

Reforming the *Indian Act*:

First Nations Governance and Aboriginal Policy in Canada

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This essay analyzes the Canadian government's recent efforts to reform the federal Indian Act, a colonial-era statute regulating First Nations life on reserve. The First Nations Governance Initiative suggests that the federal government is still having difficulty coming to terms with the contemporary policy framework in which First Nations – federal government relations operate. The paper looks at Indian Act reform from a historical perspective and explains the impact of more recent developments including the Corbiere decision. The Department of Indian Affairs' efforts to consult with First Nations in the Governance Initiative are explored, as are the effects federal efforts have had on First Nations organizations and the positive development represented by the "Joint Ministerial Advisory Committee" approach to Aboriginal policy-making. The substance of current Indian Act reform proposals is also assessed. Although the author argues that modernizing band governance under the Indian Act as an interim capacity-building measure is an idea with some merit, he concludes that the shortcomings found in Bill C-7 call into question the legality and morality of proceeding with the current proposal.

I INTRODUCTION: FIRST NATIONS GOVERNANCE AND ABORIGINAL POLICY IN CANADA

On March 29, 2001, the Minister of Indian Affairs and Northern Development, the Honourable Robert Nault, announced the Canadian federal government's intention to amend the *Indian Act*¹ by the end of 2002 and replace its "governance" sections with a *First Nations Governance Act*.² Although this schedule has proven too ambitious, a bill ("Bill C-7") has now been introduced³ and referred to the House of Commons Standing Committee on Aboriginal

1. R.S.C. 1985, c. I-5.

2. Indian and Northern Affairs Canada, News Release, "Minister Nault Launches Communities First" (30 April 2001), online: First Nations Governance, Archived News Releases <http://www.fng-gpn.gc.ca/MR_APR30_e.html> (date accessed: 1 July 2003). A brief note on terminology: in this essay, the law reform process instituted to reform the *Indian Act* and implement the *First Nations Governance Act* [*FNGA* or *Governance Act*] will be referred to as the "First Nations Governance Initiative," the "FNGI," or the "Governance Initiative." With respect to the department's name, there appears to be a completely arbitrary alternation between "Indian and Northern Affairs Canada" ("INAC") and the "Department of Indian Affairs and Northern Development" ("DIAND") in government documents and in the literature. Both names will be used in this essay.

3. See Bill C-61, *An Act respecting leadership selection, administration and accountability of Indian bands, and to make related amendments to other Acts*, 1st Sess., 37th Parl., 2002 (1st reading 14 June 2002). This bill was reinstated as Bill C-7 in the 2nd Sess., 37th Parl., 2002 (1st reading 9 October 2002), online: Parliament of Canada, House of Commons, Government Bills <http://www.parl.gc.ca/37/2/parlbus/chambus/house/bills/government/C-7/C-7_1/C-7_cover-E.html> (date accessed: 1 July 2003).

Affairs (“SCAA”) before second reading⁴ to allow for what the Minister has called “as much discussion as possible.”⁵ In light of the controversy generated by this latest attempt⁶ to reform the colonial-era *Act*, which was originally designed to allow the Canadian government to control “almost every important aspect of the daily lives of Indians on reserve”⁷ pursuant to its constitutional jurisdiction

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4. The objective of this uncommon parliamentary procedure is to allow for greater consultation and input in the drafting of the bill before the House of Commons debates its principles and policy rationale upon second reading (which will now likely take place in the fall of 2003). According to M. P. Raymond Bonin, who tabled the Standing Committee’s report in the House of Commons on May 28, 2003,

the committee held a total of 61 hearings on this bill from January 27 to May 27, 2003, travelled over a period of four weeks from Prince Rupert, British Columbia to Halifax, Nova Scotia hearing from more than 531 witnesses. The committee then sat for a cumulative total of 131 hours on clause by clause alone, the longest number of hours in Canadian parliamentary history.

See *House of Commons Debates* 107 (28 May 2003) at 1520 and House of Commons, Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources, “Fourth Report, Bill C-7, an act respecting leadership selection, administration and accountability of Indian bands, and to make related amendments to other acts”, online: Parliament of Canada, 37th Parl., 2nd Sess., House of Commons, Committee Reports <<http://www.parl.gc.ca/InfoComDoc/37/2/AANR/Studies/Reports/AANRRP04-e.htm>> (date accessed: 27 June 2003) [hereinafter “SCAA Bill C-7 Report”]. For a list of amendments being proposed at the report stage, see House of Commons, Notice Paper 110 (3 June 2003), online: Parliament of Canada, House of Commons, Order Paper and Notice Paper <http://www.parl.gc.ca/37/2/parlbus/chambus/house/orderpaper/110_2003-06-03/ordrs110-E.htm> (date accessed: 2 July 2003) at VIIff. Both the Standing Committee’s Report and the list of proposed amendments can also be found online at First Nations Governance, Standing Committee <http://www.fng-gpn.gc.ca/stcmte_e.html> (date accessed: 27 June 2003).

5. Minister Nault’s full comment was:

The *First Nations Governance Act* continues to follow a unique path through Parliament, designed to bring about as much discussion as possible as to how the Bill can and must be improved; I fully embrace the call for amendments to Bill C-7, and purposefully chose a legislative path which encouraged participation, discussion and changes to the draft legislation.

INAC, News Release, “Statement by Robert D. Nault—First Nations Governance Legislation On Track” (15 May 2003), online: First Nations Governance, News Releases <http://www.fng-gpn.gc.ca/NR_15mai03_e.html> (date accessed: 1 July 2003).

6. The *Indian Act* was last substantially amended in 1951 to eliminate restrictions on traditional dances, somewhat reduce the Minister’s powers (e.g. expropriation), reform membership and status practices (to the detriment of women), and incorporate provincial laws of a general nature (today s. 88). RCAP characterized these changes as returning “Canadian Indian legislation to its original form, that of the 1876 *Indian Act*.” Cf. Canada, *Report of the Royal Commission on Aboriginal People: Looking Forward, Looking Back*, vol. 1 (Ottawa: Supply and Services Canada, 1996), online: Indian and Northern Affairs Canada, Culture and History Publications <http://www.ainc-inac.gc.ca/ch/rcap/sg/cg_e.html> (date accessed: 1 April 2003) [hereinafter *RCAP Report*] at c. 9, s. 11 and J. Leslie and R. Maguire, *The Historical Development of the Indian Act*, 2d ed. (Ottawa: Indian and Northern Affairs Canada, 1978) at 149ff. More recently, former Minister Ron Irwin attempted to have a regime of optional replacement provisions enacted in 1997 (Bill C-79), but this bill died in the face of significant First Nations opposition when an election was called in the spring of 1997. Other efforts to overhaul the *Act* include Liberal efforts in 1983 following publication of the *Penner Report*, *infra* note 112 and the 1969 *White Paper*, *infra* note 50. Small amendments, however, have successfully been made to the *Act*, including Bill C-31 in 1985 (restoring status to Indian women who had lost it due to the *Act*’s patrilineal status provisions), and Bill C-115 in 1988 (on band council taxation powers—the “Kamloops” amendment).
7. *RCAP Report*, *ibid.* at c. 9, s. 8.

with respect to First Nations,⁸ discussion and due consideration are of the utmost importance. For despite widespread Aboriginal agreement that the *Indian Act* is an anachronistic, paternalistic and discriminatory piece of legislation that was drafted with no real consideration of Crown – First Nation treaties or the inherent Aboriginal right to self-government, many First Nations' members and leaders remain strongly opposed to this latest effort to update the statute.

The reasons for this policy paradox lie in the broader context of Aboriginal law and Canadian politics at the beginning of the 21st century. With the rise of First Nations nationalism and the successes of Aboriginal rights advocates in constitutional,⁹ legislative,¹⁰ and judicial¹¹ fora over the last 30 years, there has been a shift in the Canadian government's Aboriginal policy.¹² As a result, older

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8. In Canada, s. 91(24) of the *Constitution Act, 1867* (U.K.), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5 grants the Parliament of Canada exclusive jurisdiction to make laws in relation to "Indians, and Lands reserved for the Indians."
 9. The *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11 [hereinafter *Constitution Act, 1982*] included s. 35(1), which states that "[t]he existing [A]boriginal and treaty rights of the [A]boriginal peoples of Canada are hereby recognized and affirmed." The 1992 Beaudoin-Dobbie Report (Canada, Special Joint Committee of the Senate and House of Commons, *A Renewed Canada* (Ottawa: Supply and Services Canada, 1992)) and the *Consensus Report on the Constitution* (or "Charlottetown Accord" of 28 August 1992), meanwhile, proposed constitutionally entrenching "the inherent right to self-government within Canada" for Aboriginal peoples. Although the Charlottetown Accord failed in a Canada-wide referendum, Kent McNeil claims this effort nonetheless amounted to "a major step towards the decolonization of the Canadian Constitution." See K. McNeil, "The Decolonization of Canada: Moving Towards Recognition of Aboriginal Governments" (1994) 7 *Western Legal Hist.* 113 at 132.
 10. In the wake of the Charlottetown Accord's failure, the newly-elected Liberal federal government decided in 1995 to offer bands and/or groups of bands constituting First Nations the opportunity to negotiate self-government agreements which would become constitutionally entrenched as modern-day treaties under s. 35 of the *Constitution Act, 1982*. As of 2002, only one such agreement has been signed (with the Nisga'a First Nation in British Columbia); however, self-government negotiations continue at 80 tables (involving more than half of all First Nations and Inuit communities) in a variety of contexts (from comprehensive land claims to sectoral initiatives). See Canada, INAC, *Federal Policy Guide, Aboriginal Self-Government: The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government* (Ottawa: Minister of Public Works and Government Services Canada, 1995), online: Indian and Northern Affairs Canada, Publications <http://www.ainc-inac.gc.ca/pr/pub/sg/plcy_e.html> (date accessed: 1 July 2003) [hereinafter *Inherent Right Policy*] and Canada, INAC, "Status Report on Aboriginal Self-Government" (Fall 2001), online: First Nations Governance, Resource Material <http://www.fng-gpn.gc.ca/RM_SGSR_e.html> (date accessed: 1 July 2003) [hereinafter "Status Report"].
 11. Leading Canadian Aboriginal law cases include *Calder v. B.C. (A.G.)*, [1973] S.C.R. 313 (confirming the existence of Aboriginal title in Canada independent of the *Royal Proclamation, 1763*, R.S.C., 1985, App. II, No. 1, where title had not been extinguished); *Guerin v. The Queen*, [1984] 2 S.C.R. 335 (asserting the Crown's fiduciary relationship with Aboriginal peoples in land alienations); *R. v. Sparrow*, [1990] 1 S.C.R. 1075 (requiring that extinguishment of Aboriginal rights be express and defining the scope of s. 35 of the *Constitution Act, 1982*); and *Delgamuukw v. British Columbia*, [1997] 3 S.C.R. 1010 [hereinafter *Delgamuukw*] (admitting Aboriginal oral histories as evidence in asserting Aboriginal title).
 12. For a paradigm-based understanding of Aboriginal policy, see S. Weaver, "An Assessment of the Federal Self-Government Policy" in A. Morrison and I. Cotler, eds. *Justice for Natives: Searching for Common Ground* (Montreal and Kingston: McGill-Queen's University Press, 1997) 111 [hereinafter "Assessment of Federal Self-Government Policy"], where she outlines three distinct Aboriginal policy paradigms: (1) a historic assimilationist framework based on the *Indian Act*, a

understandings of the First Nations – Euro-Canadian relationship premised upon the desirability of the former’s eventual integration into the latter’s society have given way to the realization that Aboriginal difference is a reality to be respected and accommodated by contemporary policies.¹³ In terms of law reform, however, the question of how best to bring Canada’s colonial-era institutions and policy legacies into line with contemporary norms has proven daunting in its theoretical and practical complexity. As Sally Weaver put it, “[t]he current turbulence in the Indian policy field in Canada is due not to the government’s adherence to old modes of thinking and acting—modes that ‘brought us the problems’ in the first place— but to the co-existence of old and new paradigms and the continuing tensions between them, as the old ways of thinking gradually give way to the new.”¹⁴ Although the federal government has recognized the existence of an inherent Aboriginal right to self-government,¹⁵ the First Nations Governance Initiative (“FNGI”) indicates that it is still having difficulty coming to terms with what this approach implies for reforming existing policies, institutions and laws like the *Indian Act*.

To understand the challenges faced by the Canadian government in advancing the FNGI, I argue that the problem of *Indian Act* reform must be understood as one of clashing Aboriginal policy frameworks. In looking at the Governance Initiative, it appears that this problem plays out on at least three levels—conceptual, substantive and procedural. As far as the first of these is concerned, I argue that the Department of Indian Affairs and Northern Development (“DIAND”) has failed to make the case that its proposed *Governance Act* is unrelated to the inherent Aboriginal right to self-government. It has tried to do so with reference to the *substance* of the reform, by arguing that bolstering band council democracy, expanding band council powers, and clarifying the legal status of bands amount to interim “good governance” capacity-building measures. But for many First Nations’ leaders, the great *procedural* lengths to which DIAND has gone in its “Communities First” consultations belie this assertion. They argue that the federal government is clearly trying to ensure that it is in a strong position to defend the *Governance Act* from future constitutional attacks by being able to demonstrate that it

patron-client relationship, etc.; (2) a “White Paper” era assimilationist paradigm premised upon colour-blind equality and aiming at eliminating the Aboriginal – federal government relationship; and (3) the modern self-government paradigm. See also S. Weaver, “A New Paradigm in Canadian Indian Policy for the 1990s” (1990) 22:3 *Can. Ethnic Stud.* 8 [hereinafter “New Paradigm”] and M. Howlett, “Policy Paradigms and Policy Change: Lessons From the Old and New Canadian Policies Towards Aboriginal Peoples” (1994) 22 *Policy Studies J.* 631 [hereinafter “Policy Paradigms and Policy Change”].

13. Normative arguments supporting this proposition can be found in C. Taylor, “The Politics of Recognition” in A. Gutmann, ed. *Multiculturalism and the Politics of Recognition* (Princeton: Princeton University Press, 1992) 25 and W. Kymlicka, *Multicultural Citizenship* (Oxford: Oxford University Press, 1995) at 107ff.

14. “New Paradigm”, *supra* note 12 at 10

15. See discussion of the *Inherent Right Policy* above at note 10.

engaged in the thorough consultation likely required to justify the measure.¹⁶ As a result, many chiefs and other community leaders have been reluctant to participate in the federal consultations—lest they find themselves stuck with a federally-regulated governance regime that stymies their inherent right to self-government. And finally, returning to the conceptual level, Aboriginal rights advocates argue that even if the *Governance Act* is a temporary measure, it is still intolerable. For nothing, it can be argued, is more central to exercising the right of self-government than a community's choice of government institutions and processes.

To explain why current efforts to reform the *Indian Act* have proven so contentious, I will examine these issues by looking at several different aspects of the FNGI. First, I will briefly catalogue the genesis of the Governance Initiative, focusing on both longer-term arguments in favour of *Indian Act* amendment and more recent developments surrounding the *Corbiere* decision.¹⁷ This part will also explain how pressure to increase the accountability of First Nations has come to dominate the Governance Initiative—in the form of a “good governance” agenda. Turning next to DIAND's consultation process, I will analyze First Nations' constitutional concerns about amending the *Indian Act* and explore the source and significance of divisions among national First Nations organizations regarding their participation. The positive development represented by the recent “Joint Ministerial Advisory Committee” approach to Aboriginal policy-making will also be considered at this point. Third, I will examine the four main issues on the table in the Governance Initiative to see how the debate over these reforms has evolved, and to assess the merit and legitimacy of Bill C-7's proposals. Finally, I will draw together the arguments made in this essay with a concluding discussion of some of the broader conceptual issues raised by the FNGI. While the current formulation of *Governance Act* proposals and the nature of consultations undertaken in drafting Bill C-7 undoubtedly pose major problems and call into question the legitimacy and constitutionality of this initiative, I believe that interim, capacity-fostering governance legislation can be a helpful step towards self-government and nation rebuilding. But success in this respect will require a higher standard of good-faith conduct from both DIAND and First Nations, and a commitment from the former to make measurable progress in dealing with outstanding self-government and other claims.

16. The section 35 “Aboriginal rights” issue will be discussed in greater detail below in Part III, “The Importance of Consultations in Aboriginal Policy-Making.”

17. *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 [hereinafter *Corbiere*]. In this case the Supreme Court of Canada found the *Indian Act*'s requirement that band members reside on reserve to be eligible to vote in band elections inconsistent with the *Charter of Rights and Freedoms*' s. 15 equality guarantee. The case is discussed below in Part II, “*Corbiere* and the Concerns of Off-Reserve First Nations.”

II ORIGINS: REASONS FOR REFORM OF THE *INDIAN ACT* IN THE GOVERNANCE INITIATIVE

Current arguments in favour of reforming the *Indian Act* fall into two categories: those which have been around for a long time and more recent pressures. I will deal with the former before turning to the latter.

The *Indian Act* is an Anachronistic and Incoherent Statute Whose Reform is Long Overdue, but there are Difficulties in Agreeing on a Transition to Self-Government

The most obvious argument in favour of reforming the *Indian Act* is that it is an outdated, paternalistic piece of colonial-era legislation whose reform is long overdue. When it was enacted in 1876 by a young Dominion Parliament, the *Indian Act* was designed to consolidate and revise all existing statutes dealing with Indians and, consistent with the colonial norms of the day, regulate almost every significant aspect of First Nations life on reserve. The *Act* made no reference to existing treaties, and instead continued policies articulated in the 1869 *Gradual Enfranchisement Act*,¹⁸ the 1860 *Indian Lands Act*¹⁹ and the 1858 *Gradual Civilization Act*,²⁰ including federal control and regulation of band government, status and membership determination, reserve land distribution, the management of Indian funds and enfranchisement, and the alienation of reserve lands (a protective feature subsequently watered down to facilitate the expropriation of reserves adjoining towns). Native Canadians were viewed as wards of the state whom the federal government was responsible for protecting and “civilizing.”²¹

Although one might imagine that such a statute would be intolerable today, the *Indian Act* has maintained most of its structure and defining features, as noted above.²² The result, according to the current Assistant Deputy Minister of DIAND, is an *Act* that

is silent on a wide range of topics one would usually find in a statute that governed the relations between a government and those it served. Over the years, these gaps have led to the development of an amalgam of partially relevant *Indian Act* provisions and numerous *ad hoc* regulations, guidelines, policies, procedures and contractual agreements, many of which are not standardized, lack statutory authority

18. *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act*, 31 Vict., c. 42, S.C. 1869, c. 6.

19. *An Act respecting the Management of the Indian Lands and Property*, Statutes of the Province of Canada 1860, c. 151.

20. *An Act to encourage the gradual Civilization of the Indian Tribes in this Province, and to amend the Laws respecting Indians*, S.C. 1857, c. 26.

21. See generally Leslie and Maguire, *supra* note 6 at 52ff. and *RCAP Report*, *supra* note 6 at c. 9, ss. 8-9.

22. See note 6.

or which serve to undermine the community control and accountability that are essential for effective governance.²³

Not only are these inconsistencies confusing for citizens, thus rendering a complex statute even more opaque, they also significantly complicate statutory interpretation for legal practitioners and those involved in the administration of First Nations.²⁴

Despite widespread consensus that there are significant conceptual and technical problems with the current *Indian Act*, however, consensus on how to “update” it has been difficult to achieve, as the efforts noted above indicate.²⁵ While negotiating self-government agreements and abolishing the antediluvian *Act* arguably constitute the preferred approach under prevailing norms, such a bold response is precluded in the short term by several important considerations. These include the legal constraints established to protect Aboriginal peoples (*i.e.*, the federal government’s fiduciary duties to First Nations), the *Constitution Act, 1982*’s entrenchment of Aboriginal and treaty rights, “knock-on” effects for the coordination of related federal and provincial policies, the current institutional incapacity of many *Indian Act* bands to effectively govern themselves, and the costs associated with negotiations. (I will discuss these issues in greater depth below.) Furthermore, pressing social problems on

23. Asst. Dep. Minister W. Johnson, “Communities First: First Nations Governance (Under the *Indian Act*)” (Pacific Business and Law Institute Conference, Vancouver, 19 April 2001) [unpublished], online: First Nations Governance, Resource Materials <http://www.fng-gpn.gc.ca/RM_PresWJ_e.html> (date accessed: 1 July 2003).

24. The former Director of Policy in the Self-Government Sector of DIAND (1987-1990), Simon McInnes, commented a few years ago at a conference that:

I did not appreciate how the *Indian Act* functioned until I was at a meeting a few weeks ago with a high-priced Bay Street lawyer representing an Indian band, and he confessed that the first time he read the *Indian Act*, he took it literally. He was then amazed to find out that what it says is not what it means and that there are an army of professionals who spend their life telling us what the *Indian Act* says. It is a very confusing piece of legislation, completely out of date, drafted in the colonial period, and probably the only piece of legislation in Canada which still harps back to a colonial era.

See “Canadian Policies for Native Self-Government” in A. Morrison and I. Cotler, eds. *Justice for Natives: Searching for Common Ground* (Montreal and Kingston: McGill-Queen’s University Press, 1997) 106.

25. See note 6. Interestingly, one of the problems with the *Indian Act* being debated in the Governance Initiative, namely s. 67 of the *Canadian Human Rights Act*, R.S.C. 1985, c. H-6 [hereinafter *CHRA*], arose out of 1977 discussions relating to reform of the *Indian Act*. Section 67 excludes the *CHRA* from applying to the *Indian Act* “or any provision made under or pursuant to that *Act*.” This “temporary” clause was included when the *CHRA* was enacted in 1977 because the “issue of *Indian Act* discrimination against women was being contested in the courts and before the United Nations Human Rights Committee” at the time, and “the government of the day wanted to forestall complaints to the Commission pending discussion with the [A]boriginal leadership on how to amend the *Indian Act*.” See “Submission of the Canadian Human Rights Commission to the Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources, Bill C-7: *First Nations Governance Act*” (Ottawa, 28 January 2003), online: Canadian Human Rights Commission, Legislation and Policies <<http://www.chrc-ccdp.ca/Legis&Poli/C7/MemoireC7SubmissionP1.asp?l=e>> (date accessed: 1 July 2003).

reserves are putting significant public pressure on the federal government to “deal with the Indian problem” as opposed to washing its hands of it.²⁶

The upshot of these conflicting pressures on the federal government has been the elaboration of various capacity-building policies designed to facilitate the transition from a colonial *Indian Act* regime to a First Nations self-government framework. In the wake of the federal government’s 1995 response to the Royal Commission on Aboriginal Peoples (“RCAP”), *Gathering Strength*,²⁷ and its commitment to renewing its partnership with Aboriginal peoples, the preferred way of proceeding has been in cooperation with Aboriginal leaders. Among the most important efforts in this regard was the recent Assembly of First Nations (“AFN”) / DIAND “Joint Initiative on Policy Development (Lands and Trust Services (“LTS”))” (“Joint Initiative”). This AFN-driven effort at Aboriginal policy elaboration was launched in 1998 and involved conducting research into local land and resource management problems encountered by Indian bands in DIAND’s day-to-day administration of the *Indian Act*, which mainly occurs through the 21 LTS business lines. A variety of reports, proposals and policies aimed at transferring greater control of LTS activities to First Nations emerged from this process.²⁸

When it came time to review the Joint Initiative in the spring of 2001, however, DIAND pulled the plug despite widespread praise for the program among AFN leaders and a desire to renew it.²⁹ This decision appears to be related to differences of opinion on how this policy initiative was supposed to link up with legislative reform, which became the federal government’s priority after the *Corbiere* decision in May 1999 (as explained in the next section). Although DIAND claims the Joint Initiative was aimed at eventually drafting changes to the *Indian Act*—and it appears as though progress had been made in this

26. See, for instance, John Stackhouse’s “Canada’s Apartheid” series of 14 articles on the state of Aboriginal peoples in Canada, published in the *Globe and Mail* from 3 November - 15 December 2001, online: <<http://www.globeandmail.com/series/>> (date accessed: 1 July 2003).

27. Canada, INAC, *Gathering Strength: Canada’s Aboriginal Action Plan* (Ottawa: Minister of Public Works and Government Services Canada, 1997), online: <http://www.ainc-inac.gc.ca/gs/index_e.html> (date accessed: 1 July 2003).

28. See generally INAC, Background, “Information on the Joint Initiative and the National Gathering”, online: Indian and Northern Affairs Canada <http://www.ainc-inac.gc.ca/nr/prs/m-a2000/0/00143bk_e.html> (date accessed: 1 July 2003); Assembly of First Nations, “History and Background of the Joint Initiative”, online: Assembly of First Nations, Lands and Trust Service <<http://www.afn.ca>> (date accessed: 1 July 2003); and Assembly of First Nations, “Frequently Asked Questions About the AFN/INAC Joint Initiative for Policy Development (Lands and Trust Services)”, online: Assembly of First Nations, Lands and Trust Service <<http://www.afn.ca>> (date accessed: 1 July 2003).

29. Assembly of First Nations, “AFN/INAC Joint Initiative for Policy Development (Lands and Trust Services): AFN Confederacy Report, May 2001”, online: Assembly of First Nations, Lands and Trust Service <<http://www.afn.ca>> (date accessed: 1 July 2003).

direction³⁰—AFN leaders dispute this understanding of the program’s purposes. Instead, they argue, to impute such aims to the Joint Initiative goes against its very essence:

The idea [was] simple, but it [had] never been tried: have First Nations take the lead in developing policy options and ways of doing business. First Nations [could] identify their priorities and develop strategies to meet their needs.³¹

A First Nations driven process is not necessarily inconsistent with legislative reform, however. Instead, an AFN spokesperson is reported to have expressed optimism about the Joint Initiative generating “enough background to draft proposed changes to the *Indian Act*.”³² However, problems emerged after the AFN’s election in 2000 of the hard-line Matthew Coon Come to replace a more conciliatory Phil Fontaine as Grand Chief:

All it took was one AFN election to kill the momentum. Phil Fontaine and Jane Stewart’s Gathering Strength initiative began to wither and atrophy ... Coon Come’s political staff have been rejecting every proposal from their experienced AFN staff, and from INAC, too, ever since.³³

While this analysis appears somewhat simplistic and politically motivated, the July 2003 re-election of Phil Fontaine as Grand Chief offers a chance to see if the pendulum will indeed swing back.

Perhaps equally important in terms of leadership, however, was the Fall 1999 cabinet shuffle which saw Robert Nault replace Jane Stewart as Minister of Indian Affairs. Although he might have initially supported the Joint Initiative and enjoyed a “close working relationship” with Phil Fontaine,³⁴ things had changed by the Spring of 2001. At this point, Minister Nault was becoming concerned about the slow pace of progress on a legislative response to *Corbiere*, and went on the record stating:

You know I’ve said before we do a lot of talking around here and we don’t deliver a lot. I’m interested in seeing some deliverables, and so far my relationship, or the

30. One of the reports commissioned by DIAND in the wake of its consultations with national Aboriginal associations on how to implement the *Corbiere* decision (described in greater detail below) also outlines the Joint Initiative’s discussion of *Corbiere* legislation. According to this report, although the Joint Initiative initially emphasized “modest efforts at policy and operational change,” AFN participants soon recognized that significant capacity building would require legislative changes, which they pushed for. See B. Morse *et al.*, “Beyond *Corbiere*: In Search of Legitimacy, Proposals and Pressures for Reform” (January 2001), online: First Nations Governance, Resource Material <http://www.fng-gpn.gc.ca/RM1_e.html> (date accessed: 1 July 2003) at 7-8.

31. Assembly of First Nations, “Mission Statement for the AFN/INAC Joint Initiative for Policy Development (Lands and Trusts Services)”, online: Assembly of First Nations, Lands and Trust Service <<http://www.afn.ca>> (date accessed: 1 April 2002).

32. J. Bear, “Kill the Sacred Cow” *Windspeaker* 19:2 (June 2001) 6.

33. *Ibid.*

34. See P. Barnsley, “Government Rushing *Indian Act* Changes,” *Windspeaker* 17:2 (March 2000) 2.

government of Canada's relationship with the AFN over the last two years, has delivered very little.³⁵

The joint approach of incremental reform efforts was dead. But the federal government was more interested than ever in reforming the *Indian Act* due to developments in the judicial arena.

Corbiere and the Concerns of Off-Reserve First Nations

The issue of how communal Aboriginal rights are to interact with individual rights has long been of concern to First Nations. In the *Constitution Act, 1982*, for instance, Aboriginal peoples secured a constitutional "shield" in s. 25 of the *Charter* to protect "[A]boriginal treaty or other rights or freedoms that pertain to the [A]boriginal peoples of Canada" from operation of the *Charter's* other provisions. This protection has not proved to be without limits, however, in the face of off-reserve band members challenging what they perceive to be tyrannical band control by on-reserve members under the *Indian Act*—as the *Corbiere* case demonstrates.³⁶

At the root of John Corbiere's s. 15 *Charter* challenge of s. 77 of the *Indian Act* was this provision's requirement that band members be "ordinarily resident" on reserve to participate in band elections held in accordance with the *Act's* s. 74 default election rules. In a judgment handed down in May 1999, the Supreme Court of Canada found the "ordinarily resident" requirement to discriminate on the basis of Aboriginal residency. When it came to justifying this infringement under section 1 of the *Charter*, however, both majority and minority opinions agreed that a restriction on the right of off-reserve members to participate in band governments might be justified because their interests and concerns were likely different than those of members actually living on reserve. But the Court nonetheless found that s. 77's blanket ban on off-reserve participation was not justified, because less restrictive means were available to ensure that the interests of reserve members were not swamped by those of off-reserve members. Indeed, the Supreme Court suggested a variety of ways to balance the interests and participation of on and off-reserve members in the *Indian Act's* default election provisions, based on distinguishing between matters of a local nature and those affecting the interests of all members.

In suspending the implementation of its declaration of s. 77's unconstitutionality for 18 months, the Supreme Court stated that the time was

35. P. Barnsley, "Funds Withheld to Pressure Chiefs, Say First Nation Leaders" *Windspeaker* 19:1 (May 2001) 1.

36. The Supreme Court of Canada found in *Corbiere*, *supra* note 17 that section 25 had not been triggered by s. 77 of the *Indian Act*. Despite s. 25's broad wording and apparent extension to "Aboriginal rights" beyond those provided for in s. 35 of the *Constitution Act, 1982*, Justice L'Heureux-Dubé noted at para. 52 for the concurring minority that "the fact that legislation relates to Aboriginal people cannot alone bring it within the scope of the 'other rights or freedoms' included in s. 25." More generally, the Supreme Court justices felt insufficient evidence had been presented on the s. 25 issue, so they avoided coming to any conclusions on it.

provided “to enable Parliament to consult with the affected groups, and to redesign the voting provisions of the *Indian Act* in a nuanced way that respects equality rights and all affected interests.”³⁷ To comply with this decision, DIAND quickly decided to engage in a two-stage consultation with national Aboriginal organizations and develop an appropriate legislative response. “Phase 1” of the *Corbiere* process would occupy most of the following year with discussion of how to best address the immediate s. 77 concerns posed by the decision and how to proceed with the broader range of *Indian Act* amendments it appeared to entail.³⁸ “Phase 2” consultations were then supposed to lead to the development of legislative options. The latter process evolved into the First Nations Governance Initiative following the regulatory changes³⁹ eventually made to bring s. 77 into line with the *Charter* in the Fall of 2000, just before the Supreme Court’s deadline.⁴⁰

Beyond the narrow issue of non-resident Indians’ participation in band elections, then, *Corbiere* has been tremendously important in driving the First Nations Governance Initiative forward by raising broader issues relating to the participation of off-reserve members in band affairs generally. The decision not only forced the federal government to make legislative changes, it provided them with a basic framework for doing so by holding that new measures must fairly balance the interests of on and off-reserve members. In effect, the Supreme Court of Canada pushed DIAND towards greater consultation with the Congress of Aboriginal Peoples (“CAP”), the national Aboriginal organization claiming to

37. *Corbiere*, *ibid.* at para. 121.

38. Custom band leadership selection processes were deemed at an early stage as likely to be excluded from most governance reform efforts. These traditional methods of selecting leaders are permitted by s. 74(1) of the *Act* but not regulated by the band election provisions in ss. 74-80. Instead, the issue here was deemed to be how to protect these regimes under s. 35 of the *Constitution Act, 1982* and s. 25 of the *Charter* from further *Charter* attacks. Of Canada’s 610 bands, 365 currently operate according to custom. See B. Morse *et al.*, “Beyond *Corbiere* Statutory Renewal: Prerequisites and Agendas” (February 2001), online: First Nations Governance, Resource Material <http://www.fng-gpn.gc.ca/RM1_e.html> (date accessed: 1 July 2003) at 4 [hereinafter “Beyond *Corbiere* Statutory Renewal”].

39. See *Indian Band Election Regulations*, C.R.C., c. 952 (1978) as am. by S.O.R./85-409 PC-2000-1640 (19 October 2000). These regulatory changes allowed off-reserve members to nominate and vote for chiefs and councillors in s. 74 elections. Although s. 77 (“Eligibility of Voters for Chief” and “Councillor”) has not yet been amended, the words “ordinarily resident on the reserve” are of no force or effect following the Supreme Court’s decision in *Corbiere*, pursuant to the s. 24(1) enforcement provisions of the *Charter* and the constitutional supremacy clause contained in s. 52 of the *Constitution Act, 1982*.

40. E-mail from Duncan M. McPherson, Policy Planning Officer, Strategic Policy Directorate, Indian and Northern Affairs Canada (29 July 2003).

represent⁴¹ the interests of more than 850,000 off-reserve and non-status Indians.⁴²

This cooperation has proved to be not only in CAP's interest and in the interest of its large but traditionally marginalized constituencies (by giving them a leading role in *Indian Act* consultations and additional funding); it also benefited the federal government by providing DIAND with a natural ally or at least a more cooperative partner in legislative reform than the AFN was claimed

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41. The legitimacy of this claim has been challenged by those involved in the governments of various First Nations and the Assembly of First Nations. The AFN's Regional Vice Chief for Manitoba, Kenneth Young, for instance, has noted that Chief Dorey has no mandate from the AFN to represent First Nations People and argues that CAP is "not a legitimate representative for First Nations People in Canada residing in urban centres." See Vice Chief K. B. Young, Press Release, "Congress of Aboriginal Peoples Not a Legitimate Voice on First Nations Issues" (19 March 2002), online: "Political Power Struggle as Storm Brews: Urban Aboriginals vs. First Nations," Turtle Island Native Network <http://www.turtleisland.org/front/_front.htm> (date accessed: 1 July 2003). See also Assembly of First Nations, Confederacy of Nations Resolution No. 4/98 (Edmonton, 9-11 March 1998), regarding the "representation of all First Nations Peoples by the First Nations of Canada and the Assembly of First Nations Regardless of Residence," which asserts that the "Treaty and Aboriginal rights of First Nations people and the benefits which flow from those rights are not dependent on place of residence; and ... it is the desire of the First Nations in Canada to represent and provide services and programs for their members regardless of residence" and resolves to take steps to implement this mandate.
42. CAP has stated that it represents "the interests of more than 850,000 Aboriginal peoples living away from reserves in cities and towns across Canada." See Congress of Aboriginal Peoples, Aboriginal Governance Press Release, "Views of off reserve Aboriginal people to be sought on First Nations Governance Initiatives" (14 June 2001), online: Congress of Aboriginal Peoples, Governance Program <<http://www.abo-peoples.org/programs/Governance/GovernancePR1.html>> (date accessed: 15 July 2003). Despite the recent completion of the 2001 Aboriginal Peoples Survey, these numbers remain difficult to verify, as Statistics Canada acknowledges incomplete enumeration and under coverage among Aboriginal people: see Statistics Canada, Census Operations Division, *2001 Census: Analysis Series – Aboriginal Peoples of Canada: A Demographic Profile*, Catalogue No. 96F0030XIE2001007 (Ottawa: Minister of Industry, 2003), online: Statistics Canada, 2001 Census, Analysis Series <<http://www12.statcan.ca/english/census01/Products/Analytic/companion/abor/contents.cfm>> (date accessed: 1 July 2003). In this report, the total Aboriginal population of Canada is stated to be 976,305, of which 62 per cent is North American Indian (608,850). Just over 1.3 million Canadians reported having some Aboriginal ancestry in 2001. After adjusting for incomplete enumeration on reserve, the 2001 census data show slow, but steady, growth among Aboriginal people residing in Canada's cities, with almost one half (49 per cent) of the population identifying themselves as Aboriginal living in urban areas, up from 47 per cent in 1996. DIAND, meanwhile, states that there were just under 690,000 registered Indians in 2001, of whom just under 60 per cent lived on reserve. See Canada, INAC, *Basic Departmental Data 2002* (Ottawa: Minister of Public Works and Government Services Canada, 2003), online: INAC, Statistics <http://www.a-inc-inac.gc.ca/pr/sts/bdd02/bdd02_e.html> (date accessed: 1 July 2003). The original 1991 Aboriginal Peoples Survey found 320,000 Aboriginal people to be living in urban areas in Canada (44 per cent of the total Aboriginal population at the time). Broken down into the four main Aboriginal groups, Non-Status Indians were the most urbanized (69 per cent lived in urban areas), followed by 65 per cent of Métis, 34 per cent of Registered Indians and 22 per cent of Inuit. See K. Graham, "Urban Aboriginal Governance in Canada: Paradigms and Prospects" in J. Hylton, ed. *Aboriginal Self-Government in Canada* (Saskatoon: Purich, 1999) 377 at 379 [hereinafter *Aboriginal Self-Government in Canada*].

to have been in the Joint Initiative.⁴³ Despite the AFN's interpretation of *Corbiere* as an affirmation of its position that "First Nation governments should be representative of all of their citizens, irrespective of where they live,"⁴⁴ it seems clear that many non-status or off-reserve Indians doubted the ability of the AFN and its chiefs to represent them effectively in dealing with the federal government. As one put it:

The AFN and all the other political organizations have proved time and time again that they viewed off-reserve [F]irst [N]ations as something to forget about, to wipe their hands of, to ignore or to use us politically, but no more ... Our court cases have been as individuals, fighting not only the various government departments for our Aboriginal and Treaty rights, but our own leaders and our own bands. It's our letters on the minister's desk that have given him the moral authority to begin the process.⁴⁵

It was out of these sorts of comments, and others by "grassroots" First Nations on-reserve,⁴⁶ that a broader mandate than simply fixing up the election provisions of the *Indian Act* emerged in the *Corbiere* Phase 1 consultations. Although experts warned that "extreme caution" was necessary in proceeding with a full-fledged legislative agenda given the targeted nature of discussions and limited set of options presented, the federal government was also facing other pressures motivating it to move quickly on statutory reform.⁴⁷

43. See generally C. McLean, "Growing Alarm in Indian Country: as the Reserve Chiefs Boycott Nault's Anti-Corruption *Governance Act*, Ottawa Finds a New Ally – the Off-Reserve Indian Majority" *Report Magazine (National Edition)* 28:12 (11 June 2001) 21 [hereinafter "Growing Alarm"] and P. Barnsley, "Two Hundred Organizations Buck AFN Boycott: Over 20% of 900 Federally Funded Aboriginal Organizations to Participate in the *First Nations Governance Act* Initiative" *Windspeaker* 19:3 (July 2001) 6, where it is reported that "[t]he pendulum has swung in the opposite direction" from when DIAND cooperated exclusively with the AFN.

44. This is a quote from Okanagan Nation lawyer Carolanne Brewer, who was Executive Co-ordinator of the AFN's "*Corbiere* Response Unit" in 2000. See P. Barnsley, "Corbiere to Run for Chief: Off Reserve Voting Begins on Nov. 20" *Windspeaker* 18:7 (November 2000) 1.

45. Len Kruzenga, "Opposition to Nault's Changes Intensifies: B.C. Chief Raps Coon Come's Knuckles" *First Perspective* 10:7 (July 2001) 1, quoting Fort Williams' resident William Cook.

46. See J. Wastasecoot, "Let's Support the Minister's Initiative for the Sake of Grassroots" *First Perspective* 10:2 (February 2001) 6, where he writes:

Let's be clear about where the impetus for the minister's initiative lies. Does it really come from the minister? Or does it come from the grassroots who've been writing letters, signing petitions and getting into bed politically with political parties of the right who don't even support Aboriginal rights in a desperate attempt to bring the issue of First Nations accountability to the fore of Canada's public policy agenda? And where else could our people go? They've already been to the doors of their political organizations such as the Assembly of First Nations, Chiefs of Ontario, Assembly of Manitoba Chiefs, Federation of Saskatchewan Indians and others across the country. All efforts—and I know from personal experience having talked to many of our chiefs about the need to do something—have been to no avail ... I support the Minister's initiative to amend the *Indian Act*. At least insofar as it relates to the issue of accountability and protection of band employees, and similar matters which directly relate to "good government." We need these provisions now rather than later for the sake of those grassroots people who are suffering at the hands of a faulty governance system on their reserve.

47. "Beyond *Corbiere* Statutory Renewal", *supra* note 38 at 3.

Pressure to Bring Accountability to Band Governments and Good Governance Arguments

It was a rather interesting coincidence that the First Nations Governance Initiative was announced just days before news broke that the annual cumulative deficit of bands in Canada had attained \$422 million.⁴⁸ While First Nations' advocates responded to this development by arguing that the debt simply reflected insufficient federal funding of basic Aboriginal programs, critics have long warned that the federal government's increasing use of block grants with few conditions to fund First Nations opens the door to problems, given the lack of accountability mechanisms in the *Indian Act* framework.⁴⁹ Whichever side is right in this debate, it seems likely that headline stories of First Nations' fiscal mismanagement and corruption have led many Canadians to have negative opinions about the accountability and responsibility of chiefs and band councils. These views, in turn, have generated pressure to "do something" about this problem—pressure which the Governance Initiative speaks to in terms of increased accountability, the separation of political and administrative governmental functions, and capacity building. As I explain below, these planks in the FNGI agenda can be regrouped under the rubric of fostering "good governance."

Where do the alleged accountability problems under the current *Indian Act* regime stem from? Several recent studies offer helpful analyses. Jean Allard's "Big Bear's Treaty," for instance, suggests that many of the current problems have their roots in the collapse of the 1969 *White Paper*⁵⁰ and the subsequent political unwillingness of the federal government to deal with Aboriginal policy—other than by spending money. This rich policy vacuum was filled by the newly energized First Nations movement and DIAND bureaucrats (whose very existence had been challenged by the *White Paper*), who together developed a system of allocating power and money to First Nations chiefs, councils and organizations. The problems with this "one-dimensional" system, according to Allard, became obvious over time: money flowed from Ottawa directly to First Nations leaders, with ordinary reserve Indians having "no method for denying personal support" or presenting alternate views. Because there is little separation

48. The deficit levels are three times what they were in the early 1990s. This information was obtained by the Canadian Taxpayers Federation after a request under the *Access to Information Act*, R.S.C. 1985, c. A-1. See "Growing Alarm", *supra* note 43.

49. See, for instance, M. Jenkinson, "Self-Government Cheques and Balances: the Awarding of Block-Grants to Indian Band-Councils Without Accountability Invites Abuses" *BC Report* 8:32 (7 April 1997) 9. This issue is discussed in greater depth below.

50. Canada, *Statement of the Government of Canada on Indian Policy, 1969* (Ottawa: Queen's Printer, 1969), online: Frontier Centre for Public Policy <http://www.fcpp.org/worthalook/statement_indian_policy.html> (date accessed: 1 July 2003) ("*White Paper*"). The *White Paper* proposed to ensure the "full, free and non-discriminatory participation of the Indian people in Canadian society" by repealing the *Indian Act*, granting First Nations title over reserve lands, and dismantling the Indian Affairs department over five years. It was also proposed that the provinces would "take over the same responsibility for Indians that they have for other citizens in their provinces." This plan provoked immediate outrage and opposition from Aboriginal leaders, and the plan was shelved shortly thereafter.

between politics and administration on reserves, Allard argues that “everything on a reserve that is in any way related to band administration is politicized. Whoever is elected is in control of just about everything on reserve.”⁵¹

This extraordinary concentration of authority and money in band governments has led to several pernicious results, according to the conservative political scientist, Tom Flanagan. First, First Nations governments are far more developed than other Canadian communities of a similar size. As the Canadian Taxpayers Federation recently noted, there was “one Native politician for every 177 people” in 1999 – 2000.⁵² Flanagan also suggests that the power of extended families on many reserves merely exacerbates this “fertile field for factionalism,” patronage and nepotism.⁵³ Second, Flanagan asserts, fiscal mismanagement and corruption are widespread among First Nations. The most egregious examples he provides from among Alberta First Nations—including exorbitant chief and council salaries, out of control spending and resource mismanagement disasters—are deemed “unusual only in [their] extreme concentration of bad news.”⁵⁴ In 1998, for instance, DIAND stepped in to provide remedial fiscal plans for 15 of 43 First Nations in Alberta after audits revealed deficits exceeding eight per cent of total revenues.⁵⁵ And finally, the current *Indian Act* structure and transfer payments regime results in a great deal of taxpayer money ending up being wasted rather than helping those in need.⁵⁶

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51. Jean Allard, “Big Bear’s Treaty” (2002) 11 *Inroads* 108 at 120-131, quoting from 128 [hereinafter “Big Bear’s Treaty”].
 52. T. Fiss, “*First Nations Governance Act*: Presentation to the House of Commons Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources” (27 February 2002), online: Canadian Taxpayers Federation, Studies <<http://www.taxpayer.com/studies/Centre.htm>> (date accessed: 1 July 2003) at 2.
 53. T. Flanagan, *First Nations? Second Thoughts* (Montreal and Kingston: McGill-Queen’s University Press, 2000) at 96-102 [hereinafter *First Nations? Second Thoughts*]. A précis of Flanagan’s argument can also be found in T. Flanagan and A. Cairns, “Flanagan and Cairns on Aboriginal Policy” *Policy Options* (September 2001) 43.
 54. Flanagan’s prime example is the Stoney First Nation, which permitted the clear-cutting of large tracts of forest to raise additional band revenues in 1994. At this time, chiefs were allegedly being paid more than \$450,000 in salaries despite two-thirds of the reserve population being on welfare. Oil and gas royalties and other transfers, meanwhile, gave the band approximately \$16,000 to spend on each resident annually. See *First Nations? Second Thoughts*, *ibid.* at 90-92.
 55. DIAND estimated that it would have to intervene in this manner for approximately 20 to 25 per cent of Indian bands nationally in late 1998. See J. Tibbets, “Feds Say 150 Bands Need Financial Aid” *Calgary Herald* (20 November 1998) and M. Lowey, “Alexis Band Mired in Deepening Deficit” *Calgary Herald* (28 June 1998), cited in *First Nations? Second Thoughts*, *ibid.* at 91-92.
 56. Here Flanagan cites an article in *The Globe and Mail* on the Samson Cree Reserve where it is claimed that: “Taxpayers pour millions of dollars into the Samson Cree Reserve. That’s good for the well-connected few. But most people there live in abject poverty.” See P. Cheney, “The Money Pit: An Indian Band’s Story” *The Globe and Mail* (24 October 1998) cited in *First Nations? Second Thoughts*, *ibid.* at 93. Allard agrees with this assertion by claiming that “although at the bottom of the filtering system in terms of program delivery, chiefs and councils today have a great deal of money to work with. The funds for housing, welfare, education and other such services flow through their hands.” See “Big Bear’s Treaty,” *supra* note 51 at 128. He also notes that the budget for DIAND has swelled dramatically over the years (from \$232 million for 230,000 status Indians in 1969 to \$6.3 billion for 680,000 status Indians in 1999) “yet the problems faced by Canadian Indians today remain much the same as in 1969, and in some cases, are worse.” *Ibid.* at 127.

Although First Nations leaders claim that these problems are no more widespread than in other Canadian communities⁵⁷ and the Minister has denied feeling pressure from the right of the political spectrum in advancing the Governance Initiative,⁵⁸ the federal government's accountability and capacity-building agenda has clearly been motivated by band management difficulties and the stubbornly low standard of living on reserve. This motivation is evident, for instance, in DIAND's frequent explanation of how the Governance Initiative will help fulfil the January 2001 Throne Speech,⁵⁹ which committed the federal government to improving the quality of life of First Nations, eliminating poverty and ensuring basic needs are met, and strengthening the governance of First Nations. "Increasingly," DIAND noted, "First Nations, academics, governments and the Canadian public are drawing linkages between good governance and quality of life improvements."⁶⁰

The broader conceptual argument underwriting *Indian Act* reform and the FNIGI, then, is what might be called the "good governance" hypothesis. Recently the source of great debate in international development circles,⁶¹ this theory suggests that successful economic development requires more than simply injecting capital into the target country or community. Instead, as the World Bank argues, "poor countries have been held back not by a financing gap, but by an 'institutions' and 'policy' gap."⁶² While recent efforts at improving First

57. In an appearance before the Standing Committee on Aboriginal Affairs on February 28, 2002, for instance, AFN Chief Matthew Coon Come cited Minister Nault as claiming that 25 of 633 (or 3.9 per cent) of First Nations had had financial difficulties in 2001 and argued that the media was exaggerating the extent of the problem. See National Chief M. Coon Come and Vice Chief G. Picard, "Speaking Points" (Notes for a Presentation to the House of Commons Standing Committee on Aboriginal Affairs, Ottawa, 28 February 2002), online: Assembly of First Nations, Press Releases Archive <<http://www.afn.ca>> (date accessed: 1 July 2003) [hereinafter "Speaking Points"].

58. Minister R. Nault, Letter to the Editor, *The Edmonton Journal* (23 January 2002) A11.

59. See, for instance, Canada, DIAND, "Effective First Nations Governance," (Slide Show Presentation to the Standing Committee on Aboriginal Affairs, Ottawa, 21/26 Feb 2002), online: First Nations Governance, Resource Material <<http://www.fng-gpn.gc.ca/pres/fngfeb28/>> (Date accessed: 1 July 2003) at 9 and INAC, "Executive Summary" in *Communities First Report*, *infra* note 73, online: First Nations Governance, Final Reports <http://www.fng-gpn.gc.ca/CRP1_exesum_e.html> (date accessed: 1 July 2003) [hereinafter "Executive Summary"]. The Prime Minister also announced he was striking a "Reference Group of Ministers on Aboriginal Policy" in June 2001, a special cabinet committee to "think outside the box" and review the entire federal Aboriginal agenda. There is very little public information available about this committee. Its members include Stéphane Dion, Sheila Copps, Jane Stewart and Anne McLellan. See A. Macqueen, "Ottawa Watch" *First Perspective* 10:10 (October 2001) 2.

60. See "Executive Summary", *ibid.*

61. See generally A. Leftwich, "Governance, the State and the Politics of Development" (1994) 25 *Development and Change* 363 and D. Williams and T. Young, "Governance, the World Bank and Liberal Theory" (1994) 42 *Political Studies* 84.

62. International Bank for Reconstruction and Development, *Assessing Aid: What Works, What Doesn't, and Why* (New York: Oxford University Press, 1998) at 35.

Nations accountability practices⁶³ and developing First Nations financial institutions⁶⁴ may help in this respect, band governance, which American Indian

63. The Aboriginal Financial Officers Association of Canada ("AFOA"), for instance, was incorporated in July 1999. It comprises professionals who assist First Nations in becoming fiscally accountable and independent by "developing standards, practices, research, certification and professional development to expand capacity for members." AFOA has endorsed the FNGI as "a step towards creating an enabling environment for greater accountability to the ordinary people in First Nations communities." See Aboriginal Financial Officers Association of Canada, News Release, "Aboriginal Financial Officers Association Board Endorses Governance Initiative" (25 July 2001), online: Aboriginal Financial Officers Association of Canada Press Room, News and Background Information <<http://www.webpressroom.com/afoa>> (date accessed: 1 July 2003). The Ontario branch of AFOA condemned this decision shortly thereafter and proposed instead that DIAND work more closely with AFOA "to ensure accountability systems are in place everywhere." See Aboriginal Financial Officers Association of Ontario, News Release "Aboriginal Financial Officers Association of Ontario disagrees with National Association, rejects First Nations Governance Initiative" (20 August 2001), online: Aboriginal Financial Officers Association of Ontario, Press Releases <http://www.afoa-on.ca/nr_aug_20_01.htm> (date accessed: 1 July 2003).

64. A National Table on Fiscal Relations was established between INAC and the AFN in December 1999 to "strengthen the fiscal relationship through research, information sharing, and developing First Nations fiscal institutions and capacity": see "Status Report", *supra* note 10. This process led to the elaboration of a bill concurrent with the *Governance Act*, namely Bill C-19, *The First Nations Fiscal and Statistical Management Act*, 2d Sess., 37th Parl., 2002 (1st reading 2 December 2002), online: Parliament of Canada, House of Commons, Government Bills <http://www.parl.gc.ca/37/2/parlbus/chambus/house/bills/government/C-19/C-19_1/C-19_cover-E.html> (date accessed: 1 July 2003) [hereinafter *FNFSMA*]. This bill proposes the creation of a suite of national fiscal institutions, including a First Nations Taxation Commission (to continue the work of the Indian Tax Advisory Board), a First Nations Financial Management Board, a First Nations Statistical Institute and a First Nations Finance Authority. According to INAC:

These institutions will provide First Nations with the access to capital markets available to other governments. They will further strengthen the First Nations real property tax system and provide greater representation for taxpayers. They will develop appropriate financial standards and increase financial management capacity. Finally, they will serve to fill the current gap in First Nations statistics.

See INAC, Backgrounder, "First Nations Fiscal and Statistical Institutions Initiative" (30 December 2002), online at: INAC, News Room, Past Releases <http://www.ainc-inac.gc.ca/nr/prs/s-d2002/02218bk_e.html> (date accessed: 1 July 2002). See also the First Nations Fiscal Institutions Initiative website, online: <<http://www.fnfi.ca>> (date accessed: 1 July 2003). Critics claim that the *FNFSMA*, like the *FNGA*, is being imposed on First Nations without their consent (although the bill has support from some First Nations organizations, including the B.C. AFN, which claims that the *FNFSMA*'s institutions will be "First Nations designed, First Nations controlled and open to all First Nations for optional participation": see the "Introduction" on the B.C. AFN's First Nations Fiscal Institutions Initiative website, online: Assembly of First Nations B.C. Region, Fiscal Institutions <http://bcfn.com/fiscal_institutions/index.htm> (dated accessed: 1 July 2003)). Critics also argue that the *FNFSMA*'s institutions may have a key role in implementing the financial management provisions in the *FNGA*. More generally, they claim the bill represents another attempt by INAC to "blame the victim" and avoid dealing with Aboriginal rights. See Chiefs of Ontario, *FNFSMA* Fact Sheet #4, "The *Governance Act* (*FNGA* or Bill C-7) and the *FNFSMA* are Connected" (December 2002), online: Chiefs of Ontario, Fiscal Relations <<http://www.chiefs-of-ontario.org/>> (date accessed: 1 July 2003). Chief Roberta Jamieson of the Six Nations also recently argued at the SCAA's hearings on the *FNGA* that the current "suite" of INAC legislation (including the *FNGA*, *FNFSMA*, and Bill C-6, the *Specific Claims Resolution Act*, 2d Sess., 37th Parl., 2002 (1st reading 9 October 2002), online: Parliament of Canada, House of Commons, Government Bills <http://www.parl.gc.ca/37/2/parlbus/chambus/house/bills/government/C-6/C-6_1/C-6_cover-E.html> (date accessed: 1 July 2003)) will make "sweeping changes to the *Indian Act* that will have a devastating impact on the lives of Six Nations and all First Nations peoples forever." See Chief R.

researchers at Harvard have found to be the crucial issue in economic development,⁶⁵ has not been dealt with in a comprehensive manner by the federal government or First Nations up until now. Governance in this sense is defined as:

*the interactions among structures, processes and traditions that determine how power is exercised, how decisions are taken, and how citizens or other stakeholders have their say. Fundamentally, it is about power, relationships and accountability: who has influence, who decides, and how decision-makers are held accountable.*⁶⁶

It was both the *Corbiere* Phase 1 consultations and the Joint Initiative's work on programme management that focused DIAND's attention on "core" good governance issues—reforming the structures of decision-making and accountability within the *Indian Act*. First Nations critics who suggested that this agenda might best be pursued through the Inherent Right Policy by negotiating self-government agreements outside the *Indian Act* were met with this reply from the Minister:

The governance initiative, and I want to re-iterate, is an opportunity for us to recognize that we cannot be successful in building a socio-economic society without good structures, without good institutions, getting the fundamentals right. That's really the issue. Are we getting that done at the self-government tables? I would say that, if we are, it's moving extremely slowly and we need to find a way to move the agenda much quicker for the sake of all those people who are relying on us.

Jamieson, "Presentation to the Canadian House of Commons Standing Committee On Aboriginal Affairs, Northern Development & Natural Resources" (Hearings on Canada's Bill C-7, *First Nations Governance Act*, Toronto, 21 March 2003), online: Chiefs of Ontario, *Governance Act* <<http://www.chiefs-of-ontario.org/>> (date accessed: 1 July 2003). For more background on the debate among First Nations about the *FNFSMA*, see P. Barnsley, "Financial Institutions Debated Among Chiefs" *Windspeaker* 20:7 (November 2002) 9 and P. Barnsley, "Financial Institutions Act Divides Chiefs" *Windspeaker* 20:5 (September 2002) 1.

65. The Harvard Project on American Indian Development singled out three factors as being responsible for successful tribe development: (1) "practical sovereignty" or having the power to make decisions about their own future; (2) "capable governing institutions" or the exercise of that power through effective institutions; and (3) "cultural match" or choosing institutions and policies consistent with Indigenous conceptions of how authority should be organized and exercised. See S. Cornell, M. Jorgenson and J. P. Kalt, "The *First Nations Governance Act*: Implications of Research Findings From the United States and Canada" (July, 2002) [prepared for the Office of the B.C. Regional Vice-Chief of the Assembly of First Nations], online: Assembly of First Nations B.C. Region, Governance, Federal Standing Committee on Aboriginal Affairs <http://bcfn.com/governance/standing_committee.htm> (date accessed: 1 April 2003) at 4-5 [hereinafter "*FNGA*: Implications"] and S. Cornell and J. Kalt, "Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations" (Harvard Project on American Indian Development, John F. Kennedy School of Government, Harvard University, March 1992), cited in T. Plumptre and J. Graham, "Government and Good Governance: International and Aboriginal Perspectives" (Institute on Governance, 3 December 1999), online: Institute on Governance, Publications <www.iog.ca/> (date accessed: 1 July 2003) at 10.
66. T. Plumptre and J. Graham, *ibid.* at 3 [emphasis in original].

Especially the young population that's coming in to the age of wanting to be involved in the mainstream economy. That's the urgency of it.⁶⁷

As a result of accountability concerns and the good governance hypothesis moving onto the Aboriginal policy agenda, then, the goals of the First Nations Governance Initiative expanded beyond merely fixing up the *Indian Act's* broken election provisions to include filling in its governance holes. While the federal government no doubt took into consideration warnings it had received in reports from consultants about the difficulties this agenda might pose, especially for a short legislative time-line,⁶⁸ one wonders if they did not underestimate the criticism they might run up against. Whatever the case, the "Communities First: First Nations Governance" process was launched with great fanfare at the end of April 2001 without having obtained the support of several national Aboriginal organizations.

III PROCESS: SUCCESSES AND FAILURES OF THE COMMUNITIES FIRST "CONSULTATIONS"

The Communities First consultation process for the First Nations Governance Initiative ran from the end of April 2001 up until the end of October 2001. Over these six months, the government spent millions of dollars conducting over 400 consultation and information sessions both on and off-reserve (with approximately 7,000 First Nations people in attendance), processing 1629 questionnaires filled in by Aboriginal respondents, handling 1,200 calls received,

67. Quoted in P. Barnsely, "AFN Still Looking for a Governance Deal" *Windspeaker* 19:6 (October 2001) 1. The Assistant Deputy Minister of DIAND has also stated that "[e]ven if we were able to process ten self-government agreements per year, it would take 50 years before all the First Nations in Canada were self-governing. That is too long to wait." See Asst. Dep. Minister W. Johnson, "Communities First: First Nations Governance (Under the *Indian Act*)" (Pacific Business and Law Institute Conference, Vancouver, 19 April 2001) [unpublished], online at: First Nations Governance, Resource Materials <http://www.fng-gpn.gc.ca/RM_PresWJ_e.html> (date accessed: 1 July 2003).

68. Three approaches to legislative reform were proposed in a post-*Corbiere* Phase 1 report prepared for DIAND by B. Morse *et al.* See "Beyond *Corbiere* Statutory Renewal", *supra* note 38 at 20-21. Beyond the "minimal remedy option," a "sustaining good governance" approach was described which would put in place "a modern and effective system of democratic accountability for First Nations communities." The report made this warning, however:

Consultations on statutory renewal focused around a theme of sustainable and good governance can occur without affecting the established mechanism to promote self-government through negotiations under the inherent right and via treaty-making. This will be a fine line to walk, however, and the precise goals and objectives of this approach are in need of greater refinement to avoid slippage over into section 35 terrain. This will be a particular challenge for inclusion of First Nations that have always followed custom, but which wish to take advantage of renewal to advance good governance and address such problems as non-judicial appeals, costs of including non-residents in decision-making, etc.

Morse *et al.* also noted that this approach was "less suitable to a confined or time-limited process than is the minimal approach."

and cataloguing 600 written submissions (by e-mail and letter).⁶⁹ Despite the impressive sounding figures, the process was not without significant faults—including an unscientific methodology and large regional holes in participation. Likely in response to these shortcomings, the federal government decided in October 2001 to conduct its first-ever Canada-wide representative survey of on-reserve First Nations “to seek their views on preferences for government communications and on factors affecting quality of life, including governance.”⁷⁰ So-called “Governance Discussion Groups” (“CDGs”) were also held with First Nations people knowledgeable in governance matters, from November 2001 to February 2002.⁷¹

The results of the Communities First effort were recorded on the First Nations Governance website⁷² and tabulated in a report published in January 2002.⁷³ Criticism followed immediately, primarily from the most vociferous opponents to the consultation process, the Assembly of First Nations (“AFN”) and regional chiefs’ associations. Given DIAND’s determination to proceed with the Governance Initiative and its decision to partner with the Congress of Aboriginal Peoples for the Communities First process, the AFN has had to confront its own marginalization from the *FNGA* debate. In the next section, I will discuss the legal and normative importance of consultation and partnership in Aboriginal policy-making, and examine DIAND’s attempts to exploit differences of opinion between various national Aboriginal organizations while seeking support for its Governance Initiative. While I agree with those who argue that these efforts would likely prove unsuccessful in convincing the courts of the *Governance Act’s* constitutionality, the bigger problem raised for Aboriginal policy development is the federal government’s willingness to proceed with this reform in a highly antagonistic, uncompromising and unilateral manner. On the other hand, the success of the Joint Ministerial Advisory Committee (“JMAC”) in elaborating a concrete yet carefully considered plan for legislative development offers a promising “partnership” model for the future.

69. See “Executive Summary”, *supra* note 59 and “What We Heard” in *Communities First Report*, *infra* note 73, online: First Nations Governance <http://www.fng-gpn.gc.ca/CRP1_hrd_e.html> (date accessed: 15 April 2002) [hereinafter “What We Heard”].

70. INAC, News Release, “Communities First: First Nations Governance” (1 November 2001), online: First Nations Governance <http://www.fng-gpn.gc.ca/NR_BG2_e.html> (date accessed: 1 July 2003).

71. These CDGs mainly took place in urban centres, and, according to DIAND, offered an opportunity to review Communities First and to discuss practical implications of the information gained therein. See the CDG website, online: First Nations Governance, Governance Discussion Groups <http://www.fng-gpn.gc.ca/EA_GDG_e.html> (date accessed: 1 July 2003).

72. See the First Nations Governance Homepage <<http://www.fng-gpn.gc.ca>> (date accessed: 1 July 2003).

73. INAC, *Communities First: Consultation Report – Phase 1*, online: First Nations Governance, <http://www.fng-gpn.gc.ca/CRP1_J02_e.html> (date accessed: 1 July 2003) [hereinafter *Communities First Report*].

The Importance of Consultations in Aboriginal Policy-Making

Effective consultation or “citizen engagement” in policy development and implementation has become an important issue over the past decade. Although the only Canadian federal policy area requiring consultation before proceeding with law making is the creation of new regulations, every memorandum to Cabinet explaining the reasons for a new bill must also explain how the Minister is planning on consulting or has consulted. As Leslie Pal points out, although consultations have traditionally focused on programmatic and practical goals (*i.e.* improving policy development, design and implementation by tapping into citizens’ knowledge and perspectives), the increased emphasis on citizen engagement in the 1990s was largely attributable to “a deeper concern about the eroding democratic foundation of contemporary politics and policy-making.”⁷⁴

This “legitimizing” function of consultation in the context of policy development has taken on a particularly important role in recent Aboriginal policy-making. Not only do Aboriginal “stakeholders” face tremendously challenging social problems which they believe are largely due to the failure of past federal policies, they also have had their Aboriginal and treaty rights “recognized and affirmed” by s. 35 of the *Constitution Act, 1982*. As a result, consultation has become a *legal* requirement for government measures which infringe s. 35 rights.

The Supreme Court of Canada outlined the reasons for this requirement and what it understands the duty of consultation to mean in *R. v. Sparrow*.⁷⁵ In this case the relevant issue was whether government fishing regulations constituted a justified restriction on Aboriginal fishing rights. Despite section 35 falling outside the ambit of the *Charter*’s section 1 rights limitation provision, which might suggest that Aboriginal and treaty rights were absolute, the Supreme Court held that s. 35 rights could indeed be regulated (if not extinguished) by measures passing a rigorous justification test. Government regulations would have to have a “compelling and substantial” objective, and would have to be consistent with the “special trust relationship” (or fiduciary relationship) between the Crown and Aboriginal peoples.⁷⁶

As far as what the latter might require, Chief Justice Lamer noted several elements including whether the measure employed was the least restrictive means possible of achieving the desired result, whether fair compensation had been provided (for expropriations), and finally, “whether the [A]boriginal group in question has been consulted with respect to the conservation measures being implemented.”⁷⁷ This “duty to consult” has been confirmed as an essential

74. L. Pal, *Beyond Policy Analysis: Public Issue Management in Turbulent Times*, 2d ed. (Scarborough, Ont.: Nelson Thomson Learning, 2001) at 259 and 256-261 more generally.

75. [1990] 1 S.C.R. 1075 [hereinafter *Sparrow*].

76. *Ibid.* at 1113.

77. *Ibid.* at 1119.

element of s. 35 justification analysis in other leading cases.⁷⁸ Chief Justice Lamer explained its content in *Delgamuukw* in the following terms:

The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to [A]boriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the [A]boriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an [A]boriginal nation.⁷⁹

This analysis of section 35 infringement justification is important for the First Nations Governance Initiative for several reasons. In the first place, it is tough to predict what effect any reform of the *Indian Act* regime might have on existing Aboriginal or treaty rights. Because “the nature and scope of Aboriginal and treaty rights are unique to each First Nation,” the Supreme Court has adopted a case-by-case approach to section 35.⁸⁰ In short, different First Nations would be affected differently by the new governance measures, and the federal government’s ability to demonstrate that it consulted with First Nations—and likely *individual* First Nations⁸¹—would become crucial if a First Nation (or group thereof) decided to challenge the measures in court as a rights infringement.

78. See especially *Delgamuukw*, *supra* note 11 at 1113 and *R. v. Marshall (No. 2)*, [1999] 3 S.C.R. 533 at para. 43.

79. *Delgamuukw*, *ibid.* at para. 168.

80. AFN, “Legal and Related Issues Concerning the Federal Governance Initiative: Summary of Preliminary Analysis” (2001), online: AFN’s Legal Analysis <<http://www.afn.ca/Programs/Governance/legalanalysis.html>> (date accessed: 1 July 2003) at 20 [hereinafter “Legal and Related Issues Concerning the FGI”]. This analysis comes from an opinion letter commissioned by the AFN from Nahwegahbow, Nadjiwan and Corbiere, Barristers and Solicitors.

81. See Maria Morrellato, “Proposed *First Nations Governance Act*: Commentary and Recommendations” (August, 2002) [prepared for the Office of the B.C. Regional Vice-Chief of the Assembly of First Nations], online: Assembly of First Nations B.C. Region, Governance <<http://bcafn.com/governance/>> (date accessed: 1 April 2003) at 10-11 [hereinafter “Proposed *FNGA*: Commentary”], where it is argued that if Aboriginal governance rights are infringed,

the [A]boriginal governance rights of *particular* First Nations would need to be accommodated through consultation case by case ... The global, generic nature of the current consultation process significantly compromises the Crown’s ability to effectively consult with and seek the accommodation of the [A]boriginal governance rights held by particular First Nations.

The need for individual consultation is supported by reference to *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2002] 1 C.N.L.R. 169, 2001 FCT 1426, where the Federal Court held that consultation with the general public did not meet the Crown’s fiduciary duty to consult meaningfully with a First Nation whose hunting rights were infringed by the construction of a road. See also David Nahwegahbow’s remarks in the text accompanying note 88; “Implications of Parliament’s Exercise”, *infra* note 92 at 19 and 32-33; and “Section 91(24) Powers”, *infra* note 93 at 18 and 27.

The most obvious right First Nations might be interested in claiming infringement of is the right to self-government. Although the Supreme Court of Canada has shown some reluctance to characterize band activities as a manifestation of a constitutionally protected right to self-government,⁸² academic commentary⁸³ and lower court decisions⁸⁴ suggest that the door is not yet closed to such a right's recognition by the Supreme Court. The Court has certainly not been presented with sympathetic set of facts for finding such a right to date. The federal government appears concerned that subjecting First Nations (especially those which have been continuously operating under customary leadership selection regimes) to a new set of governance rules they oppose might provide the Supreme Court with an ideal opportunity to do so.

Although DIAND has claimed that the Governance Initiative is "not about self-government," its significant consultation efforts belie any assertion that the right to self-government might not be affected by amendments to the *Indian Act* regime. According to British Columbia Chief Herb George (Satsan), DIAND Associate Deputy Minister Dennis Wallace made it clear in an August 2001 meeting that Canada wanted to be "in a strong legal position if the legislation which results from the process is ever challenged." Satsan stated that Wallace further "indicated that the AFN's involvement in the process would be advantageous from this viewpoint."⁸⁵ The clear "danger of participating" in

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82. The two leading cases on Aboriginal self-government are *R. v. Pamajewon*, [1996] 2 S.C.R. 821 and *Delgamuukw*, *supra* note 11. In the former, a unanimous court refused a claim by two bands that they were exercising a broad s. 35 right to self-government in authorizing casinos on reserve to run high stakes gambling operations in contravention of the *Criminal Code of Canada*. Instead, the Court characterized the right being asserted narrowly, as a right to participate in and regulate high stakes gambling, which was found to not be protected by s. 35 in accordance with the test laid down in *R. v. Van der Peet*, [1996] 2 S.C.R. 507 (*i.e.* high stakes gambling was not found to be an integral part of these First Nations' distinctive (pre-contact) cultures). In *Delgamuukw* the Court again declined to deal with the right to self-government claim being made, but elaborated an understanding of Aboriginal title which implies the need for some core self-government rights (*i.e.* "The right to choose what uses land can be put" at para. 166).
83. See *e.g.* J. Borrows, "Constitutional Law from a First Nation Perspective: Self-Government and the Royal Proclamation" (1994) 28 U.B.C. L. Rev. 1 and "Sovereignty's Alchemy: an Analysis of *Delgamuukw v. British Columbia*" (1999) 37 Osgoode Hall L.J. 537; P. Hogg, *Constitutional Law of Canada*, looseleaf (Toronto: Carswell, 2002) at 27-21 and 27-22; P. Macklem, "First Nations Self-Government and the Borders of the Canadian Legal Imagination" (1990-91) 36 McGill L.J. 382 and *Indigenous Difference and the Constitution of Canada* (Toronto: University of Toronto Press, 2000); K. McNeil, "Aboriginal Rights in Canada: From Title to Land to Territorial Sovereignty" and "Envisaging Constitutional Space for Aboriginal Governments" in K. McNeil, *Emerging Justice? Essays on Indigenous Rights in Canada and Australia* (Saskatoon: University of Saskatchewan Native Law Centre, 2001) 58 and 184; B. Morse, "The Inherent Right of Aboriginal Self-Government" in *Aboriginal Self-Government in Canada* *supra* note 42, 16; and B. Slattery, "First Nations and the Constitution: A Question of Trust" (1992) 71 Canadian Bar Rev. 261 and "Making Sense of Aboriginal and Treaty Rights" (2000) 79 Canadian Bar Rev. 196.
84. See, most notably, *Campbell v. British Columbia (A.G.), Canada (A.G.) and the Nisga'a Nation* (2000), 189 D.L.R. (4th) 333, [2000] 4 C.N.L.R. 1, 2000 BCSC 1123, online: British Columbia Superior Courts <<http://www.courts.gov.bc.ca/jdb-txt/sc/00/11/s00-1123.htm>> (date accessed: 1 April 2002).
85. P. Barnsley, "AFN Executive Works to End Governance Boycott" *Windspeaker* 19:5 (September 2001) A3.

Governance Initiative consultations for First Nations, then, is that they would be assisting in efforts analogous to “*Charter-proofing*” the final measures emerging from the Governance Initiative⁸⁶ despite not necessarily agreeing with them. As First Nations’ counsel David Nahwegahbow states:

In short, it gives the Crown a license to infringe. Therefore, before entering into consultations, First Nations should insist on some guarantees from Minister Nault, in writing, that he would not proceed with the Proposal without some agreed upon level of approval. Otherwise, there is a danger that the Minister will proceed unilaterally and he will be able to argue that he consulted First Nations, even if there is widespread disapproval of the FNG Proposal or certain measures in the Proposal.⁸⁷

Were First Nations ensured final approval of whatever measures emerge from this policy-making process, or guaranteed significant participation in their elaboration as partners in legislative and regulatory drafting (along JMAC lines, as discussed below), I believe there would be less difficulty in overcoming this barrier.

Would DIAND’s efforts prove sufficient justification if a new *Governance Act* was challenged on section 35 grounds? Several recent analyses suggest not. The first is by Nahwegahbow, who argues that *Sparrow*’s explanation of the duty to consult means the Supreme Court of Canada would likely impose a heavy consultative burden on the Crown:

The Court gave wildlife legislation as an example of an infringement, which would require consent. Clearly, Minister Nault would need to do more than just inform First Nations about the FNG Proposal. Arguably, because of the intrusiveness of the measure, consent of individual First Nations should be required, either by membership ratification votes, or at the very least, by BCR [band council resolution]. However, a court might accept something short of outright consent.⁸⁸

A methodological study of Communities First commissioned by the Ontario Chiefs, however, suggests that DIAND’s consultation process could not be understood by the courts to offer a representative sampling of First Nations’ opinions on the Governance Initiative.⁸⁹ Instead, Peter Elias’ report criticizes the non-scientific sampling techniques used by DIAND, including the bias problems posed by techniques encouraging self-selection, the over-representation of

86. For a discussion of governments’ efforts to ensure potential rights infringements are defensible down the road as “reasonable” and that a record of their efforts in this regard exists, see P. Monahan and M. Finkelstein, “The Charter of Rights and Public Policy in Canada” (1992) 30 *Osgoode Hall L.J.* 501.

87. Letter from David Nahwegahbow to Chiefs of Ontario, “Legal Opinion on ‘Penultimate Draft – Cooperative AFN-DIAND Work-Plans’” (29 November 2001), online: Chiefs of Ontario, *Governance Act* <http://www.chiefs-of-ontario.org/governance/ga_apr10-02.html> (date accessed: 1 July 2003) at 4 [hereinafter “Legal Opinion”].

88. *Ibid.* at 3-4.

89. P. Elias, “An Assessment of the First Nations Governance Consultation Process” (March 2002), online: Chiefs of Ontario, *Governance Act* <<http://www.chiefs-of-ontario.org/governance/gov01.html>> (date accessed: 1 July 2003).

groups with pre-determined opinions, and the department's inability to demonstrate that key constituencies (youth, Elders, women) had participated. As far as the "results" of the process are concerned, Elias notes that consultation meetings were inconsistently and inadequately coded⁹⁰ and that there was a strong reliance on anecdotal testimony. His conclusions regarding the accuracy and reliability of data and information gleaned from DIAND's surveys and consultation sessions are telling:

Because of ambiguities, inconsistencies, and technical errors the data could be made to mean anything or nothing. In other words, the process yielded little data useful for management purposes—data that can lead to effective decision-making.⁹¹

Finally, two essays written by Kent McNeil for the B.C. Regional Vice-Chief of the AFN provide a thorough legal examination of the effect of Parliament's exercise of its s. 91(24) powers on the inherent right to self-government. While the first essay takes a historical look at whether the *Indian Act* and its amendments have infringed this right,⁹² the second focuses on the *Governance Act* and Canada's fiduciary responsibilities in bringing this legislation forward.⁹³ Professor McNeil's most interesting analysis relates to whether statutory powers granted to bands under the *Indian Act* can be said to have complemented, curtailed or replaced the inherent right to self-government existing prior to the enactment of s. 35 in 1982, that is, whether the self-governance rights were extinguished or merely modified before becoming constitutionally entrenched.⁹⁴ His argument is that the inherent right to self-government has been left intact by the *Indian Act*, and he finds this claim particularly compelling with respect to custom bands.⁹⁵ Turning to fiduciary duties, McNeil thinks the *Governance Act* would fail at the minimal impairment stage for its leadership selection provisions' lack of fit with the stated goals of the *Act*:

[T]he right being infringed appears to be more consistent with the stated purposes than the provisions themselves. To justify the infringement, it seems to me that the government would have to prove that reliance on custom somehow interferes with the ability of bands "to design and implement their own regimes for leadership

90. There was no reporting of the meetings where five First Nations appeared to denounce the proceedings, for instance, or of the angry tone of many of the meetings. See *ibid.* at 16.

91. *Ibid.* at 11.

92. Kent McNeil, "The Implications of Parliament's Exercise of Section 91(24) Powers for the Inherent Right of Self-Government" [prepared for the Office of the B.C. Regional Vice-Chief of the Assembly of First Nations], online: Assembly of First Nations B.C. Region, Governance <<http://bcfn.com/governance/>> (date accessed: 1 April 2003) at 19 and 32-33 [hereinafter "Implications of Parliament's Exercise"].

93. K. McNeil, "Section 91(24) Powers, the Inherent Right of Self-Government, and Canada's Fiduciary Obligations" (August, 2002) [prepared for the Office of the B.C. Regional Vice-Chief of the Assembly of First Nations], online: Assembly of First Nations B.C. Region, Governance <<http://bcfn.com/governance/>> (date accessed: 1 April 2003) [hereinafter "Section 91(24) Powers"].

94. "Implications of Parliament's Exercise", *supra* note 92 at 17-20.

95. "Section 91(24) Powers", *supra* note 93 at 17-24.

selection.” As this sounds counterintuitive, I think the burden on the government would be heavy.⁹⁶

Ultimately, however, it would be up to the courts decide whether adequate consultation had occurred, despite all these faults. Whether consultation has to be representative or not is unclear, and the federal government’s October 2001 representative polling of on-reserve residents may go some distance to alleviating concerns in this regard. A more pressing problem for First Nations opponents of the FNIGI, however, has been posed by those First Nations members willing to participate in consultations and supporting the Minister’s agenda for change.

Division Among National First Nations Organizations

The problem with claiming that First Nations are opposed to the Governance Initiative is that the situation is far more nuanced and complex than this blanket statement suggests. Like many large political constituencies, First Nations’ individuals and communities share certain values and differ on other principles and interests. With at least four national associations representing the interests of First Nations, namely the Assembly of First Nations, Congress of Aboriginal Peoples, Native Women’s Association of Canada (“NWAC”), and National Association of Friendship Centres (“NAFC”), questions arise about legitimacy of representation and whom DIAND should be consulting and partnering with in proposing to amend the *Indian Act*.

As mentioned above, the focus of this debate has been DIAND’s alliance with CAP for the Communities First consultation process and the AFN’s marginalization in the Governance Initiative. But the role of NAFC and NWAC in the dispute over the legitimacy and representation of Aboriginal interests cannot be ignored. The NAFC’s role has been less controversial, because this group has never claimed to be a “national organization” like the others.⁹⁷ Although the NAFC was involved in the *Corbiere* Phase 1 consultations (producing a legal analysis suggesting that *Corbiere* implies that off-reserve members have the right to nominate councillors and run for council) and some Communities First consultation sessions were held at friendship centres, the NAFC has not donned a representative mantle in the *FNGA* process.

The NWAC, meanwhile, was apparently pegged early on by DIAND to be a supporter of the Governance Initiative, due to the *FNGA*’s proposed repeal of s. 67 of the *Canadian Human Rights Act*.⁹⁸ But because other important equality issues like band membership, Indian status and individual property rights were not addressed by the *FNGA* agenda, to say nothing of more specific problems

96. *Ibid.* at 26.

97. See B. Morse *et al.*, “Beyond *Corbiere*: In Search of Legitimacy, Proposals and Pressures for Reform” (January 2001), online: First Nations Governance, Resource Material <http://www.fng-gpn.gc.ca/RM1_e.html> (date accessed: 1 July 2003) at 12-14.

98. See *supra* note 25.

like protection for women whose marriages end in divorce and band-ownership of houses, the NWAC decided in July 2001 to oppose the FNGL.⁹⁹ This decision has been the subject of criticism by both First Nations women leaders and “grassroots” First Nations women, however, who have suggested that consultations could have covered these issues and that the NWAC has missed a historic chance to lead, rather than simply following the lead of the chiefs.¹⁰⁰

The upshot of this split among Native women has been the formation of a new DIAND-funded national Aboriginal women’s group, the National Aboriginal Women’s Association (“NAWA”),¹⁰¹ which aims to “advise governments of all levels in their efforts to improve the lives and communities of [A]boriginal women and is interested in developing a cooperative and coordinated process between a national [A]boriginal women’s group and the Government of Canada.”¹⁰² Although NAWA claims to have “not taken an overall position for or against Bill C-7” and asserts that its role has merely been to provide information and to help Native women decide whether the “proposed amendments meet their self-government needs and respect their inherent rights,”¹⁰³ in light of the potential rights violation outlined above, it is tough to argue that participation in the Governance Initiative is a value-neutral stance.¹⁰⁴

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99. L. Kruzenga, “Nault Blinks, Governance Consultation Process Suspended: INAC, AFN Agree to 30-Day Cooling Off Period” *First Perspective* 10:8 (August 2001) 1.
100. See *ibid.* and S. Chase, “Some Native Women Like Plan to Amend *Indian Act*” *The Globe and Mail* (10 August 2001). The federal government agency, Status of Women Canada, has also recently published a series of policy research reports on the *Indian Act* and First Nations women’s issues. Besides arguing for reforms favouring greater participation by women and supporting reform of the s. 67 exemption of the *Indian Act* from application of the *Canadian Human Rights Code*, these essays generally support the accountability and governance agenda of the FNGL. See W. Cornet, “First Nations Governance, the *Indian Act* and Women’s Equality Rights” in *First Nations Women, Governance and the Indian Act: A Collection of Policy Research Reports* (Status of Women Canada, 2001) [hereinafter *First Nations Women*] 117 and J. Sayers and K. MacDonald, “A Strong and Meaningful Role for First Nations Women in Governance” in *First Nations Women, ibid.* 1, online: Status of Women Canada, Policy Research Publications <http://www.swc-cfc.gc.ca/pubs/06-6231140X/index_e.html> (date accessed: 1 July 2003).
101. NAWA’s president is Pam Paul, and board members include Gail Sparrow, Louise Bouvier, Muriel Stanley Venne, Rosa Walker and Shirley Henderson. See the “Board of Directors” page on the NAWA website, online: NAWA, Board Members <<http://www.nationalaboriginalwomen.ca/Board%20Members.htm>> (date accessed: 1 July 2003).
102. NAWA, “General Background”, online: NAWA, Background <<http://www.nationalaboriginalwomen.ca/background.htm>> (date accessed: 1 July 2003).
103. See NAWA, “Presentation by NAWA on Bill C-7, The *First Nations Governance Act*”, online: NAWA <<http://www.nationalaboriginalwomen.ca/standingcommitteepresentation.htm>> (date accessed: 1 July 2003) [hereinafter “Presentation by NAWA on Bill C-7”].
104. Critics go further than this, suggesting that NAWA’s participation in the FNGL has been at the behest of DIAND. For instance, NWAC’s President, Kukdookaa Terri Brown, claims that “[t]his government and Indian Affairs Minister, Robert Nault have attempted to destabilize a recognized, credible Aboriginal women’s organization by financing and creating a new national women’s group to support the proposed *First Nations Governance Act*.” See NWAC, News Release, “Kukdookaa Terri Brown, President of the Native Women’s Association of Canada to Begin ‘Heart of our Nations Tour’” (26 June 2003), online: Canadian Association of Sexual Assault Centres <http://www.casac.ca/allies/native_womens_assoc.htm> (date accessed: 15 July 2003). The New Democratic Party of Canada, which opposes Bill C-7, also claims to have obtained a note from Minister Nault to cabinet which states “[t]he Native Women’s Association of Canada opposed the

NAWA's analysis of the *Governance Act* also belies its impartiality. Although its comments are not without criticism of the bill,¹⁰⁵ their overall tone is favourable—especially with respect to the proposed amendment of s. 67 of the *CHRA*.¹⁰⁶ In short, NAWA appears to have preferred cooperation with DIAND and an opportunity to establish itself as a new voice for Aboriginal women through the organization of *FNGA* information sessions from autumn 2002 to spring 2003 and participation in the Joint Ministerial Advisory Committee.

A chance to lead rather than follow the lead of First Nations chiefs is clearly what inspired National Chief Dwight Dorey of CAP to agree to partner with DIAND in organizing Communities First consultations. As my discussion of the *Corbiere* case briefly explained above, off-reserve and non-status Indians have long been at odds with First Nations chiefs and the AFN over access to band programs, services and resources. As a result, many of CAP's interests coincided with those of DIAND in reforming the *Indian Act*. In terms of the *Corbiere* agenda of off-reserve participation in band elections, for instance, and accountability and auditing of band-owned enterprises, CAP's position is far more consistent with that of DIAND than the AFN.¹⁰⁷ Chief Dorey has also expressed some cynicism regarding AFN chiefs' unwillingness to participate in *Indian Act* reform due to their vested interests.¹⁰⁸ More recently, when appearing before the Standing Committee during the Bill C-7 hearings, Chief Dorey noted

initiative; as a result the National Aboriginal Women's Association was formed ..." (to take part in consultations). See "Nault's Bill Promotion Goes Too Far" *CBC News [online edition]* (4 July 2003), online: CBC News <http://www.cbc.ca/stories/2003/07/03/nault_protest030703> (date accessed: 20 July 2003).

105. See "Presentation by NAWA", *supra* note 103 and NAWA, "Bill C-7, *First Nations Governance Act* – Analysis and Summary", online: NAWA <<http://www.nationalaboriginalwomen.ca/bille7analysis.htm>> (date accessed: 1 July 2003) [hereinafter "Bill C-7 – Analysis"]. NAWA's main concerns relate to the extent of the power accorded to band enforcement officers, definition and use of the word "band member" in the *Act*, and the amendment to the *CHRA*.
106. The National Council of Women of Canada ("NCWC") has adopted a similar position. While offering criticism of various provisions in Bill C-7, recognizing the harmful effects of the colonial *Indian Act*, and supporting the inherent Aboriginal right to self-government, NCWC states that its research and consultation with Aboriginal women demonstrate that greater protection of human rights and personal safety on reserve is essential. For this reason, NCWC supports amending s. 67 of the *CHRA* and adding "political belief" to the list of prohibited grounds for discrimination in the *Act*. See Vice-President Mary Scott, "Brief to the Standing Committee on Aboriginal Affairs Regarding Bill C-7 *First Nations Governance Act*" (February 2003), online: National Council of Women of Canada <http://www.ncwc.ca/pdf/Final_Brief.pdf> (date accessed: 1 July 2003). Citing the lack of democracy and recourse or remedy on a small First Nation in southern Manitoba, the Provincial Council of Women of Manitoba ("PCWM") also supported many aspects of Bill C-7. See PCWM, "Brief to the Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources" (Public Hearing into Bill C-7, *First Nations Governance Act*, Winnipeg, 19 March 2003), online: NCWC <http://www.ncwc.ca/pdf/pcwm_brief.pdf> (date accessed: 1 July 2003).
107. See "Growing Alarm", *supra* note 43. Other areas in which CAP has been at odds with the AFN include the monitoring and administration of elections, and chiefs' legal fees.
108. Paul Barnsley reports that "Dorey believes the chiefs will fight change to the present system simply because they could lose power and influence." The reason for this, according to Barnsley, goes to Dorey's call for a nation-based approach to First Nations issues explained below: "he believes First Nations have abandoned their off-reserve members because the funding levels are so low they're forced to make unpleasant choices." See P. Barnsley, "Chiefs Favour 'Tinkering' With the *Act* – Dorey" *Windspeaker* 19:5 (September 2001) A1.

that although the *Governance Act* was not CAP's "preferred approach" to the challenges raised by the *Indian Act*,

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.¹⁰⁹

Nonetheless, one cannot help but wonder if CAP has also felt somewhat let down—like NWAC—by the limited agenda Minister Nault has allowed to go forward in the Governance Initiative. When he appeared before the SCAA in March 2002, for instance, Chief Dorey indicated his interest in a significantly broader agenda and reiterated CAP's earlier concerns about *Governance Act* reforms not targeting "the most basic legal concepts underlying the *Indian Act* such as Indian status and Band membership."¹¹⁰ CAP believes these legal concepts to be anachronisms which have excluded its constituents from having access to their Aboriginal rights in a discriminatory manner; they violate the "fundamental human rights of Aboriginal people because they interfere with Aboriginal control over Aboriginal identities and violate the dignity of Aboriginal people as individuals and as peoples."¹¹¹ In calling for replacement of the *Indian Act* with an "*Aboriginal Peoples Act*," which would adopt a nation-based approach like that proposed by the *Penner Report* some 20 years ago,¹¹² Dorey made it clear that his organization's partnership with DIAND today has been made in the expectation of more significant reforms in the future.¹¹³

A nation-based approach is something upon which the CAP and the AFN actually agree. Their disagreement focuses on the AFN's assertion that it already is the legitimate representative of First Nations in Canada.¹¹⁴ But the AFN's decision to oppose the Governance Initiative and boycott consultation sessions at its May 2001 Confederacy in Vancouver¹¹⁵ placed it in an awkward position: because the federal government could essentially ignore this opposition and

109. National Chief D. A. Dorey, "Presentation on Proposed Bill C-7: It's a Question of Fairness!" (Notes for a Presentation to the House of Commons Standing Committee on Aboriginal Affairs and Natural Resources, Ottawa, 28 January 2003), online: Congress of Aboriginal Peoples <<http://www.abo-peoples.org/programs/Governance/Governance.html>> (date accessed: 1 July 2003).

110. Congress of Aboriginal Peoples, "The Federal First Nations Governance Initiative at CAP: Questions and Answers – How will off reserve Aboriginal people be affected by the FNGI? ", online: Congress of Aboriginal Peoples, Governance Program Description <<http://www.abo-peoples.org/programs/Governance/Govaire2.html>> (date accessed: 15 July 2003).

111. *Ibid.*

112. Canada, Special Committee on Indian Self-Government, *Report* (Ottawa: Supply and Services Canada, 1983) ("*Penner Report*") at 54.

113. National Chief D. A. Dorey, "It's a Question of Fairness!" (Notes for a Presentation to the House of Commons Standing Committee on Aboriginal Affairs, Ottawa, 19 March 2002), online: Turtle Island Native Network <<http://www.turtleisland.org/news/dorey.pdf>> (date accessed: 1 July 2003) at 5.

114. See note 41.

115. See Assembly of First Nations, Confederacy of Nations Resolution No. 15/01 (Vancouver, 8-10 May 2001), which expressed strong disapproval of the Minister's decision to proceed in a "unilateral and arbitrary" manner on the FNGI and gave direction regarding how this position was to be given effect.

continue to forge ahead with CAP's support, the AFN and regional chiefs were left with minimal involvement in a process affecting their vital interests. I would argue that the result has been something of a crisis of legitimacy and confidence for the AFN.¹¹⁶

Although the AFN's criticism of the FNGI has been the most vociferous and comprehensive of all the national organizations,¹¹⁷ being sidelined and subjected to funding cuts¹¹⁸ has led to significant internal dissent regarding how to re-enter the process. Former Grand Chief Matthew Coon Come's remarks at the Standing Committee in early 2003, meanwhile, sounded almost like a desperate plea for recognition:

I am here today in my capacity as the National Chief of the Assembly of First Nations. The AFN is *the* national body representing the political interests and aspirations of First Nations peoples in Canada. The National Chief is elected by all the Chiefs in Canada, who in turn are elected by the citizens of their First Nations. The AFN is a truly representative body resulting from a democratic process. We have a role to play in this discussion.¹¹⁹

Things really came to a head, though, after the Chiefs-in-Assembly voted in July 2001 at Halifax to reopen the door to working with the Minister should he be willing to link *Indian Act* changes to priority First Nations issues on governance,

116. Phil Fontaine's victory over Matthew Coon Come in the AFN's July 2003 National Chief election supports this assertion, because the "relevance" of the AFN was the first plank in Mr. Fontaine's campaign "Vision" statement. See Phil Fontaine, "Vision for a Renewed Assembly of First Nations", online: Phil Fontaine, Vision <<http://www.philfontaine.com/en/vision.htm>> (date accessed: 1 July 2003).

117. The AFN and regional chiefs organizations have drafted and commissioned numerous analyses of the Governance Initiative. See, *inter alia*, AFN, "Discussion Paper on Governance" (2001), online: AFN, Briefing on the Governance Initiative <<http://www.afn.ca/Programs/Governance/AFN%20Book2%20Eng.pdf>> (date accessed: 1 July 2003) [hereinafter "Discussion Paper on Governance"]; "Legal and Related Issues Concerning the FGI", *supra* note 80; AFN, "Preliminary Analysis: *First Nations Governance Act*" (14 June 2002), online: AFN, Legislation Information <<http://www.afn.ca/FNGA%20ANALYSIS.pdf>> (date accessed: 1 July 2003) [hereinafter "Preliminary Analysis: *FNGA*"]; J. Borrows, "Stewardship, and the Proposed *First Nations Governance Act*" (August, 2002) [prepared for the Office of the B.C. Regional Vice-Chief of the Assembly of First Nations], online: Assembly of First Nations B.C. Region, Governance <<http://bcfn.com/governance/>> (date accessed: 1 April 2003); "*FNGA*: Implications", *supra* note 65; "Section 91(24) Powers", *supra* note 93; "Implications of Parliament's Exercise", *supra* note 92; and "Proposed *FNGA*: Commentary", *supra* note 81.

118. News media reported that AFN's annual funding from DIAND was halved from \$20 million to \$10 million in the Fall of 2001, and its decision to not participate in Communities First consultations meant further foregone government moneys. While the AFN characterized the cuts as punishment for its non-participation and opposition to the FNGI, the Minister replied that the reduction was attributable to the winding down of Joint Initiative projects and that the AFN's base budget from DIAND was actually only \$2.1 million. See P. Barnsley, "Funds Withheld to Pressure Chiefs, Say First Nation Leaders" *Windspeaker* 19:1 (May 2001) 1; P. Barnsley, "AFN Still Looking for a Governance Deal" *Windspeaker* 19:6 (October 2001) 1; P. Barnsley, "Coon Come Answers Nault" *Windspeaker* 19:7 (November 2001) 2; and P. Stock, "Soft Steps to Assimilation: Ottawa's Indian Policy Seems Designed to Slowly Push Natives Into the Real World" *Report Newsmagazine (National Edition)* (4 February 2002) 19.

119. "Speaking Points", *supra* note 57 (emphasis in original).

namely an inherent rights approach regarding Aboriginal title, treaties and self-determination.¹²⁰

The force behind the AFN's Halifax resolution was its accompanying threat of country-wide protests and civil-disobedience if the First Nations Governance Initiative was not suspended immediately. After the Minister agreed to a suspension of consultations for August 2001 to permit negotiations, and subsequent to further disputes over how to accommodate the AFN's interest in moving forward on an inherent rights approach,¹²¹ the AFN and DIAND eventually worked out a deal incorporating DIAND's priority concerns into a broader set of "work-plans" focusing on First Nations priorities (including the inherent rights approach and social and economic issues). This compromise was criticized by Chief Stewart Phillip of the Union of British Columbia Indian Chiefs as being the result of a "collaboration process" by the AFN executive,¹²² while the Chiefs of Ontario sought legal advice on what they alleged to be a breach of mandate inconsistent with the AFN's charter.¹²³

The main problem critics had with the AFN's efforts was the lack of linkage between participation in the Governance Initiative and the final outcome of the other work-plans. In light of Minister Nault's lack of cabinet mandate on the work-plans, Nahwegahbow's letter to the Ontario Chiefs claimed the AFN's deal was based on "blind trust."¹²⁴ While it seems clear that the purpose of the Work-Plan deal was to offer the AFN a way back into the *Governance Act* process, politically this proved to be a very tough sell and the AFN pulled out of the process in December 2001 after the Chiefs-in-Assembly rejected continued participation on the basis of the work-plans due to the Minister's unwillingness to adjust his timelines or withdraw the *FNGA*.¹²⁵ But the AFN's interest in re-

120. Assembly of First Nations, Chiefs-in-Assembly Resolution No. 3/01 (Halifax, 17-19 July 2001).

121. This dispute was provoked by the AFN's publication in early September 2001 of its proposed cooperative "Work-Plan" on "governance"—a strong statement of the inherent rights approach and condemnation of federally delegated governance powers—which Minister Nault criticized as inconsistent with DIAND's August 2001 discussions with the AFN and unrelated to the Governance Initiative. See Assembly of First Nations, "Facilitating the Exercise of Self-Government: A Cooperative Approach Between Canada and the Assembly of First Nations" (December 2001), online: AFN, Federal Government *First Nations Governance Act* <<http://www.afn.ca/Programs/Governance/Governance%20Workplan.pdf>> (date accessed: 1 July 2003); Letter from Minister R. Nault to National Chief M. Coon Come (20 September 2001), online: First Nations Governance <http://www.fng-gpn.gc.ca/RM_Let9_e.html> (date accessed: 1 July 2003); and letter from National Chief M. Coon Come to Minister R. Nault (26 September 2001), online: AFN, Federal Government *First Nations Governance Act* <<http://www.afn.ca/Programs/Governance/FederalGovernmentGovernanceAct.htm>> (date accessed: 1 July 2003).

122. Letter from Chief Phillip Stewart to National Chief Matthew Coon Come, "Re: Cooperate AFN/DIAND 'Penultimate Draft' Work-Plans on 'Governance, Inherent Rights & Social/Economic Conditions' (Nov. 2, 2001, Version)" (28 November 2001), online: Turtle Island Native Network <<http://www.turtleisland.org/news/rift.pdf>> (date accessed: 1 July 2003).

123. "Legal Opinion", *supra* note 87.

124. See *ibid.* at 4.

125. See Assembly of First Nations, Confederacy of Nations Resolution No. 30/2001 (Ottawa, 4-6 December, 2001) and Assembly of First Nations, "Commentary on the Presentation to the Standing Committee by the INAC Minister", online: AFN, Press Releases <<http://www.afn.ca/nault%20presentation%20to%20scaa%20%20website%20version.pdf>> (date accessed: 1 July 2003) at 20.

entering the process was perhaps overlooked by its critics, and, should also not be underestimated. Most important in this respect was the possibility of having a direct effect on legislative drafting through the Minister's proposal to re-embrace a partnership-based approach and establish a Joint Ministerial Advisory Committee ("JMAC") to provide technical advice.

A New Approach to Cooperative Policy Development: JMAC

Arguably the most successful procedural aspect of the Governance Initiative to date has been the Joint Ministerial Advisory Committee. This committee, which was announced by the Minister in November 2001 and filed its 200-plus page report¹²⁶ in early March 2002, comprised representatives from both DIAND and First Nations "stakeholder" groups—CAP, NAWA, and the AFN (for a short period from after the announcement of the Work-Plan until AFN's withdrawal from the process in December 2001).¹²⁷ It spent several months working on legislative proposals in the four areas in which DIAND consultations have indicated a desire for reform. Although its agenda was thus predetermined, the JMAC proved to have no compunction with engaging in a rigorous analysis and critique of the available options and discussing "non-agenda" issues. I will discuss JMAC's analysis of the four specific *Governance Act* subject areas below, but a few elements of its proposals are worth noting to demonstrate how such a joint effort can reconcile conflicting interests.

One of the main concerns JMAC members had to deal with was criticism from First Nations constituencies about the legitimacy of this initiative and its inconsistency with the idea of an inherent right to self-government. In this respect the committee made cogent arguments to the effect that eliminating the Minister's authority over bands was a step in the right direction that would "facilitate, rather than obviate or interfere with, longer term self-government

126. Joint Ministerial Advisory Committee, "Final Report: Recommendations and Legislative Options to the Honourable Robert Nault, P.C., M.P., Minister of Indian Affairs and Northern Development on the First Nations Governance Initiative" (8 March 2002), online: First Nations Governance <http://www.fng-gpn.gc.ca/JMACFR_M802_e.html> (date accessed: 15 July 2003) [hereinafter "JMAC Report"].

127. The Committee includes representatives chosen by their national Aboriginal organizations and others invited by the Minister. They were Mr. Roy Bird, Co-Chair; Mr. James Aldridge, Co-Chair; Mr. Bernd Christmas, member; Mr. Gordon Shanks, member (DIAND); Ms. Wendy Cornet, member (CAP); Ms. Carolann Brewer, member (NAWA); Mr. Roger Jones, member (initially AFN and subsequently from "The Network," along with former Parliamentarian, Wilton Littlechild); Mr. Andrew Beynon (Department of Justice); and Ms. Geneviève Thériault (Department of Justice). See INAC, Backgrounder, "First Nations Governance – Joint Ministerial Advisory Committee" (3 December 2001), online at: First Nations Governance, Archived News Releases <http://www.fng-gpn.gc.ca/NR_BG_JMAC_e.html> (date accessed: 15 July 2003) and INAC, "Joint Ministerial Advisory Committee", online: First Nations Governance, JMAC <http://www.fng-gpn.gc.ca/JMAC_mn_e.html> (date accessed: 15 July 2003).

arrangements.”¹²⁸ The JMAC’s primary means of doing so was via an “Independent Institution” to be responsible for most of DIAND’s current administrative, review and appeal roles.¹²⁹ The committee also recommended that the *FNGA* include a “non-derogation” clause to ensure that the *Act* could not be interpreted in a way that would infringe existing Aboriginal or treaty rights, and discussed options for the wording of such a clause at length in an effort to determine the clearest formulation.¹³⁰

This endorsement of the Governance Initiative’s goals was qualified, however, by noting that the onus was on the federal government to live up to its commitments regarding the transitional nature of these reforms. The “JMAC Report” also noted that the participation of regional First Nations organizations in the FNGI process was premised upon the expectation of progress on the AFN’s other work-plans.¹³¹ The JMAC proposed that the best way to ensure that governance measures were indeed interim was by *not* enacting a new stand-alone statute (which “might be portrayed as sufficient to obviate further reforms or initiatives”) but by simply amending a new schedule to the *Indian Act*.¹³² Likewise, it was suggested that the term “bands” not be replaced by “First Nations” in any new measures, lest the currency of nationhood be debased and the process of nation-rebuilding be jeopardized.¹³³

In summation, the JMAC provided a relatively novel and independent vehicle for policy formulation via stakeholder consultation. The approach addressed the legitimacy needs of not only the Minister (for legal and political reasons), but also those of First Nations organizations interested in making sure their voices were heard in the policy development process and in appearing proactive rather than reactive. Whether DIAND and the Minister have given

128. “Overview” in “JMAC Report”, *supra* note 126, online: First Nations Governance, JMAC Final Report <http://www.fng-gpn.gc.ca/JMACFR_M802_e.html> (date accessed: 15 July 2003) [hereinafter “Overview”].

129. Described at “Independent Institution” in “JMAC Report”, *ibid.* [hereinafter “Independent Institution”]. The JMAC also recommended that the *Act*’s preamble and “purpose clause” be used to demonstrate the federal government’s commitment to move forward on self-government agreements, and proposed several alternatives. See “Overview” *ibid.* and “Appendix 1” to the Overview.

130. See “Independent Institution”, *ibid.* and “Appendix 2” to the Overview.

131. See “Overview”, *supra* note 128.

132. *Ibid.*

133. *Ibid.* This view is not shared by all, however. Chief Judith Sayers of the Hupacasath First Nation has stated that “Indian, Band, Reserve, are not our words and frankly, are inappropriate. These terms need to be changed to reflect First Nations’ terms and values, but the Minister is not prepared to do so at this time.” See Chief J. Sayers, “The *First Nations Governance Act*: an Analysis”, online: Turtle Island Native Network, Governance <<http://www.turtleisland.org/news/sayersfng.pdf>> (date accessed: 15 July 2003) at 2. Some members of JMAC have reiterated, however, that the use of “First Nations” language is “not helpful to First Nations” and simply “another example” of the federal government appropriating words that First Nations developed to avoid using the federal government’s terminology (“Indians,” etc.). Their concern is that people (especially judges) will be misled into confusing an act about “First Nations Governance” with the “real inherent right of self-government.” See “Memorandum to Vice-Chief Herb George, Vice-Chief Mary Jane Jim, Vice-Chief Wilson Bearhead re: *First Nations Governance Act*” (6 May 2002), online: Turtle Island Native Network, Governance <<http://www.turtleisland.org/news/fngamemo.pdf>> (date accessed: 15 July 2003).

much weight to the JMAC's advice where it diverged from their own views, however, is debatable.¹³⁴ This outcome, I would argue, has only been to the Governance Initiative's detriment.¹³⁵ Despite criticism to the contrary,¹³⁶ I believe the "JMAC Report" represents the most balanced, thoughtful and workable document on *Indian Act* governance reform currently in the public realm.

IV SUBSTANCE: PROS AND CONS OF THE FOUR MAIN AREAS OF REFORM

The upshot of the Communities First consultation process was the emergence of what DIAND called "a clear pattern" in favour of reform:

First Nations participants have expressed a clear desire for Chiefs and Councils to have the power and authority to respond effectively to their local community needs. Participants have also expressed that the involvement of First Nation individuals in community governance is essential. At the outset, First Nations members want to be informed. Participants viewed that information is key to effective decision-making and to ensure that those making decisions are held to account. First Nations members also see a clear distinction in roles between the political leadership who make various rules and the band administration who should administer those rules. In short, First Nations participants are seeking modern, enabling and effective community governance tools that help and support the roles of First Nations members, Chiefs and Councils and band administrators. We've been clearly told that any proposed legislation should be empowering for First Nations. Finally, this

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134. From the outset, Regional Chief Stewart Phillip of the British Columbia Union of Indian Chiefs suggested that the Minister would treat the JMAC as just "one stream" of advice rather than giving it the weight it deserves. See Chief S. Phillip, "Addressing *FNGA* and Promoting a First Nations Agenda" (Remarks at the National Forum on Protection of Treaty and Inherent Rights, Winnipeg, 12 March 2002), online: Turtle Island Native Network, Governance <<http://www.turtleisland.org/news/news-aboriginalrights-phillip.htm>> (date accessed: 15 July 2003).
135. In particular, Bill C-7's lack of a non-derogation clause, maintenance of important Ministerial roles, and format (*i.e.*, as a stand-alone *Act*) raise serious problems which the Standing Committee's revisions have only partially addressed (by proposing the addition of a non-derogation clause). See "SCAA Bill C-7 Report", *supra* note 4.
136. Beyond the AFN's critique of the composition of the Committee (*i.e.*, that it mainly comprised "government representatives and Aboriginal people from off-reserve Aboriginal organizations": see Assembly of First Nations, "Commentary on the Presentation to the Standing Committee by the INAC Minister", online: AFN, Press Releases <<http://www.afn.ca/nault%20presentation%20to%20scaa%20website%20version.pdf>> (date accessed: 1 July 2003) at 21), John Borrows argues that the JMAC's reasoning was "short-sighted when measured against the longer-term goals of the *Indian Act*." Although many of the principles the Committee advocates are good when put to appropriate ends (he cites transparency, disclosure, redress, intervention and enforcement here), Borrows claims that these principles are deeply compromised and further a colonial legacy "when they are put in the service of the *Indian Act*'s colonial objectives, of parceling, dividing and assimilating First Nations leadership." While Professor Borrows may be right, the flip side to seeing the Governance Initiative as "only graft[ing] a few feeble provisions onto a dying tree" lies in considering these reforms as a transitional measure to help create the conditions in which self-government will flourish. Hence the importance of the preamble and purpose clause outlined above at note 128, and the Minister taking good-faith steps to accelerate progress in the negotiation of self-government agreements (discussed below).

pattern remains consistent across regions, age-cohorts, gender and on and off reserve residency.¹³⁷

These results should not be surprising, especially in light of the specific methodological weaknesses cited above. Furthermore, even if some First Nations people can be said to agree with these generally laudable sounding goals and principles, the devil is obviously in the details—that is, how these objectives are operationalized. The next section offers a critical look at how the four main reform proposals at issue in the FNGI would affect Canada's over 600 bands—the “basic governmental unit[s] established by the *Indian Act*.”¹³⁸ It explores the evolution of reform proposals up to Bill C-7, and seeks to determine if and how the stated aims will be achieved through the *FNGA*'s proposed “codes.” At this stage, it seems fair to say that although Bill C-7 addresses some of the early concerns of the Governance Initiative, it falls far short of the mark when it comes to the larger governance objective of enabling bands to “respond more effectively to their particular needs and aspirations.”¹³⁹

Voting Rights and Leadership Selection

Although the federal government's need to respond to the *Corbiere* decision provided a large part of the initial impetus for the Governance Initiative, as I explained above, of late this motivation for *Indian Act* reform has played second-fiddle to accountability and “good governance” issues. The reasons for this shift in focus appear to lie in (1) the sense that the federal government's Fall 2000 regulatory amendments have dealt with the most pressing *Charter* concerns¹⁴⁰ and (2) DIAND's concern with opening up a Pandora's box of status and membership issues if too much emphasis was put on the thorny problem of balancing off and on-reserve members' participation in leadership selection. As a result of steering clear of status and membership issues, the topic of leadership selection has taken on more of a “governance” flavour. This can be seen in the evolving treatment of this subject from the *Communities First Report* to the “JMAC Report” and especially in s. 5 of Bill C-7 (“Leadership Selection Codes”).

In the section on consultation results in the *Communities First Report*, for instance, DIAND noted that there was consensus on “acknowledgment of the need to balance the interests of on and off-reserve members, with a range of suggestions around how best to do this.”¹⁴¹ The most popular option cited was 70 per cent support for the creation of a special seat on council for off-reserve band

137. See “Executive Summary”, *supra* note 59.

138. See S. Imai, *Aboriginal Law Handbook*, 2d ed. (Toronto: Carswell, 1999) at 132 [hereinafter *Aboriginal Law Handbook*].

139. Bill C-7, s. 3(b).

140. See note 39.

141. “Executive Summary”, *supra* note 59.

members,¹⁴² a solution which might work for bands in certain situations but would likely not satisfy off-reserve members where they constitute a majority of band members. Rather than dwelling on this issue, though, the *Communities First Report* instead emphasized support for various reforms relating to the administration of elections or custom leadership selection processes, such as eligibility rules, rules permitting the removal of elected leaders, an extension of Chief and Council terms beyond the current two years, and the elimination of DIAND's role in running s. 74 elections and dealing with appeals.¹⁴³

The Joint Ministerial Advisory Committee likewise spent most of its report addressing default electoral code rules and how a new system would interact with current custom leadership selection processes (they proposed having new default rules that would supersede custom regimes after the transition period unless the band re-approved its custom code¹⁴⁴). To be fair, though, the JMAC did consider (and reject as impracticable) Justice L'Heureux-Dubé's suggestion in *Corbiere* that band governance functions might be divided between those of a local and general nature,¹⁴⁵ and decided to attach an appendix to the section outlining several options for balancing the interests of on and off-reserve members within its proposed default rules. These options range from leaving it up to individual bands to various mechanisms for weighted off-reserve representation on the band council—which the JMAC's discussion implies is a preferable option.¹⁴⁶

In Bill C-7, detailed provisions relating to membership issues and the voting rights of off-reserve members of bands have intentionally been omitted.¹⁴⁷ Subsection 5(1) lays out ten sorts of rules that must be contained in band "leadership selection codes" for the 245 bands in Canada currently operating under the statutorily-defined election provisions in s. 74 of the *Indian Act*.¹⁴⁸ For the 365 bands operating under customary rules, s. 5(2) offers the possibility of

142. See "What We Heard", *supra* note 69.

143. *Ibid.*

144. See "Leadership Selection and Voting Rights" in the "JMAC Report", *supra* note 126.

145. See *Corbiere*, *supra* note 17 at para. 103.

146. See *ibid.* at D-23 to 24, and at D-34ff.

147. Subsection 5(5) provides that all leadership selection codes (including for new and custom bands) "must respect the rights of all members of the band but may balance their different interests, including the different interests of members residing on and off the reserve." Minister Nault has claimed he is interested in working with First Nations on thorny membership definition problems, but has also stated: "I purposefully left membership out of the debate on the First Nations Governance legislation simply because that is a very complicated and sensitive issue for communities." See P. Barnsley, "Feds to Abandon 30 Negotiation Tables: Minister Robert Nault Encourages Lively Debate on Proposed Legislation" *Windspeaker* 20:6 (October 2002) 3 [hereinafter "Feds to Abandon 30"].

148. The required provisions under s. 5(1) include: the size and composition of the band council, the mode of selection (providing that a majority of members are elected), the term of office (subject to a five-year maximum), selection procedures (so long as a secret ballot is used), voting and electoral qualifications, how vacancies will be filled, how election results will be appealed and what constitutes electoral corruption, how elected and non-elected council members may be removed, and how the leadership selection code will be amended. Subsection 32(1) permits the government to make regulations "providing for the matters with respect to which a code may be adopted under section 5, 6 or 7, other than paragraph 5(2)(b)."

adopting a leadership selection code comprising their existing custom rules—so long as these include an appeal process and a procedure for amending the code. Following revision by the SCAA before second reading, s. 5(3) now gives custom bands three years (rather than two) to adopt their codes from the coming into force of the *FNGA*. Subsection 5(4) provides that the “default” regime in s. 5(1) will provide to newly created bands.

What are we to make of these proposals? One might have thought that by omitting membership issues and the rights of off-reserve members from Bill C-7, and by offering a slightly less prescriptive regime than exists under s. 74, this area of the reform to the *Indian Act* regime would be among the least contentious of the four main areas being addressed. Even the AFN, after all, has acknowledged that “First Nations have been calling for change in this area.”¹⁴⁹ But the AFN’s proposed alternative to the existing default s. 74 *Indian Act* electoral regime, namely customary leadership selection until the successful completion of self-government negotiations, is not one that has been adopted in Bill C-7.

Instead, the draft *Governance Act* appears to advance an accountability and “good governance” agenda by codifying the core elements of election rules that DIAND has been encouraging bands to accept when they adopt “custom codes.”¹⁵⁰ The requirements of s. 5(1) establish a mandatory minimum floor for current s. 74 bands in leadership selection, and thus “limit the scope of delegated self-government offered by the Bill to a very narrow compass.”¹⁵¹ As has been noted, these rules “clearly deviate substantially from the actual traditions and customs of First Nation leadership selection processes based on clan systems, hereditary rules or consensus selection.”¹⁵² For custom bands, the ramifications of s. 5(2) and the new definition of “council of the band” in Bill C-7 are particularly severe. The new definition appears to legally terminate the continuity of existing custom band councils (which may enjoy a s. 35 protected, unextinguished right to self-government)¹⁵³ and forces them to codify appeal and amendment procedures.

The essence of the problem, as pointed out by Professors Cornell, Jorgensen and Kalt of the Native Nations Institute, is the “degree to which matters of governance in the *FNGA* are not left substantially to First Nations’ discretion.”¹⁵⁴ The one-size-fits-all approach DIAND has adopted in Bill C-7 “neglects

149. See AFN, Fact-sheet, “Elections and Leadership Selection,” online: AFN, Federal Government *First Nations Governance Act* <<http://www.afn.ca/Programs/Governance/FederalGovernmentGovernanceAct.htm>> (date accessed: 1 July 2003) and “Legal and Related Issues Concerning the FGI”, *supra* note 80 at 10.

150. “Preliminary Analysis: *FNGA*”, *supra* note 117 at 5.

151. Letter from David Nahwegahbow to Chief Stewart Phillip, Union of B.C. Indian Chiefs, “Re: Proposed *First Nations Governance Act* (“Bill C-61”)” (16 July 2002), online: Union of B.C. Indian Chiefs, *FNGA* Page <http://www.ubcic.bc.ca/docs/FNGA_Nahwegahbow_071602.pdf> (date accessed: 15 July 2003) at 4 [hereinafter “Proposed *FNGA*”].

152. “Preliminary Analysis: *FNGA*”, *supra* note 117 at 5-6.

153. See the discussion of McNeil’s works at the text accompanying notes 94-95 and “Proposed *FNGA*”, *supra* note 151 at 9.

154. “*FNGA*: Implications”, *supra* note 65 at 8.

diversity of cultures and circumstances and raises serious issues of legitimacy.”¹⁵⁵ Although the *Governance Act* purportedly aims to “enable bands to respond more effectively to their particular needs and aspirations” and to enable them to “design and implement their own regimes in respect of leadership selection ... while providing rules for those that do not choose to do so,”¹⁵⁶ s. 5 “undermines the very idea of self-governance.”¹⁵⁷ In short, while the Canadian government has embraced the Harvard Project’s research with respect to good governance and accountability, it has neglected “practical sovereignty,” cultural match and legitimacy.¹⁵⁸

At the end of the day, one cannot but help think that a JMAC-like approach to customary leadership selection would have proven a better option for the federal government. This alternative would better respect Aboriginal difference, while holding bands opting for custom procedures accountable to their communities by requiring re-approval and registration of the selection code as a band law. The approach remains paternalistic, but paternalism is unavoidable with the *Indian Act* regime and here, the ends of fostering good governance might actually justify the means. Pending this sort of amendment to Bill C-7, First Nations will no doubt be arguing for a simpler change along the lines suggested by lawyer Maria Morrellato, who recommends that s. 5(1) become optional and that other restrictions on the rights of custom bands be removed.¹⁵⁹ Adequate funding for codification may also prove to be a vitally important issue when it comes to implementation.¹⁶⁰

Legal Standing of Bands

According to DIAND, the legal standing of bands became an issue in the Governance Initiative because under the *Indian Act* “there is no clear capacity of bands to sue, to contract, to borrow, etc., which makes it hard for councils to

155. *Ibid.* at 16.

156. Bill C-7, ss. 3(b) and (c).

157. “*FNGA: Implications*”, *supra* note 65 at 16.

158. *Ibid.* at 11-12.

159. “Proposed *FNGA: Commentary*”, *supra* note 81 at 18-20. Morrellato proposes that the provisions a leadership selection code “must” include in s. 5(1) be amended to read “may” include. She also suggests at 18 that Bill C-61 should permit communities to choose their own procedures for adopting codes, “providing that the procedure is legitimized by the community in an open and transparent manner.”

160. Although Minister Nault has promised that DIAND would make \$110 million available to help First Nations comply with the *Governance Act*’s provisions, that amounts to only \$173,775 per band when divided up evenly between the 633 bands in Canada. Critics note that this may not be enough. See P. Barnsley, “Minister Pledges \$110 Million” *Windspeaker* 20:3 (July 2002) 1. As the Kinoomaadiwag Historical Society of the M’Chigeeng First Nation notes in its “Analysis of Bill C-7 *First Nations Governance Act*” (28 June 2002), in D. McLaren, “Comment on Bill C-7, *First Nations Governance Act*” (Chippewas of Nawash, July 2002, updated December 2002), online: Dibauidjimoh News of the Chippewas of the Nawash <<http://www.bmts.com/~dibauidjimoh/Naw-Governance.rtf>> (date accessed: 15 July 2003) [hereinafter “Comment on Bill C-7”] at 8: “Compiling the current addresses of and delivering information packages to off reserve voters is a costly and time consuming endeavour especially for smaller bands. Similarly, section 6(3)(a) will be burdensome.”

conduct day-to-day business with other governments, the private sector and other third parties.”¹⁶¹ This legal uncertainty is attributable to the unique nature of bands under Canadian law¹⁶² and courts’ resultant unwillingness to recognize bands as natural persons.¹⁶³ As J. Woodward has put it,

The band, as an enduring entity with its own government, is a unique type of legal entity under Canadian law. The rights and obligations of the band are quite distinct from the accumulated rights and obligations of the members of the band ... In law a band is in a class by itself.¹⁶⁴

No doubt because of the rather technical nature of this issue, DIAND reports that participants in Communities First consultation sessions “indicated that this theme area was difficult to address, and/or of little interest to them.” Despite a similar lack of input in written submissions, however, questionnaire responses prompted by questions on the matter indicated “significant support for better definition around First Nations legal standing.”¹⁶⁵

Questionnaire responses also indicated concern regarding the effect such a clarification might have on the Crown – First Nations fiduciary relationship, and First Nations land ownership and management (by creating corporate municipalities for bands, say). The AFN has articulated similar concerns, and further, has argued that the legal status issue is simply not as much of a problem as the federal government suggests. Besides the use of economic development corporations (which separate band business from band administration) and other arrangements, over the years the courts have been willing to find *Indian Act* bands able to assume contractual obligations and to be both civilly and criminally liable.¹⁶⁶ As the “JMAC Report” points out, however, the unique nature of bands has still “often made it difficult to predict whether or not a band or band council will be considered to be a legal person, or to have the necessary legal capacity, as each new situation arises.”¹⁶⁷ The methods bands have devised also require “additional effort and expense,” a big concern when the limited

161. Canada, INAC, “Communities First: First Nations Governance Under the *Indian Act* – Discussion Paper,” (Ottawa: Minister of Public Works and Government Services Canada, 2002) at 5-6 [hereinafter “Communities First Discussion Paper”].

162. See *Montana Band v. R.* (1997), [1998] 2 F.C. 3 (F.C.T.D.).

163. See, for instance, *Letendre v. Canada (DIAND)*, [2001] F.C.A. 67 at para. 15ff.

164. J. Woodward, *Native Law* (Toronto: Carswell, 1998) at 397.

165. See “What We Heard”, *supra* note 69.

166. See “Legal and Related Issues Concerning the FGI”, *supra* note 80 at 9-10. See also Shin Imai’s discussion of these issues in his *Aboriginal Law Handbook*, *supra* note 138 at 131. Imai asserts that *Indian Act* bands can enter into contracts and be formally bound following a band council resolution (citing *Basque v. Woodstock Indian Band* (1996), 175 N.B.R. (2d) 241 (N.B.C.A.) and *Heron Seismic Services v. Peepeekisis Indian Band* (1990), [1991] 2 C.N.L.R. 52 (Sask. Q.B.), *aff’d* (1991), [1992] C.N.L.R. 32 (Sask. C.A.)), sue and be sued (citing *Montana Band v. R.* (1997), [1998] 2 F.C. 3 (F.C.T.D.) and *Clow Darling v. Big Trout Lake Band of Indians* (1989), [1990] 4 C.N.L.R. 7 (Ont. Dist. Ct.)), and be liable for criminal acts and provincial offences (citing *Paul Band (Indian Reserve No. 133) v. R.* (1983), [1984] 1 C.N.L.R. 87 (Alta. C.A.)).

167. See “Legal Status and Capacity” in “JMAC Report”, *supra* note 126.

resources of smaller bands—many of whom are very interested in economic development—is considered.

On this issue, the AFN concedes, Minister Nault “seems to have heard some of the concerns of First Nations and adhered to the recommendations of JMAC.”¹⁶⁸ Subsection 15(1) of Bill C-7 thus states that:

A band has the legal capacity, rights, powers and privileges of a natural person, including the capacity to

- (a) enter into contracts and agreements;
- (b) acquire, hold and dispose of rights and interests in property;
- (c) raise, expend, invest and borrow money;
- (d) sue or be sued; and
- (e) do anything ancillary to the exercise of its legal capacity, rights, powers and privileges.

The draft *Governance Act* also goes some distance towards preserving the unique status of bands in two respects. First, s. 15(3) stipulates that the rights, powers and privileges specified in s. 15(1) “do not affect the legal status of a band and, in particular, do not have the effect of incorporating the band.” Second, s. 15(4) ensures that the section does not affect “the interest in reserve lands or Indian moneys” held by band members. Nonetheless, some critics remain concerned that these “clarifications” do not elucidate matters as much as they should.

David Nahwegahbow, for instance, asks whether s. 15(3) refers “to ‘tax exempt status’ under the *Indian Act*? Does it include historic legal status as units of self-government? Does it include legal status as holders of Aboriginal title, or Aboriginal and treaty rights?”¹⁶⁹ Likewise, Maria Morrellato notes that the section “leaves open for debate the question of the band’s legal standing as a governing entity.” She recommends that subsection (3) be amended to specify that the status accorded by subsection (1) does not “limit the legal status of a band to govern itself,” have the effect of incorporating the band, or “abrogate existing treaty or [A]boriginal rights.”¹⁷⁰ It would also be desirable to make this provision optional and subject to a special ratification procedure, as JMAC recommended.¹⁷¹ In this manner, an important tool for facilitating business

168. “Preliminary Analysis: *FNGA*”, *supra* note 117 at 9.

169. “Proposed *FNGA*”, *supra* note 151 at 8.

170. “Proposed *FNGA*: Commentary”, *supra* note 81 at 23-24.

171. See “Legal Status and Capacity” in the “JMAC Report”, *supra* note 126, where the issue is discussed in depth. JMAC suggested that any ratification procedure should require broad support and noted that informational measures would help members understand what such a decision entails. This approach would also be consistent with the AFN’s minimum requirement that any amendment in this area be optional. See AFN, Fact-sheet, “Legal Standing and Capacity”, online: AFN, Federal Government *First Nations Governance Act* <<http://www.afn.ca/Programs/Governance/FederalGovernmentGovernanceAct.htm>> (date accessed: 1 July 2003) and “Preliminary Analysis: *FNGA*”, *supra* note 117 at 9.

transactions would be put in the hands of First Nations, but it would be left up to individual bands to decide if they needed to take advantage of this opportunity.¹⁷²

Band Powers, Authorities and Procedures

At issue in reform of band powers and authorities under the *Indian Act* are concerns about what are perceived by DIAND to be major gaps in band bylaw-making powers, bylaw enforcement, ancillary procedures and institutions of justice, and band procedures generally. As noted above, these elements are an essential part of the good governance hypothesis underwriting Governance Initiative reforms.¹⁷³ DIAND reports that Communities First consultations indicated support for improvements including increased powers for band councils (within constraints, as described in the accountability section below), the availability of fines or ticketing for enforcement purposes, and generally increased participation of members in band decision making.¹⁷⁴ Critics, however, suggest that the *Indian Act* already contains fairly broad bylaw-making powers which have been underused mainly because bands lack enforcement resources and do not recognize these powers as legitimate because of their delegated, municipal nature.

A good place to start an analysis of these issues is with the current provisions. At the moment, the *Indian Act* authorizes band councils (operating under both custom and s. 74 regimes) to enact various sorts of bylaws with majority support at a duly convened meeting. General bylaws under s. 81 (relating to local matters including traffic control, residency, health, nuisances and wildlife control) are subject to ministerial disallowance for 40 days, while s. 83 “money” bylaws (relating to property taxation, expenditure of band moneys, business licensing, etc.) actually require ministerial approval before entering into force. Section 85.1 intoxicant bylaws require approval by electors at a special band meeting. There are no procedures in place regarding bylaw development (*e.g.*, notice), adoption (*e.g.*, publication or registration in the *Canada Gazette* to permit judicial notice of the bylaws), or amendment. Penalties for bylaw violation are limited to summary conviction with minimal fines or prison terms for s. 81 and s. 85.1 offences. Although enforcement and prosecution primarily fall to provincial or federal authorities, these are under-funded and in short

172. This step would bring this reform into line with the optional provisions of the *FNFSMA*, *supra* note 64, which aims to offer First Nations taxation powers and other financial instruments that have opened the doors to investment for Indian nations in the United States. These proposed reforms will likely respond to the criticism of Aboriginal investment banker Brian Davey (of First Nations Equity Inc., a Bay Street Aboriginal investment bank), who has stated that the *Governance Act* should have gone further in providing First Nations with concrete tools for investment and business development on reserve. See M. Babbage, “*Indian Act* Revisions Fall Short of Economic Expectations: Aboriginal Banker” *Canadian Press* (16 June 2002), online: First Nations Equity Inc., News <<http://www.firstnationsequity.com/news.htm>> (date accessed: 15 July 2003).

173. See Part II, “Pressure to Bring Accountability to Band Governments and Good Governance Arguments” or, more specifically, discussion and text accompanying note 60ff.

174. See “What We Heard”, *supra* note 69.

supply for this task. First Nations Justices of the Peace appointed under s. 107 of the *Indian Act* also have a limited jurisdiction and may not meet *Charter* s. 11(d) requirements for judicial independence. Finally, no provision is made under the *Indian Act* for bylaws relating to access to information and privacy, conflicts of interests, or even the existence or administration of a band public service.¹⁷⁵

In short, as the “JMAC Report” asserts, it appears that “[t]he provisions of the *Indian Act* and its regulations are not adequate to reflect the current reality within which the bands operate.”¹⁷⁶ Critics, however, are not so certain that the real problem is with legislative inadequacy as it is a lack of familiarity with or unwillingness to use the powers and provisions already in the *Indian Act*. But although the AFN has characterized this lack of use as “a matter of choice,”¹⁷⁷ scholars have suggested that the problem might be more capacity related—which does not bode well for a rapid transition to self-government regimes:

[M]any of the submissions made to DIAND, passed on the basis of section 63, show that bands do not know the *Indian Act* enough to realize that what they want may be already available within the *Indian Act*. In short, many bands, for a host of legitimate reasons, do not understand the political and legal parameters they are operating in. How can one move to self-government and shape it autonomously when the existing status quo is not clear in the minds of people?¹⁷⁸

In light of capacity problems, then, and in the interest of elucidating some of the good governance attributes of modern governments, it is arguable that Bill C-7 proposals relating to developing band law-making powers (ss. 16-17), expanding possible enforcement techniques via “band enforcement officers” (s. 23-29), clarifying the division of band and council powers (s. 18), and permitting the delegation of powers to larger tribal councils or nation-based entities (ss. 18(1)(b) and 18(2)) generally represent positive developments.

Nonetheless, these amendments have attracted a fair amount of criticism—both in relation to their specifics and in terms of the broader issues they raise. With respect to the particulars, the sweeping powers initially accorded to band enforcement officers upon first reading of Bill C-7 have proven to be the subject of a great deal of scrutiny and have thus been scaled back by the SCAA Bill C-7 Report.¹⁷⁹ NAWA, for instance, suggested that it was unacceptable for untrained band enforcement officers to have the “right to enter homes without reasonable grounds” when this power could “have the impact of women being evicted from

175. Besides a careful reading of the statute, this account is based on analysis provided in S. Imai, ed., *The 2001 Annotated Indian Act and Aboriginal Constitutional Provisions* (Toronto: Carswell, 2000), “Governance Structures, Powers and Authorities” in the “JMAC Report”, *supra* note 126, and S. Imai, *Aboriginal Law Handbook*, *supra* note 138 at 135-40.

176. “Governance Structures, Powers and Authorities” in the “JMAC Report”, *ibid*. This endorsement of improving the current *Indian Act* regime is not made without some qualification, however, as the JMAC suggests that moving forward on the inherent right to self-government is important too (although beyond its mandate).

177. “Legal and Related Issues Concerning the FGI”, *supra* note 80 at 10.

178. “Assessment of Federal Self-Government Policy”, *supra* note 12 at 114.

179. See the amendments made to clauses 23-29 in “SCAA Bill C-7 Report”, *supra* note 4.

their homes and the community if they are considered to be in violation of a band law or on the whim of the elected leadership or other members of the community.”¹⁸⁰ David Nahwegahbow has also noted that the search and seizure provisions in the *Governance Act* are “excessive and perhaps unnecessary.”¹⁸¹ These clauses have now been made subject to a stricter warrant requirement in s. 26, a requirement that the band officers inform the person in charge of the place being searched of the reasons and legal basis for the search (s. 25), and the proviso that no force is to be used in conducting a search or inspection unless specifically authorized by the warrant (s. 28).¹⁸² The SCAA’s Report on Bill C-7 has also tinkered with the wording of s. 17 to respond to criticism that its provisions, which provide for band council law-making powers in relation to a variety of matters, are too circumscribed.¹⁸³

In terms of normative critiques, the ultimate criticism of these measures, of course, is that they are highly paternalistic, a step away from self-government (by creating a more complete, legitimate and permanent *Indian Act* regime), and a step towards establishing First Nations governments that simply ape Euro-Canadian governments rather than represent a legitimate expression of the Aboriginal right to self-determination. This argument is found not only in the AFN’s call for First Nations to have “the opportunity to develop their own systems and institutions” through self-government negotiations and greater funding for law enforcement,¹⁸⁴ but also in the AFN’s criticism of Bill C-7’s enforcement provisions, which it claims:

do not reflect First Nations’ traditions. First Nation systems of justice are premised on collective responsibility and resolution rather than punishment. The proposed legislation offers extensive authority for punishment of individuals without the necessary capacity, support or culturally appropriate mechanisms to effectively implement and enforce band laws.¹⁸⁵

Other Aboriginal critics push their analysis further still. Taiaiake Alfred, for instance, claims that the federal government’s emphasis on good governance and economic development sidesteps the vital issue of the character of government:

180. See “Presentation by NAWA on Bill C-7”, *supra* note 103 and “Bill C-7 – Analysis” *supra* note 105.

181. “Proposed *FNGA*”, *supra* note 151 at 9.

182. The conditions for warrantless searches in s. 27 have also been brought into line with *Charter* jurisprudence in the “SCAA Bill C-7 Report”, *supra* note 4.

183. “Proposed *FNGA*”, *supra* note 151 at 9. The SCAA’s Report on Bill C-7 removed the proviso that a band council could only make laws “for band purposes” in relation to the enumerated matters. A more persistent problem lies in the exemption of fish and wildlife from the ambit of band councils’ authority with respect to protection and conservation laws. Although a proviso explicitly excluding such power was removed by the SCAA, the new phrasing of s. 17(1)(a) simply makes no mention of fishing and wildlife in this list of resources falling with a band’s competence. For bands that currently have fishing bylaws in force, like the Chippewas of Nawash, this provision is still troublesome. See “Comment on Bill C-7”, *supra* note 160 at 5.

184. AFN, Fact-sheet, “Powers and Authorities”, online: AFN, Federal Government *First Nations Governance Act* <<http://www.afn.ca/Programs/Governance/FederalGovernmentGovernanceAct.htm>> (date accessed: 1 July 2003).

185. “Preliminary Analysis: *FNGA*”, *supra* note 117 at 10.

In the development approach, it doesn't matter what kind of government we have—white or Indian, traditional or not—so long as that government is stable, efficient and cooperates with other authorities to uphold the law. Stability, in this conception, comes to mean not the Indigenous ideals of harmony rooted in justice, nor peace borne out of respect, nor internal reconciliation. It does not relate to any meaningful resolution of the problems besetting our communities. To the development people, stability is simply this: imposing order, accepting the status quo and making money.¹⁸⁶

First Nations advocates thus argue that although the Governance Initiative might be adopting different means, its fundamental thrust is similar to that of the assimilationist *White Paper* in pushing First Nations towards greater integration into Euro-Canadian society.¹⁸⁷

These are important criticisms of the band powers and processes area of reform and of the FNGI more broadly. Some conservative commentators might respond to it, however, by baldly asserting that integration is indeed inevitable and has already occurred, because the old patterns of life on reserves has not been proven sustainable in the face of “the demands of civilization.”¹⁸⁸ As a result, bringing First Nations governments into line with contemporary norms is desirable to avoid falling into the “welfare trap.” A more moderate and less paternalistic response might make a lesser claim: critics like Professor Alfred do not speak for all First Nations today or even most of them. Many First Nations believe they can maintain their traditions and have living cultures without rejecting market economies, entrepreneurship, and the effective governance mechanisms essential for economic development and quality of life improvements.¹⁸⁹

From this perspective, perhaps a more appropriate reform of existing *Indian Act* provisions in this area can be found in the JMAC's proposal that governance reforms offer bands improved default rules relating to powers, procedures and authorities that could be supplanted by band-designed governance procedure codes. JMAC's idea of a First Nations Independent Institution¹⁹⁰ also offers a novel way of reducing the federal government's intervention in band affairs

186. T. Alfred, “Some Say the FNG is NFG” *Windspeaker* 19:1 (May 2001) 4.

187. See, for instance, D. Nahwegahbow, “Putting the New *Governance Act* into Context: The Long History of Opposition to Government Assimilation Policies”, online: Turtle Island Native Network, Understanding Why First Nations Oppose Minister's Governance Plans <<http://www.turtleisland.org/news/governance.doc>> (date accessed: 15 July 2003).

188. T. Flanagan, *First Nations? Second Thoughts*, *supra* note 53 at 172-173.

189. A notable example is the Membertou Mi'kmaq First Nation profiled in the *Globe and Mail* in the fall of 2001. JMAC member Bernd Christmas, who became the band's first chief executive officer in 1995, has helped the band forge significant ties with the business world and work out fishing and mining deals to boost economic development. The band's budget was \$12-million in 2001 (compared with less than \$100,000 in the 1970s, all from subsidies), and it has applied for ISO 9000 certification. See J. Stackhouse, “How the Mi'kmaq Profit From Fear” *Globe and Mail* (6 November 2001) A16, online: <<http://www.globeandmail.com/servlet/ArticleNews/printarticle/gam/20011106/FOCSTAC3>> (date accessed: 15 July 2003).

190. *Supra* note 129.

while maintaining some of the positive aspects its supervisory role has offered in the past.¹⁹¹ All in all, the current measures must be viewed as subject to further refinement as they are transitional in nature.

Accountability of Band Councils and Chiefs

Reform of governance powers and processes overlaps to some extent with the final area marked for FNGI reform: filling the financial and operational accountability lacunae of the *Indian Act* that recent incidents of band mismanagement and corruption have served to highlight. DIAND literature, naturally enough, does not explicitly link the issue to these problems; instead, emphasis is placed on the argument that “[e]ffective, stable and accountable government is necessary to the social and economic well-being of communities everywhere.”¹⁹² This belief motivated DIAND to commission a study early on in the Governance Initiative of the relative merits of different sorts of government accountability mechanisms.¹⁹³

Despite the *Indian Act*'s lack of provisions and legal authority for bylaws in this area, many First Nations have long had their own financial management and accountability mechanisms in place to uphold core principles of transparency, disclosure and redress. DIAND suggests that its approach on this issue is thus one which “looks to borrow and build upon these best practices.”¹⁹⁴ Communities First consultations, meanwhile, ostensibly revealed a desire among First Nations members for greater information regarding the running of their communities and greater opportunities to participate (via community meetings or referenda). Other “accountability themes” included interest in conflict of interest and ethics guidelines, effective opportunities for redress, and the oversight of Chief and Council salaries and the band budget.¹⁹⁵ The JMAC ran with these themes in its report, agreeing that current measures in relation to both intergovernmental accountability (for band “transfer payments”) and accountability to members are inadequate. As a result, the “JMAC Report” proposed a variety of options for the development of financial management codes with minimum requirements and a range of intervention alternatives via a new Independent Institution, as mentioned above. These proposed legislative amendments were “intended to be a transitional step towards self-government.”¹⁹⁶

191. See “Governing Structures, Powers and Authorities” in the “JMAC Report”, *supra* note 126. Besides serving as a registry for band bylaws, the Independent Institution could also serve a capacity-building role in offering drafting and legal advice on measures. The “JMAC Report” also notes that requiring band laws to be promulgated in an Aboriginal language as well as English or French would provide a unique opportunity for revitalizing First Nations’ cultures.

192. “Communities First Discussion Paper”, *supra* note 161 at 7.

193. See Kaufman, *et al.*, “Review of Accountability Systems in Selected Canadian and International Jurisdictions” (January 2001), online: First Nations Governance, Resource Material <http://www.fng-gpn.gc.ca/RM1_e.html> (date accessed: 1 July 2003).

194. “Communities First Discussion Paper”, *supra* note 161 at 7.

195. See “Executive Summary”, *supra* note 59 and “What We Heard”, *supra* note 69.

196. See “Financial Management and Accountability” in the “JMAC Report”, *supra* note 126.

Section 6 and 7 of Bill C-7 follow the thrust of the JMAC's suggestions by providing for both an "Administration of Government Code" and a "Financial Management and Accountability Code." These sections follow the pattern established in s. 5 by laying out the minimum requirements that bands must comply with in drafting their codes. More detailed "default" conditions will follow in the regulations authorized by s. 32. With respect to administration, subsections 6(1) and (2) require rules respecting meetings of band members and meetings of the band council, while s. 6(3) insists on rules relating to law making. The sorts of provisions required by these subsections include notice and community involvement, the frequency of meetings, procedures and record-keeping. Subsection 6(4) deals with a few specific concerns that band administration codes must address, namely (a) the "roles and authorities of the band administration and its relationship to the council," (b) conflicts of interest, (c) access to information and privacy, and (d) amendments. Finally, the financial management paragraphs in s. 7 require rules relating to (a) the preparation and adoption of an annual budget, (b) signing authorities and expenditure control, (c) internal financial controls, (d) loans and the lending of band funds, (e) remuneration, (f) band debt, (g) deficit and (h) amendment.

Many of the comments made above with respect to s. 5 apply to these equally prescriptive band administration and financial management proposals. While these provisions may offer bands a model for effective modern governance, they do so in a uniform manner that ignores the diversity of Aboriginal governance traditions and the different capacities and circumstances of bands. The imposition of minimum requirements also compromises the very self-government the *Governance Act* aims to foster.¹⁹⁷ The consultation and disclosure requirements of ss. 6(3) and (4), for instance, "may be inconsistent with traditional mechanisms of community consensus-building" and "legitimate methods of communication and transparency in the administration of a First Nations government."¹⁹⁸ Similar problems arise with the financial management provisions, whose requirements may be inconsistent with the oral tradition of many Aboriginal cultures—although some First Nations have already adopted rigorous budget procedures. A less intrusive approach, Maria Morrellato suggests, would be to set out general objectives of financial planning, accountability and transparency in legislation, and allow bands the option of adopting a default regulatory regime or designing their own financial management regime.¹⁹⁹

Perhaps a more prescriptive approach would be tolerable, however, if Bill C-7 dramatically reduced the scope for the Minister's supervisory involvement in the affairs of First Nations. But while s. 11 of Bill C-7 requires the appointment of an impartial person or body to hear complaints and offer redress to band

197. Note that s. 2(3) of Bill C-7 states: "Unless otherwise provided in this *Act*, the powers of the council of a band under this *Act* must be exercised in conformity with the band's administration of government code or, in the absence of such a code, the regulations."

198. "Proposed *FNGA*: Commentary", *supra* note 81 at 20.

199. *Ibid.* at 21.

members, s. 10(3) goes in the opposite direction by codifying the sort of Ministerial intervention in band affairs that has heretofore been found only in contribution agreements, namely the Minister's power to "carry out an assessment of a band's financial position" at any time and require remedial measures in three sets of circumstances.²⁰⁰

As David Nahwegahbow notes, this provision is highly problematic. First, it precludes bands from negotiating contractual terms requiring the Minister to exercise his power "reasonably" (as was done with funding agreements in the past). And second, it expands the scope of the Minister's financial oversight to all "band funds" rather than transfer payments.²⁰¹ In light of the Federal Court's recent finding that the Minister acted in a patently unreasonable manner by forcing the Pikangikum First Nation into co-management without notice and without citing reasons, this expanded role for the Minister is of great concern.²⁰² More importantly, it may also amount to an infringement of traditional governance practices or customs.²⁰³ In any event, these provisions and the continued possible role for the Minister in hearing election appeals²⁰⁴ cast some doubts on the Minister's assurances that the *Governance Act* will significantly reduce his role in the governing of First Nations.

The AFN's criticism with respect to the Governance Initiative's insistence on stricter accountability measures is blunt: not only are First Nations already among the most accountable governments in Canada, the current manner in which bands are held accountable to the federal government via conditional funding agreements (requiring annual consolidated audits) is more onerous than most others—although this has been the subject of some debate.²⁰⁵ Furthermore,

200. Remedial measures under s. 10(3) may be taken by the Minister when there has been: (a) a deterioration of the band's financial health that compromises the delivery of essential programs and services; (b) the failure to make financial statements publicly available within the period specified in subsection 9(3); or (c) the denial of an opinion, or an adverse opinion, by the band's auditor on the band's financial statements.

201. "Proposed *FNGA*", *supra* note 151 at 5-6.

202. See *Pikangikum First Nation v. Canada (Minister of Indian and Northern Affairs)* (2002), 224 F.T.R. 215, 2002 FCT 1246.

203. "Proposed *FNGA*: Commentary", *supra* note 81 at 22.

204. Although the SCCA's Report on Bill C-7 converted the mandatory role of the Minister in hearing election appeals into a permissive one, s. 32(2) now permits regulations providing for the appointment of electoral officers and still allows appeals to be heard by a ministerial designate by default, should bands not confer this jurisdiction on an impartial person or body under s. 11. See "SCAA Bill C-7 Report", *supra* note 4.

205. Jean Allard, for instance, points out that there is an important difference between "unqualified" audits and the "qualified" audits that most bands submit to DIAND. The latter are qualified because the auditor encountered irregularities like missing reports, poor record keeping or was otherwise concerned about the documentation provided. Allard suggests that less than "five per cent of band audits turned in to Indian Affairs by Canadian bands are unqualified," and notes that 40 per cent of bands file their audits late. He is critical of DIAND for taking so long in dealing with this problem and suggests that an Aboriginal auditor general will not solve the problem. See "Big Bear's Treaty", *supra* note 51 at 145-46. However, the Canadian Auditor General's December 2002 report and presentation to the SCAA both back up the AFN's arguments on this point. The report's first sentence states: "First Nations reporting requirements established by federal government organizations are a significant burden, especially for communities with fewer than 500 residents. We estimate that at least 168 reports are required annually by the four federal organizations that provided

the high level of participation in First Nations elections ensures that members can hold councillors and chiefs accountable for financial mismanagement.²⁰⁶ The main accountability problem the AFN sees is one of a “lack of human resources and institutional capacity,” not one of inadequate control:

[Funding] contracts are enforceable. Enforceability will not be made any easier if there is resistance to following the financial requirements. The fact that INAC does a poor job of monitoring and enforcing financial requirements seems to indicate that the problem lies elsewhere and the solution does not lie in imposing more law on First Nations peoples. The federal government must abandon the mentality that more control over First Nations people is the solution to its own failures.²⁰⁷

The AFN’s emphasis on conditional funding agreements, however, appears to ignore the main argument regarding accountability reforms—namely that the federal government’s various contractual funding arrangements with bands (which the “JMAC Report” described as “inconsistent in substance, format, timing, enforceability, etc.”) “do not provide a comprehensive financial management regime.”²⁰⁸ Consistent with the claimed justification for the other Governance Initiative measures outlined above, DIAND claims that the aim of accountability reforms is to bolster the democratic responsibility of band governments to band members and to ultimately reduce the presence of the federal government in First Nations governance. Upon further reflection, however, one starts to sense that the concern underlying the AFN’s criticism is significantly more profound than it appears upon first glance.

The fundamental problem with the federal government’s attempt to reform the *Indian Act* regime in this manner is that its control does not actually disappear, but merely changes form to become a somewhat more discrete “guardian” of First Nations democracy by installing minimum democratic standards of accountability, effective governance, legal capacity and leadership

most of the funding for major federal programs.” The report goes on to discuss the significant overlap and duplication in reporting requirements and how the required information is often not used and irrelevant to community priorities. The Auditor General concludes by noting that resources used to meet reporting requirements could be put to better use in supporting communities and by advising that the reporting process be streamlined to collect more targeted, relevant information. See Office of the Auditor General, “Chapter 1: Streamlining First Nations Reporting to Federal Organizations” in *December 2002 Report of the Auditor General to the House of Commons* (Ottawa: Minister of Public Works and Government Services Canada, 2002), online: Office of the Auditor General, Reports and Publications <[http://www.oag-bvg.gc.ca/domino/reports.nsf/html/20021201ce.html/\\$file/20021201ce.pdf](http://www.oag-bvg.gc.ca/domino/reports.nsf/html/20021201ce.html/$file/20021201ce.pdf)> (date accessed: 15 July 2003). At the Standing Committee, the Auditor General noted that Bill C-7 increases band council reporting requirements to band members, but does nothing to reduce the band reporting obligations to the federal government. To the contrary, as noted above, it codifies formerly contractual reporting requirements (in funding agreements) in law. See Sheila Fraser, Auditor General of Canada, “Opening Statement to the Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources” (Ottawa, 28 January 2003), online: Office of the Auditor General, Opening Statements to Standing Committees of Parliament <http://www.oag-bvg.gc.ca/domino/other.nsf/html/03aa01_e.html> (date accessed: 15 July 2003).

206. “Legal and Related Issues Concerning the FGI”, *supra* note 80 at 22-24.

207. *Ibid.* at 11.

208. See “Financial Management and Accountability” in the “JMAC Report”, *supra* note 126.

selection. By “fixing” the *Indian Act* framework with the First Nations Governance Initiative, critics fear the federal government will provide this regime with sufficient legitimacy for it to continue to survive and possibly thrive. The risk of the FNGI succeeding, then, is nothing less than the wasting away of the inherent right to self-government, the redundancy of the nation-to-nation approach, and the evolution of a new Aboriginal policy that is radically inconsistent with the aspirations of First Nations today.

V CONCLUSION: GOOD GOVERNANCE VS. SELF-GOVERNMENT

The defining element in the evolution of postwar Aboriginal policy, according to Michael Howlett, has been “the ability of [N]ative organizations to articulate a separate vision of how Canadian [N]ative policy should develop within the policy community.”²⁰⁹ While this understanding may be correct, it does not preclude different stakeholders within the policy community from having diverse and potentially conflicting understandings of what direction Aboriginal policy is heading in at any given time. Such is the case when it comes to the question of what to do with the *Indian Act*. For all the progress that has been made in advancing the Aboriginal rights agenda in Canada, the issue of how to deal with the worst policy legacies of the colonial era remains controversial and somewhat paradoxical. That Harold Cardinal’s remarks from over 30 years ago in responding to the *White Paper* still offer great insight on the reasons for this First Nations ambivalence is perhaps also telling of how far Canadians still have to go in bringing justice to Aboriginal peoples:

We do not want the *Indian Act* retained because it is a good piece of legislation. It isn’t. It is discriminatory from start to finish. But it is a lever in our hands and an embarrassment to the government, as it should be. No just society and no society with even pretensions to being just can long tolerate such a piece of legislation, but we would rather continue to live in bondage under the inequitable *Indian Act* than surrender our sacred rights. Any time the government wants to honour its obligations to us we are more than ready to help devise new Indian legislation.²¹⁰

The fundamental problem with the Minister’s *First Nations Governance Act* proposals, then, is that they seek to reinvigorate and re-legitimize what is “fundamentally flawed and beyond saving.”²¹¹

I believe the conflict of “good governance” and “self-government” approaches represented by dispute over the content of *Governance Act* proposals can only morally be resolved in the federal government’s favour if its efforts do indeed represent an interim measure. In bridging towards a regime where the inherent right to self-government is fully recognized and constitutionalized (by

209. “Policy Paradigms and Policy Change”, *supra* note 12 at 640.

210. H. Cardinal, *The Unjust Society: The Tragedy of Canada’s Indians* (Edmonton: M.G. Hurtig, 1969) at 140.

211. F. Cassidy and R. Bish, *Indian Government: Its Meaning and Practice* (Lantzville, B.C. and South Halifax, N.S.: Oolichan Books and the Institute for Research on Public Policy, 1989) at 25.

amendment or as a modern treaty), there is a weighty obligation on the federal government to act in good faith and take demonstrable steps towards making First Nations masters of their own fate. A commitment to making progress on the AFN's self-government²¹² and economic development work-plans would be a step in the right direction, as would a commitment to implementing a binding land claims tribunal amenable to First Nations and further work on treaty implementation. Another idea worth considering is the institutionalization of joint First Nations – DIAND policy-making processes at several levels (from technical committees up to the Chief – Ministerial level). Not only have such processes proved their merit with the JMAC, but they fit the longstanding Canadian tradition of resolving multifaceted policy problems through the use of intergovernmental fora.²¹³ Recent threats by Minister Nault to withdraw from 30 (of 177) treaty negotiation tables,²¹⁴ on the other hand, only serve to undermine what little confidence First Nations have in the federal government and bolster opposition to Bill C-7. Currently, it appears that the impending change in Canadian government leadership could play an important role in re-establishing that confidence, which will be essential to making progress on the *Governance Act* and other federal legislative initiatives.²¹⁵

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212. The Minister has stated to the Reference Group of the Minister on Aboriginal Policy that he expects ten self-government agreements to be signed with 50 First Nations over the next five years, which clearly demonstrates that the IRP (which is itself viewed by many First Nations as “an interim step on the road to their vision of their inherent right to self-government”) is not achieving results quickly. See Minister R. Nault, “Renewing Treaties, Claims, and Self-Government Negotiating Processes to Support a Quality of Life Agenda” (Notes for a Presentation to the Reference Group of Ministers on Aboriginal Policy, Ottawa, February 2002) [unpublished] at 26 and “Discussion Paper on Governance”, *supra* note 117 at 9.
213. See R. Simeon, *Federal-Provincial Diplomacy: the Making of Recent Policy in Canada* (Toronto: University of Toronto Press, 1972). Such mechanisms clearly have more appropriate roles than others, as the AFN's recent schism regarding JMAC participation indicates. The AFN's confederal structure, for instance, is not conducive to “executive federalism” decision making; this model has also lost favour among other Canadian governments in the wake of the Meech Lake Accord's 1990 failure. But the multilateral stakeholder approach appears to work well in building legitimacy for reforms at earlier stages in policy development, as the JMAC demonstrates.
214. These tables aim to resolve specific claims, self-government claims and comprehensive claims. See “Feds to Abandon 30”, *supra* note 147. In British Columbia, the federal government's Chief Negotiators wrote letters to First Nations at twelve tables stating that they would recommend Minister Nault withdraw from negotiations unless “concrete progress” was made within two months. According to the First Nations Summit, which represents 53 B.C. First Nations in treaty negotiations at some 42 tables, no accounting for the reasons why a table may not be progressing was included in these letters. See First Nations Summit, “Presentation by the First Nations Summit to the Federal Standing Committee on Aboriginal Affairs Re: The *First Nations Governance Act* (Bill C-7)” (Nanaimo, B.C., 19 February 2003), online: Assembly of First Nations B.C. Region, Federal Standing Committee on Aboriginal Affairs <http://bcafn.com/governance/standing_committee.htm> (date accessed: 1 April 2003) at 4-5.
215. Jean Chrétien announced in August 2002 that he would step down as Prime Minister in February 2004. At the time of writing, former finance minister Paul Martin appears likely to be chosen as the next leader of the Liberal Party of Canada at its leadership convention on 12-15 November 2003 in Toronto. Mr. Martin enjoys a good reputation among First Nations and has described his understanding of the partnership between First Nations and the Crown in terms of the Two-Row Wampum. He has also expressed reservations about the consultation involved in drafting the bill, and his fear of “spending a decade in court” if the *Governance Act* is passed as is. While Mr. Martin now

First Nations also have their role to play in moving forward from here. Beyond opposing the current incarnation of the *Governance Act* with official condemnations,²¹⁶ protests²¹⁷ and legal proceedings,²¹⁸ First Nations have to ask themselves what they can do to improve the efficacy of their governance under the *Indian Act* regime, which, realistically, is going to endure for many years to come. As Chief Roberta Jamieson of Six Nations has noted, “[w]e say publicly, the answer to any governance problems which we may have should lie with the First Nations, with us. So why haven’t we done it then?”²¹⁹ There is a vital need for First Nations efforts to deal proactively with governance and accountability concerns, both in terms of capacity building and exchanging best practices, and also in terms of making the requisite changes at home. First Nations will also have to start thinking about their membership rules and nation-rebuilding—the latter not only because of the former, but also to cope with the doubtful viability of a significant degree of self-government in small First Nations communities.²²⁰ Efforts being made with tribal councils and the various larger national tables in Inherent Right Policy sectoral negotiations (e.g. regional educational or social-

appears committed to proceeding with the *Act*, he is also on the record as supporting important amendments. See P. Barnsley, “Martin Says All the Right Things to Chiefs” *Windspeaker* 20:4 (August 2002) 13; C. Clark and K. Lunman, “Martin Softens His Opposition to Aboriginals Bill” *Globe and Mail* (9 May 2003); “Martin’s Influence Stalls New Legislation” (9 May 2003), online: CBC News <http://www.cbc.ca/stories/2003/05/08/martin_legislation030508> (date accessed: 15 July 2003).

216. See Assembly of First Nations, Chiefs-in-Assembly Resolution No. 5/02 (Kahnawake, Quebec, 16-18 July 2002), regarding “Bill C-61 Rejection of *First Nations Governance Act*.”
217. First Nations protests against the *Governance Act* have heated up over this past year, following the SCAA as it travelled across the country for its hearings on Bill C-7. Approximately 1,000 protestors also gathered for a “Drums of Nations” protest on 16 May 2003 in Minister Nault’s riding in Kenora.
218. The Federation of Saskatchewan Indian Nations (“FSIN”) has brought an action against the federal government requesting “a permanent constitutional injunction prohibiting the defendants or their agents or servants from passing the bill in question in Parliament.” On 13 March 2003, Justice MacKay denied a motion brought by the Crown to strike out the FSIN’s statement of claim, because it raised “issues of fundamental importance to the rights of the respondents” and “rapid evolution and change” in the field of Aboriginal jurisprudence made it impossible to state that the plaintiffs’ claim was certain to fail. Justice MacKay did amend the pleadings substantially, however, notably by striking out personal claims against the Indian Affairs Minister and Prime Minister and removing the request for a “permanent” injunction. See *Federation of Saskatchewan Indian Nations v. Canada*, [2003] 2 C.N.L.R. 131, 2003 FCT 306.
219. Chief R. Jamieson, “Taking Charge, Taking Action” (Remarks at the National Forum on Protection of Treaty and Inherent Rights, Winnipeg, 12 March 2002), online: Turning Point, Rights, Treaties & Governance <<http://www.turning-point.ca/index.php/article/articleview/94/1/22/>> (date accessed: 15 July 2003).
220. Flanagan notes that 70 per cent of bands had a population of less than 1,000 in 1993 while only 10 per cent were bigger than 2,000 (including off-reserve members). Even the larger nations resulting from nation-building and consolidation processes are only predicted by RCAP to have a population of 5,000 to 7,000 on-reserve members. As Cairns note, they will be “dwarfed by even Prince Edward Island.” Although these scholars do not really consider that the nature of Aboriginal governments might be somewhat different from Canadian federal-provincial norms, I think their concern with the viability of small governments is legitimate, especially from a service-delivery perspective. See A. Cairns, *Citizens Plus: Aboriginal Peoples and the Canadian State* (Vancouver: University of British Columbia Press, 2001) at 140 and *First Nations? Second Thoughts*, *supra* note 53 at 78.

services agreements) appear to be positive developments in this respect, although the challenges inherent in these processes should not be underestimated.²²¹

Finally, First Nations will have to confront the paradox inherent in opposing reform efforts offering greater autonomy by claiming that they are “simply a way for the federal government to limit its liability and an attempt to rid itself of its fiduciary responsibility and obligations to First Nations.”²²² While the general fiduciary nature of the First Nations-Crown relationship would likely *not* be affected by the Governance Initiative, the transfer of authorities and powers from the Crown to First Nations *does* appear to imply a reduction in specific fiduciary duties:²²³ why should the federal government be held responsible for areas it has no part in regulating? Self-government is all about taking responsibility for one’s own acts freely chosen, after all; reliance on fiduciary duties “may appear to contradict a push for enhanced self-determination.”²²⁴

If First Nations wish to put an end to the federal government’s antiquated role of guardian, then, there will have to be some openness to considering an evolution of fiduciary duties. A legitimate concern regarding fiduciary duties, however, is the off-loading of responsibilities. Transferring responsibility when First Nations don’t have the requisite capacities in place or when unaccompanied by sufficient resources would arguably constitute a violation of the federal government’s general fiduciary duty according to the principles articulated in *Guerin*.²²⁵ Such a manoeuvre would also be inconsistent with the good faith required of the federal government to bring the outdated elements of its approach to Aboriginal policy-making into line with contemporary notions of justice in Aboriginal policy.

221. Cairns, for instance, notes that there will likely be “enormous practical difficulties with creating larger nations out of 609 fairly independent Indian Bands” in *ibid.* McDonnell and Depew are also critical of the process’s lack of respect for band difference. See R. McDonnell and R. Depew, “Aboriginal Self-Government and Self-Determination in Canada: a Critical Commentary” in *Aboriginal Self-Government in Canada*, *supra* note 42, 352 at 356.

222. “Discussion Paper on Governance”, *supra* note 117 at 19.

223. See “Overview”, *supra* note 128.

224. B. Morse, “Government Obligations, Aboriginal Peoples and Section 91(24) of the *Constitution Act, 1867*” in D. C. Hawkes, ed., *Aboriginal Peoples and Government Responsibility: Exploring Federal and Provincial Roles* (Ottawa: Carleton University Press, 1995) 59 at 79.

225. Briefly explained, *supra* note 6.