

Memorandum to Cabinet

Mémoire au Cabinet

TAKING ACTION ON GOVERNANCE:
FIRST NATION GOVERNMENT
SUPPORT PROGRAM RE-DESIGN

Date

Minister of Indian Affairs and
Northern Development

Date

Ministre des affaires indiennes
et du Nord

DRAFT 3-9-8

MINISTERIAL RECOMMENDATIONS

ISSUE

Whether and how to implement the Aboriginal Agenda priority on governance through redesign of Indian Government Support programs to achieve more effective, responsible and accountable First Nation governments.

RECOMMENDATIONS

It is recommended that:

- consistent with the Government's Aboriginal Agenda priorities, the Minister of Indian Affairs and Northern Development (IAND), pursuant to the *Indian Act*, be authorized to implement a plan, set out at Annex A, to complete the design of a new program to foster more effective and accountable First Nation governance, and to modernize and integrate the disparate and out-dated suite of programs now in place to support Band Council and Tribal Council funding for core governance programs;
- an investment be made on a cash basis to extend Indian and Northern Affairs Canada's (INAC's) efforts to build expanded accountability and good governance at the Band and Tribal Council level:

Department	2010-1011	2011-2012	2012-2013	2013-2014	2014-2015	5-Year Total
INAC – A-Base	344	344	344	344	344	1,720
INAC – Fiscal framework						
Total						

This proposal is unfunded other than for the existing reference level investment from INAC's A-base. The stated cash amounts

- based on a recently completed engagement process with experts and willing First Nation partners, a reformed and integrated program authority be sought from the Treasury Board by the Minister of IAND in order for the re-designed governance First Nation program to be operational as of April 1, 2010.
 - the Parliamentary Plan, as set out in Annex C, be approved, and that it be implemented in consultation with the Office of the Leader of the Government in the House of Commons, the Office of the Leader of the Government in the Senate and the Prime Minister's Office. Should the effective implementation of the Plan require further policy, legislative or program design change, the Minister will return to Cabinet for approval; and
 - the Strategic Communications Plan, set out in Annex D, be approved, and all communications activities, including the timing of any announcement, be approved in consultation with the Privy Council Office and the Prime Minister's Office.
- ### RATIONALE
- The Government of Canada and willing First Nation partners are making progress in a wide range of areas. We have empowered First Nation citizens and protected the vulnerable through legislation to extend the *Canadian Human Rights*

Act to cover all activities under the *Indian Act*, and we are proceeding to ensure matrimonial property rights on reserve. We have acted on education reform and new educational institutions. We have made new investments in community water, sewer and housing infrastructure and introduced new service quality standards. We are accelerating land claim settlements with legislation establishing a fully independent tribunal. Finally, we are reconciling other historic grievances, through the residential schools settlement and the creation of a Truth and Reconciliation Commission.

7. Effective implementation of the Government's Aboriginal Agenda depends for success on effective, democratic and accountable First Nations governments. As one of our five priority areas for action, governance consists of the decision-making structure and the supporting legal framework, policies, procedures and institutions that enable First Nations to achieve the objectives and discharge the obligations mandated by their constituents. A critical feature of good governance is the ability to adapt and take advantage of opportunities for social and economic growth. Where the governance framework is weak or lacking in core competencies, reliance cannot be placed on it to exercise the authorities required for social and economic development. For many First Nations, governance capacities are weak or seriously in question. Over and above the constraints of an out-dated legislative framework provided in the *Indian Act*, First Nations are hampered by governance support programs that were designed by Indian and Northern Affairs Canada (INAC) a quarter century ago.
8. First Nations now exercise responsibilities far beyond those contemplated by the existing Indian Government Support programs, and face greatly expanded pressures on their core governance needs and capacities. Efforts to align the First Nation governance framework with modern government requirements have been attempted over the past two decades -- in constitutional proposals; in sectoral legislation; through self-government negotiations, and in national legislation. Most initiatives have stalled. In the meantime, First Nations face the need to manage a continually increasing scope of governmental services, including social welfare and income assistance; primary and secondary education, utilities, land and environmental management, and membership and election systems. What is missing is a framework that reflects modern 21st century demands on First Nation governments to be accountable to their members, financially responsible to Parliament, and effective in discharging their growing responsibilities.
9. Indian Government Support programs now in place were designed, and are still funded, in aid of a limited range of devolved programs once delivered through district and local INAC offices. Created in another era, these programs have not been reformed to reflect or fund the new responsibilities facing First Nations, such as modern audit and election burdens, information technology requirements/standards, the growth of legal and insurance costs, the much higher volume of Band Council business and greater demands for open government. The returns on our considerable new investments in social, education, housing and utilities (water, sewer, power, etc.) are in peril as long as they are being administered by Councils that are ill-equipped to do the job that all Canadians expect of their governments. Our investments, and the returns we are hoping for,

are both at risk as long as core governance programming and capacities remain so out of touch with modern realities.

10. For over a decade now, First Nation leaders have called for measures to close the growing governance deficit prompted by the outdated suite of programs for Indian Government support now in place:

- A \$216 Million Band Support Funding program of grants based on long out-dated criteria tied to the devolution of 1980s-era federal programs to Band administration; now funding at only a minority portion of the governance costs faced by First Nations [we should have a capacity assessment-based figure of the current funding level in comparison with our preferred option];
- \$114 Million in a general Band Advisory Services program that is increasingly unable to cover it's intended purposes: to fund Band employee benefits and a range of technical and related support and advisory services (mostly delivered by Tribal Councils); and
- A \$13.5 Million program for professional and institutional development that, while more contemporary and project-driven in design, is only able to respond to a fraction of First Nation demand for capacity improvement.

11. The Band Support and Band Advisory Services programs were designed around the limited administrative capacity of First Nations in the 1970s and 1980s, and to manage devolved federal programs such as education. The third and smallest program has been a "stop gap" effort to build governance capacity over the past decade in the wake of the recommendations of the Royal Commission on Aboriginal Peoples. Together with other INAC, Health Canada and other departmental program funding, the Auditor General has criticized the accounting and reporting burden triggered by the many authorities involved, with auditing and information technology costs having grown ten-fold over the past 20 years without matching increases in funding.

12. A number of options have been assessed. The *status quo* would not achieve modernization, nor meet the requirements identified by repeated program evaluations reported to the Treasury Board. The first substantive option is therefore to reform the programs incrementally: by re-profiling the existing program components and to update funding levels to support more narrowly defined objectives. A second model, the preferred approach, is to utilize the advice and counsel of First Nation administrators, leaders and specialists directly in program re-design to ensure both effectiveness and relevance. The goal is to transform existing programs through a transparent, measurable and accountable process to establish what First Nations should receive in order to assist their core governance operations in a modern context. A third approach would be to modernize the core governance authorities of First Nations governments through legislation, with new governance support programs developed to implement a new legislative framework.

13. The recommended approach, set out at Annex A to the MR, builds on a focussed but inclusive engagement strategy, the results of which are described at Annex B. [Sample language only: It was confirmed in the course of two national meetings with First Nation administrators and leaders that the most pressing

demands for accountable and effective governance must be met, but could be achieved without the need for a potentially lengthy and controversial legislative process.] The approach would be operational in nature, but transformative in outcome. The goal is to build on First Nation collaboration in the creation of a fair and balanced formula that reflects real, contemporary Indian Government Support needs, backstopped by a process for independent, third party determination of First Nation governance capacities and a means to strengthen those capacities where gaps are apparent. In this approach, First Nations and their constituents are direct participants in building the formula by which they are to be funded. Capacity gaps would be identified by a third party mechanism, with incentives for good governance provided.

CONSIDERATIONS

14. Indian Government Support programs should contribute to the integrity of decision-making structures, policies, procedures and institutions that permit First Nations to achieve effective governance. They must also contribute to effective program and service delivery within the community, and to maximizing economic and social development opportunities. Based on the work of the Royal Commission on Aboriginal Peoples, the United Nations Development Program and other sources, ten key functions of good governance appear critical in a First Nations context:

- Leadership selection
- Membership
- Decision-making
- Law-Making & Enforcement
- Financial Management
- Human Resource Management
- Administration & Information Management
- Community Planning
- Community Consultation/Engagement
- Intergovernmental Relations

These functions reflect underlying values of democracy, accountability and effectiveness. The challenge is how to generate a consensus on the most appropriate and measurable functions of modern First Nations governance, and implement a new Indian Government Support program with incentives for First Nation governments to meet or exceed the new standards involved.

15. The achievement of broad agreement around a new design for Indian Government Support programs has been achieved through a focussed but extensive engagement strategy. The consensus was driven by the practicalities of administrative necessity and was largely technical in nature, yet guided by fundamental principles shared by both western and traditional First Nation approaches to governance. The challenge was, and remains, to arrive at an informed and shared understanding of what governance factors are essential for a new Indian Government Support program, and how best to measure and remedy capacity needs. The redesigned program also builds on the advice of the 2006 Blue Ribbon Panel on Grants and Contributions by ensuring that reporting requirements and accountabilitys are relevant to the objectives of good governance and linked to the recipient government's administrative capacity.

16. There are two potential adverse consequences of proceeding to finalize an operational redesign of governance support programs. Even an operationally oriented renewal of the programs might trigger broader demands for a rights-based approach to First Nation government powers. Second, a redesign of governance

support requires the use of transparent comparators and independent evaluation techniques. As set out at Annex A, the formula developed in the course of the engagement process discloses the need for new funding at levels that are likely higher than any unilateral re-profiling of the existing programs might involve, and higher than can be accommodated by INAC's existing reference levels. Option 1 – incremental re-profiling and updating of certain costing factors – holds fewer financial implications, but would, if proceeded with, invite the charge that stringent standards for administrative accountability are being imposed on First Nations without any adequate funding being provided to meet those standards, and at levels below those available for comparable governance costs of municipal, provincial or federal authorities.

17. Proceeding with Option 3, a fully legislated approach to modernizing clear measurable and accountable functions of First Nation government, entails risks of a different magnitude. Many functions of modern First Nation governance lack a clear basis in legislation – including financial and democratic accountability systems. Many of the funded programs that Band Councils operate are similarly without clear legislative foundations – including those in realms of education, income support, health, and child and family services. Any attempt to provide clear legislative guidelines for core Indian government functions is very likely, however, to be perceived as imposing new standards unilaterally, and may lead to entrenched opposition of the type that grew in relation to the *First Nations Governance Act* in 2002-2003.

18. There is a range of horizontal policy impacts. Better relations with provinces, territories and municipalities are forecasted as capacities and expertise grow in the First Nations public service. Most if not all federal and other government programs provided to First Nations rely upon Band delivery, and therefore on effective and accountable Band governments. Program efficiencies and program effectiveness across the board can be forecasted, as will a growth in confidence by other funding agencies and partners in the ability of First Nations to deliver sectoral programs accountably.

IMPLEMENTATION PLAN

19. As set out at Annex X (Implementation Plan) the following timeline reflects the anticipated delivery of a renewed Indian Government Support Program:

Milestone	Target
<ul style="list-style-type: none"> • Finalize functions of government, capacity and performance measurement tools and indicators taking into account audit and evaluation reports • Submission to Treasury Board • Secure un-funded requirement • Implement new Indian Government Support Program through two new stream-lined and focused authorities (one grant-based, the other contribution-based) 	<p>Summer 2009</p> <p>November 2009 Budget 2010 April 1, 2010</p>

20. Risk: The very fact that the initiative focuses on “governance” is likely to trigger challenges from some First Nation leaders that the government is simply

imposing yet more accountability standards on First Nations, instead of building on First Nations' own priorities and traditions of governance.

21. Strategy: Building on the successful engagement of First Nation administrators in the past six months, the finalization of the new Indian Government Program will highlight that this initiative is all about providing First Nations an operational response to their requests for a new and expanded program. Regionally sensitive dialogues and the advice of neutral, third party experts has cast the new program design as very much a practical one, though critical to the success of First Nation governments. The use of governance factors based on First Nation definitions and those from international and Royal Commission sources will aid in ensuring that First Nations traditions and priorities are as important to the redesign outcome as are federal government considerations of transparency, accountability and budgetary restraint.

22. Risk: The recommended approach may heighten expectations for enriching major program administration funding (e.g., Health, Social Assistance, Education) in line with the need for a professional First Nation public service that meets standards akin to those at the provincial or municipal levels.

23. Strategy: The communications strategy and program renewal process has and will continue to emphasize that new resources are being committed to good governance at the core, which will aid more effective administration of all programs. Program enrichment, whether to redress administrative needs or delivery standard compliance, will depend entirely on the relevant program authorities being assessed on program-specific audit and evaluation results.

DUE DILIGENCE

24. Subject to Cabinet's recommendations, a submission to the Treasury Board would be made to seek new program authorities and to amend terms and conditions for grants and contributions by April 1, 2010. A new Indian Government Support program, based on modern and First Nation relevant functions of democratic, accountable and effective government and subject to third-party assessment of capacities, would provide clear and contemporary performance measures.

Financial, Asset and HR Implications

27. Implementation of the new program, guided by the principles set out in the Implementation Plan (Annex A), will require funding at the level of \$___ Million beginning in 2010/2011. Of this amount, \$344 Million will be sourced from INAC's existing reference levels. A source for the remaining \$___ Million annually and ongoing is required. The Chief Financial Officer of INAC has reviewed this Memorandum to Cabinet (MC) and has provided an attestation to his Deputy Minister certifying that resource requirements are fairly and fully stated based on information available at the time of presentation of the MC.

Reviews, Results and Accountabilities

28. Audits and or evaluations have been conducted on all Indian Government Support program elements in the last five years. [fining of the evaluations is a problem that needs to be addressed with A&E].

29. Audit and Evaluation studies report a clear picture: the current level and nature of Indian Government Support programming is insufficient to match the broadened obligations and pressures on Band or Tribal level governments and administrations. In most cases, intervention through imposed joint or third-party management of Band affairs is directly attributable to failures in core governance that in turn owe much of their occurrence to limited capacities in the key functions of governance and the even more limited ability of either the Regional offices of INAC or of Headquarters programming to redress.

COMMUNICATIONS PLAN

29. to be drafted by Communications Branch, with MO input

Minister of Indian Affairs and Northern Development