

# **VISIONS OF NEO-COLONIALISM? RENEWING THE RELATIONSHIP WITH ABORIGINAL PEOPLES**

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## **Abstract / Résumé**

Aboriginal peoples have been demanding a new relationship with the colonizer since the existing paradigm of colonialism was imposed. Finally, after so many years of frustration, the federal government is responding. Arguing that the federal government's vision of self-government is unacceptable, I contend that any attempt to renew the relationship between Aboriginal peoples and the settler society must be premised on a recognition of the fact that Aboriginal peoples are "partners in Confederation".

Les peuples autochtones revendentiquent une nouvelle forme de relation avec les colonisateurs depuis que le présent paradigme colonialiste fut imposé. Après tant d'années de frustration, le gouvernement fédéral répond enfin à ces revendications. En soutenant que la vision de l'autonomie gouvernementale du gouvernement fédéral est inacceptable, j'affirme que toute tentative pour renouveler la relation entre les peuples autochtones et la société colonisatrice repose sur la reconnaissance du fait que les peuples autochtones sont des "partenaires dans la confederation".

## Introduction

Throughout much of the past two decades and culminating in the release of the *Report of the Royal Commission on Aboriginal Peoples* (RCAP), many scholars, politicians and Canadians have demanded that Canada establish a new relationship with Aboriginal peoples. Hailed by many as a radical departure from the past and a *radical* vision of the future, these demands and their associated visions of a new relationship (as expressed in numerous government-sponsored reports, and existing scholarship) are anything but new nor are they even remotely radical. Rather, Aboriginal peoples have been demanding a new relationship with the colonizer and have been articulating a vision of said relationship since the existing paradigm of colonialism was imposed in the mid-19th century.

The Mohawks of Akwesasne opposed the imposition of the oppressive colonial regime from the start. In defiance, they held steadfast to the terms of the relationship (nation-to-nation) that they had established between themselves and the colonizer at the outset of their “occupation” when they held the balance of power within their territory and were pursued as allies by the various European powers. In so doing, they maintained their traditional structures of governance until they were forced to comply in 1899 when colonial authorities (the RCMP) “murdered” the Head Chief and imprisoned the other Chiefs in an attempt to impose the “authority” of the Crown and the *Indian Act* system of “puppet government” (Mitchell, 1989:118). This, however, did not stop the Mohawks of Akwesasne from continuing their battle against the imposed colonial regime and they continued to assert their sovereignty and nation-to-nation relationships within Akwesasne, within Canada, and internationally.

Similarly, the vast majority of Plains Cree also opposed the imposition of the colonial regime following the disappearance of the buffalo in the early 1880s. Visionaries like Big Bear refused to sign Treaty Number Six for that very reason. He was a free man and the Cree were a free and sovereign people, so no one had the right to confine them in their own territory nor tell them how they were to live. They were not to be haltered and led like domesticated animals. Big Bear lobbied the government continuously for a better treaty and for the recognition of Cree sovereignty, but to no avail. Despite the overwhelming conditions of starvation and disease, Plains Cree warriors under the leadership of War Chiefs Wandering Spirit and Wild Child (Imasees) took matters into their own hands and led what was to become Canada’s second “civil war” (the first being the Red River Rebellion) or the Northwest Rebellion of 1885 (Dempsey, 1984).

Attempts to resist the imposed colonial regime and demands for a new relationship did not always result in acts of defiance and violence. For

example, during the 1920s and 1930s, Mohawk veteran Frederick Loft led an attempt to form a national pan-Indian political organization to lobby the federal government for changes to the relationship. Unsuccessful because of legal restraints and governmental interference, Loft's actions did result in the development of several provincial and/or regional organizations and the establishment of the National Indian Brotherhood in 1968.

So, it has taken a considerable amount of time for the Canadian government to respond to calls for action, by appointing a Royal Commission and admitting that a new relationship was required. Sure, the colonial paradigm had witnessed several small alterations prior to the release of the federal government's response (*Gathering Strength*) to the *Report of the Royal Commission on Aboriginal People* in 1998. But given the state of the relationship between the colonizer and the colonized, the federal government had never even attempted to overhaul the colonial paradigm in a manner that respected and responded to Aboriginal concerns and demands or admit willingly that a new relationship was needed as were new solutions to the so-called "Indian problem". Instead, as is demonstrated by the 1969 *White Paper*, the federal government maintained that the solution to the "Indian problem" was the same it always had been—the protection, civilization and assimilation of Aboriginal people (Tobias, 1991:127-144).

Finally, after so many years of frustration, Aboriginal demands are being heard and not by the deaf ears (and forked tongues) to which so many had grown accustomed. Canadians and their institutions of governance (including Royal Commissions and the Courts) are responding to Aboriginal demands for a new relationship. But, while movement has been made on this front since the 1980s when self-government emerged as an acceptable "solution" and Aboriginal and Treaty rights were entrenched in the constitution, no mutually agreeable resolution has been achieved or even articulated, leaving everything open to debate and continued questioning. Thus while progress seems possible because the federal government has committed itself to a new partnership with Aboriginal peoples, there is no agreed upon vision of the future. Even more problematic, however, is the fact that academics, politicians, bureaucrats and the general public have failed to even consider some of the simplest issues that this supposed new relationship entails. Who does this renewed/new relationship involve? National Aboriginal organizations? *Indian Act* Band councils? Indigenous nations? Aboriginal people as individuals? RCAP suggested Aboriginal Nations as the basis of the new relationship but, federal policy stipulates Aboriginal Governments. Surprisingly, Aboriginal people seem to agree with both RCAP and the federal government, as they too bat around the same terminology.

If we accept the federal position—that the renewed relationship involves the federal, provincial, territorial and Aboriginal governments and a government-to-government relationship—what then, is an Aboriginal Government? Does Aboriginal Government refer to all *Indian Act* Band councils? If it does, are these really considered true governments by Aboriginal people? What about traditional governments? After all, at the time of the treaties the colonial powers viewed traditional governments as the representative bodies of nations with enough authority vested in them to surrender the territories belonging to their nation. On the other hand, if traditional governments are not considered to be Aboriginal Governments and if *Indian Act* Band councils are deemed inappropriate by Aboriginal peoples, does the federal policy necessitate the creation and establishment of new structures of governance?

These are just some of the issues to be addressed before a vision of a renewed relationship amenable to all parties can be established. They are issues, with which the federal government has yet to come to terms. For, while the current federal Aboriginal policy context is one of a renewed partnership between the federal government and Aboriginal people and their structures of governance, the federal government has yet to endorse a detailed definition as to the meaning of "Aboriginal Government" or to institutionalize a commitment to government-to-government relationships. While this lack of commitment is problematic in and of itself, even more problematic are the government's existing visions of and foundations for a new relationship between the colonizer and the colonized. The reasons for which these concurrent visions are problematic will be explored in the first section of this paper.

Arguing that the federal government's visions of self-governance are problematic and that they do not constitute a foundation upon which we can renew the relationship between Aboriginal and non-Aboriginal people, I look to the past for solutions for the problems of today. By doing so, I respond to Aboriginal demands to reconcile the past with the present and I embrace the past as a vision of the future based upon nation-to-nation relationships and treaties. Basing my analysis on existing historiographical literature and legal scholarship and the need to reconcile the past with the present, I argue that any attempt to renew the relationship between Aboriginal peoples and the settler society must be premised on a recognition of the fact that Aboriginal peoples are already "partners in Confederation" and that as self-determining peoples and "partners in Confederation", all Aboriginal peoples have the right to determine what constitutes an "Aboriginal Government".

More specifically, in this article I explore contemporary visions of a renewed relationship as expressed by the federal government and RCAP. Noting that there are problems with these visions and so many unresolved issues, I explore the history of the relationship between Aboriginal and non-Aboriginal people in what became Canada in search of a more acceptable and a historically accurate foundation upon which to build a renewed/new relationship. Based on my brief discussion of history, I argue that Aboriginal peoples are already "partners in Confederation" and that any attempt to reconcile or renew the relationship between Aboriginal and non-Aboriginal people must be predicated on a re-affirmation and a renewal of this historical relationship.

Simply stated, this article explores the potential terms and the foundations of a renewed relationship between Aboriginal peoples and the settler society and it argues that any such renewal must be based on a recognition that Aboriginal peoples are "partners in Confederation". What this renewed relationship would look like is unclear. What is clear, however, is that any attempt to reconcile the relationship between Aboriginal and non-Aboriginal peoples which is not premised on a recognition and a reaffirmation of Aboriginal peoples as "partners in Confederation" would constitute the continued colonization of Aboriginal peoples and an institutionalization of neo-colonialism as the foundation of the relationship between the colonizer and the colonized. It should be noted that this article does not attempt to put forward a new analysis of self-government or the relationship between Aboriginal and non-Aboriginal people, rather, this article attempts to problematize self-government and educate the reader about Canada's "unwritten history" by exploring a number of questions which dominate public policy. How do we renew the relationship between Aboriginal and non-Aboriginal people? What is the basis of this relationship? What does a new relationship involve? What should the terms of this relationship be? Who should the new relationship involve?

## **Looking Forward: Definitions and Visions of a Renewed Relationship**

The current federal Aboriginal policy context envisions a renewed partnership between Aboriginal and non-Aboriginal governments. But, as RCAP reported, implementation of this renewed relationship is underway before discussions have concluded (or possibly even started) on the tenets of such a relationship. As a result, a multiplicity of definitions and visions of a renewed relationship exist and the issue as to what constitutes an "Aboriginal Government" is still being debated. The federal government has

yet to adopt or endorse a specific definition as to the meaning of Aboriginal Government nor has it institutionalized a commitment to government-to-government relationships. Interestingly enough, the federal government even considers the *Indian Act* to be a foundation upon which to build this new relationship, though revised in part by the Inherent Right Policy. In this section I consider these concurrent visions of a renewed relationship and problematize them by showing that they do not address contemporary Aboriginal demands. Specifically, I raise problems with these visions by considering the key question: what is an Aboriginal Government?

### The Indian Act

Recognizing that colonialism was experienced differently and at different times by the various Aboriginal peoples, beginning in the early 1800s (in some areas of the country), colonial authorities began interfering directly with the internal autonomy and sovereignty of Indigenous nations. They did so by disbanding traditional structures of governance and institutionalizing their own “puppet” regimes which were supposed to end in the goal of “civilizing” the Indian, politically, economically, socially and religiously. Initially viewed as an experiment in civilization and assimilation, this system of “puppet governments” or indirect rule soon became the preferred policy option of the colonizers. By the 1860s it became the foundation of all government policies—policies which were consolidated in 1876 using the *Indian Act*. Notwithstanding colonial policy, in many instances, traditional structures of government continued to exist even after the *Indian Act* (and its predecessors) was imposed as an authoritative regime of colonialism and genocide. This, despite the fact that by law, only government apparatuses sanctioned by the colonizer (i.e. *Indian Act* Band councils) had any semblance of authority on Reserves and they were they only structures of governance recognized by the colonizer.

Accordingly, “government” under the *Indian Act* gains a restrictive definition meaning the delegated authority exercised by Chief and Council (responsibility and authority is vested in the Minister responsible). Notwithstanding, from a federal as well as a provincial perspective, these bodies are not considered as governments in the ordinary sense of the word and therefore, throughout much of history these bodies were ignored. Until recently, no sustained relationship existed between Band councils and other governments—except in so far as the Indian Agent was concerned or where a government deemed it necessary (e.g. for the appropriation of land).

Because Band councils are an imposed structure of governance, and because traditional structures of governance often exist concurrently or in

competition with these structures, *Indian Act* Band councils may or may not be recognized as constituting governments at the community level. Moreover, not only are Band councils an imposed system of governance, but it is important to note that this imposition violated many pre- and post-Confederation treaties. Despite these facts, the *Indian Act* is viewed by many as an acceptable foundation upon which to establish a new relationship. In many cases, *Indian Act* Band councils demand to be recognized and treated as Aboriginal Governments. Claiming existence as nations with a constitutionally recognized right of self-governance, many *Indian Act* Band councils have demanded that they be treated as Aboriginal Governments with a nation-to-nation relationship with the Crown.

Since 1969, the federal government seems to have accepted such assertions as having some validity. By negotiating agreements (be they funding arrangements, land-claim agreements or sectoral self-government agreements) the government deals with *Indian Act* Band councils as though they were Aboriginal Governments, and even refers to them as governments in the Memorandums of Understanding (MOUs) and framework agreements that precede any negotiations on such matters.

Thus, one may argue that the *Indian Act*—an instrument of oppression and domination used to “protect”, “civilize” and “assimilate” the Indian—could become the foundation for a new relationship as *Indian Act* Band councils become the vehicle through which self-government is implemented and government-to-government relationships realized. However, that being said, it can be justifiably argued that by using the *Indian Act* as the foundation upon which to build a new relationship with specific Indian Bands, that relationship is surely not one based on principles of equality nor is it a true partnership, but, rather it remains a paternalistic relationship amongst unequal “governments”.

### The Inherent Right Policy

Adopted by Cabinet in 1995, this policy recognizes that the inherent right to self-government is an existing right under s.35 of the *Constitution Act, 1982* and that the exercise of this right should be within the existing constitutional framework. The policy also suggests that self-government negotiations are the only feasible mechanism for the implementation of this right so as to ensure harmonious jurisdictional relationships. Further to this, while the policy does not define the pursuant relationship nor what constitutes an Aboriginal Government in explicit and concrete terms, it does state that Aboriginal Government is “the governing body of a land based Aboriginal group which may have jurisdiction and may exercise authority on Aboriginal lands” (Canada, 1995:27).

Such an explanation as to what constitutes an Aboriginal Government is inconclusive, because it merely explains what an Aboriginal Government may look like, not what it is or what constitutes concrete grounds for recognition. It is a definition that is open-ended, dynamic and interpretive in nature as it allows for any governing body—a traditional government, a Band council or any other structure of governance—on a land base to be recognized as an Aboriginal Government irrespective of what (if any) jurisdictions or authorities it may possess.

Furthermore, the policy suggests that Aboriginal people have an inherent right to self-government, and thus one may conclude that they have an inherent right to exercise authority over their land, constitute a government, and decide on the appropriate structure of said government subject to the *Constitution Act 1982*, especially given the nation-to-nation relationship which characterized much of the early-colonial period and many of the treaties negotiated in what became Canada. Whereas the policy suggests that self-government negotiations are the most feasible mechanism for implementation of the right and the harmonization of jurisdiction, in no way does this mean that this is the only way to operationalize this constitutionally entrenched right which Aboriginal people have already exercised using limited governmental and jurisdictional powers, subject to the *Constitution Act, 1982*. The ability of Aboriginal people to exercise some semblance of self-government under international law without a self-government arrangement or agreement was recognized by the Royal Commission on Aboriginal Peoples, suggested by the Supreme Court (in *Delgamuukw v. British Columbia*) and acknowledged by both the federal government (DIAND's inherent right directorate) and Aboriginal groups (including AFN, MNC and various Bands and tribal councils). Thus, one could easily make the argument that a self-government agreement and/or government recognition is in no way a necessary precondition for determining what constitutes an Aboriginal Government.

Moreover, it may be possible for an entity to be considered an Aboriginal Government without it exercising the inherent right to self-government. This is evident if one considers that the policy is unclear as to whether Aboriginal governing structures constitute Aboriginal Governments regardless of the existence of a self-government agreement. In other words, it implies that there may be "Aboriginal Governments" that do not exercise the inherent right to self-government, but that they are, nonetheless, "Aboriginal Governments". The idea that non-self-governing Aboriginal peoples constitute Aboriginal Governments is further evident if one looks back at the laws, policies and practices which characterized the early-colonial period and remembers that self-governing Aboriginal Governments were forcefully

dismantled and subjugated and that this (according to RCAP) has no affect on those rights and structures recognized and guaranteed previously for they are not only constitutionally entrenched, but they were merely dormant or unexercised.

Therefore, whereas the current emphasis is on negotiating self-government agreements whereby *Indian Act* Band councils become "legitimate governments" with delegated and assumed jurisdiction and authority, the policy does not explicitly state that these governing structures become Aboriginal Governments *ipso facto*, nor does it rule otherwise (i.e. that traditional governments or non-self-governing Band councils are not Aboriginal Governments). This is demonstrated by that fact that when the government enters into negotiations, the negotiation framework and the accompanying Memorandum of Understanding (MOU) typically state that both parties will deal on a government-to-government basis, as is evidenced by the Saskatchewan Treaty renewal process.

### Royal Commission on Aboriginal People

According to the Commission, the right of Aboriginal peoples to be self-governing is recognized in both international and domestic law. As a matter of international law, the right to self-determination is vested in "peoples" or "nations". Recognizing that "Aboriginal peoples are not racial groups [but] organic political and cultural entities" that constitute nations, the Royal Commission justifiably argues that Aboriginal people have the right to self-determination under international law (RCAP (2), 1996:177). As the Commission concludes, under international law the right of self-government is vested in "peoples" and "whatever the more general meaning of that term, we consider that it refers to what we will call Aboriginal nations... [meaning], a sizable body of Aboriginal people with a shared sense of national identity, that constitutes the predominant population of a certain territory or collection of territories" (RCAP (2), 1996:177-178). RCAP's recognition of an Aboriginal peoples' right of self-government is, therefore, dependent on a claim to nationhood, and whether or not such a claim is consistent with the criteria for nationhood set out in the RCAP final report.

As a matter of domestic or constitutional law, the final report points out that section 35 of the *Constitution Act, 1982*

...confirms the status of Aboriginal peoples as equal partners in the complex federal arrangements that constitute Canada. It provides the basis for recognizing Aboriginal governments as constituting one of three orders of government in Canada: Aboriginal, provincial and federal. These governments are sovereign within their several spheres and hold their powers

by virtue of their inherent status rather than by delegation. In other words, they share the sovereign powers of Canada, powers that represent a pooling of existing sovereignties (RCAP (2), 1996:168).

Conceived of in this manner, self-government is an existing right of nations. Together, these nations comprise a third order of government, an order of government which is not inferior to, or a derivative of, other governments, but has its own sphere of influence or jurisdiction within which it exercises sovereignty.

The Commission asserts that fragmented and dispersed Aboriginal nations must be reconstituted in order to exercise their right to self-government. This is not only because the right to self-determination is vested in nations, but also because the Royal Commission perceives small communities (i.e. most existing *Indian Act* band governments) as being "incapable of exercising the powers and fulfilling the responsibilities of an autonomous governmental unit" (RCAP (2), 1996:178) Thus, while the right to self-government is contingent upon a claim to nationhood it is also contingent upon claims of good governance (capacity, legitimacy and authority).

RCAP argues that, as a constitutionally recognized third order of government, once the forecasted sixty to eighty Aboriginal nations have been reconstituted and their existence as nations recognized and affirmed by the federal government, they can exercise the sphere of jurisdiction implicit in section 35 of the *Constitution Act, 1982*. The jurisdiction which is inherent to Aboriginal peoples includes all matters related to the good governance and the welfare of Aboriginal people within their territories. While this might seem all encompassing, in reality, the Commissioners have limited the Aboriginal jurisdiction by constructing a detailed analysis as to what it includes and excludes. In so doing, they argue that the jurisdiction of Aboriginal people can be divided into two co-dependent parts, core and peripheral jurisdictions.

The core jurisdiction includes all matters that "(1) are vital to the life and welfare of a particular Aboriginal people, its culture and identity; (2) do not have a major impact on adjacent jurisdictions; and (3) are not otherwise the object of federal or provincial concern" (RCAP (2), 1996:167). The core jurisdiction, therefore, includes matters such as a nation's citizenship, constitution, governmental or institutional structure, education, health and social services, family matters, economic life, land use, taxation, language and culture and aspects of criminal law and the administration of justice. Meanwhile, the peripheral jurisdiction includes "matters that have a major impact on adjacent jurisdictions or that attract transcendent federal or provincial control" (RCAP (2), 1996:167). Potentially, a nation's peripheral

jurisdiction could include matters of territorial access and residency, environmental management, natural resources, the operation of businesses, trades and professions, the management of public money, property rights, criminal law, justice administration, public works and local institutions.

RCAP suggests that Aboriginal nations have the ability to exercise their authority in the core area without the consent of the Crown (except in so far as the Crown must recognize that they are duly constituted Aboriginal nations). This is because, "Aboriginal people have a form of an organic jurisdiction within core areas. [As such,] an Aboriginal government is free to establish an exclusive sphere of operation by enacting legislation that is sufficient to displace federal and provincial laws" (RCAP (2), 1996:217).

At the same time, RCAP claims that self-government agreements or treaties are required to exercise authority within the peripheral jurisdiction. That is to say, while the right to self-government is an inherent right (not delegated) and while there is a "sphere of inherent Aboriginal jurisdiction under section 35(1) of the *Constitution Act 1982*," the ability of Aboriginal governments to govern is, in part, dependent upon the existing orders of government (RCAP (2), 1996:167).

Not only is the ability to exercise the inherent right of self-government dependent upon negotiated agreements, but like the qualification of nation-hood, RCAP places other qualifications or limitations upon the right of self-government. Such limitations include the continued application of the *Canadian Charter of Rights and Freedoms* and a test of "good governance", meaning that "any government must have three basic attributes; legitimacy, power and resources" (RCAP (2), 1996:143).

RCAP's final report not only addresses the existence of a right to self-government and the limitations on such a right, it also seeks to establish how such a right could be realized given limitations such as the existing federal framework and the resources available in an era of fiscal neo-conservatism. Though claiming that each Aboriginal nation has the right to determine the manner in which it will realize self-government (i.e. its structure, capacity and realm of influence), the Commission identifies and examines three "models" that can be utilized by Aboriginal nations to implement self-government. It should be noted however, that while suggesting that there are three models of self-government, the Commissioners "anticipate that many variations will emerge in the implementation of the three broad approaches" (RCAP (2), 1996:225). The three models that Aboriginal nations have to choose from are nation government, public government and community of interest government.

Briefly, nation government is a territorially based government operating on one or several Reserves or Métis settlements (depending on the manner

in which the Aboriginal nation has been reconstituted) which has the ability to govern in both core and peripheral jurisdictions, delegate authority, determine its own citizenship (limited by the Charter) and incorporate elements of traditional governance within structures of self-government in so far as they meet tests of good governance. Public government occurs where Aboriginal people constitute the majority of residents in a given territory and all people, regardless of Aboriginal citizenship, participate equally in functions of governance and are subject to the government's authority. While the structures and functions of such governments resemble existing Canadian governments (as in Nunavut), they can be adapted to reflect different political traditions and cultures, as well as different jurisdictions or responsibilities. Meanwhile, RCAP's third model—community of interest government—allows for self-government in urban areas where no nations exist and Aboriginal people are not receiving services from their respective nation. Under this model of governance, Aboriginal governments—operating within the boundaries of other jurisdictions—constituted by voluntary membership could exercise powers delegated from Aboriginal nation and provincial/territorial governments.

While RCAP's vision of governance provides a foundation for decolonizing the relationship between Aboriginal and non-Aboriginal people and overcomes many deficiencies associated with the *Indian Act*, there are a number of logistical problems with the recommendations. Moreover, much of the RCAP vision is inconsistent and incongruent with the constitution, federal policy and the vision of governance held by many Aboriginal people. For instance, the typical government procedure is to deal with *Indian Act* Bands (and historical nations where appropriate) for the purposes of self-government irrespective of size or capacity, and thus, the federal goal is to establish a government-to-government relationship with the Band councils recognized as constituting Aboriginal Governments.

Further, by suggesting there is a core jurisdiction within which Aboriginal Nations can exercise authority irrespective of other governments or a self-government agreement suggests that RCAP considers Aboriginal Nations (and thus existing and/or reconstituted structures of governance) as Aboriginal Governments already. This could be viewed as expanding upon the federal vision of Aboriginal Government as expressed in the Inherent Right Policy and problematized in the previous section. Thus, one could feasibly argue that existing Aboriginal structures of governance constitute "Aboriginal Governments" regardless of what powers they choose to exercise (delegated or otherwise).

RCAP does not rule out traditional structures of governance. Instead it argues that so long as they are compatible with the governance models

articulated and provide for good government they too can be "Aboriginal Governments" since Aboriginal people have an inherent right to self-government which includes the ability to choose both the unit of governance and the subsequent structure of governance. Combined with the previous point (that structures of governance may already be Aboriginal Governments). This could mean that if RCAP's vision of governance were adopted, there would be a new role for traditional governments within Canada, and that the federal government would have to deal with traditional governments as legitimate and representative structures of government.

### Gathering Strength

"The Royal Commission took the view that the right of self-government is vested in Aboriginal nations... The federal government supports the concept of self-government being exercised by Aboriginal nations or other larger groupings of Aboriginal people" (Canada, 1997:13). The government also confirms its recognition of the inherent right to self-government as an existing constitutional right. Other than this, the policy directive says little as to what Aboriginal government and a renewed relationship entails. Thus, we may assume the same problems or complexities that emerge out of the definition of Aboriginal Government under the Inherent Right Policy would remain constant and, thus, unresolved.

Regardless of the lack of a definition, *Gathering Strength* does specify that a method of recognizing "Aboriginal Governments" needs to be developed in close consultation with Aboriginal people. This confirms the government's lack of a definitive vision, as it suggests that what is to be recognized as an Aboriginal Government has yet to be decided, and that any initiative in this direction has to occur with the consultation of Aboriginal people and other partners. Thus, it seems quite clear that the government has recognized that the manner in which the Inherent Right Policy conceptualizes Aboriginal Government is problematic, and that new policies have to be developed. That being the case, the fact that the government intends to develop this policy in consultation with Aboriginal people (as part of a renewed relationship) suggests that any mechanism for the recognition of an Aboriginal Government needs to be consistent with (or at least influenced by) the vision of Aboriginal Government to which Aboriginal people aspire. Thus, I would argue, that any mechanism for recognition or any definition must include traditional structures of governance, Band councils, and some form of non-land based governance for off-Reserve status Indians, non-Status Indians, Inuit and Métis. This is further evident if one considers that the policy also seems to expand the basis for negotiating and recognizing self-governing Aboriginal groups, as it specifies the need to

work with Métis and off-Reserve Indians, and the need to explore existing treaties as a means for recognizing and implementing self-government.

## Aboriginal Governments and the Relationship in Historical Terms

As stated at the outset of the paper, after so many years in which Aboriginal peoples protested the existing relationship, the Canadian government has finally recognized that a new relationship between the colonizer and the colonized is needed. This is, as the previous section demonstrated, problematic. The problem is not, however, the idea that a new relationship is necessary. The problem is simply what the terms of this relationship should be and who does the new relationship involve? Though the RCAP report provided a very complex and elaborate vision of a renewed relationship and although the Government of Canada has been attempting to devise a solution for quite some time, no acceptable solution has been developed and current visions are problematic.

In considering where this "renewed" relationship should go in the future, I would argue that the existing visions do not recognize and respect the inherent right to self-determination. If realized, these visions would continue the domination, oppression and colonization of Aboriginal peoples as they do not respect the rights of these peoples nor the relationship agreed to in the treaties. Thus, many questions remain unanswered, questions which I raised at the outset of this article. Where should we go in the future? What does a new relationship involve? What should the terms of a renewed relationship be? Who should this new relationship involve?

This leads me to ask why there has been no substantial and all-encompassing changes in Canada's Indian policy since the current colonial regime was imposed and Aboriginal peoples began expressing their discontent with the past and their visions of the future in a public and national forum. Explaining why this has occurred is difficult. One explanation of this inability to resolve some of the outstanding demands of Aboriginal people which stands out, however, is the fact that after more than 30 years of debate there is still no agreed upon vision of the future. Possibly this has occurred because, when Aboriginal issues are addressed in the public forum, we always seem to start from scratch—trying to construct a new relationship which is completely disassociated from the past (or premised on the *Indian Act*)—and, thus, its like trying to re-create the wheel.

As RCAP concluded, to start from scratch would be impossible, as is trying to build a renewed relationship based upon colonial institutions such as *Indian Act* Band councils. According to the Commissioners,

... a vision of a balanced relationship has been a constant theme in our work as a Commission... we rejected the idea that the past can simply be put aside and forgotten as we seek to build a new relationship. What we should strive for instead is a *renewed* relationship. The concept of renewal expresses better the blend of historical sensitivity and creative initiative that should characterize future relations among Aboriginal and non-Aboriginal people in this country. It would be false and unjust to suggest that we start entirely anew, false and unjust to attempt to wipe the slate clean, ignoring both the wrongs of the past and the rights flowing from our previous relationships and interactions (RCAP, (1), 1996:676-677).

Taking heed from RCAP's assertion that we cannot start over from scratch, in the remainder of this paper I explore the relationships between Aboriginal and non-Aboriginal people in their historical contexts, paying particular attention to the terms of these relationships and who constituted the players. In so doing, I set forth the historical context of the relationship, problematize the existing visions of a renewed relationship, and set forth a vision of a renewed relationship that is grounded both in the past and in the present in so far as it meets constitutional requirements and it respects the demands and aspirations of both the government and Aboriginal people. In other words, in the remainder of this paper I examine the historical evolution of the relationship between Aboriginal and non-Aboriginal people in an attempt to find a foundation on which to build a renewed relationship. In so doing, I argue that the historical relationship between Aboriginal and non-Aboriginal peoples which is predicated on a recognition of nation-to-nation relationships provides a solid foundation for renewing the relationship between Aboriginal and non-Aboriginal peoples. That is, as my discussion of history demonstrates, Aboriginal peoples are already "partners in Confederation", and as such any attempt to renew the relationship between Aboriginal and non-Aboriginal people must be predicated on a recognition and re-affirmation of this status and the decolonization of the relationship whereby Aboriginal peoples would be empowered to renew and/or create "Aboriginal Government" in accordance with their own aspirations.

Renewing the relationship between Aboriginal and non-Aboriginal peoples means that we must reconcile the past with the present and forge a new vision of the future, one which is not predicated on the institutionalization of neo-colonialism but a realization of the post-colonial aspirations of Indigenous peoples. As such, understanding the past is critical for how do we renew a relationship when we do not understand what it is that we are renewing or the terms of the nation-to-nation relationships that we are

renewing. It should be noted that in summarizing this history, I am not attempting to provide a new reading or new interpretation of the relationship between the colonizer and the colonized but that I am merely attempting to summarize existing vast bodies of historiographical and legal scholarship. In so doing, I will use a similar conceptual schema as that used by RCAP in analyzing the history of the relationship between the colonizer and the colonized. RCAP asserts that there have been several distinct phases or periods of colonialism—separate worlds, contact and cooperation, displacement and assimilation, and negotiation and renewal—each of which has been characterized by a different relationship between Aboriginal and non-Aboriginal people. Problematic because of its simplicity and because it ignores the fact that colonialism transpired at different rates throughout the country and affected Indigenous peoples differently, it will, nevertheless, be used as the foundation for the remainder of this paper. Conceiving of this relationship as different eras or waves of colonialism is useful because it allows me to present a history of colonialism which focuses on the changing terms of the relationship between Aboriginal and non-Aboriginal peoples and not the circumstances which led to changes in the relationship, nor the variations in the relationship.

### **Pre-Colonialism**

As we all know, Christopher Columbus got lost in 1492 and was subsequently charged with the “discovery” of the New World; a land known as Turtle Island by many Indigenous peoples. As in Europe, the people who inhabited Turtle Island in 1492 belonged to many nations. Like European nations, each had its own language, culture, traditions, history, sense of nationalism, territory, laws and legal system, political system and spirituality. However, unlike European nations of the time period, the political traditions of most of these peoples were democratic and premised on the inclusion of women into political processes and society as a whole.

Given the democratic nature of these non-state polities or nations, it is not surprising that U.S. Founding Fathers like Benjamin Franklin and James Madison wrote extensively about the societies surrounding them, as these were true democracies which likely predated the brief democratic movement in Athens. Furthermore, not surprisingly the authors of the federalist papers and the U.S. Constitution looked towards the Haudenosaunee or the Iroquois Confederacy as a model for the United States as the Haudenosaunee were a confederacy with a long democratic tradition and a constitution hundreds of years old (Venables, 1992:67-106; Johansen, 1998).

Pre-colonial Indigenous nations were recognized as constituting nations with independent and autonomous structures of governance both prior to and following colonization. Nations existed as sovereign entities and engaged in mutual recognition, diplomacy and all aspects of foreign affairs prior to colonization. This is evident through treaties used to secure peaceful relations, economic reciprocity and coexistence within the same territory. Such treaties were common prior to the arrival of Europeans. Therefore, prior to colonization there was a pre-existing tradition and a long-standing history of nation-to-nation relationships among Indigenous nations and within their elaborate structures of governance.

### **Early Colonialism: Nation-to-Nation Relationships**

Prior to 1492, European and "American" nations existed independently of each other with no contact and no relations between them. But in 1492, all of that changed and by the time that permanent settlements were established in what was to become Canada, millions of Indigenous peoples had already died in the "American Holocaust" and the "Just Wars" that enabled the occupation of the Americas and colonial nations to "lawfully" appropriate Indigenous nations' territories, riches, and often their lives (Churchill, 1998).<sup>1</sup> Prior to colonization "the Red man had the land and the White man had the bible"; during colonization, the White man used the bible to dispossess the Red man of the land. This is, in large part, due to the fact that it was the Pope who "gave" European nations dominion over the Americas, and because papal doctrine established in international law the terms of this dominion and the terms of the relationship between the colonizers and the colonized. More specifically, these doctrines allowed European nations to lawfully and forcefully dispossess Indians of their territories and lives.

However, while colonial nations could lawfully use whatever force necessary to subjugate Indigenous nations and cease their properties, the idea that Aboriginal peoples constituted nations under international law had been accepted by the European nations which colonized and occupied Canada, as had the idea that acquisition of title could occur only by the consent of an Aboriginal nation (an inability to obtain consent was, however, grounds for a "Just War") (Churchill, 1993:34-37). Furthermore, because Canada was colonized with different goals and aspirations (such as settlement) than was much of the world, Canada's colonial nations were relatively dependent upon the Aboriginal peoples they "discovered" for purposes of survival and resource extraction. This lead to the establishment of far different relationships than those of mass slaughter and slavery established by the colonizers to the south (e.g. Spain).

According to RCAP, the period which followed "discovery",

was marked by increasingly regular contact between European and Aboriginal societies and by the need to establish the terms by which they would live together. It was a period when Aboriginal people provided assistance to the newcomers to help them survive in the unfamiliar environment; this stage also saw the establishment of trading and military alliances... Although there were exceptions, there were many instances of mutual tolerance and respect during this long period. In these cases, social distance was maintained—that is, the social, cultural and political differences between the two societies were respected by and large. Each was regarded as distinct and autonomous, left to govern its own internal affairs but cooperating in areas of mutual interest and occasionally and increasingly, linked in various trading relationships and other forms of nation-to-nation alliances (RCAP (1), 1996:38).

Although marked by great paradoxes and contradictions that continue to defy understanding, the relationship which transpired was, for the most part, nation-to-nation. For many, this is unexplainable and even unbelievable, for standard interpretations of history claim that the relationship between Aboriginal and non-Aboriginal peoples has always been premised on the subjugation of Aboriginal peoples, and the colonization of the land and its people was, in part, based on notions of *terra nullius* as Indians were not viewed as people with unalienable rights or claims to nationhood under international law (this is especially evident in British Columbia, Newfoundland, Labrador and parts of Quebec). Yet, as most contemporary versions of history attest, "despite their clear Imperial ambitions, in practice colonizing European powers recognized Aboriginal nations as protected yet nonetheless autonomous political units, capable of governing their own affairs and of negotiating relationships with other nations" (RCAP (1), 1996:130).

Ending either in the 1830s according to RCAP or the 1860s according to scholars such as Milloy, colonial policy, law and practice all asserted a recognition of nationhood (albeit of a protected nation type) and the existence of nation-to-nation relationships. This recognition of Aboriginal nationhood and the existence of a nation-to-nation relationship between the colonial nations and the Aboriginal nations is exemplified in treaties such as the Two Row Wampum of 1664, Imperial policies such as the *Royal Proclamation*, 1763, and the practices of the British Imperial Indian Department which "was a foreign office in every sense [as] department agents could not command; they could only employ the ordinary tools of the

diplomat: cajolery, coercion, bribery, or, put more politely, persuasion" (Milloy, 1983:56) in dealing with Indigenous nations.

Aside from government policies and practices, the status of Aboriginal peoples as nations and the necessity of a nation-to-nation relationship was also recognized in a variety of judicial decisions during this time. According to James Youngblood Henderson, this nation-to-nation relationship has been recognized in law since 1705 when a Royal Commission (supported by a 1705 decision by the Judicial Committee of the Privy Council) found the Mohegan First Nation to be a "sovereign nation [which] was not subservient to the colony" (Henderson, 1996:6) despite the fact that they had signed a treaty in 1659 and that the colonial legislative assembly in Connecticut claimed jurisdiction (through a royal charter) over the Mohegans and the lands reserved for them. In several United States Supreme Court decisions during the early 1800s based upon the *Royal Proclamation*, 1763 and international law, Chief Justice Marshall recognized

that native nations within North America were "nations like any other" in the sense that they possessed both territories they were capable of ceding, and recognizable governmental bodies empowered to cede these areas through treaties. However, ...they were nations of a "peculiar type" both "domestic to" and "dependent upon" the United States, and therefore possessed a degree of sovereignty intrinsically less than that enjoyed by the U.S. itself (Churchill, 1993:43-44).

Whereas the Marshall Doctrine is the basis of the US policy of "domestic dependent nations" and thus, self-government and nation-to-nation relations, it is also the basis of many Canadian judicial decisions. In one such decision, *Connolly v. Woolrich* (1867), the Superior Court of Quebec recognized "Aboriginal peoples as autonomous nations living under the protection of the Crown, retaining their territorial rights, political organizations and common laws" (RCAP (2), 1996:188).<sup>2</sup> According to RCAP, this means that "the sources of law and authority in Canada are more diverse than is sometimes assumed. They include the common law and political systems of Aboriginal nations in addition to the standard range of Euro-Canadian sources" (RCAP, 1993:7). This also means that, "the courts have periodically upheld the original relationship between newcomers and Aboriginal peoples and enforced the rights it embraced. Among these was the right of Aboriginal peoples to conduct their affairs under their own laws, within a larger constitutional framework linking them with the Crown" (RCAP, 1993:8).

So colonial nations, and other agents of colonial governments (such as the courts) recognized the independence of Aboriginal nations, and estab-

lished nation-to-nation relationships with them. What is important is the fact that in establishing nation-to-nation relationships and in recognizing Aboriginal nationhood, the colonizer respected and dealt with each nation's traditional structure of governance. Moreover, the colonial nations (France, Britain, U.S. and Canada) not only respected these structures of governance and did not attempt to interfere with such internal matters or to destroy or dismantle a nation's independence and structure of governance, but by law they were forbidden to do so as the courts recognized the sovereignty (albeit limited) of Indigenous nations and the necessity of non-interference with said matters of sovereignty, jurisdiction and autonomy. Thus, those Aboriginal peoples affected by colonialism in this period are—for the most part—by law, "nations within" with rights to live according to their laws and traditional structures of governance and to have a nation-to-nation relationship between their structures of governance and the Crown.

### **Sustained Colonialism: Relationships of Displacement and Assimilation**

According to RCAP, in the early 1800s (the 1860s according to Milloy), changes occurred in the relationships between Aboriginal and non-Aboriginal peoples. Irrespective of the law or the *status quo*, new policies and practices were enacted by the colonizers (initially in eastern Canada and subsequently throughout the country), which led to the establishment and institutionalization of a new relationship based upon principles of inequality and subjugation. These changes were precipitated by socio-political changes in the colonies (population, economic and military) which dramatically altered the balance of power in favour of the colonial nations. These changes also resulted from the racialization of the relationships between the colonizer and the colonized as Darwin and Spencer's theories of scientific racism and the "dying race" theories gained credibility and importance. Moreover, "the transition in the relationship was also pushed by the western belief in "progress" and in the evolutionary development in human beings to lesser to greater states of civilization" (RCAP, (1), 1996:142).

Whereas previously the relationship had been one characterized by policies of cooperation and protection (as evident in the *Royal Proclamation*) and mutually consensual nation-to-nation relations, the new relationship was characterized by nonconsensual relationships of paternalism, interference and subjugation and policies of civilization and assimilation. Specifically, these new policies were adopted with the intent of assimilating Aboriginal peoples (the few which did not die off with the rest of their "breed") into western society by dismantling Indigenous societies and structures of governance and by educating and socializing them in the ways of the

"civilized" and, thus, the political, social, religious, domestic and economic attributes of western society. Therefore, while assimilation remained a long-term goal (which the federal government was still trying to realize in the 1969 White Paper), the "civilization" of the Indian became the mainstay of federal policy (as is demonstrated by the *Indian Act* and its pre- and post-Confederation forerunners) which was realized through experimental practices in cultural genocide, most often with the assistance of the Christian churches and missionaries and other agents of control such as Indian Agents and the NWMP/RCMP.

What is of great importance in terms of the relationship between the colonial nations (the colonizers) and the Indigenous nations (the colonized) is that the terms of this new relationship were non-consensual (i.e. it became a coercive state regime based on the goals of protection, civilization and assimilation). As RCAP explains, "Aboriginal people sought to continue the terms of the original relationship...[and] resistance was particularly strong with respect to efforts to assimilate Aboriginal people" (RCAP, (1), 1996:188). Although resistance was futile, for it was met with forced subjugation, resistance began throughout the country from this period to the present, as is evident in the copious bodies of literature dealing with Aboriginal "social/political movements" and various incidents of resistance.

Not only was this new relationship non-consensual, but it broke past promises (treaties), policies (*Royal Proclamation*) and findings of common law (*Connolly v. Woolrich*). Furthermore, the new relationship also violated the post-confederation treaties (international agreements based on nation-to-nation relationships) which the Crown was negotiating at the same time that it was implementing and institutionalizing a coercive state regime of non-consensual relationships and genocide. This is evident in the discussion of Treaty Number Six (1876) which follows.

By July 15, 1870, when the government of Canada "assumed sovereignty" over the Northwest Territories, its Indian policy had long since been established and as a result, the government was cognizant of the need and its desire to negotiate treaties. Meanwhile the Cree also desired a treaty with the Crown, only they did not view treaties in the same manner (Morris, 1880:168 ; McDougall, 1970:47-49).<sup>3</sup> The Cree Chiefs advocated a nation-to-nation treaty relationship whereby the Cree would delegate certain responsibilities to the Crown in return for the government's assistance. This is evident in the lobby effort, engaged in on behalf of the Chiefs by missionaries, traders, government officials and police officers. Essentially, the Cree wanted to establish a nation-to-nation relationship, premised on an affirmation of the nationhood of each, a respect for the sovereignty of

each party, and a delegation of certain powers to the Crown to ensure that the Crown would take responsibility for the actions of its citizens and for the changes occurring within Cree territory.<sup>4</sup>

This type of reasoning, and these demands preceded the treaty, and were also very much a part of the negotiations and the final agreement (not necessarily that which was written down by the representatives of the Crown). Accounts of the treaty negotiations reveal the Crees' intent to establish a nation-to-nation relationship, and according to Morris, the Crees' continuously emphasized peaceful relations and cooperation to solve the problems they were experiencing and anticipating (Morris, 1880:191). By establishing such a relationship and accepting assistance to enable them to survive and adapt, however, the Cree were not giving up their sovereignty. Instead, they agreed to enter into a "federal like", nation-to-nation relationship with the Crown, whereby the jurisdictions and responsibilities of each party to the treaty (towards the other) were established, and Cree sovereignty and jurisdiction were recognized, affirmed and not extinguished. This is not only a view that has emerged in recent years, as even Morris (the chief negotiator) recounts that he continuously assured the Cree that the government promised "that we would not interfere with Indian's daily life" (Morris, 1880:193). This promise, according to Andrew Bear Robe, "surely included the continuation of some form of Indian jurisdiction and sovereignty" (Bear Robe, 1992:19).

Thus, for the Cree, the treaty was an agreement between two independent powers that recognized the autonomy and ability of each to determine its political status *vis-à-vis* the other. Accordingly, Treaty Six may be construed to mean that the two parties to the treaty would co-exist peacefully as two sovereign entities within the same territory. This is evident in the treaty itself, for it contained within it the "Peace and Good Order clause,<sup>5</sup> which was essentially the Cree's promise to establish (most likely through treaties) peace with all others, and to share their territory (with the very few White people expected) in accordance with their ways, while respecting and abiding by the Queen's ways wherever possible.<sup>6</sup> Thus, while the treaty established a relationship of peace and friendship and made promises of government assistance, from a Cree perspective neither party renounced their sovereignty and the leaders of the Plains Cree accepted the responsibility for maintaining peace and order in the territory they agreed to share.

From this brief discussion of Treaty Number Six it is evident that the relationship between the colonial nation and Indigenous nations which characterized this period in history was rife with paradoxes and contradictions. For while the government was legislating experimental practices

aimed at cultural genocide or the protection, "civilization" and assimilation of the Indian using the *Indian Act, 1876*, it was also concluding a binding contractual agreement or treaties under international law. These treaties, such as Treaty Number Six (also of 1876), was reminiscent of the period characterized by nation-to-nation relationships and seemed to actualize consensual nation-to-nation relationships based upon the mutual co-existence of both jurisdictions and nations despite the fact that Canada's official Indian policy was now premised on subjugation and displacement of Indian people and the eradication of individual and national identities.

It was not just the treaties that contradicted government policies of the time. As late as 1897, the Government of Canada recognized the nation-to-nation relationship as the *status quo* citing both international law and its fiduciary responsibilities, as is demonstrated in the following statement regarding the Robinson Treaties by the Solicitor General for Canada, Hon. J.J. Curran:

We contend that these Treaties are governed by international, rather than municipal law. They were made with the tribes under the authority of the Sovereign, and the faith of the nation was pledged in dealing with those annuities. The Crown is a trustee towards those Indians, and is bound to watch over their interests and enforce their rights... All these claims are safeguarded in a different manner from any claim that would arise between two subjects of Her Majesty who might come before any Court to have their matters adjudicated upon (Curran, 1897:63).

Irrespective of the treaties, international law, common law, past policies, and the Crown's fiduciary obligations, the Government of Canada continued to develop a paradoxical and contradictory relationship with Indigenous peoples based upon a realization of the goals of "civilization" and "assimilation". As a result, the relationship between the colonial nation and Indigenous nations changed from nations-to-nation to one of the severe subjugation of wards of the state who were denied the right to govern and to exist free from the interference of the state because of their presumed status as subordinate and "uncivilized" societies. Therefore, a recognition of nationhood and consensual nation-to-nation relationships ceased and in many all relationships ceased as Canada colonized, subjugated, "civilized", and "assimilated" but never sought any sort of sustained relationship with Aboriginal peoples or their structures of governance except those which had been established to act as "puppet governments" on Reserves.

### **Post??Colonialism: De-Colonization and Renewed Relationships**

The historical era in Indian-White relations characterized by paradoxical policies of displacement and subjugation (through "protection", "civi-

zation" and "assimilation") began to be dismantled in 1969 with the federal government's attempt to rid themselves of the "Indian problem" and create a "just society" through complete and total assimilation of Indians and the lands reserved for Indians. This did not succeed in creating the new era in history the policy's framers intended. Instead, as the following statement by RCAP suggests, it launched Canada into a new era of relations between Aboriginal and non-Aboriginal peoples now based upon a recognition of Aboriginal people as "citizens plus".

The release of the White Paper on federal Indian policy in 1969 generated a storm of protest from Aboriginal people, who strongly denounced its main terms and assumptions. It left in its wake a legacy of bitterness... and suspicion that its proposals would be gradually implemented. However, it also served to strengthen the resolve of Aboriginal organizations to work together for a changed relationship. This marked the beginning of a new phase in Aboriginal/non-Aboriginal relations; [a phase] of negotiation and renewal, and it is this stage that is still underway (RCAP, (1), 1996:202).

Although the relationship post-1969 is markedly different from that which preceded because of an upsurge in negotiations and consultations between the government, Aboriginal organizations and *Indian Act* Band councils and because of an abandonment of past policies aimed at the "protection", "civilization" and "assimilation" of the Indian, it is not until 1982 that the previous relationship was completely thrown into disarray and the foundations of a new relationship institutionalized. In 1982, Canada laid the foundation for the creation of a post-colonial state based upon the acceptance of Aboriginal and Treaty rights and the potential for putting an end to colonialism either through judicial action or negotiation.

The inclusion of Aboriginal and Treaty rights in the *Constitution Act, 1982* recognizes that fact that,

...over time and by a variety of methods, Aboriginal people became part of the emerging federation of Canada while retaining their rights to their laws, lands, political structures and internal autonomy as a matter of Canadian common law. ...the current constitution of Canada has evolved in part from the original treaties and other relations that First Peoples held with the Crown and the rights that flow from those relations. The treaties form a fundamental part of the constitution and for many Aboriginal peoples, play a role similar to that played by the *Constitution Act, 1867* in relation to the provinces. The terms of the Canadian federation are found not only in formal constitutional documents governing relations between the fed-

eral and provincial governments but also in treaties and other instruments establishing the basic links between Aboriginal peoples and the Crown (RCAP (2), 1996:193-194).

Thus, constitutional inclusion recognizes that Aboriginal peoples have a different set of rights than other Canadians, and, while this set of rights has yet to be fully enunciated through judicial interpretation or constitutional amendment, these rights are the foundation of the relationship between Aboriginal and non-Aboriginal people. Moreover, these rights constitute an implicit foundation for a post-colonial Canadian federation. Often referred to as Treaty Federalism or Treaty Constitutionism, it accepts as constitutional law (provisions which override legislative enactments such as the *Indian Act*) the terms of the nation-to-nation relationship established in the *Royal Proclamation*, the treaties and early agreements between the colonial and Indigenous nations. As such, Aboriginal peoples are already "partners in Confederation" and the past contains a framework for a relationship between Aboriginal and non-Aboriginal people; a relationship which is not predicated on colonization and subjugation but an affirmation of nationhood and self-determination.

As "partners in Confederation", Aboriginal peoples have a legally recognized nation-to-nation relationship with the Crown. Arguably, their status as "partners in Confederation" should determine the relationship between Aboriginal and non-Aboriginal people and define it as one between nations. It also provides a legal, political and historical foundation for acknowledging the fact that Aboriginal peoples are self-determining nations with jurisdictions which are inherent and not delegated and as having an ability to define their own path forward or to determine the terms of their relationship with the Crown. Accordingly, Aboriginal peoples continue to have the ability to define the meaning of self-government, to define their relationship with the government of Canada and to define "Aboriginal Government", albeit in a manner defined and confined by historic relationships, the treaties and the Constitution. It should be noted that this historically-derived vision of self-government is not only consistent with contemporary historiographies, legal scholarship, international law and domestic law, but it also represents a vision of self-government which is consistent with Aboriginal political discourse, oral traditions and Aboriginal demands.

## Conclusions

Aboriginal/non-Aboriginal relationships involve complex questions as to what the nature of that relationship should be and who the players in such a relationship should be. The existence of many concurrent visions on the

future of this relationship makes matters harder as has the fact that many of the federal government's visions are problematic when viewed in light of Aboriginal visions, historical precedents, legal rights and responsibilities. None of the federal government's existing visions of a renewed relationship and the constituent players (i.e. Aboriginal Governments) is acceptable to Aboriginal peoples because the existing federal visions discredit Aboriginal visions of a renewed relationship and ignore history, thus denying them their legal and political rights. Furthermore, none of the federal government's visions deal with the fact that Aboriginal peoples are already "partners in Confederation" and as such, they not only ignore Aboriginal aspirations but they ignore the law and as such they seek to sustain a colonial relationship instead of building on the post-colonial foundation provided by the *Constitution Act, 1982*.

We must continue to explore the nature and terms of the relationship between Aboriginal peoples and the settler society. But in so doing, we must venture forward and dream a post-colonial vision. We must venture forward and "create" new visions of a renewed relationship because the federal government's current attempts to define and implement a renewed relationship are unsatisfactory, and lead towards an institutionalization of neocolonialism. The past cannot be ignored, but it must be the foundation upon which any discussion of the relationship between the colonizer and the colonized is based. The original relationship and treaties are part of our legal and constitutional histories and these relationships are guaranteed in law. This, despite the fact that the government has wrongfully ignored them and attempted to override them (and thus the constitution) with mere legislation (i.e. the *Indian Act*).

Although many politicians, bureaucrats and academics are unaware of the fact that there is a long history of relationships between Aboriginal nations acting through their structures of governance, and colonial nations. These predate the paternalistic, genocidal and assimilationist relationships of forced subjugation which have characterized relations since the introduction of the *Indian Act* and its colonial predecessors. Canada has a long history of dealing with Aboriginal peoples as nations, and these nation-to-nation relationships and the existence of Aboriginal nationhood were recognized in British and Canadian policies, practices, common law, constitutional law, international law and (international) agreements such as the treaties.

Recognizing this, and respecting the historical and legal perimeters within which a new/renewed relationship must be forged, all Aboriginal structures of governance must be accepted as constituting an "Aboriginal Government" and thus a political player in government-to-government

relations. Common law recognizes that Aboriginal peoples are nations, as does international law, the treaties, and past governmental policies and practices. As nations with a right to self-determination, Aboriginal peoples have to determine and/or create their own structures of government. It could be justifiably argued, therefore, that an "Aboriginal Government" is any government which a particular people chooses to recognize as their government (be that a Band council, a traditional structure or both).

As partners in Confederation, Aboriginal people should be given the opportunity to negotiate the terms of that partnership, be it a nation-to-nation relationship or a government-to-government relationship. The terms of said partnership should not be dictated, for this merely represents the continuation of the colonial paradigm characterized by domination and oppression. As nations, with a recognized inherent right to self-government, Aboriginal people already constitute peoples under international law and as such have the right to determine what constitutes an Aboriginal Government. Furthermore, the Government of Canada has no constitutional ability to place erroneous limitations or imposed definitions of what it considers to be an Aboriginal Government, as they are also bound by the past and the law. That law has previously recognized traditional structures of governance and other internally chosen delegates as constituting Aboriginal Governments, governments of nations internal to the Canadian state.

Aboriginal people are already partners in Confederation, in the sense that the Canadian state has as its foundation the original relationships between the colonizer and the colonized. As these original relationships (and thus, treaty federalism) are recognized and affirmed in the Constitution as Treaty and Aboriginal rights, one might argue that the terms of the new relationship are already part of the Constitution. The treaties and other original relationships dictate the terms by which the existing colonial relationship of oppression and domination can be revised, discarded and a new relationship built. Therefore, the foundation upon which to build a new relationship is not the blank slate which DIAND would like us to believe.

But, we cannot begin anew and forget the past which preceded the colonial regime and the *Indian Act*. The terms of a renewed relationship were stipulated in the past. They are part of our constitutional law, our common law and our history. They hold promise not only because they are part of our legal, political, social and constitutional history and form the foundation upon which Canadian federalism was built. No, they hold promise because they rid the future of a relationship based on domination and oppression whereby Indigenous peoples (as nations) are empowered to decide the terms of a renewed relationship and the players in said relationship. Without that, the Canadian government will continue in its

mission to ignore their legal responsibilities, common law, international law and constitutional law and deal with the puppet governments it imposed while altering the existing *status quo* as little as possible and only in so far as it is deemed absolutely necessary or beneficial.

What this means in reality is unclear as most Aboriginal peoples have been so involved in "battles" with other orders of government over the existing visions of self-government that they have not had the opportunity to define self-government in terms other than "that which self-determination is not". It might mean the renewal of traditional governments or it might mean the reformation of *Indian Act* Band council governments. It might mean a relationship predicated on an affirmation of the Two Row Wampum, or it might mean a negotiated form of municipal self-government. The possibilities are endless and as of yet are largely undefined as communities have yet to engage the issue fully and negotiations to renew their relationship with the Crown have yet to occur. Thus, the future is unclear. What is clear, however, is that as we search for a way in which "we can all live together in the best way possible" and as we seek to redefine and renew the relationship between Aboriginal and non-Aboriginal people, we must reconcile the past and the present and acknowledge that Aboriginal peoples are already "Partners in Confederation". We must start from this place, and embark on a new journey together as "partners" for to do otherwise would constitute an infringement on both international and domestic law and an institutionalization of neocolonialism.

### Notes

1. This is not to say that the American Holocaust was over by the time Canada was settled, because as Churchill argues, this holocaust continues to this day.
2. RCAP not only accepts this case as justifying an inherent right to self-government, but they argue that this case has, in fact, recognized Aboriginal rights and Treaty rights as a source of constitutional law right from the beginning.
3. According to Alexander Morris, "the Crees had, very early after the annexation of the North-West Territories to Canada, desired a treaty of alliance with the government." In fact, the Crees not only desired that a Treaty be negotiated, but as early as 1871 they employed the assistance of traders, policemen, missionaries, and government employees to actively lobby for a Treaty.
4. It should be noted that the Cree have a different understanding of nationhood and sovereignty than do their colonizers. Sovereignty is a

spiritual principle which is vested in the Cree people and their relationship to all living things. As RCAP explained,

Sovereignty... "is the original freedom conferred to our people by the Creator." As a gift from the Creator, sovereignty can neither be given nor taken away, nor can its basic terms be negotiated... From this perspective, sovereignty is seen as an inherent attribute, flowing from sources within a people or nation rather from external sources such as international law, common law or the constitution (RCAP (2), 1996:109-110)

5. In Treaty Six the Peace and Good Order clause reads as follows

And the undersigned Chiefs and Headmen on their own behalf and on behalf of all other Indians inhabiting the Tract within ceded do hereby solemnly promise and engage to strictly observe this Treaty, and also to conduct and behave themselves as good and loyal subjects of Her Majesty the Queen. They promise and engage that they will maintain peace and good order between each other and between themselves and other tribes of Indians, and between themselves and others of Her Majesty's subjects, whether Indians, Half Breeds or Whites, now inhabiting or hereafter to inhabit, any part of the said ceded tract, and that they will not molest the person or property of any inhabitant of such ceded tract, or the property of Her Majesty the Queen, or interfere with or trouble any person, passing or traveling through the said tract or any part thereof, and that they will assist the officers of Her Majesty in bringing to justice and punishment any Indian offending against the stipulation of this Treaty, or infringing the laws in force in the country so ceded (*Western Treaty No. 6*).

6. The fact that many people present at the signing of the Treaty expected the government and any settlers to use resources according to their customs (for example, pay for wood) demonstrates the commonly held belief that non-Natives were to respect, obey and abide by Cree traditions, just as the Cree live under the Queen's law (insofar as they did not interfere with their own ways).

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