



## **SUMMARY**

### **AN ASSESSMENT OF THE FIRST NATIONS GOVERNANCE ACT**



March 8, 2002

#### **INDEPENDENT REVIEW COMMISSIONED**

The Chiefs of Ontario commissioned Peter Elias, Ph.D., to conduct an independent review of the INAC consultation process for the Governance Initiative of Minister Robert Nault. Some of the key points from the 16 page Elias analysis are summarized below.

#### **UNSCIENTIFIC SAMPLING TECHNIQUES USED**

The INAC consultation was not based on scientific sampling techniques. Rather, there was an unscientific or “nonprobability” collection of opinions and anecdotes. Many of the background or contextual factors (eg. the difficult relationship between INAC and First Nations) only served to increase the unreliability of the INAC data. This kind of anecdotal data can be used to justify any pre-determined result.

#### **MANAGEMENT DATA UNRELIABLE**

At the start of the consultation, in May of 2001, Minister Nault promised a comprehensive consultation open to all First Nations and First Nation citizens. Such a consultation would have been appropriate given the profound effect the governance legislation is certain to have on First Nations. The conclusion of Doctor Elias is that in the end the INAC consultation failed to produce useful and reliable management data.

#### **OVER REPRESENTATION AND PREDETERMINED OPINIONS**

The INAC sampling method encouraged self-selection or over-representation by individuals and groups with pre-determined opinions about First Nation governance issues. This problem was increased by the use of internet sampling, which effectively excluded many communities.

#### **WHO PARTICIPATED**

The consultation record does not establish that key groups (youth, Elders, women) participated in any meaningful way.

#### **INAC AWARE OF INADEQUACY**

The inadequacy of the consultation record was acknowledged by INAC officials in December of 2001. Nevertheless, the Minister’s handpicked Advisory Committee (JMAC) was instructed to proceed to the formulation of detailed legislative proposals.

#### **SERIOUSLY FLAWED**

The consultation was seriously flawed and did not produce reliable management data. The process was not consistent with the respectful and open-ended consultation/consent model recommended by the Royal Commission on Aboriginal Peoples (RCAP). Rather, the process is reminiscent of the pre-determined consultations of the bad old days (eg. the 1969 White Paper).

#### **GOODWILL DAMAGED**

The flawed INAC consultation cost a lot of money and wore out a lot of goodwill. No doubt, in the future it will be much more difficult to convince people of goodwill to participate in valid consultation. The Minister has tainted consultation as feared by the Royal Commission on Aboriginal Peoples.

The complete report will be posted on the Chiefs of Ontario web site:

[www.chiefs-of-ontario.org](http://www.chiefs-of-ontario.org)



# An Assessment of the First Nations Governance Consultation Process

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**Date:** March 7, 2002

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## EXECUTIVE SUMMARY

In May 2001, Robert Nault, Minister of Indian Affairs, launched his initiative to change the Indian Act. He told the T'su Tinna in Alberta that his officials would consult with First Nations populations before drafting changes to the Act. He told them their information, knowledge and opinions would be the basis for change. Minister Nault ...

*... promised the consultation process would reach every aboriginal person in Canada regardless of where they lived, and would include native youth, women and elders. As well, he said [Department of Indian Affairs] officials would consult with all the traditional leadership groups like the Assembly of First nations, provincial political-tribal organizations, band chiefs, and off-reserve native agencies.*

The First Nations Governance consultation process promised to do exactly what the Royal Commission on Aboriginal Peoples urged, that is consultation would be thorough and reflected in development and management plans.

The first round of Indian and Northern Affairs Canada's consultation process is now complete, and ready for a post-mortem.

INAC's First Nations Governance consultation process had two objectives.

Consultation is required by Canadian law when legislation will have an impact on aboriginal or treaty rights, title or interests. As well, it is simply good public policy to consult widely with parties most profoundly affected by legislative change. It could be argued that the legal requirement leads the process, that is that the department is engaged in consultation because it must. If this is the case, the standard for assessing the efficacy of the process is the legal standard — "Is the consultation process sufficient to qualify as 'consultation' according to law?" This is a matter for the courts.

This report addresses the second objective — The process must produce useful managerial data and information. I am satisfied that the process failed to meet this objective.

The sampling method, such as it was, encouraged self-selection, that is individuals with an interest and ready opinions about First Nations governance. They had the training and stature in the community which allowed them to form and declare their opinions in a public meeting, and the time to do so. Alternatively, they had access to the Internet, telephone, fax, or postal services. They could travel to and feel comfortable speaking in a city hotel. Other than this, there is no way to know from the record who the participants represented.

A close examination of the consultation process clearly shows the first round of consultation failed to fill Minister Nault's promise. Too many of the persons he mentions are, in fact, under-represented and under-reported in the record. The first round of the consultation process produced anecdotes, rather than data.

In scientific enquiry, anecdotes are not allowed to shape analysis or decision-making. At best, anecdotes are used carefully alongside other, more reliable and accurate data to illustrate an aspect of analysis. If all anecdotes were taken at face value, it would then simply be a matter of making decisions based on the tallest pile of anecdotes, one pile in favour and one against. Nobody with any managerial sense, much less scientific skill, would take such an approach.

Given the weaknesses in the first round of the consultation process, the resulting analysis must suffer. In other words, the data coming out of the consultation process are little better than a compendium of anecdotes which can be sorted and arranged to support almost any view.

This report only confirms what was recognized by INAC officials in early December 2001. Then, the Minister's advisory committee on this initiative were told that the results of the consultation process were tainted, biased and probably unuseable. Typically, analysis and decision-making does not go forward using obviously failed data, but the steering committee, nonetheless, asked that the record be compiled for their use. Any users of the results of the consultation process should be ready to defend their use against basic challenges to the results' reliability and accuracy.

The consultation process cost a lot of money and wore out a lot of goodwill. In the end, the results of the process are extremely vulnerable to cynical manipulation. No doubt, in the future it will be much more difficult to convince people of goodwill to participate in valid consultation. Instead, the minister has tainted consultation with the bitterness feared by the Royal Commission on Aboriginal Peoples.

# **An Assessment of the First Nations Governance Consultation Process**

## **ASSESSMENT:**

Recent decisions in the Supreme Court of Canada require the Crown to consult with aboriginal peoples if the Crown intends to take an action affecting aboriginal or treaty interests. Depending on the magnitude of the effect of the intended action, the Crown may need merely advise the affected aboriginal population, or it may need their formal consent. The Court has not defined the point at which the Crown's actions trigger the requirement to consult, nor once triggered the magnitude of appropriate consultation. Apparently, the Crown, in this case INAC believes it has a responsibility to consult with First Nations on the matter of revisions to the Indian Act and the construction of First Nations Governance.

In any event, INAC has undertaken a very extensive consultation process as an integral part of its intent to revise the Indian Act. The link between the consultation process and the intended action is described in several documents published by INAC and statements made by the Minister of Indian Affairs.

During a consultation meeting with members of the Siksika First Nation in Alberta, Minister Robert Nault described the role of consultation in the entire initiative.

*Nault said consultations would begin within weeks across Canada and continue through the summer. The resulting new governance bill could be tabled in the Commons by fall. "This is your opportunity to share your ideas on matters that shape your life," he told natives in his speech Monday. "I'm seeking your input before we draft legislation." (Edmonton Journal 01 May 2001, emphasis added)*

*"We are only just beginning consultations so we cannot say what First Nations governance will look like at the end of this process. In broad terms, we would like to look at sharing and developing best practices in the way First Nations ... govern themselves," he said.*

*"There is no secret agenda, no predetermined outcome. If I have an agenda, and I assure you it's anything but hidden, it is to strip the power and authorities bestowed on the Minister of Indian and Northern Affairs under the archaic Indian Act," Mr. Nault said. (CBC News 11 May 2001, emphasis added)*

*He promised the consultation process would reach every aboriginal person in Canada regardless of where they lived, and would include native youth, women and elders. As well,*

*he said DIA officials would consult with all the traditional leadership groups like the Assembly of First Nations, provincial political-tribal organizations (PTO's), band chiefs, and off-reserve native agencies.*

*Nault indicated it was his impression that native people are expecting a two-track approach to the tricky question of tinkering with the Indian Act, and are supportive of a process where ordinary people would be able to offer their input and observations as well as relying on aboriginal leadership to safeguard their interests. (Canadian Press 10 May 2001)*

These statements and many similar statements describe the basic structure of the consultation process — wide solicitation of data, information, ideas and opinions from the full spectrum of populations most likely to bear the consequences of the initiative, followed by drafting of the intended changes to the Indian Act. The clear implication is that change will be based on information derived through consultation. Indeed, the Minister's words say as much.

*“Our aim, as always, has been to engage as many First Nation organizations in this process as possible. Talking to both First Nations leaders and members is essential to gain the wealth of knowledge and experience on which to build this initiative. We need full discussion on the tools needed to ensure effective governance in First Nation communities. Community-level consultations are just the first step.” (CNW 10 May 2001)*

Actually, in this process, consultation has two objectives. As usual when there are multiple, and very different objectives, there is some difficulty in determining which objective has precedence. On the one hand, the objective of the consultation process is to satisfy the legal requirement to consult. At present there are no standards against which the process may be measured to determine legal adequacy. This is a matter for lawyers and the courts.

The second objective is to gain data and information so as to create an initiative best designed to meet First Nation's interests. Indeed, INAC's consultation process is a lengthy project with two main rounds of consultation. The first round, just completed, is designed to draw reaction to the intended initiative. Then, INAC analysts and officials will review the results of the consultation, modify the action in light of what they learned through consultation, draft the intended action, publish the draft widely, write the legislation, then further consult on implementation.

The role of the first consultation is to provide INAC with the managerial data and information needed to accommodate First Nations interests in changes to the Indian Act. In this case and for this purpose, the data and information gleaned from the consultation process should be accurate and reliable.

In principle, the entire initiative rests on the robustness of the first round of consultation, since all subsequent parts of the process must build on the foundation laid in the first round. If the first round of consultation proves effective, then the rest of the process may go well.

**The question is, “How effectively did the first round of consultation serve its purpose?”**

The question, as phrased here, implies that the effectiveness of the first round of consultation must be determined in light of the importance attached to the purpose. Again, the minister’s words make it clear that he and Crown attach great importance to the initiative.

*“Everything dealing with governance contained in the Indian Act is on the table.”*

*“I have sought a mandate from Cabinet to consult in these first days with First Nations between now and late fall, and then go into drafting legislation, and then into the House by late fall or early in the new year with the intent of sending it to a standing committee before second reading, so there can be another full consultation process over a year or so,” said Nault of his timetable. “I think if we have our work completed within two or two and a half years it won’t get delayed by the next election cycle, and we will succeed in making some important structural changes that will help First Nations governments build the capacity to manage their own affairs.” (Canadian Press 09 May 2001, emphasis added)*

*And [Nault] says that recent rulings by the Canadian Human Rights Commission, the Royal Commission on Aboriginal Peoples Report and the Supreme Court of Canada ruling in the Corbiere decision demonstrate that the Indian Act needs a major overhaul. “Rather than having the courts dictate the changes in the relationship between first nations and the government, Nault has said legislators and first nations should be setting the agenda.” (The First Perspective May 2001, emphasis added)*

Similarly, at least some First Nations leaders and citizens attach great importance to the initiative.

*The governance act would affect the Miq’mak from Pictou, N.S. to the Squamish Nation from North Vancouver, B.C. that have different relationships with the Federal Government. (Tekawennake - Six Nations and New Credit News April 28 2001)*

*FSIN legal adviser John Hill said the consultations are too rushed and will “require far more input from First Nation communities. There are serious questions that need to be answered.” (Star Phoenix 02 May 2001, emphasis added)*

*"If we miss this opportunity, it's really going to hurt our grandchildren, our great-grandchildren." (Star Phoenix 02 May 2001)*

*"This is very important. It is going to have lasting impact. It's major." [FSIN Chief Perry Bellegarde] said. (Star Phoenix 02 May 2001, emphasis added)*

Finally, the Minister will spend at least \$10 million on the first crucial round of consultations. The size of the budget, which is substantial, is an indicator of the importance the Minister attaches to the initiative.

Taking these comments at face value, this report assumes that all parties see the proposed initiative as very important for various reasons. Judging from the importance attached to this initiative, the highest level of consultation may be necessary. Indeed, in the *Sparrow* decision, Chief Justice Antonio Lamer of the Supreme Court of Canada said,

*"The nature and scope of the duty of consultation will vary with the circumstances. In occasional cases, when the breach is less serious or relatively minor, it will be no more than a duty to discuss important decisions that will be taken with respect to lands held pursuant to aboriginal title. Of course, even in these rare cases when the minimum acceptable standard is consultation, this consultation must be in good faith, and with the intention of substantially addressing the concerns of the aboriginal peoples whose lands are at issue. In most cases, it will be significantly deeper than mere consultation. Some cases may even require the full consent of an aboriginal nation ... ."*

If the First Nations Governance is as important as the Minister suggests, then perhaps consent will be necessary before the initiative can be implemented. At very least, a high level of consultation is anticipated. Therefore, this report assumes that all parties require high quality data and information upon which to base their decisions. In particular, the Minister needs accurate and reliable data and information in order to construct legislation which accurately reflects First Nations interests.

## **ACCURACY AND RELIABILITY:**

While the consultation process is not portrayed as a method for producing statistical or scientific data, it is nevertheless an attempt to gain reliable and accurate information for purposes of decision-making. The process, then, must be able to pass an assessment of

whether the data are sufficiently accurate and reliable to serve the objectives. If the process does produce accurate and reliable data, then all parties can be assured that decisions based on the data represent the interests of the population. If not, then decisions based on the data must be suspect.

Because of the requirement for accurate and reliable data and information, this report will treat the consultation process as a research strategy. It is assumed that the department hopes to gain useful data from the consultation process and will earnestly try to use the data to best advantage in decision-making. This, in fact, is the stated objective of the consultation process. The assessment, then, will focus on external standards to determine whether the process is able to produce accurate and reliable data for management purposes.

By far, most strategies for producing data are a compromise between the demands of good science and availability of resources for research purposes. Rarely does a researcher have all the resources needed to conduct perfect, textbook research. Nevertheless, researchers are constrained in the extent to which they can compromise between excellence and expediency and still produce useful research results.

Researchers would like to interview simultaneously each and every individual in the population of interest. Then there can be no doubt of accuracy and reliability. Since this wish is rarely, if ever, granted researchers must typically settle for interviewing a smaller part of the whole population and then using data from the smaller population to represent the whole. There are highly standardized ways of selecting the smaller part of the population so that the resulting data does, indeed, represent the whole.

Sampling, or selecting a subset of the whole population to represent the whole, is a concept that covers numerous statistical technologies, and these can be further described as either probability sampling, or nonprobability sampling.

In many fields of research, probability sampling is the desired way of producing accurate and reliable data. It is also the most rigorous, that is the most demanding of technical skills. It is the most rigorous, because if conducted properly, each individual in a population has an equal chance or probability of voicing their opinions in a consultation process. A probability sample best yields data to represent the whole. Probability sampling is predominant in every field of enquiry from anatomy to zoology.

Nonprobability sampling cannot, in itself, make assurance about how well the data represents the whole. The various names applied to nonprobability sampling techniques suggest the

reason — quota, purposive, snowball, haphazard, opportunistic, self-selecting. Usually, nonprobability sampling is used where probability sampling is not possible for cost or logistical reasons, and where there is a great deal of collateral data and information which can be used to guide the analysis of inherently uncertain research data. The social sciences, management sciences, and human services make extensive use of nonprobability sampling and rely on collateral qualitative, quantitative and historic data to analyze the resulting data.

INAC's consultation process is clearly not based on probability sampling. At least, nothing in INAC's publications suggests the department's researchers used techniques of probability sampling when designing a way of gaining data from First Nations. Neither does the organization or presentation of the data reflect the hallmarks of probability sampling, especially aggregate analysis and measures of probability.

There are, no doubt, good reasons why the researchers did not use probability sampling. The First Nations population is large and geographically dispersed. First Nations people speak many very different languages. In fact, INAC was seeking more than head counts of who thought one way or another in response to a prescribed question. They wanted data with depth and volume. The issue under investigation — governance in First Nations — is not easily measured and quantified, limiting the use of standardized response instruments typical of probability sampling.

The subject and conditions are ideal for nonprobability sampling, and that is the technology used in INAC's consultation process. However, because of its inherent weaknesses the best results of nonprobability sampling are obtained when the weaknesses are taken into account and their impact controlled.

If nonprobability techniques are used, the context in which they are used must be thoroughly understood. Context includes the potential for different cultural interpretations of a concept, the relationship between the researchers and the subject population, the spectrum of opinions held by individuals in the population, the history of similar initiatives involving the same agents and populations, and the extent and value of collateral information.

## **THE RESULTS OF CONSULTATION:**

There are no rules setting limits on the appropriate use of nonprobability samples, such as there are for probability samples. Given enough participation, the results of nonprobability

sampling can support any and all opinions. That is why nonprobability data must be buttressed with collateral information.

Nevertheless, there are some basic measures hinting at the resemblance between the sample and the whole population.

There are 256 reports published on INAC's website ([http://www.fng-gpn.gc.ca/CC\\_e.asp](http://www.fng-gpn.gc.ca/CC_e.asp)), and 51 were examined to determine how well the nonprobabilistic strategy adopted by INAC yields useful data and information.

On average, consultation meetings lasted a little over three hours, and involved 25 participants of whom 12 were women. The participants discussed a very broad range of topics having to do with governance. It would seem on average the meetings were rather lengthy, well-attended, gender-balanced, and wide-reaching.

However, the averages conceal four communities where a consultation meeting was convened and nobody whatever participated, or the seven meetings where INAC personnel outnumbered participants. The average is raised by a few meetings that involved forty and more participants. The Native Women of NWT, for example, involved 95 participants in their meeting, obliterating in the average eight meetings which attracted five or fewer participants.

As for the average length of the meetings — three or more hours — eight all-day meetings counterbalance those lasting less than two hours and, in four cases, less than one hour.

Similarly, three meetings convened by women's organizations account for almost 20 percent of women's participation in the entire consultation process. If these three groups are excluded, then participation by women would drop from a marginal 47 percent to less than 10 percent participation. There were a few meetings where there were no women participants and many more where women were few.

INAC's reports also discuss participation by local authorities, NGO's, provincial and territorial governments, non-aboriginal participants, media, and other interested groups. For example, Chiefs in Manitoba typically attended community meetings; the Prince Albert Grand Council had a representative at community meetings in their district; Quebec had provincial representatives at meetings in that province. However, it is difficult to say how consistently these details are recorded and reported by the consultation process's facilitators and rapporteur. The 51 reports analyzed here show considerable inconsistency.

Some reports specified who other than participants attended the meeting, giving their name and affiliation. Others simply give a name, but no affiliation. Thus, the influence of these people on the meeting cannot be determined. For example, the meeting at Black Lake, Saskatchewan, was attended by the local priest, but according to the published reports there is no record of any other priest attending a consultation meeting. Either the Denesuline community at Black Lake is truly unique, or the presence of local clergy was not reported consistently.

At least one report counted infants and children in the group of participants. Some reports count the number of Elders participating, but most do not. None mention youth. None of the reports suggest how many participants represent the delivery of governance services — teachers, health care workers, social workers, administrators. Some reports mention the participation of Chiefs, but most do not.

Either there is inconsistent reporting, or political leaders, Elders, service workers, and youth are severely under-represented in the results of the consultation process. Furthermore, only one meeting reported the participation of non-aboriginal individuals, and in several there may have been Metis or Inuit participants, but that is unclear. Only one report records the participation of several non-aboriginal individuals. For the most part, it is impossible to determine if all, most or even any of the participants are First Nations citizens.

These are inconsistencies expected in any similar research strategy involving a large number of field researchers, that is facilitators, information officers, and rapporteur. On average, there were three INAC people at each meeting. This implies a large field staff who must be well-trained to impart consistency to their reports. The INAC literature says nothing about how many individuals were at work on this initiative, what they did, or how they were trained to do it.

While it is impossible to say from the record who the participants represent other than themselves, but there are some indicators.

The subset of 51 reports examined here includes 27 reports of meetings held in First Nations communities rather than in a hotel in a far-off city which is where many of the meetings were held. The meetings were accessible to the local on-reserve population. Still, only very small numbers participated relative to the First Nation's total and on-reserve populations. For example, two of the larger First Nations in Saskatchewan — Kitsaki and Montreal Lake — attracted less than one percent of their on-reserve population to participate. Meetings in Winnipeg, Toronto and Vancouver, each with many First Nations residents, attracted infinitesimal participation.

There is a suggestion that First Nations were consulted which had no vested interest in the outcome of the initiative, including First Nations in jurisdictions where the Indian Act does not apply. Since the meetings were open-house, anybody could and did make comment — leaders, Elders, Crown agents, NGO's, neighbouring interests, and citizens — but there is no way of telling who said what from the public record.

As well as consultation meetings, INAC also offered media consultation through an interactive Internet poll and questionnaire, a toll-free number, and a mail-in or fax-in form. Several participants commented on the lack of appropriate technology to make use of these services.

*Critics of the plan ... wonder how well submissions made over the Internet can be verified and controlled. (Canadian Press 02 May, 2001)*

*And the Manitoba chiefs ridiculed INAC's pitch to use the Internet to consult with grassroots people as out of touch with the reality of reserves. Given the very simple fact that most first nations communities lack basic infrastructure, this is totally unrealistic. In Manitoba over half the first nations communities cannot access the Internet," the chiefs stated publicly in a press release. (First Perspective May 2001)*

There is no report on the effectiveness of the media approach to consultation. However, INAC's website has a 'chatroom' in which participants are asked to respond to several rather technical questions about First Nations governance. Recently, there were only a handful of responses, suggesting minimal use of the media, and there is no way to know who the respondents are or who if anybody other than themselves they represent.

There are too many obvious flaws in the results of the consultation process. Because of ambiguities, inconsistencies, and technical errors the data could be made to mean anything or nothing. In other words, the process yielded little data useful for management purposes — data that can lead to effective decision-making.

Bias intrudes from several directions — political, technological, economic, gender, age, incentive, and experiential. Nonprobabilistic research rarely faces the challenge of untangling such complexes of bias. Of all the seven thousand people who participated in the consultation meetings, who did they represent?

Nonprobabilistic sampling is inherently flawed, but can be useful when the context of the process is thoroughly understood. Context includes the potential for different cultural interpretations of a concept, the relationship between the researchers and the subject

population, the spectrum of opinions held by individuals in the population, the history of similar initiatives involving the same agents and populations, and the extent and value of collateral information.

In my opinion, the FNG consultation process does not adequately control for context.

## **DIFFERENT CULTURAL INTERPRETATIONS OF A CONCEPT:**

A subject like governance must implicate the breadth of aboriginal peoples' cultural expression, but none of the issues raised in the communities was put in an historic or cultural context. Thus, it is difficult to determine the relative importance of what was recorded and what was said in the meetings.

For example, an Elder in the Athabasca Denesuline community of Black Lake, Saskatchewan told the researchers he wanted his Chief given a treaty uniform just like the one given out when Treaty 8 was signed in 1899. There is no mention of political or cultural symbols in the published reports, even though they were raised in several open house forums.

### **The relationship between the researchers and the subject population**

First Nations leaders and INAC officials opened talks, but these soon faltered and remain stalled to this day. At best, the relationship between INAC and the subject population is ambiguous, tending towards hostile. In this case, I assess hostility by the level of refusal to participate in the consultation process. There are, in fact, many individuals, bands, regions, First Nations, and First Nations NGO's which refuse to participate in the process. They have withdrawn from the pool of sample candidates for an open house forum, and taken their expertise and opinions with them.

Early in the first round of consultation, the Minister announced he would serve his government's agenda regardless of First Nations issues and priorities by proceeding with changes to the Indian Act with or without representative participation. This announcement came after several large First Nations organizations refused to participate. Until that time, it seems there were other First Nations and organizations willing to let the process unfold, without either favouring or condemning it. After the Minister's threat, these 'neutral' participants

all but disappeared, realizing that their participation would not alter events. This must have driven down the level of participation in the consultation process.

By the end of the first round of consultations, entire regions of First Nations had sworn not to participate in the consultation process, including the member First Nations of the Interior Alliance and UBCIC in British Columbia, Ontario, Manitoba, all the Treaty 8 region of Alberta, and much of Saskatchewan.

## **THE SPECTRUM OF OPINIONS HELD BY INDIVIDUALS IN THE POPULATION:**

The problems began early, when INAC chose a format of open-house consultation. People were invited at large to attend a meeting and discuss the intended changes to the Indian Act. This is inviting bias in the form of self-selection. The bias may be nothing more than an abiding and sincere interest in First Nations governance and a desire to participate in settling the issue. It could also be much more than that, including participation by paid partisans. For example, several of the consultation meetings were held only for the aboriginal employees of INAC, meetings at which employees were expected to make their thoughts known under the eyes of the bosses. The problem arises in determining how well those with a special interest in governance represent the views of their First Nation.

For many different reasons, First Nations' communities, leaders, political and service organizations, and the AFN refused to participate in the first round of the consultation process. News clippings from across the country suggest many First Nations were either indifferent to the initiative, or actively opposed. At a stroke, many of those individuals best able to participate in consultation meetings withdrew.

Others would participate only if there were fundamental changes to the consultation process which in effect would place control of consultation in the hands of local authorities. This change would completely alter the Minister's expectations of utility, since he could no longer manage the process. This would be the reaction of any researcher who suddenly lost control of a project, but was still responsible for its outcome.

In any event, by summer of 2001, at least one-third of First Nations had nothing to do with the consultation process or were actively opposed. The spectrum of opinion is very much narrower without their participation.

## **THE EXTENT AND VALUE OF COLLATERAL INFORMATION**

The effect of bias on the open house consultations could be moderated with thorough use of contextual and collateral information.

INAC has a great deal of collateral data and information available and a long corporate memory, but there is little evidence suggesting the consultation process made use of these resources. For example, while the published reports of the meetings state how many people have been involved and in how many communities, it does not set these numbers in a demographic context. Women seem severely under-represented in many meetings. Are there much fewer women than men in many First Nations communities, or are they and their opinions under-represented in the process? There is no information about the ages of the participants, that is how well they represent generational variables. INAC routinely produces demographic and historic data, but none appears in the report. This removes the ability of other researchers to assess how well the research was managed and how well it fits accepted practices in nonprobability sampling, especially the effective use of collateral resources.

## **ANALYSIS AND ORGANIZATION OF THE CONSULTATION RESULTS:**

The consultation process must have produced a great volume of raw data — audio recordings, video recordings, minutes, and notes. Usually, such qualitative data are analyzed and organized, and as a result, a large volume of data are reduced to the data best suited to the initiatives's purpose, that is to provide useful managerial information. This is a usual component in the use of nonprobabilistic sample data.

The meeting facilitators were required reduce the raw data and to report on three topics clearly stated in the reporting form.

*What were the key issues, concerns and/or recommendations raised by participants related to governance subject matters?*

*Which, if any, of the following three subject matter areas received the most attention: legal standing and capacity; leadership selection and voting rights; or accountability to First Nation members?*

*What other issues, if any, were discussed?*

Many topics may have been discussed in the meetings, but the only information passed on to the minister addresses these three questions. In fact, a very few reports mention topics that were raised but not reflected in subsequent organization of the data. These other topics include indigenous languages, the content of school books, sewer and water services, housing, bussing, the advantages of wood heat, economic development, jury duty, natural resource royalties, Metis rights, bingo, medical services, roads, health, discrimination, poverty, justice, environmental protection, and child services. Although one of the questions asks, "What other issues, if any, were discussed?", many reports contained no information at all under this heading. As discussed below, there is a section in INAC's website summarizing the results of the first round of consultation. These summaries are structured to answer the three questions stated above. There is a heading titled "Other issues", but few of the other issues raised in the meetings and mentioned in the reports survive to this level of reporting.

In the case of the FNG consultation process, there are inconsistencies in how the contents of the consultations are recorded and reflected in the published reports. Each consultation report includes a section titled "Attestation", and includes this paragraph:

*To the best of our abilities to listen and comprehend, this report reflects our understanding of the opinions, positions, concerns and recommendations of participants at this meeting on First Nations Governance issues and on the consultation process used to gather their views.*

This can hardly be an accurate description of what is in the report. Some reports merely state in list form the subjects, without any mention of opinions, positions, concerns and recommendations. In others, there is a much more extensive record describing the outcome of the discussions as well conclusions reached and disputed.

Again, either some consultation meetings were incredibly terse and focused or the results are inconsistently reported.

The inconsistent reporting, however, may be irrelevant in light of how the data were subsequently analyzed and organized.

The INAC website includes a section titled, “What We've Heard : Preliminary Findings” where it is claimed:

*The first phase of consultations on the First Nations Governance initiative is complete. The following provides an initial feedback on “What We’ve Heard.” The information is by no means complete. More detailed analysis will follow, but in the meantime, it is important to share these preliminary findings. They will contribute to the development of options that will serve as the basis of new FNG legislation. We will continue to update these findings.*

The “Preliminary Findings” are the first step in separating the information from the data. Typically in a management setting, the data and the community reports are archived and stored at this point while the preliminary findings are moved forward in the initiative. The introduction to the Preliminary Findings concludes:

*From the voices of many, common themes will emerge and we can take the next steps to develop new legislation. First Nations Governance initiative is “on track” and will move forward with First Nations. ([http://www.fng-gpn.gc.ca/PF\\_ont\\_e.asp](http://www.fng-gpn.gc.ca/PF_ont_e.asp))*

In light of the many errors in the execution of the consultation process, this seems a rather extravagant claim. There is no mention of the meeting where five individuals appeared, denounced the process, and left. The community reports are politely worded, but there must have been very heated consultations across the country. The intensity, barely reflected in the community reports, is gone.

The rest of the summary reports address the other two questions in detail. Some of the reports are very particular, obviously addressing governance issues of local concern. Others are very formal and terse. Inconsistent reporting at this level of the process could easily result in misleading information being given to the managers and decision-makers.

Only a careful tracking of all the information between the preliminary summaries and the data would show how well the summaries represent the population. There is, however, an indicator of how the summaries might mislead a manager. Each regional summary is about the same length, that is each contains about the same quantity and quality of information a decision-maker might use. Fair enough, but there were over seventy meetings in Saskatchewan and only three each in Yukon and Northwest Territories. Every region was given the same space and weight in the summary going forward to management. This could result in bias, especially since First Nations in the territories stand in a different relationship to the Indian Act than other First Nations.

The fate of the information produced in the consultation process is far from certain. The entire initiative has been underway for less than a year with almost two years of work still to do. The Minister of Indian Affairs appointed an advisory committee to assist with the rest of the work. In late 2001, the committee produced its first record of meetings. The record is 115 pages in length and represent days of intense discussion of how to shape the pending legislation. It is not until page 94 that the results of the consultation process are even mentioned.

*The committee members asked about the results of consultation. There was a suggestion that the DIAND policy support team provide reports on the consultation inputs. However, concern was expressed that the consultation inputs would likely not be valid as a result of a number of issues, including, the objectivity of federal consultation documents, knowledge of the issues that First Nations were being consulted on, the lack of ability to distinguish the input of First Nation/non-First Nation participants, etc.*

These are only a few of the serious flaws that plague the consultation process, and even though the Minister's advisory committee knows the consultation process is seriously flawed, the committee intends to use the results anyway.

The DIAND policy support theme captains will provide written reports on the consultation inputs for all FNG themes to the JMAC to assist Committee members in the development of their assigned paper. (First Nations Governance Initiative, Meeting of the Joint Ministerial Advisory Committee, November 20, 2001, MEETING SUMMARY AND RECORD OF DECISION)

This trivial approach to consultation is by no means what First Nations people have in mind when they speak of consultation. The report of the Royal Commission on Aboriginal Peoples contains many reference to consultation as part of the process of building a new relationship between aboriginal peoples and the Crown. The report describes the 'old' way of doing things

*The intentions of those who made the policies and those who implemented them may have been just in their own eyes, but Aboriginal peoples could be treated in this way only because different standards applied to them than to other Canadians. Decisions could be made for them – token consultation was all that was required. To do anything else would jeopardize the desired outcome. And these moves were undertaken, it is now apparent, with no understanding of their profound and debilitating impact on almost all aspects of the [life].*  
(<http://www.indigenous.bc.ca/v2/vol2ch4s6.4.asp>)

Almost every theme discussed in the Royal Commission's report stress the importance of serious consultation.

*Under the approach we propose, instead of being guided by a policy developed unilaterally by federal authorities, which establishes preconditions for negotiations and constrains possible outcomes based on the preferences of the Crown, disputes over lands and resources should be resolved through legitimate processes of consultation and negotiation enshrined in legislation. The release of the white paper on federal Indian policy in 1969 generated a storm of protest from Aboriginal people, who strongly denounced its main terms and assumptions. It left in its wake a legacy of bitterness at the betrayal of the consultation process and suspicion that its proposals would gradually be implemented. (<http://www.indigenous.bc.ca/v2/vol2ch3s4.2.asp>)*

Despite the Royal Commission's recommendations, INAC has continued with a unilateral approach which will only add to this legacy of bitterness. Not coincidentally, as objections to the process rose from First Nations across the country, INAC made severe reductions in funding to tribal organizations.

## **CONCLUSIONS:**

In May 2001, Robert Nault, Minister of Indian Affairs, launched his initiative to change the Indian Act. He told the T'su Tinna in Alberta that his officials would consult with First Nations populations before drafting changes to the Act. He told them their information, knowledge and opinions would be the basis for change. Minister Nault ...

*... promised the consultation process would reach every aboriginal person in Canada regardless of where they lived, and would include native youth, women and elders. As well, he said [Department of Indian Affairs] officials would consult with all the traditional leadership groups like the Assembly of First nations, provincial political-tribal organizations, band chiefs, and off-reserve native agencies.*

The First Nations Governance consultation process promised to do exactly what the Royal Commission on Aboriginal Peoples urged, that is consultation would be thorough and reflected in development and management plans.

The first round of Indian and Northern Affairs Canada's consultation process is now complete, and ready for a post-mortem.

INAC's First Nations Governance consultation process had two objectives.

Consultation is required by Canadian law when legislation will have an impact on aboriginal or treaty rights, title or interests. As well, it is simply good public policy to consult widely with parties most profoundly affected by legislative change. It could be argued that the legal requirement leads the process, that is that the department is engaged in consultation because it must. If this is the case, the standard for assessing the efficacy of the process is the legal standard — "Is the consultation process sufficient to qualify as 'consultation' according to law?" This is a matter for the courts.

This report addresses the second objective — The process must produce useful managerial data and information. I am satisfied that the process failed to meet this objective.

The sampling method, such as it was, encouraged self-selection, that is individuals with an interest and ready opinions about First Nations governance. They had the training and stature in the community which allowed them to form and declare their opinions in a public meeting, and the time to do so. Alternatively, they had access to the Internet, telephone, fax, or postal services. They could travel to and feel comfortable speaking in a city hotel. Other than this, there is no way to know from the record who the participants represented.

A close examination of the consultation process clearly shows the first round of consultation failed to fill Minister Nault's promise. Too many of the persons he mentions are, in fact, under-represented and under-reported in the record. The first round of the consultation process produced anecdotes, rather than data.

In scientific enquiry, anecdotes are not allowed to shape analysis or decision-making. At best, anecdotes are used carefully alongside other, more reliable and accurate data to illustrate an aspect of analysis. If all anecdotes were taken at face value, it would then simply be a matter of making decisions based on the tallest pile of anecdotes, one pile in favour and one against. Nobody with any managerial sense, much less scientific skill, would take such an approach.

Given the weaknesses in the first round of the consultation process, the resulting analysis must suffer. In other words, the data coming out of the consultation process are little better than a compendium of anecdotes which can be sorted and arranged to support almost any view.

This report only confirms what was recognized by INAC officials in early December 2001. Then, the Minister's advisory committee on this initiative were told that the results of the consultation process were tainted, biased and probably unuseable. Typically, analysis and

decision-making does not go forward using obviously failed data, but the steering committee, nonetheless, asked that the record be compiled for their use. Any users of the results of the consultation process should be ready to defend their use against basic challenges to the results' reliability and accuracy.

The consultation process cost a lot of money and wore out a lot of goodwill. In the end, the results of the process are extremely vulnerable to cynical manipulation. No doubt, in the future it will be much more difficult to convince people of goodwill to participate in valid consultation. Instead, the minister has tainted consultation with the bitterness feared by the Royal Commission on Aboriginal Peoples.