

# NATIONHOOD AND THE RCAP REPORT

BY PHOEBE NAHANNI

Once again, it appears as though Canada is extremely reluctant to settle its relationship with Aboriginal nations within its national borders. In 1992, it created a Royal Commission on Aboriginal Peoples to investigate the status of this relationship. At the end of 1996 this Commission presented its Report in five volumes. To date, the Federal Government of Canada has not acknowledge the Report in any substantive way.

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The overall Report is expansive. I have not read every page of it, but I know the issues. These issues are not mysterious (at least to most Aboriginal peoples), but they are serious. And, they can and will be resolved. We have to be confident that they will. However, legal, political, and social interpretations have made them very complicated indeed. And that is what the Royal Commission Report is—a complicated interpretation of serious issues.

I would like to briefly mention some of the terms of ref-

erence of the Royal Commission on Aboriginal Peoples to remind myself what they were asked to do. Then I would like to discuss some of the prominent recommendations having to do with the concept of nationhood and how the Commission views the implementation of this concept.

The Commission was asked to investigate “the history of relations between Aboriginal peoples, the Canadian government and Canadian society as a whole”; “the means of integrating Aboriginal spirituality, history and ceremony into public and ceremonial life of the country”; “the recognition and affirmation of Aboriginal self-government, its origins, content and a strategy for progressive implementation”; “the historical interpretation and application, and potential future scope, of s. 91(24) of the *Constitution Act, 1867* and the responsibilities of the Canadian Crown”; and “the legal status, implementation and future evolution of Aboriginal treaties, including modern-day agreements.”

One of the many recommendations in this Report proposes the recognition of Aboriginal nations (within Canada as a nation-state) through the creation of a third order of government for these nations. How is Canada going to do this? It would first introduce a new Royal Proclamation which would state principles recognizing the new relationship. This would be followed by new legislation and institutions to implement these principles. The concept of nationhood of Aboriginal peoples

within the nation-state is the central theme in the larger picture (the Aboriginal—non-Aboriginal relations) as presented by the Commission. And, the Commission urges the federal and provincial governments to make room at the highest level.

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Certain concepts are integral to the discussion on nationhood, and they are sovereignty, self-determination, self-government, human rights, and inherent rights. Sovereignty is described as “a natural right of all human beings to define, sustain and perpetuate their identities as individuals, communities and nations” (Vol. 2, 108). As a human quality, sovereignty finds its expression in self-determination. Self-determination is a power of choice in action and self-government is one way Aboriginal peoples make

choices and put into effect the principles of self-determination. How do these theoretical discussions apply to some of the Aboriginal peoples’ realities? Treaties are one very important reality for Aboriginal peoples. Aboriginal peoples who signed treaties with the Crown say that the treaties recognized Aboriginal peoples as self-governing nations. The treaties did not create nationhood. Nationhood is an inherent right. Treaties were a common practice among Aboriginal nations in pre-colonial times. When treaties were made with the representatives of the Crown, they were nation-to-nation agreements.

The Commission reports that the pre-Confederation treaties were on a nation-to-nation basis. However, post-1850 treaties clearly provide for the extinguishment of Aboriginal title (to land and resources). How did this come about? Does this mean that Aboriginal peoples have nationhood but do not have Aboriginal title? Well, yes they have nationhood, and no, they do not, because they and their lands have been engulfed in Canada since 1850. The Canadian courts have had and continue to have a direct hand in determining the way the Canadian government and the Canadian public should view Aboriginal peoples and their lands and resources. And up to now, the courts have decided on several issues (for example, fiduciary) that may make the future a tad brighter. But, *the big one*, the one on extinguishment of Aboriginal title, will not change: it has been settled, since 1850. The Commission says it is unlikely that the courts could change their minds on this issue. Therefore, it would be best to concentrate on lands and resources while at the same time stressing the “spirit and intent” of the trea-

ties and "sharing of land and resources" as implicit in the treaties. Spirit and intent "is a term that transcends the purely legal nature of treaties and includes their constitutional and spiritual components" (Vol. 2, 42).

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Recognizing this, Aboriginal leaders have continued to stress the need for implementation of the treaties and the inherent right to self-government. Implementation requires that the written and unwritten terms of the treaties be acknowledged. Although the written terms of the original treaties were one-sided in favour of the Crown, the Aboriginal leaders continue to stress that the treaty process created a relationship between the parties and that is what the Aboriginal peoples want to keep. The Treaties also recognize the self-governing nature of the nations who entered into them. The Commission agrees, and suggests that a new relationship arrangement be one of partnership.

Nationhood of Aboriginal peoples is contemplated within the jurisdiction of Canada. In a way, this recognition has been partly accorded to Aboriginal peoples, particularly

those who have made modern agreements or treaties. It has given them formal recognition. The Commission would like to see this process go further. It would like this process to be legitimized by the recognition of a third order of government.

Two other things need to be added here. In this third-order-of-government arrangement, the Commission addresses the need to respect core responsibilities (internal) of Aboriginal nations, and that they in turn respect their responsibilities in the periphery (with provincial and federal relations). Secondly, consultations with provincial and federal governments should begin to ratify and implement United Nations agreements directly related to indigenous peoples.

In summary, here is what I learned from reading part of the Report. The Royal Commission found it could not change court decisions but it could recommend rearrangement of relations, such that Aboriginal peoples maintain nationhood and become partners within the Canadian jurisdiction through a third order of government on Parliament Hill. Written treaties will remain but they will be augmented by oral interpretation. The spirit and intent of treaties will be invoked by better sharing of land and resources. The Report does not dwell on treaties as international agreements *per se*. Aboriginal peoples will exercise their self-determination through self-government and there will be three categories of self-government to choose from.

In my view, three obvious concerns need to be addressed. First, legal and institutional interpretation of the Commission's recommendations needs to be scrutinized carefully. Aboriginal peoples must be assured that terms like "inherent right to self-govern-


ment" are not interpreted by bureaucrats so narrowly as to become virtually meaningless. Second, attention must be paid to whether the cultures of Aboriginal peoples are resilient enough to maintain their

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distinctiveness in such institutional structures and rearrangement as contemplated in the Commission Report. Will the practice of consensus, collective rights, and other Aboriginal ethical values be practical and practiced in the state apparatus? Third, although the Commission Report provides a definition for "nation" and discusses the possibilities for Aboriginal nations within Canadian jurisdiction, clarification is needed regarding the Aboriginal nations who have always considered themselves nations outside of this jurisdiction. If the same Aboriginal nations continue to maintain their nationhood outside of the Canadian jurisdiction, what happens to them? Do they not have a right to self-determination also? And is their definition of self-determination the same as the one

Canada has? The last time I looked at the concept of self-determination as interpreted by Canada, I was not too encouraged. Canada does not accord us the same kind of self-determination it accords itself, internationally. Sometimes I think Canada would prefer that we self-terminate. Looking at the dismal social and political conditions and how Canadian laws control our lives, it looks as though Canada is allowing termination to happen. My personal understanding from many Aboriginal peoples is that there should be minimal interference of Canadian law. Is it that bad? Well, inform yourselves about the oral and written history of Aboriginal and non-Aboriginal relations. Read the other volumes of the Commission Report, talk to Aboriginal women, and then you judge for yourselves. 

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