

Strengthening our Nations: Advancing Capacity for First Nation Governments & Economies

Planning and Dialogue Forum, Vancouver, BC, March 7-8, 2011

Objectives:

To profile First Nations' experiences and share lessons learned and innovative practices in advancing First Nations jurisdiction and economic development.

To exchange ideas on elements of a broad national work plan advancing First Nation governance and nation-building including the organizational structure of the AFN.

To develop and foster dialogue on tangible action items to transform current relationships and support capacity for First Nation governments and economies.

Breakout and Dialogue Sessions: Overview & Dialogue on Key Elements of Moving Beyond the *Indian Act*

Lawmaking – Key considerations in law-making

Introduction

“Lawmaking” is obviously a key element of moving beyond the *Indian Act*. Why? – because governments make and operate by and in accordance with laws.

What would happen if the *Indian Act* was repealed tomorrow? First Nations would have to have:

- the authority to enact their own laws,
- capacity and processes for developing and enacting their own laws;
- the capacity and mechanisms in place to apply, adjudicate and enforce their laws; and
- mechanisms or agreements for reconciling laws enacted by other jurisdictions, including federal and provincial governments.

Authority

Current sources of authority:

- *Indian Act* – delegated authority to make bylaws, i.e., bee-keeping
 - Band Councils are creatures of statute
 - But some form of governance structures – chiefs and principal men, hereditary structures – preceded the *Indian Act*

- Inherent right of self-government – Aboriginal and treaty right in s. 35 *Constitution Act, 1982* – inherent, not delegated
 - Prior to *Indian Act*, First Nations governed by customs
 - Inherent right not recognized by federal government
 - Federal inherent rights policy says it recognizes the inherent right of self government, but recognition is contingent of federal agreement
 - Self-government agreements
- UN Declaration on the Rights of Indigenous Peoples – endorsed by Canada:

Article 4

Indigenous peoples, in exercising their right to self-determination, have the right to autonomy or self-government in matters relating to their internal and local affairs, as well as ways and means for financing their autonomous functions.

- Potential for recognition legislation
- What happens if INAC refuses to recognize First Nation governments? - Assert inherent right, without federal or provincial concurrence, by enacting laws outside the *Indian Act*

Capacity and Processes for Developing Laws

Contemporary governments have three branches of government:

- 1) Legislative – makes laws
- 2) Executive – executes and administers laws
- 3) Judiciary – adjudicates disputes and enforces

Current *Indian Act* structures – band councils – exercise both executive and legislative functions. No judiciary.

First Nations, at community or nation level, need to build foundations for governance outside the *Indian Act*:

- Need to construct constitutional foundations – constitutions based on First Nation customs and traditions
- Need to build law-making institutions:
 - Build on existing band council structures, or
 - Build new structures – band council level or nation/treaty level
- Need to ensure citizens are engaged in law-making process or they will not respect the laws
- Resourcing needed to develop and administer laws

Capacity and Mechanisms to Administer and Enforce Law

Under the *Indian Act*, administration of laws is the ultimate responsibility of the federal government and the Minister, who delegates some matters to the band council.

Currently, there is very little in the way of mechanisms for administration and enforcement. Resources are a major issue, both for capacity as well as administration.

No provision for adjudication, presumes – matters get referred to existing courts, ie., Federal Court or provincial courts.

Need to build:

- Administration capacity beyond what exists under the *Indian Act* and current band offices
- Judicial Function – must be set up at nation, region or community level
- Policing – Some existing capacity.

Interaction with laws of other Jurisdictions

Multiple jurisdictions currently apply laws to First Nations and First Nation lands, including the federal and provincial governments, as well as municipal governments – the legislative field is fully occupied.

Need to figure out:

- How to roll back other laws, to make room for First Nation laws
- How First Nation laws will interact with other laws – harmonization or reconciliation.

Reconciliation – would be better and more orderly if other law-making jurisdictions agree. But what if they do not?

- RCAP said First Nation laws would take priority for internal matters
- Traditional territories? – co-management and shared jurisdiction is consistent with principle of sharing, underlying treaties