

The Congress of Aboriginal Peoples

The Congress of Aboriginal Peoples (CAP) was founded in 1971 as the Native Council of Canada (NCC) and represents and advocates for the collective rights of the Metis, Non-Status and registered Indians living in urban, rural and remote areas throughout Canada.

The Congress of Aboriginal Peoples is a national organization made up of Provincial and Territorial Organizations. Membership is open to persons of Aboriginal ancestry no matter where one resides.

A common view of non-native people is that Indian peoples are all registered under the *Indian Act*, live on reserves and enjoy the benefits of the Indian Act. The reality is that of a total of 1,300,000 or so persons in Canada of Indian ancestry, only 29% live on reserves, and of those in the total number who are registered Indians, over half live away from reserves. These numbers are not invented or pulled out of a hat, they stem from Statistics Canada's 2001 Census.

These are among the conditions we are mandated to address, that is, to represent the interests of the "Forgotten People". CAP's mandate is twofold: to advance the social, cultural and economic well-being of the off-reserve Indian and Metis segments of the Aboriginal population; and secondly, to advocate just recognition of their Aboriginal rights.

In order to fulfill our mandate, we must develop new political power-sharing arrangements with governments, arrangements which include us as equals in the decision-making process of decisions which impact our lives, arrangements which are not based on assimilation and control but on accommodation and consociation – arrangements which emphasizes mutual rather than unilateral dependence, sharing rather than taking and controlling.

Our participation in the Governance Initiative is very much influenced by these thoughts, and we see the inclusion of off-reserve status Indians in the Band governance process as a small but necessary important step toward achieving a new approach to Aboriginal affairs in Canada based on political power-sharing.

Phase II – Information Sessions

Upon conclusion of the 2002-2003 DIAND/CAP Comprehensive Governance Funding Agreement, CAP and its affiliates began preparing and organizing individual information sessions on proposed Bill C-7 to reach as many as CAP's off-reserve constituents as possible to inform them of the amendments to the Indian Act. In total,

CAP PTO's conducted 90 information sessions and approximately 4,400 participants attended these sessions.

This particular Phase was an important exercise in that it gave CAP and its PTO's the ability to inform the off-reserve constituents of the amendments, the ways in which these amendments might affect them, which in turn gave them the ability to take position and make up their own minds with respect to the proposed Bill. In contrast to groups who boycotted the process, it is fair to say that the off-reserve members have been empowered by acquiring knowledge that others chose to ignore.

These information sessions were conducted in parallel with regional representatives from DIAND, who presented the Department's view and position on the proposed amendments and a CAP representative, who also made presentations but from an off-reserve perspective.

The CAP Governance presentation (**appendix A**) contained three aspects: a general overview of the key areas of change, a comparative analysis of the *Indian Act* vis-à-vis the *FNGA* and an off-reserve perspective to the amendments.

CAP Fundamental Principles

The term "self-government" contains the right for Aboriginal people to organize themselves, determine their own methods of leadership selection, whether by elections, custom or otherwise, requires the governing body to be accountable to all their members and gives them the right to negotiate the jurisdiction of powers with the federal and provincial governments. More importantly, self-government gives Aboriginal people the right to determine who their citizens are or will be. The 1996 Royal Commission on Aboriginal Peoples' Report made a clear distinction between the spheres of Aboriginal jurisdiction; the core and the periphery. The core included, "all matters of vital concern to the life and welfare of a particular Aboriginal people, its culture and identity". The *FNGA* offers communities certain tools of governance but excludes the most fundamental one, citizenship.

The federal government says that the *First Nations Governance Act* will not affect Aboriginal and Treaty rights, including the inherent right of self-government. It also states that the *First Nations Governance Act*, "...would provide an interim step towards self-government".

The Congress of Aboriginal Peoples recognizes that the Government of Canada views Bill C-7 as an interim step towards self-government for *Indian Act* communities and does not want to engage in a more comprehensive reform of the *Indian Act* at this time nor a complete overhaul of the *Indian Act* and we also recognize that accountability, inclusion of off-reserve member voting in band elections, access to information, and redress amongst others, are all important issues that need to be addressed but CAP does not feel that piece-meal reform will best serve the interests of off-reserve Aboriginal people.

Aboriginal peoples of Canada have the inherent right of self-government. These rights are affirmed and protected by s.35 of the *Constitution Act*, 1982. The term “governance” implies that a group is “governed” but Indian status and membership issues are not addressed in the *FNGA*. The Government of Canada states that the tools in the *FNGA* are true governance practices yet the holders of the “effective tools of governance” cannot even decide upon who the “governed” are. Furthermore, the Minister of Indian Affairs has repeatedly stated that status and membership issues falls outside what RCAP called the “core jurisdictional issues” of governance but rather these issues falls into the periphery or secondary issues.

The Congress of Aboriginal Peoples is in disaccord with these kinds of statements. This puts CAP in the difficult position of having to defend our issues and participation given the Minister’s current mandate while at the same time, supporting measures in the *FNGA* that appeal to certain parts of CAP. On the one hand, we are opposed to piece-meal reform and the narrow scope of issues that are reflected in the *FNGA* and on the other, we must constantly defend our position because of our participation in the initiative and that is, to serve the interests of the off-reserve members.

Appearance before the Standing Committee on Aboriginal Affairs and Natural Resources

Bill C-7 was differed to the Standing Committee on Aboriginal Affairs and Natural Resources prior to second reading. The Committee was mandated to recommend changes to Bill C-7 and is near completion of tabling their report. The main purpose was to give Aboriginal people, organizations, communities and individuals the opportunity to appear before the Committee to raise their concerns with the *FNGA* to attempt to effect greater change to the legislation.

CAP appeared before the Standing Committee on Aboriginal Affairs on January 28, 2003. We gave the Committee a brief overview of our organization, mandate, constituency and specifically offered six recommendations for change to Bill C-7. These included:

1) The inclusion of a non-derogation clause (specifically, JMAC option #6). As it currently stands, there is a clause in the preamble that states, “this Act nor the *Indian Act* is intended to define the nature and scope of self-government”. Minister Nault instructed the Joint Ministerial Advisory Committee (JMAC) members that this legislation was not to infringe upon Aboriginal or Treaty rights. The advise and recommendation JMAC offered in this regard was to include a non-derogation clause and that this would be the only way to achieve the objective sought by the Minister.

Past and current legislation regarding Aboriginal people in this country included no-derogation provisions, offering protection that Aboriginal and Treaty rights would not be infringed. If a non-derogation clause is not included in the Bill, many people may very well question the Minister’s intentions and open up the whole process to scrutiny. If the Minister’s most fundamental instruction was to accord greater protection to Aboriginal

and Treaty rights, then there is a clear need for a non-derogation clause as recommended by JMAC.

The argument is that if there is a lack of a non-derogation clause, the legislation may very well be saying and interpreted by the Department of Justice that it is intended to infringe upon Aboriginal and Treaty rights.

Since 1998, the wording of non-derogation clauses unilaterally have been changed by the federal government. Recent comments by Aboriginal Senators are concerned that this has not only created uncertainty but also risked giving direction to the courts to somehow limit consideration of s.35 rights when interpreting the impacts of legislation. CAP agrees with this line of thinking and has argued and will continue to argue that properly worded non-derogation clauses, plays an important role in Aboriginal legislation.

2) Need to treat s.74 *Indian Act* bands and customary bands equally in the *FNGA*.

Current s.74 *Indian Act* bands and custom bands are treated differently in terms of access to select their leaders by means of custom in the *FNGA*. *Indian Act* bands currently selecting their leaders by means of elections will be restricted to elections in *FNGA*. Therefore, they cannot revert or convert to customary methods. Conversely, current custom bands can continue their customary methods or convert to elections.

Considering this differential treatment between current s.74 *Indian Act* bands and custom bands in terms of access to custom under s.5 *FNGA* may be discriminatory and become vulnerable to an equality challenge under s.15 *Charter*.

Furthermore, s.5(1)(d) of *FNGA* requires for secret ballot voting. Secret ballot voting may contradict Aboriginal culture, which is protected under s.35 of the *Constitution Act 1982*.

3) More direction be given to bands in allowing/disallowing the off-reserve members' right to vote (“balancing issue”).

In *Corbiere*, the court stated that bands may balance the different interests of on and off-reserve members when it comes to voting. *FNGA* does not indicate how to balance these rights nor does it lay out any criteria. S.5(5) *FNGA* gives bands great discretionary powers to potentially interfere with constitutionally protected rights of off-reserve members. Constitutional law has not been favourable to giving large discretionary powers to administrative entities. The *Book* case states that “clear lack of structures to follow may be an indicator that it’s unconstitutional”.

Many off-reserve band members complain that band councils ignore their rights and are treated differently than their on-reserve counterparts. The *Corbiere* decision noted how off-reserve band members were subject to discriminatory treatment in denying them the right to vote. If *FNGA* gives bands discretionary powers in this regard, the potential for band councils to continue discriminatory treatment of off-reserve members may be inevitable and give rise to more litigation.

It is important that band councils and the federal regulations (which have not yet been drafted) strongly take into consideration the rights of off-reserve members and that this legislation will not subject them to the treatment they have historically experienced due to past federal legislation. The *Corbiere* decision was not very enlightening in this regard but it did state the following:

“...what is necessary is a system that recognizes non-residents’ important place in the band community...However, without violating s.15(1), the voting regime cannot, as it presently does, completely deny non-resident band members participation in the electoral system of representation. Nor can that participation be minimal, insignificant or merely token”.

CAP views the wide discretionary powers accorded to band councils in the *FNGA* to be contrary to the Supreme Court of Canada’s comments in the *Corbiere* decision. As the wording suggests, the wide discretionary powers will lead to the continuation of denying rights for off-reserve members.

4) The discretionary powers of the Minister in the *FNGA* must be clearly defined and that monies subject to interference not include treaty entitlements that are protected by s.35 of the *Constitution*. Another fundamental principle the Minister instructed the JMAC was that he wanted his role and that of the Governor-in-Council diminished. S.10(3) *FNGA* gives the Minister great discretionary powers to intervene in band affairs if he considers it necessary when carrying out an assessment of a band’s financial position.

There is no requirement that “remedial measures” taken by the Minister be proportional to the situation in question, that the measures be limited in time, or that the measures be graduated with the frequency of situations giving rise to the concerns. S.10(3) *FNGA* goes well beyond INAC’s current administrative practices in that there is no gradual intervention. Currently, INAC’s policy requires:

- The preparation of a remedial management plan;
- An appointment of co-managers; and
- An appointment of third party managers.

Diminishing the role of the Minister is not the case when it comes to potential negative financial situations of a band. Instead, his power is retained and larger than his power in the *Indian Act*.

Another issue that deserves attention is band monies. Some of the band monies that are subject to an intervention by the Minister come to bands pursuant to Treaty.

These treaty entitlements are constitutionally protected under s.35 *Constitution* and interference with these monies requires justification with strict terms, as noted by the *Sparrow* and *Marshall No. 1* decisions.

The courts may very well conclude that the wide power of the Minister, without definable limits is inconsistent with s.35 of the *Constitution*.

5) Further consultations take place with respect to amending the by-law making powers, including the search and seizure powers because of the potential *Charter* challenges it may entail. Under *FNGA*, a band enforcement officer can enter any place, any time, carry out any inspection, copy and remove any document. There is no requirement of a “probable suspicion”.

S.8 of the *Charter* states that searches must be reasonable and reasonable searches must be warranted.

In these circumstances, the officer’s powers arise for the purpose of verifying compliance with a band law. There is no requirement that the band officer have any suspicion that a band law is being violated, let alone a reasonable or probable suspicion.

The Minister stated during the FNGI consultation process that the by-law making powers would not be amended and JMAC members did not discuss the issue at length due to the Ministers instructions. The first and subsequent drafts of *FNGA* included these amendments without proper consultation.

6) Clear lack of an independent institution to perform various tasks previously held by the Minister and Governor-in-Council. The notion of an independent institution carrying out various tasks facilitating governance structures is not a new one. It is a notion that Aboriginal Peoples have been striving for but with no success. It is a notion that Aboriginal Peoples see as a vehicle promoting good governance and limiting interference from INAC in their internal affairs.

The Minister instructed JMAC that he wanted his current powers diminished. JMAC recommended that the Minister establish an independent institution to carry out the activities the Minister held under the *Indian Act* to diminish his role as much as possible, given the current mandate.

The Royal Commission on Aboriginal Peoples (RCAP) recommended that the federal government, in co-operation with national Aboriginal organizations, establish an Aboriginal institution or transition centre with a mandate to:

- research, develop and co-ordinate initiatives and studies to assist Aboriginal peoples throughout the transition to Aboriginal self-government on topics such as citizenship codes, constitutions and institutions of government, as well as processes for nation rebuilding and citizen participation;
- develop and deliver, through appropriate means, training and skills development programs for community leaders, community facilitators and

field workers, as well as community groups that have assumed responsibility for animating processes to rebuild Aboriginal nations; and

- facilitate information sharing and exchange among community facilitators, leaders and others involved in nation rebuilding processes.

If the intent of the Department and the Minister is to implement this legislation as an interim step leading towards self-government, then it is imperative that an independent institution be created to achieve those goals.

An office of an ombudsperson is also needed to perform the duties of hearing complaints from band members against band councils. This is especially needed for the off-reserve members who have always been treated differently and in discriminatory ways by their band councils. The ombudsperson would offer band members an effective and inexpensive recourse against unfair decisions or discriminatory actions by band councils.

To this day, the only recourse against these types of actions is to appear before the courts and the clear downfall to this process for Aboriginal Peoples is that it is time consuming, expensive and has shown to be ineffective because of the lack of knowledge from many courts to Aboriginal law and Aboriginal issues.

The creation of an independent institution with an office of an ombudsperson, as recommended by the JMAC, RCAP and other Aboriginal Organizations in the past, including the CAP would perform the duties facilitating, implementing and effectively achieving good governance practices.

Off-Reserve Members

Although Phase II was strictly an information-sharing Phase on Bill C-7, much of the information sessions, in practice, were twofold: information/analysis on the proposed Bill and lengthy Q & A periods on issues not reflected in the Bill.

Most off-reserve members throughout the country see Bill C-7 and the issues it addresses as needed and important but for the most part, remain unaffected by the proposed changes to the *Indian Act*. Many of the changes revolve around accountability and local administrative practices. The proposed amendments do not directly affect the off-reserve members as was hoped in Phase I Consultations.

New accountability measures, redress mechanisms, voting purposes, access to information and the conditions for the adoptions of codes are issues, which will affect the off-reserve but outstanding issues such as band membership/citizenship, Indian status, new band creation, potential models of self-government in urban settings, and Nation Recognition amongst others, are not reflected in the Bill.

There has been no commitment from the Minister on what the future might hold for the off-reserve members – those who have been consulted on this Bill but who's issues

remain unaddressed. The lack of commitment by the Minister to deal with these issues has been front and center throughout the country. The lack of commitment that a total overhaul of the *Indian Act* or even another round of reform has not been addressed and this underlying theme is what we've heard during the information sessions.

Most off-reserve members are encouraged that such measures of accountability, redress and leadership selection amendments are reflected in the *FNGA* but they need that assurance that they will not be left in the cold for another generation.

It was approximately 17 years ago that the *Indian Act* was last amended and the fastest growing Aboriginal population in Canada does not want to wait another 20 years before their issues are dealt with.

The off-reserve have noted the potential danger in CAP's participation in the FNGI. They see the potential danger that CAP, as an organization is being used to promote the federal government's Aboriginal agenda. CAP has repeatedly stated that participation does not necessarily equal support and that our participation in the FNGI is serving the interests of our constituents and we will continue participating when doors are opened and we will continue fighting to participate whenever doors are shut.

The repeal of the *Indian Act* from the *Canadian Human Rights Act* is a major step forward but without a clear reference in the interpretation clause, the repeal is broad and vague and is difficult to assess what it may entail. CAP is currently doing some work on this issue and will offer further comments in the future.

Many off-reserve members question the Minister's intention of imposing legislation as a one-size-fits-all model. They see the benefit and minor increase in power of allowing bands to design their own codes but the 2-year transition period is too ambitious, given the financial situation of most bands across the country. Many expect the short transition period to be the cause of bands having to settle for the default provisions. An opt-in clause similar to the *First Nations Land Management Act* would remedy this situation.

Many also question why the proposed Act restricts access to customary leadership selection methods as an option. This means that if a band currently selects their leaders by means of elections, they can only continue electoral methods in the future. This basic principle does not reflect many Aboriginal cultures and restricting access may constitute equality challenges under the *Charter*.

CAP held its Annual General Assembly in early November 2002, where the CAP Governance Coordinator gave an in-depth presentation of the *FNGA*, analysis of the Bill, explanation of the proposed amendments, potential Charter challenges that may arise in the future and briefed the CAP delegation on the regulatory phase of *FNGA*. CAP sought direction at their AGA regarding the upcoming participation of CAP in the drafting of federal regulations. This phase will be important from an off-reserve perspective to ensure that the regulations comply with the *Corbiere* decision, do not interfere with

constitutionally protected rights of the off-reserve and that the regulatory-making process include on the whole, off-reserve members' input.

The CAP Governance Legislative Secretariat also worked closely with its PTO's in the preparation of information sessions and presentations to the Standing Committee. On-going communications and liaison work by CAP and its PTO's played a major role in reaching out to the communities and to the off-reserve constituency. The overall success of this FNGI Phase can largely be credited to this fact.

Given the Standing Committee's work is still on-going, CAP cannot enter into any discussions at this time on the regulatory phase with DIAND as this would formulate a breach of Parliamentary Privilege but we are encouraged that we will be an integral part of this process as our proposal sets out.

At this time, it is difficult to predict specifically what will have to be done over the course of the next few months. If the Standing Committee on Aboriginal Affairs recommend that there should be further amendments to the proposed Bill and the Minister accepts these recommendations, CAP will see the need for the CAP GLIS to go back to the communities and inform the off-reserve members of these changes. If on the other hand, no further amendments take place, CAP foresees the drafting of the federal regulations to take place sooner rather than later.

In the Spring of 2002, Minister Nault invited CAP to develop and propose a workplan to focus on specific issues of Indian Status and Membership, Nation Recognition, the Indian Act and its relationship to the inherent right of self-government and the future of INAC's Post-Secondary Education Assistance Program.

A workplan was prepared and submitted to the Department, which proposed to hold Special Meetings for the fiscal year 2002-2003. This plan was for DIAND/CAP to engage in joint policy development work under the 1998 CAP/Canada Political Accord but it seems the Minister's invitation fell through the cracks of the Department and never resulted in anything concrete. As mentioned in CAP's Governance Interim Report, CAP was notified on August 27, 2002 that DIAND was unable to pursue the CAP proposal but would re-consider it at a later date. CAP will continue pursuing this issue most likely on a Ministerial basis for the primary reason that it was the Minister himself who extended the invitation of opportunity for CAP and because it was the Minister's aides who outlined to CAP the specific issues for joint policy development work.

Finally, CAP would like a timely commitment that this initiative is not the end, that this initiative is only the beginning of something greater, more meaningful. In the interim, CAP has begun drafting an "Aboriginal Nation Recognition Act". The genesis of this work follows RCAP recommendations of Nation recognition. It would allow for the true historical First Nations to be recognized by the Canadian federation. This exercise would promote the amalgamation of bands to come together, work together and re-build their respective Nations as they should be.

Aboriginal Nation Recognition Act

This draft legislation (**Appendix B**) would not be the first of its kind. Bill C-52, *An Act Relating to Self-Government for Indian Nations* was prepared following the recommendations of the Penner Report. The primary reason this Bill was never enacted into legislation was because it was restricted to the current Indian Act communities. Bill S-14, *An Act Providing for Self-Government by the First Nations of Canada*, provided for greater powers of self-government but again, only for recognized Indian bands. However, many of the provisions were taken into account in drafting this legislation, along with RCAP recommendations and current International Law, providing the basis for listing the governmental powers that an Aboriginal nation could exercise as a result of its inherent right powers. The most useful legislation used in drafting this model however, was the American Bill S-611, *Indian Federal Recognition Administrative Procedures Act of 1999*. This legislation provided a useful guide that was largely adopted to meet the unique circumstances of Canadian Aboriginal politics and legal status. Much of the process provisions were borrowed from the American Bill and more specifically, the provisions dealing with the criteria that an Aboriginal nation must satisfy in order to acquire recognition, was based on the American Bill.

Background

The first premise is the proposition that Aboriginal nations are an integral and necessary part of the Canadian federation. The legal status of an Aboriginal nation would be equivalent to that of a natural person.

The second premise is that Aboriginal Nations are vested with the inherent right to self-determination, relating to their internal and local affairs.

Proof & Criteria

In this model, a date had to be identified as the starting date for which an Aboriginal nation has to prove existence, which we call a “qualifying period” test for continuity of existence, which we set at 30 years. This qualifying period begins with the assumption that allows Aboriginal communities to evolve, amalgamate and reconfigure over time. It allows for an Aboriginal community of individuals with a variety of backgrounds to come together and form new, more meaningful communities. It allows for urban communities to form a nation provided such a community has cohesiveness and a common identity for at least 30 years.

Membership Identity Step

From the perspective of CAP, a preliminary step is needed before an Applicant Aboriginal group can apply for Nation Recognition Status. The preliminary step is a

requirement for the Aboriginal Nation to first obtain a “Certificate of Full and Fair Representation”. In order to obtain this certificate, the Aboriginal Nation must satisfy the Commission that it has notified all potential interested parties, including individuals that identify with the Aboriginal group but do not have official recognition as a member.

The underlying reason for this preliminary step is because of the historical impact that the Indian Act has had on Indian identity and status and is designed to ensure that the Aboriginal Nation is a true reflection of its membership based on inherent principles of identity.

Independent Commission

An independent Commission would be created by both the federal cabinet and major Aboriginal Organizations. The Aboriginal Organizations would offer its recommendations on potential appointments and the federal cabinet would choose 3 commissioners to form the Commission.

Role of Commission

The Commission would serve 3 major roles. The first role is to act as a tribunal in accessing whether an Aboriginal Applicant should be granted a Certificate of Full and Fair Representation. The second is a temporary one; for the first 5 applications, the Commission makes the decision of whether to grant recognition. Once 5 Aboriginal Nations have been successful, they in turn form the “Nations Council of Canada” and they determine successive applications. The role of the Commission at that point is to act as a Secretariat to the Nations Council of Canada. The third role of the Commission is to facilitate the resolution of disputes and to recommend to an Aboriginal Applicant what measures are needed to ensure an application is as complete as possible before adjudication for Nation recognition.

Structure of Proposed Act

The Act begins by setting out important definitions of what an “Aboriginal community” and “effective date” are, which are used as key terms throughout the Bill. Followed are sections of the scope, purpose and general principles guiding the Act. These sections assist in the interpretation of the overall intent of the Act.

Most of the draft legislation is concerned with the substantive recognition of Aboriginal Nations and the criteria that applicants must satisfy to gain recognition.

An appeal section is also included for circumstances where an Aboriginal applicant is denied a Certificate of Fair and Full Representation. However, as proposed in the Bill, appeals on decisions of Nation recognition would not be permitted.

Finally, the last part of the draft focuses on transitional and implementation provisions including the requirement for the federal government to negotiate agreements for

determining budgets, other financing needs and clarifying jurisdictional issues. Government powers of a particular Nation takes precedence in current International Law and guiding principles and it is for this reason that the latter has been useful in drafting this model.

Conclusion

The purposes of the Aboriginal Nation Recognition model is to identify and formulate an Act that will meet our concerns, offer remedies to our issues and would be one that would garner support from other national organizations and the federal government. The attached draft, as currently structured was designed to be an inclusive piece of legislation, while at the same time, being rigorous in application so that the Aboriginal Nation recognized at the end of the day is a true reflection of the people that comprise the nation.

We acknowledge that this draft is still a work-in-progress and needs further thought and attention but CAP believes this may very well lay the foundation of serious discussion and negotiation to come with the federal government and other interested parties. It is an idealistic piece of legislation but an ideal can reach its destiny when serious people work together.

With respect to Phase II of FNGA, it is CAP's hope that the Standing Committee offers its recommendations for change and that many of those reflect CAP's recommendations as a lot of hard work, reflection and expertise stemming from different backgrounds was put in the overall analysis of the First Nations Governance Act. The performance and role of CAP's participation in the FNGI process was positively supported at the 2002 Annual Assembly of the Congress. The CAP believes that the whole process to date is a small and important step in the right direction but more joint policy work needs to be done in the months and years to come. CAP is the national voice of off-reserve Aboriginal people with respect to national policies, including the *FNGA* and we will continue fulfilling our role in that regard.