading constitutional text writer in Canada assumes that Métis do fall under federal legislative authority and so the matter must be treated with caution.³²

What this means in practice is that any legislation that names, singles out or otherwise affects the "Indianness" of the persons covered by it will not pass constitutional muster and will be invalid. This means that Manitoba likely cannot pass legislation "recognizing" First Nations as such, although it could pass such an act regarding the Métis subject to the preceding proviso. In the same way, legislation could likely implement many of AJI recommendations such as that referring to the treaty status of the Northern Flood Agreement. However, are these the types of things the provincial government will want to do? There are few advantages to proceeding in

this way and many disadvantages, including the sheer length of time it takes to draft, introduce and see a bill passed into law.

One potential way around the complex constitutional and political issues surrounding Aboriginal-specific legislation is to consider a “manner and form” act. This is a restraint on the procedure that a legislature may impose on itself with regard to how it makes laws. The theory behind it is that a legislature may re-define its legislative process so long as it does not involve matters provided for in the Constitution. Thus, a piece of legislation may have a requirement that future legislatures may only repeal it if they have conducted a referendum approving this.³³ Manitoba could conceivably pass an act stating, for example, that any legislation it enacts regarding Métis people within the province will only be effective if approved by referendum by the Métis themselves. This is, in effect, the federal government policy position regarding Indian legislation³⁴. This type of provincial legislation would certainly recognize the Métis as a distinct group within Manitoba.

The advantage of manner and form legislation is that it may be designed to introduce procedural restraints in virtually any area. The disadvantages are many, however. In the first place, it is not entirely clear that manner and form legislation would bind future legislatures. This is a legal debate that continues, notwithstanding emerging case law. Second, even if such legislation had the effect ascribed to it, there is no guarantee that a court would accept it as drafted. What might at first glance appear to be a manner and form act could be characterized as being something else by an unsympathetic court and struck down.³⁵ In addition, and as with substantive laws, the procedure for passing such a piece of legislation is neither short nor free of pitfalls in the form of parliamentary debate or potential public indignation at special measures for Aboriginal people.

In short, there would appear to be little to be gained and much to be lost if either substantive or procedural legislation were to be chosen as the preferred route for addressing the AJI recommendations.

SUMMARY

This paper set out to discuss the uses to which the term “recognition” has been put in constitutional, legal and public policy statements in Canada in recent years. The various meanings of “recognition” have been described with examples. The primary meaning is derived from international law and means to acknowledge the right of another to exist in the international law system and to enter into legally binding relationships with others. Recognition gives a legal identity on the one who is recognized. States recognize other states, but may also recognize lesser entities such as the United Nations and other international organizations.

The international recognition system was imported into North America at the time of contact between European states and Aboriginal peoples. The latter were recognized as having legal existence short of statehood. This was reflected both by the actions of the European states and their colonies of entering into treaties and other legally binding agreements with them and by the language used in official pronouncements referring to Aboriginal peoples and groups as “nations” or as “domestic dependent nations”.

A number of internal Canadian recognition instruments were described, including the *Constitution Act, 1982* recognition and affirmation of the Aboriginal and treaty rights of the “Indian, Inuit and Métis peoples”, the *Constitution Act, 1867* reference to federal law-making authority over “Indians, and Lands reserved for the Indians”, the *Manitoba Act* reference to Métis people under the former term “half-breeds”, the *Indian Act* creation of the categories of “Indian” and of Indian “band”, and the *Alberta Metis Settlements Act* establishment of a land and governance regime for Métis groups within the provincial legal system. All these references to groups of Aboriginal people is a form of official recognition of their legal existence as groups capable of entering into legal relationships with other governments in Canada and of asserting their group rights.

The secondary meaning associated with the term “recognition” - “to know again”- was

also discussed. This meaning has been at the heart of recent Canadian Aboriginal policies aimed at re-affirming the collective identities of Aboriginal peoples and of restoring the relationship between them and Canadian governments and broader Canadian society. “Knowing again” was also shown to import related meanings of reconciliation and healing. Studies of international and domestic conflicts of the type being experienced in Canada’s Aboriginal policy context were discussed and it was noted that national or regional reconciliation and healing involves three elements: joint analysis of the history of the conflict; official acknowledgment of the injustice; and, official acceptance of moral responsibility where due.

Recognition acts or statements by a government may accomplish a variety of purposes with differing legal implications depending on the purpose for the act or statement. A number of possible purposes that the Manitoba government may wish to consider were set out, ranging from symbolic actions and statements with few if any legal consequences to those that might provide impetus to essentially political processes involving government and Aboriginal people through to those that accord formal recognition of Aboriginal entities or accord them actionable legal rights.

The final part of the paper applied the meanings associated with recognition through contemporary examples drawn from international and domestic recognition and reconciliation actions and statements. Eight illustrative ways in which the Manitoba government might recognize the Aboriginal people in Manitoba and their past and present contributions to Manitoba were discussed and their advantages and disadvantages were briefly assessed.

These eight potential means of affording recognition to Aboriginal people in Manitoba are as follows:

- 1) Government announcement of publicly funded historical project to focus on the past and present contributions of Aboriginal people to Manitoba;
- 2) Meeting between Government and Aboriginal people to discuss possible courses of action to heal the relationship, reconcile opposing views of history etc;
- 3) Announcement of Government-sponsored reconciliation-type action and invitation to

Aboriginal people to participate;

- 4) Government statement in the Manitoba Legislature;
- 5) Government Resolution in the Manitoba Legislature;
- 6) Cabinet-approved statement of Manitoba Government policy;
- 7) Protocol with Aboriginal organizations;
- 8) Legislation - either substantive or procedural.

These eight means are merely examples and are not exhaustive of the types of things that the Manitoba government may do. Given the variety of factors which could influence a government decision in this area, no recommendations are offered as to the best way of recognizing the Aboriginal people within the province or their contributions to Manitoba.

ENDNOTES

1. Canadian churches have issued a number of apologies to Aboriginal groups in recent years. Some of the more prominent are: the United Church apology to various groups in 1986; the Roman Catholic apology regarding its role in residential schools in 1991; the Anglican Church apology to national Aboriginal congregations in 1993; Roman Catholic Bishop Rouleau's apology regarding the Joseph Bernier Inuit school in 1996; and the St. Andrews United Church apology for the Port Alberni residential school in 1997. In addition, Prime Minister Mulroney made a statement in 1988 regarding the WW II internment of Japanese Canadians. Minister of Multiculturalism Sheila Finestone issued a similar statement to a number of ethnic groups in 1994 regarding Canada's failure to adhere to human rights norms at various times in our history. Although neither of these statements was an apology as such, each was a statement of regret and a commitment not to repeat the actions.

2. *The Concise Oxford Dictionary* (Oxford University Press, 1964, 4th ed.).

3. 1933 Montevideo *Convention on the Rights and Duties of States*.

4. In the seminal case of *Cherokee Nation v. State of Georgia*, Chief Justice Marshall of the US Supreme Court said the following about the domestic status of the Cherokee (30 US 1 at 16):

The numerous treaties made with them by the United States recognize them as a people capable of maintaining the relations of peace and war, of being responsible in their political character for any violation of their engagements or for any aggression committed on the citizens of the United States by any individual of their community. Laws have been enacted in the spirit of these treaties. The acts of our government plainly recognize the Cherokee nation as a state, and the Courts are bound by those acts.

5. *R.v. Sioui* [1990] 1 S.C.R. 1025 at 1053.

6. *Cherokee Nation*, *supra* note 4 at 17:

...it may well be doubted whether those tribes which reside within the acknowledged boundaries of the United States can, with strict accuracy, be denominated foreign nations. They may, more correctly, perhaps, be denominated domestic dependent nations. They occupy a territory to which we assert a title independent of their will, which must take effect in point of possession when their right of possession ceases. Meanwhile they are in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian.

7. *Cherokee Nation*, *supra* note 4 at 17. Chief Justice Marshall went on to note that the Cherokee Nation is regarded both by foreign nations and by the United States "as being so completely under the sovereignty and dominion of the United States" that any foreign attempt to seize Cherokee territory or form political alliances with them would be tantamount to declaring war on the United States.

8. *Sparrow v. The Queen* [1990] 1 S.C.R. 1075 at 1103, *Delgamuukw v. The Queen* [1998] 1 C.N.L.R. 15 at 69.

9. It has merely required the Crown to demonstrate why it needs to pass legislation affecting Aboriginal or treaty rights.

10. The *Indian Act* is not a constitutional document. Thus, it is not necessarily binding on the provinces either in terms of whom it recognizes as an individual "Indian" or which group it recognizes as a "band." This is because the criteria for federal recognition are neither clear nor consistent. The assertion of federal jurisdiction over provincial

residents of Aboriginal ancestry, or the failure to assert such jurisdiction, could theoretically be challenged by the provinces. In *A.G. Canada v. Canard* ([1976] 1 S.C.R. 170) Mr. Justice Beetz declared (at 207) that the classification was essentially racial:

The *British North America Act*...by using the word 'Indians' in s. 91(24) creates a racial classification and refers to a special group for whom it contemplates the possibility of special treatment. It does not define the expression "Indian". This parliament can do within constitutional limits by using criteria suited to this purpose but among which it would not appear unreasonable to count marriage and filiation and, unavoidably, intermarriages, in the light of either Indian customs and values...or of legislative history.

Thus, it appears that Parliament may be able to legislate for anyone of "Indian" race - meaning that blood quantum (and inevitably kinship through marriage) might be the determining factors. On this basis, virtually anyone of any Indian blood could become amenable to federal jurisdiction. This would obviously include persons now classified as Métis or as non-status Indian.

11. S.A. 1938, C. 6, S. 2(A): "... a person of mixed white and Indian blood but does not include either an Indian or a non-treaty Indian as defined in the *Indian Act*." S.A. 1990, s. 1(j): ..." a person of aboriginal ancestry who identifies with Metis history and culture."

12. *The Concise Oxford Dictionary*, *supra* note 2.

13. Report of the Royal Commission on Aboriginal Peoples, Vol. 2, *Restructuring the Relationship* at 177 *et seq.* (Ottawa: Ministry of Supply and Services, 1996).

14. See, for example, *Gathering Strength: Canada's Aboriginal Action Plan* (Ottawa: DIAND, 1997) with its emphasis on "Renewing the Partnerships".

15. *Report of the Aboriginal Justice Inquiry of Manitoba*, Vol. 1, *The Justice System and Aboriginal People* (Province of Manitoba, 1991) at 1-2.

16. *R. v. Van der Peet* [1996]4 C.N.L.R. 177 at 193.

17. *The Concise Oxford Dictionary*, *supra* note 2.

18. Ivan Turok, "Restructuring or reconciliation? South Africa's Reconstruction and Development Program", Vol. 19 (1995) *International Journal of Urban and Regional Research*, 317.

19. This was the case with two of the apologies: the Anglican Church apology to national Aboriginal congregations in 1993 and the St. Andrew's United Church apology regarding the Port Alberni residential school in 1997.

20. This was particularly the case with the apology by Bishop Rouleau for the Joseph Bernier Inuit school which the local Inuit people felt was insincere and too narrowly worded.

21. Joseph Montville, "The Healing Function in Political Conflict Resolution" in *Resolution Theory and Practice: Integration and Application*, Dennis Sandole and Hugo van der Merwe (eds.) (Manchester University Press, 1993) 112.

22. The Australian Council of Reconciliation has implicitly called for this kind of approach to history with its call for the development of a national understanding and acceptance of the shared experience of Aboriginal and non-

Aboriginal Australians in the creation of modern Australia. In South Africa the entire purpose behind the Truth and Reconciliation Commission was to expose the other side of South African history with a view to integrating both the official and the unofficial versions and thereby to promote forgiveness and healing. The New Zealand Waikato Tainui Settlement for the unlawful seizure by Crown forces of Maori lands in the 1850s began with a restatement of the historical events in question that validated the longstanding Maori view that their dispossession was wrong, if not entirely illegal. For the Maori, the restatement of history was viewed as being on a par with cash compensation and an apology.

23. *Supra* note 13.

24. Based on information prepared by Professor Kathy Brock and provided to the writer by the Aboriginal Justice Implementation Commission, subsection 22 (5) of the Rules of the Manitoba Legislature reads as follows:

A Minister of the Crown may make an announcement or statement of government policy at any time in the ordinary daily routine of business appointed for ministerial statements and tabling of reports, and a spokesman for each of the parties in opposition to the government may make a brief comment with respect to the announcement or statement and the comments shall be limited to the facts which it is deemed necessary to make known to the House and should not be designed to provoke debate at that time. Copies of the announcements or statements shall be made available to Leaders of the Parties and the Speaker at the time the announcement or statement is made.

25. This information pertaining to Section 62 of the Rules of the Legislature is also provided by Professor Brock.

26. Professor Brock spoke to procedural experts and reports that (absent leave of the Legislature to introduce it) the statement of principle would appear in the form of a motion on the notice paper along with any other motions that the government or private members may wish to introduce. Two days later the motion would appear on the order paper, be introduced by the minister in question and then debated in the Legislature like any other motion. Once adopted by a majority of the members of the legislature, it would become a resolution and would henceforth be a matter of public record.

27. Professor Brock lists the following adopted resolutions uncovered by her research: Nov. 29, 1999 Crisis in Agriculture resolution (adopted); May 22, 1992 Louis Riel Resolution (adopted unanimously); March 20, 1991 Appointment of Chief Electoral Officer (adopted); March 11, 1987 Proposed Amendments by the Federal Government to the Patent Act (adopted). Others, such as the Feb. 24, 1988 Canada-US Free Trade Agreement Motion, were not adopted but presumably got some press exposure and enables the provincial government to get its views on the record.

28. See, for example, Paul Joffe, "The 1985 Québec National Assembly Resolution on Aboriginal Rights: A Brief Commentary", paper submitted to the Aboriginal Justice Implementation Commission, May 29, 2000.

29. See notes 17 and 18, *supra*.

30. The federal government used this procedure in 1995 following the Québec referendum when it introduced a motion in Parliament recognizing Québec as a distinct society.

31. This information is within the personal experience of the writer who was involved in the policy work preceding the Reconciliation Statement and in its drafting.

32. Peter Hogg, *Constitutional Law of Canada*, (Toronto: Carswell, 4th ed., 1997) at 674. See also Bradford

Morse and John Giokas, “Do the Metis Fall Within s. 91(24) of the *Constitution Act, 1867?*” in Royal Commission on Aboriginal Peoples, *Aboriginal Self-Government: Legal and Constitutional Issues* (Ottawa: Minister of Supply and Services Canada, 1995) 144.

33. This is professor Hogg’s example, *ibid* at 316.

34. The last time the federal government attempted to amend the *Indian Act* in 1997, for instance, it designed an act that would have allowed Indian bands to opt into it on a voluntary basis.

35. See Hogg, *supra* note 32 at 319.