

*Towards justice and reconciliation:  
The Principles relating to the implementation of the  
Right of self-government of the Aboriginal Peoples  
In the Report of the Royal Commission on Aboriginal Peoples 1996*

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'Governance, Self-Government and Legal Pluralism'

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I have been asked to discuss the basic principles relating to the implementation of the right of self-government of the aboriginal peoples of Canada that were recommended by the Royal Commission on Aboriginal Peoples in its 1996 final report. In doing so, I have focused as much as possible on the issues being addressed in the agenda of this conference.

*Negotiation and renewal: the general approach of the Commission*

The Commission proposed that fundamental changes have to take place in Canada to achieve justice and reconciliation in the relations between the historic nations that occupied Canadian territory prior to the takeover by the French and the English peoples. Fundamental change necessarily threatens the status quo and vested interests, and is difficult to achieve. The aboriginal peoples form a small fraction of the population, about 3% of it, and are scattered across the country. They cannot, in the present circumstances, demand change by force. They have little influence on political decisions which decide the direction of Aboriginal policy. The RCAP recommendations for fundamental change, in such circumstances, must search for good reasons other than political expediency. The Commission found its reasons in history and philosophy.

The approach is elaborated in Volume One of the final report, where the Commission examines a history of injustice in past relations that must be changed.<sup>1</sup>

*'Until the story of life in Canada, as Aboriginal people know it, finds a place in all Canadians' knowledge of their past, the wounds from historical violence and neglect will continue to fester - denied by Canadians at large and, perversely, generating shame in Aboriginal people because they cannot shake off the sense of powerlessness that made them vulnerable to injury in the first place. Violations of solemn promises in the treaties, inhumane conditions in residential schools, the uprooting of whole communities, the denial of rights and respect to patriotic Aboriginal veterans of two world wars, and the great injustices and small indignities inflicted by the administration of the Indian Act - all take on mythic power to symbolize present experiences of unrelenting injustice.*

*'The Commission is convinced that before Aboriginal and non-Aboriginal people can get on with the work of reconciliation, a great cleansing of the wounds of the past must take place'*

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<sup>1</sup> Canada, *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol. 1, (Ottawa: Supply and Services Canada, 1996) at 7

Justice and reconciliation address a fundamental contradiction at the heart of Canada: *'that while we assume the role of defender of human rights in the international community, we retain, in our conception of Canada's origins and make-up, the remnants of colonial attitudes of cultural superiority that do violence to the Aboriginal peoples to whom they are directed. Restoring Aboriginal nations to a place of honour in our shared history, and recognizing their continuing presence as collectives participating in Canadian life, are therefore fundamental to the changes we propose.'*<sup>2</sup>

The practical recommendation that followed the search for reasons for change that lie in history was for a General History project, not an official state history, but a history of the aboriginal peoples based upon the cultures and histories of the aboriginal peoples themselves.<sup>3</sup>

The Commission argued that the concepts which animated official behaviour towards Aboriginal peoples were wrong, and must be officially renounced. Describing ideas like *terra nullius* and 'discovery' as false assumptions, the RCAP proposed four principles as the ethical foundation of a renewed relationship: mutual recognition, mutual respect, sharing, and mutual responsibility.<sup>4</sup>

The Commission relied upon the value of culture, and 'the damage done' to the cultural identity of individuals and their communities in explaining the imperatives for change. The Commission's approach is open to critical examination. Other ideas about what ought to govern future official behaviour in terms of laws, policies and practices for a renewed relationship may be found and examined, as is being done by others at this conference. To the extent that ideas influence official decisions and policies, either directly or because of democratic deference to the *vox populi*, philosophical principles are important. To the extent that judicial decisions influence political behaviour, the reasons relied upon by judges in cases that require new statutes or policies are particularly important. In this regard, it is notable that the courts have also sought history-based reasons for their interpretation of the aboriginal and treaty rights that received Constitutional recognition and affirmation in the 1982 Constitutional amendment.<sup>5</sup> The search for the doctrinal foundations for a new legal and political relationship with the aboriginal peoples in Canada is at an early stage of gestation in both the judicial and political spheres.

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<sup>2</sup> *Ibid*, at 5.

<sup>3</sup> *Ibid*, at 237-238.

<sup>4</sup> *Ibid*, at 3 and 695.

<sup>5</sup> In the *Constitution Act, 1982*, s.35 (1) provides: 'The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.'

Fundamental change is hard to achieve or undertake, and the federal response has not yet addressed fundamental change.<sup>6</sup>

*Institutional changes are required for a renewed relationship*

*'We maintain that Aboriginal nations have an inherent right to determine their own future within Canada and that the governments of Aboriginal nations should be recognized as a third order of government in the Canadian federation. Treaties and agreements that provide for an orderly evolution of relations between Aboriginal governments and their federal and provincial counterparts will be advantageous for Aboriginal nations and for Canadian society as a whole.'*<sup>7</sup>

The Commission argued that structural changes designed to achieve the moral and political legitimacy of Canadian rule over the Aboriginal peoples were required. As stated in 'Opening the Door', '*The goal is the realization for everyone in Canada of the principles upon which the constitution and the treaties both rest, that is, a genuinely participatory and democratic society made up of peoples who have chosen to confederate.*'<sup>8</sup> In this approach, reconciliation can mean the recognition of common political values.

The Commission envisioned a process of negotiation and renewal designed to restore, within the constitution of Canada, a functional political relationship between the historic peoples and Canadian governments. This the Commission described as a nation-to-nation relationship, one which reflected the circumstances of political autonomy which characterized the early relations between the indigenous peoples and the intruders. Fundamental change is required in part because the current constitutional order was established without the participation of the indigenous peoples. The exceptional case is that of the Metis negotiations with Canadian representatives in Red River in 1870.<sup>9</sup>

Negotiation and renewal involves a shift from dominion by Canada over the aboriginal peoples, to a new condominium with institutions for the sharing of

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<sup>6</sup> For a critique of the RCAP approach, and of the government's failure to respond to the RCAP vision, or offer an alternative vision, see Alan C. Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver and Toronto, UBC Press, 2000). For a discussion of the views of United Nations treaty oversight bodies about Canada's failure to implement the RCAP recommendations, see Ted Moses, 'The Right of Self-Determination and Its Significance To the Survival of Indigenous Peoples' in Aikio and Scheinin, *infra*, note 11, 155, at 171ff. These treaty bodies receive reports from UN member states on their performance of international obligations.

<sup>7</sup> *Supra*, note 1, at 3-4.

<sup>8</sup> *Supra*, note 1, at xxiv.

<sup>9</sup> See Paul L.A.H. Chartrand, *Manitoba's Metis Settlement Scheme of 1870* (Saskatoon, University of Saskatchewan Native Law Centre, 1991). The Metis people have been in court over the question of the unconstitutionality of the implementation of the promises in the *Manitoba Act 1870*, which are a part of the Constitution of Canada.

political and economic power and authority. The present institutions which have served the dominion of Canada over aboriginal peoples must be changed and rebuilt, to facilitate the condominium of shared power. Justice and reconciliation demand that the exercise of political power over historic nations be justified.

*Implementing Aboriginal Self-Government: governing principles*

'*Restructuring the Relationship*' is the title of Volume Two which explains the principles behind the Commission's views on Aboriginal self-government.<sup>10</sup> In chapter 3, entitled 'Governance', the Commission analyzes the legal and political principles that underlie and inform the emergence of an Aboriginal order of government in Canada. This leads to the recommendation of concrete steps needed to restructure the relationship between Aboriginal peoples and Canada. Strategies are recommended for Aboriginal people to strengthen the governing capacities of their nations and to establish constructive working relationships with other Canadian governments. At the same time, the Commission identifies some fundamental reforms to the structure of Canadian governments that must take place to achieve constructive relationships with Aboriginal people and their nations.

At this point it is necessary to explain some basic terms that give meaning to the RCAP analysis.<sup>11</sup>

*.Aboriginal peoples( plural) refers to organic political and cultural entities that stem historically from the original peoples of North America (not collections of individuals united by so-called racial characteristics). The term includes the Indian, Inuit and Metis peoples of Canada.*

*Aboriginal people means the individuals belonging to the political and cultural entities known as Aboriginal peoples.*

*.Aboriginal nation refers to a sizeable body of Aboriginal people who possess a shared sense of national identity and constitute the predominant population in a certain territory or collection of territories.*

*.First Nation means an Aboriginal nation composed of Indian people.*

On this basis, there is an evident distinction between the groups comprised of 'persons of Aboriginal ancestry' who may benefit from affirmative action

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<sup>10</sup> Canada, *Report of the Royal Commission on Aboriginal Peoples: Restructuring the Relationship*, vol. 2, part one (Ottawa: Supply and Services Canada, 1996) The following discussion in the text reproduces much of the original text in the RCAP report, but it is at times paraphrased, summarized and interspersed with the writer's observations. The specific extracts from the Commission's Report are not indicated in the usual way, for the convenience of the reader. Throughout the discussion which follows, page and heading references are occasionally noted. References are to the printed copy of the Report, which has been out of print for many years. The final Report and other Commission reports, commissioned studies and other materials are available on CD-ROM from Libraxus in Ottawa, Ontario.

<sup>11</sup> *Ibid*, at 107.

programmes and laws under s. 15(2) of the *Charter of Rights and Freedoms*, on the one hand, and the individuals who comprise the membership of an Aboriginal nation, or an Aboriginal people with s.35 rights, on the other hand. There are currently many affirmative action programmes for 'persons of Aboriginal ancestry' in Canada, and some, like those which offer employment, provide an incentive for persons to identify as Aboriginal persons. Such individuals may or may not belong to the historic political and cultural entities recognized in s.35 of the *Constitution Act 1982*.<sup>12</sup>

The RCAP argued that the right of self-determination and the constitutional right of self-government together provide a solid basis for recognizing and institutionalizing governments under Aboriginal peoples' legal orders in Canada.<sup>13</sup> The Commission then described the basic principles that support and guide this process, and went on to recommend strategies for implementing self-government.

#### *The attributes of good government*

In making its recommendations on Aboriginal self-government, the Commission was guided by the view that *legitimacy, power, and resources* are the hallmarks of effective governments.

*Legitimacy* means that the governed have confidence in, and support the government. It depends on factors such as the way the structure of government was created, the manner in which leaders are chosen, and the extent to which the government advances public welfare and honours basic human rights. When a government has little legitimacy, leaders have to work against public apathy or resistance and expend more power and resources to get things done, or to govern effectively.

*Power* is the acknowledged legal capacity to act. It includes legislative competence, or the authority to make laws, executive capacity to execute the laws and carry on public administration, and judicial jurisdiction to resolve disputes. The power of a government may arise from long-standing custom and practice or from more formal sources such as a written constitution, national legislation and court decisions. Internal legal authority, however, is not always enough to make a government effective. Another important factor is the degree to which other powerful

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<sup>12</sup> See, generally, Paul L.A.H. Chartrand, ed. *Who Are Canada's Aboriginal Peoples? Recognition, Definition, Jurisdiction*. (Saskatoon, Purich Publishing Ltd. 2002)

<sup>13</sup> This analysis begins at 163 in Volume 2, *supra*, note 10, under the heading 'Towards an Aboriginal Order of Government'. For a more recent treatment of self-determination applied to indigenous peoples, see Pekka Aikio and Martin Scheinin, ed. *Operationalizing the Right of Indigenous Peoples to Self-Determination* (Abo, Finland, Institute for Human Rights, Abo Akedemi University 2000)

governments and institutions recognize and accept what is done by the government. Claims to sovereignty and other forms of legal authority may be of limited use if they are not respected by other governments holding greater power and resources.

*Resources* consist of the physical means of acting or governing. Resources include not only financial economic and natural resources for security and future growth, but information and technology as well as human resources in the form of skilled and healthy people. Resources are necessary to exercise governmental power and to satisfy the needs and expectations of citizens. Key resource issues include the nature of the fiscal and trade relationships among governments, which affect the control and adequacy of resources.

A government that lacks one or more of these three basic attributes will be hampered in its operations. By way of example, a government that enjoys great legitimacy but has insufficient power or resources will be able to accomplish little and will remain largely symbolic, particularly if it is competing with other political institutions that do wield substantial power and resources. By contrast, some governments have both power and resources but little legitimacy. To maintain themselves, they must rely on manipulation, intimidation and coercion. Where a government has some power but is lacking in both resources and legitimacy, it is likely to become both oppressive and dependent. To maintain itself, the regime must seek resources from other governments. In return, these benefactors become the real decision makers, imposing conditions on continued financial support and investment. Such dependence makes governments more responsive to their external taskmasters than to their own citizens. This in turn erodes whatever legitimacy they originally possessed, accelerating the need for repressive domestic measures.

Aboriginal governments in Canada often lack all three attributes necessary to be effective. First, the legitimacy of some of these governments is weak because they evolved from federally imposed institutions and historically they have been unable to satisfy many basic needs of their citizens, in part because of deficits in power and resources. Sometimes these governments have also failed to embody such basic Aboriginal values as consensus, harmony, respect for individuality and egalitarianism. Second, current Aboriginal governments have far less power than their provincial, territorial, or federal counterparts. What power they possess is frequently insecure and depends mainly on federal legislation or even ministerial approval. Third, Aboriginal governments generally lack a sufficient tax and resource base and are highly dependent on federal funding for their basic operations. This funding has often been conditional, discretionary and unpredictable, fluctuating substantially over time.

The Commission proposed three strategies to remedy these problems. First, to put in place fully legitimate governments, Aboriginal people must have the freedom, time, encouragement and resources to design their own political institutions, by means that involve consensus building at the community level. Popular control of the process of constitution building is much more important than the technical virtuosity of the final product. In other words, Aboriginal peoples have the right of self-determination and now require the means to implement this right.

Second, to possess sufficient power, Aboriginal governments must have a secure place in the constitution of Canada, one that puts them on a par with the provincial and federal governments and does not depend on federal legislation or court decisions. The effectiveness of Aboriginal governments will depend on their ability to devote their energies to improving the welfare of their constituents rather than continuously asserting, defending and redefining their legal status. In other words, Aboriginal peoples' right of self-government must be recognized.

Third, Aboriginal peoples must have adequate collective wealth of their own, in the form of land and access to natural resources, to minimize dependence on external funding and the political constraints that accompany it. No Aboriginal government, regardless of the quality and ideals of its personnel, can be fully accountable to its citizens if its basic operations are paid for by the federal government.

*The third essential attribute: resources.*

The focus of this paper, as previously mentioned, is on the subjects being considered at this conference. This invites a focus on the third attribute. Assuming the legitimacy and power of Aboriginal governments as established, they would be relatively ineffective without sufficient resources and financial arrangements in place to enable the effective exercise of this governing authority.

The Commission began its discussion of this subject by identifying goals for financial arrangements in pursuit of Aboriginal self-government. These objectives are important because they must be the subject of negotiations and will influence the eventual design of the financial framework for the Aboriginal government. The objectives also allow for an evaluation of the implementation and continued operation of particular funding arrangements to determine whether they fulfill the purposes they were designed to achieve.

*Self-reliance*

Effective government depends upon a sound economic base. This includes land and resource bases, economic activity, and access to fiscal instruments such as



taxation. Fiscal arrangements should be structured to provide for Aboriginal self-reliance to meet their governing responsibilities.

#### *Equity*

Financing arrangements must provide for an equitable distribution of resources, financial and otherwise, among and between governments, groups of people and individuals. In the design of new funding arrangements, the Commission emphasized the importance of

- 1) equity among the various Aboriginal governments that make up the third order of government in Canada, and
- 2) equity between Aboriginal and non-Aboriginal people as a whole, and
- 3) equity between individuals

#### *Efficiency*

Efficiency dictates that a government should use limited resources in as effective a manner as possible, and in so doing promote sustainable development. It is implicit that the Commission meant the most effective use of resources that is consistent with the maximum liberty of citizens.

#### *Accountability*

Governments with the authority and responsibility to spend public funds for particular purposes should be held accountable for such expenditures, primarily by their citizens and also by other governments from which they receive fiscal transfers. In the context of Aboriginal governments, the Commission viewed accountability as resting with the Aboriginal nation rather than with individual communities. Funding arrangements should reflect this basic objective, allowing for processes and systems of accountability that are both explicit and transparent.

#### *Harmonization*

Financial arrangements should include mechanisms that provide for harmonization and co-operation with adjacent governing jurisdictions. This is to ensure that decisions by individual Aboriginal governments take account of the effects of their policies on other governments. This consideration should include federal, provincial and municipal governments.

The new relationship in the vision of the RCAP, it may be recalled, included the following key elements:

- 1) Aboriginal self-government based on a recognition of the right of self-determination and the inherent right of self-government for Aboriginal peoples;
- 2) A relationship between Aboriginal and non-Aboriginal people and their governments that takes the form of a nation-to-nation relationship;
- 3) Recognition of Aboriginal governments as one of three constitutionally recognized orders of government in Canada.

From the nature of this new relationship, the Commission drew the following principles, which should shape the development of financial arrangements for Aboriginal governments.

First, a renewed relationship requires fundamentally new fiscal arrangements. In the Commission's view, developing a system of finance for Aboriginal governments based on adapting or modifying existing financial arrangements with Indian bands would be ill-advised, because those arrangements are based on a radically different kind of governing relationship. *Indian Act* band governments, for example, are perceived as a form of self-government; but in fact they are a form of self-administration, not self-government. Band governments under the *Indian Act* do not have independent authority; they derive their powers from the federal government. Moreover, given the limited range of powers delegated to them, there is little opportunity for band governments to have access to independent sources of revenue. Consequently, the financial arrangements are characterized by dependency, by extensive accountability provisions, by elaborate administrative structures and by other features that reflect that type of governing relationship. The accountability procedures for Aboriginal nation governments should not be more onerous than those imposed on the federal and provincial governments.

Second, the development of a Canada-wide framework to guide the fiscal relationship among the three orders of government should be a prerequisite for negotiations leading to the development of long-term financial arrangements for individual Aboriginal governments. A key feature of the new relationship the Commission recommended is that it would provide an opportunity for Aboriginal peoples to aggregate their collective interests as self-governing nations. This is an important step toward restoring balance in a relationship between Aboriginal and non-Aboriginal people that all too often has been weighted unduly against the interests of Aboriginal peoples. Likewise, Aboriginal nations collectively forming a third order of government should have an opportunity to aggregate their interests on fiscal matters. This would be achieved, in the Commission's recommendations, through a Canada-wide fiscal framework negotiated by representatives of the federal and provincial governments and national Aboriginal peoples' organizations.

In my view, such financial and fiscal aggregation of Aboriginal national interests would allow self-confident Aboriginal nations to build urban institutions that would allow them to take advantage of the economic advantages available in towns and cities, including economies of scale and access to markets, services, and human resources. We know that Aboriginal people are moving to the cities as individuals. The building of viable economic, educational and social institutions in the cities by Aboriginal people for Aboriginal people seems to be a goal worth pursuing, and one that would eliminate many of the objections now put up against the idea of

Aboriginal self-government. In this regard, the question whose interests are being served may be revealing. Who benefits from serving disadvantaged racial minorities in urban areas? Who would benefit from strong Aboriginal urban communities belonging to Aboriginal nations with both urban and rural population bases free to choose their destiny, and with the resource and financial base to make their vision of a happy neighborhood matter?

The third principle is that for Aboriginal self-government to be meaningful, fiscal autonomy and political autonomy should grow together. This relationship should be reflected in the proportion of transfers to Aboriginal governments from the federal and provincial governments that are unconditional. A government cannot be truly autonomous if it depends on other governments for most of its financing. The nature of transfers from other governments, for example, should reflect this principle. Compare existing financial arrangements, under which most of the funds Aboriginal governments receive from the federal government are of a highly conditional nature, with Aboriginal governments having to meet predetermined, detailed programme criteria to continue receiving these funds.

Conditional transfers are legitimate fiscal instruments for certain purposes, such as when a programme has an impact beyond a single community, or when country-wide standards in the delivery of certain public services are seen as desirable. As Aboriginal governments become more autonomous politically, however, the proportion of transfers from federal or provincial governments that is conditional should fall. This principle is reflected in federal-provincial fiscal relations and should also underlie fiscal relations with Aboriginal nation governments.

The fourth principle is that financial arrangements should provide greater fiscal autonomy for Aboriginal governments by increasing access to independent revenue sources of their own. A critical element of fiscal autonomy is a fair and just redistribution of lands and resources for Aboriginal peoples. Without such a redistribution, Aboriginal governments, and the communities they govern, will continue to lack a viable and sustaining economic base, which is integral to self-government.

Aboriginal governments should be able to develop their own systems of taxation. While most Aboriginal people already pay taxes in Canada, the difference is that under a new relationship Aboriginal citizens would pay taxes mainly to their own governments. Accordingly, Aboriginal governments should have the ability to raise revenues from the development of their lands and resources. This taxing authority, when recognized, will be an important step toward increased fiscal autonomy for Aboriginal governments and will also encourage greater fiscal accountability and citizen participation. If Aboriginal nations have the power to tax and have a tax

base, non-Aboriginal governments will expect them to levy taxes. If no effort is made by Aboriginal governments to collect taxes, there will be a negative impact on their transfer payments from other governments.

### *Establishing accountability systems for Aboriginal government*

In its public hearings, the Commission heard from Aboriginal people that establishing mechanisms for government accountability and responsibility go hand-in-hand with the autonomy that these governments will enjoy under self-government and associated fiscal arrangements. Aboriginal governments must be able to demonstrate to their citizens that they are exercising authority and managing the collective wealth and assets of the nation and administrative structures in a responsible and open manner.<sup>14</sup>

Currently, Aboriginal governments and organizations are accountable mainly to non-Aboriginal governments and agencies, such as INAC, that provide funding for their activities. There is a widespread perception in some communities that their leaders rule rather than lead their people, and that corruption and nepotism are prevalent. At the level of administration, reporting systems and lines of accountability to external agents such as INAC are time-consuming and complex and divert the energies of Aboriginal service providers away from delivery responsibilities. These arrangements have created a situation where Aboriginal governments are more responsive to external agencies than to community members. Further, the development of the capacity for political accountability has been stymied by the fact that key policy and programme decisions are made by non-Aboriginal officials and political leaders.

RCAP proposed that developing the internal capacities of their governments for political, financial and administrative accountability should be an element in the constitution-building activities of Aboriginal nations and in the implementation of their governments. The essence of accountability is the responsibility of government officials and government employees for their conduct while in public office or otherwise in a position of authority. Citizens must be assured that government is conducted by individuals who are beyond reproach and that public administration is carried out by competent public servants.

Accountability falls into three broad categories: for political decisions, for the administration of public affairs, and for the use of public funds. Elected and appointed officials are formally responsible through clearly defined rules and mechanisms. Accountability means that those dealing with or receiving services

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<sup>14</sup> This subject is treated under the heading in the above text, in Vol.2, *supra*, note 10, at 345 ff.

from governments will be treated impartially, fairly, and on the basis of equality; that government decisions will not be influenced by private considerations and will be carried out efficiently and economically; and that public officials will not use public office for private gain. In short, the constituency of people served rather than the office holders should benefit from the discharge of public functions.

Accountability mechanisms normally include reporting requirements regarding how government spends public funds, a code of ethics for public officials, and conflict of interest guidelines and enforcement mechanisms. The goal of such mechanisms, and of accountability regimes generally, is to maintain public confidence in the integrity of government, to uphold high standards in public service and to encourage the best people in the community to present themselves for public office. In this sense, accountability is integrally linked with other elements of governance, including leadership selection and decision-making processes. In this context, accountability mechanisms can enhance or erode the legitimacy of governments.

The Commission opined that the experience of American Indian tribal governments may be of interest and relevance to Aboriginal peoples in Canada designing and implementing their own systems of accountable and responsible government, in addition to the wide experience in Canadian jurisdictions. In this regard, the Commission cited the particular example of the Navajo Nation's *Ethics in Government Act*.<sup>15</sup>

*The Government of Canada must restructure its institutions to implement the new relationship with Aboriginal peoples.*

The Commission took the view that the implementation of its recommendations on Aboriginal self-government requires changes in the organization of the government of Canada for the conduct of its responsibilities related to Aboriginal affairs.<sup>16</sup>

In addressing this matter, the Commission reviewed the organizational problems, proposed some principles for reorganization, and proposed what is viewed as the best organization for the development and implementation of the RCAP recommendations through the cabinet system.

The current state of federal organization for the development and implementation of Aboriginal policy reflects historical conflicts and strains in political and bureaucratic philosophy about Aboriginal issues. It also reflects the fact that federal policy making has rarely taken a comprehensive approach to Aboriginal

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<sup>15</sup> See Vol.2, *supra*, note 10, at 348, and endnote 275.

<sup>16</sup> These recommendations are developed in *ibid*, at 353ff.

affairs. Instead, the various departments with responsibilities for matters of interest to Aboriginal peoples have developed policies and programmes independently of each other, and frequently only for specific groups of Aboriginal people. Different organizing principles and philosophies for the conduct of Aboriginal affairs have often competed with one another, both within INAC and in the federal government as a whole.

The Commission's studies of INAC and its predecessors revealed almost constant organizational and policy flux. The Commission summarized as follows the critiques of INAC that, until recently, were remarkably consistent.<sup>17</sup>

1. *INAC operates under a legacy of colonialism and paternalism and is resistant to change.* This criticism is not unexpected from the department responsible for administering colonial legislation in the form of the *Indian Act*.

2. *INAC's performance in the federal policy arena is inadequate.*

Departments with more focused functional responsibilities and budgets have been seen as being able to walk over INAC, at least in its policy role, and the department itself has been seen as having insufficient capacity to bring its own policy initiatives to fruition through the cabinet decision process.<sup>18</sup> The Commission attributed the relative weakness of INAC to its contradictory mandate, which has made it prone to protracted internal policy debates and made it difficult to benefit from the efforts of its very diverse and politically active constituency. At times virtually all of its constituents, which includes resource developers, status Indians, Inuit, and northern political leaders with aspirations to provincehood, have tried to circumvent INAC to make claims more directly on other ministers or on cabinet.

3. *INAC is evasive or negligent on the matter of meeting federal treaty and claims obligations.*

Federal policy on Aboriginal rights and title, as well as with respect to treaties and comprehensive claims, has been extremely inconsistent over time. Meanwhile federal behaviour has been relatively consistent: the federal role has been to deny the original spirit and intent of the treaties and to attempt to restrain any expansion of federal responsibilities to all Aboriginal peoples in Canada. The absence of any effective oversight mechanism, aside from the courts, has been a matter of concern.<sup>19</sup>

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<sup>17</sup> For a list of the critiques see *ibid*, at 407-408, endnotes 276, 277 and 278.

<sup>18</sup> In the writer's experience, the lack of capacity to deal effectively with policy issues is also a significant weakness of provincial governments in the context of tripartite self-government negotiations. By way of example, see the recommendations in the June 2001 final report of Manitoba's Aboriginal Justice Implementation Commission, which were intended to address some of the problems. The report is available from the government publishers and on the website [www.ajic.mb.ca](http://www.ajic.mb.ca)

<sup>19</sup> Vol.2, *supra*, note 10, at 408, endnote 282, where the Commission commented on the positive nature of some changes that were happening at the time, but concluded that 'the jury is still out on these initiatives.'

The Commission identified the following institutional capabilities needed by the federal government to meet its recommendations.<sup>20</sup>

1. a capability to negotiate new treaty arrangements, self-government accords and claims agreements;
2. a capacity to develop and review policy;
3. a capacity to service and deliver programmes to communities operating under the terms of the *Indian Act*;
4. a capacity to facilitate and implement new policies and relationships.

This implies specialized expertise, in areas such as education, health, and economic development, to implement policy and programme changes resulting from federal policy reviews and new arrangements with Aboriginal peoples and their governments. It also includes the capacity to get funds and other forms of support out to Aboriginal governments, Aboriginal agencies and organizations established jointly by Canada and Aboriginal peoples (and perhaps provinces), consistent with any federal commitments for such support:

5. a capacity to develop and establish alternative dispute resolution mechanisms, such as the lands and treaties tribunal; and
6. a centralized executive oversight capability, within the cabinet structure, to ensure that the practices of the departments and agencies throughout the federal government conform to federal policy.

The Commission identified the organizational principles behind its specific recommendations for federal structural changes.<sup>21</sup>

### *Simplicity*

Organizational changes should be as straightforward as possible; all other things being equal, where there is a choice of format or mechanism, preference should be given to the simpler form.<sup>22</sup>

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<sup>20</sup> *Ibid.*, at 360-361.

<sup>21</sup> *Ibid.*, at 359. A striking illustration of the inadequacy of interdepartmental coordination of new Aboriginal policy initiatives is evident in the varied responses of the national Aboriginal organizations who were invited to participate in the nationally televised release of the new government policy on 8 January 1998, which was described as the federal response to the RCAP report. The centerpiece of the new policy approach was a relation of partnership with Aboriginal peoples. INAC had apparently consulted with its constituency, the status Indians, in respect to the policy, and it was well received by the National Chief of the AFN. However, the partnership policy had otherwise been largely developed in isolation from the other would-be partners represented by the Native Women's Association of Canada (NWAC), the Metis National Council, and the Congress of Aboriginal Peoples, who all criticized the federal response. The Privy Council Office (PCO) has primary responsibility for federal non-status Indian and Metis affairs or relations, in the sense that an Aboriginal Affairs Secretariat serves a federal minister designated as an 'interlocutor' for the Metis and non-status Indians, constituencies that do not fall within the regular mandate of INAC.

<sup>22</sup> This is the well-known principle of parsimony, often attributed to the medieval philosopher, William of Occam (of Ockam, Surrey) that, 'plurality should not be assumed without necessity.' In Latin, the principle has been expressed as '*pluralitas non est ponenda sine necessitate*', or sometimes as '*entia non*

### *Transparency*

The reasons for and content of recommendations must be capable of being readily understood within the government of Canada, by Aboriginal people and by other segments of the attentive Canadian public.

### *Link between policy development and implementation*

Experience suggests that initiatives in which those ultimately responsible for implementation create the policy and in which the persons who conceive ideas share responsibility for implementation are most likely to be successful.

### *Oversight*

The general perception of unmet federal commitments requires specific attention to oversight under than through the courts.

### *Respect for difference*

Policies and institutional arrangements must reflect fundamental differences among Aboriginal peoples. This may imply differentiation within a single federal organization or policy regime, or different organizations or regimes.

These are the key elements of the Commission's recommendations for structural changes in federal government institutions, in order to implement Aboriginal self-government in Canada.<sup>23</sup>

1. The leadership initiative of the Prime Minister;
2. The overall structure of the federal cabinet;
3. the role of the Privy Council Office;
4. the establishment of a new department of Aboriginal relations, under a minister of Aboriginal relations; and
5. the establishment of a new Indian and Inuit services department to meet continuing federal obligations to Indian and Inuit communities, until transition to self-government.

The following brief commentaries are appropriate to the scope of the present discussion.

1. At the most fundamental level, the Commission urged, it falls to the prime minister to launch and nurture the renewed Aboriginal-Crown relationship, through a vehicle such as a royal proclamation and its companion legislation.<sup>24</sup>
2. The new senior ministerial portfolio of minister of Aboriginal relations would be created to guide all federal actions associated with developing and implementing

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*sunt multiplicanda praeter necessitatem*. The modern English version, 'Keep it simple, stupid', offers an interesting contrast and a pithy commentary on the dynamic nature of culture.

<sup>23</sup> The recommendations are developed and set out in Vol. 2, *supra*, note 10, at 361-371.

<sup>24</sup> For a discussion of the greatly centralized concentration of political power in the prime minister in Canada, see Donald Savoie, *Governing from the Centre* ( )



the new federal-Aboriginal relationship, combining policy and intergovernmental responsibilities with responsibility for the overall fiscal framework and federal spending related to Aboriginal affairs.

3. Responsibility for direct implementation of new federal policy initiatives relating to Aboriginal people should be assigned to the relevant line departments and agencies of the federal government. The Commission viewed this approach as consistent with the government's then current effort to enhance the co-ordination of initiatives by establishing ministries that work across broad policy fields, and also consistent with the Commission's principle of linking policy development to implementation.

4. A new minister, the minister for Indian and Inuit services, would head a new Indian and Inuit services department and be responsible for delivery of the government's remaining obligations to status Indians, Inuit and reserve communities under the *Indian Act*. This department would have no policy role. Its function was intended to reflect the anticipation of the Commission that many First Nations and Inuit communities would choose to live under existing legislation while reconstructing their nations. In this regard, the Commission explained that establishing this new department alongside the department of Aboriginal relations, who would be responsible for the purse strings and monitoring of federal activities relating to Aboriginal affairs, was intended to structurally differentiate the context in which the remnants of the old relationship are administered from the fundamentally new relationship proposed by RCAP. In this regard, the Commission commented, 'As peoples and communities move to embrace the new relationship, their connection with this department will wither away, to the point where it will be redundant'.<sup>25</sup>

#### *Conclusion*

It must be emphasized, as did the Commission, that ultimately the resolution of all the issues considered above, rests with the parties to achieve, and that the Commission's recommendations were intended as illustration. By definition, the Commission added, a federation is a flexible and evolving entity, and the shape and direction it takes must likewise be somewhat flexible and capable of responding to change. If there is one quality that Aboriginal and non-Aboriginal Canadians have shared historically and continue to share, it is the ability to be flexible, to respond to change, and to look to the future with hope and confidence. It was this spirit that motivated the above discussion.

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<sup>25</sup> The Commission focused its attention on the topic of Aboriginal self-rule, believing this to be the area in which it could make the greatest contribution, and did not devote significant attention to institutions of shared rule, or the participation of Aboriginal people in Canadian institutions of federalism. See Vol.2, *supra*, note 9, at 374-382. For a critical commentary on this aspect of the Commission's work, see Cairns, *supra*, note 6, esp. at 146-160.