Aboriginal Lands and Resources: An Assessment of the Royal Commission's Recommendations

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Aboriginal Commission, the five-volume final Report had hardly reached the Band councils and libraries across Canada.

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Canada to which it was mailed before pundits were solemnly enquiring about the reasons for its obscurity. This is and was an unfortunate focus. In the false crisis of immediate Cabinet indifference and in the easy stories reporting statistics about the cost of the Commission (nearly $60 million) and the number of recommendations (440), the main idea—and the fundamental contribution of the Report—have been lost.

About the hundreds of Canadians who made oral and written submissions to the Commission. The Commissioners embraced this mandate, seeking solutions to the broad range of issues put before them, while working to understand where the fulcrum for fundamental reform lay.

Of course, the Royal Commission devoted considerable effort to developing "actionable" recommendations whose practical consequences would be, and would have to be, well-considered. The final Report of the Royal Commission on Aboriginal Peoples, however, is not essentially a recommendation for the Cabinet order paper. It addresses the people of Canada, and asks them to consider and debate a new way of conceiving the country, as a consensual federation, capable enough to include the heterogeneous and polyglot settler society as well as the modern societies of the original North American nations. In a time of intense anxiety about the survival of Canada and in the face of the obvious mutual impact of Québécois and Aboriginal political dynamics, it is very strong that this is the most relevant and far-reaching feature of the Report has been overlooked.

The main elements of this vision are as follows:

1. The Aboriginal peoples of Canada have the right of self-determination.
2. The right of self-determination is grounded in emerging norms of international law and basic principles of public morality.
3. By virtue of the right of self-determination, Aboriginal peoples are entitled to negotiate the terms of their relationship with Canada to establish governmental structures that they consider appropriate for their needs.
4. The above “does not ordinarily give rise to a right of succession, except in case of grave oppression or disintegration of the Canadian state.”
5. All governments in Canada should recognize that Aboriginal peoples are nations vested with the right of self-determination. The Aboriginal nations are not racial groups, but rather political and cultural collectivities with a shared history and contemporary self-awareness.
6. Canada requires a “neutral and transparent process for identifying Aboriginal groups entitled to exercise the right of self-determination as nations.”
7. Once identified, the Aboriginal nations would either affirm, renegotiate, or commence to negotiate their relationships with Canada, in a spirit of mutual recognition and respect.

Envisioning a period of negotiation, practical adjustment, and political development that might take decades, the Commissioners anticipate the ultimate emergence of a “just multinational federation that recognizes its historical foundations and values its historical nations as an integral part of the Canadian identity and the Canadian political fabric.”

The Aboriginal peoples have been living on the land in ways that are now Canada and developing their livelihoods 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, p. 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 reacquisition, of a land base, and on access to 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 surrendering land, 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.

The Aboriginal peoples and the newcomers are still living in a country that is now Canada and developing their livelihoods 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, p. 2.435-36).

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Land 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 surrender, some times 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 implemented 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-sufficient, 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 peoples 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 Aboriginal and modern land claims agreements have not yet been signed. Among these recommendations...
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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 at the community level, seeking a constitution and seeking its constitution and seeking its

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How can non-Aboriginal governments purport to negotiate in good faith when they are undermining the very rights which are the subject of negotiations? RCP 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.

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

I think these are important and essential recommendations, but a major problem is that provincial governments have generally negotiated provincially, rather than constitutionally, and that the federal government has not been involved.

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 knew the opposite to be true. So the presumption should be rebutted when we all know the opposite to be true. The burden would then be on the Crown to rebut this presumption if it can be shown that the lands in question were in fact occupied by Aboriginal peoples at the time of colonization, or, if occupied, that the Aboriginal title has been validly extinguished.

The second reason given for denying protection to Aboriginal title against government infringement is that the lien is 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 Supreme Court of Canada 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 RCP 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 is protected against government infringement, whereas common law protection is available only to common law rights.

Aboriginal title 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 Supreme Court of Canada in Sparrow v. The Queen, [1990] 1 S.C.R. 313, that Aboriginal title is proprietary rights and that the federal government is required to negotiate in good faith when it is the subject of negotiations. The proposed new law—the Aboriginal Self-Government Act; and a mechanism for 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 peoples 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 outline of the nation's governing structures and procedures, guarantees of rights and freedoms, and a mechanism for constitutional amendment.