

Brief – Westbank First Nation

House of Commons' Standing Committee on Indigenous and Northern Affairs

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BACKGROUND

Recognition – Reconciliation - Nation Rebuilding

Westbank First Nation (WFN), a self-governing former *Indian Act* band and collectively a part of the Okanagan Nation Alliance (representing the Syilx Peoples), is often held out as one of the most successful Indigenous communities in BC and Canada. For WFN, the process of reconciliation with the Crown based on the recognition of rights has been ongoing for many years and under different governments. While significant progress has been made in moving beyond the colonial legacy, significant work still remains to be concluded. There remains outstanding business with the Crown with regard to implementing self-government on Westbank Lands (reserve lands) and more broadly in addressing the Aboriginal title and other rights of the Syilx Peoples (off-reserve) as part of the Syilx/Okanagan Nation's "Nation rebuilding" agenda.

Accordingly, WFN views the recent actions taken by the federal government to ensure internally the government engages with Indigenous peoples from a rights based perspective is a positive step forward along the path to true reconciliation. These actions include: 1) the commitment to a renewed "nation-to-nation" relationship with Indigenous Peoples based on the recognition of rights; 2) adoption of the United Nations Declaration on the Rights of Indigenous Peoples without qualification; 3) establishing a working group of Ministers to review Canada's laws, policies and operational practices in cooperation with Indigenous partners; 3) releasing the "Principles Respecting the Government of Canada's Relationship with Indigenous peoples", and; 4) beginning the long overdue process of dismantling the anachronistic Indian Affairs bureaucracy to more appropriately reflect today's evolving intergovernmental relations.

While we are optimistic that the actions taken by the government will support reconciliation we recognize the challenges moving forward. It is not easy to decolonize. For WFN, the ongoing work of reconciliation includes the work of WFN as a self-governing entity and the work of the WFN as a part of the broader Syilx/Okanagan Nation.

Rights Recognition and Self-Determination Table: As part of the Okanagan (Syilx) Peoples WFN, along with the remaining six *Indian Act* bands, continues to advance a collective nation building agenda. As a "nation" the Syilx Peoples are actively engaged with Canada at an exploratory "Rights Recognition and Self-Determination Table." For the Syilx Peoples the work of nation rebuilding was intensified following the 2014 *Tsilhqot'in* decision that granted the first declaration of Aboriginal title and where the court confirmed that it was the "nation" and not the *Indian Act* 'band' that is the proper title and rights holder. Work at this table includes: identifying the legal mechanism for Canada to recognize the Syilx/Okanagan Nation and its government; the internal development of an Syilx/Okanagan Nation constitution; demarcation of Aboriginal title lands; fisheries; and numerous other related issues.

Fiscal Relationship: In addition to the critical work of tribal nation rebuilding, Westbank has also been participating in a collaborative fiscal policy development process with Canada and other

groups that are already recognized as self-governing under agreements. The objective of this work is to further a new fiscal relationship between Indigenous Governments and the Crown and specifically to assist Canada in reworking its existing policy set out in “Canada’s Fiscal Approach for Self-Government Arrangements.”

Access to First Nations Fiscal Management Act: As a self-governing entity, WFN has been engaged with federal officials to develop a regulation to be made under the *Westbank First Nation Self-Government Act* that would adapt or restrict the application of the *First Nations Fiscal Management Act* to enable Westbank to benefit from that Act. As a result WFN would have access to additional revenue raising tools, a strengthened property tax system, as well as access to public debt financing through the First Nations Finance Authority. Currently these tools are not available to self-governments, although it was intended they would be when they were created.

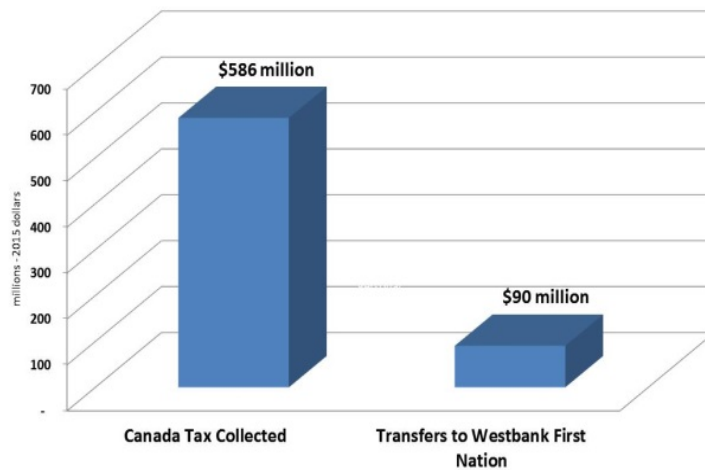
The Impact of Self-Government to Westbank First Nation

In 1985 Canada introduced its Community Based Self-government (CBSG) policy. The purpose of the CBSG policy was to negotiate individual self-government models with a number of *Indian Act* bands in the wake of the failure of the Constitutional conferences. Almost half of the *Indian Act* bands in Canada (some individually and others as groups) began the process to begin preparing for negotiating self-government, but ultimately only a handful proceeded to actual negotiations. WFN was one of these communities and signed a Framework Agreement to negotiate self-government in 1990. WFN concluded a bilateral Self-government Agreement-in-Principle, in 1998. A Final Agreement was initialed in 2000 and the *Westbank First Nation Self-Government Act* received Royal Assent on May 6, 2004. Effective date for self-government for WFN was April 1, 2005.

Since moving out from under the most restrictive and debilitating aspects of the *Indian Act*, WFN has prospered both socially and economically. The pace of change has been astonishing. As a result of Self-government WFN has a more stable and predictable government based on community-developed laws of which the most important is the *Westbank First Nation Constitution*. While not the only and not most important metric of success, economically WFN self-government has been enormously prosperous since it was implemented in 2005. It has generated over \$480 million in investment based on building permits. The Westbank economy has grown by 466% or 21% per year based on estimates of Westbank GDP. For comparison, this is a rate of economic growth that is over 20 times faster than the BC economy, which grew by 20.5% over that same period. This growth rate is obviously not sustainable but does give an indication of the amount of locked capital in Westbank lands under the *Indian Act* system.

The fiscal impacts of Westbank self-government have been equally impressive. Westbank tax revenues have grown from \$6.2 million to \$15 million or a 9.2% annual growth rate. During the same period a selection of Canada's revenues have grown by 6.0% per year from \$36 million to \$64.5 million and a similar selection of BC revenues have grown by 9.8% per year from \$17 million to \$43 million.

Cumulative Canada Tax Revenues & Transfers on the Westbank First Nation - Post Self Government Agreement



The cumulative economic and fiscal benefits from Westbank self-government are even more impressive.

- Westbank self-government has added \$5.2 billion in GDP between 2005 and 2014.
- Since 2005 Westbank has generated over \$124 million in Westbank tax revenues.
- Canada has collected \$586 million in selected tax revenues from Westbank lands during this period.
- BC has collected \$367 million in selected tax revenues from Westbank as a result of self-government.¹

One of the impacts of developing the economy at Westbank has been the reduction of WFN's reliance on federal transfers (now around 20% a year). At the same time, it has also brought attention to problems with Canada's current approach to financing self-governments. The current approach in our opinion penalizes success by not properly taking into account the relationship between revenues raised and the actual services provided and which government is responsible for what services from what source of revenue.

The Failure of Modern Treaty Negotiations in BC

During the period WFN was finalizing our self-government arrangements with Canada, questions were being asked by the BC provincial government and by some within the federal system, as to why Canada was negotiating outside of the treaty making process overseen by the

¹ *The Fiscal Impacts of Westbank First Nation Self Government Agreement*, Fiscal Realities Economists, Kamloops, BC, 2016

British Columbia Treaty Commission (BCTC). We believe there was concern that our self-government agreement would set a precedent that was inconsistent with the policies being followed for modern treaty making at that time. The most significant of these being: 1) The arrangements did not deal with the “land question” and Aboriginal title and achieving “certainty” with respect to title, 2) Westbank Lands remain 91(24) lands (reserves), and 3) Different taxation provisions and the Crown not gaining the authority to tax WFN members. The WFN self-government arrangements do not alter the fundamental relationship between the Crown and the community. The purpose of the WFN Self-government arrangements has been to take over Canada's place on Westbank Lands, expand the powers of WFN and to make the government more accountable and responsive to the needs of its membership and other residents that live on-reserve or conduct business on-reserve.

From WFN’s perspective, the ability to resolve issues of governance on-reserve was a logical foundation for the negotiation of eventual self-government provision in a treaty and to address governance over an extended land base, after the “land claims” were settled. Accordingly, in 1991 WFN submitted a letter of intent to negotiate a land claim. WFN also formally submitted a Statement of Intent to negotiate a modern treaty under the BCTC process in 1993. Westbank negotiated a Framework Agreement to guide these negotiations and a referendum of the members was held and formal treaty negotiations began shortly thereafter. Ultimately these negotiations failed.

In September 1998 WFN suspended formal treaty negotiations and began a process of review. A number of exploratory meetings with Canada and BC took place culminating in the signing of the Tripartite Political Accord on Treaty Negotiations dated May 10, 2000. The Tripartite Political Accord addresses the recognition of aboriginal title and the role of the Okanagan Nation Alliance and opened the door for resumed treaty talks. However, in 2009 WFN indefinitely suspended treaty negotiations on the grounds that there was absolutely no likelihood of a settlement. There were many reasons for coming to this conclusion. This included the Crown’s limited mandates with no recognition of rights and continued insistence on regressive “certainty” language. From a purely “settlement” perspective, the cash and land components were too small (typically between \$60, 000 - \$70,000 per capita). Also what was being offered with respect to self-government was inconsistent with WFN self-government. Further, Canada and BC have remained committed to positions that would require reserve lands becoming provincial lands with an unfavorable tax policy. However, the most important and compelling reason for Westbank suspending negotiations is that WFN is not the “proper title” holder and has no legal authority to negotiate a comprehensive, section 35, land-based treaty.

MOVING FORWARD

With respect to Nation rebuilding, it is important for Canada to support the work of nation rebuilding which ensures that the proper title and rights holders come to the table. In our case recognition and support for the Syilx/Okanagan Nation. At the same time efforts must continue to be made to assist *Indian Act* bands in moving away from the *Indian Act* as we did, and when they do, ensure they are properly supported, both politically and financially. They need to succeed. It is also important to realize that with respect to their on-reserve governance, not all *Indian Act* bands that are a part of a recognized “Nation” will be in a position to move away from the *Indian Act* at the same time. Accordingly, policies need to be flexible to support both recognition at the “Nation” level and nation-rebuilding activities, while the work of individual bands in moving beyond the *Indian Act* is ongoing. The Syilx/Okanagan Rights Recognition and Self-Determination Table is an example of such an approach.

That said, delay in moving beyond the *Indian Act* for reserve-based communities has a cost. WFN’s experience since self-government demonstrates that the delay in becoming self-governing can have enormous social and economic cost. Had self-government been an “easier” option for WFN and negotiations shorter, WFN would have been even further ahead than today. Not being self-governing sooner has resulted in significant lost opportunity. One can only speculate what the lost opportunity cost is for all other Indigenous communities in Canada that are not yet self-governing? While some might like to think WFN is unique, we are not. There are many urban or semi-urban communities, or rural communities adjacent to non-Aboriginal towns, that are in a similar position today to WFN prior to our becoming self-governing. As was recommended by the Royal Commission on Aboriginal Peoples, recognition legislation could be considered. Future recognition legislation could also support a new fiscal relationship that supports our existing agreements.

For self-government to be a success, there needs to be a predictable and stable fiscal relationship between self-governments and the Crown. In the short term ensuring fiscal relations for self-governments work, the federal policy review that is currently underway needs to be completed as soon as possible. Specifically, for advanced self-governments like WFN with significant revenues, the issue of “own source revenue” (OSR) needs to be addressed. While the government has suspended for three years the current punitive OSR policy, which takes into account OSR when calculating federal transfers, a long-term solution is needed as part of a new fiscal relationship. The existing (suspended) policy does not properly account for how the revenues raised by Indigenous governments are used and assumes it can automatically be used to offset transfers, which are being provided for other purposes. As part of this discussion, there is a need to ensure tax policy and tax room sharing is fully on the table in an all of government approach.

The success at WFN is an example of what can be accomplished where there is a coming together of minds and political will. Moving forward to resolve the larger questions of Aboriginal title and nation rebuilding for Westbank as part of the Syilx/Okanagan Nation will also require political will. In WFN's experience, progress has been made under both Conservative and Liberal governments and that substantive change in advancing relations with Indigenous peoples requires all party support. If there is to be progress made through a new approach based on recognition of rights, there will be a need for a high degree of non-partisanship in Parliament. If the changes that appear to be coming are implemented there will be much hard work ahead, much of which will need to be undertaken internally by our Nations as we rebuild.

This Committee, and Parliament, should strongly encourage the government to move expeditiously on implementing the nation-to-nation relationship based on rights recognition, and to resolve claims based on this recognition and where required existing policies/mandates be repealed and new policies written.

Recommendations

To support the ongoing implementation of WFN self-government and the rebuilding and recognition of the Syilx/Okanagan Nation:

1. Reinforce the importance of the Rights Recognition and Self-Determination Table between the Syilx Peoples and Canada.
2. Replace the various comprehensive land claims policies and "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government" with a new recognition policy that is consistent with UNDRIP, the ten principles and the direction from the courts.
3. As an immediate priority, complete the review of Canada's approach to financing self-governments and to ensure that existing self-governments are not penalized for success.

General Description of Westbank First Nation:

WFN is one of eight community bands that comprise the Syilx/Okanagan Nation, WFN reserves are located in the South Central Interior of British Columbia adjacent to West Kelowna and Kelowna. With a history rich in culture and tradition, and a population of over 800 members

and 10,000 other residents, WFN places high value on the responsible management and protection of its resources, environment and watersheds.

WFN has been a self-governing entity since 2005. The leadership consists of a chief and 4 councillors elected by the membership every 3 years. As well, a 5 member Advisory Council is elected every 3 years by the non-member residents to represent their interests. The administrative operations of the government are carried out by over 200 employees, including a Director of Operations and several senior staff who are responsible for managing their respective departments. Developing considerably as an organization while expanding jurisdictions, WFN has become a sophisticated government reflected by its commitment to strong, stable and sustainable financial practices. Actively encouraging economic development, WFN nurtures functional relationships with other governments, invests heavily in responsible development and infrastructure, and provides increasingly enhanced and financially sustainable services to its members.