Legislative Summary **LS-435E**

BILL C-7: THE FIRST NATIONS GOVERNANCE ACT

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LEGISLATIVE HISTORY OF BILL C-7

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
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Referred to Committee:	9 October 2002	Second Reading:	
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Statutes of Canada

N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

Legislative history by Peter Niemczak

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TABLE OF CONTENTS

Page

CANADA
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BIBLIOTHÈQUE DU PARLEMENT

BILL C-7: THE FIRST NATIONS GOVERNANCE ACT

Bill C-7, an Act respecting leadership selection, administration and accountability of Indian bands, and to make related amendment to other Acts, was introduced in the House of Commons and deemed referred to the Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources (House Committee) following first reading on 9 October 2002.(1) Reference prior to second reading authorizes a committee to undertake broader study of a bill, given that its principle has not yet been approved, and to entertain a wider range of amendments, including proposals to modify the bill's scope.

The proposed stand-alone First Nations Governance Act, intended to apply to more than 600 *Indian Act* First Nations communities or Indian bands,(2) set out requirements related to "governance" codes in matters of leadership selection, administration of government, and financial accountability. Communities would have been required to either adopt codes containing prescribed rules in these areas or, should any of the codes not be developed, become subject to a default regulatory regime in relation to that subject matter. Bill C-7 also, *inter alia*, defined bands' legal capacity; redefined their law-making authority; repealed legislation exempting *Indian Act* provisions from the *Canadian Human Rights Act*; and made consequential amendments to the *Indian Act*.

From 27 January through 31 March 2003, the House Committee held approximately 60 Ottawa and cross-country meetings on Bill C-7, hearing from over 500 witnesses, including First Nations organizations, community leaders and individuals, as well as other interested participants from various spheres such as legal and church

(1) The bill was originally introduced in the 1st session of the 37th Parliament as Bill C-61, but died on the *Order Paper* when Parliament was prorogued on 16 September 2002. By motion adopted 7 October 2002, the House of Commons provided for the reintroduction in the 2nd session of legislation that had not received Royal Assent. The bills would be reinstated at the same stage in the legislative process they had reached when the previous session was prorogued.

(2) Only First Nations communities with self-government legislation in place – the Nisga'a and Sechelt in British Columbia, the Cree of northern Quebec, and a number of Yukon First Nations groups – were expressly excluded from the bill's application by clause 35.

communities. Following clause-by-clause consideration from 8 April through 27 May 2003, Bill C-7 was reported back to the House on 28 May with 51 technical and substantive amendments, largely government-sponsored. The legislation was being considered at combined Report and second-reading stage when the House rose on 13 June. Bill C-7 was not debated further when Parliament resumed on 16 September and died on the *Order Paper* with the prorogation of Parliament on 12 November 2003.

BACKGROUND

A. General Considerations

Subsection 91(24) of the *Constitution Act, 1867* granted Parliament legislative authority over "Indians, and Lands reserved for the Indians." The first consolidated *Indian Act* was enacted in 1876. Today, as the principal instrument of federal jurisdiction over First Nations, that Act continues to define and give the government, through the Department of Indian Affairs and Northern Development (DIAND), enormous powers over most aspects of the lives and affairs of registered or status "Indians" belonging to "bands" and living on and off "reserves."(3)

The *Indian Act*'s essential flaws have long been acknowledged.(4) First Nations object to its inherent paternalism, while government officials acknowledge its limitations as a framework for modern relations with First Nations. Although it has served as an assimilative tool, however, the *Indian Act* has also provided certain protections. These conflicting roles, together with differing views of federal authorities and First Nations on the nature and scope of

(3) Under subsection 2(1) of the *Indian Act*, R.S.C. 1985, c. I-5: an "Indian" is a person who is either registered or entitled to be registered under the legislation; the term "reserve" means a tract of land to which the federal Crown holds title but that is "set apart by Her Majesty for the use and benefit of a band"; a "band" is a "body of Indians" for whose common use and benefit lands have been set apart or moneys are held, or that is declared to be a band by the Governor in Council. A "council of the band" is selected under the Act's electoral regime, or according to band "custom."

(4) Problems with the *Indian Act* have been identified in reports of governments, First Nations and other organizations. See, for example, Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, Volume 1, *Looking Forward, Looking Back*, Chapter 9: "The *Indian Act*" (Ottawa, Ministry of Supply and Services, 1996), pp. 281-319.

the inherent right of Aboriginal self-government under section 35 of the *Constitution Act, 1982*,[5] have intensified the complexities of reforming the *Indian Act*.

The Appendix contains a brief review of selected aspects of the *Indian Act*'s development through the most recent reform initiative in 1996.

B. Jurisdictional and Demographic Considerations

Federal policy maintains that the government's core responsibilities under subsection 91(24) of the Constitution are to on-reserve First Nations people and Inuit,[6] while off-reserve First Nations persons, as provincial residents, fall within provincial jurisdiction. This policy has served as a source of friction among federal and provincial levels of government, with the latter typically asserting that the former has primary responsibility for all Aboriginal persons. For their part, First Nations groups have long been concerned about compromised access to programs and services from either level of government for the off-reserve registered population.[7]

First Nations demographics are worth noting. According to DIAND figures for the year 2001, out of a total registered First Nations population on- and off-reserve of 690,101, 57.5% resided on reserves and 42.5% off-reserve, up from 29% in 1985. The net migration flow of First Nations people to reserves is nevertheless projected to continue, with the on-reserve population expected to exceed 60% within a decade. In 2001, 48% of the registered population were under 25.[8] DIAND documentation indicates that First Nations communities vary greatly in population – from 32 having more than 2,000 members to nearly 400 having fewer than 500, including more than 140 with fewer than 100 – and location, ranging from highly urban to extremely remote.[9]

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(5) Subsection 35(1) recognizes and affirms "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada," including the Indian, Inuit and Métis peoples. In August 1995, the government issued a policy statement recognizing the inherent right of Aboriginal self-government as an existing Aboriginal right under section 35.

(6) In its 1939 decision *Re Eskimo*, the Supreme Court of Canada ruled that Inuit were "Indians" within the meaning of subsection 91(24).

(7) Additional information on this issue may be found in a 2001 document prepared by Tonina Simeone entitled *Federal-Provincial Jurisdiction and Aboriginal Peoples*, TIPS-88E, Parliamentary Research Branch, Library of Parliament, Ottawa.

(8) DIAND's *Basic Departmental Data 2002*, March 2003, available on-line at http://www.ainc-inac.gc.ca/pr/sts/bdd02/bdd02_e.pdf.

(9) *Overview of First Nations in Canada*, Presentation to the House of Commons Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources, 21 February 2002.

FIRST NATIONS AND GOVERNANCE

A. The 1999 *Corbiere* Decision

The *Indian Act* defines a band's "electors" as persons of at least 18 years of age who are registered as members on a band list and not disqualified from voting at band elections. Subsection 77(1) of the *Indian Act* further stipulated that in order to vote in band council elections held under the *Indian Act*, members must be "ordinarily resident on the reserve." In May 1999, in *Corbiere* v. *Canada (Minister of Indian and Northern Affairs)*,[10] the Supreme Court of Canada found this provision contrary to the equality rights of off-reserve band members under section 15 of the *Canadian Charter of Rights and Freedoms*, and suspended its decision to enable government compliance with it. The Court noted the broader implications of the *Indian Act*'s restrictive definition of "elector" in matters of band governance, and suggested that a preferable electoral process would be one that balanced the rights of on- and off-reserve members.

DIAND's December 1999 response called for a two-phase process. The first involved changes to election and referendum regulations that came into effect in October 2000. The second, longer-term phase called for "working with Aboriginal organizations to develop *Charter*-consistent long-term sustainable solutions to address the *Corbiere* decision and future challenges to provisions of the [*Indian Act*]":[11]

> This statutory renewal will be informed by consultations with Aboriginal organizations, the AFN/INAC Joint Initiative on Policy Development (Lands and Trusts Services),[12] the results of the study to be undertaken by the Special Representative[13] who is looking at the legislative gaps in the [*Indian Act*]…, the review of the *Canadian Human Rights Act*,[14] and upcoming decisions from the Supreme Court of Canada.

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(10) [1999] 2 S.C.R 203, on-line at http://www.lexum.umontreal.ca/csc-scc/en/pub/1999/vol2/html/1999scr2_0203.html.

(11) DIAND, *Backgrounder*, "Consultations on the *Corbiere* Decision," 9 December 1999, Ottawa; on-line at http://www.ainc-inac.gc.ca/nr/prs/s-d1999/99172bk2.html.

(12) Since 1998, this joint process has been devoted to creating a framework for the eventual transfer to First Nations of greater control over matters within the Lands and Trusts Services Sector that covers approximately 80% of the *Indian Act.*

(13) In May 2000, the Minister of Indian Affairs appointed a Special Representative to investigate and make recommendations related to the general absence of protection for First Nations women under the *Indian Act*. Her report, submitted in January 2001, has not been made public to date.

(14) Since its enactment in 1976, section 67 of the CHRA has provided that "[n]othing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act."

B. First Nations Governance Initiative: Government Action

The January 2001 Speech from the Throne contained government commitments "to [strengthen] its relationship with Aboriginal people" and to "support First Nations communities in strengthening governance, including implementing more effective and transparent administrative practices."

On 30 April 2001, with Cabinet approval to undertake an incremental approach to reforming the *Indian Act*, then Minister of Indian Affairs Robert Nault (the Minister) formally initiated "Communities First: First Nations Governance," described as a multi-phase process for the development of "governance"(15) legislation. Over the ensuing months, meetings were held across the country to ascertain the views of on- and off-reserve First Nations groups and individuals on the planned governance initiative (FNGI). DIAND figures indicate that from May through November 2001, about 10,000 individuals took part in this initial process, whether at one of over 400 meetings across the country, through questionnaires or other means.

According to DIAND documentation provided to participants, "[t]he objective of [the FNGI] is to provide the tools many First Nation leaders and individuals have called for to run their communities efficiently and fairly":

> Legislated governance under the [*Indian Act*] is not about nation-to-nation governance, or the Inherent Right to self-government under the Canadian Constitution, or the fulfilment of treaties … [and] is also not intended to change the special, historic relationship that exists between First Nations and the federal government.
>
> The way we are using the term "governance" means how a community is run and the rules that apply in its day-to-day operation for the many First Nations who are still under the [*Indian Act*] and will stay there until they choose to take on self-government and/or agreement is reached on the implementation of existing treaties. … Based on ideas from First Nations and others, new legislation would build on the idea of "effective governance" and could include these general subject matter areas: 1) Legal Standing and Capacity; 2) Leadership Selection and Voting Rights; and 3) Accountability to First Nation Members.(16)

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(15) For a discussion on governance and the distinction between governance and government, see Tim Plumptre and John Graham, *Governance and Good Governance: International and Aboriginal Perspectives* (Ottawa: Institute on Governance, 1999), on-line at http://www.iog.ca/publications/govgoodgov.pdf.

(16) Department of Indian Affairs and Northern Development. "Communities First: First Nations Governance," *Consultation Package*, on-line at http://www.fng-gpn.gc.ca/samp_mat_e.asp. The full selection of First Nations Governance materials can be found at http://www.fng-gpn.gc.ca/index_e.asp.

Status and band membership, First Nations women's concerns relating to land, the delivery of programs and services and broad review of the *Indian Act* were listed among matters not to be covered in the new legislation.

In December 2001, the Minister announced the formation of a nine-person Joint Ministerial Advisory Committee (JMAC), consisting of First Nations and government representatives as well as independent members, "to assist in developing policy proposals for the development of draft legislation," taking into account the results of the prior canvassing of views on the FNGI.

C. Reactions to the FNGI

The Assembly of First Nations (AFN) is a national representative/lobby organization for First Nations people and is particularly closely associated with those on reserve. Although acknowledging the need for broad change to the existing system, the AFN expressed serious concerns about the FNGI, rejecting the phase one process as fundamentally flawed and questioning whether the FNGI overall is consistent with the rights, needs and priorities of Canada's First Nations.(17) Several affiliated provincial, regional and local First Nations assemblies, organizations and communities have echoed these views.(18) AFN resolutions calling for a boycott of the FNGI phase one process and for a joint alternative course of action were succeeded by efforts to achieve the latter. These were in turn overtaken, in December 2001, by rejection of a proposed DIAND–AFN co-operative workplan on governance legislation and the *Indian Act*, following which the Assembly's representative withdrew from the Joint Ministerial Advisory Committee. On 28 February 2002, AFN National Chief Matthew Coon Come tabled an AFN alternative to the FNGI with the Committee, describing it as incorporating both the Minister's issues and First Nations priorities.(19)

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(17) AFN documentation concerning the pre-legislation FNGI may be consulted on-line at http://www.afn.ca/Programs/Governance/FederalGovernmentGovernanceAct.htm.

(18) They include the Atlantic Policy Congress of First Nation Chiefs, the Chiefs in Ontario, the Assembly of Manitoba Chiefs, the Federation of Saskatchewan Indian Nations, the Union of British Columbia Indian Chiefs, the First Nations Coalition for Inherent Rights, the Six Nations of the Grand River.

(19) Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources, *Evidence*, 28 February 2002, on-line at http://www.parl.gc.ca/InfoComDoc/37/1/AANR/Meetings/Evidence/AANREV42-E.HTM. The *First Nations Plan: First Nations' Governance from a First Nations' Perspective* may be consulted on-line at http://www.afn.ca/02-02-10%20FNplan.pdf.

In a 19 March appearance before the Committee, National Chief Dwight Dorey of the Congress of Aboriginal Peoples (CAP) described his organization as representing "the interests of more than 800,000 off-reserve Aboriginal people living in urban, rural and remote areas."(20) According to Chief Dorey: CAP's decision to participate in the FNGI phase one process reflected responsibility "to get involved in these issues that directly affect us and a significant portion of the people … we are elected to serve"; declining to take part would have been a disservice to off-reserve First Nations members; although broader changes are necessary in the medium and long term, "some basic reforms to the [*Indian Act*] can be undertaken quickly" along the lines proposed in the FNGI.(21) CAP was represented on JMAC.

On 14 March 2002, President Terri Brown of the Native Women's Association of Canada (NWAC) advised the Committee that her organization, formed in 1974, "is mandated by its national membership to be the national voice for Aboriginal women." Ms Brown indicated that NWAC initially supported a moratorium on the FNGI process, in part in order to clarify its own position, since many issues other than the three advanced by the Minister have an impact on First Nations women. By the time NWAC had considered these matters and decided to request funding in order to participate in the subsequent FNGI process, another organization, the National Aboriginal Women's Association (NAWA) – formed in October 2001 as a research and policy-oriented body on Aboriginal women's issues – was involved in FNGI discussions.(22) NAWA was subsequently represented on the JMAC.

D. Report of the Joint Ministerial Advisory Committee

JMAC's Final Report was tabled with the Minister on 8 March 2002. The Report reviews options for legislative reform in the various areas covered by the FNGI, making recommendations in some areas and not in others where consensus was not reached. Although it

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(20) The AFN and CAP are at odds as to which organization speaks for off-reserve First Nations people.

(21) Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources, *Evidence*, 19 March 2002, on-line at http://www.parl.gc.ca/InfoComDoc/37/1/AANR/Meetings/Evidence/aanrev46-e.htm#Int-173817. CAP's FNGI-related documentation is available on-line at http://www.abo-peoples.org/Next/programs/Governance/Governance.html.

(22) For a fuller discussion of this issue, see Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources, *Evidence*, 14 March 2002, on-line at http://www.parl.gc.ca/InfoComDoc/37/1/AANR/Meetings/Evidence/aanrev45-e.htm#Int-167313.

is beyond the scope of the present paper to provide an exhaustive review, it may be useful to cite verbatim the Report's accounts of the Minister's instructions to JMAC and of the ensuing broad approach that JMAC concluded is best suited to attaining the FNGI's objectives.

1. Minister's Instructions to JMAC

> The Minister has clearly stated that the amendments:
>
> - must not infringe existing aboriginal or treaty rights;
> - must not alter the fiduciary relationship between First Nations and the Crown;
> - must be consistent with the *Canadian Charter of Rights and Freedoms*, including section 25 of the *Charter*;
> - must maximize the ability of bands to determine their own governance regimes, while providing those who prefer to operate under a statutory regime the ability to do so, and providing basic rules of political and financial accountability to apply to all bands; and
> - must not impose requirements on bands that many of them would be unable to fulfil due to lack of resources or capacity, or as a result of small populations.(23)

2. JMAC's Conclusions on Legislative Approach

> A Bill should be prepared which will:
>
> - include a Preamble and a statement of purposes to guide the interpretation and implementation of the Act;
> - include a non-derogation clause;
> - address the legal status and capacity of bands;
> - provide statutory or default regimes in respect of leadership selection, governance structures and procedures, and financial accountability to apply to every band that does not choose to design its own regime;
> - enable the Governor-in-Council to enact regulations that will provide the details of the default regimes, following an appropriate consultation process;
> - enable bands to design their own regimes in respect of leadership selection, governance structures and procedures, and financial accountability, provided that certain essential elements are

(23) *Recommendations and Legislative Options … on the First Nations Governance Initiative*, available on-line at http://www.fng-gpn.gc.ca/JMACFR_M802_e.asp (JMAC Report or JMAC), p. B-4-5 of the paper version. Subsequent references will also be to this version.

addressed, while leaving to each band the particular way in which those elements are addressed;
- eliminate or reduce the current roles of the Minister and Governor-in-Council in band governance;
- establish an independent institution to assist bands with governance, particularly during the transitional period between enactment of the legislation and the coming into force of the default or band designed regimes, and to replace some of the current functions of the Minister and Governor-in-Council;
- bind the Crown.(24)

DESCRIPTION AND ANALYSIS

The First Nations Governance Act (FNGA or the bill) introduced on 9 October, **as amended by the House Committee**, consisted of a lengthy preamble and **73** clauses divided into four Parts: Band Governance; Powers of Band Councils; General; and Transitional Provisions, Related Amendments and Coming into Force. The following review considers selected significant elements of the FNGA, **including proposed amendments**, with reference to JMAC Report observations and recommendations as well as existing provisions in the *Indian Act*. For purposes of clarity, the vocabulary of that Act and of the FNGA is used throughout,(25) and related provisions in the bill are discussed together rather than in numerical order. Some overlap may be noted. This review is followed by a brief overview of parts of the *Indian Act* that remain unaffected by the bill, and of principal JMAC Report recommendations that are not contained in Bill C-7.

A. Legislative Approach

In 1997, Bill C-79, the most recent government legislation intended to reform the *Indian Act*, died on the *Order Paper*. It proposed modifications in a number of areas, but only for those bands choosing to be governed by its optional scheme. Bill C-7 contained no such optional mechanism and would have applied to all bands.

The JMAC Report observed that technical challenges might be associated with an incremental approach to reforming the *Indian Act* owing to the interrelated nature of its

(24) *Ibid.*, p. B-8.

(25) JMAC recommended against changing the term “band” to “First Nation” at this time owing to ongoing debate as to the scope and significance of the latter appellation, and concern that such a change could influence “the outcome of the broader efforts at Nation re-building,” *ibid.*, p. B-6.

provisions.(26) It also recommended that legislative changes resulting from the governance initiative "be by way of amendments to the [*Indian Act*] rather than by way of a new, stand-alone statute," in part in order to avoid complexities associated with interlocking statutes and to indicate more clearly "that the amendments are intended to be interim, transitional measures."(27) Although the FNGA did effect consequential amendments to the *Indian Act*, the government elected to proceed by way of "stand-alone" legislation. Enactment of Bill C-7 would have resulted in most bands being subject to two governing statutes, the *Indian Act* and the FNGA, for different purposes. Bands that are currently or that may become participants in the 1999 *First Nations Land Management Act*,(28) as well as the Mohawks of Kanesatake,(29) would be subject to three interconnected statutes. These dual or triple regimes could have entailed complex administration and implementation requirements for bands and government.

B. Preamble

The FNGA's substantive provisions were preceded by an eight-paragraph Preamble that would have entered the annual statute book as an integral part of the legislation. In recent years, statutory preambles seem to be employed more frequently – including in statutes relating to Aboriginal peoples – as a way of establishing a context and rationale for legislation and of underscoring parliamentary intent in enacting it.(30) Preambles are interpretive rather than substantive, and may on occasion be relied upon by courts seeking to resolve ambiguity in the statute they precede.

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(26) *Ibid.*, p. B-4.

(27) *Ibid.*, p. B-9.

(28) S.C. 1999, c. 24. Under this legislation, land-related provisions of the *Indian Act* cease to apply to signatory First Nations communities that adopt prescribed land codes. In March 2002, the Minister announced the FNLMA process would be opened up to enable additional communities to assume land management jurisdiction. **As of November 2003, 12 communities had ratified land codes.**

(29) Under the *Kanesatake Interim Land Base Governance Act*, S.C. 2001, c. 8, specified Kanesatake lands are not subject to the *Indian Act*'s reserve provisions, while provisions not related to reserves continue to apply to Kanesatake Mohawks.

(30) See, for example, the *Nunavut Waters and Nunavut Surface Rights Tribunal Act*, S.C. 2002, c. 10; the *Nisga'a Final Agreement Act*, S.C. 2000, c. 7; the *Canada National Marine Conservation Areas Act*, S.C. 2002, c. 18; the *Federal Law-Civil Law Harmonization Act*, No. 1, S.C. 2001, c. 4; the *Law Commission of Canada Act*, S.C. 1996, c. 9.

Noteworthy aspects in the preamble to Bill C-7 included:

- a statement underscoring "broadly held Canadian values" such as "representative democracy, including regular elections by secret ballot." It may be noted that over 50% of Indian bands do not fall under the *Indian Act*'s electoral provisions, using "custom" leadership selection processes that may not all involve elections and/or secret voting (par. 2);

- statements relating the absence of governance provisions in the *Indian Act*, and the need for effective governance tools for bands subject to that Act (par. 3-4);

- statements aimed at stressing that the FNGA is not intended to supersede ongoing processes related to self-government(31) (par. 5-6);

- a statement that the exercise of powers under all federal legislation is subject to the *Canadian Charter of Rights and Freedoms*. As the Charter's application to federal legislation is automatic, this statement appears designed to emphasize that the Charter governs band council powers under the FNGA (par. 8).

C. Interpretation and Purpose (Clauses 2-3)

Clause 2 contained relatively few definitions, providing that words and expressions in Bill C-7 had the same meaning as in the *Indian Act* unless otherwise indicated. Those worth noting here include:

- "band funds": the broad definition of this new term appeared to include most if not all sources of revenue generated by bands, while explicitly excluding "Indian moneys" under the *Indian Act*, that is, moneys received or held by the Crown for bands' use and benefit.(32) The scope of this definition suggested that the accountability and financial management provisions at clauses 7 through 10 of Bill C-7 would not be restricted to funds received from DIAND;

- "council": the *Indian Act* defines a band council as either established under its electoral provisions or chosen according to custom. The FNGA's definition provided that a council would be selected by election or custom under new leadership selection measures set out at clause 5, or in default regulations;(33)

- "eligible voter": this new term meant a member of the band, whether on or off reserve, of at least eighteen years of age. Under Bill C-7, an eligible voter's role was essentially restricted

(31) Self-government negotiations, which would presumably have continued as they have under the *Indian Act*, cover a range of comprehensive and sectoral initiatives and currently number about 80.

(32) The Minister suggested that separate legislation might be forthcoming to provide for the transfer of Indian moneys currently held in trust by the Crown to band governments.

(33) The *Indian Act*'s existing definition was to be replaced to conform to the FNGA (clause 43(2)).

to clause 4 code-related procedures. It should be noted that the term "elector," which was to remain in the *Indian Act*,[34] contains identical membership and age criteria, but does not refer to on- or off-reserve residence. This may suggest that, while an "elector" was also an "eligible voter" under the FNGA, an off-reserve "eligible voter" might not necessarily be an "elector" for purposes of the *Indian Act*. The distinction could have been significant, since "electors" under that Act decide matters such as the validity of land designations and surrenders (section 39).[35] The question of off-reserve members' potentially broader role as "electors" was not dealt with explicitly in Bill C-7 by way of amendments to the *Indian Act* or otherwise.

The purposes of the FNGA were described as: making provision for effective band governance "on an interim basis pending … self-government"; **enabling bands to gain independence in managing their affairs; reducing ministerial involvement in those affairs**; and enabling bands both to respond to their individual needs and to design their own governance regimes in prescribed subject matters, should they choose to do so (clause 3). Generally speaking, these objectives corresponded to those suggested in the JMAC Report's sample purpose clause, **while that of reducing the Minister's involvement in band affairs, added by the House Committee, reflected a need identified by both JMAC and First Nations witnesses.**

In a significant addition to the bill, the House Committee unanimously voted to insert a non-derogation clause providing, for greater certainty, that nothing in the legislation was to be construed "so as to abrogate or derogate from any existing aboriginal or treaty rights of the aboriginal peoples of Canada under section 35 of the *Constitution Act, 1982*." The absence of a non-derogation provision in the bill, as introduced, had been identified as a key omission by First Nations and other witnesses.

(34) Clause 43(3) would have modified the definition to remove a reference to "band elections" which would no longer have taken place under the *Indian Act*.

(35) Referring to the discussion under First Nations and Governance, A. The 1999 *Corbiere* Decision, it should be noted that the *Corbiere* decision did not definitively settle the scope of off-reserve band members' entitlement to participate in band affairs. It is therefore not apparent post-*Corbiere* that the term "elector" in the *Indian Act* is to be read as implicitly including off-reserve members for all purposes. In this light, the Supreme Court of Canada's finding that "Aboriginality-residence" is an analogous ground or a "constant marker" of potential discrimination for purposes of section 15 of the Charter remains important.

D. Provisions Related to Band Governance

1. Governance Codes (Clauses 2(3), 4-7, 31-32, 34, 36, 52, 59)

a. Proposal and Adoption (Clauses 4 and 31)

Clause 4 was to be new law and played a pivotal role in the FNGA. It provided, first, that a band council might propose that any or all – or, implicitly, none – of three possible codes in areas of leadership selection, administration of government and financial management and accountability be adopted by the band's "eligible voters" (clause 4(1)). Second, adoption of any proposed code required approval by a majority of participants in the vote, provided those voting to approve totalled 25% plus one of eligible voters (clause 4(2)). The latter clause raised the question of whether it set a sufficiently high threshold on matters of significant import to bands or whether, conversely, the threshold might be too high, given low voter participation in some bands. Both a council's proposal of any governance code and the ensuing vote were to be subject to regulations that might be made under clause 31.

b. Leadership Selection (Clauses 5 and 52)

Sections 74-80 of the *Indian Act* currently set out the framework for band council elections, with section 74 providing that bands are brought under that Act's electoral scheme by ministerial order. The *Indian Act* does not prescribe rules for "custom" leadership selection, which has served as the legislation's default leadership selection process since its inception.(36) Under federal policy, bands applying to "revert" to custom from the *Indian Act*'s scheme are typically required to operate under electoral regimes and, since 1988, under written codes.(37) As mentioned, more than half the bands that remain under the *Indian Act* are "custom" bands for leadership selection purposes, by election or otherwise.(38)

(36) The evolution of the *Indian Act*'s system of elective government is summarized in a 1991 paper prepared by Wendy Moss (Cornet) and Elaine Gardner O'Toole entitled *Aboriginal People: History of Discriminatory Laws*, BP-175E, Parliamentary Research Branch, Library of Parliament, Ottawa, under the heading "Self-Government."

(37) DIAND, *Conversion to Community Election System Policy*.

(38) Custom bands are not distinguished for other purposes under the *Indian Act*.

Clause 52 of Bill C-7 would have repealed the *Indian Act*'s electoral provisions, while clause 5 prescribed rules that were to apply to leadership selection codes adopted by both section 74 and custom bands.

i. Section 74 Bands

Codes adopted by bands governed by section 74 of the *Indian Act* as of the coming into force of clause 5 would have been obliged to include a minimum of ten elements, of which the components were themselves prescribed in some cases (clause 5(1)). These elements included:

- the size and mode of selection of a band's council, of which the majority of members were to be elected by secret ballot;
- the term of office of elected members, which was not to exceed five years;
- "qualifications of persons who vote" and candidates;
- mechanisms for appealing election results and removing council members; and
- the procedure for amending the code.

In this area, the JMAC Report proposed that, while legislation should "clearly set out the basic standards of political accountability," it should ensure that those standards are "as unintrusive (non-prescriptive) as possible."(39) With a few exceptions, such as the absence of criteria defining voting qualifications,(40) the matters set out in clause 5(1) generally corresponded to those recommended by JMAC for band-designed electoral processes. The FNGA left open the question of how a code's appeal mechanism might operate in practice. The matter of selecting a body to which voters might appeal election results could have proved troublesome, particularly for small remote communities.(41)

(39) JMAC Report, pp. D-18–19.

(40) Clause 5(1) did not stipulate that persons who are "eligible voters" in relation to code adoption procedures must also be entitled, under leadership selection codes, to vote in council elections.

(41) The question of appeals is touched upon under D.1.h, Observations related to governance codes.

ii. Custom Bands

Leadership selection codes adopted by custom bands would have been required either to include the above minimum elements for section 74 bands or to set out the band's existing custom rules, plus an appeal mechanism and amending formula (clause 5(2)). Custom leadership codes, unlike any other governance code provided for in Bill C-7, might only be adopted within **three** years of the coming into force of clause 5 (clause 5(3)).(42) This time restriction explicitly placed custom bands under a more onerous requirement than would have applied to non-custom bands and might have been open to interpretation as designed to limit or reduce custom practices.

iii. Off-reserve Band Members

Under clause 5(5), non-custom leadership selection codes "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" (emphasis added). This provision appeared to reflect references in the *Corbiere* decision to the balancing of rights of on- and off-reserve band members as a possible approach to devising an equitable electoral process for bands under the *Indian Act*'s election system. The provision did not extend explicitly to the bill's custom leadership selection codes, nor did the bill address off-reserve participation in leadership selection in the context of custom bands elsewhere.(43) The JMAC Report proposed that legislation related to leadership selection "[ensure] that all regimes include the right of all members of bands to appropriate participation and, in particular, are consistent with the Charter …"(44)

iv. Choice of Regime

The JMAC Report noted that "[t]he ability of bands to select their own … regimes is likely an aboriginal right, a treaty right, or both. Imposing a regime on a band that prefers to select its leaders using some other regime would therefore be an infringement of those

(42) See D.1.e, Governance codes vs. Regulatory default system.

(43) The *Corbiere* decision was not required to address the custom context either. The JMAC Report noted that related issues are before the courts, p. D-16.

(44) *Ibid.*, p. D-18.

[section 35] rights."[45] Under this interpretation, the single option open to section 74 bands might have risked infringing their right to opt for a custom regime,[46] while the time restriction applicable exclusively to custom bands might *de facto* have subjected them to a regime not of their selection. **Both conditions were raised as matters of concern by witnesses before the House Committee.**

c. Administration of Government (Clause 6)

The *Indian Act* currently contains various provisions assigning powers to band councils, such as by-law-making authority, and stipulates that the exercise of band and band council powers requires the consent of a majority of electors and band councillors, respectively. It does not prescribe rules for the administration of band government *per se*, or address matters such as privacy, access to information or conflict of interest. For bands under the *Indian Act*'s electoral regime, procedural matters are addressed to some extent in the *Indian Band Council Procedure Regulations*,[47] which the JMAC Report viewed as "deficient, … not well known or followed," and in need of complete revision.[48]

Clause 6 prescribed minimal procedural and other administrative standards for inclusion in any "administration of government" code adopted by any band.[49] These codes would have been obliged to set out rules relating to:

- band meetings, including their frequency, band members' participation and minutes (clause 6(1));

(45) *Ibid.*

(46) This was also the sole option open to newly established bands under clause 5(4)). It is worth noting that the term "established" does not necessarily mean new entities: see section 17 of the *Indian Act* on "New Bands." For example, when Newfoundland entered Confederation, in 1949, the bands in the region were not recognized under the *Indian Act*. In 2002, both Innu communities in Labrador became "bands" under the *Indian Act* by Order of the Governor in Council.

(47) C.R.C., c. 950.

(48) JMAC Report, p. F-9.

(49) Clause 2(3) provided that unless excepted, a council's powers under the FNGA were to comply with the band's administration of government code or the relevant default regulations. Clause 43(4) amended section 2(3) of the *Indian Act* accordingly and modernized the provision relating to the exercise of band powers without altering its substance.

- band council meetings, including the holding of annual open meetings, the manner of making decisions and exercising council's powers, record keeping and access to records (clause 6(2));

- the development, making and registration(50) of band laws, **the delegation of law-making powers**, and public notice of proposed laws (clause 6(3));

- specified other topics, including band administration and its relationship to council, conflicts of interest of council members and band employees, access to information and privacy matters, and code-amending procedures (clause 6(4)).

Generally speaking, the matters targeted for inclusion corresponded to those recommended in the JMAC Report.(51)

d. Financial Management and Accountability (Clause 7)

Canadian governments typically operate within accountability guidelines found in legislation, regulations and policy. The *Indian Act* does not provide for financial accountability of band governments, for which accountability requirements are found either in their own codes, policies or by-laws or in federal policy, such as the current intervention policy authorized in funding agreements between bands and DIAND. The requirements of other federal departments providing funding to bands are inconsistent. Noting that "the capacities of bands, both organizational and financial, to implement enhanced accountability measures will need to be assessed and considered,"(52) the JMAC Report concluded that it seemed "reasonable that legislation could provide the basis for establishing consistent and comprehensive band financial management and accountability regimes."(53)

Like clauses 5 and 6 in areas of leadership selection and government administration, clause 7 set out minimum standards for any "financial management and accountability" code adopted by any band. They included rules for preparation and adoption of an annual budget; controlled expenditure of and signing authority for band funds; internal

(50) See discussion on clause 30 concerning band and national registries.

(51) JMAC Report, pp. F-25–26. JMAC cautioned that conflict of interest rules risk being overly complex and technical, leading to inadvertent breaches, and recommended that such rules relate only to financial matters, with optional inclusion in administration of government codes of conflict of interest rules for band employees: p. F-20 and F-26.

(52) *Ibid.*, p. E-2.

(53) *Ibid.*, p. E-11.

controls for deposits and asset management; various loan-related matters; salaries of council members and band employees; debt and debt management as well as deficit management; and procedures for amending the code.

These standards generally reflected those considered suitable for bands' financial codes by the JMAC Report.(54)

e. Governance Codes vs. Regulatory Default System (Clauses 4(3), 32, 36)

Provisions at clauses 4 through 7 relating to "band-designed" governance codes did not stipulate a time frame for their adoption. The transitional provision in clause 36 addressed this matter, stating that regulations under clause 32 were to apply to bands without their own codes **three** years after the code adoption provision in clause 4 came into force.(55) Clause 32(1) authorized the Governor in Council to make regulations in all areas in which band-designed codes might be proposed under clause 4, with the exception of custom leadership selection codes.

Accordingly, a band would fall subject to the default regime(s) authorized by clause 32(1), should its governance code(s) not be created, proposed and approved within the **three**-year window provided by clause 36.(56) Except in the case of custom leadership selection codes discussed above in clause 5(3), "default" bands were not to be precluded from adopting their own governance code(s) at a later date.(57)

The protracted nature of the legislative process at any level of government raised concerns about whether the bill's time frame for the development and ratification of complex governance codes by bands with widely varying circumstances would prove adequate, or whether many bands might find themselves governed by one or more default systems, at least initially, owing to insufficient time and tools. **The House Committee did increase the time frame for the adoption of governance codes to three years in response to witness concerns**

(54) *Ibid.*, p. E-14.

(55) Under clause 36, a band's eligible voters might adopt clause 32 regulations within the **three**-year window.

(56) During this transition period, the *Indian Act*'s electoral provisions were to remain in effect.

(57) While a band code was in force, regulations under clause 32 on the same subject matter were to be inapplicable to that band (clause 4(3)).

that the two-year period in the bill, as introduced, was not adequate.[58] Some questioned whether a three-year period would prove more workable from the perspective of First Nations communities; many witnesses had proposed a more expanded time frame, such as five years.

Should the governance provisions of Bill C-7 have taken effect gradually, as was left open-ended by the bill's amended coming into force provision (clause 59), the timing issue could have been mitigated for at least some bands. Although the bill did not provide for such a process, DIAND documentation indicated that it would consult with bands on default regulations, and apparently intended that governance code provisions would come into force upon their passage. Accordingly, a gap was expected between adoption of the bill and the passage of default regulations and coming into force of governance provisions.

f. Ministerial Role in Appeals (Clause 32(2))

As introduced, clause 32(2) required that regulations creating an appeal process related to elective band council positions "must provide that an appeal be heard by the Minister." **Many witnesses objected strongly to continued ministerial involvement in electoral matters. Under the government amendment adopted by the House Committee, leadership selection regulations might provide that appeals of council members' elections or applications to remove council members from office "shall be heard by a person designated by the Minister," in those cases where communities had not made provision for these matters in their own redress legislation under clause 11, discussed below. The regulations might also authorize the appointment of electoral officers.**

g. Exemptions (Clause 34)

Under the FNGA, the Governor in Council might, within **three** years of the coming into force of clause 4 relating to code adoption, order that a band be exempt from the bill's application, in whole or in part, for a prescribed period. Such an order would have excused bands from both code adoption requirements and the application of default governance systems, and might be issued only to facilitate completion of pending self-government agreements

(58) **Corresponding amendments were made to other clauses in which the two-year period appeared in the bill, as introduced (see clauses 5(3), 34). The two-year time frame was maintained for the obligation to enact a band law establishing a redress body under clause 11.**

(clause 34). Depending on when clause 4 was to take effect, this mechanism might have been brought to bear, for example, in the case of self-government processes currently nearing completion in British Columbia, Yukon or the Northwest Territories or that might accelerate under the British Columbia treaty process.(59)

h. Observations

The proposed FNGA regime was intended to effect considerable reforms for over 600 bands and band governments. The JMAC Report commented on the issue of bands' present capacity to develop new governance systems, expressing the view that

> [b]ands should be the primary entity to assume [functions currently exercised by government]. Some bands may not now have the capacity … [T]here is the need for an institution, particularly during an interim period. In addition, because of the size of some bands, some may not be able to assume all the roles, and therefore there is also a need for an institution to provide governance services to bands on a permanent basis.(60)

JMAC cautioned that "[i]f there is not an institutional capacity component to this initiative, bands will be forced to privately retain lawyers, accountants, financial officers, and other consultants at considerable expense."(61) It suggested that an "independent Institution" created legislatively could fill many functions, including assisting to establish and implement governance practices and draft codes upon request, designing and providing training programs, handling election appeals, undertaking responsibilities related to financial accountability, and so forth.(62)

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(59) **Under a government amendment adopted by the House Committee, an exemption order was required to provide that those *Indian Act* measures repealed or amended by Bill C-7 that were specified in the order continued to apply to the First Nations community during the exemption (clause 34(2)).**

(60) JMAC Report, p. G-3.

(61) *Ibid.*, p. G-4.

(62) *Ibid.*, pp. G-6–10.

During the House of Commons first-reading debate on Bill C-7 in the 1st session of the 37th Parliament, the Minister touched briefly on the institutional issue, indicating that the bill would "pave the way to create an advisory body to support first nations as they take on added roles to build better communities. The advisory body could assist with developing codes for governance, leadership selection and financial management, as well as providing a process for complaints and appeals."(63) Bill C-7, as introduced, did not provide explicitly for any institution of the sort advocated by the JMAC Report, **nor did the House Committee amend the bill to address this matter. A major Report Stage government amendment, however, proposed creation of the Canadian Centre for First Nations Governance that would: play a public education role on governance matters; provide communities with various forms of technical assistance in implementing the legislation; develop governance guidelines; offer capacity-building training in governance; and maintain a national registry of band codes and laws.(64)**

It is worth mentioning, in the context of this proposal, a recent short-lived precedent for a non-statutory First Nations governance centre with broad support, research, training and facilitation objectives. Flowing from the 1996 *Report of the Royal Commission on Aboriginal Peoples* and the federal government's *Gathering Strength* response, a joint initiative of the Assembly of First Nations and the Department of Indian Affairs culminated, in May 2001, in the establishment of the First Nations Governance Institute under a ten-person board of directors consisting of regional First Nations representatives.(65) The Institute's federal funding was terminated and its operations suspended several months after its inception. A number of witnesses testifying before the House Committee on Bill C-7 recommended that it be reinstated. In the result, the model proposed by the government for Bill C-7 both resembled and differed from the Institute and the independent Institution recommended by JMAC(66) in a number of respects.

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(63) House of Commons, Hansard, *Debates*, 17 June 2002, on-line at http://www.parl.gc.ca/37/1/parlbus/chambus/house/debates/207_2002-06-17/HAN207-E.htm#PT-2.

(64) House of Commons, *Order Paper and Notice Paper No. 114*, 9 June 2003, Motion No. 85.

(65) Additional information about the 2001 First Nations Governance Institute may be obtained *via* the former body's Web site, at http://66.129.69.182/index.htm.

(66) JMAC Report, pp. G-4 – 11.

On 4 December 2003, the Minister announced the creation of and seed funding for another non-statutory First Nations Governance Institute, whose objectives are to include promoting and assisting in the development of First Nations' governance. It remains to be determined whether this initiative will be retained by current Minister Andrew Mitchell, named 12 December 2003.

The FNGA did not create a "compliance" mechanism to determine if band-designed governance regimes met the legislation's requirements. On this matter, the JMAC Report concluded by consensus that "such a requirement is unnecessarily intrusive and costly" and would amount to "nothing more than a continuation of the Minister's power of disallowance" of band by-laws under the *Indian Act*. The Report further noted that band-designed regimes were open to court challenge whether or not a verification procedure existed.(67)

2. Financial Management (Clauses 8-10, Clause 59)

Clauses 8 through 10 prescribed additional financial management measures with further implications for bands' implementation capacities.(68)

a. Financial Statements (Clauses 8 and 9)

Under the FNGA, bands would have been required to maintain their accounts and prepare annual financial statements following accounting principles of the Canadian Institute of Chartered Accountants (clause 8). The bill also required that bands' financial statements be audited under that Institute's standards by an independent auditor (clause 9(1)), and that they include the salaries and expenses of council members (clause 9(2)).

Bill C-7 made provision for enhanced access to bands' financial statements, stipulating that a band must make its financial statements "publicly available" within a prescribed period, and provide a copy to "any person" paying a fee (clause 9(3)). The issue of disclosure of bands' audited financial statements has been controversial. Currently, no legislated requirements apply. Government policy specifies that bands must submit annual consolidated audits to DIAND for evaluation of their overall financial status, and make them available to their

(67) JMAC Report, pp. B-18–19.

(68) The JMAC Report noted that many bands lack capacity to deal with this complex area of administration. It indicated that certified Aboriginal Financial Officers of the relatively recent Aboriginal Financial Officers Association are making inroads in addressing this matter.

members.(69) Although audits submitted to government are generally subject to the *Access to Information Act*, a band may refuse access to non-band members where the requested audit contains confidential information concerning the band's private commercial transactions, financial holdings or own-source revenues.(70)

Clause 9(3) did not define the scope of the statements that must be made public, neither stipulating that they must be consolidated, nor that they need detail only public revenues. JMAC members differed as to how financial management provisions in eventual legislation might deal with this issue.(71) The Report observed, on the one hand, that information concerning a band's commercial transactions and revenues unrelated to government transfer payments was vital for band members but arguably "no affair of the general public."(72) On the other hand, other levels of government and the many bands that do make consolidated audits widely available do not appear penalized by publication of commercial information. Given that band members are already entitled to full disclosure, "it may be a small step to require full public disclosure."(73)

b. Financial Breach (Clauses 10(1)-(2))

Any "significant breach" of a rule related to debt or deficit in a band-designed accountability code or default regulation would have triggered a requirement that the band council assess the band's position and develop a recovery plan for the financial management of "band funds," to be presented to band members within a prescribed period (clause 10(1)). Quarterly reports on the plan were to be made until the breach was remedied (clause 10(2)).(74)

The bill did not define "significant breach." Under current DIAND policy, a deficit of 8% of a band's operating budget results in review of its financial circumstances, with the first stage of intervention involving a band-designed and -administered remedial plan under

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(69) DIAND also provides these audits to members claiming denial of access.

(70) This was confirmed in the 1988 decision of the Federal Court of Canada in *Montana Band of Indians* v. *Canada* (*Minister of Indian Affairs and Northern Development*), [1989] 1 F.C. 143 (T.D.) and in subsequent complaints to the Information Commissioner.

(71) JMAC Report, p. E-24.

(72) *Ibid.*, p. E-12.

(73) *Ibid.*, pp. E-16–17.

(74) Under the FNGA's transitional clauses, bands that exceeded their accountability code's deficit limit as of the taking effect of clause 10 were subject to that provision (clause 40(1)).

DIAND supervision. The scheme set out in clauses 10(1) and (2) appeared to combine elements of the existing policy approach and of a JMAC option aimed at ensuring bands a high degree of independence in dealing with their financial situation. In this regard, while DIAND interventions deal exclusively with moneys transferred under funding agreements, "band funds" referred to in clause 10, as defined in clause 2, appeared to include non-governmental sources of band revenue.

c. Ministerial Involvement (Clause 10(3))

The FNGA also authorized discretionary ministerial interventions in bands' financial affairs. Clause 10(3), as introduced, allowed the Minister to assess a band's "financial position" and, if he or she considered it necessary, require "remedial measures" when any of three circumstances became known: deteriorated financial health compromising delivery of "essential" programs; failure to make financial statements public within the prescribed period; and an adverse opinion by the band's auditor. **First Nations witnesses and others objected strongly to the statutory entrenchment of the Minister's existing intervention authority under funding agreements. A government amendment adopted by the House Committee provided that, in addition to the Minister, "a person or body designated by the Minister" might also undertake the financial assessment, but left the remedial measures phase under the Minister's sole authority. A further Report Stage government proposal would have empowered the Minister's designate to order remedial measures as well.[(75)]**

Clause 10(3) contained elements of another alternative outlined in the JMAC Report relating to interventions for bands in financial difficulty.[(76)] The Report noted that this option "maintains a significant role for the Minister in the financial accountability regime of bands and therefore runs contrary to one of the main objectives of this legislation project."[(77)] JMAC suggested that it would be preferable to assign the intervention role to an independent First Nations institution: eventual legislation could "provide for a transition and a linkage by designating the Minister as the institution until such time as a First Nations institution comes into

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(75) House of Commons, *Order Paper and Notice Paper No. 114*, 9 June 2003, Motion No. 26.

(76) JMAC Report, p. E-19.

(77) *Ibid.*, p. E-20.

being with the capacity to perform this function,"[78] perhaps under anticipated fiscal institutions legislation. **Although the amended clause did allow for intervention by some person or body other than the Minister, it would not appear that this modification addressed witnesses' underlying criticism of the provision that related not only to the Minister's continued role in bands' financial management, but also to the new statutory basis for that role.**

Under present DIAND policy, interventions in a band's affairs may follow political or social turmoil as well as financial difficulties. Clause 10(3) appeared to restrict the Minister's statutory capacity to intervene to financially driven circumstances, but did not preclude continued interventions under funding agreements in other contexts. The provision did not define the sort of remedial measures the Minister might undertake, set a time limit for ministerial interventions,[79] nor define the scope of the "financial position" in clause 10 that the Minister was authorized to assess. **A government amendment to clause 33 did address these matters. As introduced, clause 33 provided for very broad authority to make regulations to carry out the FNGA's purposes. The amendment adopted by the House Committee set out an exhaustive list defining regulatory powers under that provision, much of which related to clause 10(3). Under the modified clause 33, regulations might be made specifying:**

- **the scope of powers in relation to assessments of bands' financial position, "including the power to require that access be given to bank accounts" and other prescribed sources;**
- **what represented a deterioration of financial health sufficient to compromise essential program delivery; and**
- **remedial measures that might be taken, including third-party management, and time limits for those measures.**

As amended, clause 33 regulations might also provide that clause 10(3) powers "do not affect any right exercisable" under funding agreements with bands – including presumably the Minister's right to intervene in specified circumstances – and authorize the withholding of funds payable to a band until remedial measures were in place.

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(78) *Ibid.*

(79) Bill C-7 provided that the Minister might continue remedial measures for a band under such measures on the coming into force of section 10, or order a recovery plan for that band (clause 40(2)).

The JMAC Report underscored that "whatever intervention method is selected, it should ensure that the intervener has the same capacity as the band administration to deal with the full financial picture of a band including trust accounts, commercial ventures, other own source revenues, as well as inter-governmental transfers."(80)

d. Observations

Bill C-7 did not provide for an external auditor general. The JMAC Report considered that such a body would be premature at this early stage of the development of bands' governance structures, and that the Report's proposals provided a comprehensive accountability package. JMAC expected that bands would function satisfactorily with capacity development help through a First Nations institution, but might wish to establish such an external body to provide independent assessment of their performance at some future date.(81)

The legislation made no mention of "results-based" accountability. The JMAC Report considered this option, concluding that performance measures for Canadian public institutions remain largely policy-dictated, and that "legislation is not the appropriate vehicle to ensure that program outcomes are achieved."(82)

3. Complaints and Redress (Clauses 11, 33, 39, 41-42)

a. Band Process (Clauses 11, 33, 39)

Apart from election appeals to the government,(83) the *Indian Act* does not currently provide a mechanism for treatment of band members' grievances related to band administration. Under Bill C-7, a band council would have been required, within two years of Royal Assent (clause 39), to put in place a law authorizing either an impartial person or body to consider complaints by band members or non-member reserve residents and to undertake remedial measures (clauses 11(1)-(2)). This represented the only mandatory exercise of band council law-making authority under the FNGA.

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(80) JMAC Report, p. E-19.

(81) *Ibid.*, p. E-22.

(82) *Ibid.*, pp. E-21–22, E-27.

(83) The process set out in the *Indian Band Election Regulations*, C.R.C., c. 952, s. 12-13, applies only to bands under the *Indian Act*'s election regime.

Bill C-7's redress mechanism, as introduced, applied to complaints (1) alleging breach of a governance code or (2) contesting a discretionary decision "against" a member or resident by the council or a band employee. A government amendment adopted by the House Committee expanded the grounds for complaint under (1) to include "contravention" or "unfair or improper application" of the legislation, default regulations or certain band laws, and added council members to the persons against whom a complaint might be lodged. The amendment further provided that a First Nations law under clause 11 might authorize the redress body, when dealing with a complaint based on the conduct of an election or the gravity of a contravention, to set aside a council member's election or to order a member's removal from office (clause 11(2.1)).[(84)] Bill C-7 prohibited any person or body in a conflict of interest position in relation to a complaint from considering it (clause 11(4)), while a decision from which an appeal could be taken under a governance code, **default regulations or other prescribed instruments** might not be contested using the bill's redress mechanism (clause 11(5)).

Many First Nations witnesses criticized the clause 11 redress scheme, not only on the basis of its obligatory nature, but also from a capacity perspective, particularly for smaller or isolated communities.[(85)] The question of whether a national Ombudsperson office might prove a more suitable, more impartial structure was also raised with some frequency. On this topic, the JMAC Report suggested that First Nations members would benefit from an internal process, which could be supplemented by an Ombudsman function carried out by JMAC's recommended independent Institution.

During the House Committee's deliberations, an opposition amendment to create an Ombudsman office to complement the clause 11 redress body was judged inadmissible as a "money" amendment. A Report Stage government amendment proposed the establishment of the "Office of the First Nations Ombudsman," with an Ombudsman appointed by the Governor in Council and mandated to consider and mediate only those complaints that were alleged to have been dealt with inadequately by the clause 11 body.[(86)] The government-proposed body would thus apparently have resembled a second-level structure akin in some respects to an appeal body.

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(84) See previous discussion of clause 32(2).

(85) See discussion of clause 18 under E.2.b, Governance Laws.

(86) **House of Commons, *Order Paper and Notice Paper No. 114*, 9 June 2003, Motion No. 84. The government amendment also proposed that the Ombudsman would deal with clause 11 complaints pending the making of a clause 11 law by a band council.**

b. External Process (Clauses 41-42)

Bill C-7 opened a broader redress avenue under the *Canadian Human Rights Act*(87) (CHRA). Section 67 of that statute has stipulated since 1976 that "[n]othing in this Act affects any provision of the *Indian Act* or any provision made under or pursuant to that Act." The controversial exemption has not entirely prevented band members from gaining access to CHRA mechanisms, as the courts have generally interpreted that the human rights legislation remains applicable to band council activities or policies that are not based on the *Indian Act* or regulations under it.

In 2000, the report of the federally appointed Review Panel on its comprehensive review of the CHRA recommended that the section 67 exemption be removed, and that an interpretive provision be incorporated in the CHRA "to ensure that Aboriginal community needs and aspirations are taken into account in interpreting the rights and defences in the [CHRA] in cases involving employment and services provided by Aboriginal governmental organizations. Such a provision would ensure an appropriate balance between individual rights and … community interests."(88)

Clause 42 of the FNGA proposed to repeal section 67 of the CHRA, thus making its redress mechanisms available to band members in relation to federal and band government actions under both the *Indian Act* and Bill C-7. Clause 41 added an interpretive provision along the lines recommended by the Review Panel under which the needs and aspirations of the Aboriginal community affected by a complaint against an "aboriginal governmental organization" were to be taken into account in interpreting and applying the CHRA, "to the extent consistent with principles of gender equality."

The bill did not define "aboriginal governmental organization" or "principles of gender equality." The concept of gender equality does not appear in other federal statutes consulted.(89) Its inclusion in clause 41 appeared to represent the sort of balancing exercise contemplated by the Review Panel, with specific reference to gender alone perhaps reflecting

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(87) R.S.C. 1985, c. H-6.

(88) Canadian Human Rights Review Panel, *Promoting Equality: A New Vision*, June 2000, Ottawa, p. 132.

(89) DIAND policy requires that gender equality analysis to assess the "differential impact on women and men of proposed and existing policies, programs and legislation" be integrated in the development and implementation of legislation: *Gender Equality Analysis Policy*, on-line at http://www.ainc-inac.gc.ca/pr/pub/eql/eql_e.pdf.

recognition of the potential prevalence of gender-related issues that might be raised under the CHRA following removal of the section 67 exemption. Under clause 41, a woman complainant's rights under the CHRA might be trumped by community interests only to the degree consistent with gender equality principles.

The JMAC Report agreed removal of section 67 should be linked to insertion of an interpretive provision to ensure "aboriginal and treaty rights [are considered] in interpreting and applying the *CHRA* to bands and band councils." It ultimately concluded, however, that repeal should occur "only in the context of the federal government's comprehensive response to the Review Panel's recommendations," which has not yet taken place. JMAC also expressed concern that elimination of the exemption would result in increased workload for the Canadian Human Rights Tribunal and increased training and resource needs of bands in order to implement the CHRA and defend against complaints. In JMAC's view, "[c]onsideration will need to be given to whether band councils will face complaints when they are implementing federal programs," as well as to the relationship between the CHRA and status and membership issues under the *Indian Act*.(90)

First Nations and other witnesses raised a number of questions about the interpretive clause at clause 41, describing it as vague, difficult to interpret, potentially unworkable, and in need of clarification as well as broadening of the factors to be considered by the CHRC. Concern was also expressed with respect to the potential effect of the interpretive clause on collective rights. Many witnesses echoed JMAC's concerns about the capacity of First Nations communities and the CHRC to deal effectively with the repercussions of removal of the section 67 exemption.

4. Band Government Operations (Clauses 12-14)

The FNGA provided that band councils must make policies and rules related to government operations available to members and reserve residents, including programs and services offered to them (clause 12). It is not clear to what degree this requirement could have represented an additional burden for band administrators, particularly those from small bands. In addition, assuming the provision extended to federal operations, programs and services, the

(90) JMAC Report, p. B-12.

federal government would arguably be better placed, from both resource and knowledge perspectives, to provide information about them.

The *Indian Act* does not currently protect band councils or employees from civil proceedings related to work or office-related activity. Bill C-7 provided that the liability of council members and band employees would be limited with respect to anything done during the exercise in good faith of any power or duty under the *Indian Act*, the bill, regulations made under either, any governance code or law under the FNGA or any by-law under the *Indian Act* (clause 14).

E. Provisions Related to the Powers of Band Councils

1. Legal Capacity (Clause 15)

Although the *Indian Act* defines bands and band councils and confers authority on both, it has not, to date, explicitly recognized either as legal persons. Bands under the *Indian Act* are considered unique legal entities with somewhat ambiguous status under Canadian law, legal persons for specific purposes under specific statutes but not others.(91) The JMAC Report concluded that "certain advantages would accrue to bands if their legal status was clarified."(92)

Bill C-7 proposed that any band under the *Indian Act* would have "the legal capacity, rights, powers and privileges of a natural person," including the right to contract, engage in property transactions and legal proceedings, and do anything ancillary to its capacity (clause 15(1)), and that a band's capacity be exercised through its council (clause 15(2)). The clause 15(1) definition echoed the general substance of those set out for specific bands under various federal statutes establishing self-government or other regimes,(93) and generally corresponded to one of the options contained in the JMAC Report.(94)

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(91) While some courts have held that a band has the capacity to sue, be sued and to enter into contracts, others have ruled that a band is not a "person," has no corporate status, and may not own real estate.

(92) JMAC Report, p. C-13.

(93) *Cree-Naskapi (of Quebec) Act*, *Sechelt Indian Band Self-Government Act*, *Yukon First Nations Self-Government Act*, *Kanesatake Interim Land Base Governance Act*, *First Nations Land Management Act*.

(94) JMAC Report, p. C-18.

The JMAC Report acknowledged an enduring view that equating bands with legal persons makes them akin to corporate bodies and represents a fundamental change in their status.(95) It recommended that any changes in this area "must be accompanied by provisions that ensure that [they] do not diminish [bands'] unique nature under Canadian law. Bands must not be transformed into corporations." Similarly, concerns over potentially increased vulnerability of reserve lands and band moneys led JMAC to conclude it was essential that these interests not be affected by any amendments related to bands' legal capacity. The FNGA generally reflected both areas of concern. Although not explicitly acknowledging the unique nature of bands' legal status, the bill did provide, for greater certainty, that the definition in clause 15(1) neither affected that status nor had an incorporating effect (clause 15(3)), nor did it affect band members' interests in reserve lands and band moneys under the *Indian Act* (clause 15(4)).

Several witnesses before the House Committee maintained the position that it would be more appropriate to define a First Nation's legal capacity as that of a government or nation rather than that of a natural person. It was also recommended that the legislation stipulate explicitly that the legal capacity provision would not restrict the inherent right of self-government, Aboriginal or treaty rights.

In relation to a further concern related to the fiduciary relationship between the Crown and bands, the JMAC Report noted that defining bands' legal capacity "will not affect the general fiduciary relationship between the Crown and First Nations" *per se*, but that other amendments giving bands greater authority over their interests could alter specific fiduciary duties.(96) Finally, JMAC noted the need to reconcile the Bill C-7 definition of legal capacity with those in other acts, none of which was amended by the bill.

2. Law-making Powers (Clauses 16-18, 33, 37, 51, 53-55, 59)

Under the *Indian Act*, a band council's by-law-making powers in relation to reserves may at present be considered analogous in some respects to those of municipalities under provincial legislation, with the council's authority confined to matters delegated and

(95) In this light, one alternative considered by JMAC on which no consensus was reached would have made any new provisions for enhanced legal capacity optional, *ibid.*, pp. C-20–23.

(96) *Ibid.*, p. C-15. JMAC underscored the distinction between the fiduciary relationship and fiduciary obligations, noting that if the Minister of the Cabinet no longer has authority over a given subject matter, the fiduciary duty in that area will cease as well, pp. B-4–5, n.

defined by the *Indian Act*. These limitations have long been criticized by bands and representative organizations as out of keeping with traditional law-making practices. Currently, the *Indian Act* provides for band by-laws as follows:

- Subsection 81(1) lists 22 areas in which a council may make by-laws related to local matters such as allotment of and residence on reserve land, zoning, traffic control, trespassing and other law and order matters, wildlife protection and husbandry. Section 81 by-laws may not be inconsistent with the *Indian Act* or regulations under it. In this regard, subsection 73(1) gives the Governor in Council rarely exercised regulatory power over many closely related, if not overlapping, matters. All section 81 by-laws are subject to the Minister's power of disallowance (section 82);

- Section 83 authorizes councils to make several categories of "money" by-laws, subject to the Minister's approval and to the Governor in Council's regulatory authority over the exercise of the by-law-making power;

- Under section 85.1, a band council may make by-laws governing the use of intoxicants on a reserve, subject to the approval of a majority of voting electors, and provided the Minister is furnished with copies forthwith.

The JMAC Report noted that many section 81 powers "seem anachronistic and [do] not address a host of issues" such as landlord-tenant and environmental issues where band councils' authority might be enhanced.(97) JMAC members supported the elimination of ministerial authority in relation to band by-laws.(98)

a. General Laws (Clauses 16 and 17)

Bill C-7 essentially retained most of the substance of by-law subject-matters currently set out in sections 81, 83 and 85.1 of the *Indian Act*, while modernizing and consolidating them (clauses 16(1) and 17(1)). The bill repealed most of the *Indian Act*'s by-law provisions (clauses 53 and 55), including those defining "money" by-law powers.(99) Some of the latter would, however, have remained in effect, along with the related requirement for

(97) *Ibid.*, pp. F-13–14.

(98) *Ibid.*, p. F-12.

(99) Under transitional clause 37, a band's by-laws that were in effect when the *Indian Act*'s by-law provisions were repealed and that did not conflict with the FNGA or the band's governance code(s) were to be deemed band laws under the FNGA, and deposited in the registries required by clause 30 within the prescribed period. Registry provisions are discussed under E.4.

ministerial approval (clause 54).[100] The legislation would also have rescinded subsection 73(1) of the *Indian Act* (clause 51), but not the Governor in Council's broad authority under subsection 73(3) to make regulations "to carry out the purposes and provisions of this Act."

Clauses 16(1) and 17(1), **as amended by the House Committee**, altered councils' law-making scope with the addition of authority over:

- prevention of damage to property (16(1)(*b*)), provision of services by the band **and charging of service-related fees** (*d*), and residential tenancies (*i*);[101]
- the protection and conservation of natural resources "within the band's reserve," **as well as the disposition of a prescribed list of those resources, excluding fish and wildlife** (17(1)(*a*)), and preservation of a band's language and culture (*c*).

The bill made no provision for ministerial authority related to councils' law-making processes.

Several witnesses before the House Committee took the position that Bill C-7's retention of the *Indian Act* approach setting out an exhaustive list of delegated law-making powers was at odds with the concept of inherent rights. Some recommended that the legislation be amended to acknowledge the underlying inherent right of self-government. Other specific criticisms related to the bill's failure to provide for First Nations jurisdiction over education, child welfare and the environment.

b. Governance Laws (Clause 18)

In addition to re-working and adding to councils' existing by-law-making jurisdiction, the FNGA defined new law-making powers related to governance matters that generally appeared to correspond to the JMAC Report's recommendations for additional council authority in this area.[102] Clause 18(1)(*a*), for instance, authorized a band council to make laws related to the establishment, composition and powers of "bodies," and their relationship to the

(100) Money by-laws retained in section 83 of the *Indian Act* included those related to taxation for local purposes; enforcement of payments; recovery of interest; and raising moneys from band members for projects. Note that the *Indian Act*'s remaining provisions pertaining to money by-laws (sections 83 and 84) were to be repealed by Bill C-19, the First Nations Fiscal and Statistical Management Act, described as the "third plank" of a plan designed to improve bands' self-sufficiency, the other two being the FNGA and the *First Nations Land Management Act*. **Bill C-19 also died on the *Order Paper* when Parliament was prorogued on 12 November 2003.**

(101) Bill C-7 did not make provision for laws on local environmental matters, as suggested by JMAC, perhaps reflecting the complexity of jurisdictional issues in the area.

(102) JMAC Report, p. F-26.

band.[103] Such a body might, for example, be established to implement the redress mechanism mandated by clause 11 for the purpose of dealing with band members' complaints. The majority of the remaining discretionary authorities set out in clause 18(1) related to topics that were required to be included in governance codes, including elections of council members (*c*), conflicts of interest (*d*) and access to information and privacy (*e*).[104]

Of particular note, clause 18(1)(*b*) also enabled a band council to make laws for the delegation "to any person or body … of any of the council's powers" under the bill or the *Indian Act*, with the exception of those set out in clause 18 itself. This broadly drafted provision extended, for example, to council powers set out in the bill to propose codes under clause 4 and to make laws under clauses 11, 16 and 17, as well as to remaining by-law authority, allotment of reserve land and other council powers under the *Indian Act*. Bill C-7 further authorized councils of two or more bands to make laws for "joint establishment" of such a delegated body and outlining its composition and powers and relationship to the bands involved (clause 18(2)). It did not define the legal capacity of any delegate entity created either by a single band or jointly, or require that relevant band laws outline procedural measures specific to its creation, such as the prior approval of band electors.[105]

Clauses 18(1)(*b*) and 18(2) conferred extensive delegation authority. Government documentation suggested that the combined authority "will be particularly useful in small communities where capacity limitations might otherwise impede implementation of the FNGA."[106] On this issue, the JMAC Report noted that the *Indian Act* makes no provision for any delegation of council jurisdiction and recommended that councils be authorized to delegate "some powers to health boards, tribal councils or entities under the [*Indian Act*], provided that law-making powers can only be delegated to another elected body."[107] The bill did not set conditions related to delegation, and may have expanded on the scope of delegated authority contemplated by JMAC.

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(103) The JMAC Report referred to "band council committees," *ibid.*

(104) The conditions for entering into commercial transactions may also be the subject of laws under clause 18(1).

(105) Notice requirements in government administration codes and, presumably, in the eventual analogous default system, would apply.

(106) DIAND, "Communities First: First Nations Governance," *Law-making*.

(107) JMAC Report, p. F-11.

3. Conflict of Laws (Clauses 16(2)-(3), 17(2)-(6), 18(3))

The *Indian Act* does not contain explicit conflict of laws provisions *per se*. Under subsection 81(1), general by-laws may not be inconsistent with the Act itself or with regulations made under its authority. Bill C-7 specified that in the event of conflict:

- between a clause 16 council law and any federal statute or federal regulation: the federal instrument was to prevail, **with one prescribed exception related to specific regulations under the *Indian Act* (clauses 16(2)-(3))**. Accordingly, a band law would not have prevailed over, for example, conflicting regulations under the *Fisheries Act*;

- between a clause 17 council law and any federal statute or any federal regulation made under the *Indian Act* or Bill C-7: the legislation or regulation was to prevail, **with four prescribed exceptions that also involved specific *Indian Act* provisions (clauses 17(2)-(6))**;

- between a council governance law and any federal statute, any regulations under Bill C-7 that apply to the First Nations community in question, or any code adopted by that community: the legislation, the regulations or the code was to prevail (clause 18(3)).

The rationale for distinctions in these conflicts of laws clauses, as well as for the noteworthy new clause 16(2) requirement that band laws be compatible with <u>all</u> federal statutes and regulations, is not readily apparent. **This requirement was criticized as a backward step by a number of witnesses.**

4. Registries (Clause 30)

Under the FNGA, a band was to be required to maintain a registry containing any codes and all laws made by its council under the bill,[108] to provide "all persons" reasonable access to it (clause 30(1)), and to furnish copies to anyone requesting any law or code (clauses 30(5)). The bill provided that, unless otherwise specified, a band's code(s) and laws were to take effect the day following their deposit in the band registry (clause 30(4)). The Minister was also to establish a national registry of all band codes and laws made under the bill and enable access to it (clause 30(2)).[109]

(108) Clause 6(3) provided that a government administration code must contain rules for the maintenance of such a registry.

(109) **Under a proposed consequential Report Stage government amendment, the First Nations governance centre, discussed under heading D.1.h., Observations, was to establish the national registry.**

The JMAC Report favoured a band registry scheme for band laws,[110] as well as "a formal mechanism" [111] such as local or national registration to evidence the adoption of band-designed codes. JMAC does not appear to have addressed the option of a parallel national registry of either laws or codes. The rationale for the dual requirement relates, according to government documentation, to ensuring "overall transparency and access … locally and nationally."[112]

5. Enforcement (Clauses 19-29)

Sections 101 through 107 of the *Indian Act* provide for offences under it and related punishments; peace officer enforcement of a band's intoxicant by-laws and a few other provisions in the legislation, including seizure and detention of goods; disposition of fines to the Crown for the benefit of the band or its members; and appointment of justices of the peace with authority over offences under the *Indian Act*. The JMAC Report observed that problems associated with enforcement of by-laws under that Act include the absence of a ticketing scheme, and the lack of sufficient enforcement officers and prosecutors.[113]

Bill C-7 proposed to fill certain gaps in and expand bands' existing enforcement capabilities, while leaving the *Indian Act*'s existing provisions undisturbed.

a. Offences (Clauses 19-22)

The bill would have:

- authorized band laws **under clauses 16 and 17** to impose fines of up to $10,000 and/or imprisonment of up to three months[114] on anyone convicted of contravening their provisions (clause 19(1));

(110) JMAC Report, p. F-25.

(111) *Ibid.*, p. B-18.

(112) DIAND, "Communities First: First Nations Governance," *Registration and Proof of Band-Designed Codes and Laws*.

(113) JMAC Report, p. F-5. The *Indian Act* does not make explicit provision for the appointment of by-law enforcement officers. Although some bands do create "enforcement" positions, for example under their by-law authority over the observance of law and order (par. 81(1)(*c*)), they have limited duties and no true enforcement capacity.

(114) In the case of a law **for the conservation and protection of natural resources on the reserve or related to public works and waste management**, the maximum fine and term of imprisonment that might be set were $300,000 and six months, respectively.

- provided for a ticketing scheme to be implemented by peace officers or band enforcement officers (clause 21),[115] and for the payment of resulting fines and transfer of forfeited property to the band council (clause 22(1)).

Bill C-7's ticketing scheme and increased fines were consistent with specific recommendations of the JMAC Report.[116] **Some witnesses before the House Committee objected to the amplified penalty provisions.**

b. Inspection and Search (Clauses 23-29)

A common criticism of Bill C-7 during House Committee hearings related to the bill's original enforcement provisions which authorized, in the view of many witnesses, unduly sweeping search and seizure powers for band enforcement officers seeking to monitor compliance with or to investigate potential offences against band laws. Witnesses expressed concern that, in the absence of additional resources, First Nations communities lacked the capacity to meet the funding/training needs associated with implementing the bill's enforcement measures. The provisions were seen as subject to abuse and to legal challenge under the Charter guarantee against unreasonable search and seizure or under rules governing civil liability.

In the result, the House Committee adopted a series of government amendments apparently designed to respond to these and other concerns by more clearly delineating the intended scope of enforcement activities, in particular inspection activities, under Bill C-7. These modifications

- **authorized band councils to hire qualified band enforcement officers "for the purpose of conducting inspections and searches on reserve lands" (clause 23(1));**

- **defined "inspection" as related to <u>verification of compliance</u> with band laws, involving entry into and examination of a place "that is subject to regulation under a band law made for the regulation of an activity on a reserve," with prescribed conditions including the giving of notice; and "search" as related to <u>enforcement</u> of band laws, involving entry into and examination of a place, "excluding an inspection" (clause 2(1));**

(115) Under clause 21(4), a band might make an agreement with a competent provincial authority as to which ticket or process would be used under the ticketing scheme, thus determining procedures applicable to it.

(116) In 1996, Bill C-79 contained similar provisions, with less substantial fine increases. Bill C-7 did not address the JMAC Report's further recommendation related to lack of clarity with regard to prosecutions of band laws. According to JMAC, provincial and/or federal prosecutors may refuse to prosecute band by-laws on the ground that they are not within their respective areas of responsibility.

- **specified that band laws under clauses 16 and 17 related to the regulation of an activity on reserve lands might authorize inspections of places where that activity occurs (new clause 17.1) (clause 25);**

- **stipulated that a search of a place by a band enforcement or peace officer to enforce a band law was required to comply with conditions set out in a warrant issued by a justice of the peace who was satisfied on reasonable grounds that any thing relating to past or present offences against a band law might be there (clause 26);**

- **provided for warrantless searches of places other than dwellings to enforce specified band laws related to, for instance, health or conservation of wildlife, where the delay in obtaining a warrant could risk bodily harm or death or loss of evidence of an offence (clause 27);**

- **prohibited band enforcement officers from using force when conducting an inspection or search, while authorizing peace officers to use force in a search only if the warrant authorized it (clause 28);**

- **empowered a band enforcement or peace officer to seize any thing found that is believed on reasonable grounds to be evidence of an offence under the band law authorizing the inspection or search (new clause 29.1).**

As the foregoing suggests, Bill C-7's modified enforcement provisions defined the exercise and scope of inspection powers more restrictively than was the case under the bill's original scheme.[(117)] Search powers, allowing for their rewording, appear to have remained substantially unchanged, while providing for their exercise by enforcement or peace officers from provincial or other policing bodies. This modification may reflect an attempt to mitigate the concern some witnesses raised with respect to the potential for abuse in the conduct of searches.

The question of whether the amended search provisions would have been less likely to attract Charter scrutiny appears moot. The JMAC Report observed, as was reflected in witness testimony, that band enforcement officers "would need to receive adequate training on the proper exercise" of search and seizure powers. The Report further noted that resolving serious issues related to the enforcement of band laws would involve providing more funding, and would require discussion with other federal departments.

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(117) **Additional Report Stage government amendments were proposed for a number of inspection and search provisions**.

F. Unaffected Parts of the *Indian Act*

Most of the *Indian Act* would have remained intact. The bulk of significant amendments to it proposed by Bill C-7 and discussed under previous headings related primarily to electoral provisions, band by-laws and regulatory authority,(118) while a few others repealed a handful of provisions long considered to be particularly archaic.(119)

Parts of the *Indian Act* not already discussed that were to remain substantively unaffected by the FNGA include:

- Definitions (sections 2(1)-(2))
- Administration (section 3)
- Application (sections 4-4.1)
- Definition and Registration of Indians (sections 5-17)
- Reserves (sections 18-19), Possession of Lands in Reserves (sections 10-29), Trespass (sections 30-31)
- Lands Taken for Public Purposes (section 35)
- Special Reserves (section 36)
- Surrenders and Designation (sections 37-41)
- Descent of Property (sections 42-44), Wills (sections 45-46), Appeals (section 47), Distribution of Property on Intestacy (sections 48-50)
- Mentally Incompetent Indians (section 51), Guardianship (section 52)
- Money of Infant Children (sections 52.1-52.5)
- Management of Reserves and Surrendered and Designated Lands (sections 53-60)
- Management of Indian Moneys (sections 61-69)

(118) Amendments making related consequential changes to the *Indian Act* or minor textual modifications have not been reviewed.

(119) Proposed repeals of section 32-34, 71, 92-93 (clauses 46, 50, 57) duplicate proposals made in 1996 in Bill C-79.

- Loans to Indians (section 70)[120]
- Treaty Money (section 72)
- Taxation (section 87)
- Legal Rights (sections 88-90)[121]
- Trading with Indians (section 91)
- Schools (sections 114-122)

G. Principal JMAC Report Recommendations Not Included in Bill C-7, **as Amended**

With reference to the legislative approach proposed in the JMAC Report,[122] it would appear that significant recommendations not pursued or contained in Bill C-7 relate to:

- Making legislative changes by way of amendments to the *Indian Act* rather than in a stand-alone statute
- Creation of an independent Institution to assist bands with governance-related and other administrative activities
- Making the legislation binding on the Crown, as is the case in settlement legislation related to land claim agreements and other recent legislation such as the *First Nations Land Management Act*.

COMMENTARY

Divergences in governmental and First Nations' perspectives on the First Nations Governance Initiative emerged during the pre-legislative period beginning in April 2001. A substantial body of documentation, as well as the overwhelming majority of testimony given before the House Committee, attest that they continued to differ sharply as to the objectives, merits and effects of Bill C-7 throughout the abbreviated legislative process.

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(120) Bill C-79 proposed to repeal this section.

(121) Section 88 makes provincial laws of general application applicable to Indians, provided they are consistent with the *Indian Act* and its subordinate statutory instruments and do not make provision for anything in or under that Act. Clause 56 incorporated the FNGA and regulations and laws under it into section 88.

(122) See p. 8.

From the government's viewpoint, the legislation reflected commitments to strengthen First Nations governance made in the January 2001 Speech from the Throne, and was essential to address an unacceptable situation affecting First Nations communities arising largely from a deficient *Indian Act* regime. Bill C-7 was thus intended to remedy significant gaps in that regime that have prevented First Nations communities and governments from managing their own affairs effectively and responsibly, by providing tools that would enable First Nations communities to develop economically and to exercise autonomous decision-making power with reduced government involvement. For the government, the FNGA was also a pivotal component of a broader reform plan to modernize First Nations governance systems that included the 1999 *First Nations Land Management Act* as well as anticipated fiscal legislation. It was not intended to replace the historical treaties, undermine ongoing treaty and self-government processes, or affect the government's fiduciary responsibilities toward First Nations people.

The Assembly of First Nations and other First Nations bodies representing regions across the country viewed Bill C-7 differently. At its Annual General Assembly (AGA) in July 2002, the AFN confirmed its position on Bill C-7's predecessor, Bill C-61, in a resolution condemning the legislation as a violation of the inherent right of self-government and committing the AFN to oppose it. The resolution called upon AFN Chiefs to ensure this opposition was heard, including through the parliamentary process. A separate resolution gave notice of First Nations' intention "to strengthen and sustain our own systems of governance, to enact and enforce our own laws without interference from federal government and legislative policies and regulations." The AGA endorsed the February 2002 *First Nations Plan* as an alternative to Bill C-61, now C-7. **In November 2002, a Special Chiefs' Assembly called on the Prime Minister to withdraw Bill C-7 and other then-pending pieces of legislation, and undertake a renewed partnership with First Nations. Subsequent assemblies to October 2003 reiterated the AFN's opposition to the FNGA.**

In condensed form, some of First Nations' primary criticisms were that the bill: was drafted without consultation or consent following a flawed process; was based on subsection 91(24) of the 1867 Constitution, rather than on a rights-based approach under section 35 of the *Constitution Act, 1982*; represented an attack on historical treaties and a threat to the inherent right of self-government under section 35; imposed more bureaucratic control over the lives of First Nations people without resolving long-standing social and economic issues; failed to address urgent needs of First Nations communities in matters such as health, housing and

employment, or the concerns of First Nations women; imposed a one-size-fits-all approach with numerous additional requirements for all First Nations communities and no parallel commitment to provide necessary resources or supports; served the interests of government by off-loading federal responsibility; increased the costs of governance for First Nations communities; and failed to provide measures that would enable First Nations communities to develop their economies. **Before the House Committee, many First Nations spokespersons maintained that the imposition of Bill C-7 would be especially onerous since their communities had already developed standards through their own process. Others argued that, in any event, prescriptive legislation such as Bill C-7 was not necessary to bring about administrative reform for communities in need of it.**

Excluding those matters on which the House Committee adopted amendments, as discussed in preceding pages, specific criticisms of the bill raised by First Nations spokespersons, often from a capacity/cost perspective, included the 25% threshold for code adoption (clause 4); legislating authority for ministerial interventions in First Nations communities' financial affairs (clause 10); the requirement that all communities create a redress mechanism (clause 11); the legal capacity clause (clause 15); and the repeal of section 67 of the CHRA (clause 41).

In July 2002, the Federation of Saskatchewan Indian Nations initiated a Federal Court challenge to Bill C-7's predecessor, Bill C-61, alleging, *inter alia*, that the FNGA process breached the government's fiduciary duties toward First Nations and seeking a declaration to that effect. **In March and August 2003, government applications to prevent the case from proceeding were dismissed.**

First Nations opposition to Bill C-7 was not universal. The National Chief of the Congress of Aboriginal Peoples described the legislation as a move to address obsolete sections of the *Indian Act*, and as positive for the CAP constituency, providing off-reserve members the means and process to exercise their right to vote in band elections. According to the President of the National Aboriginal Women's Association, positive aspects included the bill's human rights protections, which would improve the lives of women on reserves, and band councils' authority to pass laws without ministerial interference. Individual First Nations members expressed support for the legislation's accountability provisions, in particular, or, more generally, for its

practical solutions. Others, acknowledging proposals such as removal of the CHRA exemption, considered that positive steps had been undone by bad process.

Non-Aboriginal editorial opinion, although mixed, tended to favour the FNGA, describing the bill as “a promising start,” “necessary and overdue,” setting “the right course,” “a straightforward, sensible outline,” “addressing native grievances,” “[providing] a better framework” for First Nations governments and not to be feared by them. It was suggested that although the bill had important positive effects, the government should admit that it “really is about assimilation.” Less positive commentary observed that because drafting the FNGA was neither collaborative nor inclusive, the bill should be allowed to die to enable government and First Nations to resume discussions to resolve outstanding issues, and that the Minister had “lost any hope of winning the support” of the Chiefs for the FNGA.

Available commentary from the academic sector, also mixed, tended to be more critical of Bill C-7.

APPENDIX

SELECTIVE OVERVIEW OF *INDIAN ACT* HISTORY

SELECTIVE OVERVIEW OF *INDIAN ACT* HISTORY*

1876 to 1985

The first consolidated *Indian Act* (the Act) enacted in 1876 reflected the government's preoccupation with land management, First Nations membership and local government, and its ultimate goal of total assimilation of Canada's Aboriginal population. Despite frequent modifications over the period from 1876 to 1951 in areas such as settlement of western reserves, leadership selection,[(1)] enfranchisement[(2)] and prohibition of traditional practices, its underlying principles related to civilizing, assimilating and protecting Indians remained unchanged.[(3)] The amendments in question generally increased government control over and reduced autonomy for Indian bands.

From 1946 through 1948, a Special Joint Committee of the Senate and House of Commons reviewing the Act heard of poor living conditions, government intrusion in band affairs, unmet treaty obligations and other concerns. Its ensuing report reflected few Indian priorities; the Committee proposed revising the Act "to remove many of its coercive measures without altering its assimilative purpose."[(4)] In the result, the amended 1951 Act did not differ a great deal from its predecessor, preserving its key elements while reducing the role of the Minister of Indian Affairs (the Minister) in band government somewhat and increasing autonomy in reserve management.

Participants in consultations on possible further revisions to the Act in the 1960s stressed the need to honour special rights, address historic grievances and allow greater Indian

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* This overview draws heavily on previously prepared documents by the author and by former Parliamentary Research Branch analyst Jill Wherrett.

(1) The evolution of the Act's system of elective government is summarized in a 1991 paper prepared by Wendy Moss (Cornet) and Elaine Gardner O'Toole entitled *Aboriginal People: History of Discriminatory Laws*, BP-175E, Parliamentary Research Branch, Library of Parliament, Ottawa.

(2) This process by which an Indian gave up Indian status and band membership was abolished by 1985 amendments.

(3) See J. Leslie and R. Macguire, *The Historical Development of the Indian Act*, 2nd ed. (Ottawa: Department of Indian Affairs and Northern Development, 1979); W. Daugherty and J. Madill, *Indian Government Under Indian Act Legislation 1868-1951* (Ottawa: Department of Indian Affairs and Northern Development, 1980); J. Taylor, *Canadian Indian Policy During the Inter-War Years, 1918-1939* (Ottawa: Department of Indian Affairs and Northern Development, 1984).

(4) J. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991), p. 221.

involvement in policy-making.[5] Instead, the government issued its 1969 White Paper on Indian Policy, which was withdrawn in 1971 in light of First Nations groups' rejection of the policy's proposed repeal of the Act and termination of distinct "Indian" legal status.

Aboriginal and treaty rights were recognized and affirmed in section 35 of the *Constitution Act, 1982*. In 1983, a Special Committee of the House of Commons conducted a landmark study of Indian self-government. Indians appearing before the Penner Committee criticized the Act, *inter alia*, because it lacked measures enabling them to manage their own communities, while the then Minister listed government authority over band powers and assets; limitations on reserve land use; and the ambiguous legal status of bands among the Act's constraints. The Committee concluded that the Act's policy basis was "antiquated," proposed that a framework for self-government be legislated and recommended against amending the Act as an approach to self-government.[6]

1985 to 1997[7]

Enacted in 1985, Bill C-31 aimed to eliminate discrimination based on gender and marital status in the Act's registration provisions,[8] reinstate or recognize those who had been excluded from status under those provisions, and empower bands, for the first time, to assume control over their membership.[9] Bill C-31 also increased bands' by-law authority over, for example, residence on and development of reserve lands. Ensuing rapid growth in the status Indian population, with increased demands upon community and government resources, and varying capacities to transmit status to offspring owing to different categories of registrant are

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(5) S. Weaver, *Making Canadian Indian Policy: The Hidden Agenda, 1968 – 1970* (Toronto: University of Toronto Press, 1981), p. 5.

(6) House of Commons, Special Committee on Indian Self-Government, *Indian Self-Government in Canada: Report of the Special Committee*, Minister of Supply and Services, Ottawa, 1983.

(7) Developments of recent years related to the Act and not discussed in this paper are surveyed in a June 2001 Parliamentary Research Branch paper prepared by the author entitled *The Indian Act*, TIPS-17E, revised in June 2001, on-line at http://lpintrabp/apps/tips/tips-cont.asp?Language=E&Heading=14&TIP=47.

(8) The intention was to bring the Act in line with the equality rights guarantees in section 15 of the *Canadian Charter of Rights and Freedoms*, which came into effect in April 1985.

(9) Previously, the sole requirement for band membership was Indian status. Within certain prescribed limits, Bill C-31 authorized bands to define their own membership criteria.

among Bill C-31's ongoing controversial effects. Those associated with the bill's membership provisions also persist.(10)

A multi-phased review of the Act from 1986 to 1990 that featured some consultation with Indian organizations focused on a number of areas for reform, with a view to proposing optional legislative changes that would enable individual bands to decide when they were ready to take on increased responsibility.(11) As the broader review continued, the 1988 "Kamloops Amendment" (Bill C-115) clarified the status of conditionally surrendered or "designated" reserve lands and granted band councils taxation authority. In 1993, DIAND-supported working groups of chiefs narrowed the range of priorities for legislative action that bands might opt into to three areas: lands, forestry and moneys. The 1999 *First Nations Land Management Act* is the only one of these initiatives to have resulted in final legislation to date.(12)

In April 1995, the then Minister embarked on a process to amend the Act, assuring leaders that only changes with First Nations support would proceed.(13) Strong negative reactions to September 1996 proposals from segments of First Nations leadership resulted in some pre-introduction revision to Bill C-79, the Indian Act Optional Modification Act, which was tabled in the House of Commons in December 1996. As its title implies, the bill would have allowed bands to opt into – but not out of – its package of changes to the Act. These related to, *inter alia*, reserve lands, bands' legal capacity, band council elections and law-making authority and rules of succession. In the constitutional context in which its changes were being proposed, Bill C-79 also contained a non-derogation clause under which neither the Act nor the amendments were to be construed as abrogating or derogating from existing Aboriginal and treaty rights, including the inherent right of self-government.

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(10) A constitutional challenge to Bill C-31's membership scheme has been in effect since 1986: *L'Hirondelle* v. *Canada*, Federal Court of Canada File Nos. T-66-86 A and B, or *Sawridge Band* v. *Canada* (commonly known as the Twinn case).

(11) See DIAND, *Lands Revenues and Trusts Review: Phase I Report* (Ottawa: Ministry of Supply and Services, 1988) and *Phase II Report*, 1990.

(12) S.C. 1999, c. 24. The legislation and background to it are discussed in an October 1998 document prepared by Jill Wherrett, then of the Parliamentary Research Branch, and entitled *Bill C-49: An Act providing for the ratification and the bringing into effect of the Framework Agreement on First Nation Land Management*, LS-324E, Parliamentary Research Branch, Library of Parliament, Ottawa. Under this legislation, land-related provisions of the Act cease to apply to signatory First Nations communities that adopt prescribed land codes. As of July 2002, 5 of 14 participating communities had done so.

(13) Possible amendments circulated to First Nations leaders in September 1995 related to reserve lands, natural resources, estates, Indian moneys, elections, by-laws and education.

Following first-reading debate, the House of Commons Standing Committee on Aboriginal Affairs and Northern Development held hearings on Bill C-79 from February through April 1997. In the main, First Nations representations rejected the bill on process and substantive grounds. Common general concerns related to the pre-legislation consultation process; differing First Nations priorities; retention of ministerial powers; potential effects of opting in; effects on First Nations' inherent right of self-government and constitutionally protected Aboriginal and treaty rights; and the Crown's fiduciary obligations toward First Nations. Concerns with specific aspects of the bill included its low opt-in threshold and definition of bands' legal capacity.(14) Bill C-79 died on the *Order Paper* in spring 1997.

The November 1996 RCAP Report recommended enactment of an Aboriginal Nations Recognition and Government Act, which

> [s]hould amend the [Act] to clarify that [its provisions] would apply to a recognized Aboriginal nation exercising powers under section 35 of the *Constitution Act, 1982*, but only to the extent the nation wishes.
>
> We make no particular recommendation regarding the amendment or repeal of the [Act]. The future of this act, and particularly the issue of lands, resources and the fiduciary obligation that attaches to reserve lands under the [Act], are matters that should be subject to negotiations. As a practical matter, withdrawal from the [Act] regime should be phased to provide an appropriate transition period for bands that become part of recognized Aboriginal nations [under a proposed Aboriginal Nations Recognition and Government Act].(15)

(14) Bill C-79 and related Committee proceedings are reviewed in an April 1997 paper prepared by the author and entitled *Bill C-79: An Act to permit certain modifications in the application of the Indian Act to bands that desire them*, LS-280E, Parliamentary Research Branch, Library of Parliament, Ottawa.

(15) Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples*, Volume 2, *Restructuring the Relationship*, Part One (Ottawa: Ministry of Supply and Services, 1996), p. 319.