

VOLUME 2


Restructuring the Relationship


Report of the Royal Commission on Aboriginal Peoples

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PART ONE

A Note About Sources

Among the sources referred to in this report, readers will find mention of testimony given at the Commission's public hearings; briefs and submissions to the Commission; submissions from groups and organizations funded through the Intervener Participation Program; research studies conducted under the auspices of the Commission's research program; reports on the national round tables on Aboriginal issues organized by the Commission; and commentaries, special reports and research studies published by the Commission during its mandate. After the Commission completes its work, this information will be available in various forms from a number of sources.

This report, the published commentaries and special reports, published research studies, round table reports, and other publications released

during the Commission's mandate will be available in Canada through local booksellers or by mail from

Canada Communication Group — Publishing
Ottawa, Ontario
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A CD-ROM will be published following this report. It will contain the report, transcripts of the Commission's hearings and round tables, overviews of the four rounds of hearings, research studies, the round table reports, and the Commission's special reports and commentaries, together with a resource guide for educators. The CD-ROM will be available in libraries across the country through the government's depository services program and for purchase from

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Briefs and submissions to the Commission, as well as research studies not published in book or CD-ROM form, will be housed in the National Archives of Canada after the Commission completes its work.

A Note About Terminology

The Commission uses the term *Aboriginal people* to refer to the indigenous inhabitants of Canada when we want to refer in a general manner to Inuit and to First Nations and Métis people, without regard to their separate origins and identities.

The term *Aboriginal peoples* refers to organic political and cultural entities that stem historically from the original peoples of North America, not to collections of individuals united by so-called 'racial' characteristics. The term includes the Indian, Inuit and Métis peoples of Canada (see section 35(2) of the *Constitution Act, 1982*).

Aboriginal people (in the singular) means the individuals belonging to the political and cultural entities known as Aboriginal peoples.

The term *Aboriginal nations* overlaps with the term *Aboriginal peoples* but also has a more specific usage. The Commission's use of the term *nation* is discussed in some detail in Volume 2, Chapter 3, where it is defined as a sizeable body of *Aboriginal people* with a shared sense of national identity that constitutes the predominant population in a certain territory or collection of territories.

The Commission distinguishes between local communities and nations. We use terms such as a *First Nation community* and a *Métis community* to refer to a relatively small group of *Aboriginal people* residing in a single locality and forming part of a larger *Aboriginal nation* or *people*. Despite the name, a *First Nation community* would not normally constitute an *Aboriginal nation* in the sense just defined. Rather, most (but not all) *Aboriginal nations* are composed of a number of communities.

Our use of the term *Métis* is consistent with our conception of *Aboriginal peoples* as described above. We refer to *Métis* as distinct *Aboriginal peoples* whose early ancestors were of mixed heritage (*First Nations*, or *Inuit* in the case of the *Labrador Métis*, and *European*) and who associate themselves with a culture that is distinctly *Métis*. The more specific term *Métis Nation* is used to refer to *Métis people* who identify themselves as a nation with historical roots in the *Canadian west*. Our use of the terms *Métis* and *Métis Nation* is discussed in some detail in Volume 4, Chapter 5.

Following accepted practice and as a general rule, the term *Inuit* replaces the term *Eskimo*. As well, the term *First Nation* replaces the term *Indian*. However, where the subject under discussion is a specific historical or contemporary nation, we use the name of that nation (e.g., *Mi'kmaq*, *Dene*, *Mohawk*). Often more than one spelling is considered acceptable for these nations. We try to use the name preferred by particular nations or communities, many of which now use their traditional names. Where necessary, we add the more familiar or generic name in parentheses — for example, *Siksika (Blackfoot)*.

Terms such as *Eskimo* and *Indian* continue to be used in at least three contexts:

1. where such terms are used in quotations from other sources;

2. where Indian or Eskimo is the term used in legislation or policy and hence in discussions concerning such legislation or policy (e.g., the *Indian Act*, the Eskimo Loan Fund); and

3. where the term continues to be used to describe different categories of persons in statistical tables and related discussions, usually involving data from Statistics Canada or the Department of Indian Affairs and Northern Development (e.g., status Indians, registered Indians).

Report of the Royal Commission on Aboriginal Peoples

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Introduction

IN VOLUME 1 OF OUR REPORT, we presented an historical overview of the relationship that has developed over the last 400 years between Aboriginal and non-Aboriginal people in Canada. We have seen that it was built on a foundation of false premises — that Canada was for all intents and purposes an unoccupied land when the newcomers arrived from Europe; that the inhabitants were a wild, untutored and ignorant people given to strange customs and ungodly practices; that they would in time, through precept and example, come to appreciate the superior wisdom of the strangers and adopt their ways; or, alternatively, that they would be left behind in the march of progress and survive only as an anthropological footnote.

It was not to be. 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. They were not untutored and ignorant; they were simply cast by the Creator in a different mould, one beyond the experience and

comprehension of the new arrivals. They had a different view of the world and their place in it and a different set of norms and values to live by.

Many non-Aboriginal Canadians recognize this today and would like to start afresh. They find it quite understandable that settlers in the early days had difficulty relating to Indigenous peoples — and indeed Indigenous peoples had a similar difficulty relating to them — but they find it impossible to justify the sad history of colonialism that followed. The time has come, they told the Commission in briefs and oral presentations, to put the relationship between Aboriginal and non-Aboriginal peoples on a more secure foundation of mutual recognition and respect and to plan together a better future for our children and our children's children.

This theme was echoed by many of the Aboriginal people who came to our hearings. Many, it is true, remain bitter and find it hard to put the past behind them. Memories of relocation, residential schools, discrimination and racism keep coming to the surface, causing them to lose heart and wonder whether things will ever change. But Commissioners were left in no doubt that deep down the spirit is still there, along with Aboriginal people's determination to assume their rightful place in a new Canadian society where diversity is not just accepted but welcomed and encouraged, and where Aboriginal peoples are recognized not just as one of the founding peoples but as Canada's First Peoples.

Most Aboriginal people can rise above their circumstances, believing firmly that their destiny is to remain here on the land the Creator set aside for them to care for and protect. Commissioners are persuaded that Aboriginal peoples' deep-seated spirituality explains the miracle of their survival through centuries of adversity and pain. They will assuredly live to see a new day for their children, and they are anxious and impatient to start putting in place the foundations of the new relationship.

In this volume, the Commission addresses what we see as the four basic pillars of the new relationship:

- treaties
- governance

- lands and resources
- economic development

1. Treaties

For a great many people, the centre-piece of any new relationship between Aboriginal and non-Aboriginal people is the inherent right of Aboriginal peoples to self-government. Why then would Commissioners begin with treaties? The explanation is simple. The treaty was the mechanism by which both the French and the British Crown in the early days of contact committed themselves to relationships of peaceful coexistence and non-interference with the Aboriginal nations then in sole occupation of the land. The treaties were entered into on a nation-to-nation basis; that is, in entering into the pre-Confederation treaties, the French and British Crowns recognized the Aboriginal nations as self-governing entities with their own systems of law and governance and agreed to respect them as such. For several centuries, treaties continued to be the traditional method of defining intergovernmental relations between Aboriginal and non-Aboriginal people living side by side on the same land. It continues to be the mechanism preferred by most Aboriginal people today.

Accordingly, in analyzing treaties in Chapter 2 of this volume, we consider them from two different perspectives. We examine the treaties already in existence to see how successful the treaty mechanism has been in creating and maintaining a smooth and mutually satisfying relationship between the parties over time. But we also examine the treaty concept itself to see whether it offers the best way to establish new agreements involving the settlement of land claims and self-government structures. Obviously, these two purposes are related. If Aboriginal peoples did not see merit in the treaty mechanism, they clearly would not wish to adopt it as the basis for their future relations with non-Aboriginal governments.

It will be apparent in Chapter 2 that treaties have had some disadvantages, most arising out of issues of interpretation. Governments have insisted on the written document as embodying the entire agreement between the parties; Aboriginal parties have considered the oral arrangement, whether reflected in the written document or not, as reflecting the true consensus reached by the parties. The courts have favoured the Aboriginal position

and have established, through a series of important decisions, the fundamental principles of interpretation that should apply to historical treaties. If these principles were applied to new treaties, having regard to the context of treaty negotiations, Aboriginal people would have good reason to put their faith in the treaty process.

It is indisputable, however, that existing treaties have been honoured by governments more in the breach than in the observance, and this might give Aboriginal parties reason to pause and reconsider the wisdom of using this process. Several recent changes in the Canadian constitution provide some reassurance, however, especially sections 35 and 25 of the *Constitution Act, 1982*, which recognize and affirm existing Aboriginal and treaty rights and protect them against erosion. Rights conferred on Aboriginal parties in new or renewed treaties entered into after 1982 would enjoy the protection of these provisions.

The courts have also enunciated new principles in recent years that Aboriginal parties to treaties can use to their advantage, such as the fiduciary obligations owed by federal and provincial governments to Aboriginal peoples and the fact that any violation of treaty promises would be seen by the courts as calling into question the honour and integrity of the Crown. By and large, therefore, Aboriginal people see more advantages than disadvantages in the treaty process and have told us that this is their preferred way to handle future negotiated settlements.

In effect, what is contemplated in some cases is a renewal of the old treaties to make them meaningful in today's context — not to change their spirit and intent, but to interpret them in a reasonable way in terms of today's realities. In other cases, new treaties will be required to reflect the new relationship between governments and Aboriginal people as a result of modern land claims settlements and negotiated arrangements for Aboriginal self-government, the two being inextricably intertwined in the view of many Aboriginal people. In either case, the aim will be to establish through negotiation the basis for a new relationship between Aboriginal and non-Aboriginal people based on the principles set out in Volume 1 of our report: mutual recognition, mutual respect, sharing and mutual responsibility.

2. Governance

For roughly 400 years, Aboriginal people in Canada have been ruled by foreign powers, first by the French and the British and later by Canadians. In the eyes of Aboriginal people, none of these governments had any legitimate authority over them. Why do they say this? They point out that under international law, which is embodied in a series of conventions and covenants to which Canada is a signatory, all peoples have the right of self-determination, and this right includes the right to decide how they will be governed. No government can be imposed upon a people without their consent; this would be a denial of their right of self-determination.

Aboriginal people in Canada say that they never consented to be governed by the French or the British or the government of Canada. Indeed, they were never consulted and had no say in the matter. Nor, they allege, did European powers assert authority over them on any valid grounds. Canada was not uninhabited when the Europeans came, nor was it 'discovered' by them. It has been the homeland of Canada's First Peoples for millennia.

Nor could the newcomers claim title to the land by conquest, for there was no conquest. Early in the contact period the relationship was one of peaceful coexistence and non-interference. It was mainly after Confederation that Canada began to appropriate large tracts of land to house the ever-increasing influx of settlers and that the process of colonization and domination of the Aboriginal population began. No one asked them whether they wanted to be British subjects or Canadian citizens. They were simply herded into small reserves to make way for development and at Confederation were assigned to the exclusive jurisdiction of the Parliament of Canada. It apparently struck no one as strange, and possibly even improper, to hand over control of a whole people to a branch of the new federal government. Such is the perception of Aboriginal people, and in Volume 1 we documented some of the worst features of colonization that ensued.

It is not surprising, therefore, that Aboriginal people are calling for a complete change in their relationship with federal and provincial governments to one that recognizes their inherent right of self-government as distinct peoples and as Canada's First Peoples. The time seems opportune; indeed, the cracks in the existing relationship are coming starkly to the fore all across the country, and it should be apparent by now that

trying to preserve the status quo is futile.

It is clear to the Commission that if Aboriginal peoples are to exercise their self-governing powers within the context of Canada's federal system, then federal and provincial governments must make room for this to happen. Instead of being divided between two orders of government, government powers will have to be divided among three orders. This is a major change, and one that will require goodwill, flexibility, co-operation, imagination and courage on the part of all concerned.

Aboriginal people are not a homogeneous group, and it seems unlikely that any one model of self-government will fit all First Nations, Métis people and Inuit. The basic principles, however, should be settled by negotiation; the flexibility should be in their application.

In Chapter 3, the Commission considers a variety of governance models, including models for the increasing number of Aboriginal people living in urban centres. We hope that these models will be helpful in stimulating serious discussion on this very challenging subject.

3. Lands and Resources

Chapter 4, in Part Two of this volume, is devoted to lands and resources. This is probably one of the most sensitive aspects of the current dialogue, but it is one that must be addressed without equivocation. As interveners told us many times at our public hearings, self-government without the capacity for a broad measure of self-reliance is a recipe for disaster. How true this is. Governments need money to carry out their responsibilities, but Aboriginal nations have limited resources. Their lands and resources were taken from them by the settler society and became the basis for the high standard of living enjoyed by other Canadians over the years. Only a small proportion of Canada's resource income has come back to Aboriginal people, most in the form of transfer payments such as social assistance. This has never been, and is not now, the choice of Aboriginal people. They want to free themselves from the destructive burden of welfare and dependency. But to do this they need to have back some of what was taken away. They need land and they need resources. How are they to get them in a country where almost every acre is spoken for? Most non-Aboriginal Canadians are probably unaware that even the amount of land

initially set aside as reserves for Indian peoples has been reduced over the years to the point where just a third of the original remains. The Métis people, with few exceptions, have no land base at all.

One way for Aboriginal peoples to acquire more land and resources is through the land claims process, but in most cases such negotiations have been hamstrung by lack of goodwill, if not lack of good faith, on the part of governments. Claims have dragged on for years, and it is clear that the processes in place are not effective. The Commission has studied these processes and has recommendations to change this situation. One positive step would be to establish an independent tribunal to monitor both the specific and the comprehensive land claims process.

A tribunal would ensure, among other things, that claims were being dealt with in a timely fashion, that the parties were negotiating in good faith, and that the disputed resources were not being depleted pending the disposition of the claim. The goal would be to ensure that the process was not being abused, that delays were kept to a minimum, and that principles of fundamental justice and fairness were being respected. The Commission is persuaded that without such a supervisory body, land claims negotiations will continue to drag on, to the detriment of only one of the negotiating parties — Aboriginal claimants.

Not all Aboriginal peoples have a land claim, however, and even for those who have, the settlement may fall far short of what is required for self-government. The Commission therefore approached the subject of land from a much broader perspective. Why do Aboriginal peoples want land? What do they need it for? They need lands and resources for self-government, but also for more than that. They need a land base for their people. In Chapter 3, we suggest that the nation, rather than the local community, is the preferred unit of self-government. Each Aboriginal nation would govern its own people and require enough land to accommodate them. Although all members of the nation may not want to live on the nation's land base — where Aboriginal laws, customs, language, identity and culture would prevail under self-government — many will want to do so. There is already a movement afoot among Aboriginal people to recapture their identity and culture, and Aboriginal self-government might be expected to provide further impetus in this direction. Aboriginal nations will need land, in some rough proportion to their numbers (which are on the

increase, if current demographic trends persist), on which they are a majority and can maintain and promote their language, identity and culture and live their own way of life. In Chapter 4, we discuss some of the criteria for determining how much land and resources would be required realistically to support Aboriginal self-government in both its aspects — as a cultural homeland and as a viable economic base.

The Commission recognizes, of course, that lands and resources alone will not provide self-sufficiency for Aboriginal governments. We therefore had to consider the potential for economic development.

4. Economic Development

In Chapter 5, the Commission looks at the immensely difficult problem of how to build a viable economic base in Aboriginal nations and their communities to support self-government. Certainly, a share in the resources of an adequate land base would help, and this has to be part of any treaty renewal process or comprehensive land claims agreement. But by itself it is not enough.

During our public hearings, we visited a cross-section of First Nations, Inuit and Métis communities and saw at first hand the terrible poverty in which many Aboriginal families are living. How could this happen in an affluent country like Canada? We saw also the psychological impact of years of grinding poverty — the sense of helplessness and hopelessness, the low morale, the lack of self-esteem. As one hunter and trapper, who had seen the wildlife habitat destroyed in the name of development, said to us, “How can I hold my head up high when I can’t put bread on the table to feed my family?” How does one respond to a question like that? How will Canada respond?

It is clear that the traditional economies of Aboriginal peoples must be strengthened. Tremendous hardship was inflicted on thousands of Aboriginal families by the anti-fur campaign of the animal rights lobby. Serious threats to traditional economies have also resulted from resource development projects — loss of habitat, mercury pollution, acid rain, and resource depletion through overfishing and clear cutting. The Commission believes that co-jurisdiction and co-management arrangements, where governments and Aboriginal people share responsibility for resource

development, would result in less environmental damage and therefore less damage to the traditional economies of Aboriginal peoples.

Thriving, economically viable communities are not going to be created overnight. Aboriginal people recognize that a renewed focus on education and training is of vital importance. The inertia that paralyzes many communities has had a particularly deep impact on young Aboriginal people, causing them to drop out of school at alarming rates and abandon all prospects for a meaningful future. Yet this is the generation that must start to get ready for self-government: they must be the political leaders, the business entrepreneurs, the institution builders, the policy makers, the scientists, technicians and educators. It cannot happen without a massive investment in education and in imaginative and widely implemented approaches to help people acquire job experience. In the Commission's view, this is part of the mutual and shared responsibility of which we spoke in Volume 1 and a vital aspect of the new relationship.

A significant step in the right direction would be for the federal government to fulfil its treaty promises. Its failure in this regard is a national disgrace. Another step would be for all governments to comply with the equality provisions of the *Canadian Charter of Rights and Freedoms*. We heard a lot about restorative and corrective justice during our mandate but saw very little evidence of it in practice.

Finding employment is often problematic for Aboriginal people. Few job opportunities are available in Aboriginal communities, and in urban centres Aboriginal applicants often face discrimination and racism. Employment equity and affirmative action are positive steps, but they can never completely solve such a large-scale problem. Some 300,000 additional jobs for Aboriginal people need to be created in the next 20 years if Aboriginal people are to attain the same level of employment as other Canadians enjoy.

Governments are not likely to be able to create these jobs. Creating an environment in which small businesses and an appropriate mix of private and public enterprises can emerge and grow in Aboriginal communities would seem to be a more appropriate role. Aboriginal business development was a recurrent theme during our hearings. At our round table on economic development we heard some remarkable success stories, but

we also heard about barriers to success, the main one being difficulty gaining access to capital. In Chapter 5, we review institutional lending policies and suggest how financial institutions might play a greater role in furthering Aboriginal economic self-sufficiency. We also see a role for Aboriginal lending institutions; land claims settlements could provide a funding base for such institutions. Aboriginal people are fully aware that, in addition to supporting traditional economies, new forms of economic activity are required for the future, including resource-based industries, manufacturing and services, if self-sufficiency and self-government are to become a reality.

The messages of Volume 2 of our report are clear:

- The treaty process is the most appropriate vehicle for embodying the new relationship between Aboriginal and non-Aboriginal people in Canada.
- The time is right for Canadians and their governments to recognize the inherent right of Aboriginal peoples to self-government and to make room in the Canadian federation for its exercise.
- A more equitable and just allocation of lands and resources to Aboriginal peoples is a fundamental prerequisite for preserving Aboriginal culture and identity and for the effective operation of Aboriginal self-government.
- An adequate land and resource base by itself is not enough to support self-government: the challenge of Aboriginal economic development must also be met through the combined efforts of Aboriginal and non-Aboriginal people, governments and institutions.