

The Many Roads to Community Well-Being

*A Report on the Event Proceedings of a Critical
Conversation on First Nations and Regulatory
Regimes*

Tuesday, May 2th, 2015, 8:30 a.m. to 12:30 p.m.

Senate Room, 6th Floor Robertson Hall, Carleton University

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It's very tough to talk about getting rid of the Indian Act when there is no consensus. You can't just get rid of something and leave a legislative vacuum. So the role I've tended to play is one of advocating changes a step at a time and making sure that we have the jurisdiction within our reserve lands and within our traditional territories.

Chief Manny Jules

Going back to 1989, what we were experiencing at home where I'm from in Nipissingwe were losing opportunities because we were moving so slow under the confines of the Indian Act...opportunities to partner, opportunities to create some revenue, create some job opportunities, and create opportunities where we could start to retain some of our youth.

Philip Goulais

Over the last couple of decades, we've really seen this renaissance in terms of the establishment of governance regimes, the re-establishment of institutions – whether it's health care, land management, fiscal institutions, taxation institutions, child welfare – and we see a number of communities that are doing really well in Canada. So when we put that equation in place: Does greater regulatory reform...does greater self-government equal well-being? I think we are getting the seed of the sense that this is true.

Bob Watts

Introduction

Regulation is an essential component of modern public governance; however, the environment in which Canada's regulatory regimes must function is undergoing fundamental change. In particular, new and powerful players, such as First Nations and business, are becoming actively involved. Carleton University's Regulatory Governance Initiative (RGI) seeks to have a direct impact on enhancing the effectiveness of regulations. With a focus on regulatory policy, governance and management, the RGI adopts a holistic and problem-driven approach. The RGI's *Critical Conversation* event series aims to push the boundaries of current thinking on policy and regulation around current challenging issues by bringing together representatives of First Nation communities, business, government and academia to have the discussions about regulation that we need to have, but rarely do. On May 5, 2015, the RGI hosted a *Critical Conversation on First Nations and Regulatory Regimes*.

The summary of the event proceedings from this *Critical Conversation* seeks to capture the key themes that emerged during this discussion and to draw out core ideas that can prompt further dialogue and serve to further clarify the path(s) forward. This session brought together the expertise of more than 50 diverse participants.

Agenda

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| 8:30 a.m. | Opening Prayer with Simon Brascoupé |
| 8:40 a.m. | Opening Remarks by Bob Slater, Director, Regulatory Governance Initiative |
| 8:55 a.m. | Chief Manny Jules – Chief Commissioner of the First Nations Tax Commission |
| 9:10 a.m. | Philip Goulais – Former Chief, Nipissing First Nation |
| 9:25 a.m. | Bob Watts - Nuclear Waste Management Organization |
| 9:40 a.m. | Speaker Plenary Discussion |
| 10:25 a.m. | Roundtable Discussions |
| 12:00 p.m. | Closing Remarks by Dr. Rick Van Loon |
| 12:15 p.m. | Closing Prayer with Simon Brascoupé |
- Speakers' biographies are provided in Annex 1.

Presentations

In order to ensure that all participants began the discussions with a common understanding

of the issues being explored, a discussion paper, prepared by Bob Watts, was distributed to participants in advance of the session. This discussion paper introduces concepts of well-being from federal government and First Nations' perspectives. It then goes on to share some of the Canadian and American experiences with First Nations governance and regulation. Finally, the paper concludes by posing a series of questions that were used to focus roundtable discussions during the May 5, 2015 Critical Conversation.

In addition, the session began with presentations by three speakers with extensive experience and involvement with First Nations interests and activities related to Canada's regulatory regimes.

Chief Manny Jules

Having dedicated over 30 years of his life to public service in support of Aboriginal issues, Chief Manny Jules took the time to explain his decision to focus his efforts on confirming secure property rights for First Nations within their traditional and treaty territories. He also emphasized the importance of securing the authority to exercise jurisdiction to manage these lands. He argued that, with property rights and the appropriate jurisdiction, First Nations have many options available for their communities, which can fundamentally change the nature of the relationship with government.

Chief Jules pointed out that we cannot fully understand the current circumstances First Nations face without going back hundreds of years. He argued that the basis of our history together and the basis of the Indian Act stem from decisions that pre-date the creation of Canada. To illustrate his point, he specifically referred to the 1836 decision to not let First Nation peoples own land. He proposed that this was based on the belief that Indians were lesser humans and not capable of looking after themselves. He also talked about how Canada's current place in the global economy depends heavily on the country's rich resources and this resource-based economy was established as a result of a close partnership between First Nations and early settlers. In particular, Chief Jules talked about both the real and symbolic importance of trading beaver pelts. Despite the critical importance of First Nations played in founding Canada's economy, Chief Jules maintained that, since the early 1800s, First Nations have been systematically shut out of Canada's economy and its place in the global market. Furthermore, as a result of these early decisions and discriminatory practices, First Nations now have to stand in line for benefits from government programs rather than participate as equal partners.

Chief Jules goes on to ask, how do we resolve these issues that are so deeply ingrained? He cautions against getting rid of the Indian Act when there is no consensus on what should replace it. He also suggests that while the recent *Tsilhqot'in* Decision (2014) is very important, it remains to be seen whether the *Tsilhqot'in* can take this recognition of their aboriginal title "to the bank." He explains that federal and provincial powers and jurisdiction are built into the constitution and a focus on securing aboriginal title requires the federal and provincial governments to vacate this jurisdictional space, which requires constitutional change. He goes on to dismiss the idea that there is likely to be any real

constitutional change in our lifetime. Instead, he argues that mechanisms must be set up within the existing constitutional framework for First Nations to govern themselves and exercise jurisdiction to benefit and share in the bounty of this land. In particular, this means that First Nations need a new fiscal relationship, so they are not beholden to others to meet their needs. Without this fiscal control, Chief Jules concludes that the cycle of dependence and poverty will never end. It is with this in mind that he has focused his efforts on ensuring the creation of the *First Nations Fiscal Management Act*. He subsequently took on the role of Chief Commissioner of the First Nations Tax Commission, which supports the development and implementation of First Nation property tax regimes.

Chief Jules drove his point home by talking about on-reserve housing. He spoke about the findings of a recent study that identified the complete lack of regulations and standards for housing on reserve. This same study indicated that because the majority of homes are not built to Canadian standards, efforts to bring them up to code is projected to be backlogged for 100s of years. However, Chief Jules observes that work to improve the quality of on-reserve housing is like “building on sand” because no regulatory regime exists to ensure a consistent minimum standard is achieved. Chief Jules concluded his talk by advising that we have to stop planning for next year or even seven generations and starting thinking in millennia.

Philip Goulais

Philip Goulais provided an in depth look at the new First Nations Land Management Regime that came into force in 1999. This Regime allows First Nations to opt out of land-related provisions of the Indian Act in order to develop their own land codes to manage lands and resources. Mr. Goulais pointed out that a critical feature of the *Framework Agreement on First Nation Land Management*, which came into force with the ratification of the First Nations Land Management Act (FNLMA), is that the agreement cannot be unilaterally amended by Canada. Any changes require the consent of First Nations. Mr. Goulais explained that those who worked to negotiate the Framework Agreement were making a conscious effort to shed the legacy of the Indian Act land provisions, practices, policies and procedures. He explained that those communities that initiated the work to create this new regime were focused on taking back control of their communities’ land bases – they wanted their lands to be managed by their people and their ways. This effort stemmed from a realization that First Nation communities were missing out on opportunities as a result of the existing land management system and the health and well-being of their communities were being hurt as a result.

Philip Goulais spoke about how this land management regime takes a community out of 25% of the Indian Act and, since the ratification of the FNLMA, 51 land codes have come into force (Table 1) and 46 more First Nations are expected to vote on proposed codes in 2015-16 (Table 2).

Table 1: First Nations with Operation Land Codes

BC	20. Stz'uminus	6. Kahkewistehaw
1. Skowkale	21. Sumas	7. One Arrow
2. Aitchelitz	22. Tsawout	
3. Campbell River	23. Tsawwassen	MB
4. St. Marys	24. Tsekani (McLeod Lake)	1. Opaskwayak Cree Nation
5. Yakwekwioose	25. Ts'kw'aylaxw (Pavilion)	2. Chemawawin
6. Beecher Bay	26. T'sou-ke	3. Swan Lake
7. Kitselas	27. Tsleil-Waututh	4. Brokenhead
8. Leq'a: mel	28. Tzeachten	
9. Lheidli T'enneh	29. Westbank	ON
10. Malahat	30. We Wai Kai (Cape Mudge)	1. Mississaugas of Scugog Island
11. Matsqui	31. We Wai Kum (Campbell River)	2. Chippewas of Georgina Island
12. Musqueam	32. Williams Lake	3. Dokis
13. Seabird Island		4. Henvey Inlet
14. Shx'w'ha:y Village	SK	5. Mississauga First Nation
15. Skawahlook	1. Flying Dust	6. Nipissing
16. Sliammon	2. Muskeg Lake	7. Whitefish Lake
17. Snaw Naw As (Nanoose)	3. Muskoday	8. Anishinaabeg of Naongashiing
18. Songhees	4. Whitecap Dakota	9. Bingwi Neyaashi Anishinaabek
19. Squiala	5. Kinistin	

Table 2: First Nations with Land Codes Under Development

BC	AB	MB
1. Akisqnuk	1. Tsuu T'ina	1. Long Plain
2. Chawathil	2. Alexis Nakota	2. Fisher River
3. Cheam	NS	3. Nelson House
4. Cowichan	1. Membertou	4. Norway House
5. Haisla	NL	5. Sagkeeng
6. Homalco	1. Miawpukek	SK
7. Katzie	NB	1. George Gordon
8. Komoks	1. Madawaska Maliseet	2. English River
9. Lower Nicola	ON	3. Mistawasis
10. Kwantlen	1. Chippewas of Kettle & Stony	4. Yellowquill
11. Lil'Wat	2. Chippewas of the Thames	QC
12. Metlakatla	3. Long Lake #58	1. Mashteuiatsh
13. Nak'adzli	4. Magnetawan	2. Abenakis de Wolinak
14. Neskonlith	5. M'Chigeeng	
15. Scowlitz	6. Temagami	
16. Shuswap	7. Beausoleil	
17. Shxw'ow'hamel	8. Pikwagnagan	
18. Soowahlie	9. Shawanaga	
19. Tahltan	10. Wasauksing	

Furthermore, he explained that independent studies by KPMG have found that First Nations responsible for their land management are more efficient than the Government of Canada for land transactions. Furthermore, studies found that no First Nations that have joined the First Nations Land Management Regime want to go back to the Indian Act system.

This is not to suggest that there are not challenges. In his presentation, Mr. Goulais talked about the growing interest by First Nations to join the new regime – with approximately 70 First Nations currently on a waiting list to begin the process. Many communities have limited capacity to develop and implement these new land management systems. In addition, the capacity of the resource centres established to support the process is stretched to provide communities with the necessary support to advance through the process of establishing their land management codes.

Bob Watts

In the final presentation, Bob Watts focused on several fundamental changes that are underway. He pointed to the imminent release of the final report by the Truth and Reconciliation Commission of Canada and the important lessons that still need to be learned from the past. Mr. Watts talked about the shift from a system designed based on an assumption of legal and racial superiority to a relationship of equals that creates space for First Nations laws and governance. He also discussed the fundamental changes taking place within communities, where there is more and more pride, expression of rights and a growing desire to have a say about their territories.

Mr. Watts then introduced the Harvard Project, which links indicators of well being of indigenous peoples in the United States to sovereignty and control of culturally appropriate institutions (not just acquiring other peoples institutions). He explained that, in the United States, the emphasis has been on a move to sovereignty. He goes on to argue that, although Canada has a different constitutional structure, there is still the flexibility to move to a relationship of equals. However, there are still different views both within and outside First Nations communities about how to achieve this. Some First Nations want a full departure from the Indian Act; while others believe this is best achieved one step at a time.

Mr. Watts points out that over the past couple of decades, there has been a renaissance of sorts. There are many communities that are doing well and we begin to see that there is a connection between these communities having control and their well-being. However, there are still gaps and, in some cases, those gaps are increasing. He goes on to make the point that there is still a lot of work to do.

Bob Watts finished by looking to the future. He suggested that we are living in an exciting time of reconciliation, efforts to find new ways to work together, and substantial work to create institutions that are important to First Nation communities. He observed that there are many new governance ideas being developed and implemented (including resource taxes, environmental law and development policies) that establish new fiscal arrangements that see money go back to First Nations. This paves the way for greater well-being in

communities. He argued that many of these ideas had their start during the Charlottetown Accord negotiations and he suggested that we will see more of these ideas coming to life in the coming years.

Roundtable Discussions Process

Following the presentations, session participants were invited to engage in small group discussions. To take full advantage of the diverse perspectives and expertise in the room, a mix of participants were assigned to each table and asked to consider one of the questions introduced in the discussion paper (Annex 2). Each group was asked to record and present their responses. The themes and issues raised as part of this exercise are presented in Annex 3.

Key Themes and Ideas

To close the session, Dr. Rick Van Loon summarized and commented on the common themes he observed during the session. This section integrates Dr. Van Loon's remarks with the material collected from the table discussions and the themes identified in the presentations.

Historical Context

Throughout the session, there was a recognition that the well-being of First Nations rests within the communities themselves. Communities' control of their own destinies is fundamental to their success. Furthermore, a defining condition of our collective progress is to acknowledge the mutual dependence that exists between First Nation communities and the broader Canadian population. There needs to be a willingness to work together to ensure one another's prosperity.

A theme during the session was that this mutual dependence is something that was understood during the earliest stages of the relationships between First Nations and early settlers – from exploring, to mapping, to resource extraction. During the first 200 years together, there was a recognition that those colonizing North America would not be successful without a partnership with First Nations. For a number of reasons, this relationship deteriorated in the early 1800s and resulted in a “dark ages” for First Nations. Indigenous peoples are still feeling the impact of this era, including substantial socio-economic and health challenges. This difficult period continued until 1969, when a strong reaction to the Government of Canada's White Paper, focused on assimilation, triggered an outright rejection of the trajectory of First Nations circumstances and their relationship with the Government of Canada. Since then, we have made slow and halting progress down a new path.

Incremental Change

Dr. Van Loon observed that the presentations and discussions did not concentrate on comprehensive land claims. He argued that complex jurisdictional, judicial and constitutional issues mire these large efforts and can be paralyzing. There was no doubt that First Nations do not want to remain under the Indian Act; however, questions remain about what to replace it with. For example, all communities can agree that child welfare laws and policies need to be changed, but there is no consensus on how to do this.

Instead, the discussions during the session focused strongly on tangible and practical initiatives, like taxation and land management. There was a recognition that the examples provided in the presentations and discussions were more immediate and concrete. There was a sense that the changes required will be more effective and sustainable with a step-by-step approach rather than a focus on a comprehensive “big bang” solution that is not meeting current needs and may not meet the future needs of First Nation communities.

“Just Do It” Approach

There was a general sense that there is a large range of possible approaches; however, participants gravitated towards finding solutions outside of the judicial system. There was a “just do it” mentality to the stories and examples shared by the presenters and recognition that lower profile, non-constitutional and experimental initiatives have been the most effective. These approaches are successful because they are not irrevocable and they can adjust and evolve to meet specific needs and as capacity grows. Furthermore, there needs to be room for flexibility to meet diverse needs and the ability to start with what we know. Mistakes are made and will be made, but the experiences of First Nations across Canada demonstrate that overall progress is being achieved.

First Nations will benefit most from the opportunity to draw from a variety of options. There was a sense that, rather than focusing on abolishing the Indian Act, it would be more effective to build the regulatory and policy framework that would leave the Indian Act threadbare, so it will “wither on the vine.”

Building Capacity and Acknowledging Challenges

This is not to suggest that, even with incremental change and a “just do it” approach, it is easy to find solutions or that there are not serious challenges. There was a realization that it is unproductive to assume that First Nations can or will progress at the same pace. Community readiness varies substantially across Canada. Therefore, the discussions highlighted that a focus on enhanced overall capacity is essential. First Nations need control to build the regulatory frameworks that will enable progress and also ensure that communities have the necessary authority and appropriate accountability to make and enforce the laws and policies. Participants also reflected on the importance of stability and transparency to ensure credible and sustainable regulatory initiatives are being developed and implemented.

Presenters and participants also struggled with the reality that there are a variety of factors outside a First Nation's control that can affect their overall success and well-being, including a community's location – its access to natural resources, markets, public services like education and health services -- and its population size. These primary factors can directly influence other importance factors, such as youth retention and entrepreneurship, which has a direct impact on community capacity and well-being.

Finally, the discussions highlighted that the capacity issues that constrain communities' success are not only within First Nations. In fact, achieving long-term success requires us to recognize that it is also the capacity issues faced by federal and provincial governments that create hurdles to realize the changes necessary to ensure the well-being of these communities.

Concluding Thoughts

Dr. Van Loon succinctly observed that the overall question that could best be used to frame the issues and ideas that emerged during this session are: What may be the many roads to community well-being? Dr. Van Loon concluded that the response uncovered during the session is that "the central role [of First Nations] is to make their own decisions supported by a solid, legitimate legal framework, which is culturally appropriate and enabled by a supportive environment." Solutions will not be found by unilateral efforts by federal and/or provincial governments to "fix" or change First Nation communities. The discussions throughout the session illustrate that, for many years, we in Canada have not done a very good job at this, but we are probably getting better.

Dr. Van Loon concluded that there are many reasons to be optimistic about the future and that there is a lot of good will that allows work to move forward. Slow progress is being made and there is every reason to believe that it will continue with the work of many of the people that participated in this session.

Annex 1: Speakers' Biographies



Speaker

Bob Watts' current projects include working on the Siting Process with the Nuclear Waste Management Organization and as an Adjunct Professor and Fellow in the School of Policy Studies, Queens University. He is a former CEO of the Assembly of First Nations and before that the Interim Executive Director of the Canada's Truth and Reconciliation Commission, which will examine and make recommendations regarding the Indian Residential School era and its legacy.

A former Assistant Deputy Minister for the Government of Canada, Bob is a graduate of the John F. Kennedy School of Government, Harvard University and Fellow at the Harvard Law School. Bob has taught, debated and lectured at a number of universities in Canada and the United States and at the Canada School of Public Service. Bob is from Mohawk and Ojibway ancestry and is a member of the Six Nations Reserve.



Speaker

Philip J. Goulais is currently the Director, Lands Advisory Board Eastern Region. In February 2007, Mr. Goulais developed his own Advisory & Contract Services, which he operates from his home at Nipissing First Nation. From August 2003 to 2006 he was the Chief of Nipissing First Nation.

Mr. Goulais served eight years as the Indian Commissioner of Ontario from February 1992 to March 2000, and was Grand Chief of the Robinson-Huron Territory from 1982 to 1988. He served as Chief of Nipissing First Nation from 1978 to 1992. One of Mr. Goulais major accomplishments was the 1994 Mississauga First Nation Land Claim Settlement Agreement.



Speaker

C.T. (Manny) Jules has dedicated over 30 years of his life to public service in support of Aboriginal issues. He is a member of the Kamloops Indian Band and served as Chief from 1984 to 2000. Mr. Jules led the amendment to the *Indian Act* in 1988 so that First Nations could exercise the jurisdiction to levy property taxes on-reserve. The Indian Taxation Advisory Board (ITAB) and the current First Nation property tax system were created as a result of his vision and efforts.

Mr. Jules served as Chair of ITAB from 1989 to 2003 and 2005 to 2007. He was the driving force behind the *First Nations Fiscal Management Act*, creating the First Nations Tax Commission. Mr. Jules was the recipient of an Honorary Doctorate of Laws from both the University of British Columbia in 1997 and Thompson Rivers

University in 2006, the Order of British Columbia in 2009, and the Queen's Diamond Jubilee medal in 2013. Mr. Jules is also a member of the Canadian Council for Aboriginal Business Hall of Fame



Speaker

Rick Van Loon was appointed President and Vice-Chancellor of Carleton University on August 1, 1996. He was reappointed for a four-year term on August 1, 2001 and retired in July 2005. He chaired the Council of Ontario Universities from 2003 to 2005.

He has held a number of senior positions with the federal government. Prior to his appointment at Carleton, Dr. Van Loon was Associate Deputy Minister, Health Canada for two years. Before Health Canada, he was Associate Deputy Minister of Indian Affairs and Northern Development. He has taught political studies at Queen's University and public administration and political science at Carleton University and the University of Ottawa. Richard Van Loon received his Ph.D. in political studies (1968) from Queen's University. He graduated with a Master of Arts degree in political science (1965) and a Bachelor of Science degree in chemistry (1961) from Carleton University.



Facilitator

Dr. Robert Slater is Adjunct Professor and Senior Distinguished Fellow in Environmental Policy at Carleton University and is the Executive Director of the Regulatory Governance Initiative. He is also President of Coleman, Bright and Associates, a consulting firm that operates internationally specializing in Sustainable Development issues and a Senior Fellow with the International Institute for Sustainable Development.

Dr. Slater occupied several senior positions during a 32-year career at Environment Canada and was the Senior Assistant Deputy Minister for eight years. He was instrumental in establishing the National Roundtable on the Environment and the Economy, the International Institute for Sustainable Development and the UNU Institute for Water, Environment and Health.

He was appointed a Member of the Order of Canada in 2009

Annex 2: Roundtable Discussion Questions

Given that enhanced First Nations governance and regulatory regimes contribute to the overall well-being of First Nations, select and answer one of the following questions:

1. Do the co-management boards created by modern treaties provide a model that could be adapted to deal with development decisions on First Nations' territories in the provinces?
2. How does Tsilhqot'in affect these matters across the country?
3. What is the range of regulatory measures taken to date by First Nations who are subject to the Indian Act? Do those who have opted out of some governance provisions, substituting their own regimes, have better economic control? (This is what the Harvard model would predict.)
4. What is the status of land management reform, and how is that working out?
5. How are First Nations in different situations dealing with 'boundary issues' --the interests and decisions of their non-First Nations neighbours?

Annex 3: Themes and Issues from Roundtable Discussions

