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A Tool for Designing or Assessing Appeal Systems in An Aboriginal Context

By John Graham

June 2011

About Patterson Creek Consulting Inc.

John Graham is the President of Patterson Creek Consulting Inc., which specializes in issues relating to Aboriginal Governance. Services include facilitation, policy research, evaluation, professional development courses, and governance workshops. These workshops focus on a variety of topics ranging from strategic planning to board governance to policy development. Mr. Graham defines governance as the structure, processes and rules that determine how families, organizations, governments and global entities make critical decisions. Governance determines who the decision makers are, whom they engage, and how they are held to account.

Good governance is a journey not a destination and revolves around five principles: legitimacy and voice, strategic direction, accountability, fairness, and performance. These principles are neither absolute nor watertight and are shaped by history, culture and technology in particular contexts.

Using these principles and linking them to day to day practice, Mr. Graham has conducted over 350 governance projects for a wide variety of clients including

- Inuit, Métis and First Nations organizations and governments federal, provincial and territorial governments
- industry associations
- school boards, and
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A Tool for Designing or Assessing Appeal Systems in An Aboriginal Context

I. Introduction

Appeal systems are critical elements of any court system in a liberal democracy. But they are also prevalent in all governments in regards to ‘administrative’ decisions. At the municipal level in Canada, citizens can appeal decisions relating to a range of issues from zoning to parking fines. At the provincial level there are appeal processes for among other things decisions on energy, environmental assessments, human rights, liquor licences, rental housing and securities. Similarly at the federal level, appeal tribunals abound and deal with a wide variety of issues: from refugees, pensions, transportation, parole, staff relations, patent medicines, industrial relations, competition to radio and television.

Appeal systems can also be found in non-governmental bodies – for example, in organizations established to regulate professions such as lawyers and doctors.

While less prevalent in Aboriginal organizations and governments, formal appeal mechanisms have also had, at least in some instances, a reasonably long history. For example, the *Indian Band Election Regulations*, established pursuant to the *Indian Act*, have an appeal procedure. Another long standing example is the Metis Settlements Appeal Tribunal (MSAT), established by an act of the Alberta Legislature in 1990.

Recent self-government agreements and other pressures promise to make appeal systems play an increasingly important role in Aboriginal governance. To give one example, the self-government agreement that the Tsawwassen First Nation negotiated has this commitment under its governance section¹:

13. Tsawwassen First Nation will establish procedures for appeal or review of administrative decisions made by Tsawwassen First Nation or a Tsawwassen Public Institution

Consequently in its Education, Health and Social Development Act, passed in 2009 pursuant to this self-government agreement, the Executive Council of the Tsawwassen First Nation undertook to “... by regulation establish a procedure for the appeal of a decision not to provide, to discontinue or to reduce assistance under...[each of the Act’s major sections]”².

¹ <http://www.tsawwassenfirstnation.com/finalagreement.php>

² http://www.tsawwassenfirstnation.com/tfnlaws/education_health_social_development_act.php

Another example of the growing pressure for appeal systems comes from the Office of The Federal Interlocutor (OFI). As a part of its funding support for the development of Metis registry systems, OFI is expecting recipients to develop appeal mechanisms for membership and harvester matters.

Given the growing importance and prevalence of appeal systems in Aboriginal governments and organizations, the objective of this publication is to provide a useful tool both to those who are charged with designing new appeal systems or conversely those asked to evaluate existing systems. It has three principal sections. The first (Section II) focuses on the question: “what are the critical elements that should make up an appeal system?” Section III then takes up the question: “What criteria might be useful in judging whether an existing or newly designed appeal system meets the test of good governance?” In the final section (Section IV), the focus is on applying the frameworks developed in the previous two sections to an actual appeal mechanism.

II. Elements of an Appeal System

From a literature review and discussion with experts in the field, there appear to be at least eight elements that make up an appeal system:

- **Legislative or Policy Base** – what is the legal mechanism for establishing the appeal system and that provides for its powers
- **Goals** – what is the system trying to accomplish; how would one judge success or failure
- **Scope** – what types of decisions are subject to appeal; what is the trigger for an appeal; who is eligible to make an appeal
- **Structures** – what body or bodies will conduct the appeal; how are the individuals making up these bodies chosen; what are the powers and authorities of these bodies; can their decisions be appealed; what dispute resolution instruments can this body or bodies employ
- **Process** – how does an individual go about making an appeal; what documents are required; how does the individual appellant communicate with the appeals body; how is the result of the process communicated
- **Prevention Measures** – what measures are in place to ensure that the large majority of disputes are adequately dealt with by the administrative body itself so as to keep the number of formal appeals, especially those with a win/lose type outcome, to a minimum; and for the appeal body, what other types of dispute resolution mechanisms in addition to formal arbitration are available to minimize win/lose outcomes
- **Organization Arrangements** – how will the appeals body be accountable to the appropriate political leadership
- **Communications** – how is the existence of the appeal system and its accessibility communicated to possible appellants

Therefore, the first question to ask in designing or assessing an appeal system is whether all eight elements described above are present.

III. Characteristics of Sound Appeal Systems

The next critical question is how to identify a good or sound appeal system. An appeal system is also a governance system and consequently the five UN-based principles for sound governance – legitimacy, fairness, performance, vision and accountability should be relevant³. Using these five principles, this section identifies the critical characteristics of a sound appeal system.

Legitimacy

From an appellant's point of view, an appeal system would have legitimacy if it exhibits at least three characteristics. The first is independence from the administrative body whose decision is under appeal. The second is the competence and integrity of those involved in the deliberations of the appeal body. And the third is cultural relevance. That is, the system should have some cultural resonance with the community it seeks to serve. Absent any of these characteristics, an individual might well view any attempt at making appeal as not worth the effort.

Fairness

Fairness in an appeal system should produce the following characteristics:

- Accessibility – the individual is aware of the appeal option and how to make an appeal; further the cost in terms of time and money is not prohibitive
- Timeliness – the appeal process does not take an inordinate amount of time ('justice delayed is justice denied')
- Procedural fairness – appellants should have ample opportunity to make their case
- Protection of Privacy – the potential appellant should agree to the appeal process having access to personal information; further, the appeals body should respect relevant privacy legislation. For administrative bodies not part of the federal or a provincial government, the relevant legislation will be the *Personal Information Protection and Electronic Documents Act*.

Performance

Performance in a well-functioning appeal system should have at least three characteristics – efficiency in the use of resources; effectiveness, that is, the achievement of objectives; and a

³ For a discussion of these principles, see John Graham et al, "Principles for Good Governance in the 21st Century", <http://pattersoncreek.ca/policy-briefs/principles-for-good-governance-in-the-21st-century>

sustainable funding source. In terms of efficiency, an appeal system, among other things, should deal with frivolous appeals in an expeditious manner. Further there should be effective preventive measures adopted by the administrative body itself so as to keep the number of appeals referred to the appeal body to a manageable number and to minimize the win/lose outcomes. Such measures might include:

- Clearly communicated requirements for what is needed to gain a favourable administrative decision
- Helpful tools for applicants to develop the necessary documentation for an application to the administrative body
- Well trained staff proficient in handling ‘difficult’ individuals and in providing assistance to applicants
- Follow-up procedures in place for unsuccessful applicants to the administrative body

To further enhance the efficient use of resources, the appeal body should have an array of dispute resolution options (e.g. investigations, mediation) in addition to formal hearings to reduce costs and minimize win/lose outcomes.

In terms of effectiveness, the system should provide some finality to the appeal in that an appellant does not feel inclined to pursue other avenues like the provincial court system. In addition, there should not be some unintended consequences which are negative – for example using the appeal system for purposes for which it was not intended.

Finally, a sound appeals mechanism must have a sustainable funding source, one that at the same time ensures the independence of the appeal body. Without sustainable funding, an appeal system will have difficulty, among other things, in attracting and retaining competent members and staff.

Accountability

Sound accountability invariably involves transparency. It should also mean effective accounting for the resources and authorities granted to the appeal body. One example of transparency is the publishing of the results of the decisions rendered by the appeal body. Accounting for resources and authorities might imply some annual reporting to appropriate governing bodies.

Strategic Vision

The appeal system should conform to the overall strategic vision of the organization or government. This would usually imply maintaining Aboriginal control of critical decisions. Further, the appeal system might be designed in such a way as to offer opportunities for expansion under a self-government regime into a full blown Aboriginal judicial system. Finally, the appeal system should fit with the desire to have the determination of certain administrative decisions – for example, the determination of citizenship or the adjudication of election disputes - to be governed by the principle of political neutrality.

Summary

The table below provides a summary of the characteristics of a sound appeal system and the relationship of these characteristics to internationally recognized principles of sound governance.

Principles of Sound Governance	Characteristics of Sound Appeal systems
Legitimacy	<ul style="list-style-type: none">• Independence• Competence and integrity• Cultural relevance
Fairness	<ul style="list-style-type: none">• Accessibility• Timeliness• Procedural fairness• Protection of Privacy
Performance	<ul style="list-style-type: none">• Efficiency• Effectiveness• Sustainable funding
Accountability	<ul style="list-style-type: none">• Transparency• Accounting for resources & authorities
Strategic Vision	<ul style="list-style-type: none">• Aboriginal control• Potential expansion under self-government• Political neutrality

In the Section which follows, the above frameworks become useful tools for both describing a Métis appeal system – in this case the Metis Settlements Appeal Tribunal - and for assessing its soundness.

IV. Using the Framework: Metis Settlements Appeal Tribunal

The Metis Settlements Appeal Tribunal (MSAT) is an appropriate candidate to test out the frameworks developed in this note for several reasons. First, MSAT has been in existence for over two decades and as such has considerable history and experience on which to base an assessment including several evaluations, the principal results of which are part of the public record. Second, there exists an extensive amount of information on MSAT that is publicly available. For example, the Institute on Governance published on its web site a series of working papers which help to situate MSAT within the broader framework of Metis self-government in Alberta⁴. Further, MSAT itself has an excellent web site with significant material on which to base an assessment⁵.

That said, this assessment relies wholly on information on the public record. A more comprehensive assessment would be based on, among other additional methodologies, extensive interviewing of MSAT members and staff, Metis political leaders, other Metis stakeholders and Alberta Government officials. Such methodologies are beyond the scope of this note.

Elements of an Appeal system

MSAT, a quasi-judicial tribunal, was created by the *Metis Settlements Act*, adopted by the Alberta Legislature in 1990. Its mandate is to “exercise its powers and carry out its duties with a view to preserving and enhancing Metis culture and identity and furthering the attainment of self-governance by Metis Settlements under the laws of Alberta”. More specifically, MSAT mission is “...to strengthen Metis self-governance and to preserve and enhance Metis culture and identity by resolving disputes through effective, fair, culturally appropriate mediation, adjudication and education initiatives”⁶. Currently MSAT’s annual budget of roughly \$1 million⁷ comes through the Minister responsible for Metis Settlements. MSAT has a full time staff of seven.

The MSAT’s scope consists of 23 different areas of authority including “... land disputes, right of entry orders, election of General Council⁸ officers, timber disputes, membership disputes and

⁴ This publication is now available at www.pattersoncreek.ca. See “Advancing Governance of the Metis Settlements of Alberta: Working Papers”, March 2007. MSAT is described on pages 9-12.

⁵ www.msat.gov.ab.ca

⁶ “MSAT Business Plan for 2010-2013”, available at the MSAT web site.

⁷ This figure doesn’t include the cost of office space.

⁸ The Metis Settlements governance system consists of eight Settlements, each with a Council, as well as a regional government called the Metis Settlements General Council, made up of representatives from the Settlement Councils, who in turn elect a number of officers.

oil and gas matters. The areas of authority grow, or shrink, depending on the introduction of new laws and contracts that name MSAT or the amendment of current laws and contracts that remove MSAT as the dispute resolution body.”⁹ In 2009, MSAT reported close to 1400 initial contacts.

MSAT has a number of ‘tools’ at its disposal to resolve disputes falling under its mandate. These include investigations, mediation, conciliation and formal hearings.

The structure of MSAT is laid out in the 1990 *Metis Settlements Act*. MSAT consists of at least seven people. These include a chairman picked by the Minister from a list provided by General Council, three appointees by General Council, and three appointees by the Minister—at least two of whom cannot be settlement members. Because MSAT had the power to determine compensation for surface access by oil and gas operators, the Act also provided for an Existing Leases Land Access Panel within MSAT that would deal with these issues.

In summary, the *Metis Settlements Act* provides for the establishment of MSAT, sets out its broad objectives and scope and determines its structure - four critical elements in any appeal system.

In terms of the other four elements that make up an appeal system all are present:

- Process – MSAT’s web site provides extensive detail on the organization’s three step process: i) intake and investigations; ii) mediation and hearings; and iii) make and distribute the decision
- Preventive measures – the MSAT uses investigations, conciliation and mediation as strategies for resolving disputes on a more amicable, win/win basis. What is not clear from the public record is whether the Settlement Councils or General Council have formal plans in place to help them resolve or prevent disputes.
- Organizational Arrangements – MSAT uses a variety of accountability measures including business plans, annual reports, community visits and meetings with the Minister and Metis Settlement leadership, seven year performance reviews, and publishing its decisions
- Communications – the web site is a major element of MSAT’s communication approach. Other elements include community newspapers and visits, school visits, and investigation of social media (developing a Facebook presence)

In sum, MSAT appears to have all of the eight elements of an appeal system in place.

Good Governance Criteria

Given that the MSAT has all of the elements of an appeal system, the next question is how MSAT stacks up to the criteria developed from the good governance principles.

⁹ “MSAT Business Plan for 2010-2013”, op. cit. P. 2

The general answer to this question is very well indeed albeit with a few areas of concern, principally related to independence, scope and Metis control. These concerns surfaced in several reviews. The first occurred in 1999 when the Minister and General Council set up a joint task force to review its progress and consider its mandate.¹⁰ It found that “...MSAT was doing a good job, its mandate should be expanded to cover more self-governance matters, and the appointment process needed to be de-politicized. The Report included draft legislation designed to achieve these objectives. With minor modifications this draft legislation was incorporated into the 2004 amendments to the *Metis Settlements Act*. These particular amendments, however, have yet to be proclaimed”¹¹.

In 2003, four years after the Task Force report, MSAT conducted its own internal review of operations. It found that over its seventeen years of existence the Tribunal had been called upon to resolve everything from builder’s lien problems to disposition of estates. The vast majority of these (89%) had been about land and membership issues. In the last year, however, 23% had related to other types of issues—often complaints about local governance practices. MSAT’s lack of mandate to deal with these governance issues showed the need to implement the recommendations made in 1999 by the Task Force.

The study also pointed out the problems of running a quasi-judicial body in a situation where administrative decisions—budget, hiring, and firing—were made by the Department within the Alberta Government responsible for the Settlements rather than MSAT. This was seen as a serious obstacle to the independence and “judicial” responsibilities of the Chair. The Province’s view appears to be that, since it provides all of MSAT’s funding, it is obligated by the *Financial Administration Act* to maintain authority over the budget and administration.

With these reviews as background, here is a brief summary on each of the characteristics of a sound appeal system identified in Section III, recognizing the limitations of not having access to a current and comprehensive evaluation of MSAT, based on other lines of evidence, including interviews.

- **Independence** – as noted above, financial control of the budget by the provincial minister is a concern. MSAT has procedures in place so that staff or members are excluded from working on cases affecting their particular settlements
- **Competence and integrity** – MSAT has adopted a Code of Conduct and has procedures in place to orient any new members and staff. Further, the method of choosing members is likely superior to other options such as allowing each Settlement Council to choose MSAT members. Its current business plan notes that it is working with General Council and the Government of Alberta to develop a “Mandate and Roles Document”. Among other things, this document might clarify “existing or new competency guidelines for MSAT members”. MSAT also has in place a training budget for members

¹⁰ Task Force To Review The Mandate Of The Metis Settlements Appeal Tribunal: Final Report; June 30, 1999

¹¹ “Advancing Governance of the Metis Settlements of Alberta: Working Papers”, op. cit.

and staff. One of its performance measures is “Core competencies of Board and staff are enhanced”.

- **Cultural Relevance** – Its legislative mandate, vision and mission statements all make reference to the importance of preserving Metis culture and identity. In its 2009 Annual Report, MSAT notes its commitment to using mediation and other forms of dispute resolution. Mediation, MSAT believes, “...promotes understanding amongst participants about the (cultural and family) values, identity, needs and priorities of others.”
- **Accessibility** – one of MSAT’s three objectives in its Business Plan for 2010-2013 is “increased presence” through enhancements to the web site, use of social media, use of community newsletters, community meetings and moving MSAT offices to a better location
- **Timeliness** – another of MSAT’s Business Plan objectives is to “resolve all disputes in a timely, cost effective, fair and independent manner” through community-based approaches that promote conciliation and mediation of disputes; developing and applying procedures that enhance efficiency of decision-making processes; and evaluation of core competencies and training to improve competencies
- **Procedural fairness** – MSAT has in place a number of documents on its web site outlining its procedures
- **Protection of privacy** – MSAT is subject to the province’s privacy legislation
- **Efficiency** – see timeliness criteria above. One of its performance measures is that “disputes are routinely resolved without having to go to a hearing”. The 2009 Annual Report notes that MSAT’s use of conciliation reduced its case load by 25%.
- **Effectiveness** – see timeliness criterion above. MSAT’s Annual Reports provide considerable evidence of organizational effectiveness.
- **Sustainable funding** – MSAT does have a sustainable funding source, the provincial government. Nonetheless a concern is that this funding source is not Metis controlled.
- **Transparency** – A third objective in its current business plan is to meet “all statutory and other obligations jointly set out by the Metis Settlements General Council and the Government of Alberta” through issuing business plans, annual reports and other reporting documents in a timely fashion; and supporting the development of appropriate Mandate and Roles Document
- **Accounting for resources and authorities** – see Transparency criteria above. The Metis Settlements Act requires the MSAT on or before March 31 in each year to give to the Minister and General Council an annual report showing the nature of its activities, the general manner in which it has dealt with them, and any other matter that the Minister directs. The Minister must table the report in the Legislature.
- **Aboriginal control** – the budgetary process and the authority of the Minister to choose a number of the MSAT members is a concern. That said, the 2009 Annual Report notes that all seven members of the Tribunal are Metis, an asset according to MSAT, given

“...the Appeal Tribunal’s mandate to exercise its powers and duties with a view to preserving and enhancing Metis culture and identity and furthering the attainment of self-governance by Metis Settlements under the laws of Alberta”.

- **Potential expansion under self-government** – The reviews noted above have highlighted areas of possible expansion. There is considerable flexibility in the manner in which MSAT has been structured to allow it to take on new responsibilities. It is also noteworthy that one of its principal outcomes as described in its Business Plan for 2010-2013 is to “become the dispute resolution body of first choice for the Metis Settlements and their stakeholders”. In this regard, only one MSAT ruling was granted leave to appeal by the Alberta Court of Appeal in 2009. And even here, MSAT worked with the appellant to have the matter returned to the Tribunal for a re-hearing.
- **Political neutrality** – this is a clear objective of MSAT that is reflected in many of its documents including its Code of Conduct.

Conclusion

Despite the limitations of this assessment, a fair conclusion is that MSAT stacks up very well with the characteristics of a sound appeal system. The public record indicates that it is aware of all of these characteristics and committed to meeting them. Concerns related to independence, Metis control and scope are embedded in its legislation and largely beyond its immediate control.