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 justification 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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outline of the nation's governing structures and procedures, guarantees of rights and freedoms, and a mechanism for constitutional amendment. A draft constitution would be subject to a "double majority" standard. Specifically, it would be considered adopted if

(a) 40 per cent of the eligible voters participated in the referendum;

(b) the constitution were approved by 50 percent plus one of those eligible voters across the nation as a whole (the first majority); and

(c) a simple majority of those voting in each community approved the constitution in 75 per cent of the communities (the second majority).

The third phase would involve seeking recognition as an Aboriginal nation under the new proposed Aboriginal Nations Recognition and Government Act. Assuming that a nation's constitution is approved and the decision to seek recognition is endorsed, application for recognition would be made to a neutral recognition panel appointed by and operating under a proposed Lands and Treaties Tribunal. The panel would consist of a minimum of three persons, the majority of whom would be Aboriginal. The panel would have broad investigative powers to ensure that fundamental fairness had been observed in the process and that the criteria for recognition had been met.

THE ABORIGINAL RECOGNITION AND GOVERNMENT ACT AND ITS ROLE IN TRANSITION

The Royal Commission's recommendation for an Aboriginal Recognition and Government Act is key to implementing the new relationship. The Act would establish the process through which the government of Canada can recognize the accession of an Aboriginal group to nation status and the nation's assumption of authority as an Aboriginal government. The Act would establish criteria for the recognition of Aboriginal nations, including

- evidence among the communities concerned of common ties of language, history, culture, and of willingness to associate. This must be coupled with sufficient size to support the exercise of a broad, self-governing mandate;

It is the Commission's view that both the federal and provincial governments are required by the honour of the Crown to participate in treaty processes and to give effect to treaty rights and promises.

- evidence of a fair and open process for obtaining the agreement of its citizens and member communities to embark on a nation-recognition process;
- completion of a citizenship code that is consistent with international norms of human rights and with the *Canadian Charter of Rights and Freedoms*;
- evidence that an impartial appeal process had been established by the nation to hear disputes about an individual's eligibility for citizenship;
- evidence that a fundamental law or constitution has been drawn up through wide consultation with its citizens; and
- evidence that all citizens of the nation were permitted to ratify the proposed constitution through a fair means of expressing their opinion.

The Aboriginal Nations Recognition and Government Act would authorize the creation of recognition panels, under the aegis of the proposed Aboriginal Lands and Treaties Tribunal, to advise the government of Canada on whether a group meets the recognition criteria. The Act would enable the federal government to vacate its legislative authority under section 91(24) of the *Constitution Act, 1867* over the core powers needed by Aboriginal nations, and to specify which additional areas of jurisdiction the Parliament of Canada is prepared to acknowledge as core powers. Finally, the Act would provide the authority for enhanced financial resources so as to enable recognized Aboriginal nations to exercise expanded governing powers for an increased population base in the period between recognition and the conclusion or reaffirmation of comprehensive treaties.

EXERCISING ABORIGINAL SELF-GOVERNMENT—THE TREATY PROCESS

Once Aboriginal nations are recognized pursuant to the Aboriginal Nations Recognition and Government Act, they would then enter into a treaty process. Reorganization within the federal government in preparation for the treaty process would be substantial, since there is currently no government department or agency devoted to the fulfilment of treaties. The Commission recommends that a Crown Treaty Office be established which would implement, renew, and make treaties within a new Department of Aboriginal Relations. The Office, which would be mentioned in the Royal Proclamation and mandated in the companion legislation, would be the lead Crown agency participating in nation-to-nation treaty processes.

It is the Commission's view that both the federal and provincial governments are required by the honour of the Crown to participate in treaty processes and to give effect to treaty rights and promises. The fulfilment of the Crown's duty is their joint responsibility. Since the provinces now share in the fiduciary duties of the Crown, there is also a need for each province to establish a Crown Treaty Office.

The Royal Commission recommends that permanent treaty commissions, established on a regional basis, provide independent and neutral fora where negotiations can take place as part of the treaty process. Several examples of similar commissions exist now, such as the B.C. Treaty Commission and the Saskatchewan Office of the Treaty Commissioner. These treaty commissions would be independent from the federal government, the provincial governments, the Aboriginal nations and the treaty nations, and would be created through legislation by all parties. Commissioners would be appointed in equal numbers from lists prepared by the parties, with an independent chair selected by the commissioners. In addition to facilitation, treaty commissions would have fact-finding and research capabilities, and would provide mediation services as jointly requested. Treaty commissions would monitor and guide the conduct of the parties in the treaty process to ensure that fair and

proper standards of conduct and negotiation are maintained. They would also supervise and facilitate cost-sharing by the parties, and provide binding or non-binding arbitration at the request of the parties.

Renegotiation or replacement treaties should be an option for treaty nations that regard their original treaties as fundamentally flawed. However, this alternative is extremely unlikely to be the choice of many of the treaty nations who have strongly advocated that their existing treaties be implemented.

There will be a need to resolve disputes within the treaty processes. In this regard, the Royal Commission recommends that an Aboriginal Lands and Treaties Tribunal could play a supporting role in treaty processes. The Tribunal should have three main elements in its mandate. First, it should have jurisdiction over process-related matters, such as ensuring that the parties negotiate in good faith. Second, the tribunal should have the power to make orders for interim relief. Third, it should have jurisdiction to hear appeals on funding for the treaty process. The tribunal would be a forum of last resort in treaty processes and every attempt should be made to provide for a negotiated, mediated, or arbitrated resolution of treaty disputes with the assistance of treaty commissions.

In the Royal Commission's view, the most common outcome of treaty implementation and renewal will be a formal protocol agreement that defines specific treaty rights and obligations, perhaps for specified periods of time, with clearly defined mechanisms for review and renegotiation of the elements covered by the agreement. Such protocol agreements should be ratified legislatively to remove any doubt as to their legal status. Alternatively, treaty implementation agreements could be given the status of supplementary treaties that leave the original treaties intact and add to them. Based on the submissions the Commissioners heard, however, this is less likely to be preferred by treaty nations. A third possible outcome could be a new treaty that terminates and replaces the original one. Renegotiation or replacement treaties should be an option for treaty nations that regard their original treaties as fundamentally flawed. However, this alternative is extremely unlikely to be the choice of many of the treaty nations who have strongly advocated that their existing treaties be implemented. Irrespective of the type of agreement reached, legislation and regulations will likely have to be enacted by the treaty parties to formalize the renewed treaty and to provide for implementation, review, and dispute resolution.

SELF GOVERNMENT AND INHERENT JURISDICTION

The outcome of the treaty processes, then, is the exercise of Aboriginal self-government. In the Commission's view, the inherent right of Aboriginal self-government was recognized and affirmed in section 35(1) of the *Constitution Act, 1982* as an Aboriginal and treaty right. The inherent right is thus entrenched in the Canadian Constitution and provides a basis for Aboriginal governments to function as one of three distinct orders of government in Canada.

The Commission concludes that the Canadian Charter of Rights and Freedoms *applies to Aboriginal governments and regulates relations with individuals falling within their jurisdiction. However, under section 25, the* Charter *must be given a flexible interpretation that takes account of the distinctive philosophies, traditions, and cultural practices of Aboriginal peoples.*

The sphere of inherent Aboriginal jurisdiction under section 35(1) comprises all matters relating to the good government and welfare of Aboriginal peoples and their territories. The Commission divides the sphere of inherent jurisdiction into two sectors: a core and a periphery. The core of Aboriginal jurisdiction includes all matters that

(a) are vital to the life and welfare of a particular Aboriginal people, its culture and identity;

(b) do not have a major impact on adjacent jurisdictions; and

(c) are not otherwise the object of transcendent federal or provincial concern.

An Aboriginal group has the right to exercise authority and legislate at its own initiative without the need to conclude self-government treaties or agreements with the Crown.

The periphery of Aboriginal jurisdiction comprises the remainder of the sphere of inherent Aboriginal jurisdiction. It includes matters that have a major impact on adjacent jurisdictions or that attract transcendent federal or provincial jurisdiction. A self-government treaty or agreement would be required for an Aboriginal group to legislate in this area.

When an Aboriginal government passes legislation regarding a subject matter that falls within its core jurisdiction, any inconsistent federal or provincial legislation is automatically displaced. Where there is no inconsistent Aboriginal legislation in a core area of jurisdiction, federal and provincial laws continue to apply within their respective areas of legislative jurisdiction. With respect to matters on the periphery of Aboriginal jurisdiction, a self-government treaty or agreement is needed to settle the jurisdictional overlap between an Aboriginal government and the federal and provincial governments.

The Commission concludes that the *Canadian Charter of Rights and Freedoms* applies to Aboriginal governments and regulates relations with individuals falling within their jurisdiction. However, under section 25, the *Charter* must be given a flexible interpretation that takes account of the distinctive philosophies, traditions, and cultural practices of Aboriginal peoples. Moreover, under sec-

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ended with the White Paper policy will come as a surprise to all those who, following Harold Cardinal and the late George Manuel, were persuaded that assimilation was at the very heart of the 1969 White Paper. The Commission never seems prepared to acknowledge that, etymologically, "assimilation" is a euphemism, if not a litotes, for the extinguishment either of persons or of peoples.

The Report presents a deeply moving account of the residential schools, characterized by malnutrition, overcrowding, and more aggressive forms of physical abuse resulting in mortality rates of up to 40%.

The Report presents a deeply moving account of the residential schools, characterized by malnutrition, overcrowding, and more aggressive forms of physical abuse resulting in mortality rates of up to 40%. Even more stirring are the stories of a long series of communities which were repeatedly uprooted, displaced and, despite promises of food, clothing, houses, and the tools of economic development deserted in conditions of extreme impoverishment. But there is something deeply inappropriate about referring to the peoples dispossessed and displaced in this way as "*relocatees*". Although a later sub-section is entitled "Displacement and Assimilation", the major account of these events is given in a unit called "Relocation of Aboriginal Communities". The use of the term "relocation" is strangely resonant with the Nazi use of the same term to describe the forced movement of European Jews into Poland for "re-settlement", meaning less than benign neglect.

Finally, there is a sub-title "Displacement and *deconstruction* of the Indian nations as policy". The word "deconstruction" does not occur in the text of that subsection. In the absence of a whole sentence, I can only guess that this title is yet another understatement intended to make the history the Commission is intent upon telling more palatable to the reader. Just which reader's sensibilities they intended to appease will remain a mystery until someone publishes a study on relations between the commissioners and their research staff. Perhaps, to paraphrase a commentator on the Holocaust, it was necessary to find words to reduce the unspeakable into the merely unsayable.

Looking Back, Looking Forward, euphemism, litotes, and obfuscation notwithstanding, brings us—two steps forward and one step back—haltingly closer to what Winona Stevenson pleaded for: "the deconstruction of our colonization [to shed] light on why our communities are so troubled today and why Aboriginal women are at the bottom of Canada's socio-economic ladder".

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tion 33, Aboriginal nations can enact "notwithstanding" clauses that suspend the operation of certain *Charter* sections for a period of time. However, by virtue of sections 28 and 35(4) of the *Constitution Act, 1982*, Aboriginal women and men are in all cases guaranteed equal access to the inherent right of self-government and are entitled to equal treatment by their governments.

The constitutional right of self-government is vested in the peoples who make up Aboriginal nations, not in local communities. Aboriginal nations have the right, under section 35 of the *Constitution Act, 1982*, to determine which individuals belong to the nation. However, this right is subject to two limitations. First, it cannot be exercised in a manner that is discriminatory toward women or men. Second, it cannot specify a minimum "blood quantum" as a general prerequisite for citizenship. Aboriginal peoples are not racial groups. They are organic political and cultural entities, often with mixed genetic heritages and often including individuals of varied ancestry. Their identity lies in their collective life, history, ancestry, language, culture, values, traditions, and ties to the land.

In order to assume their rightful place in this vision, Aboriginal peoples need to have tools at their disposal to ensure their success in reclaiming nationhood, in constituting effective governments, and in negotiating new relations with the other partners in the Canadian federation. Aboriginal peoples will need capacities to rebuild their nations, to set up Aboriginal governments, to negotiate new intergovernmental relations, and to exercise government powers over the longer term. This will require increased training of Aboriginal government officials, enhanced planning and management capacities, the development of codes of conduct and accountability regimes for public officials, and the establishment of data collection and information management systems.

David C. Hawkes was the Research Director for the Royal Commission on Aboriginal Peoples. This article is an excerpt from a paper that Mr. Hawkes delivered at a Public Forum held on the Final Report in early March 1997.