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COMPARATIVE GOVERNANCE STRUCTURES AMONG ABORIGINAL PEOPLES IN CANADA

1. General principles

Effective government, according to the Royal Commission on Aboriginal Peoples, requires "three basic attributes: legitimacy, power and resources."

Legitimacy is "public confidence in and support for the government." Power is "the acknowledged legal capacity to act"; it requires law-making authority, the "capacity to execute the laws and carry on public administration," and "judicial jurisdiction to resolve disputes." Resources consist of the financial, physical, technological, and human means with which to act.

Different forms of Aboriginal government in Canada enjoy the attributes of power and resources to varying degrees.

2. The *Indian Act*

The *Indian Act* model was not meant to give Aboriginal communities very much power, nor very many resources. In fact, the *Indian Act*'s original purpose was to replace traditional governments and give "minor and circumscribed powers to the band while extensive control of reserves was assigned to the federal government and its representative, the Indian affairs department."

The *Indian Act* does not include any protection of Aboriginal harvesting rights, such as hunting, fishing, or trapping. It is only since Aboriginal and treaty rights acquired constitutional protection in 1982 that infringement of those rights is prohibited unless the federal or provincial governments can meet a justification test.

The *Indian Act* deals with band councils that govern reserves, not customary forms of government that govern an Aboriginal people's traditional lands. A band council's power to adopt bylaws extends principally to activities on the reserve. The Minister of Indian Affairs has the power to disallow most bylaws; others require the Minister's approval.

Band council budgets come from a variety of funding agreements with the federal government and require the councils to provide specified services; even the power to determine how to deliver specified services varies. Any money a band receives from the federal government from the use of reserve lands may be spent only with the authorization of the Minister of Indian Affairs and only for purposes set out in the *Indian Act*.

Despite the restrictions placed on them by the *Indian Act*, communities have been unwilling to abandon the Act without the assurance of protection for some existing rights and new powers. In particular, they have feared losing the little they still have, especially their reserves. The *Indian Act* has only ceased to apply where First Nations have entered into modern treaties or self-government agreements.

3. New statutes and self-government agreements

A number of new statutes increase the powers that band councils can exercise on reserve. In each case, once a community adopts a code or other framework, these statutes give greater law-making power. They apply in the areas of management of reserve lands, management of oil and gas on reserve, financial administration, and taxation on reserve.

So-called self-government agreements have been reached in British Columbia with Sechelt and Westbank concerning powers over their "land base." These agreements are not treaties and they do not address claims to rights and title beyond the former reserves. However, both these communities have broader powers than an *Indian Act* band, especially over matters concerning the use and transfer of land. They also have

direct control over the significant revenues they receive from the use of their lands by non-members, and they benefit from five-year agreements on funding from the federal government for the public services they provide.

4. Modern treaties

a. Old and new treaties

In the 19th century, land cession treaties were entered into with First Nations under which these Nations ceded title to their traditional lands in return for the creation of reserves, the recognition of hunting and fishing rights, and certain other material benefits. The surrendered land became subject to provincial control while First Nations were pressed back into small reserves under federal jurisdiction.

But in some parts of Canada, such as most of British Columbia, northern Quebec and Labrador, and Yukon and Northwest Territories, no treaty-making took place at all. As a result of political and legal challenges by Aboriginal peoples beginning in the 1970s, governments began negotiating land claims agreements, especially in Yukon and Northwest Territories.

Among the provinces, since the Cree and Inuit of Quebec entered into the James Bay and Northern Quebec Agreement in 1976 (and the Naskapi signed a parallel agreement in 1978), only the Nisga'a in British Columbia in 1999, the Tsawwassen and Maa-Nulth First Nations in 2006, and the Labrador Inuit in 2005 have successfully completed treaty negotiations.

b. The James Bay and Northern Quebec Agreement

Under the James Bay and Northern Quebec Agreement, Cree lands fall into three broad categories: Category I governed by the band councils, but owned by the federal Crown; Category II lands under provincial jurisdiction but where the Cree have exclusive harvesting rights; Category III lands under provincial jurisdiction and where Cree harvesting rights are recognized but are not the exclusive activity.

The Cree bands act as the local government authority on Category I land. Beyond these core lands, however, the Cree's exclusive harvesting rights on Category II lands prohibit undertakings that would interfere unreasonably with hunting, fishing, and trapping. On Category III lands, harvesting rights are recognized but public access is the rule.

In order to implement the harvesting rights, the James Bay and Northern Quebec Agreement create an environmental assessment regime for the whole territory in which the Cree participate. They also participate in a consultative committee that manages hunting, fishing, and trapping, and the band councils have the power to regulate members' exercise of their harvesting rights on those lands. Since 2002, the Cree also participate in forest management and harvesting.

Cree bands have the power to impose taxes (other than income tax) for local purposes on Category I lands; they administer their own funds. They have benefited from more flexible federal funding than under standard federal contribution agreements. In addition, certain programs and services (such as education and health) are funded in whole or in part by the province, but through entities controlled by the Cree.

c. The Nisga'a Treaty

The lands the Nisga'a received under their treaty are all held by them in full ownership. Unlike *Indian Act* reserve lands, Nisga'a lands can be sold by the Nisga'a Nation or a Nisga'a village, though they are subject to the conditions for sale set out in the Nisga'a constitution. The Nisga'a lands, which include most former reserves, remain under Nisga'a jurisdiction even if they are sold.

Beyond these lands, the treaty provides for a collective Nisga'a collective wildlife harvesting entitlement in a defined Nass Wildlife Area and a collective Nisga'a collective fish entitlement in the Nass River watershed. However the annual wildlife management plan and the fish harvest agreements are not themselves part of the treaty.

The Nisga'a Nation as a whole is governed by the Nisga'a Lisims Government, which replaces the tribal council. Nisga'a villages are governed by village governments, which replace *Indian Act* band councils. Their power to make laws includes not just regulation of Nisga'a lands and property, but also several important areas such as adoption, the provision of child and family services, and policing and local courts.

The Nisga'a governments have only a protected right to tax the property interests of Nisga'a on Nisga'a lands. However the treaty does provide a right to negotiate toward an agreement that would create a non-treaty authority to tax non-Nisga'a more extensively.

The treaty provides for agreements every five years under which Canada, British Columbia, and the Nisga'a will determine the funding required to provide agreed-upon public services. Currently these services consist of health, education, social services, local government, and housing. The financing agreements are not part of the treaty.

d. The significance of modern treaties

When the British Columbia Supreme Court upheld the validity of the Nisga'a Treaty in 2000, it held that the Aboriginal right to self-government includes the power to negotiate a treaty meant to give a clearer definition to those rights.

Modern treaties can provide more effective government than under the *Indian Act* because they increase the power and resources given to Aboriginal governments. In common with self-government agreements and certain other new legislation that applies to First Nations, modern treaties recognize autonomous law-making authority and do away with the requirement for approval or the possibility of disallowance by a federal Minister. With the recognized law-making authority, modern treaties generally provide more stable funding to Aboriginal governments to ensure that they have the means to exercise that authority.

In addition, modern treaties address the rights of Aboriginal people to use the resources of their traditional territory beyond the core lands reserved to them under the agreements. The treaties therefore address more of the activities most important to Aboriginal people, and because the Aboriginal governments that are parties to the treaties have jurisdiction over these activities, they have greater legitimacy.