



HOUSE OF COMMONS

March 29, 2004

**Mayor Walter Gray**  
1435 Water St.  
Kelowna, British Columbia  
V1Y 1J4

Dear Mayor Gray:

Thank you for taking time to meet with me this morning to consider the impact of Bill C-11, the *Westbank Bill*, on your community.

Further to our discussion, I would be available to meet with your Council on any evening during the weeks of April 5<sup>th</sup> and 12<sup>th</sup>, except April 8<sup>th</sup>.

A summary of my concerns could be briefly stated as follows.

In November the Government of Canada sought agreement on the final sitting day of the last session of Parliament for the passage of Bill C-57, the *Westbank Act*, without debate and Committee hearings. Bill C-57 has been re-introduced in this session of Parliament as Bill C-11 and is now at Committee Report Stage, just prior to Third Reading.

The only reason that the Bill is now before the House is because I refused to give unanimous consent to its passage without debate or Committee hearings on November 7, 2003. I believed that the people affected by the Bill deserved a hearing and the ramifications on *Charter* rights careful consideration. Neither happened.

I am enclosing a copy of a *legal opinion* on the Westbank Bill recently prepared by Chris Harvey, Q.C., of MacKenzie Fujisawa in Vancouver. Mr. Harvey makes it very clear that the Bill will have serious implications for British Columbia.

Chris Harvey's legal analysis outlines how the Bill will recognize the Westbank Council as a third order of government grounded on a constitutionally based inherent right of self government with the authority to (i) block access to the *Charter of Rights and Freedoms*, (ii) limit the right of access to the B.C. Courts; and (iii) override federal and provincial

laws.

With regard to the **Removal of Charter Rights**, Mr. Harvey advises:

“The effect of this section in 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 ... 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.”

With the Westbank Bill now at Committee Report Stage, I have asked the Speaker to allow the House of Commons to consider an amendment to the Bill to ensure that the Westbank government and law will not be exempt from the application of the *Charter of Rights and Freedoms* and the *Canadian Human Rights Act*. All Canadian citizens have as a right of citizenship the protections set out the *Charter*. It would be wrong for Westbank residents to have anything less than the full rights of Canadian citizenship.

Mr. Harvey makes clear that the Bill in its present form shields Westbank government and law from the application of the *Charter of Rights and Freedoms* and the *Canadian Human Rights Act*. The Westbank Agreement, that the Bill gives effect to, triggers section 25 of the *Charter*, thus shielding matters deemed to be aboriginal rights from the application of the *Charter*. My amendment will address this serious deficiency in the Bill. All Canadians ought to have the protection of the *Charter* and the *Canadian Human Rights Act*. Stripping Canadians of their *Charter* rights should not be entered into lightly. My amendment will provide Members of Parliament with a simple opportunity to ensure that all Westbank residents continue to have the protection of the *Charter* and *Canadian Human Rights Act*.

The issue is not whether the Westbank should have self-government but whether they should have to sacrifice their protection founded in the *Charter* and *Canadian Human Rights Act* in order to gain the opportunity to govern their local affairs as other Canadians do. I would ask for your support as I move this amendment in Parliament so as to ensure the application of the *Charter* and the *Canadian Human Rights Act* to Westbank law and government

My amendment amends section 3 of the Bill such that the Westbank Agreement will have “the force of law, except

- (a) with regard to any and all references to the inherent right or aboriginal right of self-government, so as to ensure the full application of the *Charter of Rights and Freedoms* to Westbank law and government; and
- (b) with regard to any limitation on the application of the *Canadian Human Rights Act*.”

With regard to the **Limitation on Access to the Courts**, Mr. Harvey advises:

“Thus citizens who have grievances pertaining to treatment of them by the Westbank First Nation government will likely have to go first to a tribunal appointed by that government.... 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 Westbank First Nation to seriously limit a fundamental citizenship right, namely the right of access to a Court appointed under s. 96 of the *Constitution Act, 1867*.”

With regard to the **Encroachment on the Supremacy of Parliament**, the Act recognizes the Westbank Council's authority to make laws that may override general laws established by Parliament. Mr. Harvey cites as an example the prohibition of intoxicants and states:

“Parliament has transferred its role with respect to 'intoxicants' ... Westbank laws, which prevail over any inconsistent federal laws, may be passed by the ... Council relating to the 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.”

"Laws could be passed without any Parliamentary scrutiny that authorize, for example, the growing of marijuana.... All this could be done within the powers given the Westbank First Nation by this Act."

Mr. Harvey concludes his *legal opinion* with the following statement:

“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. ... Bill C-57 strips away so many of the usual checks and balances that it is an invitation to corruption and abuse of power.”

This legal analysis of the *Westbank Act* makes it clear that the Bill has serious implications for B.C. municipalities and their residents through its creation of a third order

of government immune from the *Charter*, that blocks access to the Courts, and is empowered to override certain laws established by either the federal Parliament or the Province's legislature.

I will look forward to meeting with you and your Council in the near future.

Yours truly,

A handwritten signature in black ink, appearing to read 'John Cummins', written in a cursive style.

John Cummins, M.P.  
Delta-South Richmond

Enclosures