THE CHALLENGE OF GOVERNANCE AND THE ABORIGINAL PEOPLES

ABSTRACT

Over the protests of the Assembly of First Nations, numerous provincial and regional First Nations organizations and a large percentage of the band leadership, the Minister of Indian Affairs introduced Bill C-61 (later reintroduced as Bill C-7), the First Nations Governance Act (FNGA), into the House of Commons in June 2002. While the Bill has been publicly promoted as the result of extensive consultations with the "grass-roots", its design and content betray a neo-liberal agenda that has less to do with the aspirations of First Nations people than with preconceived notions of administration and accountability systems. This paper is intended to discuss the concepts of governance, administration and management as it relates to First Nations, and contrast these to the notions advanced by in the FNGA.

THE ASSEMBLY OF FIRST NATIONS
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Full references and a bibliography to this text can be found at http://www.acs-aec.ca/magazine.html

Defining Governance

In recent years, many disciplines have entered into the Aboriginal rights discourse, debating the impacts, justifications and consequences of colonization, Aboriginal rights and Aboriginal self-government. Through negotiated agreements, government studies, commissions and policies, the term "Aboriginal self-government" has come to evoke particular understandings about the processes, boundaries and methods of actualizing a type of self-administration that adheres to specific "democratic" or "universally-accepted" principles. Of late, the term "good governance"[1] has come into favour, finding its way into discussion of Aboriginal governance. The term is apparently intended to portray the attributes of "strong, accountable and sustainable governments and institutions"[2] and entail practices that are superior to mere "governance". What is evident from most of the discussion is that the epistemological basis for these concepts lies not in the nature of the Aboriginal nations, but rather in the socio-economic status of the post-colonial state and its administrative needs.

Although in its general sense, the term "governance" describes a variety of societal conditions that involve some degree or other of decision-making, much literature discusses governance in terms of practical elements, programs and administration rather than the expression of philosophical values and world-views[3]. In considering the indigenous nations, what is deemed "good governance" may thus bear little or no relationship to the worldview of the people being governed but may instead reflect the needs of the state to address a social, economic or political need of its own.

From Friendship to Domination

Before one can fully appreciate the perspective of First Nations, it is necessary to have at least a rudimentary understanding of the historical relationship between Canada and First Nations.

The Royal Commission on Aboriginal Peoples (RCAP) describes four stages in the relationship between Aboriginal people and non-Aboriginal people in Canada. These are:

- *Separate Worlds* – This was pre-contact (before 1500) when Aboriginal and non-Aboriginal people lived on separate continents and knew nothing of one another;
- *Nation to Nation relations* – Immediately after contact, this period was characterized by fragile relations of peace, friendship and rough equality during which treaty relationship were formed;
- *Gradual Domination by Non-Aboriginal people* – As the indigenous nations declined in population and power due to death from disease, warfare and genocidal practices, the settler colonizers increased and came to dominate, taking over Aboriginal lands and resources, pushing Aboriginal people to small areas of land "reserves" and instituting policies and laws aimed at obliterating Aboriginal nations.
- *Renewal and Renegotiation* – This was describes as the turning point when Aboriginal people became revitalized, demanding a critical review of the relationship; renegotiation and renewal based on recognition, respect, sharing and responsibility[4].

Although the longest stage was pre-contact, the best documented stage is that of settler domination, wherein the indigenous nations were weakened in all aspects such that a relationship of relative equality between sovereigns was altered to one of domination. The diminished position of indigenous nations vis-a-vis the colonizers was conveniently affirmed by the United States Supreme Court in the precedent-setting case decided by Chief Justice Marshall in Johnson v. McIntosh who states @ 572:

> On discovery of this immense continent, the great nations of Europe were eager to appropriate to themselves so much of it as they could respectively acquire. Its vast extent offered an ample field to the ambition and enterprise of all; and *the character and religion of its inhabitants afforded an apology for considering them as a people over whom the superior genius of Europe might claim ascendancy…*[5]

He goes on at 590 as follows:

> *…But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness.* (emphasis added).

Marshall's statement illustrates a commitment to the philosophy of manifest destiny which endorsed divine principles of superiority and a duty of the colonizers of North America to rule over the savage primitive inhabitants. Apparently convinced of their inferiority, First Nations were not represented in these proceedings or the Canadian precedent that followed this case, *St. Catherines Milling and Lumber Co. v. R* .[6] As a result, the debate and subsequent implications of colonizing laws and policies occurred in the absence of the nations whose partnership was originally sought and relied upon by both England and France, and, aside from providing that the Parliament of Canada had legislative authority over "Indians and lands reserved for the Indians"[7], the original constitutional arrangements ignored the indigenous nations. In accordance with with the prevailing attitudes of the day, First Nations who had so recently been partners and allies were relegated to little more than an administrative hindrance in the construction of a new colonial empire on the lands of the ancestors had shared.

Governance and "Canadian Indians"

In administering "Indians and lands reserved for the Indians", the federal government controlled virtually every element of the lives of First Nations people, including their manner of governance. The *Indian Act*[8] has been the primary legislative expression of governance for First Nations[9] in Canada for over a century. In keeping with the view that indigenous people were "uncivilized", the objectives of the Indian Act administrative system were twofold: to segregate indigenous people from "civilization" and to gradually assimilate them into "civilization" through programs aimed at changing the culture, economy and lifestyle of Aboriginal people[10].

The *Indian Act* redefined in racial terms the many diverse nations of indigenous people in Canada, segmenting settlements into "bands of Indians", and using blood quantum, marriage and paternity as determinants of Indian status and membership. The governance systems established under the *Indian Act* were principally intended to enable the Canadian officials to delegate some of their administrative duties to the Aboriginal people. Thus, with the introduction of the elected council system in 1869[11], a provision that was replicated in the subsequent consolidated federal Indian Acts, a system of external controls was introduced into the internal governments whereby the colonized enforced the rules and structures of the colonizer. It is apparent that, although this could be perceived as a form of "self-government", it was not modeled on the governing practices of the indigenous nations; rather it mirrored the values and aspirations of the colonizing nation. The Deputy Superintendent of Indian Affairs is reported to have described the objectives in this way:

> The Acts framed in the years 1868 and 1869, relating to Indian Affairs, were designed to lead the Indian people by degrees to mingle with the white race in the ordinary avocations of life. It was intended to afford facilities for electing, for a limited period, members of bands to manage, as a Council, local matters – that intelligent and educated men, recognized as chiefs, should carry out the wishes of the male members of mature years in each band, who should be fairly represented in the conduct of their internal affairs.
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> Thus establishing a responsible, for an irresponsible system, this provision, by law, was designed to pave the way to the establishment of simple municipal institutions.[12]

Despite the lack of enthusiasm of First Nations to embrace these "advancements", the federal government found ways to implement its objective by "allowing" bands to use customary means to form councils[13]. From the perspective of the First Nation community, what is hailed as success by the federal government may in fact be a demonstration of how, through active resistance to an unworkable and unacceptable policy, they were able to manipulate government policy so as to maintain their own forms of governance. This phenomenon is noted by O'Malley in his discussion of Australian policy relating to social programs intended for administration by the Aboriginal population, wherein he notes:

> The governmental version of self-determination was failing in its own terms because of the robust nature of Aboriginal forms of governance. These subjects of self-determination were not liberal subjects already primed with the taken-for-granted assumptions, knowledge and practices of the populace of urban, white Australia. Despite attempts to create such an Aboriginal citizenry, the strength of what Trigger refers to as the Aboriginal 'Blackfella domain' frustrated white political programmes. This resistance did not appear so much in hostile conflict, as in more subtle processes which sustained indigenous governance.[14]



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A similar phenomenon could be observed in the First Nation people of Canada. While the transformation of bands to the elected band council system was declared successful by the Department of Indian and Northern Affairs (INAC), by 1971, over 100 years after its introduction, only 71% of all bands were using the elected system[15]. According to at least one study, this success rate was more likely due to INAC's insistence on dealing only with the elected council than to the desire of the First Nation population[16].

A History of Resistance

It is notable that the interaction between indigenous nations and their colonizers is frequently characterized by the level of resistance maintained in the face of persistent attempts to override culture and traditions. First Nations people have voiced concerns about government policies relating to governance for many years. Because indigenous people were resistant to the introduction of the elected council system, by 1895 INAC had unilaterally drawn up a list of bands to be place under the Act[17]. It thus became the practice to pressure, cajole or entice indigenous people into adopting the legislative policy by the most efficient means possible. At the other extreme, Indian agents were equally able to prevent bands from engaging in elections if they felt they were not sufficiently "advanced". This practice was apparently fairly routine, particularly when concerned with more remote communities. In some instances, bands were surprised to learn that in accepting an elected system, they were considered to have abrogated their treaty.[18] Even with the institution of elected systems, life chiefs frequently retained influence and in a number of communities, traditional forms of government continue to retain certain authority.[19] Aboriginal culture has demonstrated its resilience in the face of repeated assaults through legislative and program design.

The Penner Special Committee on Indian Self-Government and the Royal Commission on Aboriginal Peoples were both in agreement that any movement toward self-government must begin with the First Nations themselves. As a starting point, RCAP suggests that there are three potential models for Aboriginal self-government – the nation government, the public government and the community of interest government.[20] The Penner Committee[21] recommended that the band begin by defining its membership, which would then adopt a constitution which would be recognized under federal legislation. RCAP saw nation rebuilding as an essential first step for First Nations government. Both RCAP and the Penner Report noted the need for First Nations to have flexibility in implementation, and a solid economic and financial base, including access to lands and resources.

Contrary to the recommendations of the aforementioned reports, Bill C-7 takes a prescriptive approach to First Nations government, leaving little discretion to the band while much remains with the Minister. Rather than addressing membership, which is considered fundamental to governance, Bill C-7 omits mention of membership,

instead focussing on the enactment of codes to address leadership selection, band administration, and financial management and accountability. Although, the act appears practically oriented, one cannot help but be struck by the alternatives that will face bands who must either enact codes within two years or come under the default provisions of the act.

A similar approach was taken with the enactment of Bill C-31, an *Act to Amend the Indian Act*. Enacted in 1985 in order bring the act into conformity with the *Canadian Charter of Rights and Freedoms*[22], that Bill gave bands two years to enact membership codes failing which, they would fall under the *Indian Act* default membership provisions. Bands that were already struggling financially, worried that INAC would not provide adequate financial support for the influx of new members. In response, many hurriedly adopted codes that later proved to be unduly cumbersome or too costly to administer or were challengeable in court. Despite receiving incentives to develop the codes, when challenged, the bands seldom received any assistance from INAC.

History has shown that the will of the federal government can impose policies against the will of the First Nations, but only at great human and financial cost.

Concepts of Governance versus Administration

At the heart of the debate relating to self-government is the question of who defines it. Both the Penner Committee and the RCAP recommended that the fundamentals of governance be left to the First Nations. There is an acknowledgement of the difficulties this entails, and the likelihood that First Nations will need time and support to sort out issues that will inevitably arise. According to RCAP, governance is dependent on power, legitimacy and resources in order to be sustainable. Legitimacy is founded in the cultural values of the people being governed and is the basis upon which such things as authority and mechanisms of government lie. So while the notion of liberal democracy may be generally appealing to the Euro-Canadian, it may seem less fair within a more closely-knit kin-based society. In such a group, a traditional family or clan based government, or even a system based on heredity may be abundantly more just. Similarly, notions of common ownership, potlatch or "giveaway" that are part of some First Nations traditions are likely counter to values of the dominant capitalist consumer society, yet they are linked to philosophies inherent to the spirituality, existence and lifeworld of specific indigenous nations that are likely incomprehensible to the average Euro-Canadian[23].

It is these very communal values that make the indigenous nation unique. While many social theorists have debated the meaning of community, any self-defining community based on national identity provides a potential source of common values. Admittedly, the history of legislated interference in First Nations membership and government has influenced the perspectives of some First Nations, and in a few cases may highlight foundational issues of major significance in the First Nations. Despite this, if governance is the *process* of self-regulation as opposed to the regulating institutions[24], First Nations governance can only be regained through internal discourse that redefines the common, *sui generis* values.

While this may seem an affront to the notion of equality in a pluralistic state, Patrick Maklem[25] argues, as have First Nations leaders, that the justification for self-government is sovereignty based on prior claims and it is the very fact of their unique nature that validates them. He states at p 1345:

> … claims of prior sovereignty need to be recast in the discourse of distributive justice. Principles of distributive justice are required to explain why it is important to deviate from the ideal of equal citizenship and to promote respect for prior sovereignty through indigenous-specific distributions of political rights and responsibilities…

He goes on at p. 1348:

> To those who possess it and those who seek it, the meaning of sovereignty, internal or external, is at once complex and simple. Its complexity arises because different collectivities express sovereignty in radically different ways... Given such diverse expressions of sovereignty, one might doubt that principles for its distribution can be grounded in shared meaning. Sovereignty, however, is valued by different collectivities for the same reason. Sovereignty's value lies in the fact that it creates a legal space in which a community can negotiate, construct, and protect a collective identity. Sovereignty, simply speaking, permits the expression of collective difference.

Conclusions

"Effective tools for governance" can only be determined with a clear vision of governance. Governance is an expression of the values and choices of individuals and their society. In order to be effective, First Nations governance should be founded in the values, traditions and practices of the indigenous nations themselves. This perspective has been advanced by the Royal Commission on Aboriginal Peoples, the Special Committee on Indian Self-Government, and by the pleas of many First Nations over the past century. History has shown that the will of the federal government can impose policies against the will of the First Nations, but only at great human and financial cost. A belief that a particular course of action is "in their best interests" does not make it so if the end result creates fear and confusion. While the proposed FNGA may reflect the aspirations of some First Nations, it should not be imposed upon all. Neither First Nations nor the federal government will be prepared for such a massive change in such a short time frame.