Indigenous Bar Association's Submission to the Senate Committee Re. Aboriginal Governance

Introduction

Mr. Chairman, Honourable Members: Thank you for providing the Indigenous Bar Association (IBA) the opportunity to make this presentation.

Our organization was incorporated in 1989, and as the name suggests we are an organization made up of Indigenous lawyers from across Canada.

Our membership includes Inuit, Métis and First Nation peoples.

The objectives of the IBA, as stated in our constitution, are as follows:

- to recognize and respect the spiritual basis of our Indigenous laws, customs and traditions;
- to promote the advancement of legal and social justice for Indigenous Peoples in Canada;
- to promote the reform of policies and laws affecting Indigenous Peoples in Canada;
- to foster public awareness within the legal community, the Indigenous community and the general public in respect of legal and social issues of concern to Indigenous Peoples in Canada;
- in pursuance of the foregoing objectives, to provide a forum and network amongst Indigenous lawyers: to provide for their continuing education in respect of developments in Indigenous law; to exchange information and experiences with respect to the application of Indigenous laws; and to discuss Indigenous legal issues.

We intend, in this submission to concentrate on the following subjects:

- Fundamental Principles
- Accountability and Capacity Building
- Sustainability
- Section 35 Attorney-General % Meeting Fiduciary Obligations
- Fundamental Principles

The first and foremost concern that our organization has regarding Aboriginal governance is the lack of recognition of the right of Aboriginal peoples to self-determination and the lack of juridical recognition of the inherent right of Aboriginal self-government. This translates into failure in self-government negotiations because of insufficient clout on the part of Aboriginal peoples and the lack of sufficient incentive on the part of both federal and provincial governments to negotiate fair and

meaningful self-government agreements. Until governments stop denying the existence of these rights, very little progress will be made.

It is important for your Committee to comment on this problem so please allow us to elaborate. The RCAP report recognized two separate and distinct bases for Aboriginal self-government:

> 1) It recognized that Aboriginal peoples have a right of self-determination, based upon principles of international law.
>
> 2) Separately, RCAP also recognized that Aboriginal peoples possess an inherent right of self-government based upon, common law doctrines.

While Indigenous peoples in Canada have consistently maintained that they possess a right of self-determination, governments have steadfastly refused to recognize this right. The present government issued a policy entitled, *Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government*, which purports to recognize the inherent right of self-government. However, there are some serious problems with this:

- First of all, it is only a policy. It is open to interpretation; can be easily changed and is not binding in law. Our organization believes that the right of self-government must be recognized by law.
- Secondly, although the federal inherent rights policy is stated to recognize the inherent right of self-government, the experience at the negotiating table is that this recognition is limited and meaningless. What the justice lawyers say is that the inherent right is recognized "in principle". However, they deny that specific Aboriginal groups with whom the federal government is negotiating "possess" the inherent right of self-government. Aboriginal peoples are told to "go to court" if they want specific recognition that they possess an Aboriginal right to self-government.

We recommend that you urge the federal government to unequivocally recognize the right of self- determination and the inherent right of self-government of Aboriginal peoples as recommended in the RCAP report.

However, it should be noted that though we agree with the general principle of recognition in the RCAP report, we do not necessarily agree with all of the findings made by RCAP regarding the definition and the scope of these rights. Specifically, we question as a matter of domestic law and international law, the notion that only "Aboriginal nations" of sufficient size and other characteristics, as defined by RCAP, possess the right of self-government.

The common law basis for Aboriginal rights focuses on the culture and the customary legal system of the Aboriginal people in question. Logically, one must look to the historical evidence and practices of the particular Aboriginal people in question in order to determine where the sovereignty or right of self-government of that people resided. Different Indigenous nations had different laws, customs and practices on this matter. For example for many Indians in British Columbia, sovereignty resides at the nation level. Accordingly, the committee will notice that when Indians in BC use the term "First Nation" they mean Indian nation.

In parts of Canada east of BC, for example in the case of the Anishnabek, the term First Nation is commonly used to refer to bands or communities. This is based on differences in the cultures and customary laws and practices of Anishnabek peoples. The Anishnabek considered the local band or tribe as the level of social organization where residual aspects of sovereignty resided except for those areas of jurisdiction specifically allocated to the nation level. The point we are making is that it is inappropriate to conclude without looking at the facts that only the "Aboriginal nation" possess the right of self-government.

Some members within the international law section of our organization have questioned the criteria in RCAP for recognizing whether an Aboriginal people possess the right of self-determination and self-government. To continue with the issue of "Aboriginal nation", international law recognizes that entering into treaties recognizes the existence of international personality. It has been recognized in the UN treaty study undertaken by Mr. Martinez a copy of which I understand has been deposited with this Committee, that Indian treaties are international treaties. By and large in Canada, many of the numbered treaties were signed by Chiefs and headmen of bands rather than centralized nations. It follows therefore that a significant level of political sovereignty resided at this level.

Members within our international law section urge, and our organization urges, this Committee to look at emerging international standards in this regard rather than to be constrained by the findings of RCAP on this matter. We would like to refer the Committee to the attached "Nuuk Conclusion and Recommendation on Indigenous Autonomy and Self-Government". These were adopted by a UN meeting of experts representing state governments at a meeting in Nuuk, Greenland on September 24-28, 1991.

Accountability and Capacity Building

On the issue of accountability, we share the view of the Royal Commission on Aboriginal Peoples (RCAP) that the colonial experience and its legacy have negatively affected Aboriginal governments. The once sovereign and completely independent Aboriginal governments have become dependent and marginalized first by European and then Canadian and provincial governments.

The only way to redress this is to ensure that there is true legal recognition of the right of self-government. Moreover, governments in Canada should facilitate the rebuilding of capacity of Aboriginal peoples to govern themselves in ways that are appropriate to their respective cultures.

As self-governing peoples, they will be able to reinstitute their traditional governing structures in a paradigm that is recognizable to the citizens they are to serve and ought to be accountable to.

Issues of accountabilty and transparency are not foreign concepts to Aboriginal peoples. However, the manner in which resourcing has been provided to Aboriginal governments to date does not realistically reflect the needs or the values of the Aboriginal nations. As such, the tremendous responsibilities for services with limited means often creates an unmanageable burden within which accountability can be compromised.

Determining true accountability of Aboriginal nations requires a genuine partnership with governments in Canada, especially the federal government, one that acknowledges and respects the unique position, cultures and histories of Aboriginal people. It should also recognize that as a consequence of deliberate and oppressive federal policies, the needs in Aboriginal communities are immense.

Concurrent with the discussion of accountability, Aboriginal peoples must accelerate the capacity building that has been ongoing within our nations in the recent past in a manner that is culturally appropriate.

Measures to ensure accountability and accelerated capacity building can take place through the establishment of the Aboriginal Government Transition Centre that was recommended by the Royal Commission on Aboriginal peoples. We, the IBA, believe it is our obligation to ensure this recommendation is implemented and that we play a significant role in its implementation, in light of our Aboriginal perspective and expertise in law and governance.

- Sustainability
- Barriers to Achieving Fiscal Autonomy under *Indian Act* Regime:

Achieving self-government is an evolving process. Many Aboriginal peoples may not be in a position to enter into comprehensive self-government agreements in the near future for a variety of reasons. For example, the *Indian Act* continues to place barriers for First Nations to become fiscally independent. Irrespective of specific self-government efforts, there is a need to remove barriers for First Nations to govern using capital based on the assets they have. Legislation which removes these impediments, that is developed in full consultation with First Nations, is a step in the right direction. To the extent it promotes certainty and protection to investors, it will allow First Nations to generate capital to enhance government programs and services.

New Fiscal Arrangements under Self-Government Agreements

Financing Aboriginal governments requires new fiscal relations and funding mechanisms to respond to the new jurisdictional arrangements undertaken by the various parties to self-government agreements.

Discussions will need to be undertaken to determine how money is to be transferred to Aboriginal governments and by which government Federal or Provincial. We recommend that a Fiscal Relations Table be established on a national level.

Resource Revenue Options

There are two areas that need to be addressed. The first is to recognize that Aboriginal peoples have a right to an equitable redistribution of lands and resources within their traditional territories. This means that Aboriginal governments would have a equitable share in economic opportunities that arise in the exploitation of natural resources from the land. This could be in the form of royalties or a share of property taxes generated from traditional territories.

Another source of revenues that should be explored are bonds and securities. Aboriginal governments should also have the same powers as other governments to issue bonds and securities to generate capital for their projects.

Achievi**ng Fiscal Equality**

It must be remembered that not all Aboriginal governments are going to have the capacity to generate sufficient funds from their own sources. They may not have adequate resources to draw from. These governments need to be assured of accessing sufficient transfer funds so that they can provide programs and services on a basis equal to their neighbors. This transfer of funds must be in the nature of "block" funding. This is more consistent with respect for autonomy of Aboriginal governments. Conditional funding or specific target funding would continue the paternalism that has heretofore straight jacketed Aboriginal people.

Section 35 Attorney-General % Meeting Fiduciary Obligations

We note that one of the questions posed by this Committee is the following:

> Many Aboriginal groups have expressed concerns about the erosion of their special relationship with the federal crown. How can the joint goals of implementing self-government while maintaining this special relationship best be achieved?

The question undoubtedly refers to fiduciary obligations of the Crown — and in order to properly appreciate its implications you need to know the origin of the fiduciary relationship.

Aboriginal peoples have always talked about the trust responsibility of the Crown. It has been understood to be a political concept. More recently, since the decision of the Supreme Court of Canada in *Guerin, Sparrow* and *Delgamuukw*, we now understand it to be a legal concept, which creates binding legal obligations.

Fiduciary obligations arise from the nature of Aboriginal rights and Aboriginal title which includes a restriction on the ability of Aboriginal peoples to surrender their rights or title to anyone but the Crown. This limitation was originally intended to benefit and protect Indian interests in lands. It evolved historically through early executive and legislative acts, including the *Royal Proclamation of 1763*. The law recognizes that it place such extreme power in the hands of the Crown *vis-a-vis* Aboriginal peoples that it placed a corresponding legal duty on the Crown to act in the best interests of Aboriginal peoples.

How does this relate to issues of governance? Aboriginal rights includes a range of rights from Aboriginal title, to harvesting rights, to potentially the Aboriginal right of self-government. Indeed, as we noted above the present government recognizes that the inherent right of self-government is an existing right which is protected under section 35 of the *Constitution Act, 1982*. Therefore, the Crown has a duty to protect not just land-related Aboriginal rights, but also self-government rights of Aboriginal peoples.

The concerns which Aboriginal people have about the Crown relinquishing its fiduciary duty through negotiating self-government comes from the historic failure of the Crown to live up to its trust responsibility. In other words, Aboriginal people do not trust the Crown to act in their best interests. Of course this lack of trust is exacerbated by fears of off-loading in times of fiscal restraint.

You need to solve the lack of trust through structural reforms which aim to protect and maintain the fiduciary obligations of the Crown, while at the same time allowing Aboriginal governments to grow.

Connected with the problem of distrust, is the constitutional conflict of interest which has always existed and continues to exist on the part of the federal Crown and its Department of Justice in fulfilling the dual roles of protecting Aboriginal and treaty rights and the rights and interests of Canadians generally. Historically, Aboriginal peoples have been the losers in this conflict of interest because political interests have always favoured the majority.

The structural reform, which we are recommending to protect and maintain the fiduciary obligations of the Crown, must at the same time address the issue of conflict of interest. As such, the IBA recommends an Attorney-General to protect section 35 rights which would operate in the same way as federal and provincial Attorneys General now do in protecting federal and provincial laws and *Charter*-based rights.

The main function of the Attorney-General would be to safeguard Aboriginal and treaty rights from governments or other interests. A related function might be to correct deficiencies in the justice system, an objective which has eluded federal and provincial legislators to date. It must be remembered that the administration of justice is an important governance function. to which the RCAP devoted a separate report entitled, *Bridging the Cultural Divide*.

Under self-government in Canada First Nations, Inuit and Métis will be assuming ever greater control over their territory and government. Self-government agreements that underlie this assumption of control will be scrutinized within the present legal system which as already proven disastrous for Aboriginal peoples and as such calls for vigorous constitutional protection in the same fashion as that afforded to *Charter* rights and federal and provincial legislation under sections 91 and 92 of the *Constitution Act, 1867*.

Conclusion

In conclusion, we want to state that the IBA is doing its part in trying to ensure that the recommendations of RCAP are given serious consideration. We are working with the Law Society of Upper Canada, the Canadian Bar Association and the Law

Commission of Canada to convene a conference to follow-up on the RCAP recommendations. This is specifically in response to recommendation 13 of *Bridging the Cultural Divide*.

We invite the Senate Committee on Aboriginal Peoples to participate in this Conference which is being held at Osgoode Hall, Toronto, Ontario on April 22-24, 1999.

This submission was prepared by the following IBA members: David C. Nahwegahbow, Past President; Helen Semagamis, Secretary-Treasuer; Donald Worme, Past President; and Diane Corbiere, member.