Aboriginal Governance: a Discussion Paper

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Introduction

This discussion paper on the implementation of aboriginal self government will sketch areas where research work in the area of recognizing and affirming the aboriginal self government may usefully be done. It is the result of collaboration between the Northwest Tribal Treaty Nations, The Law Commission of Canada, and the First Nations Governance Centre. The NWTT's involvement in the project is an expression of its purposes as set out in the treaty signed on February 11, 1991:

1. We shall continue to practice our own tribal political system and laws, and we intend these separate jurisdictions to continue.
2. We shall continue to express our sovereignty as Nations.
3. We shall assist each other to reaffirm our continuing Hereditary Title and give expression to our rights; and to defend these against any erosion through external forces.
4. We shall collectively join the other First Nations efforts to pursue the explicit recognition of aboriginal title in Canada's constitution.
5. We shall continue to enter into bilateral and multilateral relationships with each other to strengthen and assist in settling matters and common concerns regarding our respective cultural identities, traditions, diversity, equality of our peoples and our common boundaries according to our traditional laws.
6. We shall, in the spirit of sharing and co-existence, continue to enter into mutually beneficial relationships regarding access to traditional territories and natural resources. These include all resources that come from our territories.

The Law Commission of Canada has been undertaking work addressing the question of how to make space for indigenous legal traditions: As the Commission states:

> Indigenous communities around the world continue to uphold traditions about law and relationships among people, in particular, governance of community, of the environment and of punishment for wrong-doing. Such traditions — often transmitted orally — provide the basis for good community practices and sound decision making.
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> Canadian courts have recognized the importance of such traditions in certain circumstances. Indigenous customary laws are used in matters relating to adoptions, marriages and elections. Lawmaking power is often included in self-government agreements, such as those developed for the Nisga'a

> territory and in Yukon. Such power often refers to traditional legal knowledge. Canada's constitutional documents, such as the *Constitution Act 1982*, among others, also protect customs, practices and traditions that are integral to Indigenous societies.
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> However, traditional knowledge is often lost, misinterpreted or, more seriously, ignored in decision making. How can we ensure a greater place in our legal thinking for Indigenous traditions? What tools can the legal system adopt to allow difference to express itself in decision making? What tensions arise when difference is expressed? How can different legal traditions co-exist effectively?
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> The Law Commission of Canada is pursuing through research and consultations the question of protection and respect for Indigenous legal traditions in an increasingly pluralistic society.[1]

It falls within the Mandate of the FNGC to support First Nations as they seek to implement their inherent rights of self-government and assist First Nations in the further development of their day-to-day government operations: As noted in "The Design of a First Nations Governance Centre" at page 5:

> the First Nations Governance Centre will be based upon the principle of choice. First Nations may draw upon its services as we see fit. We will not be required to do so by legislation or any other means. The Centre will operate through the control and direction of First Nations.
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> The Centre will develop services that are culturally enriched and empowered by our traditions, customs, laws and inherent governing powers.
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> A First Nations Governance Centre will have a two-pronged mandate. It will be designed to assist in the further development of our day-to-day government operations, and it will support us as we seek to implement the inherent rights of self-government.
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> This means the Centre will support our efforts to gain recognition for our jurisdictional authorities and to achieve the characteristics of good government.
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> Most fundamentally, the objectives of the Centre will be to support and enhance our efforts to govern ourselves.[2]

Background

[1] (http://www.lcc.gc.ca/en/about/rapports/2004/ra%5F2004/html/governance.asp)
[2] (http://www.fngovernance.org/pdf/FNGCOverview0904.pdf)

Since the Penner Commission issued its report in 1983, recommending that the federal government recognize First Nations as a distinct order of government within Confederation and initiate processes leading to self-government, and suggested that this distinct order of government be constitutionally entrenched and legislation be introduced to facilitate it, there has been an increasing awareness of the practical necessity for indigenous self-government in Canada. However against this practical necessity are the practical realities that the constitutional entrenchment of anything in Canada is fraught with difficulties, and the First Nations Governance legislation in any form presents unique difficulties for the Parliament and government of Canada. There is a lot of work to do.

In fact there is a range of work presently being undertaken in Canada with respect to indigenous governance in Canada and a range of options available to be pursued. Since the failure of the Proposed First Nations Governance Act, work at various Treaty tables continues. Notably the Assembly of First Nations has been engaged with other key aboriginal organizations—Inuit Tapiriit Kanatami, Métis National Council, Native Women's Association of Canada and the Congress of Aboriginal People—in roundtable discussions with Canada on the big policy issues, and Canada has committed to collaboration and partnership with aboriginal peoples in future policy decisions.[3] And in the Senate Bill S-16 (*An Act providing for the Crown's recognition of self-governing First Nations of Canada*) was proposed last year, receiving First Reading on October 27, 2004. And of course beyond all this the Nisga'a, Labrador Inuit and Dogrib have all concluded Final Agreements, the Westbank First Nation has a self government agreement, there are several Agreements in Principle signed in British Columbia, and the NWTT member nations are working through various governance chapters within the BC Treaty process:

[3] See for a description of this process "The Canada-Aboriginal Peoples Roundtable found at http://www.afn.ca/cmslib/general/CAPR.pdf.

In light of all this what the NWTT proposes with the assistance of the Law Commission of Canada and the First Nations Governance Centre is to map out and pursue a course leading from the *Indian Act* model of governance to a model of s. 35 governance, including:

a) *Indian Act* issues;
b) Issues beyond the *Indian Act*; and
c) The recognition and affirmation of the right of self government.

The aim of the process is to identify what can be done now in terms of moving towards self government and also to chart the governance trail from the *Indian Act* to the inherent right. This is a movement from the *Indian Act* which may be characterized as a form of rule by policy directive to self government. It is proposed that the project would take the following shape:

1. Understanding the Present Picture of First Nations Governance in Canada;
2. Grasping the developing law and principles of reconciliation.
3. Practical Considerations
4. Policy Considerations
5. Legislative Options

I will comment briefly on each of these headings.

<u>Understanding the Present Picture of First Nations Governance in Canada</u>

The *Indian Act* was first enacted in 1876. It contained then many of the provisions it still features today—the surrender provisions, immunity from seizure; a tax exemption; limited bylaw making powers —some provisions which have disappeared but whose effects may still be felt—enfranchisement and irregular bands—and some features which survive in a modified form—the inheritance of Indian Status through the male line. As well there is at least one notable provision in the *Indian Act* today which was absent in 1876, that being

section 88. Section 88 appears to have been the carrot by which the Parliament was able to enact the last major revision to the Act—a carrot or a double edged sword because it was enacted in order to ensure the legal protection of treaty rights, but has been interpreted as referentially incorporating provincial laws as federal laws and thus removing much of the immunities which Indians previously had from provincial law making power.[4] For our purposes however it is enough to note that the *Indian Act* is in many ways the product of an earlier age which does not deal in many ways with the most important aspects of aboriginal governance, and cannot be amended easily in order to address those aspects. This means that many of the rules by which First Nations people are governed are often not legislative in character. They are policies which partake generally of all the faults of policies. They are difficult to find, applied inconsistently, hard to interpret, and create a high degree of uncertainty inconsistent with the concept of the rule of law itself, a concept recognized to be a fundamental principle in the Canadian Constitution.[5] The system as it exists fails to meet the aspirations of aboriginal peoples to be self governing. It also fails to meet the basic promises of our system of government:

> In the *Manitoba Language Rights Reference*, *supra*, at pp. 747-52, this Court outlined the elements of the rule of law. We emphasized, first, that the rule of law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all. Second, we explained, at p. 749, that "the rule of law requires the creation and maintenance of an actual order of positive laws which preserves and embodies the more general principle of normative order". It was this second aspect of the rule of law that was primarily at issue in the *Manitoba Language Rights Reference* itself. A third aspect of the rule of law is, as recently confirmed in the *Provincial Judges Reference*, *supra*, at para. 10, that "the exercise of all public power must find its ultimate source in a legal rule". Put another way, the relationship between the state and the individual must be regulated by law. Taken together, these three considerations make up a principle of profound constitutional and political significance.[6]

It should also be noted that the most recent successful initiatives for change, the *First Nations Land Management Act*, and the *First Nations Fiscal and Statistical*

[4] R. v. Dick, [1985] 2 S.C.R. 309.
[5] Reference re Secession of Quebec, [1998] 2 S.C.R. 217 at para. 32
[6] Secession Reference at para. 71

Management Act were both Acts initiated by First Nations to address the gaps in First Nations governance existing because of the particular situation of First Nations people in Canada. This suggests that success in legislating for First Nations is much easier to achieve if the initiative is a product of First Nations' particular circumstances.

The first part of the project is a review of federal policies affecting First Nations governance. This is important because even in a world where First Nations laws are recognized and affirmed those laws would not govern the behaviour of the federal government. Particularly given the disparity in resources between the federal and First Nations governments, and the federal governments spending power, self government as a matter of legislative authority may be rendered ineffective as long as the federal government has control of the purse strings. And it must be added that since the *Indian Act* is very hard to change, many of the most important issues facing First Nations are dealt with only in policies and not in legislation. The critical questions here will be "What is the best way to address change in the context of these policies? Is the enactment of new legislation sufficient to wipe the policy slate clean or is more needed to be done that that? Will any new legislation effectively be frustrated if these policies are not specifically addressed as well?"

Grasping the Developing Law and Principles of Reconciliation

The second part of the project is a look at the principle of reconciliation between aboriginal rights and the sovereignty of the Crown as it has been elaborated by the Courts in *R. v. Sparrow*, [1990] 1 S.C.R. 1075, *R. v. Van der Peet*, [1996] 2 S.C.R. 507, *Delgamuukw v. B.C.*, [1997] 3 S.C.R. 1010, *R. v. Marshall*, [1999] 3 S.C.R. 456 and 553, *Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73 and other cases. The idea of reconciliation forms in Canadian law a basis upon which self government can be established in the Constitution, and protected. The concept will here be elaborated in order to understand the contours of that protection and its limits.

Practical Considerations

The primary practical consideration in the movement beyond the *Indian Act* and head 91(24) of the *Constitution Act, 1867* into section 35 of the *Constitution Act, 1982* and the inherent right of self government is how to achieve consensus among all the parties, First Nations, federal and provincial politicians and civil servants, and the Canadian public at large. The fate of the First Nations Governance bill demonstrates clearly that without the support of First Nations leaders and communities no attempt to reform the *Indian Act* or establish self government is likely to meet with success. And across the country although it is generally agreed that there are serious problems with the present system and that First Nations have an inherent right of self government, there is no necessary consensus among First Nations as to how to fix the present system or what the inherent right should look like in the context of Canadian confederation:

> Aboriginal peoples anticipate and desire a process for continuing the historical work of Confederation. Their goal is not to undo the Canadian federation; their goal is to complete it. It is well known that the Aboriginal peoples in whose ancient homelands Canada was created have not had an opportunity to participate in creating Canada's federal union; they seek now a just accommodation within it. The goal is the realization for everyone in Canada of the principles upon which the constitution and the treaties both rest, that is, a genuinely participatory and democratic society made up of peoples who have chosen freely to confederate. Canada's image of itself and its image in the eyes of others will be enhanced by changes that properly acknowledge the indigenous North American foundations upon which this country has been built. Aboriginal people generally do not see themselves, their cultures, or their values reflected in Canada's public institutions. They are now considering the nature and scope of their own public institutions to provide the security for their individual and collective identities that Canada has failed to furnish.
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> This Commission concludes that a fundamental prerequisite of government policy making in relation to Aboriginal peoples is the participation of Aboriginal peoples themselves. Without their participation there can be no legitimacy and no justice. Strong arguments are made, and will continue to be made, by Aboriginal peoples to challenge the legitimacy of Canada's exercise of power over them. Aboriginal people are rapidly gaining greater political consciousness and

asserting their rights not only to better living conditions but to greater autonomy.[7]

On the other side of the coin there must be participation and cooperation of federal politicians and civil servants in order to:

1. muster the political will in parliament to effect positive change;
2. understand the way in which federal policy is made;
3. gather up the disparate policies affecting First Nations; and devise practical methods of changing those policies both in legislation and policy.

Provincial support is necessary because at the most basic level the federal government has shown itself unwilling in the past to act on First Nations issues over provincial objections.

Popular support is necessary because change is virtually impossible without it in the Canadian system of government.

Policy Considerations

This section starts from the premise of the Royal Commission on Aboriginal peoples with respect to the criteria of effective governance: Legitimacy, Power and Resources. What are these qualities and how are they best secured. As the Royal Commission states aboriginal governments must be self determining, recognized as having a place in Confederation and having adequate wealth to minimize dependencies. They also must be able to reform themselves on a scale perhaps more in tune with traditional history where they can act jointly in order to take advantage of efficiencies of scale where that is appropriate.

[7] From "Looking Forward, Looking Back", Vol I, *Report of the Royal Commission on Aboriginal Peoples, Volumes 1-6* (Ottawa: Supply and Services, 1996) "Opening the Door" http://www.aincinac.gc.ca/ch/rcap/sg/cg1_e.pdf

It is also true that the right of self determination means that aboriginal governments are inherently not simply governments which self administer programs the parameters and policies of which are designed elsewhere. The Choice between self Administration and Self Government is set out in "In Pursuit of Capable Governance" prepared by Stephen Cornell et al for the Lheidli T'enneh First Nation. To put it another way the federal government remains in control of a policy agenda removed from the hands of the First Nations people most affected by it as noted in a First Nations Governance Projects. Without addressing that fundamental fact, self government in Canada will always be of a self administering kind rather than a fully self governing kind. I am reminded that in March 15, 1951 in Hansard the then Minister responsible for Indian Affairs said this:

> I think, sir, that our policy should be to extend self-government to all the reserves as soon as possible. It might be argued that this would give to band councils on the reserves greater powers than are now held and exercised by municipal authorities in our form of government, but if that would be the result surely we can impose safeguards to see that a band council does not exercise authority greater than a municipal council unless it is in the interest of the band. I think perhaps we can discuss that better in the committee stage (page 1352).

Self government can mean many things and municipalities exercising delegated authority and hence by definition subordinate, are nevertheless self governing. Perhaps a fundamental distinction to be made is between assumed authority and delegated authority. While it is true that because of s. 35 it may never be accurate to describe First Nations as delegates in the full blown subordinate sense, it is nevertheless true that without addressing satisfactorily the three criteria for effective government First Nations can never be anything but practically subordinate. Particularly because of the greater size of federal and provincial governments, First Nations governments will normally be susceptible to control through the spending power of those governments.

<u>Legislative Options</u>

In this section we address the different types of legislative approaches which might be taken:

a) is legislation necessary at all;
b) can change be accomplished through piecemeal amendments of the *Indian Act* ;
c) should change come from completely new legislation

There may be some changes which can be addressed without new legislation. As noted earlier, many of the issues of most importance to First Nations are not addressed in the *Indian Act* at all. They exist as a matter of federal policy and can perhaps be addressed by changing the policy.

By the same token, amendment of the *Indian Act* is a possible option on other issues. Particularly on smaller issues where there is a broad consensus it might be possible to make progress by amendment of the Act, but as noted earlier it has proven very difficult to amend the Indian Act in the past and this makes a piecemeal approach potentially very difficult.

The final option is to pursue legislation along the model of the First Nations Land Management Act, which would enact self government on an "opt-in" basis. Whatever option is chosen it should embody some basic principles:

Consent of First Nations people to any legislation affecting them is fundamental. In the *Secession Reference* the Court said the following:

> It is, of course, true that democracy expresses the sovereign will of the people. Yet this expression, too, must be taken in the context of the other institutional values we have identified as pertinent to this Reference. The relationship between democracy and federalism means, for example, that in Canada there may be different and equally legitimate majorities in different provinces and territories and at the federal level. No one majority is more or less "legitimate" than the others as an expression of democratic opinion, although, of course, the consequences will vary with the subject matter. A federal system of government enables different provinces to pursue policies responsive to the particular concerns and

> interests of people in that province. At the same time, Canada as a whole is also a democratic community in which citizens construct and achieve goals on a national scale through a federal government acting within the limits of its jurisdiction. The function of federalism is to enable citizens to participate concurrently in different collectivities and to pursue goals at both a provincial and a federal level.
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> The consent of the governed is a value that is basic to our understanding of a free and democratic society.[8]

Aboriginal nations are distinct political collectivities within Canada whose consent is required before changes to the way they are governed can be legitimately made.

The rule of law "excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of government,"[9] and as said in the Secession Reference at para 71, quoted earlier, "the relationship between the state and the individual must be regulated by law." Governance legislation must reduce the arbitrariness of the *Indian Act*, and ensure that "the exercise of all public power must find its ultimate source in a legal rule"[10] By the same token the rule of law must be interpreted flexibly enough to avoid imposing on aboriginal peoples forms of government not suited to their cultures and communities.

A third principle of First Nations governance concerns the relationship of First Nations governments with the federal and provincial governments. It should be on a government to government basis, meaning that the First Nations' governments must not be subordinate or inferior to the federal and provincial governments. In general:

> Delegation implies subordination… [and] subordination implies duty: delegation is not made to be accepted or acted upon at the will of the delegate; it is ancillary to legislation which the appropriate legislature

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[8] at paras. 66 and 67.

[9] A.V. Dicey, *The Law of the Constitution*, 10th ed., (London: Macmillan, 1959) at page 202.

[10] *Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island; Reference re Independence and Impartiality of Judges of the Provincial Court of Prince Edward Island*, [1997] 3 S.C.R. 3 at para. 10.

> thinks desirable; and a duty to act either by enacting or by exercising a conferred discretion not, at the particular time, to act, rests upon the delegate."[11]

The existence of s. 35 and the unique constitutional position of aboriginal peoples makes it inappropriate to use a delegation model. Instead the model should be a model where the legislation allows First Nations to assume their own inherent authority as peoples with rights of self government.

A fourth principle is that the legislation should support feasible operations and encourage First Nations to take advantage of economies of scale. The Parliament must ensure that where First Nations assume authority under legislation, there is also practically the power and resources to act.

The legislation must be enabling, not prescriptive. It must be flexible enough to enable whatever form of government is chosen by a First Nation to reflect the ideas and culture of that First Nation.

Finally the legislation must be grounded in the constitutional guiding principle set out by the Supreme Court of Canada in *R. v. Sparrow*:[12]

> The Government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the Government and aboriginals is trust-like, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.

Courts are consistent in their affirmation of the principle that the honour of the Crown is at stake in dealings with aboriginal people and the legislation must be mindful of the trust-like, non adversarial relationship which it addresses.

[11] *Nova Scotia (Attorney General)* v. *Canada (Attorney General)*, [1951] S.C.R. 31.
[12] [1990] 1 S.C.R. 1075 at 1108.

Recommendation

The document titled "Working together to create sustainable wealth" an economic strategy of the Northwest Treaty Nation, states clearly that economic prosperity for the Nations of the north can not be achieved without the ability to be self governing.

We therefore recommend that The Northwest Tribal Treaty Nations approve continuing research and support the work require to move our nations towards of Self Government.
And further recommend that the NWTT work in cooperation with the First Nations Governance Centre, the Law Commission of Canada and the National Chief of the Assembly of First Nations.