

# CanadaWatch

PRACTICAL AND AUTHORITATIVE ANALYSIS OF KEY NATIONAL ISSUES

a publication of the York University Centre for Public Law and Public Policy and the Robarts Centre for Canadian Studies of York University

## SPECIAL ISSUE: THE RCAP REPORT AND THE FUTURE OF CANADA

### ABORIGINAL SELF-DETERMINATION AND SELF-GOVERNMENT: SOVEREIGNTY BY INCLUSION

BY REG WHITAKER

Much to the chagrin of many Canadians, this country constantly finds itself interrogating its fundamental constitutional nature. In the 1997 federal election, the "national unity" issue was seen by many to have hijacked the electoral agenda. Was Canada to be a country that recognized the "distinctiveness" of Quebec within its federal structures, or was it to be a nation of strictly equal provincial units? There is the basis here for profound division and, of course, the potential for the breakup of the country. Yet this stark dichotomy of visions masks and is made possible by a missing dimension—an absence that is no accident, that is quite deliberate: the question of Aboriginal national self-determination and self-government.

Not only were First Nations left out of the so-called "national unity" debate, Aboriginal issues were shamefully absent from the electoral agenda altogether, despite the recent appearance of the for-

midable report of the Royal Commission on Aboriginal Peoples (RCAP). This silence was not the result of mere oversight; it was *strategic*. The politicians and the parties are co-conspirators in seeking to confine Aboriginal issues within square brackets, as it were, apart from the main business of the nation. This will not do, however, particularly in

### WHY JEAN CHRÉTIEN—AND THE CANADIAN PEOPLE—SHOULD READ THE REPORT OF THE RCAP

BY FRANCES ABELE

*Aboriginal peoples anticipate and desire a process for continuing the historical work of Confederation. Their goal is not to undo the Canadian federation; their goal is to complete it.* [RCAP, *The Mandate*, 1991]

The final report of the Royal Commission on Aboriginal Peoples addresses longstanding and seemingly intractable problems from a long term perspective—a feature it shares with most Canadian royal commissions. Reports

light of the unavoidable centrality of the national unity issue. Just as putting Aboriginal peoples on reserves failed to put them out of sight, out of mind, so too putting the issue of Aboriginal self-government in square brackets breaks down in practice.

Memories are short. Only fifteen years ago the *Constitution Act, 1982* included sections 25 and 35 recognizing Aboriginal rights as fundamental to the law of the land. It was not that long ago that Elijah Harper provided the final straw that broke the back of Meech Lake. It was even

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that take the long view of complicated matters tend to be long and complicated themselves; occasionally their recommendations may seem politically awkward or even utopian.

Both the complexity and the "awkwardness" of royal commission reports reduce the enthusiasm with which governments and the major institutions of the national press receive them. In the case of the

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more recently that the Charlottetown Accord was hammered out by Aboriginal leaders sitting with the First Ministers as equals, recognizing the "inherent right to self-government" and envisaging Aboriginal government as one of three orders of government in Canada.

*One way or another, the national question in Canada can no longer be addressed in terms of "duality", but must involve the more complex issue of multiple nationalities.*

Not only are memories short, vision is short-sighted. If Quebec votes for sovereignty in the next referendum, a flashpoint of crisis will without doubt be the rejection by the Cree and Inuit of northern Quebec of the idea that they could be transferred like cattle from one jurisdiction to another on the basis of someone else's "right to national self-

determination". Yet no negotiated settlement of the conflicting claims of Québécois and Aboriginal self-determination (whether by partition, a Canadian-Quebec condominium in the north, international adjudication, or by joint constitutional protocol) could be concluded without major repercussions for relations with Aboriginal peoples outside Quebec. One way or another, the national question in Canada can no longer be addressed in terms of "duality", but must involve the more complex issue of multiple nationalities.

The first Chrétien government from 1993 to 1997 set about negotiating one-on-one "self-government" agreements with individual bands, as in Manitoba, bypassing the national organization of the Assembly of First Nations. These individual arrangements are not an adequate substitute for an overall plan based upon consensual principles. Indeed, there is some general anxiety among Aboriginal leaders that, under *ad hoc* agreements, individual bands may be taken advantage of by governments and by corporations and, given the historical track

record, such fears appear all too credible. Worse yet is a thrust toward "municipalization", where "self-government" is a dispensation from the provinces—which may of course be taken away (ask the residents of Metro Toronto!).

*[T]he RCAP offers by far the most comprehensive and detailed set of proposals yet for what genuine Aboriginal self-government might look like and how to get there.*

In this context, the RCAP offers by far the most comprehensive and detailed set of proposals yet for what genuine Aboriginal self-government might look like and how to get there. The section on "Governance", which takes up most of Volume 2, *Restructuring the Relationship*, is both a summation of the various strands of thinking that have gone into this question over the past two decades and a

specific plan of action. To some degree, it carries forward the thrust of the self-government proposals in the Charlottetown package, but the RCAP recommendations are not only immensely more detailed, subtle, and comprehensive than Charlottetown, but also forthrightly confront some prickly issues that Charlottetown either evaded or ignored: [1] the question of membership in the community (who can qualify as an Aboriginal person for purposes of self-government); [2] the effective units of self-government; [3] how Aboriginal governments would relate to each other and to the existing orders of government in Canada; [4] the financial requirements that existing governments would be obliged to provide if Aboriginal governments are to be anything more than empty shells. The last point is one central to the Report as a whole—and the one that has predictably cooled governments toward its recommendations. But the candour with which the costs are spelled out is typical of the approach of the Commissioners to the other

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Understandably, we have focused on only a few aspects of the Report which, as Frances Abele points out, was written in response to a broad, comprehensive mandate. The entire document is a rich repository of data, knowledge, and insights about the Aboriginal peoples of Canada. We particularly recommend the Thanksgiving Address, which graces the opening of the first Volume of the Report. Canadians may find much to admire (if not imitate) in the Aboriginal values of environmental stewardship and concern for future generations, as the fol-

lowing brief excerpt indicates: "Finally, we acknowledge one another, female and male. We give greetings and thanks that we have this opportunity to spend some time together. We turn our minds to our ancestors and our Elders. You are the carriers of knowledge, of our history. We acknowledge the adults among us. You represent the bridge between the past and the future. We also acknowledge our youth and children. It is to you that we will pass on the responsibilities we now carry. Soon, you will take our place in facing the challenges of life. Soon, you

will carry the burden of your people. Do not forget the ways of the past as you move toward the future. Remember that we are to walk softly on our sacred Mother, the Earth, for we walk on the faces of the unborn, those who have yet to rise and take up the challenges of existence. We must consider the effects our actions will have on their ability to live a good life."

The twenty-first century begins in less than two-and-a-half years. If our country is to survive for another hundred years, we will need to respond successfully to several funda-

mental challenges. Undoubtedly, we will have to work out with Canadian Aboriginal peoples a new relationship that is rooted in fairness, equity, and mutual respect. What better place to begin than with a full public discussion of the RCAP Report? 

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## SOVEREIGNTY BY INCLUSION *from page 70*

central issues. This is a Report that does not shrink from taking on tough issues, even those that divide native communities themselves.

*Sovereignty is "the natural right of all human beings to define, sustain and perpetuate their identities as individuals, communities and nations" or, more simply, "the right to know who and what you are".*

On the issue of membership, the RCAP rejects race, or the establishment of a "blood quantum". It does so not so much on the grounds of liberalism but on the basis of Aboriginal traditions: culture, the relationship to the land, and a collective sense of identity have been more important than

consanguinity; people can and have chosen to belong. The RCAP is quite aware of the dangers of traditionalist fundamentalism. They are, for example, firm on the stipulation that all rights to self-government must be equally available to men and women, and they delineate carefully where the *Charter of Rights* should apply to Aboriginal governments and how its provisions should be interpreted in light of Aboriginal cultures.

On the effective units, the Report recognizes that many bands and local communities are simply not large or viable enough to exercise self-government. "Nations"—relatively sizeable bodies of Aboriginal people with a "shared sense of national identity that constitute the predominant population in a certain territory or collection of territories"—will be the units, and the RCAP estimates these to number between 60 and 80, which might be fewer with cross-provincial groupings (this contrasts with an estimate of about a thousand local Aboriginal commu-

nities across the country). Of course, some powers can be devolved down to the local communities on the subsidiarity principle.

*Whereas Quebec sovereignists would simply replicate the Canadian state on a smaller scale but with the same expectations of uniformity, Aboriginal voices generally do not see why many trees cannot grow in a forest, as part of a "complex ecological system".*

Sovereignty is usefully distinguished from self-government. Sovereignty is "the natural right of all human beings to define, sustain and perpetuate their identities as individuals, communities and nations" or,

more simply, "the right to know who and what you are". For Aboriginal people, this is not a secular, political concept, so much as a spiritual one: "as a gift from the Creator, sovereignty can neither be given nor taken away, nor can its basic terms be negotiated." While Aboriginal and non-Aboriginal concepts of sovereignty are expressed in very different languages that arise out of differing cultural backgrounds, Aboriginal understandings present a less absolutist notion of sovereignty than European versions (James Tully has described Western constitutional discourse as the "empire of uniformity"). For Aboriginals, sovereignty can be shared among different peoples so long as the right to self-determination ("the power of choice in action") is recognized. Whereas Quebec sovereignists would simply replicate the Canadian state on a smaller scale but with the same expectations of uniformity, Aboriginal voices generally do not see why many trees cannot grow in a forest, as part

of a "complex ecological system".

Within this context of inherent sovereignty, self-government is one of a "range of voluntary options available to Aboriginal peoples who wish to take advantage of it". Forms of self-government may vary. Here the RCAP is sensitive to the diversity of Aboriginal cultures and to the range of governmental forms that might be adopted. There is no one model, whether of consensual decision-making or formal written constitutional structures that can, or should, be imposed upon this diversity.

It also has interesting, if incomplete, extrapolations about one of the most difficult problems of all: how forms of self-government might be extended to Aboriginal people living off reserves in minority urban settings. This is one of the weaker points of the Report, but given the apparent intractability of some of the issues (especially where Aboriginal and non-Aboriginal rights come into conflict), it has at least provided a thoughtful start.

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*Particularly interesting is the consideration of how specific forms of taxation will impact upon non-Aboriginal jurisdictions and upon the wider political economy within which Aboriginal economies will function.*

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Another gap tentatively filled in by the RCAP is the institutionalization of representation of the third, Aboriginal, order of government in the existing Canadian political sys-

tem. The important point here is that Aboriginal governments, however structured, cannot be seen as municipalities, that is, subordinate to higher "levels" of government. Nor, as an "order" of government, can they be seen as simply like provinces, that is to say, jurisdictions created by the *BNA Act* under a particular "distribution" of powers. Instead, deriving their authority from an existing or inherent sovereign right of self-determination already recognized in the *Royal Proclamation* of 1763, in treaties, in judicial decisions, and in the 1982 Constitution, Aboriginal governments would be separate from and co-ordinate with the provinces and the federal government. This requires broader institutional representation than simply a series of governments, and the RCAP Report does sketch out some plausible forms up to an elected Aboriginal parliament, or House of First Peoples, that would share responsibility with the Parliament of Canada for matters relevant to Aboriginal peoples on a "Nation-to-Nation" basis.

To the Commission's credit, a good deal of detailed attention is paid to the problem of financial arrangements for Aboriginal governments, especially around issues of taxation and revenue sources. Earlier discussions had often given inadequate focus to this critical dimension. Particularly interesting is the consideration of how specific forms of taxation will impact upon non-Aboriginal jurisdictions and upon the wider political economy within which Aboriginal economies will function. Yet looming behind all these plans is the nasty nettle that the RCAP has grasped honestly: none of this will work unless Canadian society is willing to provide the substantial short-term fiscal transfers

that alone will make possible the reduction of the huge long-term costs of continued neglect and indifference toward nearly one million indigenous people in this country.


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*There is a worrying tendency throughout to try to resolve correctly identified problem areas by creating yet more governmental or bureaucratic structures; there are perhaps a few too many projected tribunals and commissions and other administrative mechanisms. But, despite the inevitable warts, we don't need any more studies or any more specifications of the problem than have been provided here.*

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The RCAP Report has spelled out in far greater and more careful detail than ever before what can and should be done in relation to governance. Certainly, as in any large-scale collective effort like this, there are weak points that can be identified. The problems of separate governmental forms for Aboriginal people living in cities have not been fully or even adequately addressed. There is a worrying tendency throughout to try to resolve correctly identified problem areas by creating yet more governmental or bureaucratic structures; there are perhaps a few too many projected tribunals and commissions and other administrative mecha-

nisms. But, despite the inevitable warts, we don't need any more studies or any more specifications of the problem than have been provided here. The Report clearly provides the basis for proceeding. Whether the lead will be followed is up to the re-elected Liberal government.

The former minister of Indian Affairs, Ron Irwin, did not seek re-election. With a new minister with a reputation for a constructive, non-confrontational approach to politics (Jane Stewart), a new majority government, and a deficit heading rapidly toward zero, the Liberals have a window of opportunity. As they contemplate the coming challenge of yet another Quebec referendum on sovereignty, they might well consider the intriguing philosophical lesson that this Commission poses to the fundamental idea of governance in Canadian society. Sovereignty, Aboriginal voices are telling us, is not an absolute, not a zero-sum of authority; it is something that can, and should, be shared. How sovereignty could be shared without one people triumphing over another, is thoughtfully spelled out in this Report. There is no shortage today of those who are defining sovereignty by exclusion. We could well listen to those speaking of inclusion. 

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