

Two new initiatives for reforming aboriginal governance in Canada

BY PAUL BARNESLEY

There's a battle going on in Canada. Only rarely does it make front-page news. It's not widely understood by the general public. But it's an all-out, high-stakes political fight that could change the face of the country forever.

Robert Nault, Canada's Indian and Northern Affairs (INAC) minister, has announced that his department will seek to ready a *First Nations Governance Act* for passage into law by the autumn of 2002. A consultation process, to be unprecedented in scope, was announced by the minister on April 30th.

The consultations began on May 23rd at the Montreal Lake First Nation in Saskatchewan and are expected to continue across the country until October.

The consultations are directed at grassroots people, not the Native leaders. Nault has stated that the leaders are protective of their status and do not welcome any proposed changes that could erode their present power.

Native Leaders opposed

The chiefs formally rejected the Nault initiative on May 10, 2001. That decision came after three days of debate during the spring *Confederacy of Nations*, a meeting of chiefs from across the country.

Assembly of First Nations (AFN) Grand Chief Matthew Coon Come urged all First Nations people to boycott the consultation process. In response, Nault said he will go ahead with the consultation process and then frame the legislation, with or without the support of the chiefs.

The minister says the *Governance Act* is a necessary interim measure that's designed to plug holes in the *Indian Act*, the federal law that's been in place since 1876 and governs almost every aspect of

the lives of those Native people to whom it applies.

Everyone, including First Nation leaders, agrees that the *Indian Act* is inadequate. The powers of the "band council" are limited, incomplete, poorly supported by regulations and were not intended to be long term. The powers reserved for the minister and the federal cabinet are reminiscent of colonial times.

The *Indian Act* is under attack from every direction in more than 200 court cases. Nault believes it's better to come up with a clear plan to fix the Act, rather than waiting for the courts to re-create the relationship between the government and First Nations in a haphazard, isolated, case-by-case basis.

Disguised colonialism or democracy?

The national chief admits that his people need to have better governance structures, but allowing the federal government to decide how they will be created is just repeating the original mistakes of colonialism.

"After all, it is the national organization that has worked over the years and knows what changes need to be made. What we're trying to do now is itemize some of that. So I feel that any effort by the minister will lead down a path of being rejected as not acceptable by the First Nations. But I do believe that First Nations want certain changes also," Coon Come said.

It appears that expensive, time consuming joint initiatives keep hitting the jurisdiction wall. The federal government won't give up the top rung on the ladder and First Nations insist on a nation-to-nation arrangement. The minister—completely unwilling or unable to give ground on

either point—appears to have grown impatient with the deadlock. He is bypassing the leaders and going to the First Nations people in the hope of moving the *Governance Act* forward.

Coon Come believes the minister should be dealing with him and should face the fact that the government is going to have to give a little to break the logjam. For the moment, the minister is only dealing with those First Nations that agree to buck Coon Come's call for a boycott of the consultations.

Nault was asked if the people can stop his process. "It's possible, if they make a legitimate argument," he said. "So far, I haven't heard any. But if people are going to fight about whether we should consult or not, I think that's pretty risky. That tells me that we've got some real serious problems out there. So far, what I've heard from the national chief and his vice-chiefs is: Give me more money. Show me more process. All these excuses."

New fiscal institutions: the way forward?

One former chief has a few ideas that he thinks could fix a lot of the limitations of the *Indian Act*. Clarence "Manny" Jules, a long time chief of the Kamloops Indian Band in British Columbia, has pushed several controversial initiatives forward to the point where they are ready to go to Parliament.

He explained each of the four institutions that he would like to see created by the proposed Financial Institutions Act.

First, a statistical agency that compiles and analyzes economic information about First Nations is, he said, "absolutely critical to fiscal development."

Second, he would want the Act to create a national First Nations *tax commission* that could deal with First Nation taxation powers.

That issue scares many chiefs because their people have tax exempt status by virtue of Section 87 of the *Indian Act*. As a chief, Jules succeeded in taxing non-Native entities that operated on his traditional territory and he believes other First Nations can do the same.

"The Supreme Court of Canada recognizes that we have this (power), not only deriving from federal legislation, but inherently this is one of our powers."

The third institution, a First Nation *finance authority* will make it easier for First Nations to get access to capital, he said.


"Canada is one of the few countries, when it comes to dealing with First Nations, where all of the infrastructure

has to be dealt with in one fiscal year. We don't have the ability, as every other level of government does, to begin to develop bonds and debentures and get into the free market system," he said.

"We have to be able to pool our resources. Not only those that are involved in real property tax but those that have treaty land entitlements, treaty settlements and the like. And also, the billion dollars that the federal government spends on infrastructure—we should be able to lever that, turn it into a lot more resources for our communities and thereby build in the kinds of infrastructure that our communities sorely need."

The fourth institution would be a First Nations *financial management board*, a national institution that would set standards of financial management and assist and advise local institutions.

The federal government drafted the financial institutions legislation, working in tandem with the AFN. But neither the government nor the AFN has formally approved it. The minister has made the *Governance Act* the priority. But if the chiefs endorse either initiative, it will be the *Financial Institutions Act*.

It's still very early in the game and even experienced observers are not sure how this will end. Former Minister Ron Irwin tried to amend the *Indian Act* in 1996 and he was stopped—just barely—by the chiefs. Nault and his staff have undoubtedly learned from that experience—as have the chiefs. 

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History: First Nations and Canada

The first colonial law dealing with the subject of First Nations—*The Royal Proclamation of 1763*—recognized the indigenous peoples held title to their land. Treaties between the newcomers and the peoples already occupying the land were negotiated on a nation-to-nation basis.

Frequently, especially in the early days, the treaties were peace and friendship agreements proposed by the Crown because the settlers were small in number and living in a hostile environment, vulnerable to attack and utter destruction. Native leaders like to say that when their people had the upper hand, they behaved with honor and respected the newcomers. Now that it's the other way around, where Canada has the military might and financial clout to impose its will, the Native leaders say they expect the same honorable treatment in return.

When King George III issued the *Royal Proclamation* he recognized the existing sovereignty of the indigenous peoples in the "new world." Whether he knew it or not, that set the stage for centuries of struggle between theory and practice. The king decreed that settlers could not arbitrarily dispossess

the indigenous peoples of their land. Only representatives of the Crown, not individuals, could accept land surrenders from Native leaders in a formal process that the monarch ordered must be open, honorable and free from duress.

But North America was a long way from King George's court. Fraudulent land deals and dispossession by force may have violated the colonial law of the *Royal Proclamation*, but they happened all the same. Even in cases where surrenders followed the rules set down in the proclamation, the promises made were frequently broken.

To this day, land claims worth hundreds of millions of dollars—perhaps even billions—are being examined, negotiated or fought in the courts because of the illegal or negligent acts of pioneers.

The special status of Native people in Canadian law and public policy has been in place since before Canadian Confederation. The tax-exempt status recognized by Section 87 of the *Indian Act* is left over from the nation-to-nation relationship that existed in the

beginning. At that time, it was unthinkable that citizens of indigenous nations should be subject to the taxation of a foreign monarch.

As the settlers increased in number and pushed their way deeper and deeper into territories controlled by indigenous nations, making deals and promises along the way to acquire land, the nation-to-nation concept became a nuisance and was discarded, despite the protests of Native leaders. Later, when Native people sought to fight this point in the colonizers' courts, Canada enacted a law that made it illegal for a Native person to hire a lawyer.

When the remaining British North American colonies came together in Charlottetown in 1867 to create Canada, the discussion was already settled about who would control what. Native people were not invited to participate in those talks. In the British North America Act that emerged from those discussions, Section 91 (24) gave the responsibility "for Indians and lands reserved for Indians" to the federal government and not the provinces, another consequence of the nation-to-nation approach.