THE CANADIAN BAR ASSOCIATION
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February 28, 2012

Via email: appa@sen.parl.gc.ca

Honourable Gerry St. Germain
Chair
Senate Committee on Aboriginal Peoples
The Senate of Canada
Ottawa, ON K1A 0A4

Dear Senator St. Germain:

Re: Bill S-6, *First Nations' Elections Act*

I am writing on behalf of the Canadian Bar Association's National Aboriginal Law Section (CBA Section) in regard to Bill S-6, *First Nations' Elections Act*. The CBA is a national association of over 37,000 lawyers, notaries, law students and academics, and our mandate includes seeking improvement in the law and the administration of justice. The CBA Section consists of lawyers specializing in Aboriginal law and related issues from across Canada.

The proposals in Bill S-6 find their roots in electoral reform and modernization initiatives proposed by the Assembly of Manitoba Chiefs (AMC) and the Atlantic Policy Congress of First Nations (APCFN). Both organizations have considered the merits of legislation allowing First Nations to "opt-in" to a legislative regime that would modify the existing *Indian Act* election process.[1] Approximately 241 First Nations currently conduct their elections in accordance with the *Indian Act* regulations.

As a whole, the goals of Bill S-6 are laudable. However, the CBA Section suggests some amendments that we believe would improve the Bill.

Bill S-6 incorporates some issues considered by the AMC and APCFN, including longer terms of office (modified from two to four years), enhancements to the mail-in ballot system, criteria for eligibility to stand for election, offences and penalties for breaches of democratic protections, and an independent adjudicative process for determining election appeals.

The Bill would go further than the AMC and APCFN recommendations to allow for a great deal of Ministerial discretion, including being able to include First Nations as "participating First Nations"

[1] The *Indian Act* election process is governed by sections 74 - 80 of the *Indian Act* (1985, c. I-5) and the *Indian Band Election Regulations* (C.R.C., c. 952).

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without their "opt-in" or consent.[2] As currently drafted, the Bill would also allow the Minister to include First Nations that govern their elections in accordance with their band custom and not pursuant to the *Indian Act* election process.[3]

Improved Stability, Effectiveness and Transparency

By increasing terms of office to four years and setting procedural fairness requirements for elections, the Bill offers the potential for great improvements to First Nations' elections systems and stability for First Nations. Bill S-6 would provide a clear framework for the conduct of elections to help address some recurring deficiencies that systemically plague the current *Indian Act* election process, many of which have resulted in appeals and litigation.

In addition, the prohibitions, offences and penalties (including fines, imprisonment and inability to run in future elections) provide clarity and enforceability of acceptable democratic practices in First Nations' elections. These improvements respond directly to concerns raised by the AMC and APCFN, and some that have been extensively canvassed in the case law.

Constitutional Framework

The right to self-government is recognized and protected by section 35(1) of the *Constitution Act*, *1982*. While the federal government has authority to legislate with respect to Indians under section 91(24) of the *Constitution Act*, *1867*, First Nations have an inherent right to govern themselves in accordance with their own customs and traditions, including but not limited to those practices that pre-date the enactment of the *Indian Act*.

> The Government of Canada recognizes the inherent right of self-government as an existing Aboriginal right under section 35 of the *Constitution Act*, *1982*....Recognition of the inherent right is based on the view that the Aboriginal peoples of Canada have the right to govern themselves in relation to matters that are internal to their communities…[4].

In addition, the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) guarantees the right to autonomy in matters of internal self-government and the freedom of indigenous peoples.

> *Article 3*
> *Indigenous peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.*
>
> *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...*
>
> *Article 20*
> *1. Indigenous peoples have the right to maintain and develop their political, economic and social systems or institutions.*[5]

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2 Bill S-6, section 3(1)(b) and (c).

3 Many First Nations that currently operate under a customary system of governance have extended terms of office. The results of the elections may be subject to judicial review at the Federal Court.

4 According to the website of Aboriginal Affairs and Northern Development Canada: http://www.aadnc-aandc.gc.ca/eng/1325102789963

5 *UNDRIP* UN 61/295, Sept 13, 2007.

Both constitutional and international law support autonomy, self-governance, and the preservation and enhancement of internal political structures of governance of indigenous people.

Participating First Nations

As currently drafted, Bill S-6 would allow the Minister to place a First Nation on the *Schedule of participating First Nations* by order. This can occur when there is a request or "opt-in" by the First Nation. However, the Bill would also allow for Ministerial discretion to make an order where there is no request by the First Nation, but where:

- the Minister is satisfied that a protracted leadership dispute has significantly compromised governance of that First Nation,[6] or
- an election has been set aside under section 79 of the *Indian Act*, where there was a corrupt practice in connection with that election.[7]

We believe that this aspect of the Bill would permit overly broad discretion to the Minister to bring First Nations under the purview of the *Act*.

a) Customary systems of governance

An analytical distinction must be drawn between First Nations that currently conduct elections in accordance with the *Indian Act*, and those that operate by custom. Over half of First Nations in Canada conduct their elections according to the custom of the band.[8] The recommendations that underly the proposed legislation were not intended to apply to First Nations that currently govern their elections in accordance with their custom.[9] Those customary election processes do not directly involve the Minister or Aboriginal Affairs and Northern Development Canada.

Some traditional systems of governance and elections have been in place historically, and some are codified iterations of traditional systems. Others have been developed to serve the current needs of First Nations. Customary systems of governance have served many First Nations well, without the involvement of the federal government. Others have suffered problematic interpretation and application and certain customary election practices have been the subject of judicial review by the Federal Court. Still, these systems of governance and elections are constitutionally protected by section 35 and recognized by UNDRIP. In our view, allowing the Minister to prescribe a form of election for First Nations that currently operate in accordance with customary elections would represent a significant interference with protected rights of self-government.

RECOMMENDATIONS

The National Aboriginal Law Section recommends that:

- *the scope of Bill S-6 be limited to First Nations currently operating with an Indian Act electoral system.*
- *Bill S-6 enable the Minister to include a First Nation currently governed by customary elections to the schedule of participating First Nations, at the request of*

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6 Bill S-6, section 3(1)(b).

7 Bill S-6, section 3(1)(c).

8 341 First Nations (or 55%) are governed by custom - source : Backgrounder – First Nations Elections Act, AANDC http://www.aadnc-aandc.gc.ca/eng/1323203585807 (Dec 6, 2011).

9 See, for example: "Improving the System for First Nations Elections: Discussion Paper", October 1, 2010: http://www.apcfnc.ca/en/aboutapc/resources/Indian%20Act%20Election%20Reform%20Discussion%20Paper%20-%20English%20Version%20October%201,%202010.pdf.

that First Nation, as approved in accordance with prevailing customary practices, or by a majority of the votes cast in a secret vote in which a majority of the electors of that First Nation participated.

- *Bill S-6 not apply to First Nations with self-government agreements.*

b) Ministerial discretion

Bill S-6 was originally intended to allow First Nations to "opt-in" to legislation that would allow them to move their elections away from the *Indian Act* process, recognizing that process was not meeting the needs of many First Nations. *Indian Act* elections continue to be an effective electoral mechanism for some First Nations.

The Bill would also allow the Minister to add a First Nation to the schedule, but in our view, the standards for doing so are insufficiently defined. The Bill is silent on the definition of "significantly compromised governance", what constitutes a "corrupt practice" and the characteristics that meet those standards.[10] The broad discretion afforded to the Minister to include "participating First Nations" could then impact on constitutionally protected rights and international legal principles. Under Canadian law, a legislated ability to infringe on constitutionally protected rights of governance must be justified and minimally impair on the rights of the First Nation.

RECOMMENDATION

OPTION 1

The National Aboriginal Law Section recommends that Bill S-6 be amended to narrow the discretion of the Minister to include a First Nation in the schedule to those First Nations that have made a request, and, in situations where there is:

a) a protracted leadership dispute that has significantly compromised governance of that First Nation; or

b) an election has been set aside under section 79 of the Indian Act, where there was a corrupt practice in connection with that election,

the Minister may add the name of a First Nation to the schedule, if approved by a majority of the votes cast in a secret vote in which a majority of the electors of that First Nation participated.

OPTION 2

In the alternative, we recommend that the standard required to engage section 3(1) (b) be clarified.

Eligibility Criteria to Stand for Election

Section 9 provides that only an elector of a First Nation may stand for election. However, while the Bill aims at remedying corrupt election and governance practices, it does not provide a more detailed list of criteria for eligibility as a candidate for election.

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[10] This problem also exists with respect to section 79 of the *Indian Act* and the *Indian Band Election Regulations.* We recommend that the determination of what constitutes "corrupt elections practices" is an area deserving of legislative reform.

Many election codes adopted by First Nations exclude people who are insolvent or bankrupt, those charged and convicted of sexual or violent offences, those with known substance abuse problems and so on. While any legislative reform must be consistent with the *Charter of Rights and Freedoms* and the *Canadian Human Rights Act*, we suggest that specific criteria be developed as to which people ought not to be eligible for public office.

RECOMMENDATION

The National Aboriginal Law Section recommends that Bill S-6 provides more detailed criteria for eligibility to be a candidate for election.

Efficient, Timely and Cost Effective Appeals

The current process for election appeals under the *Indian Act* provides that an appeal can be made to the Minister within 45 days, followed by an investigation, and a review by the Minister.[11] If there is a corrupt practice, a contravention of the *Indian Act* that might have affected the elections or if a candidate was ineligible, the Governor in Council may set aside the election.[12]

Bill S-6 would shift decisions on election appeals from the Minister and Governor in Council to the courts (including the Federal Court and Superior Courts of a Province).[13]

Many First Nations that have *Indian Act* elections find the current appeal process is not time or cost effective, leaving communities in a state of uncertainty for extended periods.[14] For those First Nations that operate by custom, proceedings initiated by Application (as for judicial reviews of electoral decisions for custom bands) can sometimes be time consuming and cost prohibitive.

An appeal as of right, as proposed in Bill S-6, would also be time consuming and potentially cost prohibitive. It could prevent legitimate appeals from being brought and limit access to justice for parties that cannot afford litigation. Appeals to the courts may not be the best option to address the dual concerns of procedural fairness and efficiency.

One of the election appeal options advanced by AMC was to constitute an independent and impartial election appeals tribunal. This may provide a more cost effective, accessible and culturally appropriate method of dispute resolution. The decisions of a specialized tribunal would be subject to judicial review by the courts.

RECOMMENDATION

The National Aboriginal Law Section recommends that an independent and impartial election appeals tribunal be constituted, rather than referring appeals to the Federal Court or Superior Courts of the Province.

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11 Sections 12 – 14 of the *Indian Band Election Regulation*, *supr*a note 1.

12 Section 79 of the *Indian Act*, *supra* note 1.

13 Bill S-6, section 33.

14 Unrest and uncertainty can reign for many months, sometimes for more than a year, which is half of an elected term under the *Indian Act*.

Internal Dispute Mechanisms and Appeal Processes

Bill S-6 does not currently provide for First Nations to develop their own internal dispute resolution or appeal mechanisms. We recommend that First Nations listed in the schedule to the Act be enabled by regulation to develop their own internal dispute or appeal mechanisms.[15]

> **RECOMMENDATION**
>
> *The National Aboriginal Law Section recommends that Bill S-6 be amended to enable participating First Nations to develop their own internal dispute mechanisms or appeal processes, and decisions made be reviewable by application to the Federal Court for Judicial Review.*

Conclusion

We applaud the efforts in Bill S-6 to help enhance the governance of First Nations and to ensure that elections are conducted fairly. However, we stress that these efforts must not interfere with the constitutionally protected right of First Nations to determine their own systems of internal governance. To achieve that objective, we have recommended several amendments to the Bill.

In his introduction of the *First Nations' Elections Act* to the Senate for Second Reading, Senator Dennis Patterson stated that:

> Strong, stable and effective governments are something all Canadians believe in and all Canadians deserve: the freedom to elect your representatives according to a system that meets your needs, corresponds with your values and helps you reach your goals.[16]

We agree with Senator Patterson's statement. We recommend that our suggested modifications be made to Bill S-6, in keeping with this vision.

Yours truly,

(original signed by Tamra Thomson for Aimée E. Craft)

Aimée E. Craft
Chair, Aboriginal Law Section

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15 Many First Nations' customary election codes provide for internal dispute or appeal mechanisms (e.g. Election appeal tribunal, Council of Elders, independent adjudicator, etc.).

16 Record of Standing Senate Committee on Aboriginal Peoples, Dec 8, 2011: http://www.parl.gc.ca/Content/Sen/Chamber/411/Debates/039db_2011-12-08-e.htm#48