

# the corbiere ruling

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# A Loaded Verdict

## COMMENTARY I

- The court's **Corbiere** ruling was based on the "**Indian Act**" prescription for electoral rules and has serious implications for those who want to protect their Aboriginal and Treaty rights.
- The issue of inherent power of government was not addressed by the court within the meaning of Aboriginal and Treaty Rights in Section 35 of the "Constitution Act, 1982". A fact noted by the Judges.
- This means that electoral rules will be designed to entrench Aboriginal communities as local administrative entities disconnected from the "Indian Act", and geared to operate in accordance with the Federal Government's self-government policy of 1995.
- As announced by the Minister of the day, the goal of the 1995 self-government provisions is to municipalize aboriginal communities along the lines of those subject to provincial jurisdiction. The further implication therefore is that electoral rules will be modeled after those imposed by provincial law.
- As it stands, one has to conclude that the Corbiere ruling, based exclusively on the "Indian Act", fits into a federal agenda to get rid of Crown trust obligations by means of an L.T.S. initiative which started in 1986, the 1995 self-government provisions, the Land Management Act, Modern Treaty Making, new taxation measures, and other extinguishment processes as originally dictated by the "White Paper" of 1969.

### Implications of the Supreme Court's Decision in the Corbiere Case

#### **Introduction:**

The Supreme Court of Canada published its decision in the case of Corbiere et al versus the Queen and the Batchewana band on May 20, 1999. The Judges declared that the words "and is ordinarily resident on the reserve" in subsection 77(1) of the **Indian Act** are discriminatory and have to be changed or struck out.

There were five interveners who presented their views to the Court including the Congress of

Aboriginal Peoples and the Native Women's Association. The Assembly of First Nations was not one of the interveners, and, at the time, appeared to show no interest in the outcome.

Prior to an appeal to the Supreme Court, a Federal Court Judge had dealt with the case as one that had relevance exclusively to the Batchewana band. His verdict in favour of the plaintiffs therefore had no implications beyond the particular situation affecting a single community.

Once the Supreme court got into the act however, the Judges saw fit to extend, elaborate and apply the Federal Court's guidelines throughout the country. Such a far-reaching verdict necessarily deserves closer examination than it has received so far.

In the course of preparing this analysis, enquiries to the Department of Indian Affairs revealed that officials had begun to develop a federal response to the court's ruling virtually from the moment it was issued: Confirmation was received that INAC intended to change electoral rules to conform to the 1995 "self-government" initiative. In other words, the electoral practices of Aboriginal communities would be brought into line with those that provinces prescribe for their municipalities.

Given the time constraints on the federal government, it is likely that by now, the Cabinet has already approved a course of action that is to be imposed on Aboriginal communities.

It seems evident therefore that under the pressure of a court's deadline, the government has abandoned any pretense of a "partnership" with the AFN nor can Aboriginal leaders expect that they will have much influence in shaping what has been decided in the privacy of federal board rooms. What is certain is that when an electoral regime finally comes out of the federal pipeline, it will be part and parcel of the various initiatives now in play to further an extinguishment goal.

### **Background**

The case before the Court concerned the right of off-reserve band members to participate in the affairs of their community. This issue was brought by a Batchewana band member before the Federal Trial Court on April 24, 1997. A decision that favoured the plaintiff resulted in an appeal by the federal government. The matter then went to the Federal Appeal Court which upheld the original decision. Federal lawyers next sought a final ruling from the Supreme Court of Canada which upheld and expanded the scope of the original judgement.

### **How the Case was Argued:**

The issue put to the Court was whether off-reserve band members of the Batchewana reserve had voting rights in the community. It was pointed out to the Judge that 78% of the Batchewana membership lived away from the reserve. These included band members who had their status restored after 1985 as a result of Bill C-31, and who were unable to exercise their right to return to their reserve. An absence of housing, employment opportunities and other factors were cited as obstacles that affected the legitimate rights of off-reserve band members to either live within or

participate in the affairs of their community.

Because the case was argued exclusively as an “Indian Act” issue, the Judge was confined to a determination whether Section 77(1) of this statute discriminated between on and off-reserve members of the Batchewana community.

### **Judgement of the Federal Court**

In the Trial Division, the Judge concluded that taken in isolation, Section 77(1) of the “Indian Act” was not discriminatory. This provision set an age level for voting eligibility and confines voting rights to band members “ordinarily resident” on the reserve.

The Judge noted however that in the context of the “Indian Act” as a whole, a “band” was defined as a “body of Indians” whose lands and monies are held in trust by the Crown. The statute did not make such a property interest subject to place of residence. He concluded therefore that Section 77(1) was discriminatory and that voting rights in the specific sectors of lands and monies, as defined by the “Indian Act” should be extended to off-reserve band members.

To reinforce his decision, the Judge observed that the “Indian Act” prescribes forms of local administration similar to provincial municipalities. He cited examples where provincial law allowed non-residents to vote in instances where they held property and paid taxes in a community. The implication seemed to be that such practice was not foreign to established Canadian institutions of local government.

Given these facts, the Judge invoked Section 15(1) of the Charter of Rights and Freedoms which protects individuals from discriminating practice.

The relevance of Section 35 of the Constitution Act, 1982 was not considered because the case was not argued as a governance issue related to constitutionally protected Aboriginal and Treaty rights. Section 25 of the Charter, which protects Aboriginal and Treaty rights from other Charter provisions such as Section 15(1) therefore was not applied.

The Judge also specified that his judgement was limited exclusively to Batchewana band members. He stated that he had to limit his judgement in this way because no evidence had been offered to justify a broader application.

Subsequent review by the Federal Appeal Court upheld the regional judgment. At this point, federal lawyers launched a final appeal to the Supreme Court of Canada. In doing so, they chose to pursue their argument in strictly “Indian Act” terms.

### **Judgement of the Supreme Court of Canada**

The Supreme Court of Canada rendered its judgement on May 20, 1999. This court confirmed the ruling of the Federal Court, with a number of changes.

Based on the evidence before it, the Court saw fit to apply the Federal Court's ruling to all "Indian Act" bands. The Judges also set out a number of guidelines about how the voting rights of off-reserve band members could be implemented. They stated that the federal government should resolve the issue within an 18 month time frame and suggested that "extensive consultations" be undertaken with Aboriginal interests.

In explaining its decision, the Court made a number of observations. The Judges noted that off-reserve band members generally experienced disadvantage and prejudice. They observed that frequently, band members were compelled to live off-reserve not by choice but as a result of conditions in the communities. In the Court's opinion, therefore, the legitimate interest of off-reserve band members should not be denied in band governance.

More specifically, the Judges stated that, given the terms of the "Indian Act", off-reserve band members were legitimate co-owners and stake-holders in their community's assets. Exclusion from decisions about the disposition of the assets was prejudicial to their interests.

In proposing that the federal government employ "extensive consultations" as a means of ensuring that the Court's judgement was tailored to regional and community differences, the Judges avoided laying out any detailed solutions. Nevertheless, the Judges did suggest some general guidelines about how their ruling could be implemented.

Thus, the Judges conceded that in removing the discriminatory effect of the "Indian Act", it might still be necessary to preserve "certain distinctions" between on and off-reserve band members. They cited as an example the fact that certain "local matters" of interest to off-reserve members would include the disposition of land and "Indian monies" as defined in the "Indian Act".

By way of suggestion, the Court extended the possible interests of off-reserve members to include the operation of band schools, housing programs, recreational services etc. The Judges thought that such involvement in community affairs could apply especially to band members who live within commuting distance. They indicated that the rules in the more general sectors could be different for band members who live at some distance from their communities.

## **Implications**

There are two important implications that arise from the Court's decision. First of all, the Judges were confined to dealing with the residency and electoral issue entirely within the framework of the "Indian Act" and its prescription for local government. Inconsistencies among the various clauses of this statute tended to contradict each other. Moreover, a legislated municipal-type of local government did not raise issues concerning Aboriginal and Treaty rights. This enabled the Judges to invoke the equality provision of the Charter of Rights and Freedoms and rule that the residency and electoral provisions of the "Indian Act" discriminate against off-reserve band members.

What the Court's judgement does is provide the federal government with a mandate to dismantle most if not all the governance provisions that are now in the "Indian Act". The effect is to reinforce a longstanding federal goal to get rid of this statute entirely - a process that is now being accomplished piecemeal by such specific legislation as Bill C 49, Bill C 36, comprehensive claims agreements etc.

Moreover, because Aboriginal governance has never been defined within the meaning of Section 35 of the Constitution Act, 1982, the only version at play is the one prescribed by the federal government. A Court precipitated end to some or all of the governance clauses in the "Indian Act" therefore leaves Aboriginal communities no other avenue except to opt into the self-government arrangements approved by the Federal Cabinet in May, 1995. A review of the self-government submission to Cabinet, which will be summarized later in this paper, shows it to be an extinguishment initiative.

What may have been an appropriate ruling on behalf of the Batchewana band members got out of hand when the Supreme Court extended it to other bands. One is left with the suspicion that federal lawyers deliberately stayed away from raising Section 35 constitutional arguments. By doing so, the federal government, whether by calculation or inadvertently, got the kind of judgement that reinforces their extinguishment goal.

Another evident implication is that it may be more important now than ever to ask the Supreme Court of Canada to define governance within the meaning of Section 35 of the Constitution Act, 1982. It is significant that the Judges noted at the time of their verdict that, had a constitutional argument been made, their ruling would have been different.

There are indications that the Judges are ready to hear a constitutional argument on governance as an entrenched Aboriginal and Treaty right. This perhaps was the implication of their comment in the recent Delgamuukw decision on Aboriginal title. The Judges at the time observed that they did not go on to render a ruling on governance only because they were not asked to do so.

One can speculate that had the residency and electoral rights case been posed as a governance issue within Section 35, the Judges decision might have paralleled the Supreme Court's earlier judgement in Delgamuukw. In this instance, the Judges declared that unextinguished Aboriginal title on traditional land is a collective property right. The Court went on to balance Aboriginal title with federal and provincial interests in a way that requires some form of accommodation among the parties.

In the Delgamuukw Decision, the Judges acknowledged that Aboriginal title was never extinguished with "plain and clear intent". A strong argument is waiting to be made that neither governance nor Aboriginal title was ever lawfully extinguished by historic treaties, and may still exist in some form

as a constitutionally entrenched Section 35 right.

It is significant that in finding the residency and electoral provisions of the “Indian Act” discriminatory, the Judges regarded this statute as intended for a class of persons rather than a collectivity that defines a nation. The Judges therefore did not see fit to apply Section 25 of the Charter of Rights and Freedoms in reaching their decision.

Section 25 of the Charter is a non-derogation and non-abrogation clause intended to protect unextinguished collective Treaty and Aboriginal rights from any other conflicting clauses. This clause might have been applied had the case been argued within the meaning of Section 35 of the Constitution Act, 1982. As it was, treating band members as a class of individuals defined by statute appears to have negated the intent of Section 25 and brought Charter clauses into play that are intended to protect individual rights exclusively. A right to an identity as citizens of an Aboriginal Nation got lost in the shuffle.

A Department of Indian Affairs circular which went out on July 16, 1999 outlines in general terms how the government proposes to advance the Court’s judgement. This circular is as loaded with implications as the Court’s verdict and deserves detailed commentary. The balance of this analysis deals with the Supreme Court’s ruling and its implications in the larger context of federal policy.

## Targeted Bands

### COMMENTARY II

- Bands operating under the “Indian Act” will be affected.
- Bands who operate under INAC’s custom government provisions as introduced effective December 2<sup>nd</sup>, 1996 will be affected if electoral practices do not conform to court’s guidelines.
- Bands whose Governance is recognized by a Governor-in-Council proclamation as provided by Section 4(2) of the “Indian Act” may or may not be affected depending on their voting practices. [There are 17 Section 4(2) bands]. This Section is no longer an option for bands according to INAC

(Former bands who have ratified various kinds of extinguishment agreements have exited the “Indian Act”. Their system of governance and their individual rights and obligations conform to provincial municipal-type models)

At present, there are three categories of Aboriginal communities to which the “Indian Act” applies in whole or in part.

Those which the Court addressed specifically (288 bands) operate in accordance with the provisions of the “Indian Act”. In this category, the Judges found the electoral provisions to be discriminatory within the meaning of Section 15(1) of the Charter of Rights and Freedoms and set out guidelines for changes.

A number of bands fall within a second category defined by a federal directive entitled “New Policies - Custom Elections”. This directive was instituted on December 2, 1996.

Bands who have opted into the federal government’s custom provisions will be vulnerable to changes if their electoral practices do not conform to the Court’s judgement. The policy stipulates that custom arrangements have to conform to the non-discriminatory and equality provisions of the Charter of Rights and Freedoms. Moreover, because neither the courts nor the federal government acknowledge that community-based election practices are based on collective Aboriginal and Treaty rights, within the meaning of Section 35 of the Constitution Act, 1982, departmental officials indicate that custom governments are not immune from the Court’s ruling.

The Court's judgement does not mention custom arrangements, which suggests that the federal government is not strictly bound to implement electoral changes for this group of bands. One has to keep in mind however that the custom policy as it stands allows the Minister to review, approve and revoke custom arrangements. This means that he has the power to cancel any offending electoral practices to bring them into line with the decision of the Court. On the other hand, the Minister can simply wait for an off-reserve band member who is excluded from voting under an existing custom electoral code to sue for relief. There is little doubt that a Judge in such a case would apply the precedent set by the Supreme Court.

There is a third category of bands who at present operate under a Governor-in-Council proclamation as provided by Section 4(2) of the "Indian Act". As of this year, their number has been reduced from 18 to 17.

A Parliamentary Committee that deals with statutes and regulations has declared that it is unlawful to apply Section 4(2) in isolation from other provisions of the "Indian Act". This Committee has been pressuring the Department of Indian Affairs to cancel the existing arrangements and to stop applying Section 4(2) in the future. As a result, Section 4(2) has ceased to be an option since 1985.

Most of Section 4(2) bands are to be found in B.C., and all of them allow their members to vote regardless of whether they live on or off the reserve. The feature that sets these bands apart from others is they have opted out of all provisions of the "Indian Act" except those sections that have to do with band membership and procedures for land surrenders.

This small minority of proclamation bands will have the distinction of being the only communities unaffected by the Court's judgement. Their electoral rules appear to meet the essential requirements of the Supreme Court, so long as they do not revert to either custom arrangements or the electoral provisions of the "Indian Act".

Some passing notice deserves mention to a fourth category of bands who also are immune from the Court's judgement. These are Aboriginal groups whose "uncertain Aboriginal and Treaty rights" have been given "certainty" by various extinguishment agreements.

What federal policy documents describe as endowing Aboriginal and Treaty rights with "certainty" defines the term "extinguishment" or "termination" as used in the USA. For example:

In accordance with agreements ratified by federal legislation and frequently constitutionalized, Aboriginal groups are redefined as ethnic minorities with essentially the same rights and obligations as other provincial citizens. Extinguished Aboriginal groups are phased into the same tax regime as other Canadians. They are allotted parcels of privatized "fee-simple" lands that become disposable assets and they surrender all claims that may be outstanding on traditional lands. Their local forms of governments are modeled after municipal forms established by provincial law and as such, are in transition to full provincial jurisdiction.

The electoral codes of extinguished communities are imbedded in agreements that have legal force. Such Aboriginal groups cease to be of any major concern to the federal government because neither the “Indian Act” nor custom arrangements remain important considerations. All that remains for the government to do so is fulfill its outstanding obligations under an agreement before it removes itself entirely from the affairs of such Aboriginal groups.

In short, extinguished Aboriginal and Treaty rights defines peoples who have exchanged their historic collective identity and title as nations for the same individual rights as set out for non-native Canadians in the “Charter of Right and Freedoms”. Such an exchange is furthered or achieved through a number of avenues including comprehensive claims settlements (so-called modern treaties), self-government agreements, specific statutes that redefine land management and taxation regimes, treaty renewal initiatives, capped block funding arrangements intended to phase out over time special federal services etc.

In a sense, extinguishment is non-discriminatory by Ottawa’s definition because it removes all special distinctions, historical and legal, between Indigenous peoples and Canadians at large. Ironically, what is not extinguished is societal discrimination that denies Aboriginal people jobs and a decent standard of living.

## The Federal Cabinet Owns Policy-Making COMMENTARY III

- Implementation of the Corbiere Guidelines was supposed to be done following “Extensive Consultations”. The mechanism to do this work was supposed to be a so-called “AFN/INAC Joint Initiative for Policy Development (Lands and Trust Services)”. This process was announced by the Minister in a circular to Chiefs dated July 16<sup>th</sup>, 1999.
- Almost a year later, and on the eve of the court’s 18 month deadline, the AFN seems to be stuck at the starting gate. There is good reason for this. All important policy development and strategic interventions in aboriginal society are developed first in federal boardrooms and blessed by Cabinet Ministers. No belated hue and cry from the AFN or its members will change a Cabinet prerogative to reserve policy making exclusively to itself.
- One has to question why the former AFN regime has waited virtually to the final countdown to ask the government to seek an extension from the court to the eighteenth month time frame. It is doubtful that the government will agree to make such a proposal to the court and may only concede some last minute “consultations” on a made-in-cabinet design for electoral changes.

On July 16, 1999, two months following the Corbiere Decision, Jane Stewart, a former INAC Minister, circulated a memo to all Chiefs. She detailed how the new electoral rules would be developed jointly with the AFN

The Minister reported that the exercise would be managed by an AFN/INAC Joint Policy Development process (Lands and Trusts Services) and would involve “extensive consultations” with aboriginal peoples.

A year later, there is little evidence that either much “joint” activity has taken place or consultations - at least of the visible kind. The fact that two-thirds of the time-frame for implementing electoral rule changes has been used up without any significant input from aboriginal leaders suggests two possibilities.

Within the exclusive precincts of federal boardrooms, officials have been busy putting together a submission to Cabinet on electoral changes without much reference to any “Joint” exercise with the AFN or to “extensive consultations”. This is not surprising because, as federal officials revealed, such changes are already predetermined by the 1995 self-government policy and various other

avenues to extinguishment.

It's possible therefore that given an eighteen month time-frame for implementing the court's ruling, the AFN has been left behind at the starting line. Cabinet Minister's have apparently already reviewed a strategy for fast-tracking extinguishment measures such as their self-government provisions as vehicles for electoral changes and fulfilling a goal to dismantle the "Indian Act".

One has to conclude that what the government describes as an "AFN/INAC Joint Policy Development (L.T.S.)" process amounts to nothing more than bilateral exchanges that have no influence whatsoever on the substance or direction of federal policy. In its legal sense, "Joint" operations has a specific meaning. It conveys the idea of a shared purpose to be carried out by the AFN and the government. More fundamentally, "Joint" means an equal right to a voice and direction of Indian Affairs policy. It suggests shared control by both parties in making policy, including the way the court's guidelines on electoral changes are to be applied. In applying the term "Joint" to describe a policy-making exercise with the AFN, the Federal Government is clearly misleading Aboriginal Peoples.

The truth is that no government responsible to parliament and mindful of its electorate abdicates its prerogative right to supremacy in shaping policy in any way it meets its own objectives.

In the Indian Affairs sector, as in all other areas of federal responsibility, policy-making is geared to the attainment of some predetermined goal and lies within the exclusive domain of Cabinet Ministers. If the predetermined goal for Aboriginal peoples is extinguishment, Cabinet Ministers will only approve specific policy submissions that further or attain such a goal. A non-governmental organization therefore can propose or advise but, in the end, has no influence whatsoever over what a Cabinet wants to do.

As a general rule, federal policies begin to be developed during a relatively public phase which is followed by a highly secret process that leads to a final result.

During the initial phase, a Minister who will be sponsoring a submission to the Cabinet, may assemble views from officials within his or her department, bring other interested departments into the picture, and most of all, pay special attention to lawyers in the Justice Department. The Minister also frequently canvasses the views of provincial governments.

Even during the preliminary stage of policy development, the AFN is unlikely to be privy to the advice offered to the Minister from other quarters. For example, given the time constraints imposed by the Court on the government within which electoral changes have to be implemented, the Justice Department no doubt has already laid out a set of preferred options for the Minister. Such legal advice often is protected by solicitor/client privilege and may not necessarily be shared with the AFN.

During the secret phase, a submission to Cabinet is prepared which is only for the eyes of federal Ministers and their senior officials. No outside party such as the AFN will see its contents unless there is a leak. In the past, Cabinet papers which have ended up in unauthorized hands have precipitated RCMP investigation. Criminal charges can be brought against any offender who is identified.

At the Cabinet decision-making stage therefore, the AFN can only assume that its preferred options have not been superseded by a totally different course of action developed by Privy Council officials, the federal Justice Department or some other interested parties. The buck stops at the final level of Cabinet decision-making. Cabinet Ministers examine the options before them on some issues like changes to electoral rules against the larger backdrop of an established Indian Affairs goal. This is to ensure that all separate initiatives are adjusted to the same compass bearing. Given that the extinguishment of Aboriginal and Treaty rights and collective title is a proved policy goal, changes to electoral rules will be made accordingly.

Any debates or differences that arise on a given issue at Cabinet Committee sessions or in a full meeting of Cabinet can never be revealed in public. Any Minister who violates the principle of Cabinet solidarity by voicing objections about a decision in public is in effect, prepared to resign. An Indian Affairs Minister can be over-ruled by his Cabinet colleagues and be required to implement a collective decision regardless of his own views.

When it comes to setting a policy direction for Aboriginal peoples, any views of the AFN that may have penetrated the walls of a Cabinet boardroom take a back seat to an established government agenda reinforced by non-native biases.

In this larger scheme of conflicting interests and political power, the AFN does not figure very prominently. The kindest way to regard the so-called “AFN/INAC Joint Initiative for Policy Development” is that it is a pretense. It is intended to convey a false impression to Aboriginal peoples that their national organization has more influence in policy development than it actually has.

By falling into a role of appearing to be a co-producer of policy initiatives for Aboriginal peoples, the AFN has put itself far out on a limb. As destructive as federal policy is to the rights and powers that are inherent in historic treaties and their unique status as aboriginal peoples, the government can claim that its measures are “Indian driven”. Moreover, should an aboriginal backlash occur to electoral rules which are perceived to be part and parcel of a general drive to eliminate distinctions based on aboriginal and treaty rights, it will be the AFN and not the federal government which is likely to find itself in a direct line of fire.

# Is the Assembly of First Nations A Federal Store-Front for Cabinet-Produced Goods?

## COMMENTARY IV

- A package of federal initiatives intended to attain an extinguishment goal is being implemented, band by band and region by region, without reference to any “AFN/INAC Joint Policy Development Process”. It is reasonable to assume that neither the AFN nor its membership will be able to influence the substance of electoral changes in any way that does not support an extinguishment goal.
- The former AFN regime seemed inclined to openly or tacitly endorse measures crafted and approved by Cabinet Ministers. Such unilateral federal measures are often described as “optional” or a “process” and are never stated in terms that reveal final outcomes. The reason for this kind of obscurantism goes back to an instruction Cabinet Ministers received during an earlier Liberal regime in 1977. Ministers were told to avoid talking about extinguishment as an ultimate goal because this could unite aboriginal leadership and cause the kind of backlash that occurred against the 1969 “White Paper” policy.
- Aboriginal leaders who do not question measures that are described as “optional” or a “process” is like consenting to be a passenger in a vehicle driven by a federal authority without asking where it is going.

To appreciate the roles that the government and the AFN was expected to fulfill in designing electoral changes and managing their implementation, one has only to look at other recent examples.

In all instances, the government acted as producer and script writer, and the AFN a part player on a government managed stage. The following examples are just a few of the more notable.

### **“Gathering Strength” - Canada’s Aboriginal Action Plan**

This package of initiatives was announced by INAC’s Minister on January 7<sup>th</sup>, 1997. At the time, the Minister stated that she was responding to the recommendations of the “Royal Commission on Aboriginal Peoples”.

The truth is that the main elements contained in “Gathering Strength” were outlined in the “Liberal Red Book” in 1993. A more elaborate version went as a submission to Cabinet in a document entitled “Aboriginal Policy Review” in June 1994. In fact, the essential theme of the “Gathering Strength” policy can be traced back to the “White Paper” of 1969 and beyond to 1966 when an initiative named “Choosing a Path” was unveiled.

A more highly embroidered and disguised “Gathering Strength” policy is nothing more than the latest mutant of a series of earlier versions. The policy therefore has as much connection with the significant recommendations of the Royal Commission as the price of rice in China. All the federal strategists did was appropriate the label “Gathering Strength” and some program features from the Commission’s report and called it a “response”. All the recommendations that had to do with restoring Aboriginal autonomy and enhancing their land and resource base were swept under a carpet.

At the very least, Ottawa’s “Action Plan” deserved some critical examination to discern what lay hidden behind all its fine rhetoric. Yet, the National Chief chose to appear on the same stage as the Minister singing the praises of a set of well worn measures that have sought for decades to assimilate Indigenous peoples into Canada’s spiritually disfigured, market driven and profit centered economy. The sub-text in this kind of message to Indigenous nations is that their Aboriginal and Treaty rights are for sale and to hell with the seventh generation.

#### **Bill C-49: A First Nation Land Management Act**

A similar unilateral federal initiative which has haunted Aboriginal peoples since confederation is Bill C-49, “First Nations Land Management Act”. This statute became law this past summer and was announced in an AFN Bulletin dated June 11, 1999 wherein the National Chief “applauds” its passage.

The essential purpose of Bill C-49 is not much different from one announced in the House of Commons in 1869, by Hector Langevin, a Minister of Public Works. He declared 130 years ago that:

“The government intends to divide the whole reserve among the male Indians over 14 years of age, and when an Indian is enfranchised, he receives his deed and becomes a white-man in the eyes of the law.”

Mr. Langevin’s plan to privatize reserves as “fee-simple” holdings did not make much head-way in succeeding years. There were two reasons for this. Till 1951, the “Indian Act” specified that, much like an immigrant, an Indian could only be enfranchised and made a full-fledged citizen of Canada if deemed “fit” by a board of white men for assimilation. Whether “fit” or not, the fact was that most Aboriginal people preferred to think of themselves as citizens of their own nation and rejected enfranchisement and assimilation into what many regarded as an alien society.

Canada got around the problem in 1960 simply by declaring that all Indians henceforth were citizens of Canada and allowed to vote. Provinces did the same shortly after. What amounted to a legislated switch in identity was engineered in a wholesale way without the consent of Aboriginal peoples or any evident respect for their age-old histories as citizens of their own nations.

As newly minted citizens of Canada and the provinces, all aboriginal persons after 1960 could be managed as people “fit” for assimilation. All that remained to be done from Ottawa’s perspective was to dismantle the institutional and legal trappings that set Indians apart from Canada’s ethnic minorities. A drive to privatize reserves became one such initiative as a necessary prerequisite to entrenching Aboriginal communities as future municipalities.

Till 1968, federal strategists believed that an existing reserve regime could be dismantled by creating an exit in the “Indian Act” to full extinguishment. This plan met strong resistance from Aboriginal leaders at the time. Ottawa’s fall-back initiative then was to come up with a sweeping “White Paper” plan in 1969 that would remove all remaining distinctions that set Aboriginal peoples apart from other Canadians.

In his capacity as Minister of Indian Affairs in 1969, Jean Chretien announced the “White Paper” in these terms:

“The plan is to declare the Indians to be no longer special subjects of the federal government, with special education and health services for example, but full citizens of Canada and the provinces within which they live entitled to the regular provincial services enjoyed by other Canadians.”

The fact is that an alleged “partnership” with Aboriginal peoples was not invented as a promotional gimmick for “Gathering Strength - Canada’s Aboriginal Action Plan”. At the time, Jean Chretien was engaged in his selling job on the “White Paper”, his efforts were reported on May 3<sup>rd</sup>, 1969 in the “Ottawa Citizen” under the heading “New Partnership era for Indians”.

Jean Chretien’s “White Paper” also included a “Land Act” as one necessary feature in his extinguishment plan. This version of Bill C-49 proposed first to “change the system” by removing land management at arm’s length from the Minister. This was to be followed by establishing “fee-simple” regimes along the lines proposed by Hector Langevin in 1869.

Aboriginal leaders demonstrated that they were ready to resist at all costs Jean Chretien’s “final solution”. At this stage, the federal government simply adopted another strategy to do away with “Indians” as “special subjects of the federal government”. The “White Paper” was to be implemented in the future band by band, region by region and by employing different avenues to achieve the same final result. The assumption was that the process would be so gradual that hardly anyone would notice.

Since the early 1970's the federal government has been integrating former reserve lands into Canada's "fee-simple" market economy by means of comprehensive claims settlements and self-government agreements. A proposal for a "Chartered Lands Act" emerged as part of a so-called "Lands, Revenues and Trusts" version between 1988 and 1993. This statute was intended to bring the remaining bands into Ottawa's new land regime. The Conservative government at the time described this later lands initiative as "Indian-driven", which many Aboriginal people at the time took to be a joke.

One may well ask therefore what is it that the National Chief was applauding? Is it the apparent intention of Chiefs and Councils of 14 bands to opt into Bill C-49? Or is it the implication that Chiefs and Councils have seen the light and have opted for extinguishment?

The AFN might say in its defense that it is necessary to respect an "Indian-driven" decision to go for Bill C-49, even if the effect is extinguishment. This kind of argument overlooks Ottawa's post "White Paper" strategy to pursue its extinguishment measures "band by band" and "region by region" while declaring at the same time that its policy initiatives are "optional".

#### **Lands, Trusts and Services "Process" (L.T.S.)**

During the previous Conservative Government regime, this exercise was known as the "Lands, Revenues and Trusts" process. It was initiated as a result of criticism raised by the "Office of the Comptroller General" in October 1986. This O.C.G. declared that federal fiduciary trust obligations and accountability for tax monies were not being properly discharged.

The Conservative Government concluded that the O.C.G.'s report offered a good opportunity to finally rid itself of all trust responsibilities and potential liabilities simply by getting out of the Indian Affairs business altogether.

After the usual false starts, a three stage strategy was devised. This consisted in the first instance of soliciting consultant studies totaling \$26 million to tell the department how best to dismantle the "Indian Act" to achieve the desired result. Once these off-loading blueprints were completed, the Minister of the day identified seven Chiefs in different parts of the country to chair committees who would devise implementation plans in such sectors as "self-government", "land management", "monies", etc.

At the end of the top-down process, aboriginal communities were expected to ratify a set of agreements under the impression that as distinct peoples, some form of self-determination was being restored and that they were getting the "Indian Agent" off their backs. The fact that the agreements were linked so that ratifying a land management accord for example closed options for a future governance regime was poorly understood in aboriginal communities. In fact, the hidden goal of the L.R.T. process was to abandon aboriginal communities as municipal-type entities, paying income and property taxes, living on marketable fee-simple lands, and qualified at last to function as full-

fledged individual citizens of provinces without special distinctions, subject to provincial property and civil rights laws. Aboriginal and Treaty rights issues would become a dead letter and the “Indian Act” would be gone along with historic federal crown obligations.

A federal election in 1992 brought a temporary pause to the Conservative Government’s “lands, revenues and trusts” exercise. In any event, this initiative was meeting a lot of resistance from Chiefs generally, and the AFN at the time refused to have any part of it.

When the Liberals took power in 1992 it was not long before L.R.T. re-emerged under its new L.T.S. title. It was now given a veneer of credibility through the pretense of making it appear to be an “AFN/INAC” Joint Policy Development process.

Ron Irwin, the new Liberal and often cranky INAC Minister undertook to give L.T.S. off-loading added muscle in 1996 by preparing Bill C-79 for parliament. Had another election not interrupted the passage of this legislation, there would now be an enabling statute in place to give legal sanction to L.T.S. off-loading.

Because it was clear to the government that Chiefs would never accept the intent of L.T.S. and Bill C-79, an alternative strategy was adopted. Federal strategists decided that the same purpose Bill 79 was supposed to serve could be achieved by specific legislation on land management, modern treaties, taxation, etc. At the same time, the government could appear to be responsive to aboriginal concerns by announcing that Bill 79 was shelved.

A legal firm (Ackroyd, Plasta, Roth and Day) examined the implications and potential outcome of the L.R.T./L.T.S. exercise and came to the following conclusion, they said that the effect -

“will significantly alter the Minister’s fiduciary obligations, particularly for Indian land and monies. Moreover, they have the potential (and in fact, the high probability) of undermining the reserve land provisions of treaties and permanently altering the land ownership and management regimes on reserve. This, in our view, may drastically alter the nature of self-government on reserves, wealth and ownership of property, and result in expedited “municipalization” on Indian reserves, opening (or necessitating the way to direct Indian property tax assessment and commercial real estate on reserve land).”

Given the profound impact the L.T.S. initiative has on Aboriginal and Treaty rights, AFN leadership should have been asked to explain why they were carrying this banner for the federal government? Moreover, if changes to electoral rules are indeed to be an extension of the L.T.S. process, as stated by the Minister on July 16<sup>th</sup>, 1999, will this not be just another nail driven into an aboriginal and treaty coffin?

### **The 1995 “Self-Government” Policy**

This major self-government initiative emerged out of a Cabinet boardroom in Ottawa in 1995 without even a token attempt to involve either the AFN leadership of the day, or aboriginal groups. The previous AFN National Chief disowned the policy entirely and urged Chiefs to do likewise. The late AFN regime seemed to endorse it and had gone so far as to propose training for band personnel who will be expected to operate under the new self-government arrangements.

In a recent “Progress Report” on Ottawa’s “Gathering Strength” initiative, the Minister reported that a total of 80 bands were engaged in defining their governance arrangements in line with a federal policy on “self-government”. Federal officials have indicated that the new electoral codes will be incorporated into any self-government agreements that are signed.

As the architect of Ottawa’s current design for “self-government”, Ron Irwin made it known in public interviews what he had in mind. On January 30<sup>th</sup>, 1994, in a television interview, he declared that “it would be more on the line of municipal governments”. That same year, Finance Minister Paul Martin added his own provision to the intent of the federal plans for self-government. He was reported in the “Toronto Sun” on December 21<sup>st</sup>, 1994 as saying:

“Forcing natives to pay income tax is part of the process toward self-government”.....It’s obviously tied to self-government.”

On May 11<sup>th</sup>, 1995, Cabinet Ministers reviewed and approved a detailed blueprint for “self-government”. This document consisting of approximately two hundred long foolscap pages is today’s machine for recycling aboriginal communities as the full-fledged citizens of municipalities and the provinces whose main connection with the federal government is to be an annual tax return to Revenue Canada and the province.

The Minister refused to release the document to aboriginal leaders and stated that his secret design for self-government would be implemented band by band. He also said that his plans respected “inherent rights”.

A clearly assimilationist self-government policy appears to have had the uncritical support of the recent AFN regime. This organization also seemed to have accepted the concept of “inherent rights” which has a meaning totally different than the impression conveyed to aboriginal peoples.

“Inherent rights” do not define collective rights that are the foundation for aboriginal title, autonomy and nationhood. “Inherent rights” are personal rights to life, liberty and security of person as defined for all Canadians in the “Charter of Rights and Freedoms”.

It is in its proper definition as purely individual rights that “inherent” is used in all extinguishment agreements. The federal government has ensured that this narrow definition is preserved by issuing

two directives to its so-called negotiators.

The two directives dated March 15<sup>th</sup>, 1996 and March 27<sup>th</sup>, 1996 are entitled “Guidelines for Federal Government Negotiators”. They were prepared by the Federal Justice Department who are experts in disguising the real intent of agreements in obscure legal language.

The directive on “inherent rights” to self-government anticipates that most, if not all aboriginal parties to such agreements will insist that the phrase be included. Federal negotiators are offered a menu of clauses whose effect will be to produce an agreement “deemed acceptable” to the federal government. In other words, no other construction to such an agreement is acceptable except that which conforms to the pre-determined federal self-government policy.

Federal negotiators are informed that self-government agreements “inevitably do have some effect on aboriginal and treaty rights”. The phrase “inherent rights” used in the proper context evidently is intended to mislead aboriginal signatories into thinking that aboriginal and treaty rights are being preserved.

As an extra precaution to safeguard extinguishment principles, Justice Department lawyers instructed federal negotiators to insert any clauses that might later be open to interpretation in a “whereas” preamble. According to the directives, this strategy will diffuse “controversial issues” by giving them “less legal weight”. In other words, an aboriginal party might believe they won concessions when, in fact, they won nothing.

What is immediately clear is that federal negotiators have no mandate to negotiate anything aside from getting agreement to a policy set in concrete. Neither did the AFN seem disposed to challenge any federal policy, either as one that is unilaterally imposed, or one that carries the veneer of being “Indian driven” because it received the blessing of an “AFN/INAC Joint Initiative”.

Electoral practices lie at the very heart of any system of government, as one of the rights of citizenship. The fundamental issue insofar as aboriginal nations are concerned is whether aboriginal and treaty rights include an inherent power to determine their own citizenship and design governance according to their own laws.

Electoral rules that are likely to emerge as a decision of federal Cabinet Ministers will have to be consistent with those in effect in provincial municipalities. This is because electoral rules cannot contradict established federal “self-government” policy which provides for municipal-type aboriginal communities. Federal officials have in fact confirmed such an outcome.

A policy that models aboriginal communities after provincial municipalities can be read as a strategy to produce a better fit for ultimate provincial jurisdiction. As creatures of provincial law, one can anticipate the amalgamation of former reserves with non-native municipalities or regional non-native governments. This inevitably will result in public forms of government where electoral rules may at

best allow aboriginal candidates to seek office with non-natives.

One can cite as examples religious communities such as the Hutterites, Doukhobors, Mennonites and others who immigrated to Canada to escape persecution and to preserve their traditional way of life. Their hope for self-determination did not last into the 20<sup>th</sup> century once provinces began to establish municipalities and pass laws regulating their local affairs, including local school systems. Communities whose institutions, customs and practices were ordered by religious doctrine found it difficult and often impossible to preserve this kind of autonomy. Many escaped increasing encroachment by provincial laws and regulations by moving to countries such as Paraguay and Mexico. Others remained to face inevitable assimilation.

Moving to another country is not an option for Indigenous Peoples. For many, neither is assimilation.

These examples show that alarm bells should sound whenever federal authorities describe their activities as a “process”. Most recently, Mr. Nault declared that the non-implementation of the Supreme Court’s decision in **Delgamuukw** is being treated as a “process” that “allows the parties to set aside the legal debate over aboriginal rights and title and focus on developing treaties”. (Letter from Nault to the Aboriginal Rights Coalition, March 6, 2000).

What the Minister means is ignore the court’s judgment and ratify comprehensive claims agreements which extinguish collective aboriginal rights and title. This is the federal mould into which all government initiatives are poured. Changes to electoral rules is a “process” based on the same strategy and directed to the same undercover goal.

## Consultations Are Not Negotiations

### COMMENTARY V

- The Supreme Court's suggestion that its guidelines for removing the discriminatory sections of the "Indian Act" involve "extensive consultations" with First Nations implies that they should have influence in shaping changes.
- On September 25<sup>th</sup>, 1999, Robert Nault was reported in the "Ottawa Citizen" as being committed to dismantling the "Indian Act", as were his predecessors all the way back to 1969.
- Indications are that the **Corbiere** ruling offers the federal government an excuse to begin the process of unraveling the "Indian Act" and giving added impetus to its other extinguishment initiatives such as L.T.S., its Land Management statute, Modern Treaty Making, the "self-government" policy, etc.
- Because a cabinet sustained and directed federal extinguishment policy does not recognize First Nation autonomy and inherent governance powers, "extensive consultations" amounts to nothing more than imposing a "made-in-cabinet" agenda on First Nations.

The Minister states that the AFN's consultative activities related to the federal "Gathering Strength" package of programs and the "Joint Initiative", could be extended to meet the Court's suggestion for "extensive consultations" regarding changes to electoral codes.

To consult means to discuss a matter with another party with a view of seeking mutual agreement or understanding. Consulting however, does not include conciliation, arbitration, the necessity for consent or any other form of consensus binding on the parties.

"Extensive Consultations" which the Judges proposed should be done on electoral changes therefore means that as many Aboriginal groups as time permits may eventually be informed about the necessity to introduce electoral changes. Any views offered by Aboriginal groups may be noted and in the end, it will be the federal Cabinet that will have decided what should be done. Such a decision will have little or no relevance to the views expressed by an Aboriginal group that was actually consulted.

"Consultations" which occur after a submission on electoral changes has already been reviewed and

approved by the Cabinet is the usual practice in government. This kind of “cart before the horse” process reduces consultation to promoting a scheme for electoral changes that has already been pre-determined by the Cabinet. Any AFN role in conducting “extensive consultations” therefore would amount to nothing more than being a soap salesman for a federal initiative. Moreover, whatever the federal government decides to do with electoral codes may not go much beyond being an agenda item at assembly meetings.

A review of federal policy documents show that the federal government does not believe that it has a duty to consult about anything with Aboriginal groups.

For example, a Justice Department briefing document on the implications of the recent Supreme Court’s Delgamuukw Decision dated March 3, 1999 declares:

“Whether there is a duty to consult with a particular First Nation over a particular matter, and the extent of that duty, must be evaluated on a case by case basis. There is no “one size fits all answer”.

In the same document, federal lawyers concede that there may be possible exceptions to the government’s hit and miss approach to consultations. They note that:

“Canada currently consults with respect to dispositions of federal Crown lands in areas where Aboriginal groups claim Aboriginal rights, even though there is no legal obligation to consult unless a First Nation could establish that they have an Aboriginal right that has been infringed by Canada’s actions.”

The latter statement acknowledges two relatively recent developments: that is:

With respect to non-treaty regions, the Supreme Court has ruled that lawful extinguishment requires “plain and clear intent”. Once an Aboriginal group has established to the satisfaction of the federal government that it has a legitimate claim, a concession would be made to a need for “consultation”.

It should be noted that the federal Justice Department uses the term “Canada consults” rather than “Canada negotiates”. What this choice of words means is that in such non-treaty regions as British Columbia, “Canada consults” about a settlement based on its own extinguishment policy. Aboriginal groups are often informed that any alternative settlement that does not result in extinguishment is “off the table”.

Had Ottawa’s policy for dealing with Aboriginal peoples used the phrase “Canada negotiates”, a different relationship would have been implied. Genuine negotiations would require that the federal government give serious consideration to alternative forms of accommodation that does not result in extinguishment. The reality is that by Canada’s definition, consultation is a process to persuade

Aboriginal groups to surrender to a future prescribed by federal Ministers.

Insofar as historic treaties are concerned, Canada's one-sided interpretation that they are extinguishment accords suggests, in the words of the federal policy, that there is "no legal obligation to consult" about their true intent. The federal position on treaties is vulnerable because a good legal case can be made that extinguishment did not occur with "plain and clear intent". This is the reason that "treaty renewal" is being promoted today to give such original treaties "certainty" as extinguishment agreements. Short of a Supreme Court ruling on historic treaties comparable to their Delgamuukw Decision, it seems virtually impossible to get the federal government to a table to discuss an alternative interpretation.

To achieve rapid resolution to the so-called "Indian problem", federal authorities are prepared to spare no expense or effort. A British Columbia Supreme court decision on March 23, 1999 (Gitanyow) declared that it is a legal, not just a moral, political and honorable duty for the Crown to negotiate in good faith with Aboriginal peoples. So far, there is no evidence that the federal government has changed its ways.

Federal policy does not allow for genuine negotiations along the lines of the B.C. Supreme Court's judgment. In a "bad faith" context what is allowed in some circumstances is consultation, which may be taken as a code word for buying or imposing compliance.

Whatever "extensive consultations" actually takes place on electoral changes therefore can be expected at best to be a show-case exercise. Any aboriginal entity that thinks their view carries much weight in Ottawa's political environment is somewhat like believing that they can paddle their canoe up Niagara Falls.

## Collaboration Is Not Partnership

### COMMENTARY VII

- According to the Minister's circular of July 16<sup>th</sup>, 1999, changes to electoral rules are to be done in "partnership" with the AFN. The term "partnership" coloured the government's "Gathering Strength" announcement in 1997 and has been part of its public relations strategy all the way back to the "White Paper" of 1969.
- Black's Law Dictionary (West Publishing, 1979) defines partnership as a relationship based on equality and respect for each others' interests and rights. Such a relationship with aboriginal leaders would be expected to result in a mutually acceptable accommodation in Canada's federal system with Aboriginal Nations that does not extinguish their historic autonomy, collective rights and rights to self-determination.
- The same dictionary defines collaboration as treasonous cooperation with an enemy. Colonial rule over Indigenous peoples, whether direct and coercive or indirect and devolved, requires the collaboration of key aboriginal leaders to be effective. This remains the real nature of a relationship that enables the federal government to keep its extinguishment policy on track.
- Aboriginal peoples can never be genuine and equal partners of a power that has dispossessed them of everything that defines a nation, and today works to ensure that the result is final and irreversible according to international and domestic law. An issue such as electoral changes therefore cannot be an acceptable result if done in a collaborative relationship instead of a real partnership. This is because collaboration within the framework of a cabinet-directed extinguishment policy will not restore an aboriginal nation's inherent power to determine its own citizenship and system of governance.

It has been said by the current Minister and his predecessor that new electoral rules are to be developed and implemented in "partnership" with the AFN. The term "partnership" carries much the same connotations as "process" and "AFN/INAC Joint Policy Development". All these federal inventions convey an aura of sweetness and affection. It will be recalled that the same approach was used in a fairy tale. In this children's story, a wolf disguised himself as Little Red Riding Hood's Grandmother to fool her into becoming a meal for him.

The only way that the kind of partnership about which federal Ministers speak so frequently could be genuine would be if a majority of aboriginal leaders and their constituents supported an extinguishment policy. One has to assume therefore that the few who appear to be promoting the implementation of such a policy are best defined as collaborators, and federal instruments of indirect rule. By no stretch of the imagination can collaboration in aid of a federal agenda be described as a genuine partnership.

In the late 19<sup>th</sup> and early 20<sup>th</sup> centuries, colonial administrators developed a system of direct and indirect rule to control the affairs of indigenous peoples. The methods are detailed in their dispatches to their British home office and reproduced in a publication (“Principles of Native Administration” selected documents: 1900-1947: London, Oxford University Press, 1965).

C.S. Temple stated that:

“Under direct rule, the Native, even the educated Native can never take any but a small share in government”.

Another colonial administrator, Lord Lugard described a more up-dated system of controlling native populations. He wrote in 1916 in his political memoranda that at a later stage of managing colonized peoples, a form of indirect rule was preferable. He defined this method as:

“...rule through the Native Chiefs, who are regarded as an integral part of the machinery of Government, with well-defined powers and functions recognized by Government and law, and not dependent on the caprice of an Executive Officer.”

Lugard went on to say that Native Chiefs thus recognized were not to be regarded as independent rulers. He stated that:

“The Central Government reserved to itself the sole right to raise and control armed forces, to impose taxation of any kind, and to make laws and to dispose of such lands as are under native law and custom...”

He noted that “It is the consistent aim of the British staff to maintain and increase the prestige of the Native ruler, to encourage his initiatives, and to increase his authority.” This was seen as a way of maintaining the loyalty of Chiefs whose “powers rightly belong to the controlling Power” (that is, the colonial government).

British colonial traditions and practices serves as a template for Canadian governments. For many decades, the “Indian Act” gave legal sanction to a system of direct colonial rule that enabled the Minister to control every aspect of social, cultural and economic life in aboriginal communities. The

Minister exercised his autocratic powers to dispossess and relocate communities to meet the needs of an increasing white population, and to erase aboriginal autonomy, history, languages and identity in the cause of assimilation. He could even replace a local Chief with anyone who was prepared to be a lot more cooperative with federal authorities, and frequently did so.

During the 1970's, the federal Cabinet concluded that it was safe to shift to Lord Lugard's model of indirect rule. By 1976, there were several core-funded organizations operating who, in the words of a 1976 Cabinet document "were prepared to revisit the principles of the "White Paper of 1969". At the same time, federal Ministers were told that:

"No attempt be made by government to define any final objectives for the native people." (Cabinet document May 27<sup>th</sup>, 1976)

The same Cabinet submission stated that it was necessary:

"To make careful preparations to ensure Cabinet control of federal policy initiatives..."

The aim of aboriginal collaboration in "indirect rule" was to:

"Develop with the provinces practical arrangements for appropriate sharing of responsibilities and costs..."

In other words, indirect rule would create an illusion of "partnership" based on a "process" which does not reveal "final objectives" and begins to phase provincial rule into the affairs of aboriginal communities, band by band and region by region. The "sharing of responsibilities and costs" refers to services and programs available in other federal departments for all Canadians either directly or by fiscal transfers to provinces.

Public statements by Ministers suggest that accelerated devolution of administrative duties to local Chiefs and Councils (to be consolidated fully and with finality by the L.T.S. exercise) will restore autonomy. This is grossly misleading. As Lord Lugard stated, devolved power under indirect rule "rightly belongs to the controlling power".

In Canada at present, a federal "controlling power" has applied its resources and powers for a single purpose. This is to manage a transition from indirect rule by the federal government to indirect rule by provinces as their municipalities. What provinces choose to do under their constitutional authority with aboriginal communities after the changing of the guard will no longer be a federal concern.

An extinguishment policy maintained by indirect rule allows the federal Cabinet to keep its finger on the destruct button. In recent government literature this is laughingly called "a practical solution".

To give the appearance of legitimacy to a destructive aboriginal policy, the federal government with the assistance of their lawyers, have developed a legal rationale to justify their measures.

For example, from a federal perspective, aboriginal governance remains an empty box in Section 35 of the Constitution Act, 1982. The Cabinet therefore asserts a right to define governance - as it has indeed done with its 1995 “self-government” initiative.

As extra insurance, federal lawyers took care that “aboriginal and treaty rights” would be modified by the phrase “of Canada”. The intent was to make such rights subject to a divisible Crown - namely federal and eventually provincial.

The implication of a divisible Crown is that Section 91(24) of the Constitution Act, 1867 is not seen as imposing any lasting obligation on the federal government for “Indians and lands reserved for Indians”. Internal policy documents describe this section as “permissive”.

The upshot of this kind of thinking is that there is constitutional permission to fulfill an exclusive federal right to extinguish aboriginal and treaty rights with “certainty” and “finality” and effect an exchange of Crown jurisdiction from federal to provincial.

All the various avenues that have been devised in recent years to further an extinguishment goal envision a final trashing of the “Indian Act”. “A practical solution” to electoral practices therefore can be expected to be cast in the same mould.

Because aboriginal governance is being treated as an “Indian Act” rather than an aboriginal and treaty rights issue, a feature of governance such as electoral rights is being addressed within an existing extinguishment framework.

A government that believes that the future of aboriginal peoples can be settled by re-arranging jurisdictions because the Crown is divisible is barking up the wrong tree. Most aboriginal groups probably understand that if they surrender to such a “practical solution”, they will have no future as first nations.

A ticket for a quick trip out of the “Indian Act” is now gladly offered by the federal government. This is because it’s a non-stop journey that lets passengers off at only one station marked “province”. Anyone who believes such a destination brings aboriginal groups to some biblical promised land should recall the fate of the Metis people. Their 1885 armed resistance in the west failed to halt their subordination to an eastern power in Ottawa.

Once the federal government established control in the newly acquired western territory, Metis were offered a choice. They could be defined as “Indians” under the provisions of an “Indian Act”, or they could take a scrip for a plot of fee-simple land or the equivalent in money.

Many Metis chose either scrip or money instead of “Indian Act” rule. Today, even though Metis are identified in the Constitution as one of the three “Aboriginal peoples in Canada”, their options are closed. Scrip and money were the grandfathers of contemporary extinguishment agreements. The effect in each case is to extinguish aboriginal title. Moreover, it would be difficult to make a case that the majority of Metis people have prospered as full-fledged citizens of the provinces. Many today are impoverished and landless.

As a shameful colonial artifact, the “Indian Act” should be abandoned. This should be done however on terms and conditions set by aboriginal leaders and peoples, not by a federal government. Moreover, questions regarding ways and means require that there be a genuine partnership based on good faith, equality, and a shared commitment to above-board negotiations.

In dealing with the specific issue of electoral practices, the aim should be to agree on principles which support rather than negate aboriginal and treaty rights. A legal trick invented by federal lawyers is to box such rights in a “whereas” section of an agreement so that they become meaningless. Such traps should be avoided.

To work toward a productive partnership (assume that this is even feasible) aboriginal leaders will need to deal with a system of collaboration that serves federal interests exclusively. This method of managing aboriginal peoples remains an important feature in the final stages of indirect rule. Professor Hall of Lethbridge University offered an apt description of its design and purpose. He stated:

“You have this very cynical system where the Liberals used the ‘Indian Act’ to infuse a patronage network into Indian country and to essentially keep Indian groups pacified by greasing those most articulate and potentially those who might be able to mobilize Indian country; it’s kind of a sophisticated system of indirect rule.”

The term “patronage” as applied to aboriginal peoples describes a federal authority that showers rewards and honours aboriginal organizations and individuals so long as they engage in the business of extinguishment with it. A federal “patron” protects and extends financial and material assistance to such beneficiaries as an exercise of government power rather than of trust. This means that the benefits that now flow to the consumers of federal policy will cease whenever an extinguishment goal is reached.

Collaborators therefore do not have much of a future, unless a final reward can be extracted in the form of a senate appointment.

## Taking Charge Of The Verdict

### COMMENTARY VII

- From the time that colonial powers first imposed a racist policy of dispossession, many aboriginal leaders have actively and passively restrained, counteracted and opposed extinguishment measures. In spite of Cabinet directed efforts, traditional customs, belief systems and ties to the land remain alive. These values survive at the core of aboriginal being and are the foundation on which the political autonomy of nations can be restored, including the right of peoples to define their own citizenship. A federal design for electoral practices therefore should be rejected. To back down on this issue is to allow the government to strike at the very heart of political rights.
- There is every indication that the substance of electoral changes as well as the implementation strategy have already been developed by the government during the past twelve months. A ready-made Cabinet decision does not allow for genuine negotiations. Moreover, aboriginal leaders should not participate in any consultation exercise that casts their national organization in the role of marketing agency for a federal version of electoral rules.
- The federal government keeps its thumb on the scale of justice, the most recent examples being its responses to the **Delgamuukw** and **Marshall** judgements. There is every reason therefore to reject self-serving federal interpretations of court guidelines and apply their own understanding in ways that do not subtract those features that define nationhood. Taking charge of the **Corbiere** ruling moreover amounts to regaining control as self-determining peoples. This can be done whenever control can be wrestled away from a few collaborators who are nourished by a federal patronage system to fulfill an extinguishment goal.

What is emerging is a unilateral federal initiative. It is to implement electoral changes without the pretense of bothering with far-reaching “consultations”. In fact, the court’s guidelines are seen as fuel to give added speed to the dismantling of the “Indian Act”. Minister Nault said as much last April before the House of Commons Aboriginal Affairs Committee. He stated that his department considers recent Supreme Court rulings “as an opportunity for the systematic dismantling of the Indian Act” because it fails the test of the Charter of Rights and Freedoms.

INAC Ministers are like wrestlers. After one called “statute killer” gets tossed out of the ring, as Ron Irwin was with his Bill C-79, a successor crawls back into the rink disguised as a “Charter Monster”.

The Minister does not explain that the Charter only addresses the rights of individual Canadians (that is, rights to life, liberty and security of a person). Nor does he reveal that the Charter does not acknowledge any significant collective rights. The exception is Section 25, a special clause which protects “aboriginal, treaty or other rights and freedoms” of aboriginal peoples from other Charter provisions. In linking the dismantling of the “Indian Act” to the Charter, the Minister is saying that Section 25 is destined to disappear along with the statute. In fact, extinguishment agreements accomplish this dual purpose.

An “Indian Act” based ruling on electoral rules therefore should be rejected outright by aboriginal leaders. As with most Supreme Court rulings, the Judges issued general guidelines for dealing with a discriminatory section in the “Indian Act”. Guidelines leave a lot of room for interpretation by the federal government and aboriginal leaders. What the Judges, in suggesting “extensive consultations” likely were speaking about was “negotiations”. In this instance, the government chose to ignore either process. Instead, the Minister wants to use the guidelines to drive an extinguishment policy towards a Cabinet directed goal.

Going back to the court to ask for an extended time-frame for implementing electoral rules accomplishes nothing. Even if the government agreed to return to the court for extra time, it will not do anything to alter the purpose to which the government intends to apply electoral changes.

At the same time, there are sound reasons for aboriginal leaders to ask the Supreme court for a judicial review of a Cabinet decision on electoral rules on Constitutional grounds. These include:

1. An electoral regime was designed within the government without any significant participation by aboriginal leaders nor the consent of their communities.
2. There is irreconcilable contradiction between governance as defined in the “Indian Act” and governance which is implicit in Section 35 of the “Constitution Act, 1982”
3. The doctrine of continuity as applied to traditional governance based on aboriginal and treaty rights cannot be abrogated or derogated without consent within the meaning of Section 25 of the Charter of Rights and Freedoms.
4. A nation-to-nation relationship, as affirmed by the Royal Commission on Aboriginal peoples and according to the Law of Nations acknowledges every nation’s rights to its own system of government based on its traditions and laws within the framework of International Human Rights Conventions.

5. The phrase “of Canada” which modifies “Aboriginal and Treaty Rights” in Section 35 of the Constitution Act, 1982 and “Aboriginal peoples” in Section 25 of the “Charter of Rights and Freedoms” is not limited in its interpretation to subordination to provinces following the dismantling of the “Indian Act”.
6. Provinces “of Canada” exercise their Section 92 spheres of sovereignty as partners in Confederation. It is Canada’s lawful trust obligation to restore a similar relationship based on a partnership as was promised by the Crown when historic treaties were offered and should remain the principle on which contemporary treaties are founded.
7. Electoral rules based on the “Indian Act” and changes as predetermined by the federal cabinet are an abuse of power and unconstitutional, the effect of which is to negate fundamental principles that are inherent in Aboriginal and Treaty promises and the rights of nations to survive as nations.

A sound argument can be made in a court along the lines outlined above. Many precedents in common law and spelled out in international conventions cannot be easily dismissed by judges. The recommendations of the Royal Commission on Aboriginal Peoples would also do much to reinforce such a case.

Because the phrase “of Canada” was included in Sections 25 and 35 of the Constitution, Judges will always work from the premise that Canada’s sovereignty over aboriginal peoples is firmly entrenched in its supreme law. There are nevertheless constitutional limitations on the exercise of federal power. One such limitation is that no federal government can employ “great frauds and abuses”, (in the words of the Royal Proclamation of 1763) to destroy with finality the inherent autonomy of aboriginal nations.

One cannot predict that the court will render a ruling that challenges the fundamental tenets of a federal extinguishment policy. Lawyers for the aboriginal side would have to examine virtually every federal initiative to prove that they all are directed to this single goal. They would have to show that dismantling the Indian Act offers Aboriginal nations no other alternative than absorption by provinces and assimilation. Judges would have to be persuaded that an alternative to extinguishment is a matter of Crown trust within the meaning of aboriginal and treaty rights. They would have to understand that assimilation is an individual choice. It is an outcome that cannot be imposed fairly or honorably on a nation in circumstances where the federal government controls information, and administers a patronage system for a purpose that is unacceptable to most Aboriginal peoples.

A judicial review of an Indian Act based on a federal initiative on electoral rules and by implication Aboriginal governance raises other considerations. Since the **Delgamuukw** ruling, the make-up of the Supreme Court has changed. It may be less inclined to upset public opinion or rock the

government's policy boat. Moreover, even should the Judges come down on the side of Aboriginal nations, its decision could fall on deaf ears in government.

There have been many recent court judgements which the government has deflected or neutralized whenever they undermined its extinguishment agenda. A Study done for the Royal Commission offers many examples of federal obstruction in instances of judgements favorable to aboriginal peoples. (Government conduct in the context of litigation with Aboriginal peoples). The Study concluded that the federal tactic usually is to "take a protracted amount of time to respond to the court's conclusion, and more often than not seek to define narrowly, the effect and extent of the judgement's application."

The Royal Commission Study concluded, in effect, that there is a world of difference between what a court says and what the government does. An aboriginal victory in the courts has yet to translate into any significant change in an entrenched extinguishment policy. Nevertheless, a court challenge along the lines proposed may be well worth pursuing. Regardless of the outcome, the more immediate effect would be to put a freeze on a federal version of governance, including its related electoral regime.

Whether or not Aboriginal leaders opt for a judicial review, or whether an eventual judgement is favorable or not, it is a destructive federal policy that has to be challenged in the end. It is no credit to those Aboriginal leaders who speak loudly and passionately about aboriginal and treaty rights as a prelude to surrendering them in the end. Such rights are not a legal vacuum. Neither can they be leased or auctioned off to a provincial sink-hole where Aboriginal nations will vanish along with the "Indian Act".

It has been said that you can bring a horse to water but you can't make it drink. If a horse can withhold its consent, so can Aboriginal leaders. When the government comes bearing its own version of electoral rules derived from its interpretation of the court's guidelines they can be simply returned to sender. The capacity to gain immunity from the federal propaganda tricks, such as disguising municipalization as self-government will enable aboriginal leaders to turn back all federal extinguishment measures.

Aboriginal leaders, elders and ground level peoples will remain vulnerable so long as some of their numbers operate within the apparatus of a federal ruling authority. Dismantling the "Indian Act" via electoral changes and other ongoing measures is the final step to declaring Aboriginal peoples legally assimilated. To counter this process, Aboriginal leaders should take action to dismantle a federal patronage system that is collaborating to implement an extinguishment agenda.

Had the AFN been recruited as a key player to carry out a Cabinet-directed mandate? Such a possibility is suggested in circumstances where a national organization is favored with unprecedented levels of federal funding and a capacity to share this benevolence with regional and local organizations. Another unique feature of the AFN under its late leadership was that its own

enlarged in-house staff was reported to be reinforced by seconded federal personnel. Such concessions are rarely, if ever, made to a non-government entity unless it was perceived to be a necessary and valuable instrument of federal policy.

If indeed, the AFN was either a willing or a naïve party to fast-tracking a federal policy to its conclusion, its role is best described as that of a sacrificial goat. This is because such a mission sooner or later comes to a conclusion. To collaborate in such a process is not a career choice.

At a time when the government is satisfied that its mission is largely accomplished, there will be no further need for funding an AFN. Whatever advantages some regional and local leaders may see, financially or otherwise, will vanish like the leaves in autumn when the funding tap is turned off.

On the flip-side of the patronage coin it is necessary to ask what would happen to the AFN if it challenged federal policy and became a dedicated advocate for an Aboriginal cause? In the latter part of 1997, the AFN under a former leadership did oppose Ron Irwin's "self-government" initiative and refused to play along with the L.R.T./L.T.S. process. The Minister's response was to threaten to punish the AFN for its sins by withdrawing federal funds and closing its doors. He let it be known that his priorities could just as easily be carried out by working directly with regional organizations and local Chiefs.

A national organization whose continued existence is tied to federal purse-strings is clearly in a bind. It loses when the government accomplishes its extinguishment goal. It also loses if it resists such federal measures. So much for partnership!

Aboriginal leaders should give serious thought to the task of creating an organization that can freely represent the rights of Aboriginal peoples. There is no mid-ground between nationhood and assimilation. It is not that difficult to mobilize own-source funding to support an organization in much more modest surroundings and with fewer dollars, but a lot more independence. It is the only way that the anti-aboriginal plans of government can be taken out of the closet and exposed to the full light of day.

A truly representative national organization would not be obligated to spend so much of its time playing in a federal sandbox. Its priorities and agenda would belong to the Aboriginal peoples. However, there is a lot of work to be done beyond the simple act of declaring nationhood.

Aboriginal peoples are seriously wounded after generations of colonial oppression and Indian Act rule. The process of restoration and healing will take a long time and requires a lot of investment of money. A national organization therefore should be upholding the principle that when a State such as Canada inflicts the kind of damages it did on Aboriginal peoples, it has a lawful obligation to pay reparations.

There is also a strong case to be made that no Aboriginal nation extinguished its resource rights on

traditional lands with “clear and plain intent”. A national organization has every reason to work towards regaining for Aboriginal nations a fair share of Canada’s resource wealth. This is a critical issue because a resource base is essential to support autonomous governments and an aboriginal economy.

These are but a few important priorities of many that an organization should pursue on behalf of its constituents. Such an assignment is not for faint-hearted leaders. It requires the fibre of a Tecumseh to bring the federal government to heel and force it to apply its dollars to fulfilling the full range of its trust obligations.

Historic Nations have deep roots. Even after a lot of clear-cutting they can re-generate with renewed growth. In many countries in the world today, age-old nations who have long been captives of State policies are rediscovering their spirituality, their identity and their will to survive and prosper as nations in their own right. Aboriginal peoples on this land can do no less if they want to take charge of their future.