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OUR FILE NO.

January 20, 2004

VIA E-MAIL

Mr. John Cummins
Delta-South Richmond
Room 548, Confederation Building
House of Commons
Ottawa, Ontario
K1A 0A6

Dear Sir:

Re: Bill C-57

This responds to your request for an opinion on the question whether Bill C-57 conforms to requirements of Canadian constitutional law.

Bill C-57 is intended as an Act of Parliament to give effect to the Westbank First Nation Self-Government Agreement (the "Agreement"). If passed it will become known as the Westbank First Nation Self-Government Act. Although not yet passed I will refer to Bill C-57 as the "Act".

The Westbank First Nation ("WFN") is an Indian Band within the meaning of the Indian Act. Its principal reserves (IR 9 and 10, which I will refer to as the "Land") are located in an area known as "Westside" adjacent to the City of Kelowna and the unincorporated community of Westbank. The population of the Band is 594 of whom 383 live on the Land as of December 31, 2002.

The Land is about 2390 acres in extent and is partially developed prime residential and industrial land. It is quite densely populated. There are about 7500 non-WFN

people who either live or own businesses on the Land. Most of the residential homes are established on 99-year leases of which over 80 years has yet to run. The Land is physically indistinguishable from the surrounding Westside land and merges with Westbank and Kelowna into one semi-urban conglomerate.

The purpose of the Act is to incorporate by reference the Agreement, approve it and give it the effect of law. The “Agreement” is defined as including any future amendments to the Agreement. Thus the Act incorporates by reference and gives the force of law to a document part of which is not yet in existence.

The “Agreement” also authorizes the enactment of, and gives legal effect to, a body of law which is not yet in existence. This is known as “Westbank Law”. It is to be enacted from time to time by the WFN Council. Courts are directed in the Act to take judicial notice of Westbank Law. Westbank Law on numerous subjects may be inconsistent with, and will prevail over, laws passed by Parliament.

The Constitution of the WFN will determine how and by whom the Council is elected. The Constitution is not set out in the Act or Agreement. It is whatever the members of the WFN, by a majority on a ratification vote, determine it to be. This contrasts with, for example, the Sechelt Indian Band Self-Government Act which provides that the Sechelt constitution must meet certain criteria and must come before the Governor in Council for approval prior to having any effect.

In a number of areas, such as citizenship, banking, national defence, criminal law, intellectual property, broadcasting and telecommunications, the WFN Council has not been granted governmental authority. However, in numerous other areas it has paramount authority. The WFN has all the attributes of a self-governing enclave. Canadian citizens living or working there, both aboriginal and non-aboriginal, will be subject to a form of government that is, for most of them, not elected by them and is unrestrained by any of the checks, balances and safeguards that apply to other governmental institutions in Canada.

The substance of the Act is contained in the Agreement of some 84 pages which is referentially incorporated in the Act. This is a remarkable piece of legislation. It amounts to an abdication of the sovereign law-making and executive authority of the

Crown in Parliament. Its effect on the people residing and working in Westbank is to remove many of the fundamental political and legal safeguards that support their freedoms and security. This is completely out of character in a modern liberal democracy committed to equality of opportunity and individual rights. It is surprising to see basic legal rights which have been acquired gradually over many years of political struggles being so abruptly discarded.

Your question is whether this is constitutionally permissible.

The short answer is that many of the provisions of this legislation are contrary to accepted norms of parliamentary practice in Canada. Some of the provisions are so clearly inconsistent with such norms that they may be said to be unconstitutional in law.

I will first discuss some general principles.

A: “A Constitution Similar in Principle to that of the United Kingdom”.

The words of this sub-heading appear in the preamble to the *Constitution Act, 1867*. They have been held to import into the Canadian constitution not only the basic principle of the rule of law but all the constitutional norms and charters developed through centuries of struggles in England between Parliament and the Crown. Thus every citizen of Canada, aboriginal and non-aboriginal alike, is entitled to be governed by laws which are passed or authorized by a democratically elected Parliament or a provincial legislature. Law-making authority may be delegated down to subordinate institutions but it is not acceptable in such an arrangement that the subordinate institutions be authorized to supplant Parliament and Parliament’s laws by passing laws that are inconsistent with the laws of Canada and prevail over them.

B. Canadian Constitutional Law is the Supreme Law of Canada.

Section 52 of the *Constitution Act, 1982* provides that

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.

The fundamental importance of the Constitution as a protector of the rights and freedoms of citizens has been described as follows by a former Chief Justice of Canada:

The constitution of Canada does not belong either to Parliament, or to the Legislatures; it belongs to the country and it is there that the citizens of the country will find the protection of the rights to which they are entitled. It is part of the protection that Parliament can legislate only on the subject matters referred to it by s. 91 and that each Province can legislate exclusively on the subject matters referred to it by s. 92. The country is entitled to insist that the legislation adopted under s. 91 should be passed exclusively by the Parliament of Canada in the same way as the people of each Province are entitled to insist that legislation concerning the matters enumerated in section 92 should come exclusively from their respective Legislatures.¹

C. No Third Order of Government in Canadian Constitutional Law.

It has long been held by the highest Court in Canadian law that constitutional powers in Canada are wholly and exhaustively distributed between the federal and provincial governments. See, for example, *A-G for Ontario v. A-G for Canada*, [1912] A.C. 571, 581.

Modern aboriginal rights cases discussing the effect of s. 35 have reaffirmed that “there was from the outset never any doubt that sovereignty and legislative power...vested in the Crown.” See *R. v. Sparrow*, [1990] 1 S.C.R. 1075 at p. 1103, and *R. v. Van der Peet*, [1996] 2 S.C.R. 507 at para 49: “one of the fundamental purposes of s. 35(1) is the reconciliation of the pre-existence of distinctive aboriginal societies with the assertion of Crown sovereignty”. In *Delgamuukw*, [1997] 3 S.C.R. 1010 at para 82 Chief Justice Lamer said that the accommodation of aboriginal rights “must be done in a manner which does not strain the Canadian legal and constitutional structure”.

¹ *A.G. of Nova Scotia v. A.G. of Canada*, [1951] SCR 31, [1950] 4 D.L.R. 369

Accordingly, the concept of a “third order of government”, though much discussed in academic and political circles, has never gained recognition in Canadian constitutional law.

D. No “Inherent” Right of Self-Government.

The academic debate as to whether there exists in law an “inherent” right of self-government is reflected in s. 1(a) of the Agreement which provides:

The purpose of this Agreement is to implement aspects of the inherent right of self-government by Westbank First Nation on Westbank Lands based on the recognition that the inherent right of self-government is an existing aboriginal right within section 35 of the *Constitution Act*, 1982.

The inference in this statement is that such a right was an existing aboriginal right when the *Constitution Act*, 1982 was passed and that Parliament is being asked merely to recognize that fact in this section of the Agreement. As such, this section is both mischievous and plainly incorrect. A discussion of the meaning of “inherent” in this context is to be found in a recent case in the Newfoundland Court of Appeal. It will be noted that this case again affirms the sovereignty of Parliament.

In classifying as inherent the municipal power to repeal, modify and replace regulatory measures, no suggestion is being made the municipalities are vested with the supremacy with which parliamentary bodies are cloaked. That power imports no sovereign autonomy. As is frequently stated, municipalities are the creatures of the legislative bodies from whom their powers are received. This being the case, parliamentary supremacy is retained by the creator. Any contention that it divested itself of any vestige of its legislative supremacy in conferring municipal power would be totally incompatible with the notion that a legislative body in a federal parliamentary state is sovereign within its constitutional sphere. This goes to the very essence of parliamentary democracy.

Dawe v. Town of Conception Bay South, [2001] NFCA 19

Thus, given that Parliament and the provincial legislatures are established by the Constitution as the supreme and only legislative bodies, and given that all power must be founded on the Constitution, there is no remaining room for “inherent” powers of government.

E. Referential Incorporation and the Delegation of Legislative Power.

Parliament is competent to delegate specific legislative powers to a subordinate body. There is no constitutional impediment to so doing. However, it is contrary to accepted constitutional norms for Parliament to delegate powers to a body (such as, in this case, the WFN Council) to pass laws which are inconsistent with and prevail over the parent (delegating) statute or other Acts of Parliament. The legitimacy of the practice of delegating legislative power has been based on the rationale that it does not derogate from the sovereignty of Parliament because it is done within a limited scope which is precisely defined by government and is usually accompanied and fettered by guidelines laid down by the government. Also, because it can be revoked by Parliament at any time it does not derogate from Parliamentary supremacy. This rationale does not apply to a delegation of legislative power which is unfettered by any principles or guidelines laid down by authority of Parliament or where the delegating legislation cannot be revoked at any time by Parliament.

Referential incorporation is a similar device which permits the legislation of another legislative body to be incorporated and thus effectively made part of a federal Act of Parliament. It is even constitutionally permissible for Parliament to incorporate future legislation of another body, *i.e.* legislation as it presently exists and as it may from time to time be amended and changed. This is called “anticipatory referential incorporation”. Again, however, it would be contrary to basic constitutional norms for this device to be used to justify a virtual abdication of sovereign legislative power as is the case in Bill C-57. The device of anticipatory referential incorporation can only be justified on constitutional grounds if the enabling legislation can be revoked by Parliament at any time, Parliament thus retaining its notional sovereignty and control.

Discussion of Constitutional Irregularities in Bill C-57

For the purpose of analysis the Act and the Agreement may be read as one. However, it must be remembered that the Agreement may be amended at any time without the necessity of Parliamentary amending legislation. It may be done by Order in Council. Thus, the defects identified below in the present Agreement may be exacerbated and duplicated by further Agreements without any further involvement of Parliament.

A. The effect of grounding the Act on a s. 35 “inherent” aboriginal right to self-government.

Although the Agreement is expressly not a Treaty it is brought within s. 35 of the *Constitution Act, 1982* by the government’s recognition of the inherent right of self-government within s. 35. This appears in the preamble to the Agreement and in sections 1 and 3.

This wording will have the effect of rendering it virtually impossible for any future Parliament to repeal the Act. The concession that the Act is founded on an aboriginal right would lead to a compelling argument that Parliament is powerless to revoke the legislation. Why? Because the “inherent” aboriginal right to self-government means that it has always existed as a third order of government in our constitutional framework and is now a s. 35 protected aboriginal right. Thus it denies the autonomy and supremacy of Parliament and the exhaustive distribution of governmental powers between Parliament and the provincial legislatures. On this basis the rights of self-government accorded in the Act are a “recognition” not a conferring of legislative power. A power which is not conferred by Parliament cannot logically be revoked by Parliament. On this basis a revocation or extinguishment of this “third order of government” would require a constitutional amendment involving the other two orders of government and the amending provisions of the *Constitution Act*. In practical terms this could not be done.

The only answer to this compelling argument would be for the government of Canada to argue against itself that no “inherent” right of self government exists in Canadian law. Whereas this is, in my opinion, correct, a Court dealing with such a reversal of position by the government of Canada may well reject the argument. At the very least, the grounding of the Act on the inherent right of self-government would seriously weaken any contrary and inconsistent argument by a future government. By

this sleight of hand, therefore, Parliament, by passing Bill C-57, would seriously undermine fundamental principles of Constitutional law that have been accepted for over a hundred years.

The point of this is that it rebounds directly on the mechanism adopted to effect WFN self-government, namely referential incorporation and delegation of power. As stated above, these devices are only legally permissible where Parliament retains the authority to revoke the delegated or incorporated legislation at any time. Since this Act effects an abandonment of this authority (by reason of the combined effect of s. 35 and the theory of the “inherent” self-government right) the whole Act is transformed in character from a delegation of power to a subordinate body to a total abdication of power by the parent body. Parliament is abdicating its sovereign constitutional authority in this Act. It is not within Parliament’s power to do this. The Constitution, being the supreme law, cannot be set aside by Parliament acting alone.

B. The removal of the civil rights of persons governed by Westbank Law.

[I] Removal of *Charter* Rights.

It must be remembered that all those living and working on Westbank Lands, approximately 94% of whom are not aboriginal or members of the WFN, at present have their full rights and freedoms guaranteed under the *Charter*. Section 15 of the *Charter* provides that

15. (1) Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.

The *Charter* further provides:

28. Notwithstanding anything in this Charter, the rights and freedoms referred to in it are guaranteed equally to male and female persons.

36. (1) Without altering the legislative authority of Parliament or of the provincial legislatures, or the rights of any of them with respect to the exercise of their legislative authority, Parliament and the legislatures, together with the government of Canada and the provincial governments, are committed to

(a) promoting equal opportunities for the well-being of Canadians;

(b) furthering economic development to reduce disparity in opportunities; and

(c) providing essential public services of reasonable quality to all Canadians.

It is to be expected that the WFN Constitution will not permit the 7500 or so non-aboriginal persons living and working in Westbank to vote for the law-making Council of the WFN. Those persons will, therefore, place a high value on the formal guarantees of *Charter*. Without the opportunity of political redress their legally enforceable remedies will be their only defence to injustice and oppression.

The *Charter* is structured in a way that provides an exception to equality rights with respect to practices by aboriginal people that constitute an aboriginal or treaty right. That exception applies over a relatively small and confined area since most rights exercised by aboriginal people do not fall within the definition of aboriginal or treaty rights. As the Supreme Court of Canada has said more than once:

Indians are citizens and, in affairs of life not governed by treaties or the Indian Act, they are subject to all of the responsibilities of other Canadian citizens.²

Aboriginal rights are only those rights that are “integral to the distinctive aboriginal culture” and were practised prior to European contact and influences and have

². Nowegijick v. The Queen, [1983] 1 S.C.R. 29, at p. 36.

continued up to 1982. It is in this limited area that, by reason of s. 25 of the *Charter*, the equality rights of the *Charter* do not apply. That is generally accepted as a legitimate exception to Canada's commitment to equality rights since it preserves the distinctive culture that is the heritage of aboriginal people. This is the means by which our Constitution accommodates distinct aboriginal practices within a multi-cultural society based on the principle of equality under the law.

The affairs which will be dealt with by Westbank laws mostly fall outside the category of "aboriginal rights" in this limited sense. Thus, without more, those persons affected by Westbank laws would have the same right to equality of treatment after the enactment of Bill C-57 as they had before. However, the Act has a provision that changes that. It is s. 32 of the Agreement. Its opening two lines provide that the government of the WFN and the legislative Council are bound by the *Charter*. What is given in those first two lines, however, is then removed by the following five lines. They add, as a qualification to the *Charter* rights given, the words: "with due regard for section 25 of the *Charter*".

As discussed above, s. 25 of the *Charter* is the section that grants an immunity to aboriginal or treaty rights from challenges based on the *Charter*. The effect of this section in the Bill C-57, in conjunction with the characterization of self-government as a s. 35 aboriginal right, is that Westbank laws would be made pursuant to an aboriginal right and thus immune from *Charter* challenge. A Westbank Law, for example, which discriminates between persons residing or working in Westbank on the basis of their race, or some other analogous ground, could not be struck down as a contravention of the *Charter*.

Thus, the two lines stating that the *Charter* applies are nothing short of a hoax on the Canadian public. Those drafting this Act have seen fit to disguise the fact that it revokes essential *Charter* rights from those who will be affected by Westbank Law. This is the undeniable effect of this unfortunate document.

[II] Removal of Rights under the *Statutory Instruments Act*.

Section 8 of the Act provides that the *Statutory Instruments Act* does not apply in respect of Westbank law. Thus, those affected by Westbank law are stripped of

another batch of protections accorded to other Canadians with respect to other federal laws. The *Statutory Instruments Act* is designed to ensure that all laws authorized by Parliament to be passed by subordinate bodies accord with established standards. Such laws must be vetted by the Privy Council, must be published in the Canada Gazette and may be reviewed by the Joint Standing Committee of the House of Commons and Senate for the Scrutiny of Regulations. If found objectionable the laws can be laid before the House of Commons and, if no action is taken to preserve them, they are automatically struck down.

The following extract from s. 3 the *Statutory Instruments Act* gives an illustration of the protections created by this Act, none of which would apply to Westbank law:

3. (1) ...where a regulation-making authority proposes to make a regulation, it shall cause to be forwarded to the Clerk of the Privy Council three copies of the proposed regulation in both official languages.

(2) On receipt by the Clerk of the Privy Council of copies of a proposed regulation pursuant to subsection (1), the Clerk of the Privy Council, in consultation with the Deputy Minister of Justice, shall examine the proposed regulation to ensure that

(a) it is authorized by the statute pursuant to which it is to be made;

(b) it does not constitute an unusual or unexpected use of the authority pursuant to which it is to be made;

(c) it does not trespass unduly on existing rights and freedoms and is not, in any case, inconsistent with the purposes and provision of the *Canadian Charter of Rights and Freedoms* and the *Canadian Bill of Rights*; and

(d) the form and draftsmanship of the proposed regulation are in accordance with established standards.

The *Statutory Instruments Act* also provides that all laws of Canada must be published in the Canada Gazette and that if they are not, no one can be convicted of an offence consisting of a contravention of such law. Bill C-57, by contrast, provides only that Westbank laws must be provided to Canada “for Canada’s internal information purposes” and that if this is not done it does not render the law unenforceable against any person who is liable under such Westbank law. The WFN is directed to maintain its own public register of Westbank law but there are no consequences for non-publication of Westbank law and no mechanism for Parliamentary scrutiny of such law.

Also, unlike the Sechelt Self-Government Act, there is no requirement that the constitution of the WFN (being the document which will determine rights to vote among other things) must be submitted to the federal government for scrutiny and prior approval. The Westbank constitution is approved by Parliament in this Act sight-unseen. What is more, it is given the power to prevail over any federal laws that are inconsistent with it.

While these provisions do not necessarily render the Act unconstitutional they are a marked departure from the current rights of Parliament and the protections granted to the citizen with respect to other federal laws.

[III] Removal of Public Financial Accountability.

The Agreement provides the WFN with the jurisdiction over its own internal financial auditing. This provision also states that Westbank law on this subject shall prevail over any federal law with inconsistent provisions. Another section of the Agreement (s. 55) provides that Westbank financial accountability standards shall be at least comparable those of other public governments.

Thus, a government elected by about 500 people and dealing with revenues raised from about 8000 Canadian citizens is accountable only to itself. The role of the Auditor General of Canada has been entirely dispensed with.

Whereas there is no constitutional rule against Parliament dispensing with the generally accepted principles of accountability to Parliament for use of public funds this is a clear departure from usual constitutional norms.

[IV] Limitation on Access to the Courts.

Section 47 of the Agreement provides that the WFN may establish boards, tribunals, commissions or other administrative bodies for determining, among other things, rights under Westbank Law. Section 10 of the Act provides that an application to the Courts may only be made “after all applicable procedures for appeal or review provided by Westbank law have been exhausted”.

Thus citizens who have grievances pertaining to treatment of them by the WFN government will likely have to go first to a tribunal appointed by that government for adjudication of such matters. Their normal right to go directly to an independent tribunal or Court will have been seriously eroded.

The constitutionality of these provisions will depend on how they are implemented. At this stage it can be said only that power is given by this Act to the WFN to seriously limit a fundamental citizenship right, namely the right of access to a Court appointed under s. 96 of the *Constitution Act, 1867*.

[V] Encroachment on the Supremacy of Parliament.

In numerous different areas, some of which have already been mentioned, the WFN government is authorized to pass laws inconsistent with, and prevailing over, laws passed by Parliament. This is a direct attack on the supremacy of Parliament. Neither provincial governments nor municipalities have such powers. To empower a subordinate authority to revoke or derogate from rights accorded to individuals by Parliament itself is an extraordinary use of Parliament’s legislative power. It is unconstitutional for the reasons given above under the discussion of the effect of grounding the Act on a s. 35 “inherent” right.

An example of the consequences of this may be given by considering ss. 217 to 221. These appear under the headings “Public Order, Peace and Safety” and “Prohibition of Intoxicants”. Laws protecting public safety and security are the responsibility of Parliament. Laws passed for the control of narcotics are part of this. In the Agreement, however, Parliament has transferred its role with respect to “intoxicants” to the WFN. Westbank laws, which prevail over any inconsistent federal laws, may be passed by the WFN Council relating to the prohibition (which would include non-

prohibition) of the manufacture, possession and sale of intoxicants. Existing jurisprudence suggests that “intoxicants” includes not only intoxicating liquors but also intoxicating substances such as marijuana. People under the influence of drugs have been held to be “intoxicated”.

This example illustrates the possibilities available where supreme legislative authority over a subject head is given to a Council elected by a small group to govern a much larger group. Laws could be passed without any Parliamentary scrutiny that authorize, for example, the growing of marijuana. Such laws could discriminate on racial grounds as between those who have the right to grow and sell such products. A tribunal could be appointed comprised of supporters of the majority members of Council with delegated authority to govern all aspects of the right to grow and sell. All this could be done within the powers given to the WFN by this Act.

Summary

The Constitution of Canadian is founded on the notion that the right to govern all persons resident in Canada is a sovereign claim that all Canadians have in common. In accordance with the Constitution it resides exclusively and exhaustively with Parliament and the provincial legislatures. Any departure from this model would require a constitutional amendment.

Bill C-57 departs from this model in a significant way. It derogates from the civil rights of citizens and the constitutional role of Parliament. It is based on the notion that there exists an “inherent” aboriginal right of self-government in the Canadian constitution sufficient to support an enactment such as Bill C-57. Such a notion, although often debated, has found no place in Canadian law. No historical evidence exists of a pre-existing aboriginal practice of governing non-aboriginal people. Nor is there any evidence of any aboriginal governance right surviving the inception of Crown sovereignty and the exhaustive division of legislative powers in the *Constitution Act, 1867*. Without such evidence there is no basis for legal recognition of such a right.

Bill C-57 appears to be based also on the notion that title to land justifies a transfer of the powers of government to the landowners. This notion, too, has no place in Canadian law. Civil and constitutional rights exist independently of title to land.

In this letter I have given illustrations of the problems in both law and practice which may be expected to arise from the grant of near absolute power to a small group of about 500 WFN members to rule over a population of about 8000. It is said that absolute power corrupts. Bill C-57 strips away so many of the usual checks and balances that it is an invitation to corruption and abuse of power.

Yours truly,

MACKENZIE FUJISAWA

Per: "*Christopher Harvey*"

CHRISTOPHER HARVEY, Q.C.

CWH:JW