Submission on Bill C-7

First Nations Governance Act

NATIONAL ABORIGINAL LAW SECTION
CANADIAN BAR ASSOCIATION

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PREFACE

The Canadian Bar Association is a national association representing 38,000 jurists, including lawyers, notaries, law teachers and students across Canada. The Association's primary objectives include improvement in the law and in the administration of justice.

This submission was prepared by the National Aboriginal Law Section of the Canadian Bar Association, with assistance from the Legislation and Law Reform Directorate at the National Office. The submission has been reviewed by the Legislation and Law Reform Committee and approved as a public statement of the National Aboriginal Law Section of the Canadian Bar Association.

Submission on Bill C-7
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I. INTRODUCTION

The National Aboriginal Law Section of the Canadian Bar Association (the CBA Section) recommends that the *First Nations Governance Act* (FNGA) be withdrawn, and a process of legislative action be undertaken with the aim of either repealing or replacing the *Indian Act,* possibly in accordance with the conclusion of meaningful negotiations on self-government.

The social, legal and cultural reality of First Nations has changed significantly since the adoption of section 35 of the *Constitution Act, 1982*. In 2003, First Nations are a growing and demographically younger group, are highly mobile, experience a higher rate of crime and conflict with the law than any other group, experience continuing poverty and lack of meaningful employment, and are increasingly creating communities in urban centres far from bands or their traditional territories. First Nations have a strong desire to create self-government structures that reflect ancient traditions in a modern context. The proposed FNGA does not reflect these realities or aspirations. Instead, it would act as a leveler, adding some certainty to the legal earmarks of a band administration structure but removing distinctiveness among First Nations and limiting First Nations to *Indian Act* bands and reserves.

As Chief Roberta Jamieson noted in her speech to the Indigenous Bar Association in Toronto in October 2002, it is no longer acceptable to First Nations to be complicit in adopting a new form of colonial administration, though it is

understandable that, given the pressures that communities are encountering, that some may wish to effect immediate change in the short term.

The Canadian Bar Association has had a longstanding interest in the problems facing aboriginal peoples:

> When we look at the 200 year history of the policies we developed to control and direct Native people, there is not very much to be proud of. Either because of colonial expediency, inordinate paternalism or even racism, we excluded Native people from full membership in a society where we hold that fairness and justice are basic tenets.[1]

The Royal Commission on Aboriginal Peoples addressed this serious concern and, in its Report, concluded that the touchstone for future relations between the Federal government and aboriginal peoples should be the recognition and implementation of an inherent right of self-government in accordance with s. 35 of the *Constitution Act, 1982.*

The Canadian Bar Association recognizes that the Federal government is attempting to come to terms with history and, through the *First Nations Governance Act* (FNGA), is trying to address the current reality experienced by Aboriginal Peoples and to plan for the future.[2]

The CBA Section agrees that meaningful change in governance is essential. The band council provisions of the *Indian Act* are a particular focus of grievance because of the imposition of band council form of government in place of pre-existing models of self-government. Unfortunately, the FNGA does not provide a basis for developing effective governance regimes that reflect the needs and aspirations of aboriginal communities in Canada.

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1 Address of the President of the Canadian Bar Association in 1986, as quoted in Preface to Aboriginal Rights in Canada: An Agenda for Action , The Canadian Bar Association Committee Report (August 1988, CBA, Ottawa).

2 The FNGA was first introduced in the House of Commons in Spring 2002 as Bill C-61, and later reintroduced as Bill C-7.

The FNGA purports to legislate in the area of "...leadership selection, administration and accountability of Indian bands, and to make related amendments to other Acts." These other Acts include the *Indian Act* and the *Canadian Human Rights Act*. The preamble indicates that the purpose of the FNGA is to effect change in the administrative processes associated with Indian band government but not to derogate from any inherent rights of aboriginal self-government.

The process and the content of the First Nations Governance Initiative, which constituted the Federal Government's consultation phase with First Nations leading up to the FNGA, has resulted in a variety of strong and often conflicting views being expressed by First Nations, non-aboriginal Canadians and civil society groups on the scope and design of a revised system of government. This submission represents the CBA Section's contribution to the discussion on this important issue.

II. PREAMBLE

The preamble to the FNGA states that "bands, within the meaning of the *Indian Act*, require effective tools of governance", to improve the quality of life in their own communities. This wording is indicative of the perspective that "First Nations" are equivalent to bands as defined in the *Indian Act*. There is no recognition that First Nations include shifting and evolving communities that are rural, transient, urban or confederacies of communities acting as a First Nation. The FNGA would preclude formal recognition of these communities and limit "First Nations" only to the band structure and reserve lands.

This may restrict opportunities for the thousands of displaced First Nations people living in urban concentrations who are creating communities. The FNGA would fail to recognize, moreover, that First Nations people are inhabitants of the entire land, and their aboriginality is not frozen or limited to territories their ancestors

occupied at the time of contact or treaties with the government. As written, the FNGA regime would give them little or no effective representation in the affairs of a band community in which they do not actually reside.

RECOMMENDATION:

1. **The FNGA should explicitly recognize and permit communities of First Nations people living off-reserve to create their own government institutions.**

The preamble also states that the FNGA is not intended to define the nature of any right of self-government or predetermine self-government negotiations, and indicates the Federal government's recognition of the inherent right to self-government, as reflected in its policy to negotiate self-government agreements. In our view, Bill C-7 requires a more binding commitment than a mere recognition of this right. This should be a substantive provision in the legislation rather than part of the preamble. Including this key concept in the legislation could serve as the basis for a more dynamic framework than that presented in the FNGA in its current form.

RECOMMENDATIONS:

2. **The FNGA should contain a non-derogation clause to protect and recognize the right to self-government and commit to the negotiation of agreements on self-government by the Federal government.**

3. **The FNGA should expressly provide that any codes adopted are interim and transitional in nature, pending a final agreement on self-government between a First Nation and the Federal government, and that the FNGA no longer applies to a First Nation with a concluded agreement.**

4. **The provisions concerning legal capacity of bands should indicate that the effect of such provisions will not limit or abrogate the First Nation's right to self-government, or its Treaty or aboriginal rights.**

III. PART 1 - BAND GOVERNANCE

Section 3(a) provides that the governance tools in the FNGA are intended to serve as interim measures pending the implementation of the inherent right of self-government. Section 3(c) provides that bands may design and implement their own regimes for leadership selection, administration, and financial management and accountability, while providing rules for bands that do not choose to do so. However, the central provisions of the FNGA set out mandatory elements for these band codes.

Section 4 authorizes a band to develop and adopt any or all of three codes relating to leadership selection, government administration, or financial management and accountability. Mandatory features for each code are set out in section 5 (leadership selection), section 6 (government administration) and section 7 (financial accountability and management). There is little flexibility in these provisions.

For example, section 5(1) provides that the code must specify, among other elements:

- that a term of office for a council member not exceed five years;
- what constitutes "corrupt electoral practices";
- that a procedure be adopted for appealing an electoral result.

It may be argued that the inclusion of these and other "rules" for the creation of a band government structure are to obviate some of the harmful occurrences of instability in office, unfair manipulation of electors or the difficulty of appeal by band members. While the codes developed under the FNGA need to respect and

acknowledge as paramount the "broadly held Canadian values" (as referred to in the preamble) of representative democracy, the fact is that many aspects of traditional leadership structures in the communities do not resemble our traditional views of representative democracy. The FNGA should be flexible enough to allow blending of traditional structures with the norms and practices of representative democracy; it should not spell the end of those traditional structures.

The codes in the FNGA are administrative structures deriving authority from federal statute — prescriptive "rules" to ensure that principles of administrative fairness are respected in resulting codes. However, with such prescriptiveness there is an attendant continuing loss of autonomy for First Nations, who will only ostensibly design their own "governance". It is, therefore, not an accommodation of the substantive right.

RECOMMENDATION:

5. **The provisions authorizing a band to develop and adopt codes for leadership selection, government administration or financial management and accountability should be flexible enough to accommodate traditional structures and practices of First Nations.**

Under section 4(2), ratification of a code is achieved through adoption by a band council and the assent of a majority of eligible voters, defined in section 2 as band members over eighteen years residing on or off the reserve. However, at least 25% of the band electorate must participate for a valid election. The cost of maintaining such an electoral system may prove prohibitive, particularly for reserves with a small band membership or for one that resides largely off-reserve. Provision should be made for funding assistance in appropriate situations. Smaller bands may also benefit from assistance of an elections officer who would assume responsibility for carrying out the details of the election – ballot creation, establishing polling stations, distribution of relevant public information and the like.

RECOMMENDATION:

6. **Provision should be made for smaller bands to receive financial or administrative assistance to establish and implement an electoral system for ratification of codes, on request.**

The FNGA provides in several instances for a two-year deadline to create and implement the codes. If a band fails to meet the deadline, which could occur if the band chose not to participate or designed an alternative system that did not meet the Minister's requirements for a code, then the default band governance codes apply. Meeting the ratification deadline or meeting the code requirements may run counter to a community's social and economic reality or cultural traditions and therefore be patently unattainable. It is suggested that the Minister be given discretion to vary these deadlines in appropriate circumstances at the request of a band.

RECOMMENDATION:

7. **The Minister should have discretion to vary deadlines in appropriate circumstances at the request of a band.**

The default band codes cannot now be reviewed, as they will be in regulations not yet published. This is a matter of some concern for First Nations, as it seems there will be a legislated form of governance from the federal government in any event.

Section 5(2) provides for the adoption of customary rules for leadership selection, rather than the codes, where a band was not subject to an order under section 74 of the *Indian Act.* In that case, a leadership selection code adopted by the band must include the rules set out in section 5(1) or consist of the customary rules for leadership selection, but with a process for appeal and amendment of the codification of the customary rules. The opportunity to adopt customary rules is available only for the first two years after the section comes into force. Bands currently operating in accordance with such rules may have a very strong argument that they are exercising an unextinguished aboriginal right to self-government.

The requirement that a leadership selection code be adopted within two years may be an infringement, and possibly an extinguishment, of the right of self-government.

Section 6 sets out rules for the administration code, but there is no provision for reflecting custom or tradition in this code or in the code requirements for financial management, which are the most prescriptive. Section 6 explicitly requires the code to reflect frequency of meetings, keeping minutes, record keeping and public notice. It includes requirements for the adoption of conflict of interest guidelines, access to information and band law enactments.

Section 7 mandates financial management and accountability rules. Section 9(3) requires that the band's financial statements be made publicly available within 120 days after the end of the fiscal year, to any person upon payment of a reasonable fee. While this ensures transparency, it means that anyone with the fee and curiosity, but not necessarily with an active or even beneficial interest in the First Nation community, can have access to band financial statements. The disclosure provision may also be onerous on the band and seemingly mandates a higher level of disclosure than for non-First Nations institutions.

Section 11, *Complaints and Redress*, requires band councils to create an impartial arbitral body to consider and render decisions on band members' complaints of band decisions or a breach of codes. Many band members on and off reserve may welcome this, as the ability to appeal a band council or band employee decision in a meaningful way has not been available, with resulting inequities. However, some First Nations may not have the capacity to implement an appeals body, and an inaccessible right is no different from an absence of right. Also, while the FNGA allows for the appointment of an impartial person to hear complaints, in small communities it may not be desirable to confer ombudsman-like powers on an individual living in that community, and it may be difficult to identify and involve an appropriate and acceptable outside person.

The CBA Section supports section 14, which provides that no civil proceedings may lie against a member of council or employee of a band for anything done, or omitted to be done, during the course of the exercise or the purported exercise in good faith of any power or duty in accordance with the FNGA, the *Indian Act*, regulations, codes or band by-laws.

IV. PART 2 - POWERS OF BAND COUNCILS

Sections 15 to 18 clarify the much litigated area of the legal capacity of bands. Generally speaking, the CBA Section supports this part of the FNGA.

Section 15, for example, provides that a band has the same legal character as an incorporated entity and may, acting through its band council, make contracts, acquire, hold and dispose of property, raise, spend, invest, and borrow monies, sue or be sued, and do anything ancillary to the exercise of the legal capacity. The legal and business certainty of this provision for bands would be quite positive. Current defects in the legal capacity of bands result in lost opportunities or significant delays in obtaining adequate financing or in engaging in business or capital works projects.

Of concern is section 17, which sets out the field in which band councils may make laws, more akin to the by-law function under the *Indian Act*. The limited nature of the list necessarily limits the self-government function.

For example, section 17(1)(a) permits the band council to make laws regarding the protection and conservation, disposition and commercial use of reserve natural resources EXCEPT for fish, wildlife or resources that require a surrender under the *Indian Act*. This does not leave a lot of meaningful room for any resource development, including the lease of lands.

Of particular concern is section 17(1)(g), which permits the band council to make by-laws concerning the rights of spouses or common law partners and children who reside with members of the band. Although the FNGA preamble gives a blanket recognition that the *Charter of Rights and Freedom* applies to the exercise of power under an Act of Parliament, there is no explicit requirement that such laws be made in accordance with equality provisions of sections 15 and 28 of the *Charter of Rights and Freedoms*. Thus, it is possible that band by-laws, as well as adopted codes or customary rules, could prove to be disadvantageous for aboriginal women and children who reside on reserve.

Potentially, the offending laws could be struck down by the operation of conflict of laws provisions, as they would be in opposition to the section 35 guarantees of the *Constitution Act, 1982*. In practice, however, the groups affected would probably lack the knowledge and resources to challenge these laws. As the effects of inequality stemming from the operation of the "blood quantum" rules and the disenfranchisement of First Nations women by marriage from Indian status and band membership still occur, it is recommended that specific protection be given in the FNGA to the equality rights of aboriginal women.

RECOMMENDATION:

8. **The FNGA should be amended to require that band by-laws, adopted codes and customary rules respect the equality provisions in the *Constitution Act, 1982*, to protect the equality rights of aboriginal women.**

V. PART 3 - GENERAL

Sections 31 and 32 provide for Governor in Council regulations respecting the adoption of a code by a band as well as the matters with respect to which a code may be adopted under sections 5, 6 and 7. There is no assurance that First Nations concerns will be provided for in the "matters" covered in the regulations. Further,

if one assumes that the default codes will be a codification of the rules in sections 5 to 7, with the associated requirements for financial auditing and reporting, many First Nations will find them unacceptable.

Section 34 empowers the Governor in Council to suspend selectively any band from the application of the FNGA or any of its provisions to facilitate negotiation and ratification of a final agreement on self-government, within two years of Section 4 coming into force. The CBA Section supports this provision, providing that band support is obtained prior to any decision of the Governor in Council.

RECOMMENDATION:

9. **Section 34 should require that the agreement of a band be obtained before a decision is made by the Governor in Council to suspend the band from application of the FNGA.**

VI. CONCLUSION

The National Aboriginal Law Section of the Canadian Bar Association does not support Bill C-7 as it is currently worded, and recommends that it be withdrawn. A more comprehensive legislative initiative is required — one that recognizes the changing and diverse nature of First Nations, reinforces their right to create self-government structures suited to their traditions and aspirations and confirms their unique place in Canadian society.

If the FNGA proceeds on its current legislative course, however, we make the following recommendations, recognizing that the government would proceed in its exercise of legislative control of Indians, with the attendant fiduciary duty:

VII. SUMMARY OF RECOMMENDATIONS:

1. **The FNGA should explicitly recognize and permit communities of First Nations people living off-reserve to create their own governance institutions.**

2. **The FNGA should contain a non-derogation clause to protect and recognize the right to self-government and commit to the negotiation of agreements on self-government by the Federal government.**

3. **The FNGA should expressly provide that any codes adopted are interim and transitional in nature, pending a final agreement on self-government between a First Nation and the Federal government, and that the FNGA no longer applies to a First Nation with a concluded agreement.**

4. **The provisions concerning legal capacity of bands should indicate that the effect of such provisions will not limit or abrogate the First Nation's right to self-government, or its Treaty or aboriginal rights.**

5. **The provisions authorizing a band to develop and adopt codes for leadership selection, government administration or financial management and accountability should be flexible enough to accommodate traditional structures and practices of First Nations.**

6. **Provision should be made for smaller bands to receive financial or administrative assistance to establish and implement an electoral system for ratification of codes, on request.**

7. **The Minister should have discretion to vary deadlines in appropriate circumstances at the request of a band.**

8. **The FNGA should be amended to require that band by-laws, adopted codes and customary rules respect the equality provisions in the *Constitution Act, 1982*, to protect the equality rights of aboriginal women.**

9. **Section 34 should require that the agreement of a band be obtained before a decision is made by the Governor in Council to suspend the band from application of the FNGA.**