

Presentation on proposed *Bill C-7* to the:
**Standing Committee on Aboriginal Affairs and Natural
Resources**

by

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It's a Question of Fairness!

Check Against Delivery

Mr. Chairman, Members of the Standing Committee.

Thank you for the opportunity to speak with you on the proposed First Nations Governance Act.

I would like first, to introduce, Frank Palmater, Vice-Chief of the Congress of Aboriginal Peoples and Patrick Brazeau, who coordinates the work on the First Nations Governance file undertaken by us and our affiliate organizations across 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 who are Metis and Indians living away from reserves in cities, towns and rural areas across Canada.

A common view of Indian peoples is that they 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 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 a just recognition of their Aboriginal rights.

I am firmly in the view that in order to fulfill our mandate, we must develop a new political power-sharing, arrangement with governments, an arrangement which includes us as equals in the making of decisions which impact our lives, an arrangement which is not based on assimilation and control but on accommodation and consociation – an arrangement, in a nut-shell, 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.

Copies of our information kits have been distributed to you containing useful information about the Congress of Aboriginal Peoples, programs and projects in which we are involved, data on our off-reserve constituents and milestones of our 30-year history.

Following Phase I consultations, Minister Nault established the Joint Ministerial Advisory Committee in November 2001 to provide a report, including recommendations for the Minister to consider for proposing amendments. JMAC completed its work in March 2002 and tabled its final report to the Minister.

The Congress of Aboriginal Peoples appeared before the Standing Committee on Aboriginal Affairs and Natural Resources on March 19, 2002, giving a brief history on:

- our organization; the individuals we represent;
- the programs and initiatives we were working towards;
- the partnerships we were establishing with various governmental departments; statistics on the Aboriginal reality in Canada; and

- an in-depth overview of our participation in the First Nations Governance Initiative consultations.

All of this information can be found in your kits.

On June 14, 2002, Bill C-61 was introduced in the House of Commons and differed to this Committee prior to Second Reading.

Now we stand before you today to discuss our remaining issues with the proposed Bill, which has been reinstated as Bill C-7.

Taking what we heard in Phase I consultations and having participated in the Joint Ministerial Advisory Committee, let us now focus on the recommendations we offer this Committee for your consideration.

1. There is a clear lack of a non-derogation clause in the proposed Bill.

Minister Nault instructed the JMAC members that this legislation was not to infringe upon Aboriginal and Treaty rights. The advice JMAC offered the Minister 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, which we concur with. *We recommend* that a non-derogation clause, specifically, non-derogation option #6, as recommended by JMAC be included in the Bill.

2. Differential treatment of bands in *FNGA* in terms of having access to custom as a means of selecting their leaders.

The FNGA allows only those bands currently operating under customary selection to continue those practices. The current INAC policy allows s.74 election bands to convert or revert to customary methods of leadership selection. Election regimes were historically used to promote assimilation and to replace the customary methods.

We recommend that the window of opportunity for s.74 election bands remain, to convert to customary methods of selecting their leaders, with the approval of both on and off-reserve members.

3. The “balancing” issue of on and off-reserve members has not been resolved in the proposed *Act*.

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.

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”.

We recommend that more direction be given to bands in allowing/disallowing the off-reserve members’ right to vote. A system is needed where both on and off-reserve members will decide upon how to effectively balance these rights to limit future Charter challenges.

4. Wide powers of Minister in intervening in band affairs with respect to potential financial difficulties of a band.

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.

Currently, INAC's policy requires:

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

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

CAP recommends that the discretionary powers of the Minister in the *FNGA* be clearly defined and that monies subject to interference not include treaty entitlements that are protected by s.35 of the *Constitution*.

5. *FNGA* confers broad search and seizure powers.

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.

It is our view that the search and seizure powers are far too broad and could be subject to abuse.

CAP therefore recommends that 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.

6. There is a 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 practices has been one 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.

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 recommended that the federal government, in co-operation with national Aboriginal organizations, establish an Aboriginal institution.

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 these goals.

Furthermore, 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 too often 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.

CAP recommends 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 to perform the duties facilitating, implementing and effectively achieving good governance practices.

These are the recommendations we offer this Committee for your review and consideration to effect positive changes.

How does the CAP view this Bill?

It is certainly not our preferred approach to the many issues brought upon us by the Indian Act, but the reality is that this piece of legislation is the only option on the table at the moment and when given the opportunity to participate in such reform, we must address the needs of our constituents and fully participate.

Otherwise, we wouldn't be doing ourselves any justice for which we have been organized to do over the past 30 years.

The political and social reality affecting Aboriginal Peoples in this country is based by and large on the Indian Act and the reserve system. Programs and services are aimed at the reserve communities. Aboriginal rights do not stem from reserve communities, and this Bill affects on-reserve members of bands as well as those off-reserve.

Aboriginal Peoples in this country are the only citizens who do not have mobility rights. This means that once an Aboriginal person leaves the "reserve community", this person basically loses most rights of being an Aboriginal person. A question we often ask ourselves is why are we continuously being exposed to outdated colonial ways of thinking and oppressed by federal legislation in the twenty-first century?

But this broader issue is not part of the Minister's mandate at this time and we, as an organization and as Peoples understand that. However, we believe that it is worth mention and important to note that issues such as membership/citizenship, nation recognition, potential models of self-government in urban settings and new band creation amongst others, should become the government's priorities in the coming years for reform in order to give tangible meaning to s.35 of the *Constitution*. After all, it is simply a question of fairness!

We have offered this Committee, recommendations for your review and consideration in the hope that you will make some positive changes to the proposed Bill.

We have outlined problems and shortcomings within certain sections of the proposed Bill in respect to future potential *Charter* challenges that can be avoided by the power this Committee has in effecting change.

As the Chief Justice of the Supreme Court of Canada once stated, “Let’s us face it, we are all here to stay”. It is precisely those words that our organization believes in, that the only way to effect positive change in this country for all Aboriginal Peoples is to work in partnership with governmental departments and other Canadians.

In order for our People to benefit, we at the Congress of Aboriginal Peoples must participate and contribute, and we will continue doing so in the years to come to work towards our common purpose.

Thank you for your time and I’d like to invite any questions you may have.

Wela’lin.

APPENDIX I

JMAC NON-DEROGATION OPTION

Non-Derogation Option #6

For greater certainty, nothing in this Act shall be construed so as to abrogate or derogate from any existing aboriginal or treaty rights of the Aboriginal peoples of Canada under section 35 of the Constitution Act, 1982.

