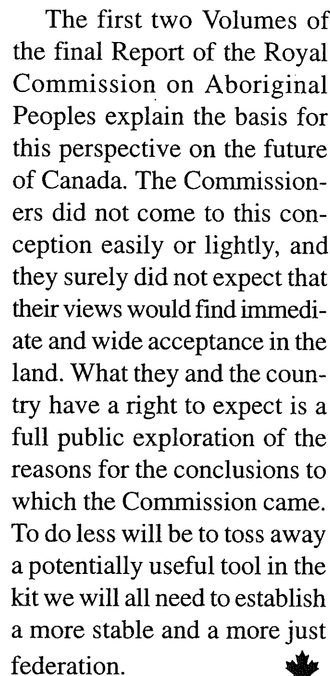
the common knowledge of the real origins of Canada and upon *mutual* respect. As they note in the beginning of their long letter to Canadians:

"A country cannot be built on a living lie. We know now, if the original settlers did not, that this country was not *terra nullius* at the time of contact and that the newcomers did not 'discover' it in any meaningful sense. We know also that the peoples who lived here had their own systems of law and governance, their own customs, languages and cultures".



The first two Volumes of the final Report of the Royal Commission on Aboriginal Peoples explain the basis for this perspective on the future of Canada. The Commissioners did not come to this conception easily or lightly, and they surely did not expect that their views would find immediate and wide acceptance in the land. What they and the country have a right to expect is a full public exploration of the reasons for the conclusions to which the Commission came. To do less will be to toss away a potentially useful tool in the kit we will all need to establish a more stable and a more just federation.

Frances Abele is Director of the School of Public Administration at Carleton University. She was seconded to the Royal Commission on Aboriginal Peoples during 1992-94, where she worked on research and policy questions. The views expressed in this article are her own, however, and do not necessarily reflect the views of the Commissioners or her former colleagues on the staff. *The author would like to thank her husband, George Kinloch, for his help in several ways.*

ABORIGINAL LANDS AND RESOURCES: AN ASSESSMENT OF THE ROYAL COMMISSION'S RECOMMENDATIONS

BY KENT MCNEIL

The Aboriginal peoples have been living on the land in what is now Canada and deriving their livelihood from its natural resources for thousands of years. Elder Alex Stead, at a public hearing held by the Royal Commission on Aboriginal Peoples (RCAP) in Winnipeg on April 22, 1992, put it this way: "We are so close to the land. This is my body when you see this mother earth, because I live by it. Without that water, we dry up, we die. Without food from the animals, we die, because we got to live on that. That's why I call that spirit, and that's why we communicate with spirits. We thank them every day that we are alive" (RCAP Report, vol.2, pt. 2, 435-36).

The Aboriginal peoples' connection with the land is not just economic—it is spiritual, and it is social and political as well. Their very existence as peoples with distinctive cultures depends on maintenance, and in some cases expansion or re-acquisition, of a land base, and on access to adequate natural resources. It is for this reason that land claims are of such vital importance for the Aboriginal peoples.

In its Report, RCAP points out many problems with the way the issues of Aboriginal lands and resources have been handled by the Canadian and provincial governments in the past. In many parts of Canada—particularly in the Atlantic Provinces, Quebec, and British Columbia—lands were taken from the Aboriginal peoples without their consent and without payment of compensation. Where there was a form of consent in the treaties, these documents have usually been interpreted by non-Aboriginal governments and courts as absolute surrenders of lands, whereas the Aboriginal peoples who signed them often intended to share the lands with the newcomers while preserving their own land uses and traditional ways of life.

[M]any reserves have been drastically reduced in size by surrenders, sometimes through government coercion or misrepresentation, and occasionally through outright fraud.

Lands set aside as reserves for the Aboriginal peoples were generally poor lands with limited natural resources (although in a few instances there was undiscovered oil, gas, or minerals below the surface, as in the case of some Alberta reserves). As a result, the reserves generally do not provide adequate economic bases for self-sufficiency. Moreover, many reserves have been drastically reduced in size by surrenders, sometimes through government coercion or misrepresentation, and occasionally through outright fraud.

Due to these wrongs, most Aboriginal peoples today do not have adequate lands and resources to be economically self-sufficient, making it impossible for them to finance self-government. Their economies and ways of life have been seriously interfered with, and in some cases virtually destroyed. The RCAP Report contains a number of recommendations to redress these past wrongs, so that the Aboriginal peoples can regain their self-sufficiency and political autonomy within Canada.

The Report recommends that the treaties be interpreted in accordance with the understanding of the Aboriginal peoples who signed them, so that they involve a sharing of lands and resources where that was intended, rather than an extinguishment of Aboriginal title. The treaties should be implemented according to their spirit and intent, and violations of them should be rectified. Where lands set aside as reserves are insufficient for current populations to be economically self-reliant and politically autonomous, non-Aboriginal governments should provide additional lands to foster these objectives. This is in the interest of all Canadians, as the cycle of dependency that so many Aboriginal people are caught in is a debilitating burden on the whole of Canadian society.

The Report also contains recommendations for the settlement of Aboriginal title issues in areas of Canada where treaties and modern land-claims agreements have not yet been signed. Among these are recommendations

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that the federal government not seek blanket extinguishment of land rights in exchange for benefits in the agreements, and that self-government be included so that it becomes a constitutionally protected treaty right under section 35 of the *Constitution Act, 1982.*

How can non-Aboriginal governments purport to negotiate in good faith when they are undermining the very rights which are the subject of negotiations? RCAP recognized this problem, and recommended a Canada-wide framework agreement whereby the federal and provincial governments would acknowledge the necessity for interim relief agreements before Aboriginal land claims are settled.

There are also proposals in the RCAP Report respecting land-claims process, so that the federal government no longer acts as the judge where it has a vested interest in the outcome. The principal recommendation to avoid this conflict of interest is the creation of an Aboriginal Lands and Treaties Tribunal that would not only supervise and monitor negotiations of Aboriginal land claims, but would also have adjudicative powers over claims or parts of claims referred to it by Aboriginal claimants.

I think the recommendations outlined above provide a basis for fundamental reform where Aboriginal lands and resources are concerned. But the Report also touches on another major concern that I want to address in more detail, namely, interim relief while land claims negotiations are taking place. These negotiations tend to be complex and contentious, and often can go on for many years before a settlement is reached. In the meantime, non-Aboriginal governments—especially provincial governments—act as though lands subject to Aboriginal claims are Crown lands, and continue to grant third-party interests, such as timber licences, mining leases, and the like, for resource development on these lands. How can non-Aboriginal governments purport to negotiate in good faith when they are undermining the very rights which are the subject of negotiations? RCAP recognized this problem, and recommended a Canada-wide framework agreement whereby the federal and provincial governments would acknowledge the necessity for interim relief agreements before Aboriginal land claims are settled. These interim agreements would provide for:

1. Withdrawal of lands most likely to be selected by the Aboriginal party in the final land claims agreement, to prevent government dispositions of third-party rights to those lands during the negotiations, unless the Aboriginal party consents;

2. Aboriginal participation in the management of lands and resources throughout the claimed territory for the duration of the interim agreement; and

3. Taxes and royalties on new resource development that is authorized on the claimed land to be held in trust pending the outcome of the negotiations.

I think these are important and essential recommendations, but a major problem is that provincial governments are unlikely to accept them because, up to now, the courts have generally tolerated provincially authorized resource development of lands that are subject to Aboriginal claims. I think the courts have sometimes failed to perform their judicial function in this respect, specifically their duty to uphold the rule of law by protecting legal rights from government infringement in the absence of legislation clearly and plainly authorizing the infringement.

Aboriginal title to specific lands, it is argued, does not exist until it has been proven in a court of law. This argument is wrong because it rests on a rebuttable presumption that the Aboriginal peoples did not occupy and use the lands when Canada was colonized by Europeans, when we all know the opposite to be true.

It has been clear since the decision of the Supreme Court of Canada in *Calder* v. *Attorney-General of British Columbia*, [1973] S.C.R. 313, that Aboriginal title to land entails legal rights of possession and use that are entitled to common law protection. So, in the absence of clear and plain statutory authority, how do governments get away with creating third-party rights in lands that are subject to Aboriginal claims? Two explanations are generally given for this, both of which are inadequate:

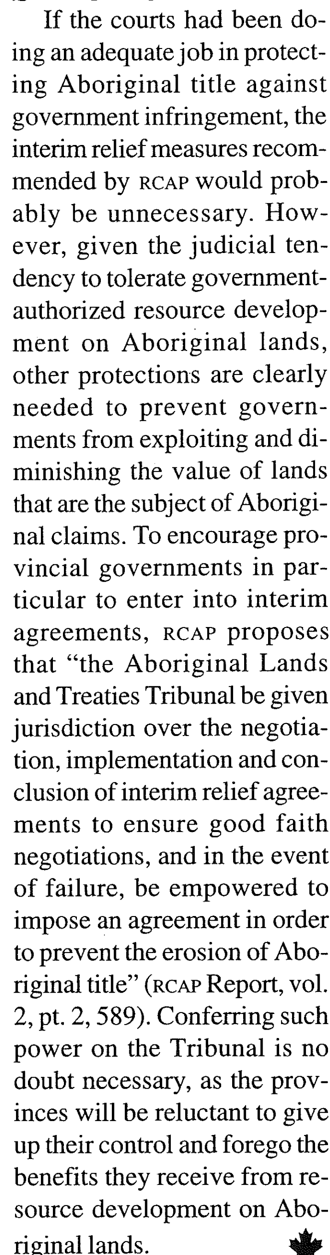
1. Aboriginal title to specific lands, it is argued, does not exist until it has been proven in a court of law. This argument is wrong because it rests on a rebuttable presumption that the Aboriginal peoples did not occupy and use the lands when Canada was colonized by Europeans, when we all know the opposite to be true. So the presumption should be the other way around—since the Aboriginal peoples were already here, it should be presumed that all of Canada was subject to Aboriginal title at the time of colonization. The burden would then be on the Crown to rebut that presumption if it can by showing either that the lands in question were not in fact occupied by Aboriginal people at the time of colonization or, if occupied, that the Aboriginal title has been validly extinguished.

2. The second reason given for denying protection to Aboriginal title against government dispositions to third parties is that Aboriginal title is not proprietary—instead, it is said to be limited to traditional uses of the land which are non-proprietary in nature (this issue of the nature of Aboriginal title, which is presently unresolved, has been argued before the Supreme Court of Canada in June of this

year in *Delgamuukw* v. *British Columbia*, on appeal from the British Columbia Court of Appeal decision reported at (1993), 104 D.L.R. (4th) 470).

If the courts had been doing an adequate job in protecting Aboriginal title against government infringement, the interim relief measures recommended by RCAP would probably be unnecessary. However, given the judicial tendency to tolerate government-authorized resource development on Aboriginal lands, other protections are clearly needed to prevent governments from exploiting and diminishing the value of lands that are the subject of Aboriginal claims.

But whether Aboriginal title is proprietary or not is really irrelevant in this context, as it does entail legal rights which are just as entitled to common law protection against government infringement as any legal rights. Moreover, due to section 35 of the *Constitution Act, 1982*, Aboriginal title now enjoys additional constitutional protection which the property rights of other Canadians do not. As a result, Aboriginal title can only be infringed by legislation that meets a strict test of justifica-



tion laid down by the Supreme Court in *Sparrow* v. *The Queen*, [1990] 1 S.C.R. 1075.

If the courts had been doing an adequate job in protecting Aboriginal title against government infringement, the interim relief measures recommended by RCAP would probably be unnecessary. However, given the judicial tendency to tolerate government-authorized resource development on Aboriginal lands, other protections are clearly needed to prevent governments from exploiting and diminishing the value of lands that are the subject of Aboriginal claims. To encourage provincial governments in particular to enter into interim agreements, RCAP proposes that "the Aboriginal Lands and Treaties Tribunal be given jurisdiction over the negotiation, implementation and conclusion of interim relief agreements to ensure good faith negotiations, and in the event of failure, be empowered to impose an agreement in order to prevent the erosion of Aboriginal title" (RCAP Report, vol. 2, pt. 2, 589). Conferring such power on the Tribunal is no doubt necessary, as the provinces will be reluctant to give up their control and forego the benefits they receive from resource development on Aboriginal lands.

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A BLUEPRINT FOR THE FUTURE: OVERVIEW AND SUMMARY OF THE KEY RCAP CONCLUSIONS AND RECOMMENDATIONS CONCERNING SELF-GOVERNMENT

BY DAVID C. HAWKES

THE TRANSITION TO ABORIGINAL SELF-GOVERNMENT

How will the transition to Aboriginal self-government occur? The Commission outlines a process comprising four distinct but related elements that will clear the path for Aboriginal self-governance:

1. The promulgation by the Parliament of Canada of a royal proclamation and companion legislation to implement those aspects of the renewed relationship that fall within federal authority;

An Aboriginal nation's constitution would likely contain several elements: a citizenship code, an outline of the nation's governing structures and procedures, guarantees of rights and freedoms, and a mechanism for constitutional amendment.

2. Activity to rebuild Aboriginal nations and develop their constitutions and citizenship codes, leading to their recognition through a proposed new law—the Aboriginal Nations Recognition and Government Act;

3. Negotiations to establish a Canada-wide framework agreement to set the stage for the emergence of an Aboriginal order of government in the Canadian federation; and

4. The negotiation of new or renewed treaties between recognized Aboriginal nations and other Canadian governments.

THE THREE PHASES FOR TRANSITION

The transition to Aboriginal self-government on a nation-to-nation basis must begin with Aboriginal peoples themselves. The Royal Commission estimates that there are currently between 60 and 80 historically based Aboriginal nations in Canada, compared with a thousand or so local Aboriginal communities. The first phase will involve Aboriginal people consulting at the community level, seeking a mandate to organize the nation's institutions. This mandate would be confirmed through a referendum or some other mechanism of community approval.

The second phase will involve preparing the nation's constitution and seeking its endorsement from the nation's citizens. An Aboriginal nation's constitution would likely contain several elements: a citizenship code, an

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