

Federal Accountability Regimes and First Nations' Governance in Canada

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The core constitutional and political issue in Canada of finding worthy pathways to Aboriginal self-government guides my remarks here today.¹ Accordingly, I begin with the basic question of what the probable impact of recent reforms on federal accountability regimes will have on the ongoing work of negotiating and establishing a third order of sovereign governments, and associated political bodies, through treaty making and land claims within the Canadian federation.

The *Federal Accountability Act*

As the description for this session states, “the introduction of the Federal Accountability Act places an onus on public institutions, including First Nations government, to account for public spending in an open and transparent manner.”² Relevant parts of the federal accountability regime introduced by the Conservative government of Stephen Harper are:

- A new Parliamentary Budget Officer to support Members of Parliament and parliamentary committees with independent analysis of economic and fiscal issues and the estimates of the government.

¹ For a recent discussion on this, see Frances Abele and Michael J. Prince, “Four Pathways to Aboriginal Self-Government in Canada,” *The American Review of Canadian Studies*, 36 (4), Winter 2006, pp. 568-595.

² The *Federal Accountability Act* received Royal Assent on December 12, 2006. The Act makes substantive changes to 45 Canadian statutes and amends over 100 others. Among the reforms is a five year lobbying ban, rules to eliminate corporate and union donations, and to protect whistleblowers.

- New powers for the Auditor General to audit individuals and organizations that receive federal money.
- Ongoing departmental reviews of granting programs enshrined in law.
- Strengthened internal audit functions within departments.
- A consistent approach to promote legal and policy compliance and enforce disciplinary measures.

I wish to make five general points about this topic of the federal accountability laws and First Nations' governance in Canada. I then will briefly mention some steps that the Assembly of First Nations is advocating as well as look at the Tsawwassen Final Agreement, recently negotiated under the British Columbia treaty process.

1. The Federal Accountability Act introduced by the Harper Government has *a focus on governance that is narrower than that of accommodation between Aboriginal peoples and Canadian authorities*. The intended focus is to strengthen audit and oversight functions of government and parliament; reinforce existing and create new watchdogs of scrutiny and control;³ with a focus on administrative details and financial and personnel matters. Underpinning these initiatives are tools of investigation, prohibitions, registrations, and sanctions. In the case of Aboriginal peoples, these tools sound all too familiar to the coercive elements of *Indian Act*.⁴ Issues of accountability and transparency for First Nations must be situated in the context of historical and contemporary issues of constitutional reconciliation and self-determination.
2. Federal accountability laws, and related policies and procedures, emphasize the *interdependence* of the federal government and Aboriginal authorities. By itself, this observation is not exceptional or intrinsically controversial. Probing deeper into the power dynamics, a question that

³ The federal accountability agenda of the Harper government involves the creation of several watchdogs: a Conflict of Interest and Ethics Commissioner, Commissioner of Lobbying, Parliamentary Budget Officer, Public Appointments Commissioner, Procurement Ombudsman, Public Sector Integrity Commissioner, and a Director of Public Prosecutions. As different breeds of watchdogs, they will no doubt vary in their actual bite and bark.

⁴ The Auditor General stated in a 2002 report that First Nations are “over-burdened with reporting requirements that require First Nations to file on average 168 reports a year – or three per week – which only account for spending and do not provide any useful information on whether or not programs are actually working to improve the lives of First Nations citizens.”

follows is: what kind of rationality, distribution of authority and influence, and set of interests are produced in this interaction and what sorts of interests are omitted to guide mutual relations.⁵ In addition to interdependence, these federal laws and policies constitute *a regulatory pattern of roles and relations* between federal agencies and First Nation governments. This emphasis on rules and procedures produces a managerial focus and a hierarchical relationship. It may promote an enhanced governance capacity, but one of a particular and partial form, that of administrative control, thus depoliticizing Canada-Aboriginal relations and disempowering First Nations. It is depoliticizing in that an emphasis on managerial techniques and financial controls desensitizes policy makers and officials to the fundamental priority of the inherent rights of Indigenous peoples. In other words, the impulses of technocracy embedded in these techniques and rules drive out issues of territory and any designs by indigenous communities for the revival of traditional practices in the modern context.⁶

3. The effects of these rules are likely to not only maintain but also very likely to increase the exercise of federal powers over decision making processes of First Nation governments and related Aboriginal political and administrative entities. Conceivably, this will *lead to an expanded subjection of First Nation communities to external authorities, techniques and ways of governing*; by a federal government on which they are heavily dependent upon and still controlled in many aspects of daily living and community affairs.
4. My fourth point concerns how the Harper government's accountability regime squares, if it does, with the goal of constitutionally entrenched self-government for Aboriginal peoples. My short answer is that this new federal accountability regime fits awkwardly and uneasily with the

⁵ A fascinating inquiry into such a 'bargain' between politicians and public servants in Canada is provided by Donald J. Savoie, *Breaking the Bargain: Public Servants, Ministers, and Parliament* (Toronto: University of Toronto Press, 2003).

⁶ Many decades ago, Karl Mannheim in his book, *Ideology and Utopia* (New York: Harcourt, Brace and Co., 1936), wrote that "the fundamental tendency of all bureaucratic thought is to turn all problems of politics into problems of administration." Mannheim explained this tendency "by the fact that the sphere of activity of the official exists only within the limits of laws already formulated. Hence the genesis or the development of law falls outside the scope of his activity" (p. 105). A more recent expression of this, relevant to matters of Canadian federalism, appears in Donald V. Smiley and Ronald L. Watts, *Intrastate Federalism* (Toronto: University of Toronto Press, 1985). Smiley and Watts make the general argument that "new decisional processes have a disposition to make governments insensitive not only to regional values and interests but also to all interests other than those of governments themselves" (p. 28).

Aboriginal right of self-determination. In the short to medium term at least, the accountability rules appear to further structure and confine the gradual augmentation of powers some Indian Act bands are pursuing. The logic of this model of accountability suggests that most First Nation governments will continue to be municipal-like governments, junior partners to Ottawa, under close supervision by the Department of Indian Affairs and other federal agencies.

5. In any given policy field and any given government's agenda, only a relative few issues enjoy priority attention and sustained action. So far, the debate over the federal accountability measures of the Harper government (and similar measures introduced by the Chrétien and Martin governments) have left largely unexamined the issue of how these structures, rules and procedures affect the expression and advancement of Aboriginal interests and values within the federation. As long as governmental emphasis is on matters of accountability, management and service plans, then the fundamental business of redefining the constitutional terms and conditions of Canada's political communities – and thus *seeking an honourable reconciliation and accommodation with the Indigenous peoples of this land now called Canada - will be marginalized from the national agenda.*

What to do then? What is being done in developing a new approach to accountability that advances self-government? Over the past few years, the Assembly of First Nations (AFN) has called on the federal government to work with First Nations to pursue several aims:

- ❖ To develop appropriate, culturally relevant structures and more effective reporting systems,
- ❖ To ensure that First Nations remain accountable to First Nation citizens, as well as the federal government, and
- ❖ To ensure that the First Nations right to self-government continues to be supported by the Government of Canada.

With the Office of the Auditor General, the AFN is working on the creation of an independent First Nations Auditor General and an independent First Nations Ombudsperson.⁷

⁷ Assembly of First Nations, "Federal Accountability Act must not infringe on First Nations Rights," April 7, 2006. <http://www.afn.ca/article.asp?id=2505>

These proposed initiatives are opportunities for building governance capacity and indigenizing accountability both within and across First Nations.⁸

The Tsawwassen Final Agreement

In British Columbia, the treaty making process represents for many First Nations a process for negotiating a more fitting network of accountability relationships to their own communities plus modified relationships to the federal and provincial governments.

The Tsawwassen First Nation reached a final agreement with Canada and BC late last year, following about 14 years of negotiations, and this past summer a significant majority of the members of that First Nation approved the agreement. This is only the second final agreement produced by the treaty process over this period and it is the first to be ratified by members.⁹

Since the Tsawwassen Final Agreement is a long complex document, I will comment on select items that relate to our topic. On governance, the Final Agreement says that the Tsawwassen First Nation will have a constitution that provides, among other things, “for a system of financial administration with standards comparable to those generally accepted for governments in Canada, through which Tsawwassen Government will be financially accountable to Tsawwassen Members.”¹⁰ The Tsawwassen Government will have the ability to enter into contracts and agreements; acquire, hold and sell property; raise, spend, invest and borrow money; and make laws in respect of financial administration for all Tsawwassen institutions (government and public bodies).¹¹

Fiscal relations between the Tsawwassen Government and the provincial and federal governments are multifaceted. There is (1) a series of capital transfer funds¹² established on specific purposes with specific amounts, (2) a Fiscal Financing Agreement (FFA) to be negotiated every five years for agreed

⁸ Assembly of First Nations/National Aboriginal Women’s Summit, “Policy Recommendations,” Vancouver June 2007.

⁹ After the Final Agreement is ratified by the BC Legislature and the Canadian Parliament, it becomes a constitutionally-protected legal agreement or treaty as regards the exercise of Tsawwassen, federal and provincial governmental jurisdictions and authorities. Thus, the Final Agreement prevails to the extent of any inconsistency with a federal law or provincial law.

¹⁰ Tsawwassen Final Agreement, Chapter 16, 8(g).

¹¹ Tsawwassen Final Agreement, Chapter 16, 7(a), (b), (c) and 43(d).

¹² These funds deal with economic development, forest resources, commercial fish, commercial crab, wildlife, and reconciliation.

upon services and programs, (3) a negotiation loan repayment plan, and (4) taxation powers agreements and an own source revenue agreement.

The FFA, as a block grant, will be the ongoing vehicle for financing an extensive range of cultural, education, health, housing and other social services for Tsawwassen residents and members. Appropriation of funds for the FAA is subject to approval by the federal parliament, BC legislature and Tsawwassen Government. In addition, the FFA is to include procedures for “the collection and exchange of information, including statistical and financial information, required for the administration” of these agreements; dispute resolutions; and “accountability requirements, including those in respect of reporting and audit, of Tsawwassen First Nation.”¹³

Concluding Thoughts

First Nations will not simply react to the *Federal Accountability Act*. Any legislation, and especially one that involves various types of changes like this one, requires interpretation, further discussion, and discretion in giving form and substance to the provisions. First Nations will therefore interpret the Act along with the AFN, other Aboriginal organizations, the Auditor General of Canada, and, in the case of treaty processes, a provincial government and possibly local regional governments. Each party will interpret and negotiate the meaning of the Act from their perspective.

Obviously it is very early to say how federal legislation and policy on accountability is affecting First Nations in BC.

My main conclusion, nevertheless, is that the ability of First Nations, singly and in collective arrangements, to define and redefine accountability relations is enhanced within a treaty making process, where attention to First Nation constitutions, citizenship and democratic local accountabilities are central considerations. Even within this context, however, the accountability system for a First Nation will be a negotiated order; the result of bargaining, comprising by all sides, learning and adapting practices over time.

¹³ Tsawwassen Final Agreement, Chapter 19, 2(f) (i), (ii), (iii).