VOLUME 20, ISSUES 1-5 JANUARY-MAY 2022

FIRST NATIONS STRATEGIC BULLETIN

FIRST NATIONS STRATEGIC POLICY COUNSEL

Trudeau Government's National "Reconciliation" Plan to Complete Canada's Colonization Project: *Using Chretien's "Inherent Right Policy" and Legacy Legislation*

By Russ Diabo

Chretien's Legacy—Redbook-White Paper Policies and Legislation

Jean Chretien with 1993 Redbook, the Liberal Electoral Platform, (Photo courtesy of Tom Hanson/Canadian Press)

To understand the current Trudeau Liberal government's **National Reconciliation Framework** regarding Indigenous Peoples (First Nations, Metis, Inuit), one needs to understand the origins of the **Liberal Party of Canada's** policy and legislative framework.

In June 1990, at the **Liberal Leadership Convention** held in Calgary, I was one of the people who had been involved in the process of preparing amendments to the **Liberal Party of Canada's** constitution to create an **Aboriginal People's Commission**, modeled on the existing Liberal Women's and Youth Commissions, to present at the **1990 Liberal Convention** for a vote by Liberal delegates.

The **Liberal Party Convention** easily adopted the amendments creating the **Aboriginal People's Commission (APC) of the Liberal Party of Canada**, which was followed by an election by Aboriginal Liberal delegates attending the Liberal Convention to elect the founding APC Executive and I was elected as APC Vice-President of Policy, a position I held from 1990 until 1994, which was a turbulent time in Canada.

While the Liberal Convention was being held in Calgary, a constitutional amendment process to recognize Quebec's "*distinct society*" status called the **Meech Lake Accord** died when it failed to meet a required June 1990 ratification deadline, because **Manitoba Cree MLA Elijah Harper** refused to give consent in accordance with the

Special points of interest:

- **Trudeau is using Chretien's "Inherent Right Policy" & Legacy Legislation to complete Canada's colonization project**
- **Trudeau gov't created 2 Departments to transition First Nations into Municipalities**
- **Court rules UNDRIP is only an 'interpretive aid'**

Inside this issue:

Elijah Harper, Cree MLA, Manitoba

"The issue of whether Aboriginal self-government is an Inherent right or a delegated right conditional on reaching agreements with Crown governments was the focus of constitutional talks in the 1980's"

A Mohawk man on SQ car, 1990. (Photo courtesy of CP/Tom Hanson

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procedures established in the Manitoba Legislature for proposed constitutional amendments, thus delaying introduction of the proposed **Meech Lake Accord** into the Manitoba Legislature and causing the ratification deadline to pass.

Following the failure of the **Meech Lake Accord** at the end of June, on July 11, 1990, in Quebec, a Sûreté du Quebec (SQ) SWAT Team was sent to enforce an injunction on a group of Mohawks from Kanehsatake who were camping in a stand of pines, blocking the expansion of a golf course from 9 to 18 holes, which would encroach on Mohawk lands that included a Mohawk burial ground and involve cutting down a stand of pine trees over 100 years old for the expanded golf course.

A gunfight resulted in the Kanehsatake pines as Mohawk men tried to protect children and women from the SQ SWAT Team who were assaulting the area armed with automatic weapons and tear gas, when the gun fight ended that day, an SQ officer, Corporal Lemay, was found dead.

The men from Kanehsatake immediately contacted the men from Kahnawake who then blocked the Mercier Bridge in support of Kanehsatake. This July 11th firefight resulted in a 78 day stand-off between the Mohawk Nation at Kanehsatake, Kahnawake, the SQ and later the Canadian Army.

The cause of this conflict over a golf course expansion was the denial of Mohawk sovereignty and land rights by the governments of Quebec and Canada, as the Municipality of Oka obtained a court injunction to remove Mohawk Peoples from the Pines in Kanehsatake.

The issue of whether Aboriginal self-government is an Inherent right or a delegated right conditional on reaching agreements with Crown governments was the focus of constitutional talks in the 1980's. These talks ended in failure in March 1987 without coming to an agreement on self-government being ether an Inherent Right, or a conditional right dependent on reaching an agreement with federal and/or provincial governments.

In 1990, the **Supreme Court of Canada** started defining the meaning of Aboriginal and Treaty rights in section 35 of Canada's new *Constitution Act 1982*, with its *Sparrow* decision involving Aboriginal fishing rights.

However, the **Supreme Court of Canada** has yet to rule on whether self-government is an existing Aboriginal right or a conditional right subject to Crown government regulation.

This was the situation in Canada in 1993, when as APC Vice-President of Policy I, along with others, were involved in the **Liberal Party of Canada's election platform development process** in preparation for the 1993

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federal election.

As the **Aboriginal People's Liberal Commission**, we did an extensive process of consultation with Aboriginal Peoples organizations and governments in development of a platform on Aboriginal and Treaty issues.

Once we had an **APC draft Aboriginal issues document** prepared that we wanted included in the **federal Liberal Party Platform**, we had to engage with the Liberal leader Jean Chretien's advisors and staff, who acted as a buffer for him. At first, the Liberal leader's gatekeepers didn't want Aboriginal issues included in the Liberal 1993 election platform. This was first articulated by **Chaviva Hosek**, **Director of the Liberal Caucus Research Bureau**, who was also Co-Chair of the Liberal Platform Committee, along with then **M.P. Paul Martin**. **Chaviva Hosek** said if we put Aboriginal Peoples' issues in the platform, others like Italians or Greeks would want to be included too.

We pushed back that those ethnic groups don't have rights included in the constitution as Aboriginal Peoples do. It was after that exchange that Chretien's principal advisor, **Eddie Goldenberg**, got directly involved in discussions with us, who were the APC representatives.

On behalf of **Jean Chretien**, **Eddie Goldenberg** was overseeing the Liberal Platform development along with **Chaviva Hosek**, **Paul Martin** and Martin's assistant, **Terri O'Leary**.

As APC representatives we pushed our way into the **1993 Liberal Platform Development Process**, we weren't invited.

As the Liberal Platform was being developed, we had several meetings on Parliament Hill where we were shown numbered draft copies of the Liberal Platform for discussion, which we had to return once the meetings were done.

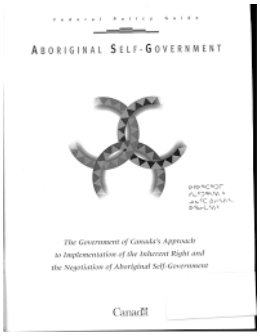
Finally, after much tough debate occurring over weeks during the summer of 1993 with **Chaviva Hosek**, **Eddie Goldenberg** and others like Liberal MP's such as **Warren Allmand**, we reached consensus on a short version of the Liberal Aboriginal Platform to be included in **Chapter 7 of the Redbook**, which was called "*Creating Opportunity: The Liberal Plan for Canada*".

The Aboriginal issues we couldn't get agreement on to include in the **1993 Redbook**, we pushed hard to have included in a longer separate version of the **Liberal Aboriginal Platform**. We succeeded: on October 8, 1993, while on the campaign trail, **Liberal Leader**, **Jean Chretien** issued a press release announcing the longer Liberal Aboriginal Platform, in which he stated, that "*the cornerstone of our approach will be the recognition of the inherent right to aboriginal self-government.*"

RENEWING THE PARTNERSHIP
Aboriginal Peoples' Policy Platform

"As APC representatives we pushed our way into the 1993 Liberal Platform Development Process, we weren't invited"

L to R: PM Jean Chretien & Eddie Goldenberg. (Photo courtesy of Peter Bregg)



Cover of 1995 Federal 'Inherent Right' Policy, still in use

"Prime Minister Jean Chretien broke his promise to recognize the Inherent Right to self-government by adopting an 'Aboriginal Self-Government' Policy, which recognizes the right in an abstract sense, but doesn't recognize that any particular First Nation has the right on the ground"

Cover of Secret Federal Guidelines

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Chretien's promise was also included in the **1993 Liberal Redbook**: "*A Liberal government will act on the premise that the inherent right of self-government is an existing Aboriginal and treaty right.*"

However, in 1995, after winning a massive majority government in 1993, leaving the **Conservative Party** with only two seats in Parliament, **Prime Minister Jean Chretien** broke his promise to recognize the Inherent Right to self-government by adopting an "*Aboriginal Self-Government*" Policy, which recognizes the right in an abstract sense, but doesn't recognize that any particular First Nation has the right on the ground.

In 1996, the **Assembly of First Nations** obtained a copy of a secret federal internal document prepared by the **Department of Justice and Inherent Right Directorate**, dated March 22, 1996. The document, entitled "*Guidelines for Federal Self-Government Negotiators (Number 1) - language for Recognizing the Inherent Right of Self-Government in Agreements and Treaties*", proved the Liberal government's "*Inherent Right Policy*" was merely a Liberal public relations tool.

The 1996 secret federal guidelines stated in part:

> ***This paper has two objectives: to help federal negotiators understand the legal and policy considerations surrounding recognition of the inherent right of self-government in a wide range of agreements and treaties with Aboriginal groups, and to provide them with approved recognition language for these agreements…negotiators should be aware of the legal and policy considerations surrounding the choice of recognition language, and of the type of recognition language deemed acceptable by the federal government.***
>
> *In essence, the debate over how to recognize the inherent right centers around two broad approaches, which we refer to as the* ***specific recognition*** *and* ***general recognition*** *approaches.* ***Specific recognition*** *entails recognizing that a particular group of Aboriginal people have an inherent right ("Canada recognizes that First Nation •x· has an inherent right of self-government .. _").* ***General recognition*** *involves recognizing that the inherent right is an existing right within the meaning of section 35 of the Constitution Act, 1982,* ***without actually acknowledging that specific Aboriginal groups (i.e., the Aboriginal parties to the agreement) have an existing inherent right.***

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> *The **general recognition model** begins with a clear, and unambiguous statement recognizing that **the inherent right of self-government is an existing right within the meaning of s.35 of the Constitution Act, 1982**. Under this approach, recognition of the inherent right is explicit, **but we remain agnostic as to which groups actually have such a right**.* [emphasis added]

The document goes on to list federally approved language for clauses to be used in "*specific*" recognition of the "*Inherent Right*" of self-government in **Framework Agreements**, **Agreements-in-Principle** or **Final Agreements**.

Also obtained by AFN in 1996 was a secret document prepared by the federal **Inherent Right Directorate and Department of Justice**, dated March 15, 1996, entitled "*Guidelines for Federal Self-Government Negotiators (Number 2) - How to Deal with Requests for Recognition as "Distinct People(s)"*".

The document states in part:

> *Negotiators will be faced with requests from aboriginal groups to include language in agreements recognizing them as "a distinct peoples" or as "distinct peoples". Recognition ma[y] also be sought as "people" or "peoples" without the accompanying adjective "distinct". **All of these formulations raise similar problems/issues from the federal perspective**.*
>
> *1.**Use of "people(s)" by itself without further qualification has potential implications related to the international right of self-determination, a right traditionally considered akin to the right of a sovereign state. Officials have no authority to use this language in agreements, whether binding or otherwise, since it may raise implications vis-à-vis the right of self-determination at international law**...The word "peoples" found in s.35 of the Constitution Act, 1982 ("the aboriginal peoples of Canada" - emphasis added) **is clearly set within the context of the Canadian constitutional framework and therefore does not have implications related to self-determination**. Nonetheless, use of the expression "the aboriginal peoples of Canada" in **negotiated agreements should still be approached with***

Allen Rock, Justice Minister in 1996, when secret Guidelines were developed.

"The document goes on to list federally approved language for clauses to be used in "specific" recognition of the "Inherent Right" of self-government in Framework Agreements, Agreements-in-Principle or Final Agreements"

L to R: Chief Bill McCue & Indian Affairs Minister Ron Irwin during signing of 1993 Framework Agreement on First Nations Land Management.

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> ***care…Characterizing any sub-group as one of "the aboriginal peoples of Canada" could be problematic in that it may give credence to a claim by a specific group to an aboriginal or treaty right(s) not otherwise maintainable at law.***
>
> ***2. Use of the term "distinct people(s)" raises other considerations.*** *While a good argument can be made that Indian people (and even perhaps. for example, the Anishnaabe) are a distinct group, the more larger the collectivity is sub-divided the less likely it is that distinctiveness can be demonstrated…* ***References to sub-groups as distinct entities may raise questions related to which groups are holders of aboriginal and/or treaty rights.***
>
> 3. ***Use of the term "distinct people(s)" or "distinct status" has implications in the Canadian unity context where "distinct society" and other related terms are under debate.*** [emphasis added]

"In 1996, Ron Irwin also began an Indian Act amendment process, which was not contemplated in the 1993 Liberal Aboriginal Platform"

The document goes on to list 3 options regarding use of the terms "*peoples*", "*distinct People(s)*" or "*distinct status*" in agreements: 1) The first preference is to avoid such language in negotiated agreements; 2) Before agreement is reached on any specific formulation, language must be approved by **PCO and Justice**. Negotiators should, therefore, not sign off until the wording has been reviewed; 3) If the negotiating context makes resort to **Option 1** or **Option 2** impossible, a formulation that links "*distinct*" and "*peoples*"/"*status*"/"*society*") will be acceptable **provided it is absolutely clear that the assertion is not indicative of the position of the Government of Canada**. **Option 3** "*is the least preferred option*."

Ron Irwin, Minister of Indian Affairs, 1993-1997.

While the **Chretien government's Minister of Indian Affairs, Ron Irwin**, was imposing the 1995 "*Inherent Right Policy*" across Canada, on February 12, 1996, Irwin signed a **Framework Agreement on First Nation Land Management** with 13 First Nations, which was later ratified in 1999 by the **First Nations Land Management Act**, allowing the First Nations to opt out of the **Indian Act** into another federal law for regulating First Nations land management.

In 1996, **Ron Irwin** also began an **Indian Act** amendment process, which was not contemplated in the **1993 Liberal Aboriginal Platform**.

It is my opinion, based on my interactions with Chretien while APC Vice-President of Policy, that this idea of amending the **Indian Act** came from Chretien himself, who stubbornly refused to accept the **1969 White Paper** was rejected by anybody other than First Nations—certainly not the Cana-

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dian public.

This is not just my opinion, **former APC Co-Chair, David Nahwegahbow**, recalls when in 1994, he, **Marilyn Buffalo**, **Elder Pete Waskahat** from Frog Lake, Alberta and myself, met with **Prime Minister Jean Chretien** in his office on Centre Block:

> *I also recall one instance in which the Aboriginal Peoples Commission put forward a motion to the Liberal Policy Convention in 1994, to the effect that the Party was disavowing the 1969 White Paper. We were summoned to Mr. Chrétien's office and chastised for putting forward such a resolution. Chrétien and Goldenberg tried to intimidate us into withdrawing the motion, but we refused*.

Following this exchange with **Prime Minister Chretien**, in 1996, **AFN National Chief Ovide Mercredi**, retained me to advise AFN on the federal **Indian Act Amendments** legislative process, as the **Indian Act Amendments Coordinator**.

Our **AFN Team** analyzed the proposed **Indian Act** amendment package and recommended that First Nations reject it, because our conclusion was that **Minister Irwin's** amended version of the **Indian Act** was worse than the status quo. It would have led to more, not less, control of the federal bureaucracy over First Nation governments.

AFN Chiefs-in-Assembly agreed with our analysis, and we began an AFN campaign to stop **Minister Irwin's** proposed **Bill C-79**, the **Indian Act Optional Modification Act**, which had many amendments to the **Indian Act**, and despite their so-called "*Inherent Right Policy*", **Bill C-79** had a key clause to convert Indian Bands into federal municipal corporations with "*natural person powers*":

> *Legal capacity of bands - 16.1 A band has the capacity and, subject to this Act, the rights, powers and privileges of a natural person*.

What are "*Natural Person Powers*"?

> *Natural person powers give municipalities similar flexibility to that of individuals and corporations in managing their organizational and administrative affairs without the need for more specific legislative authority*. **SOURCE: Ontario Ministry of Municipal Affairs and Housing**
>
> *Self-government is negotiated* ***within the Canadian constitutional framework*** *and federal* ***legislation is***

David Nahwegahbow, lawyer & former Liberal APC Co-Chair

"I also recall one instance in which the Aboriginal Peoples Commission put forward a motion to the Liberal Policy Convention in 1994, to the effect that the Party was disavowing the 1969 White Paper. We were summoned to Mr. Chrétien's office and chastised for putting forward such a resolution. Chrétien and Goldenberg tried to intimidate us into withdrawing the motion, but we refused"

Marilyn Buffalo, former Liberal APC Co-Chair.

Jane Stewart, Minister of Indian Affairs, 1997-1999.

"In 2000, another federal Liberal government was re-elected and a suite of federal-First Nations legislation was introduced as part of Jean Chretien's legacy as he prepared to retire from politics, believing he had solved another perennial Canadian problem. The "Indian problem""

Bob Nault, Minister of Indian Affairs, 1999-2003.

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> ***passed before the negotiated agreement takes effect…Under self-government, Indigenous laws operate in harmony with federal and provincial laws.*** *Indigenous laws protecting culture and language generally take priority if there is a conflict among laws…However,* ***the Canadian Charter of Rights and Freedoms, the Canadian Human Rights Act and other general laws such as the Criminal Code continue to apply***". [emphasis added] **SOURCE: CIRNAC Self-Government Website**

With the help of the **Bloc Quebecois** and **NDP** parties we were able to slow **Bill C-79** down in the **Standing Committee on Aboriginal Peoples** until the summer of 1997, when Parliament recessed and a federal election was called, causing **Bill C-79** to die on the Parliamentary *Order Paper*.

The **Chretien Liberal government** was re-elected in June 1997, with a new **Minister of Indian Affairs, Jane Stewart**, who saw the 1999 **First Nations Land Management Act** pass into law.

In 2000, another **federal Liberal government was re-elected** and a **suite of federal-First Nations legislation** was introduced as part of **Jean Chretien's legacy** as he prepared to retire from politics, believing he had solved another perennial Canadian problem. The "*Indian problem*".

To this end, it was in 2000 that **Chretien's then Minister of Indian Affairs, Bob Nault**, began discussions on a key part of **Chretien's legacy legislation—Bill C-7**, the **First Nations Governance Act**, which recycled much of what **Bill C-79**, the **Indian Act Optional Modification Act** proposed, including the key clause to convert First Nation governments into municipal corporations:

> "*Legal Capacity, Capacity, rights, powers and privileges - 15. (1) A band has the legal capacity, rights, powers and privileges of a natural person*".

Again, with the help of the **NDP** and **Bloc Quebecois** parties First Nations were able to delay **Bill C-7** in the **Standing Committee on Aboriginal Peoples** long enough for **Jean Chretien** to announce his retirement from politics and **Bill C-7** died like **Bill C-79** did.

Also included in **Chretien's legacy suite of legislation** was the "*Specific Claims Resolution Act*", which passed in 2002, but was never implemented and was subsequently replaced years later.

However, also part of **Chretien's legacy legislation** was the **First Nations Fiscal and Statistical Management Act**, to create national fiscal institutions for off-loading ongoing federal Treaty and fiduciary obliga-

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tions and assimilating First Nations into Canada's tax system. AFN had rejected **Bill C-19**, because it was tied to the **First Nations Governance Act**.

The **First Nations Fiscal and Statistical Management Act** was introduced into the House of Commons as **Bill C-19**, **An Act to provide for real property taxation powers of First Nations, to create a First Nations Tax Commission, First Nations Financial Management Board, First Nations Finance Authority and First Nations Statistical Institute and to make consequential amendments to other Acts**, by then **Minister of Indian Affairs, Bob Nault**, under **Prime Minister Chretien**, but it was stalled until September 2003, and in the fall of 2003, **Bill C-19** did not make it to **House of Commons Report Stage** as it fell off the Liberals' radar as **Jean Chretien** prepared to leave politics.

In December 2003, **Paul Martin became the new Liberal Leader and Prime Minister of Canada**. **Prime Minister Martin** named as his new **Minister of Indian Affairs, Andy Mitchell**, who in March 2004 re-introduced part of **Chretien's legacy legislation**, the **First Nations Fiscal and Statistical Management Act**, as **Bill C-23**, which also stalled in the House of Commons.

In November 2004, the Liberal government under **Prime Minister Paul Martin re-introduced Chretien's legacy Bill** (formerly **Bill C-19** and **C-23**), for a third time in the House of Commons as **Bill C-20**, the **First Nations Fiscal and Statistical Management Act**.

The Liberal government succeeding in getting all Party support to push **Bill C-20** through the House of Commons before the House recessed for the Christmas break. Even the so-called "progressive" **New Democratic Party** (**NDP**) voted with the Liberals, as their **Aboriginal Affairs critic, MP Pat Martin** (Winnipeg Centre), accepted the Liberal line that the new amendments would make **Bill C-20** "*optional*" for First Nations.

Bill C-20, the **First Nations Fiscal and Statistical Management Act** received Royal Assent on March 23, 2005, and in 2022, we can see that these national institutions created by the federal law are not "optional". For Indian Bands to be eligible for the current Trudeau government's 10-year funding grants, a Band has to be certified by the **First Nations Financial Management Board**.

1995 Inherent Right Policy & Trudeau Government

What does this have to do with the current Trudeau government?

Well, the so-called 1995 "*Inherent Right Policy*" has continually been used as the umbrella policy for **ALL** discussions, negotiations and legislation with First Nations, Metis, and Inuit by the federal government under

L to R: AFN Nat'l Chief Phil Fontaine & Prime Minister Paul Martin, 2004.

"In November 2004, the Liberal government under Prime Minister Paul Martin re-introduced Chretien's legacy Bill (formerly Bill C-19 and C-23), for a third time in the House of Commons as Bill C-20, the First Nations Fiscal and Statistical Management Act"

Andy Scott, Minister of Indian Affairs, 2004-2006.

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L to R: Justice Minister, Jody Wilson-Raybould & Prime Minister Justin Trudeau, February 14, 2018.

Prime Ministers Jean Chretien, Paul Martin, Stephen Harper and now Justin Trudeau.

Chretien's legacy legislation (**First Nations Land Management Act & First Nations Fiscal Management Act**) has also been used by successive Prime Ministers since Chretien up to current **Prime Minister Justin Trudeau** to assimilate Indians and Indian Bands into Canada's property and tax systems.

However, unlike previous Prime Ministers, **Justin Trudeau** had a **2015 Liberal Indigenous Platform** coupled with a star candidate, **Jody Wilson -Raybould**, whom Trudeau appointed as Justice Minister in his Cabinet, and who also helped—at least initially—sell the Liberal platform of "*reconciliation*" and a new "*nation-to-nation*" relationship to Indigenous Peoples (First Nations, Metis, Inuit).

"unlike previous Prime Ministers, Justin Trudeau had a 2015 Liberal Indigenous Platform coupled with a star candidate, Jody Wilson-Raybould, whom Trudeau appointed as Justice Minister in his Cabinet, and who also helped—at least initially—sell the Liberal platform of "reconciliation" and a new "nation -to-nation" relationship to Indigenous Peoples"

In December 2015, **Prime Minister Justin Trudeau** announced a pan-Indigenous (First Nations, Metis, Inuit) **Two-Track approach to Indigenous policy**:

> *1) closing the socio-economic gap between Indigenous Peoples and non-Indigenous Canadians [programs] (**Indigenous Services Canada**), and*
>
> *2) making foundational changes to laws, policies and operational practices based on the federal recognition [definition] of rights to advance [federal interpretation of] self-determination and self-government. [Inherent & Treaty Rights] (**Crown-Indigenous Relations**)*

In May 2016, **federal Justice Minister Jody Wilson-Raybould** told a **United Nations Forum** that there "*is a need for a national action plan in Canada, something our government has been referring to as a Reconciliation Framework*". **Wilson-Raybould** also told an **AFN Chiefs' Assembly** in July 2016 that the **UN Declaration on the Rights of Indigenous Peoples** will be "*will be articulated through the constitutional framework of section 35*."

In June 2017, a **Canada-AFN Memorandum of Understanding on Joint Priorities** was signed, essentially taking over the **AFN** as a "*Permanent Bilateral Mechanism*" of the federal Cabinet decision-making process. The **Canada-AFN agreement on joint priorities** committed the parties to the agreement to:

> ***1) establishment of a permanent, ongoing Cabinet -level process** for First Nations leadership and members of the federal Cabinet ("AFN-Canada Working Group") to review progress on **jointly set priorities**; (co-development of an Indigenous Languages Act to support the preservation, revitalization and strengthening of Indigenous Languages [Bill C-91], work in*

L to R: Trudeau & Bellegarde signing MOU, 2017.

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partnership on measures to implement the United Nations Declaration on the Rights of Indigenous Peoples, including ***co-development of a national action plan and discussion of proposals for a federal legislative framework on implementation*** *[Bill C-15], ongoing work to develop options for consideration by Chiefs-in-Assembly and federal decision-makers for a* ***new fiscal relationship*** *to ensure sufficient, predictable and sustained funding for First Nations governments [10-Year grants & self-government fiscal policy])*

2) to hold at least three meetings of the AFN-Canada Working Group per year, with one of these meetings to be chaired by the Prime Minister;

3) to ***establish a steering committee of senior officials*** *to identify and establish requirements to support the* ***AFN-Canada Working Group*** *(work plan development, human resources, fiscal support, process and machinery of government requirements)*; [emphasis added]

Following the signing of the **Canada-AFN MOU on Joint Priorities** on July 14, 2017, the Canadian federal government released its **Principles respecting the Government of Canada's relationship with Indigenous peoples**, which neither substantively nor procedurally meet international minimum standards. First of all, although purporting to relate to the relationship with Indigenous Peoples, the principles were unilaterally released by the Canadian federal government under **Prime Minister Justin Trudeau** and **Justice Minister Jody Wilson-Raybould**. They did not engage with or consult, let alone seek the consent of Indigenous Peoples and Nations as the proper Aboriginal and Treaty Rights Holders. Under international law, Indigenous Peoples are subjects of international law and the holders of internationally protected Indigenous rights.

Canada's 10 Principles are a proxy for the **federal definition of UNDRIP** and shows Canada is trying to domesticate Indigenous Peoples and international law, in violation of international legal standards. Canada has been questioned by the **UN Human Rights Committee** about how they implement the **International Covenant on Civil and Political Rights** (**ICCPR**) **Article 1** on the right to self-determination in regard to Indigenous Peoples and in their response, Canada indicated that it was their position that Indigenous Peoples exercise their right to self-determination as Canadians and as part of Canadian society, not recognizing that Indigenous peoples have their own standing at international law.

"Canada's 10 Principles are a proxy for the federal definition of UNDRIP and shows Canada is trying to domesticate Indigenous Peoples and international law, in violation of international legal standards"

Group Shot of AFN & Ministers, the CANADA-AFN MOU on Joint Priorities.

Carolyn Bennett, Minister of Indigenous Affairs giving qualified support for UNDRIP at UN, 2016.

"in May 2016, then federal Minister of Indigenous Affairs and Northern Development, Carolyn Bennett, pretended to "announce on behalf of Canada that we are now a full supporter of the Declaration without qualification." Minister Bennett immediately contradicted this in the next sentence by adding a qualification: "We intend nothing less than to adopt and implement the declaration in accordance with the Canadian Constitution." This clearly is a qualification, which goes back to the Constitution Act 1867"

Cover, Rights Recognition Framework, Engagement Document

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Canada is not only trying to domesticate Indigenous Peoples, but also international law. At the UN Permanent Forum on Indigenous Issues in May 2016, then federal **Minister of Indigenous Affairs and Northern Development, Carolyn Bennett**, pretended to "*announce on behalf of Canada that we are now a full supporter of the Declaration without qualification*." Minister Bennett immediately contradicted this in the next sentence by adding a qualification: "*We intend nothing less than to adopt and implement the declaration in accordance with the Canadian Constitution*." This clearly is a qualification, which goes back to the **Constitution Act 1867**. It further tries to qualify and subjugate international law to lesser national standards. This is in violation of international law: national laws and policies should only be passed if they conform with international law and not vice versa.

On February 14, 2018, **Prime Minister Justin Trudeau** made a speech announcing his intention to conduct an engagement process with Indigenous Peoples, "*provinces and territories, and non-Indigenous Canadians: people from civil society, from industry and the business community, and the public at large*", to introduce into Parliament a **Rights Recognition Framework Bill**, which was presented to an **AFN Meeting** in September 2018, where the proposed **Recognition and Implementation of Rights Framework Legislation** was widely rejected. Once again, the Trudeau government had recycled elements of Chretien's previous attempted legislation (**1997 Indian Act Amendments & 2003 First Nations Governance Act**).

A September **2018 federal paper** entitled "*Overview of a Recognition and Implementation of Indigenous Rights Framework*" **described the proposed Framework legislation as follows**:

> "*To summarize, the legislation could: enable the Government of Canada to* ***recognize Indigenous Nations and Collectives as legal entities with the status and capacities of a natural person****; enable the self-determined exercise of governance by* ***federally recognized*** *Nations and Collectives; affirm Canada's intent to enter into* ***government-to-government fiscal relationships with recognized*** *Nations and Collectives; and, require Canada to co-develop further measures to support these elements*." [emphasis added]

After First Nations across Canada rejected the Trudeau government's proposed Framework in September 2018, on November 15, 2018, a **statement from the Office of the Minister of Crown-Indigenous Relations** was issued saying:

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PM Trudeau announcing 2-Track Approach to Indigenous Issues, Dec. 2015.

> "**Our Government is committed to advancing the framework, and to continue actively engaging with partners on its contents**…We continue to make substantial progress…**through policy changes and the development of the Recognition of Rights and Self-Determination Tables**…We look forward to continue working with our partners on developing more of this crucial framework". [Emphasis added]

In 2019, as part of the **Trudeau government's Two-Track approach**, the federal government introduced an Omnibus Budget **Bill C-97 An Act to implement certain provisions of the budget tabled in Parliament on March 19, 2019 and other measures** (First Reading April 8, 2019), buried in **Bill C-97** was legislation to dissolve the **Department of Indian Affairs** and create two new federal departments (**Indigenous Services & Crown-Indigenous Relations**). **Bill C-97** was proclaimed into law on June 21, 2019.

"Bill C-97 established statutory definitions used by both Indigenous Services Canada (ISC) and Crown-Indigenous Relations and Northern Affairs Canada (CIRNAC), moving the focus from Indians and Indian Bands to Indigenous individuals and Indigenous Governing Bodies in order to transition Indian Bands into Indigenous Municipal Corporations having "Natural Person Powers""

Bill C-97 established statutory definitions used by both **Indigenous Services Canada** (**ISC**) and **Crown-Indigenous Relations and Northern Affairs Canada** (**CIRNAC**), moving the focus from **Indians and Indian Bands** to **Indigenous individuals and Indigenous Governing Bodies** in order to transition Indian Bands into Indigenous Municipal Corporations having "*Natural Person Powers*":

> **Indigenous governing body** means a [band] council, [Indigenous] government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds **rights recognized and affirmed by section 35 of the *Constitution Act, 1982***.
>
> **Indigenous organization** means an **Indigenous governing body** or any other entity that represents the interests of an Indigenous group and its members.
>
> **Indigenous peoples** has the meaning assigned by the definition aboriginal peoples **of Canada subsection 35(2) of the *Constitution Act, 1982*.** [emphasis added]

Bill C-97 is **pan-Indigenous legislation** written to by-pass the **Indian Act**, which remains in force while it is emptied out as First Nations opt into the federal options of "modern treaties", self-government agreements or alternate federal legislation. As **Sue Collis**, a PhD student from Queens University who wrote a paper called "*Whither the **Indian Act***" puts it:

> "*The state's method is no longer to repeal, or even*

Fathers of Colonization—1867.

'Trudeau's Plan' coninued from page 13

> *substantially amend, the **Indian Act** but, instead, to move communities, one by one and section by section, into alternate legal structures until no one is left for the Act to govern*."

Dr. Jeremy Schmidt, from the Department of Geography in Durham University, UK, wrote a paper called "*Dispossession by municipalization: Property, pipelines, and divisions of power in settler colonial Canada*", and explains the **Trudeau government's Two-Track approach** this way:

> "*Canada pursues the "municipalization" of First Nations through state mechanisms that subvert Indigenous authority to the state, then delegate forms of state authority to Indigenous peoples, and conclude by asserting that delegated authority satisfies demands for Indigenous self-determination.*"

"Canada pursues the "municipalization" of First Nations through state mechanisms that subvert Indigenous authority to the state, then delegate forms of state authority to Indigenous peoples, and conclude by asserting that delegated authority satisfies demands for Indigenous self-determination"

According to the **CIRNAC** website on "*self-government*":

> *"There are 25 self-government agreements across Canada involving 43 Indigenous communities. There are also 2 education agreements involving 35 Indigenous communities*."

> "*Currently there are about 50 self-government negotiation tables across the country. These tables are at various stages of the negotiation process and in many cases are being negotiated in conjunction with modern treaties*."

> "*Canada recognizes that Indigenous peoples have an inherent right of self-government guaranteed in section 35 of the Constitution Act, 1982. **The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government was first launched in 1995 to guide self-government negotiations with Indigenous communities***." [emphasis added]

As you can see the Trudeau government continues to use the **Chretien era's 'general recognition' of the Inherent Right to self-government**, while **defining the specific recognition of the Inherent Right to self-government in framework agreements, agreements-in-principle, final agreements and now in federal legislation** for Indigenous languages (**Bill C-91**), Child & Family Services (**Bill C-92**), Replacing the Department of Indian Affairs with two new Indigenous Departments (**Bill C-97**) and a Canadian definition of **UNDRIP** (**Bill C-15**).

Trudeau's Two Track approach to transitioning First Nations into 4th level Indigenous Municipal Corporations appears to be working, ac-

'Trudeau's Plan' continued from page 14

cording to the **2022-2023 CIRNAC Departmental Plan**:

> *"CIRNAC will hold innovative discussions at over 169 negotiations tables based on the affirmation of rights, respect, cooperation, and partnership.* ***Through these discussion tables, representing over 469 First Nations, 22 Inuit communities and 8 Métis organizations, with a total population of over 1 million people, CIRNAC will increase the number of treaties, agreements and other constructive arrangements****. The priorities identified by Indigenous groups are the starting point for discussions at these tables."* [emphasis added]

As a "*Permanent Bilateral Mechanism*" of the Trudeau government, **AFN** "*co-developed*" **Bill C-91**, **Bill C-92**, and **Bill C-15** while remaining silent on **Bill C-97**, the replacement of Department of Indian Affairs with two new pan-Indigenous Departments.

If First Nation communities do not immediately begin developing their own local self-determination plans with families, including elders, women and youth, whether they live on reserve, or off-reserve, each First Nation will eventually be fiscally managed into becoming a **4th level Indigenous Municipality on a fee simple property land base**, until the lands are sold off by those communities who are unable to become prosperous in the capitalist market economy.

This is the Trudeau government's National "*Reconciliation*" Plan to complete Canada's colonization project using Chretien's "*Inherent Right Policy*" and Legacy Legislation (**1999 First Nations Land Management Act & 2005 First Nations Fiscal Management Act**).

"If First Nation communities do not immediately begin developing their own local self-determination plans with families, including elders, women and youth, whether they live on reserve, or off-reserve, each First Nation will eventually be fiscally managed into becoming a 4th level Indigenous Municipality on a fee simple property land base"

Trudeau Using Elements of Chretien's FNGA as a Framework in 2-Track Approach to Transition First Nations into Municipalities

L to R: Former PM Jean Chretien & Liberal MP Bob Nault in 2018.

By Russ Diabo

In 2002, a paper on "*Legal Status and Capacity*" of an Indian Band was written for a **Joint Ministerial Advisory Committee** appointed by the then **Minister of Indian Affairs, Bob Nault** in relation to the proposed "**First Nations Governance Act**" (**Bill C-7**), in 1995, there was an analysis done on the so-called 1995 "***Inherent Right Policy***, for AFN when Ovide Mercredi was AFN National Chief.

Since the time of the **Chretien Liberal government** (**1993-2004**) nothing has fundamentally changed in terms of the federal policy framework for negotiating "*self-government*" agreements except federal rhetoric!

"Since the time of the Chretien Liberal government (1993-2004) nothing has fundamentally changed in terms of the federal policy framework for negotiating "self -government" agreements except federal rhetoric"

The two documents referred to above are relevant to the current Trudeau government's **Two-Track Plan** to transition First Nations (**Indian Act** Bands) into **Indigenous Municipal Corporations** "*having the rights, powers & privileges of a natural person at law*".

From 2000 to 2002, there was a debate within **AFN** over the **First Nations Governance Act** (**FNGA**) between those Chiefs who supported the **FNGA** and those who opposed it.

This culminated in an **AFN Special Chiefs' Assembly** held in Ottawa on May, 22, 23, 2002, where a faction of the **AFN Executive Committee** led by **pro-FNGA, BC Regional Chief Herb "Satsan" George**, who presented a "*Penultimate Draft*" of a Work-Plan for a "*Co-operative Approach on Government to Government Relations between First Nations and Canada*" to the **AFN Chiefs' Assembly**.

The **proposed AFN-Canada approach** was to address "*the legislative governance initiative and broader changes to the Indian Act regime*" that **DIA Minister Bob Nault**, was proposing in **FNGA**, which Chiefs had consistently rejected and boycotted **Nault's FNGA process** to develop the legislation.

In preparation for the **May 2002, AFN Special Chiefs' Assembly**, the following legal opinion on the proposed "*Penultimate Draft*" of a **Joint AFN-Canada Work-Plan** for the proposed **First Nations Governance Act (Bill C-7)** was presented to the **AFN Special Chiefs' Assembly**:

> "*we would like to highlight some of the major points raised in our opinion:*
>
> ***How First Nations conduct themselves in respect of their inherent rights in the post-1982 period has far greater legal consequences****, because of section 35. First Nations will need to* ***avoid conduct that can be interpreted as consent or acquiescence to the extinguishments, or more likely, the infringement of their inherent rights.***

L to R: PM Trudeau celebrating Chretien's 25 year anniversary since winning 1993 election, photo taken in 2018.

'2-Track approach to municipalization' continued from page 16

The FNG Proposal if enacted into law will potentially infringe upon First Nation Aboriginal and Treaty rights, namely the inherent right of self-government. The Penultimate Draft establishes a process for the Crown to carry out consultations in respect of this Proposal in a manner, which does not contain adequate safeguards for First Nations. As such, ***the Penultimate Draft could facilitate this infringement by allowing the Crown to satisfy its constitutional duty to consult at a standard lower than would otherwise be required****.*

Justification for the Crown's infringement of the inherent right of self-government should require the consent of First Nations*. However, it is unclear what level of consultation the Courts will require to justify the FNG Proposal. As such,* ***engaging in any consultation process could prove hazardous to the inherent right of self-government****. In short, it gives the Crown a licence to infringe. Therefore, before entering into consultations, First Nations should insist on some guarantees from Minister Nault, in writing, that he would not proceed with the Proposal without some agreed upon level of approval.*

In light of the AFN Charter and given the terms and the spirit of the Resolution of the Chiefs-in-Assembly of July 17, 18 and 19, 2001, the Penultimate Draft does not conform to the Resolution because: ***first, it does not reject the FNG Proposal but rather provides for its continuation; second, it does not give inherent rights priority over the FNG Proposal and does not directly link work and approval on the FNG Proposal with implementation of inherent rights; and third, it does not define the criteria and high standard of conduct for consultation and justification.*****"** [emphasis added]

After debate between the **pro and anti FNGA Chiefs**, the **AFN Special Chiefs' Assembly** adopted **Resolution #3/2002 Endorsement of National First Nations' Rights Agenda**, which overwhelmingly rejected the proposed **AFN Executive Committee's** "*Penultimate Draft*" **Work-Plan** to participate in **DIA Minister Nault's** process to develop the **FNGA**.

As **Prime Minister Jean Chretien** retired from politics in 2003, leading the transition to the leadership of **Paul Martin** who became Prime Minister, **Chretien's Minister of Indian Affairs, Bob Nault**, announced he was

AS AFN-BC Regional Chief, Herb 'Satsan' George led the pro-FNGA faction, but failed to get AFN support as AFN rejected federal FNGA process.

"After debate between the pro and anti FNGA Chiefs, the AFN Special Chiefs' Assembly adopted Resolution #3/2002 Endorsement of National First Nations' Rights Agenda, which overwhelmingly rejected the proposed AFN Executive Committee's "Penultimate Draft" Work-Plan to participate in DIA Minister Nault's process to develop the FNGA"

Matthew Coon Come was AFN Nat'l Chief, 2000 -2003.

PM Trudeau giving his 'Rights Recognition Framework' speech in HoC, Feb. 14, 2018.

'2-Track approach to municipalization' continued from page 17

not running in the next federal election and in a parting gift, **Nault** rewarded **Herb "Satsan" George** for his support of the **FNGA**, to head up the Liberal government's establishment of an "*Independent Centre for First Nations Government*" with an initial budget of $5 million.

The federal bureaucracy has been after national legislation to convert Indian Bands into municipal corporate entities that have the "*power, rights and privileges of a natural person at law*" for decades now.

The approach is consistent with the 1995 "***Inherent Right Policy***" of Self-Government, imposed by **Jean Chretien**, which remains the umbrella policy for **ALL** discussions and negotiations with the federal government.

Despite **Justin Trudeau's** promise to replace the self-government policy in 2018 with "*something better*", it remains in place by the **Trudeau government**, as does the **Indian Act**, despite dissolving the federal **Department of Indian Affairs** in 2019.

"Despite Justin Trudeau's promise to replace the self-government policy in 2018 with "something better", it remains in place by the Trudeau government, as does the Indian Act, despite dissolving the federal Department of Indian Affairs in 2019"

To understand how federally legislated municipal powers would work for First Nations (Indian Bands), it parallels provincial municipalities, the B.C. government describes municipal powers as:

> ***Municipal Corporate Powers***
>
> *In order for municipalities to operate efficiently, they must be able to exercise certain fundamental powers to operate as a legal body and to interact with others.*
>
> ***Corporate Powers in Legislation***
>
> *In B.C., local government corporate powers are broadly stated in provincial legislation and are similar for both municipalities and regional districts.*
>
> *The corporate powers for municipalities are described in section 8 of the Community Charter as being "natural person powers." Municipalities have the same rights, powers and privileges of a "natural person of full capacity". For example, municipalities may enter into legal agreements, buy and dispose of land, hire and manage employees, and take or be subject to legal actions. These are typically referred to as "corporate powers" and are enabled through the Community Charter.*

On June 27, 2019, CIRNAC Min. Carolyn Bennett signs 'Self-Government' Agreement with Metis Nations of Alberta, Saskatchewan & Ontario.

Failing to get First Nations support for his government's proposed 2018 "***Rights Recognition Framework***" **Bill**, for First Nations (Indian Bands) the **Trudeau government** is promoting it band-by-band, at "*Recognition tables*" to sign onto a **template agreement that the Metis of Alberta, Saskatchewan and Ontario have signed in 2019**.

'2-Track approach to municipalization' continued from page 18

Section 7 of that template agreement provides as follows:

> ***FIRST NATION X GOVERNMENT'S LEGAL STATUS, ROLE, JURISDICTION, LAWS, AND AUTHORITY, CHAPTER 7: LEGAL STATUS AND CAPACITY***
>
> "*7.01 As of the Self-Government Implementation Date, the First Nation X Government and each of its Governance Structures will be a legal entity with the rights , powers, and privileges of a natural person at law*".

The following are recent examples of the federal government's attempts to pass national legislation to impose municipal corporate status over First Nations (Indian Bands), which were defeated by First Nations opposition.

Bill C-79, Indian Act Optional Modification Act (1979):

"*Legal capacity of bands - 16.1 A band has the capacity and, subject to this Act, the rights, powers and privileges of a natural person*."

Bill C-7, First Nations Governance Act (2004):

"*Legal Capacity, Capacity, rights, powers and privileges - 15. (1) A band has the legal capacity, rights, powers and privileges of a natural person*".

Proposed Recognition and Implementation of Rights Framework Legislation (2018):

"***To summarize, the legislation could:*** *enable the Government of Canada to* ***recognize Indigenous Nations and Collectives as legal entities with the status and capacities of a natural person****; enable the self-determined exercise of governance by federally recognized Nations and Collectives; affirm Canada's intent to enter into government-to-government fiscal relationships with recognized Nations and Collectives; and, require Canada to co-develop further measures to support these elements*." [emphasis added]

The following are some specific examples of the band-by-band, group-by-group approach (divide & conquer) where First Nations (Indian Bands) have accepted the legal capacity and status—delegated authority (federally created through legislation) as municipal corporations (natural persons at law).

Bill C-93 Sechelt Indian Band Self-Government Act (1986):

"***CAPACITY AND POWERS OF BAND****, 6.The Band is a legal entity and has, subject to this Act, the capacity, rights, powers and privileges of a natural person*".

TLICHO LAND CLAIMS AND SELF-GOVERNMENT AGREEMENT ACT (2003):

"***GENERAL POWERS****, 7.2.1 The Tlicho Government is a legal entity with the legal capacity of a natural person*".

L to R: Coun. Clarence Joe Jr., Coun. Lloyd Jeffries, Chief Stan Dixon, Coun. Warren Paull, Coun. Benedict Pierre Sr. Dixon was chief of the shíshálh Nation in 1986 with passage of Sechelt Indian Band Self-Government Act.

"The following are some specific examples of the band-by-band, group-by-group approach (divide & conquer) where First Nations (Indian Bands) have accepted the legal capacity and status—delegated authority (federally created through legislation) as municipal corporations (natural persons at law)"

Aug. 2003, PM Chretien & MP Blondin with Tlicho at signing of Land Claim & Self-Gov't Agreement.

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Nisga'a Final Agreement Act (2003):

"***LEGAL STATUS AND CAPACITY***, *5. The Nisga'a Nation, and each Nisga'a Village, is a separate and distinct legal entity, with the capacity, rights, powers, and privileges of a natural person*".

Westbank Self-Government Agreement Act (2005):

"***LEGAL STATUS AND CAPACITY***, *19. In addition to Westbank First Nation's capacity to pass and enforce Westbank Law pursuant to this Agreement, Westbank First Nation is a legal entity with the rights, powers and privileges of a natural person*".

Tsawwassen Final Agreement Act (2007):

"***LEGAL STATUS AND CAPACITY***, *7. Tsawwassen First Nation is a legal entity with the capacity, rights, powers, and privileges of a natural person*".

"The AFN, MNC & ITK are now the "Bilateral Mechanisms" the Trudeau government is using to give the public appearance of the "co-development" of policy and law"

Meadow Lake Agreement-in-Principle (2001):

"***8.0 Capacities of a Meadow Lake First Nation and Meadow Lake Tribal Council***, *8.01 Capacities of a natural person Each MLFN is a separate and distinct legal entity with the capacities, rights, powers and privileges of a natural person.*"

Sioux Valley Dakota Nation Governance Agreement Act (2014):

"***SIOUX VALLEY DAKOTA NATION***, ***Capacity***, *5. (1) Sioux Valley Dakota Nation is a legal entity and, without restricting the generality of the foregoing, has the capacity, rights, powers and privileges of a natural person*".

Cree Nation of Eeyou Istchee Governance Agreement Act (2018):

"*Cree First Nations, Legal capacity, 9(3) A Cree First Nation has, subject to the Agreement, the capacity, rights, powers and privileges of a natural person.*"

ANISHINABEK NATION GOVERNANCE AGREEMENT (2022):

"***ANISHINABEK NATION GOVERNMENT***, ***Legal Status and Capacity***, *4.1 The Anishinabek Nation is a distinct legal entity with the rights, powers and privileges of a natural person*".

L to R: AFN NC Archibald & PM Trudeau, at Kamloops Oct. 18, 2021.

The **AFN, MNC & ITK** are now the "***Bilateral Mechanisms***" the **Trudeau government** is using to give the public appearance of the "***co-development***" of policy and law.

In my opinion, if there is no coordinated First Nations movement to stop the Trudeau government's top down secretive negotiation approach at the various federal tables, his government's definition (recognition) of self-

'2-Track approach to municipalization' conclusion from page 20

determination (self-government municipal status) will become the **national federal standard of recognition** and without the national legislation the federal government failed to get, the Trudeau government will likely succeed with group-by-group ratification of self-government agreements through specific federal legislation and the "*assumed sovereignty of the Crown*" set out the section 35 Common Law, which is heavily based on the **Doctrine of Discovery**.

Truth Before Reconciliation:
The **Truth Before Reconciliation Network on Education and Advocacy** is a core team of people who are working to get Crown governments and Canadian society to address "**Truth Before Reconciliation**", because we believe the **Truth and Reconciliation Commission** and its **Calls to Action** are not sufficient to address the colonization that First Nations have historically experienced and which continues today, particularly under the colonial policies and legislation passed under the **Constitution Act 1867** and the unilaterally imposed federal policies and legislation defining Inherent & Treaty Rights in section 35 of the **Constitution Act 1982**.

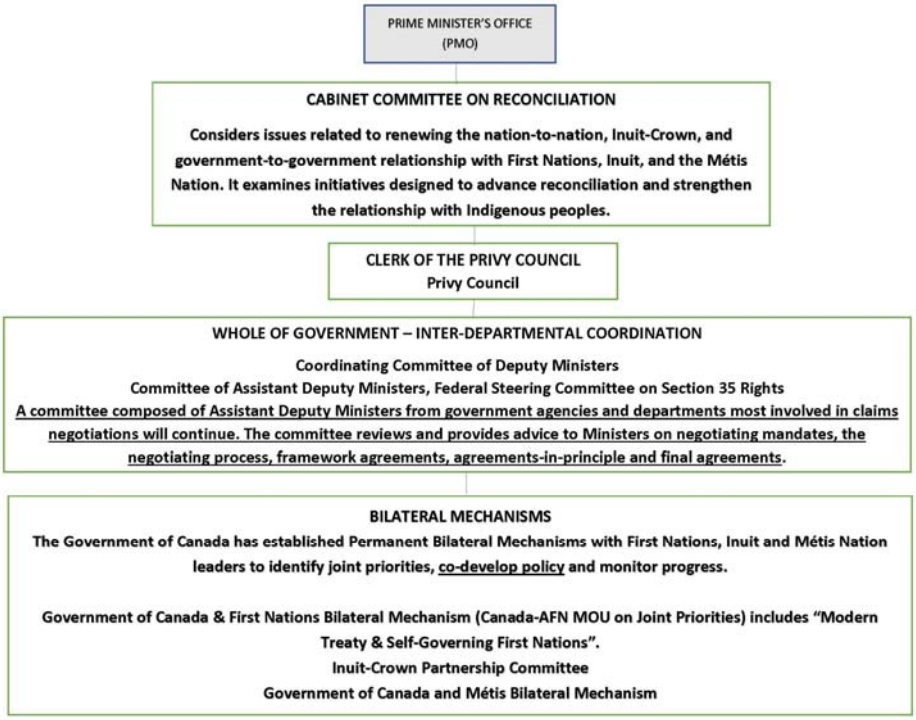

Chart depicting the Permanent Indigenous (AFN, MNC, ITK) Bilateral Mechanisms in the Executive Branch of the Government of Canada for "Co-Development" of Indigenous Policy & Law

CIRNAC Min. Marc Miller has mandate to negotiate "Modern Treaties" & "Self-Gov't".

"without the national legislation the federal government failed to get, the Trudeau government will likely succeed with group-by-group ratification of self-government agreements through specific federal legislation and the "assumed sovereignty of the Crown" set out the section 35 Common Law"

Feds Call UNDRIP an 'interpretive aid only' in Legal Battle over Alberta First Nation's Election Delay

By Brett Forester, May 03, 2022

'It's disappointing, on that level, to see kind of an impoverished interpretation of what the new legislation implementing UNDRIP means in practice,' says lawyer

The Canadian government claims the UN Declaration on the Rights of Indigenous Peoples (UNDRIP) is an "interpretative aid only" that can't be used to strike down federal laws even though Parliament has passed legislation requiring they be in sync.

Lawyers for Indigenous Services Canada (ISC) made the argument in response to a Federal Court challenge mounted by members of a Dene community in northern Alberta against the now-expired regulations that let First Nations postpone elections to deal with COVID-19.

The government, after losing a court case last April, retroactively validated these regulations in a section of the 2021 budget act — a section the group now asks the court to overturn.

"Around the time that they passed the budget bill, Bill C-15 came into effect," explained the group's lawyer Orlagh O'Kelly. "In UNDRIP, there is a requirement to consult with First Nations and Indigenous Peoples before passing legislation that impacts them. We say: That came into effect here and it wasn't followed."

The case was filed by 49-year-old Sidney Chambaud and eight other members of the Dene Tha' First Nation, about 850 kms from Edmonton, after their leadership used the regulations to delay the community's October 2021 election.

In response, the government's legal brief says UNDRIP "may be used as a contextual aid" in interpreting domestic law. "However, neither the UN Declaration nor the UN Declaration Act can displace the Constitution or clear statutory language, nor has any Canadian Court suggested that the UN Declaration itself has constitutional status."

O'Kelly told APTN News she was "disappointed but not surprised" to see the argument, saying it seems to justify the critics' "worst fears" about the **United Nations Declaration on the Rights of Indigenous Peoples Act**.

Tabled in the House of Commons under bill number C-15, the act says the government "must take all steps necessary" to sync federal laws with the declaration. It received royal assent in June 2021 but not without substantial debate and some controversy.

Critics charged the statute would blunt the international instrument's edge by subjecting it to Canadian common law, which already permits the infringement of Aboriginal rights, making it a toothless "legislative guide" the government may simply ignore.

"It's disappointing, on that level, to see kind of an impoverished interpretation of what the new legislation implementing UNDRIP means in practice," said O'Kelly in a phone interview. "People had high hopes for Bill C-15. Those who were cynical about it would say, more or less, 'I told you so.'

"Again, it'll be another interesting issue to see how the court receives that argument."

Legal wrangle ongoing

Chambaud's case is the latest development in a complicated jurisdictional and legal tangle that began when COVID-19 was declared a pandemic in March 2020.

As the novel coronavirus ripped across the planet, First Nations with looming elections feared potential

'UNDRIP only Interpretive' continued from page 22

consequences of in-person voting.

But as councils examined options, ISC told them they had to hold votes or let governance lapse into the band manager's hands as the department had no authority to extend their terms.

ISC similarly told First Nations who select their leaders via custom election codes the department had no jurisdiction in this area and that "the final decision to maintain or to postpone an election is under your purview and must be made in accordance with your community governance code."

The government flip-flopped a few days later by dusting off the Indian Act to produce the First Nations Election Cancellation and Postponement Regulations as a temporary stopgap measure to fight the virus.

But in Sec. 4, the regulations went beyond the Indian Act and authorized First Nations under custom codes to extend their term of office "even if the custom does not provide for such a situation."

Floyd Bertrand, a member of Acho Dene Koe First Nation near Fort Liard, N.W.T., sued for judicial review after his band, which is governed by custom code, used the regulations to extend their term.

Bertrand succeeded. The Federal Court concluded the Indian Act can't override customary election codes, which, the court declared, are a form of self-government and like constitutions.

A judge ordered an election and deemed Sec. 4 of the regulations invalid. The government appealed but also promised to override the ruling by passing a special new law.

This was contained in the 2021 Budget Implementation Act, which retroactively declared the regulations and any decisions made under them valid.

But in overriding the court, Parliament also purported to again override the customary governance codes of First Nations, unilaterally empowering them to extend their term of office even if their codes don't allow it.

Chambaud's leadership in Dene Tha' availed themselves of the newly affirmed regulations on Oct. 7 to stay in office until June 2022, according to court filings. The regulations expired the next day.

Chambaud alleges the government's use of budget legislation on this issue violated both Aboriginal self-government rights protected by Sec. 35 of the Constitution as well as the new UNDRIP law.

He's asked the court to strike down the disputed line in the budget act as illegal and order an immediate election. Chambaud told APTN he and the members backing him just want to vote; if they set a legal precedent, it'll be a bonus.

"Things have got to go through members. Members are the ones that are in charge of who they put in place as leaders," said Chambaud. "We're standing up to this group of eight people: Their term has expired and us, as members, are asking to call elections."

First Nation says decision reasonable

For its part, the Dene Tha' band council argues the election deferral was "a reasonable decision" that falls under chief and council's customary authority, saying leaders must occasionally make emergency decision without consensus or consultation.

"For example, clan leaders made decisions respecting the relocation of sick individuals when dealing with outbreaks of diseases such as Spanish flu, smallpox and chicken pox," says the band's legal brief. "Decisions to relocate during flooding in 1962 were also made by the Nations' family leaders without consultation."

The filing says there will be an election held June 2022, rendering the case moot. The First Nation also argues the nine applicants, who submitted a petition signed by 307 backers, don't have representative

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Feedback is welcome. Let us know what you think of the Bulletin—Russell Diabo, Publisher and Editor, First Nations Strategic Bulletin.

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legal standing to advance arguments about collective Aboriginal rights.

In its legal filing, Canada agrees with the mootness argument and contends a judicial review of a local governance decision is the wrong place to make complicated arguments about Aboriginal self-government rights and UNDRIP.

APTN contacted ISC asking the department to explain why its taking these legal positions but did not receive a response by publishing time.

O'Kelly acknowledges her clients are taking novel positions, but they've asked the court to hear their arguments — even if the case is moot — due to the issues' substantial importance. To support the position, Chambaud's filing quotes from a B.C. lower court ruling handed down in January.

"It remains to be seen whether the passage of UNDRIP legislation is simply vacuous political bromide or whether it heralds a substantive change in the common law respecting Aboriginal rights including Aboriginal title," the judge opined. "Even if it is simply a statement of future intent, I agree it is one that supports a robust interpretation of Aboriginal rights."

While made in the B.C. context, which has a nearly identical law, the courts must eventually face the question of whether Canada's UNDRIP law is a vacuous political bromide or a tool for change, according to O'Kelly.

"How the courts use this legislation is really going to be telling," she said. "There's few cases to rely on, but thankfully some of them have quotes like that."

The judicial review is scheduled for a hearing May 26. Chambaud looks forward to it, though he wishes there were a quicker way to resolve the dispute.

"It's a frustrating point, a lengthy process," he said, "but in the end it's for a good cause."

[Article reprinted courtesy of APTN]