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# LOOKING FORWARD WITHOUT LOOKING BACK: JEAN CHRÉTIEN'S LEGACY FOR ABORIGINAL-STATE RELATIONS

Michael Murphy\*

## I. INTRODUCTION

Jean Chrétien's involvement with Aboriginal<sup>1</sup> policy began more than three decades ago as a young Minister of Indian Affairs with the Trudeau government. This is a long period, perhaps, by prime ministerial standards, but not so long in comparison to a set of questions whose roots are older than Confederation. Aboriginal policy issues in Canada carry the weight of history. After the balance of power shifted decisively in favour of the European newcomers in the early part of the nineteenth century, Aboriginal peoples were gradually subjected to a paternalistic and colonial relationship with the emergent Canadian state. Since that time, Aboriginal peoples have been struggling to secure the recognition of their basic right to self-determination, to establish their relationships with Canada on a more egalitarian footing, and to restore their communities, cultures and economies that have been battered by more than a century and a half of displacement, dispossession and disempowerment. It would be both unrealistic and unfair to expect a single Canadian administration to erase this disruptive policy legacy overnight. It is a process that will take many years, a great deal of resources and an even greater quantity of political will. It is, however, both realistic and fair to expect a government to seize historic opportunities to establish new, more promising policy trajectories. Faced with opportune political conditions, and with country-wide public and political support for Aboriginal issues at a historic high in the post-Charlottetown period, Jean Chrétien's Liberal government was presented with precisely this sort of historic opening. The former Prime Minister seemed to be the right man for the job, bringing with him to office both a personal and a professional commitment to

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\* Department of Political Science, University of Otago, Dunedin, New Zealand. The author thanks Siobhan Harty and the two anonymous referees for their helpful comments on an earlier draft of this article.

<sup>1</sup> I will focus most of my discussion on First Nations, although the concerns of other Aboriginal peoples, including the Inuit, off-reserve and urban populations are also raised at various points in the article.

improving Canada's relations with its Aboriginal peoples. He made a promising start. The shift began with the government's recognition of the inherent right of self-government in 1995. It continued with the commencement of an innovative treaty process in Saskatchewan, and with decisions to follow through on major governance initiatives embarked upon by the preceding government, including the Nisga'a treaty, agreements with Yukon First Nations, and the establishment of Canada's newest territory of Nunavut. The government also signaled its intention to implement the recommendations of the Canadian Royal Commission on Aboriginal Peoples (RCAP), which, in its 1996 *Final Report*, had laid out a comprehensive blueprint for a renewed relationship between Aboriginal peoples and the Canadian state.<sup>2</sup>

For a time it seemed that the federal government was preparing to make a decisive break with the past, and to move away from a relationship with Aboriginal peoples based on paternalism and government control to a relationship based on co-equality and mutual consent. But the Chrétien government has not lived up to this promise and in the latter years of its administration has helped reverse much of the initial momentum in favour of lasting change and renewal. What could have become one of Chrétien's most innovative and forward-looking policy legacies ended up looking more like a strategic retreat to the policy past. The follow-through on RCAP was disappointing. In particular, the commissioners' blueprint for transforming the overall relationship with Aboriginal peoples was not implemented, let alone subjected to serious and sustained public debate. This lack of follow-through on the RCAP *Final Report* was compounded by the unilateralist tenor of recent policy decisions such as the termination of stalled land claim and self-government negotiations, when a co-operative approach would have been preferred. Equally disappointing was the government's determination to forge ahead with the controversial *First Nations Governance Act* (FNGA)<sup>3</sup> over the objections of First Nations leadership and much informed opinion. It is no small irony that Jean Chrétien's history of involvement with Aboriginal policy ended as it began, with an attempt to force through an unpopular change to the *Indian Act*.<sup>4</sup> In the end, the Chrétien government seemed to tire of focusing on the renewal and renegotiation of historic relationships, and chose instead to focus

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<sup>2</sup> Canada, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples* (Ottawa: Canada Communication Group, 1996).

<sup>3</sup> Bill C-7, *An Act respecting leadership selection, administration and accountability of Indian Bands, and to make related amendments to other Acts*, 2d Sess., 37th Parl., 2002.

<sup>4</sup> R.S.C. 1985, c. I-5. In January of 2004, Chrétien's successor, Paul Martin, announced that the FNGA would be scrapped. The Martin government did not indicate whether, or with what, the Act would be replaced.

on more modest efforts to improve the quality of life of the Aboriginal population. These efforts were well-intentioned, and, if successful, would constitute a modest but still laudable policy legacy. However, as the RCAP and many others have warned, there is good reason to believe that the achievement, even of this more modest Liberal objective of improving the economic self-sufficiency, political capacity and social well-being of Aboriginal peoples, will itself be compromised by the failure to develop a relationship that more effectively involves Aboriginal peoples as the authors and initiators, rather than the passive objects, of government policy. In other words, Jean Chrétien may very well be remembered for the fact that his Aboriginal policies were unable to meet even their own more modest standards of success.

This article is divided into four parts. Part two briefly describes the history of Aboriginal-state relations in the period between the White Paper<sup>5</sup> of 1969 and Jean Chrétien's election as Prime Minister in 1993. Key policies and transition points and their relation to the new discourse of Aboriginal nationalism are the primary focus. Part three analyzes some of the more important policy initiatives on Aboriginal peoples during Chrétien's tenure as Prime Minister, paying particular attention to their implications for the underlying relationship between Aboriginal peoples and the state. This is followed by a brief conclusion.

## II. SETTING THE STAGE: THE 1969 WHITE PAPER AND ABORIGINAL NATIONALISM

Chrétien's first major foray into Aboriginal policy was his introduction of the Trudeau government's 1969 White Paper on Indian policy. Inspired by ideas of liberal universalism and Trudeau's vision of a just society, the policy sought the assimilation of Aboriginal peoples. The federal government intended to end both its special responsibility for Aboriginal affairs and the differential legal and political status of Aboriginal peoples under the *Indian Act*, in order to more fully integrate them as equal individual members of Canadian society. Treaty rights were characterized as minimal and limited in nature. Inherent Aboriginal rights — those claimed by First Nations on the basis of their original occupation and governance of their traditional territories — received scant attention, but in a speech delivered in August of 1969, Trudeau rejected them outright.<sup>6</sup> The White Paper, which claimed a basis in “a year's intensive discussions with Indian

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<sup>5</sup> Canada, *Statement of the Government of Canada on Indian Policy* (Ottawa: Queen's Printer, 1969) [“White Paper”].

<sup>6</sup> For Trudeau's comments see P. Cumming & N.H. Mickenberg, *Native Rights in Canada*, 2d ed. (Toronto: The Indian-Eskimo Association of Canada, 1972) at 331–32.

people throughout Canada,”<sup>7</sup> was roundly condemned by Aboriginal people and political organizations across the country, both for its assimilationist tone, and for its unilateralist approach to Aboriginal rights and interests. It was formally withdrawn in 1971.

One of the great ironies of this policy, designed to signal the end of “special” status for Aboriginal peoples and their assimilation as equal citizens of Canada, was that it engineered precisely the opposite consequence by inspiring the launch of a more vigorous period of Aboriginal nationalism and political mobilization.<sup>8</sup> From this point onwards, the idea of Aboriginal peoples being passively acted upon as policy clients, or simply being consulted as to the nature and extent of their rights, would be deemed insufficient. Representatives of Aboriginal peoples began to more aggressively assert their right to be the designers and initiators of public policy relating to their rights and interests, and to negotiate their mutual interests and jurisdictional limits on an equal basis with the federal government. Mainstream Aboriginal nationalism and its underlying claim to self-determination was never about separatism. Instead, it articulates the need for a relationship among Aboriginal and non-Aboriginal peoples and governments that acknowledges the need for co-operation and political negotiations to manage their complex interdependence. The essential point is that the negotiating partners are to be accorded equal political status, with neither having the power to dictate terms arbitrarily to the other or to interfere indiscriminately in the other’s internal affairs. In other words, Aboriginal nationalism represents a rejection of intergovernmental relationships based on unilateralism and domination in favour of those based on mutual recognition and consent, and the co-equality of Aboriginal and non-Aboriginal governing authorities.<sup>9</sup>

At the moral centre of the Aboriginal nationalist challenge is the argument that, despite the sometimes very different empirical needs, characteristics and

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<sup>7</sup> *Supra* note 5 at 5.

<sup>8</sup> For background on this period see Sally Weaver, *Making Canadian Indian Policy* (Toronto: University of Toronto Press, 1981).

<sup>9</sup> J.Y. Henderson, “Empowering Treaty Federalism” (1994) 58 Sask. L. Rev. 241; G. Alfred, *Heeding the Voices of Our Ancestors: Kahnawake Mohawk Politics and the Rise of Native Nationalism* (Oxford: Oxford University Press, 1995); J.Tully, “The struggles of indigenous peoples for and of freedom,” in P. Patton, D. Ivison & D. Saunders, eds., *Political Theory and Indigenous Rights* (Cambridge: Cambridge University Press, 2000) 36–59; J.Borrows, *Recovering Canada: The Resurgence of Indigenous Law* (Toronto: University of Toronto Press, 2002).

circumstances of Aboriginal and non-Aboriginal peoples,<sup>10</sup> each is entitled to an identical normative right to self-determination. This is the basic democratic right of a people to determine their individual and collective futures and to negotiate relationships with other societies predicated on the principles of equality and mutual consent. Aboriginal peoples may accept that the disruption of their traditional economies, societies, and forms of governance precipitated by colonization will affect how they exercise their right to self-determination, but will not accept that these disruptions have altered their entitlement to the right *per se*. Whatever their empirical circumstances, the point is that the state should not assume an automatic right to act on behalf of indigenous peoples, treating them as the passive objects rather than the active authors of policies relating to their interests.<sup>11</sup>

By the late 1970s the Liberals had dramatically shifted their position on Aboriginal rights. Trudeau's comments at the 1983 First Ministers' Conference on Aboriginal Constitutional issues contrasted sharply with his convictions a dozen years previous: "Clearly, our Aboriginal peoples each occupied a special place in history. To my way of thinking this entitles them to special recognition in the constitution and to their own place in Canadian society, distinct from each other and distinct from other groups."<sup>12</sup> The shift was partly a result of the strength of the opposition to the White Paper, but also to breakthroughs in the judicial recognition of Aboriginal rights in cases brought by the Nisga'a and the James Bay Cree. The latter development led to Chrétien's announcement, again as Minister of Indian Affairs, of a new federal land claims policy and the subsequent negotiation of Canada's first modern land and self-government treaty in James Bay and Northern Québec. Aboriginal-state relations were shifting onto a new trajectory, whose crowning achievement was the entrenchment of Aboriginal rights in section 35 of the *Constitution Act, 1982*.<sup>13</sup> Though not directly involved in either the drafting of the constitutional accord, or in the debates related to its various revisions, Aboriginal representatives were conceded a presence in terms of consultation — a significant gain over past policy processes involving their interests. It is important to recognize that Aboriginal rights were not considered one of the priority issues on the

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<sup>10</sup> These differences relate to factors such as the size, capabilities and independence of indigenous governments. For a discussion of these and related issues see M. Murphy, "Understanding Indigenous Nationalism," in M. Seymour, ed., *The Future of the Nation-State* (Montreal & Kingston: McGill-Queen's University Press) [forthcoming].

<sup>11</sup> *Ibid.*

<sup>12</sup> M. Boldt, *Surviving as Indians: The Challenge of Self-Government* (Toronto: University of Toronto Press, 1993) at 24.

<sup>13</sup> Being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

constitutional agenda. In fact, as the minister responsible for the constitutional negotiations, Chrétien initially agreed to delete the Aboriginal provisions to appease provincial concerns over jurisdiction, lands and natural resources.<sup>14</sup> A diluted version of the Aboriginal provisions made it back into the final draft, not as a result of federal lobbying, but as an indirect result of lobbying by women's groups that helped re-open the draft constitutional accord, and by pressures from Aboriginal peoples, the federal New Democrats and the NDP government in Saskatchewan.<sup>15</sup>

In 1983, one year after the constitutional entrenchment of Aboriginal rights, a First Minister's Conference on Aboriginal Issues was held, in fulfilment of a mandate set out in section 37 of the *Constitution Act, 1982*. While impressive for its symbolic inclusion of Aboriginal representatives in this key intergovernmental forum, little progress was made on issues such as the definition of Aboriginal self-government or the more explicit clarification and entrenchment of Aboriginal and treaty rights. Three subsequent conferences, the last of which was held in 1987, also failed to produce much in the way of substantive results.<sup>16</sup> Indeed, throughout the 1980s it was left mostly to the courts to define and delimit Aboriginal constitutional rights. They obliged in a number of landmark decisions, although they generally steered clear of the specific issue of the right to self-government.<sup>17</sup> Meech Lake was the next significant policy touchstone. By this time, of course, Chrétien had resigned his seat in Parliament and the Tories, under Brian Mulroney, had taken power, but the ensuing events helped set the stage for Chrétien's return to politics as Prime Minister in 1993. Aboriginal organizations pressed hard to be partners in the Meech process and for the right to self-government to be placed on the agenda. Angered by their eventual exclusion, First Nations seized the opportunity to kill the resulting Accord with the help of Elijah Harper, the lone Aboriginal member

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<sup>14</sup> R. Romanow, "Aboriginal Rights in the Constitutional Process," in M. Boldt & J.A. Long, eds., *The Quest for Justice: Aboriginal Peoples and Aboriginal Rights* (Toronto: University of Toronto Press, 1985) at 78; A.J. Hall, "Making Sense of the New Indian Act" *Winnipeg Free Press* (15 August 2002), online <[www.winnipegfreepress.com](http://www.winnipegfreepress.com)>.

<sup>15</sup> Romanow, *ibid.* at 78–80; R. Gibbins, "Canadian Indians and the Constitution: A Difficult Passage Toward an Uncertain Destination," in J.R. Ponting, ed., *Arduous Journey: Canadian Indians and Decolonization* (Toronto: McClelland & Stewart, 1991) at 307–308.

<sup>16</sup> Gibbins, *ibid.* at 311–13. O.P. Dickason, *Canada's First Nations: A History of Founding Peoples from Earliest Times*, 2d ed. (Toronto: Oxford University Press, 1997) at 386.

<sup>17</sup> M. Asch, "From *Calder* to *Van der Peet*: Aboriginal Rights and Canadian Law, 1973–96," in P. Havemann, ed., *Indigenous Peoples Rights in Australia, Canada, and New Zealand* (Auckland: Oxford University Press, 1999) 428; M. Murphy, "Culture and the Courts: A New Direction in Canadian Jurisprudence on Aboriginal Rights?" (2001) 34 *Can. J. Poli. Sci.* 109.

of the Manitoba Legislature. Canada's federal political leadership took careful note of the Aboriginal involvement in the demise of the Meech Lake Accord, and in the period leading up to the negotiation of the Charlottetown Accord, Tory Minister for Constitutional Affairs, Joe Clark, invited leaders of the two territorial governments and the four national Aboriginal organizations to participate. The Aboriginal organizations were regarded as full partners in this process and participated at all levels of the negotiations. This was the first time in Canada's history that Aboriginal peoples were provided with a direct voice in negotiating changes to the Constitution which affected their rights; a development that spoke of a new chapter in the history of Aboriginal-state relations.

The Aboriginal sections of the Accord were the product of a number of significant compromises demanded by the other parties to the negotiations. Nevertheless, its provisions reflected many of the positions adopted by Aboriginal groups over the previous two decades. Most significantly, this included the entrenchment of Aboriginal governments as a Third Order of Government in the Canadian federation, a quantum leap for Canadian politicians who, only a decade earlier, tended to equate the inherent right of self-government with secession and absolute Aboriginal sovereignty. The changes contemplated at Charlottetown were not to be, however, since the Accord was rejected by a majority of Canadians. Nevertheless, both the successful negotiation of the Accord and its eventual defeat, yielded key lessons for the future of Aboriginal-state relations. First, it represented a paradigm shift in the willingness of Canadian governments to recognize and constitutionalize an inherent right of Aboriginal self-government. Second, the Accord's demise significantly reduced the enthusiasm among political leadership and the general population for a future round of constitutional negotiations, a trend well-suited to the cautious and pragmatic political instincts of Jean Chrétien — the Prime Minister in waiting.<sup>18</sup>

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<sup>18</sup> It also seemed more in line with the preferences of sectors of the Aboriginal grassroots population who, in definitively rejecting the Accord, appeared unwilling to accept a mega-constitutional framework for Aboriginal self-government negotiated on their behalf by national Aboriginal organizations. Many Inuit, in contrast, voted in favour of the Accord. Caution is essential in interpreting levels of Aboriginal support for the Accord, particularly given the fact that turnout among Aboriginal voters measured less than 8 percent. See M.E. Turpel, "The Charlottetown Discord and Aboriginal Peoples' Struggle for Fundamental Political Change," in K. McRoberts & P.J. Monahan, eds., *The Charlottetown Accord, the Referendum, and the Future of Canada* (Toronto: University of Toronto Press, 1993) 117.

### III. NEW PRIME MINISTER, NEW RELATIONSHIP?

With the decimation of the Tories in the 1993 election and the Chrétien Liberals commanding a large majority in the House of Commons, the stage was set to implement the changes outlined in the Red Book of Liberal policy promises so prominently featured in the election campaign.<sup>19</sup> Aboriginal policy was one of the areas slated for change. Building on the consensus reached at Charlottetown, the first significant change was the announcement of the government's intention to recognize the inherent right of Aboriginal self-government as a departure point for future negotiations with First Nations. True to Chrétien's cautious and pragmatic political instincts, the policy was designed to bypass issues of formal constitutional entrenchment and abstract debates about the nature or source of the inherent right to self-government. The Liberals simply declared that such a right already existed under section 35 of the *Constitution Act, 1982*, adding that the most important thing was to negotiate the specific terms of its implementation.<sup>20</sup> Granted, the outlines of this new policy were not entirely consonant with the relationship among equals sought by First Nations. The inherent right policy retained troubling elements of unilateralism. The government established, at the outset, the scope of policy jurisdictions that were open to negotiation, and dictated a set of financial, administrative and democratic benchmarks that Aboriginal governments were required to meet in order to exercise the right to self-government, subjects which, in a relationship among equals, legitimately belonged to the realm of negotiations. These reservations aside, the Aboriginal policy trajectory seemed set to continue on its new, and more promising, post-Charlottetown track.

Equally promising was the initiation of an innovative approach to treaty negotiations in Saskatchewan, a process described by the Office of the Treaty Commissioner as “[a] paradigm shift ... in relations between the Government of Canada and Treaty First Nations in Saskatchewan, one which could turn the page on the Indian Act approach of the past and build upon the treaty relationship.”<sup>21</sup> The process was established to negotiate an integrated First Nations governance system comprising a single province-wide government, an intermediate layer of regional governments based on tribal or treaty areas, and

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<sup>19</sup> Liberal Party of Canada, *Creating Opportunity: The Liberal Plan for Canada* (Ottawa: Liberal Party of Canada, 1993).

<sup>20</sup> Canada, *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Indian and Northern Affairs Canada, 1995).

<sup>21</sup> Saskatchewan, Office of the Treaty Commissioner (OTC), “Statement of Treaty Issues: Treaties as a Bridge to the Future” (1998), online: <[www.otc.ca/index.php](http://www.otc.ca/index.php)>.



a third layer of local government. In recognition of the increasingly urban character of many Aboriginal populations, the governance model is intended to provide for First Nations jurisdiction both on- and off-reserve. Initially mandated to cover First Nations jurisdiction in education and child and family services, subsequent negotiations are anticipated in relation to justice, lands and resources, hunting, fishing, trapping and gathering, health, and housing.<sup>22</sup> The process exceeds, in important ways, the standards established in the Liberals' own inherent right policy, in that much of the residual unilateralism appears to have been avoided. Of particular note, the process included an Exploratory Treaty Table whose purpose was to produce an agreement among government and First Nations on how the treaty negotiations themselves should be conducted. Representatives of Saskatchewan First Nations were included as full partners at all stages of these discussions, and Canada emphasized that it would not unilaterally alter its policies on treaties prior to the Exploratory Treaty Table discussions, in order to respect the partnership approach with Saskatchewan First Nations.<sup>23</sup>

The Saskatchewan Treaty Process also provided some indication that the Chrétien government intended a serious engagement with RCAP's *Final Report*, whose recommendations and principles were explicitly applied to help structure and guide the Exploratory Treaty Table discussions.<sup>24</sup> RCAP itself was created in response to political events. In the wake of the Oka crisis, one of the darker chapters in the recent history of Aboriginal-state relations in Canada, Aboriginal peoples across Canada had redoubled their calls for fundamental changes in their socio-economic and political situations and in their relationships with other Canadian governments.<sup>25</sup> Public sentiment was also running high in favour of a just settlement of Aboriginal claims. In 1991, the Mulroney government responded to these pressures by creating the mandate for RCAP. The seven Commissioners were charged with reviewing the entire history of Aboriginal-

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<sup>22</sup> A richer description and analysis of this initiative appears in D. Hawkes, "Re-building the Relationship: The Made in Saskatchewan Approach to First Nations Governance" (paper presented at "Reconfiguring Aboriginal-State Relations in Canada," 1–2 November 2002).

<sup>23</sup> *Supra* note 21.

<sup>24</sup> *Ibid.* at 28, 43, 75–78.

<sup>25</sup> The crisis involved an armed stand-off between the Mohawks of Kahnéssetake and the Canadian Army in the Summer of 1990 that lasted seventy-eight days. The cost of the stand-off was staggering, both in human and economic terms. It left one Québec police officer dead, significantly raised tensions between the Aboriginal and non-Aboriginal communities in the vicinity of Oka, blackened Canada's international reputation as a defender of human rights, and cost the Canadian and Québec governments an estimated \$150 million. See G. York & L. Pindera, *People of the Pines: The Warriors and the Legacy of Oka* (Toronto: Little, Brown, 1991).

state relations, in all of its aspects. The Commission heard testimony from over 2,000 people and organizations, consulted hundreds of experts, commissioned over 200 research studies, and reviewed the recommendations of all of the major previous inquiries and reports on the subject. In 1996 they submitted a five volume *Final Report* containing more than 440 recommendations: a blueprint for change. The Report is a solution to what the Commissioners identify as a social crisis among Aboriginal people, characterised by their economic marginalization and the social disintegration of their communities. This crisis finds its source in the colonial nature of the relationship between Aboriginal and non-Aboriginal peoples over the last 150 years. The solution to the crisis is to change the nature of the relationship, and anchor it in principles of co-equality, mutual respect and consent rather than subservience, paternalism and dependency. The commissioners recommended that Aboriginal and non-Aboriginal peoples come together as equals to negotiate the specific terms of this new relationship, which would be codified in secure and mutually binding agreements sealed by the freely given consent of both parties.<sup>26</sup>

The Chrétien government was slow to respond to the *Final Report*, and there was much speculation that it would simply be shelved. This may not have been a difficult task. With the public and the government locked into the new paradigm of debt and deficit reduction, the Commission's call for stiff spending increases over a multi-year period could easily have supplied the noose from which to hang the entire report. Indeed, it is probably not an exaggeration to say that the one thing which most Canadians know about the *Final Report* was that it cost more than \$50 million to produce. Nevertheless, although fiscal concerns undoubtedly structured the nature and scale of their response, the Liberals did, indeed, respond to the *Final Report* early in their second mandate. This included a statement of reconciliation, presented by then Minister of Indian Affairs Jane Stewart on behalf of Canada (a ceremony from which the Prime Minister was conspicuously absent). The statement conveyed the government's regrets and an apology for actions of past governments in their relations with Aboriginal peoples. The statement was accompanied by the announcement of a \$350 million community healing fund to deal with the legacy of residential schools.<sup>27</sup> The broader outlines of the government's official response to RCAP are found in its 1998 report entitled *Gathering Strength*.<sup>28</sup> The report openly acknowledges that Canada's long history of colonial attitudes and practices played a substantial

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<sup>26</sup> RCAP, *supra* note 2, v. 1–2.

<sup>27</sup> J. Stewart, Speech on the occasion of the unveiling of *Gathering Strength — Canada's Aboriginal Action Plan* (Ottawa, 7 January 1998), online: <[www.ainc-inac.gc.ca](http://www.ainc-inac.gc.ca)>.

<sup>28</sup> Canada, *Gathering Strength: Canada's Aboriginal Action Plan. A Progress Report* (Ottawa: Public Works and Government Services, 1998).

role in the erosion of Aboriginal societies, cultures, economies and forms of political organization.<sup>29</sup> In addition to the specific initiative on residential schools, the government conveyed its intention to build a new relationship in partnership with Aboriginal peoples, and to focus specific attention on strengthening Aboriginal governance and fiscal relationships, and on repairing the social and economic fabric of Aboriginal communities across the country.

The slimness of the government's thirty-six page official response to a Royal Commission that issued over 440 detailed recommendations might have been excused on the grounds that, as the Commissioners themselves concluded, the process of repairing the relationship with Aboriginal peoples would not happen overnight, but instead required a period spanning many years.<sup>30</sup> However, the Commission was also emphatic that this longer-term process would need to be jump-started in the short-term by fundamental changes in the principles and institutions governing Aboriginal policy, and backed up by sufficient political will to see through these fundamental changes in the decades to come. Jean Chrétien did not rise to either of these challenges, and his government failed to move on recommendations considered by RCAP to be central to a renewed relationship with Aboriginal Canadians. In the immediate term, the Commissioners called for a new Royal Proclamation to supplement the *Royal Proclamation of 1763*,<sup>31</sup> as a symbolic turning point in the relationship. This proclamation would supplement the written part of the Canadian Constitution and would form part of the Constitution as does the *Royal Proclamation of 1763*. The new Royal Proclamation would acknowledge wrongs and harms of the past and the need for redress; would recognize the inherent right of self-government of Aboriginal nations, and the jurisdiction of their governments as one of three orders of government in the federation; would commit governments and institutions to act in the name of the Crown to honour Aboriginal and treaty rights; and would commit the Crown to a reconfigured treaty process. The Royal Proclamation was to be accompanied by five major pieces of federal legislation, and a commitment to establish a forum to negotiate a Canada-wide Framework Agreement for implementing the Commission's recommendations.<sup>32</sup> Granted, the government may have disagreed with the RCAP approach, but if this was the case then they should have provided a public account of their reasons for concluding so, and explained why their alternative process for renewing the relationship, if indeed such a process had been conceived, was preferable. No such public accounting was provided, leading one of Canada's most respected

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<sup>29</sup> *Ibid.* at 4.

<sup>30</sup> RCAP, *supra* note 2, v. 5.

<sup>31</sup> R.S.C. 1985, App. II, No. 1.

<sup>32</sup> RCAP, *supra* note 2, v. 2, Part 1.

political scientists to conclude that the government's response to the RCAP vision of a renewed relationship was at best evasive and at worst "an embarrassment."<sup>33</sup>

In the latter years of his administration, Chrétien fell back on his instincts for smaller scale and piecemeal reform, announcing modest programs targeting Aboriginal children and youth, education, health and the needs of urban Aboriginals. In his response to the Speech from the Throne in January of 2001, the Prime Minister stated:

Quite frankly I am concerned that in the case of Aboriginal peoples, *we may be spending too much time, too much energy, and too much money on the past*, and not nearly enough on what is necessary to ensure a bright future for the children of today and tomorrow... There are never enough resources to do everything. *Our approach will be to focus on the future*. And most important, on the needs of children.<sup>34</sup>

Such programs are not to be scoffed at, and indeed they reflect many of the concerns and priorities expressed within Aboriginal communities and by the leadership of Aboriginal political organizations.<sup>35</sup> However, there is a real danger in viewing the redress of historic grievances on the one hand and concrete improvements in the lives of Aboriginal people on the other as alternative rather than as complementary ends. In fact, the research conducted by RCAP suggests that efforts to improve the quality of life enjoyed by Aboriginal people are crucially dependent on efforts to come to terms with the past and to place the relationship between Canada and Aboriginal peoples on a more positive and mutually acceptable footing. "A renewed relationship is the necessary context and an essential contributor to change in other spheres."<sup>36</sup>

The Liberals, however, soon made good on their intention to look forward without looking back. In October of 2002, Minister of Indian Affairs Robert Nault threatened to shut down as many as thirty stalled land claim and self-government negotiating tables, stating that the government was "not in the business of building an industry for lawyers and consultants" with a vested

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<sup>33</sup> A.C. Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: University of British Columbia Press, 2000) at 121–22.

<sup>34</sup> See e.g. J. Chrétien, "Address by Prime Minister Jean Chrétien in Reply to the Speech from the Throne," online: <www.pm.gc.ca> [emphasis added].

<sup>35</sup> See e.g. "INAC On-Reserve Survey: Final Report" (Ottawa: EKOS, 2001).

<sup>36</sup> M.B. Castellano, "Renewing the Relationship: A Perspective on the Impact of the Royal Commission on Aboriginal Peoples," in J. Hylton, ed., *Aboriginal Self-Government in Canada: Current Trends and Issues*, 2d ed. (Saskatoon: Purich, 1999) 97.

interest in perpetuating inconclusive negotiations.<sup>37</sup> The first tables were shut down in November of the same year. This policy is disturbing for a couple of reasons. First, leaving aside the issue of the government's own army of lawyers and consultants, the Minister asks us to believe that the self-interested and intransigent "Aboriginal industry," a term with clear resonance among right-wing critics of Aboriginal policy,<sup>38</sup> is the sole explanation for stalled negotiations, when evidence suggests it might equally have to do with factors such as government domination of the negotiations process, their insistence on the policy of extinguishment of Aboriginal rights, or their reluctance to cede final decision-making authority to Aboriginal governments in key policy jurisdictions.<sup>39</sup> Second, and more fundamentally, whatever the obstructing factors might be, Chrétien and his minister once again demonstrated a preference for unilateral and imposed solutions rather than co-operative and consensual approaches to challenging issues in Aboriginal policy.

Nowhere was this approach more apparent than in the government's efforts to force through the FNGA. The historical parallels of this policy initiative with the process surrounding the White Paper of 1969 were not lost on many. Once again Jean Chrétien found himself the champion of a revision of the *Indian Act* that provoked fierce opposition from First Nations. This time, however, the reform was being sold, not as assimilation, but as an interim measure leading up to the negotiation and implementation of the inherent right of self-government. The purpose of the Act was to increase the accountability, accessibility, and transparency of governance on reserves, which, in turn, was intended to facilitate gains in governing capacity and socio-economic performance.<sup>40</sup> Though it is difficult to find critics who disagree that the *Indian Act* is a restrictive and arcane piece of colonial legislation, there were many who

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<sup>37</sup> K. Lunman, "Ottawa says it may quit stalled land claims" *Globe & Mail* (7 October 2002) A1.

<sup>38</sup> T. Flanagan, *First Nations? Second Thoughts* (Montreal & Kingston: McGill-Queen's University Press, 2000).

<sup>39</sup> R.F. McDonnell & R.C. Depew, "Aboriginal Self-Government and Self-Determination in Canada: A Critical Commentary," in Hylton, *supra* note 36, 359; F. Abele, K. Graham & A. Maslove, "Negotiating Canada: Changes in Aboriginal Policy over the Last Thirty Years," in L. Pal, ed., *How Ottawa Spends 1999-2000: Shape Shifting: Canadian Governance Toward the 21st Century* (Toronto: Oxford University Press, 1999) 264; RCAP, *Treaty-Making in the Spirit of Coexistence: An Alternative to Extinguishment* (Ottawa: Canada Communication Group, 1995).

<sup>40</sup> R. Nault, "Speech to Announce the First Nations Governance Initiative" (30 April 2001), online: <[www.fng-gpn.gc.ca](http://www.fng-gpn.gc.ca)>.

disagreed strenuously with the process and substance of the FNGA.<sup>41</sup> In terms of process, unlike the White Paper, the government seems to have made a genuine effort to consult widely with people at the grassroots level. This process met with some success, but it was anything but problem free. In the first place, the time allotted for consultations (two months) was criticized for being too brief for a substantive digestion and deliberation of the issues.<sup>42</sup> Doubts were expressed as to whether community input would make it into the legislation, particularly where it conflicted with government priorities. The absence of a planned second round of direct consultations on the substance of the draft bill aggravated this concern. Many communities registered extremely low turnout rates while others felt pressured to participate in a process that was the only game in town. For example, the Congress of Aboriginal Peoples (CAP), which fundamentally disagreed with the government's approach to *Indian Act* reform, felt they could not afford to stay outside of a process the government was determined to see through regardless of Aboriginal opinion. CAP's preference, like that of the AFN, is to discuss alternatives to the *Indian Act* and the need to reform federal *self-government* policy.<sup>43</sup>

A more fundamental problem with the FNGA process was the fact that it was based on *consultations* not *negotiations*. As such, it reinforced rather than reversed the paternalistic nature of the relationship with Aboriginal peoples, who again were treated like special interest groups rather than equal partners in a process of mutual recognition and respect. What should have been clear to governments in the wake of the first failed effort to overhaul the *Indian Act* in 1969 was that Aboriginal peoples are not content to let government define and dominate the policy-making agenda while they are relegated to a position of commenting on what emerges from the other end. As articulated by the AFN, "any initiative dealing with First Nations governance should be designed, driven

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<sup>41</sup> K. Brock, "First Nations, Citizenship and Democracy" (paper presented at the Conference in Honour of Alan Cairns, Vancouver, University of British Columbia, 11–14 October 2001); M. Orsini & K. Ladner, "From 'Negotiated Inferiority' to 'No Negotiations Necessary': The *First Nations Governance Act* and the Continuation of Colonial Policy" *Politiques et Société* [forthcoming].

<sup>42</sup> Congress of Aboriginal Peoples, "Final Report, Phase 1 Consultations. Federal First Nations Governance Initiative (Ottawa: Congress of Aboriginal Peoples, 2002) at 7; Speech by Chief Adrian Stimson of the Siksika First Nation, at the Announcement of the First Nations Governance Initiative (Siksika First Nation High School, Saskatchewan, 30 April 2001), online: <[www.fng-gpn.gc.ca](http://www.fng-gpn.gc.ca)>; Assembly of First Nations (AFN) "The AFN's Position on the Federal Legislative Initiative on First Nations Governance" (2001), online: <[www.afn.ca](http://www.afn.ca)>.

<sup>43</sup> RCAP, *supra* note 2 at 4–6.

and ratified by First Nations.”<sup>44</sup> This message, repeated emphatically throughout the RCAP report, was not heeded by the Chrétien Liberals. The Liberals responded to criticisms of the FNGA by arguing that the negotiation of self-government agreements to replace the *Indian Act* were going too slowly, hence reforms to the *Act* were necessary in the interim, particularly in order to respond to a number of challenges to the *Act* before the Supreme Court of Canada.<sup>45</sup> These are legitimate concerns, but they do not explain why the government chose to control the agenda of the interim process itself and to consult with Aboriginal peoples as mere stakeholders rather than as equal partners in the policy process, particularly when the Court itself so frequently endorses a strategy of negotiating the nature and bounds of Aboriginal rights. In fact, the government seemed determined to bypass, and thereby aggravate, First Nations’ leadership as part of its process of reform, a departure from their own earlier cooperative approach with the AFN in developing the First Nations Fiscal Institutions, the First Nations Governance Institute, and the Joint Initiative for Policy Development, Lands and Trust Services (LTS).<sup>46</sup> Rather than building on these earlier achievements, the Chrétien government instead sounded a retreat, a decision with profound implications for the former Prime Minister’s legacy for Aboriginal-state relations.

Major reservations must also be entered regarding the substance of the FNGA, specifically its intention to increase the legitimacy of Aboriginal governments and their capacity to improve the social and economic quality of life in their communities. This was the message delivered by the architects of the Harvard Indian Project (HIP) in their review of the FNGA. HIP has conducted extensive empirical research on the determinants of economic success among U.S. Indian Reserves, and more recently they have been analyzing Aboriginal governance and economic development on the Canadian side of the border. Their research shows that the three best predictors of reservation economic success are practical sovereignty, capable governing institutions, and cultural match. Practical sovereignty means effective control of reservation institutions, resources, development strategies, *etc.* “In short, genuine decision-making

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<sup>44</sup> AFN, *supra* note 42.

<sup>45</sup> “Speech by Chief Adrian Stimson,” *supra* note 42. The case of *R. v. Corbiere*, [1999] 2 S.C.R. 203 is particularly important in this regard. For discussion see B. Morse, *et al.*, “*Corbiere* and the Supreme Court’s Vision of Governance” (paper prepared for the Department of Indian Affairs and Northern Development) (Ottawa: B. Morse & Associates, 2001); and B. Morse *et al.*, “Beyond *Corbiere*. Statutory Renewal: Prerequisites and Agendas” (Ottawa: B. Morse & Associates, 2001).

<sup>46</sup> AFN, “AFN’s Key Messages on the Proposed Legislative initiative on First Nations Governance,” online: <[www.afn.ca](http://www.afn.ca)>.

power over matters of substance has moved into indigenous hands.”<sup>47</sup> Capable governing institutions entails the establishment of institutions that facilitate the effective, responsible and accountable exercise of the jurisdictional authority of Indian nations and usually entails the establishment of an effective and politically independent court system, and the separation of politics and business management practices. Cultural match means a “fit” between the formal governing institutions and the community’s conception of how authority should be organized and exercised. This “fit” is crucial to establishing the legitimacy of those governing institutions.<sup>48</sup>

The architects of the HIP note that the Canadian government has expressed serious interest in the results of the Harvard Project, but also note that their use of the findings has focused almost exclusively on the dimension of good governance. Neither the dimensions of practical sovereignty nor the dimension of cultural match received much attention in the FNGA. This was a mistake in HIP’s estimation, since these different dimensions of governance are crucially interdependent. Their research shows that good governance without sovereign powers is ineffective. Alternatively, HIP concludes that, by giving tribes primary decision-making powers, the effect is to make them responsible, and accountable, for the decisions they make, which in turn leads to a dramatically improved quality of decision-making and socio-economic outcomes. Similarly, HIP emphasizes that, if there is not a good cultural match between governing institutions and the expectations of the community, there are likely to be problems with the legitimacy of those institutions, particularly if they are to be imposed, as in the case of the FNGA.<sup>49</sup> HIP recommended, instead, that the Canadian government transfer significant constitutional authority and decision-making power to First Nations, and invest in the governance capacity-building initiatives designed and chosen by the communities themselves. This conclusion is directly in line with the broader findings of the RCAP report, with the preferences expressed by Canada’s Aboriginal leadership, and with the approach that was promised, but ultimately never delivered, by Prime Minister Chrétien.

#### IV. CONCLUSION

Why did the early promise of the Chrétien government recede as his career as Prime Minister came to a close? Possible explanations for the lack of follow-

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<sup>47</sup> S. Cornell, M. Jorgensen & J.P. Kalt, “The First Nations Governance Act: Implications of Research Findings From the United States and Canada” (report to the Office of the British Columbia Regional Vice-Chief, Assembly of First Nations, 2002) at 4.

<sup>48</sup> *Ibid.* at 4–7.

<sup>49</sup> *Ibid.* at 11–12, 15.



through include the former Prime Minister's well known preference for cautious, pragmatic and piecemeal solutions to political problems, and his corresponding lack of inclination towards bold and visionary public policy. The Liberals may also have been reacting to an intensified right-wing critique of Aboriginal policy from Reform/Alliance on the political front (witness the Reform Party's blistering parliamentary attack on the Nisga'a Treaty), and from the academic community.<sup>50</sup> Like most previous governments, the Chrétien Liberals were keenly aware that Canadian publics, though generally supportive of Aboriginal peoples and cultures, do not have much sustained interest in, or commitment to, these issues and tend to be even less interested in the dedication of public funds to policies and programs for Aboriginal peoples. In his long and successful political career, Jean Chrétien demonstrated a tremendous aptitude for judging what would and would not expend his political capital with the majority of Canadians.<sup>51</sup> In this respect, Aboriginal issues could never compete with marquee policy items such as debt and deficit reduction, the post-September 11 security agenda, and health care, issues with a much more intense and lasting purchase on the minds of the Canadian public. In line with previous Canadian governments, Aboriginal policy in the Chrétien era appears to have been driven not so much by a thoughtful longer-term vision of Aboriginal-state relations as by political events, opportunities and pressures of a more transitory nature. Hence, it is likely that the Chrétien government calculated that it had sufficient political capital early in its administration to pursue a bolder set of Aboriginal policy initiatives, but once this political capital began to diminish, so did the government's will to see these initiatives through to a bold new legacy in Aboriginal-state relations.

Whatever the motivations at work, the failure of the Chrétien Liberals to move decisively to purge the remaining vestiges of colonialism from federal Aboriginal policy is a factor that continues to fuel the dysfunctional relationship between Canada and its Aboriginal peoples. Chrétien was clearly reluctant to accept First Nations' claims to equal status and stature in the federation. He was unwilling to break with the assumption, held by Canadian prime ministers since Confederation, that Aboriginal governments are subordinate political entities,

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<sup>50</sup> P. Russell, "Indigenous Self-Determination: Is Canada as Good as it Gets?" (Keynote Address at the Conference on Rethinking Indigenous Self-Determination, University of Queensland, Brisbane, Australia, 25–28 September 2001). Examples of this sort of critique include M.H. Smith, *Our Home or Native Land? What Governments' Aboriginal Policy is Doing to Canada* (Victoria: Crown Western, 1995); and Flanagan, *supra* note 38.

<sup>51</sup> J. Hylton, "Future Prospects for Aboriginal Self-Government in Canada," in Hylton, *supra* note 36 at 445; R. Mofina, "3% back native funding as top priority: poll" *The Ottawa Citizen* (5 January 2003) A4.

and, as such, are not entitled to a share in Canadian sovereignty but instead, enjoy powers which are devolved or delegated from the Canadian state, whose sovereignty must remain comprehensive and undivided.<sup>52</sup> As one commentator sums up the situation, “[t]he federal government won’t give up the top rung on the ladder and First Nations insist on a nation-to-nation arrangement.”<sup>53</sup> This failure, both of political imagination and political will, has blackened what might have been a brilliant legacy in a policy area in which the former Prime Minister took both a personal and a professional interest. At risk is both the ethical imperative of forging a more just and democratic relationship, but also the more concrete improvements to the economies, societies and lives of Aboriginal peoples which Chrétien increasingly prioritized in the latter years of his mandate.

The end of the Chrétien era provides an interesting contrast with Québec’s recent successes in rebuilding relations through new agreements with the Cree in James Bay and the Inuit of Nunavik. Both agreements, which confer substantial authority for economic and community development to the Aboriginal parties, are explicitly referred to as “nation-to-nation” partnerships. Though substantial disagreements remain, and much progress remains to be made, the perception amongst many First Nations leaders is that there has been genuine change in the right direction. Pita Aatami, president of Makivik Corporation, which represents Inuit of Nunavik, describes this sentiment following the signing of a wide-ranging agreement on economic development with the province: “In the past, when we signed agreements, we were always dictated to. Now we’re dictating together. This is a new beginning, a new era. We’re starting to work as partners.”<sup>54</sup> It is difficult to assess the closing years of

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<sup>52</sup> J. Tully, “A Just Relationship Between Aboriginal and Non-Aboriginal Peoples of Canada,” in C. Cook & J. Lindau, eds., *Aboriginal Rights and Self-Government: The Canadian and Mexican Experience in North American Perspective* (Montreal & Kingston: McGill–Queen’s Press, 2000) 42; P.H. Russell, “Aboriginal Nationalism: Prospects for Decolonization” (1996) 8 *Pacifica Review* 57 at 66–67.

<sup>53</sup> P. Barnsley, “Two New Initiatives for Reforming Aboriginal Governance in Canada” (2001) 1 *Federations* at 11.

<sup>54</sup> Alexandra Panetta, “Quebec treaty to pump millions into Inuit Region” *Times-Colonist* (10 April 2002) A6. Jean Charest’s incoming Liberal government provided additional cause for optimism with the announcement, on 17 June 2003, of the establishment of a joint council of elected officials from the Québec government and the Assembly of First Nations of Québec. The council, composed of an equal number of Aboriginal and non-Aboriginal elected officials, is designed to promote an exchange of ideas on various subjects, including territory and resources, taxation and economic development, and services for Aboriginal people off reserve. According to Charest, “[t]he signing of the mutual political commitment and the ensuing exchanges represent a major step forward in the political relations between

Jean Chrétien's administration with anything remotely approaching the same kind of optimism. Instead, a political career that began with one widely reviled initiative on *Indian Act* reform, in the end, could not avoid foundering on another.

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the Government of Québec and the First Nations, and could eventually lead to a permanent space for political exchanges." Information on this new development can be found in a press release on the website of the Secrétariat aux affaires autochtones du Québec. See online: <[www.mce.gouv.qc.ca](http://www.mce.gouv.qc.ca)>.

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