

NWTT GOVERNANCE PROJECT
*Best Practices and Standards and Regulations
with Respect to Law Making*

EXECUTIVE SUMMARY:

One of the things which became clear through the introduction of the *First Nations Governance Act* in the House of Commons was that governance needed to be looked at in a way which was aware of the elements of traditional Aboriginal governance in Canada and attempted to reconcile those elements with the objectives of good governance in a western democratic society. This paper begins that work. The first part of the paper takes the following shape:

1. Introduction, Identifying the Northwest Tribal Treaty Nations

After identifying the NWTT Nations, the paper sets out the purpose of the paper: to review current and traditional models of governance and law making processes of First Nations, and the blending of the traditional with modern democratic practices with an eye to developing Best Practices in the territories occupied by the Northwest Tribal Treaty Nations.

2. Background, Setting out Some of the History of the First Nations Governance Act, and Some of the Responses to it

The proposed *FNGA* met with a lot of resistance centered on a number of opinions that it constituted and infringement of the Aboriginal right of self government. Various technical proposals for future reform of the *Indian Act* are set out as well in this part.

3. Considerations about Law Making in an Aboriginal Setting

The Harvard Project set out a number of common criteria found to exist in those Aboriginal communities where self government and economic activity work best. These include: Practical Sovereignty; Capable Governing Institutions; and Cultural

Match; as well as strategic orientation as demonstrated by long term planning, and creative leadership. One factor is the development of culturally grounded independent Courts. Any system of governance for Aboriginal people must take into account the legal culture and traditional governance of the Aboriginal peoples themselves, and then reconcile that with the Canadian political structures. The functions of a constitution as an expression of the will of the people to govern themselves and to define how they are to be governed, are also reviewed

4. *A Survey of Traditional Governance in the Northwest, Including Examples from: Kitselas Traditions Set out in The Men Of Medeek; the Potlatch System of the Carrier, and the Gitksan*

In each area of the Northwest, the traditional laws may be different. Each group adapted to its specific needs, in order to maintain a coherent society. Nevertheless it is useful to examine some of the materials available concerning traditional governance, which demonstrate that the people of the Northwest had a clear idea of law rooted in custom. *The Men of Medeek* from Kitselas illustrates clearly a process of law making rooted in the close observation of events to observe their consequences; the making of laws to encourage those events having good consequences; the making of laws to discourage those events having bad consequences; and further observation of events. It also provides further evidence of what the law making process entailed, including:

- consultation to determine what to do, which safeguards the legitimacy of the law and the authority of the Chief;
- publication of a new law in the feast hall;
- accountability for bad law making in loss of authority and specifically loss of persuasive authority;
- teaching the children (publicizing) the law; and
- observation of events after law making to ensure that it works.

The potlatch system as practiced by the Carrier was also examined, based upon a report prepared by Justa Monk. The potlatch is based on four principles: honesty, love, respect, and sharing. The potlatch promotes self worth, cooperation, equality, acceptance and connectedness through the operation of the clan system, by which every person has a role to play in the potlatch ceremonies. The Carrier have four clans and no quarrelling or intermarriage among clan members is allowed. The potlatch is central to the maintenance of social cohesion as a means of payment of debts, sharing, selection of leaders, and adoption. Punishment in various forms is the responsibility of headmen.

Inside the Gitksan, a paper prepared for the Gitksan Treaty Society, outlined various aspects of governance in Gitksan society. Of particular importance for our purposes is the process of leadership selection in Gitksan society which is not merely hereditary but also based on long training and demonstrated ability. Furthermore the process of decision making is not dictatorial but consensual in nature.

5. *A Survey of Some Contemporary Models of Law Making From the Gitanyow, the Nisga'a, and the Westbank First Nation*

The Gitanyow have designed what might be called a mixed constitution composed of both traditional leadership, in one council, and elected representation by clan and non Gitanyow representation, in a second council. Further, each council will have different responsibilities. There are also judicial review procedures.

The Nisga'a government is composed of the (1) Nisga'a Lisims Government, which is composed of both legislative and executive elements and includes representation from the villages and urban locals (2) the Nisga'a village governments of New Aiyansh, Gitwinksihlkw, Laxgalt'sap, and Gingolx, and (3) representatives from the Nisga'a urban locals in Vancouver, Terrace, Prince Rupert/Port Edward, and any other urban locals established according to Nisga'a law. There are to be elections every four years. Each level of government has specified jurisdiction, and provision is also made for the

administration of justice, both through a Nisga'a Court and police services, for the enforcement of Nisga'a, federal and provincial laws.

Under the Westbank Self Government Agreement, an elected governing council has power to enact laws on reserve land in relation to matters set out in the Agreement. Matters over which law making power has been given include personal immunity of government employees from civil liability, the establishment of administrative bodies, financial management, lands and resources, membership, wills and estates, expropriation, agriculture, environment, health, education, language and culture, regulation of businesses, traffic, public works and local services, intoxicants, and generally laws for the maintenance of public order, peace, and safety, and prohibition of intoxicants. Some matters are specifically excluded: criminal law, including the procedures in criminal matters; protection of health and safety of all Canadians; intellectual property, in respect of all matters within federal jurisdiction; and broadcasting and telecommunications. Provision is made for the enforcement of Westbank laws and for the imposition of fines and imprisonment similar to that set out in s. 787 (1) of the Criminal Code. Judicial review of decision making is also provided for.

6. An Examination of the Proposed First Nations Governance Act

The proposed Act provided for the development and adoption of leadership selection codes, administration of government codes, and financial management and accountability codes. While the enactment of a code was at the option of individual bands, codes may or may not be created by a band, the legislation was not truly optional since in the event a band did not chose to enact a code, the regulations would impose codes on it. There were to be Rules for rules for meetings of the general membership of the Band, rules for meetings of the Band Council, and rules for passing and registering Band laws. That there should be rules is of course fundamental to the Rule of Law. Expanded legislative powers could have provided Band Councils with the ability to establish a longer term framework and administrative structure to Aboriginal governance, binding in law. We note however the absence of some degree of separation of powers, so that programs were

administered apart from politics by an independent civil service. Therefore much of the focus of First Nation government would remain enmeshed in administrative decisions rather than policy questions. The problem of financial accountability was not sufficiently addressed in so far as financial accountability is often a matter of contract between First Nations and federal or provincial governments which provide funding for specific programs. Federal and provincial spending power tends to reduce democratic financial accountability to the community. As well, the proposed Act provided for the hearing of complaints and redress but it failed in our view adequately to modify itself to local circumstances particularly in dealing with the degree of interconnectedness between band members. It should be noted that the Act provided for expanded powers of band councils and improved protections for their employees in the performance of their work.

7. A Study of the Federal Parliamentary System of Governance

The process of federal law making through three readings in the House of Commons and the Senate, including Committee stages was reviewed. From a functional point of view the job of parliament includes the powers of Supply, Representation; and Legislation, and it is important to note that the most important of these is supply, that is the provision of government with the money it requires to govern, especially in this age where regulatory powers are often delegated to Cabinet or to Ministers.

8. A Study of the Present Indian Act System—to Understand Some of the Problems of the Indian Act System, One Must See It in the Context of Federal Parliamentary Governance As A Whole

The central point in this part of the paper is that while politically Band Councils are responsible to their Bands, financial power lies with the Department of Indian Affairs, and other departments of government with whom First Nations deal. It is financial power which primarily determines the policy direction of bands, and band councils often find themselves limited in scope. They become service delivery mechanisms in the Department of Indian Affairs rather than the government of a people with a right of self

government. Any change in the present system must ensure that financial and political accountability flow primarily in the same direction. First Nations governments must become financially independent of the Department of Indian Affairs: and approval of expenditures should be done by the community itself. The importance of the legal recognition of Aboriginal title with its inescapable economic component may provide Aboriginal governments with independent sources of revenue not necessarily tied to program delivery objectives imposed on Aboriginal peoples by other governments.

The initial part of the paper is concerned to identify best practices from current models of First Nations Governance, and compare them with the model of parliamentary democracy. In order to evaluate them, however, we needed to shift that focus to more general considerations of what makes good governance. The second part of the paper deals with these topics:

1. Legitimacy and the Rule of Law;

There are two basic sources of legitimacy for any government. These are tradition, and the good of the people. The value of tradition was recognized by both the common law which ultimately is customary law, and in Aboriginal sources such as *The Men of Medeek*. Indeed there is a remarkable similarity between early expressions of customary law in both the common law and in Aboriginal sources. Traditionally the Aboriginal people in the northwest had a clear understanding of the idea of law making. It is important to note that this law making was plenary, not restricted to heads of power such as federal and provincial governments are in Canada. In fact the model of federalism based on division of powers is not the only possible model, and even those systems which do divide power develop doctrines to settle cases where there is overlap—paramountcy being a good example. There is nothing inevitable in the treatment of Aboriginal governance as a matter of identifying areas of jurisdiction where Aboriginal people are more or less empowered. The second legitimating factor of a government is the promotion of some good. Historically the Europeans justified their assertion of power over Aboriginal people in relation to this—by claiming that they were Christianizing or civilizing Aboriginal peoples. But this justification no longer convinces anybody and the

project of governance must be understood in the context of finding legitimacy in the methods of governance for First Nations. The government of First Nations by the Department of Indian Affairs particularly has not been good and has been characterized by an absence of the rule of law and an overabundance of departmental discretion. Governance then has ultimately to do with the project of reconciling Crown sovereignty with the rights of Aboriginal people. If a government does not adhere to certain fundamental behaviors, it is not ruling by law, but by discretion. Under the Department of Indian Affairs there has been too much rule by discretion, and this is striking because a review of traditional ways reveals that the people of the Northwest were governed by rules and customs not dependent upon the idiosyncratic behaviours of the chiefs. There were expected behaviours reinforced by division of responsibility, and consequent negotiation between parties.

2. The Separation of Powers

In its original form the separation of powers was born in the idea that a mixed form of constitution was best. Originally this meant that no class of people should be able to tyrannize the other classes—neither the monarch, nor the aristocracy, nor the common folk. The ideal of the consent of different assemblies was in effect a separation of power based upon class. The idea in its modern sense separates the functions of government—legislative, executive and judicial—so that in its pure form different persons exercise each of these types of powers. The idea is that the separation of powers is a structural form which is best suited to preventing the fusion of the powers of legislation, execution and judging in a manner both arbitrary and oppressive to the people at whom they are aimed. However, the doctrine of the supremacy of Parliament undercuts the separation of powers. No such principle was ever entrenched in the English or Canadian Constitution. The English model of government divides sovereignty in between the Crown and Parliament, and the main separation occurs not by means of a constitutional separation of powers in the abstract, but by the necessity of parliamentary consent to the raising of revenue. It is through the control of revenue that Parliament is able to assert control over the Crown, which wields executive power. It is because of the

Parliament's control over finance that it can compel the Crown to agree to the enactment of legislation, enforce ministerial responsibility to Parliament, and ensure the independence of judges. Separation of revenue raising powers from the hands of the government is thus the critical element in ensuring responsible accountable government.

3. *Subsidiarity*

Subsidiarity is a principle of governance adopted in the European Union which asserts that it is wrong for a larger organisation to assume functions which can be performed efficiently by smaller and lower bodies. Larger bodies of government should be used to help or aid the functioning of smaller bodies, but not to destroy or absorb them. Subsidiarity is an alternative way of organizing a federal state not by subject matter as in Canada, but by the assumption that smaller bodies are best left to govern themselves unless there is some demonstrable need to intervene. It has direct application to First Nations governments in its relations to the federal and provincial governments, and can illuminate many of the concepts which have found their way into the case law of section 35 of the *Constitution Act, 1982*. As a matter of policy, the principle of subsidiarity should be used to guide the exercise of the authority of the federal government. It is important to note that subsidiarity includes the principle that where possible, policy choices should be made by those proximate to them. First Nations will be in many cases the proper people to decide what policies are best for them.

4. *Best Practices*

Best Practices are “good practices that have worked well elsewhere. They are proven and have produced successful results.” No model of modern Aboriginal governance has been around long enough to meet the Best Practices Standard, either because the time elapsed since the establishment of the model has not been sufficient for it to have been proven, or because the model has not been implemented at all. As well, there are many distinctive Aboriginal cultures in Canada, each with their own traditions, and a successful model of governance will derive its legitimacy in part from its incorporation of traditional

values peculiar to each individual First Nation. We nevertheless propose some guiding principles, and a model of governance.

5. Some Principles

The Harvard Project enumerated five principles of effective governance in the First Nations' context: Practical Sovereignty; Capable Governing Institutions; and Cultural Match; as well as strategic orientation as demonstrated by long term planning and creative leadership. The Institute on Governance distilled the following principles from the U.N.'s work on governance: Legitimacy and Voice; Direction; Performance; Accountability; and Fairness. As well Fuller's work sets out eight failures the absence of which undercuts the possibility of the existence of the Rule of Law: failure to achieve rules at all; failure to publicize the rules people are expected to observe; the abuse of retroactive legislation; failure to make rules understandable; the enactment of contradictory rules or rules that require impossible conduct; too frequent changes in the rules; and disagreement between rules as announced and rules as practiced.

6. A Model of Governance

The paper proposes a model of governance which could be used to guide First Nations, as they attempt to accommodate modern ideas of responsible and accountable governance within a traditional framework. The model allows for community participation in government but also allows for leadership.

7. Recommendations for Further Steps.

The following recommendations are made in the paper:

- a. Develop model Legislation concerning a Law Making Process and a Public Service Act;

- b. Hold a governance conference in Terrace concerning First Nations and Provincial Relations;
- c. Develop links with Governance Institutes, Federal Processes, and others in recognition that in the current time governance is a global and not simply a First Nations Issue;
- d. Develop a model Law governing law making procedures.
- e. Research into the traditional laws of the Nations of the NWTT, both with respect to the manner in which laws were made, and the substance of those laws.

In general the purpose of this paper is to demonstrate that traditional governance adhered to the principles of good governance in making rules for the Nations based upon careful observation of what was needed, achieving consensual decision making, and not behaving in an arbitrary or despotic way. Traditional Governance models and principles cannot be ignored in the creation of contemporary institutions for First Nations. This work is directed toward the goal of ensuring that First Nations' traditions are recognized as an integral part of future reform of governance.