DISCUSSION NOTES

ON

THE INDIAN ACT

DEPARTMENT OF CITIZENSHIP AND IMMIGRATION – INDIAN AFFAIRS BRANCH

DISCUSSION NOTES ON THE INDIAN ACT

Introduction

We are now ready to proceed with an important review of the Indian Act. Perhaps the first step should be to examine together some of the main features of the Act which appear to require amendment, and to consider what changes in the underlying principles are necessary in order to reflect the needs, objectives, and desires of the Indian people.

The purpose of this paper is to focus attention on some of the present provisions and objections or suggestions that have been made with respect to them. The comments herein are intended to facilitate and promote discussion. They do not necessarily represent the Government's view, for the Government does not wish to come to any firm views in regard to changes in the Act until it has the benefit of your advice. However, we have taken into account submissions by Indian bands and associations, as well as interested non-Indian groups to the Joint Committee on Indian Affairs, along with subsequent representations made by Indian groups and individuals and our own experience with the problems and needs of Indians.

Background of the Indian Act

The Indian Act, c. 149, R.S.C. 1952, provides the legal framework within which the affairs of the Indians are administered by the Government of Canada in accordance with the exclusive legislative jurisdiction vested in it by the British North America Act. It does not embody all the laws applicable to Indians, for generally speaking they are subject to the same laws as non-Indians. Rather, the Indian Act represents special legislation taking precedence over provincial legislation which the Parliament of Canada considers is essential

to the needs of the Indian people not only as a safeguard to protect their treaty and property rights, but as a means of promoting their advancement. It does not include, however, many of the programs operated by the Indian Affairs Branch which are authorized each year by Parliament through the Estimates and Appropriation Acts.

Prior to 1951 the last complete revision of the Indian Act was in 1880. That Act had been amended from time to time but it had become increasingly apparent that many of the provisions of the old Act were outmoded and did not provide a sufficient framework within which the needs and aspirations of the Indian population could best be met. During the years 1946, 1947 and 1948 a Special Joint Committee of the Senate and House of Commons considered the Indian Act and the administration of Indian affairs in general. As a result of the work of this Committee and the representations made to it by Indian organizations, Indian bands, and groups and individuals interested in the welfare of Indians, a new Indian Act was passed by Parliament in 1951.

In considering the whole question of Indian legislation, it must be realized that there are a great many Indian bands widely scattered throughout Canada, speaking different languages, differing in racial and cultural background, and in various stages of economic, political, and social development. In view of these varied and diverse Indian interests, a comprehensive Indian Act must be broad enough to accommodate the different Indian groups and communities. The 1951 Act modernized and improved existing legislation in light of conditions existing at that time. Even more important is the fact that it reflected a shift of emphasis from traditional protection towards self-government. However, it has become obvious that further changes are required to meet present-day conditions. This is borne out by the many suggestions

that were made by Indians and others to the Joint Committee on Indian Affairs in the years 1959 to 1961 and since. A copy of the final report and recommendations of that Committee is in the material accompanying this paper.

For convenience, the subjects are dealt with under general headings. Where there are specific sections of the Act relating to the subject, these are indicated.

Application of the Act - Section 4

This section establishes three principles:

(1) That with the exception of the sections which provide that reserve lands cannot be sold or alienated without a surrender by the band (Sections 37 to 41), the Governor in Council may by proclamation declare that any other section or sections of the Act shall not apply to an individual Indian, to a band or to a reserve or surrendered land.

(2) That the provisions of the Act pertaining to the education of Indian children shall not apply to Indian children ordinarily resident off reserves or Crown lands.

(3) That unless the Minister otherwise orders, the provisions of the Act pertaining to wills and estates of deceased Indians shall not apply to Indians ordinarily resident off reserves or Crown lands.

One of the suggestions that have been advanced is that provision (1) above should not be used unless the band council consents.

Definition and Registration of Indians - Sections 5 to 17

In the present Act, the provisions for determining entitlement to Indian status and membership were drafted to meet a specific problem, i.e. the fact

that prior to 1951 band lists were incomplete and their accuracy was questionable. It was intended to overcome past difficulties by allowing those who could qualify to come into membership, while at the same time giving bands an opportunity to put out of membership any persons who were not entitled to be members.

Many adjustments have been made to the lists since 1951; and if it were not for the fact that a few persons might be excluded from the benefits of the Act, it would be possible to close the lists and set up a fairly simple basis for persons seeking membership in future. However, this would infringe on rights granted by the 1951 Act, and the 1951 basis might be retained, although modified, in respect to correct some of the problems and difficulties that arise under the present provisions.

As a result of the Registrar's obligation under the Act - to register and to post on band lists the name of every person entitled to be registered as an Indian - information about the circumstances of the unmarried Indian mother and her child which welfare agencies treat as highly confidential becomes public knowledge. Parental choice as to whether or not a child is registered would resolve this aspect of the problem, especially where the child is put out for adoption. Problems pertaining to the legal adoption of children fall into two categories. The non-Indian child legally adopted by Indian parents is not entitled to band membership and is denied certain privileges and benefits such membership provides for his adopted family. He may be rejected by the reserve community and be treated as a trespasser. At the same time the Indian child legally adopted by non-Indians remains an Indian within the meaning of the Indian Act. Provisions within the Act for registration of the child legally adopted by Indian parents and for withdrawal from membership of the Indian child adopted by non-Indian parents would serve to resolve these specific issues.

The special provisions for protest of the addition to a band list of the name of the child born out of wedlock perpetuates to some extent the undesirable features of the 1951 Act, which the amendment in 1956 was intended to correct. Reference is made to the provision whereby a child of an Indian mother was not entitled to be registered if the putative father was considered to be non-Indian. The one-year protest period causes delay and uncertainty in planning which has detrimental effect on the future welfare of the child. It has been suggested also that in some instances it is contrary to the custom of those Indians who follow the matriarchal system, where the child always follows the status of the mother. Accordingly, the suggestion has been made that the illegitimate child of an Indian woman should be eligible for membership regardless of who the father might be.

Reserves - Sections 18 and 19

Although reserves have been set apart for the exclusive use of the Indians, of necessity portions of them are required by the Government for the administration of the affairs of the Indians. Subsection (2) of Section 18 provides the authority for the Government to use reserve lands for such purposes and to pay compensation to Indians whose rights of possession may be affected by such use.

Prior to 1956 the authority of the Minister under this subsection was much broader than it now is. Originally, reserve land could be made use of for the specific purposes set out in the subsection and "for any other purpose for the general welfare of the band". However, the section was amended in 1956 to provide that making use of land for the general welfare of the band must be with the consent of the band council.

This subsection could also be called the band expropriation section, for under its authority if a band required an individual Indian's land for some

purpose in the general interests of the band the council could ask the Minister to take the individual's land for the purpose. While the section has been rarely used in this manner, the authority for such expropriation is there. It is likely to be more commonly used in cases where reserve roads are being widened and some members of a band may be opposed to the idea and refuse to agree to give up part of their land for this purpose. It has been suggested that the individual Indian and the band council rather than the Minister should agree on the compensation to be paid, and failing agreement there should be some means of appeal.

Section 19 provides authority in the Minister to plan for the orderly development of reserves. The section is virtually unchanged since the first Indian Act and the authorities therein are rarely exercised without the full consent of the band council. There has been considerable criticism of the wide and apparently arbitrary powers vested in the Minister by the Indian Act; and it has been suggested that the band council should exercise the authority in this section or that since councils have authority to make by-laws for zoning, construction of roads, etc., the section could be repealed.

Possession of Land in Reserves - Sections 20 to 29

These sections establish a land registry system and provide that an Indian may acquire legal possession of a parcel of land in the reserve only by allotment from his band council and with approval of the Minister. Once an allotment has been made he may transfer or sell it to another Indian of the same band subject to approval and the recording of the transfer by the Department, or may devise it to his heirs. If he ceases to be a member of the band he must dispose of his property to the band or a member of it.

These sections have not proved entirely acceptable to Indians and have presented difficulties in administration. The Certificate of Possession system of land holding has not been adopted by many bands. However, most bands recognize that individual Indians have rights to the parcels of land they occupy and to the improvements thereon. It has been suggested that Indians be permitted to transfer, sell or devise recognized interest in reserve land even though such lands are not held by them under a Certificate of Possession.

It has also been suggested that the band council should be given more authority to establish the conditions for setting aside land for the use and occupancy of individual Indians and also to determine whether the conditions have been fulfilled with an individual Indian having some means of appeal when he considers an unfair decision has been made by his band council.

Certain problems relating to the registration of land have become apparent in the administration of Indian estates. In years gone by transfers of property on reserves were frequently not recorded, and it is not unusual in administering an Indian estate to find a gap in the chain of title to the estate property which cannot be closed by the production of any existing document. To meet this difficulty it has been suggested that formal recognition might be given an Indian or the estate of a deceased Indian as having a right of possession to land in a reserve in cases where continuous undisputed possession can be established for a substantial period of time.

Section 28 provides that permits may be granted by the Minister to occupy or use a reserve. Where the permit is for more than one year this may be done only with the consent of the band council. It has been suggested that the band councils themselves should have authority to grant permits instead of this being done by the Minister.

Trespass on Reserves - Sections 30 and 31

Only the members of the band for whose use and benefit a reserve has been set apart have any legal right on the reserve and all other persons, Indian or non-Indian, may if their presence on the reserve is unauthorized be guilty of trespass. Some have advanced the opinion that the trespass section should be more detailed and specific, others that general trespass on reserves should be dealt with on the same basis as other private property.

Section 31 provides the machinery for the recovery of lands in a reserve improperly held or occupied by non-Indians. It has been suggested that the section should be broadened to include land improperly held by an Indian as well.

Sale or Barter of Produce - Sections 32 and 33

These sections apply only to Manitoba, Saskatchewan and Alberta. Section 32 (1) provides that Indians on reserves in those provinces must obtain a permit from the Agency Superintendent before selling cattle or farm produce.

This provision was presumably intended originally to protect the Indians concerned. However, it discriminates against Indians in those provinces as compared with those in other provinces, and it appears to have outlived its usefulness.

It has been suggested that in so far as their livestock and produce from their land are concerned Indians of these three provinces should be free to decide when and to whom they should sell. Accordingly, these sections might be removed from the Act. If any bands wish to set up a permit system of their own, extension of the by-law making powers of band councils in Section 80 could be considered.

Roads and Bridges - Section 34

As worded, Section 34 presupposes that Indian Superintendents will be giving orders to bands to perform certain maintenance work on reserves. While there may have been some necessity for the section years ago, today band councils are quite conscious of their responsibilities in maintaining roads, fences, and bridges.

The section calls for arbitrary decisions by the Minister on local matters which, it is contended, could just as well be left for decision by band councils. In short, it has been suggested that the principle set out in the section is archaic and it should be repealed.

Lands Taken for Public Purposes - Section 35

Section 35 is often described as the expropriation section of the Indian Act. This is a misnomer for the term expropriation implies "taking without consent", whereas the exercise of such a right against reserve lands is not conferred by the section.

In the public interest, certain corporations are authorized by federal or provincial statute to take private lands for their purposes without the consent of the owner. Normally, this right could not be applied to Indian reserves, nor does the Indian Act confer this right upon them. Rather, it provides that if they can establish a valid need for reserve land, the Governor in Council may consent to it being taken subject to such terms and conditions as may be prescribed.

The principle established is that the Governor in Council decides in any particular case whether the public interest shall be paramount to the band interest. In recent years, it has been the general practice to require

all companies seeking consent under this section to first reach agreement with the band concerned. Provinces, as well as certain corporations, may seek land under this section of the Act. However, it does not give the Federal Government similar rights. If Canada wishes to acquire Indian reserve property for purposes other than those set out in Subsection (2) of Section 18 of the Indian Act, it must negotiate with the band in the same manner as would an individual. Some Indian groups have suggested that band council consent should be acquired before lands are granted for public purposes.

Surrenders - Sections 37 to 41

This is one of the key parts of the Act in that it affirms the general principle, in existence since the first Federal statute regarding Indians and their lands, that no disposition may be made of reserve lands without the joint consent of the band and the Governor in Council.

More and more frequently Indian councils are carrying out more of their negotiations regarding major sales or leasing of reserve land. However, these negotiations are at all times subject to review by the Department, which usually acts in these matters not only as an adviser to the band but, if the need arises, as the authority having the final say. More bands are, nevertheless, using their own business consultants. It has been suggested that more authority ought to be given to the band councils to manage their own land matters. In this respect, there are two significant areas covered by the present surrender provisions: (a) lands that are sold, and (b) lands that are leased.

At present, both lands that are leased and lands that are sold must be surrendered by the voting members of the band. To the majority of the Indians

the word surrender implies the loss of their land and this has given rise to difficulties regarding proposals for leasing. It has been suggested, therefore, that the word surrender should only be used with respect to the sale or complete alienation of reserve land. On the other hand, leasing might be dealt with in a different manner. For example, it has been suggested that the band council ought to be authorized to enter into leases up to say ten years and that only in cases of longer leases would it be necessary for the council to seek the authority of the voting members of the band. Where lands are to be sold outright then it may only be done with the approval of the band members.

There have been one or two other aspects of the surrender provisions which require attention. At present the Act is worded so that only adult members ordinarily resident on the reserve may vote at a surrender. There are some bands that are quite small and the members are scattered with no one living on their reserve. As a result, it would not be possible for them to legally surrender their lands even if they wished to do so. If all members are entitled to vote in band affairs, irrespective of where they reside, this would correct this weakness.

Estates of Indians - Sections 42 to 52

Jurisdiction and authority in relation to all matters having to do with the estates of deceased Indians have been vested in the Minister for years. The same is also true for the property of mentally incompetent Indians and of infant Indian children.

There have been a number of changes suggested with respect to these sections. First of all, under the Act at present, if the estate of an Indian

does not exceed $2,000 in value, it shall be given to the widow to the exclusion of other heirs. It has been pointed out that this amount is too low and that the amount should be raised to at least $5,000. The average value of Indian estates has increased considerably since 1951. As the major asset in most estates is a parcel of land, to require that an estate in the $3,000 to $4,000 category be divided among several heirs is likely to destroy the economic value of a barely adequate land unit and therefore deprive the widow of a livelihood from the estate.

It has been found by experience that Section 51, while fairly broad in scope, does not contain clear authority to use the property of mentally incompetent Indians for the support of their family and dependents, and it has been suggested that this omission should be corrected.

The provisions of Section 52 cover the property only of minor Indian children, and does not in any way relate to the guardianship or custody of the person. The heading "guardianship" is inaccurate and a heading signifying a trustee relationship would be more accurate. In this regard, it has been suggested that the Act set out the authority for administration and use of the child's property in much the same way as would be the case of the guardian or public trustee in one of the provinces.

There have been other minor technical suggestions made which would bring the estates provisions more into line with provincial law.

Management of Reserves and Surrendered Lands - Sections 53 to 60

Sections 53 to 57 are administrative sections which outline formalities to be observed in the disposal of surrendered lands and provide the authority for the passing of regulations governing the disposal of timber, mines and minerals.

Sections 58 and 60 are very important sections. Section 58 deals with (a) leasing of unused or uncultivated land; (b) leasing of individually - held land; and (c) disposal of sand, gravel, fallen timber, etc. Leasing is carried out by the Minister on behalf of the band or the individual concerned. It has been suggested that the band council should be able to approve leases of band land whether or not it is unused or uncultivated and that they should be able to do this for periods of up to say ten years, without requiring a formal surrender by the voting members of the band. Where the leases are for a long term, then the consent of the band members might be required.

As far as individually-held land is concerned, it has been suggested that the individual Indian should have more control over leasing, and that he should be able to have the right to lease his land in his own name and be fully responsible for all aspects of the transaction.

At present, the Act provides that the Minister may dispose of sand, gravel, etc., on the reserve with the consent of the council unless there is undue difficulty or delay in getting council consent. It has been suggested that the band council should be in a position to sell sand, gravel, clay and other substances on its own authority.

Section 60 provides that an Indian band may be given the right to take over the management and control of its reserve lands. While the authority is in the Act, it has not been used to any extent yet. One suggestion that has been made is that the band council might be given responsibility for land management rather than have all decisions taken by a majority of the electors of the band as required at present. If the band were a legal entity and the council could legally enter into contracts, the management of reserve land might be more readily carried out at the local reserve level.

Management of Indian Moneys - Sections 61 to 68

Sections 61 to 68 provide, among other things, for the Government to pay interest on the funds it holds for bands; for two types of band accounts, the first a capital account in which shall be placed moneys derived from the sale of land or capital assets, such as timber, minerals, etc., and the second a revenue account in which all other moneys received on behalf of the bands shall be credited; the various purposes for which capital and revenue moneys may be expended, and so on.

Generally speaking, these sections of the Act have operated fairly satisfactorily. As might be expected there are complaints from councils from time to time that they are over-restricted in expending their funds, that the Act does not go far enough in permitting expenditures for certain purposes.

In 1951, Section 68 provided the first major change in the basic principle that management of Indian moneys should be under the control of the Government and made it possible to transfer management and control to band councils. This may be done for revenue moneys.

Up to 1959 no band had specifically asked for control of its revenue moneys, although several bands had asked for information on the subject previously. However, within the past six years about 100 bands have requested and been given authority to manage all or part of their revenue moneys. Annual budgets are prepared and, once approved, the moneys are placed in a local bank account and used to pay accounts for the purposes set out in the budget.

A number of suggestions have been made, however, for increasing the purpose which band funds may be used for and also for granting more authority to the band council over the use of band moneys. Among the changes suggested is that Section 64 should take into account that a band may acquire capital

money from a source other than the sale of surrendered land and that all moneys derived from the capital assets of the band should be regarded as capital moneys for all purposes. There are some restrictions now.

Another suggestion is that there should be some provision included for the guarantee of loans made to the members of the band from any credit source. At present, capital funds may be used to guarantee loans for building purposes, but this does not extend to other worthwhile purposes. Some bands have, however, guaranteed loans made by some of the banks and by this means have enabled their band members to obtain necessary financial credit.

It has been suggested also that the band council should be able to control and manage capital funds as well as revenue and that Section 68 should be amended accordingly. The thought here is that since the band council operates under a budget, and once the budget is approved there is no reason why the administration of the funds should not be carried out locally. If suggestions made elsewhere to give the band council authority to enter into contract locally are adopted, then it would place in the hands of the band council not only authority to make the contract but also to pay the accounts when they come due without having to send them to the Indian Affairs Branch for processing.

Financial Credit - (See Sections 69 and 88)

There are important limitations on the ability of Indians to obtain credit, and one of the main reasons for this is contained in Section 88 of the Indian Act. This section provides that the real and personal property of an Indian or a band situated on a reserve cannot be pledged or mortgaged to anyone other than an Indian, and such property is not subject to attachment or seizure except at the instance of an Indian.

These provisions served as a protection to the Indians, and were intended to prevent the alienation of Indian property. It has become increasingly evident, however, that under present-day conditions some changes must be made which will open to Indians additional sources of financial credit, and credit of various types, which have previously been unavailable. Unless this is done, economic advancement will be seriously handicapped, and the need for action has been recognized in representations made by a number of Indian spokesmen.

It seems to be generally agreed that there must be some form of restriction on the pledging of real property, so that land cannot be alienated from a reserve. This may mean that certain sources of intermediate and long-term credit, requiring first mortgages on real property, would continue to be unavailable. However, this difficulty might be overcome in large measure if, for example, bands were permitted to pledge their interest in reserve lands as security for loans. Bands with insufficient funds of their own for lending purposes might then borrow from a loan fund and in turn make loans to band members who would pledge their individual interest in real property as security.

A system of band and/or government guarantees of loans from lending institutions might be possible, as a substitute for the type of security normally required by the lender. This and other types of guarantee arrangements would have to be carefully explored to determine if they would be feasible.

Turning from real property to personal property, the removal of the restriction on the pledging of personal property would be a simple matter, and it would enable Indian individuals and bands to have access to forms of short-term credit such as bank loans under Section 88 of the Bank Act,

and loans secured by chattel mortgage. There is a great need for this type of financial credit for economic development on Indian reserves.

Whatever may be done to facilitate loans from normal financial sources, there might still be a place for departmental loans and advances. It has been suggested that the Revolving Loan Fund should be increased in amount and its scope should be broadened. Another suggestion is that a separate Development Fund should be established to finance reserve business enterprises.

In any scheme that might be developed it would be necessary to ensure that a band or the Department, as the case may be, is provided with adequate authority to foreclose and realize upon real or personal property taken as security for a loan or guarantee.

Farms - Section 70

Under the provisions of this section, the Minister may operate farms on reserves, may employ persons to instruct Indians in farming, and may apply any profits from the operation of such farms towards assisting Indians to engage in farming. There have been no departmentally-operated farms for some years. Where community farms are operated, these are under the direction of the band council. The section, therefore, serves little purpose and might well be dropped from the Act, as the band councils themselves can operate community farms as they wish.

Regulations - Section 72

This section sets out various matters on which the Governor in Council may make regulations.

At present the following regulations have been made: Indian Reserve Dog Regulations; Regulations Governing the Operations of Pool-Rooms, Theatres, Dance Halls and Other Places of Amusement; Indian Reserve Traffic Regulations; and Indian Health Regulations.

Concurrent authority to make by-laws on some of the same subjects is also given to band councils under Section 80. It has been suggested that some of the powers now given to the Governor in Council to make regulations might be transferred and given to the band council under their by-law making authority.

Election of Band Councils - Sections 73 to 79

Subsection (1) of Section 73 was intended to provide a uniform system which would be applicable to all bands. It will be noted that the wording of it is such that is applicable only to bands that have been designated as subject to its provisions. The remaining bands continue to elect their chief and councillors according to the custom of each band. The majority of the bands do come under the provisions of the Act and progressively fewer and fewer bands are adhering to their traditional system of electing and holding office.

The Act as it is presently worded can only be applied to bands that have reserves. It has been suggested, however, that Section 73 be amended so that bands not living on reserves, such as those in the Yukon and Northwest Territories or on Crown lands, will be able to adopt the elective system if they so wish.

It also seems desirable to consider adding to the methods by which a chief and councillors are elected. It has been claimed that the present fixed term of office does not provide the necessary continuity of experienced

members on council, and this could be achieved by having overlapping or staggered terms of office. This is done in many rural municipal councils and school boards. If a provision were added to permit a system of overlapping terms, presumably it should also specify that this system would only be adopted if approved by a majority of the voters of a band at a referendum held for that purpose.

There are additional methods of electing a chief that might be considered. For example, it has been suggested that a single slate of councillors be elected, and the councillor receiving the greatest number of votes would be the chief of the band. The advantage of this would be that whereas unsuccessful candidates for the office of chief are now eliminated from council, they could still serve as councillors if they received sufficient votes to put them in office. In this way the best possible council could be selected.

This system would be similar to that covered by Sec. 73 (3) (a) (ii), except that the councillor who became chief would be elected to that office by popular vote rather than by a majority of the elected councillors. Bands using this system might elect one councillor for every one hundred members plus one additional councillor. The new system could be introduced by majority approval at a referendum.

Another aspect of importance is the eligibility of Indians to vote in band elections. Section 76 provides that an elector must be twenty-one years of age and "ordinarily resident on the reserve". Prior to 1951 the word "ordinarily" did not appear in this section. Lacking any clear definition as to what is meant by "ordinarily resident" the eligibility of any voters who may be living off the reserve is open to question. It is doubtful whether the section as worded meets the needs of the majority of the Indians. The increasing Indian population and lack of opportunity on

many reserves is compelling more Indians to seek employment outside the reserves and establish residence away from the reserve in order to hold employment. However, such residence away from the reserve does not necessarily imply a lack of interest in the affairs of the band. There could be a strong argument put forward for suggesting that all band members twenty-one years and over should be eligible to vote. It has been suggested, therefore, that the residence qualification be removed from the Act, and that the holding of property or an interest in property be added as an alternative to residence in those reserves where more than one electoral section has been established.

The expiry date of the term is automatically set by the first election, and this has not proved satisfactory for those bands who may wish to have their elections held at a more suitable time of the year. The bands endeavour to hold their elections at a time when the majority of voters are on the reserve, but employment and other conditions may change so that a date which may have been satisfactory some years ago is no longer suitable. This could be corrected by providing authority to extend or reduce the term of office by six months. More realistic dates for holding elections and taking office could then be worked out for any band where circumstances change. The change could be brought about in accordance with the wishes of majority of the adult members of the band voting at a referendum held for the purpose.

The two-year term of an elected council also creates difficulties in situations where it is found virtually impossible to hold an election before the expiry date. When this happens, there is no duly constituted council and the business of the band comes to a standstill. This difficulty could be overcome by adding a provision which would enable the existing council

to act until the new council takes office, provided this is done within a specified period of, say, six months.

There have also been suggestions made that the term of office should be for one, three, four, or five years, rather than the two years now in effect.

Powers of Band Councils - Sections 80 to 85

Band councils may make by-laws on a number of matters of local concern. It has been suggested, however, that the authority to make by-laws should be expanded to include a greater number of matters of direct concern in the administration of reserve affairs. For example, among the things suggested is that the council should be able to designate areas as park lands, playgrounds, commercial, industrial, residential, grazing or farming areas and in general be able to control the utilization of land within a reserve. In addition to a general control of land use, councils' authority might be broadened to include the operation and management of local works or services.

Safety on the reserve is another matter that has been of concern, especially fire prevention and protection, and problems relating to sanitary conditions in private premises as well as public places on the reserve. The regulation of the hours of businesses or trades, pool rooms, dance halls, public games, sports, races, athletic contests, and other places of amusement as well as the control and management of picnic and camping grounds and fees for the use thereof have also been suggested as some of the powers councils should have.

At present the provision of Section 72 may only be applied by the Governor in Council. It has been suggested that any band council should

be able to make money by-laws if it so wishes and that its powers of raising money should be increased; for example, it has been pointed out that the band council ought to be able to levy taxes on the interests of non-Indians occupying reserve land and also raising money by means of a community service or poll tax.

In addition, it is suggested that more by-law authority should be set out whereby officials of the band might be hired, the terms of their employment prescribed, and also the amount of remuneration to be paid.

Taxation and Legal Rights - Sections 86 to 89

Section 86 exempts Indians from direct taxation on their interest in lands on their reserves or their personal property situated on a reserve. There is one exception to this and that is band councils may impose taxation by by-laws. Various Indian groups have suggested that the exemption from taxation should be broadened and that special consideration should be given to those Indians who must seek a livelihood through fishing rather than use of reserve land.

In discussing the need for financial credit to enable Indians to obtain the necessary funds for economic development purposes, reference was made to the provisions of Section 88 as being one of the main obstacles to Indians obtaining credit from financial institutions. Since under Section 88 the real and personal property of an Indian cannot be pledged, mortgaged or seized, it is not possible for Indians to get credit where the financial institutions will only lend if adequate security is given. It has, therefore, been suggested that some means should be found whereby at least any Indian who wished to do so could put up for security any of his personal property. If this were done and the Indian was unable to repay his loan then the lending institution would be able to realize on the security.

Similarly, if means are found whereby a band may borrow money from a lending institution it would undoubtedly have to put up some security and be subject to having such security foreclosed in the event of default of payment.

Intoxicants - Sections 93 to 100

In the Indian Act the sections dealing with intoxicants provide for various stages of development: (a) the first is one of total prohibition; (b) the second provides for the consumption of alcoholic beverages in public places, and is brought into effect on the request of the province concerned and with the concurrence of the Governor in Council (This stage is now in effect in British Columbia, Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, Nova Scotia, and the Yukon and Northwest Territories); (c) the third stage, permitting Indians to purchase and use intoxicants off reserves in the same manner as other residents in accordance with the laws of the province, may be proclaimed by the Governor in Council at the request of the province concerned. This has been proclaimed for Saskatchewan, Manitoba, Ontario, Quebec, New Brunswick, and the Yukon and Northwest Territories.

Provision is also made in the Indian Act for Indians residing in a province where the third stage is in effect to hold a community referendum at the request of the band council concerned. If a majority of those voting are in favour, the Governor in Council may issue a proclamation permitting the possession of intoxicants on the reserve. This has been done for a number of bands in Saskatchewan, Manitoba, Ontario and New Brunswick.

Where the third stage is not in effect in a province, referendums may still be held, but only if the province does not object to the band council's

request for a referendum within sixty days after it has been notified of the request. If the band obtains the right of on-reserve possession following referendum, its members have, in so far as the Indian Act is concerned, the right to also purchase and possess intoxicants off reserves in accordance with the laws of the province. A number of bands in British Columbia, Nova Scotia and Alberta have obtained the right of possession both on and off their reserves under this procedure.

In the light of present-day circumstances, it has been suggested that Indians should have the same off-reserve liquor rights as other residents of the province where they reside, and their on-reserve privileges should be a matter for decision by the band concerned.

It has therefore been suggested that the intoxicant provisions in the Indian Act be amended so that the situation would be as follows:

(a) Off reserves, there would be no restrictions in the Indian Act on the possession, consumption, sale or manufacture of intoxicants by Indians.

(b) On reserves, the present federal restrictions concerning (1) possession and consumption, (2) sale, or (3) manufacture of intoxicants would still apply until a majority of the electors of a band voting at a referendum have signified that they wish to have one or more of these privileges on their reserve.

This would still require some legislation on the subject - prescribing the prohibitions and procedure for bringing into effect changes desired by the electors of various reserves.

An alternative approach to the foregoing might be to repeal all the present provisions respecting liquor and give the band councils authority to pass a by-law respecting the sale, manufacture, possession or consumption

of liquor on the reserve, and to prescribe penalties for infractions. This would give complete control to the residents for what is done on the reserve. Off the reserve Indians would be in the same position as any other resident of the province in which he lives.

The third alternative would be to repeal all the provisions respecting liquor so the Indians would have the same rights and privileges and operate under the same laws as other residents of the province.

Enfranchisement - Sections 108 to 112

Enfranchisement is the legal process whereby a person ceases to be an Indian within the meaning of the Indian Act. It carries with it loss of band membership rights, as well as loss of Indian status. The enfranchisement provisions of the Act and the term "enfranchisement" itself have been misunderstood and misinterpreted by many of the people concerned. The number of enfranchisements for the past 10 years has ranged from 473 to 1,123, the majority being Indian women who were enfranchised following marriage to a non-Indian and their children. The enfranchisement provisions may have retarded the progress of the Indian people, for it appears that many Indians feared they would be enfranchised if they left their reserves in an attempt to better their conditions. This feeling while not general seems to have persisted among some, despite the fact that the compulsory provisions of the Indian Act have been repealed.

In line with the findings and recommendations of the Joint Parliamentary Committee on Indian affairs, it has been suggested that the enfranchisement provisions of the present Act be repealed, and the term "enfranchisement" no longer be used. By taking this action, the Indians' right to remain Indians would be acknowledged, the status distinction between Indians and

non-Indians would be abolished, and the principle would be affirmed that Indians are Canadians of Indian racial origin.

Withdrawal from Band Membership

Repeal of the enfranchisement provisions would leave no way in which a band member could give up his rights if he so desired, and this would infringe on the freedom of the individual. It appears, therefore, that some means of voluntary withdrawal from band membership might be considered.

Should the right to withdrawal be subject to certain conditions? For example, the provisions of the Act might require that the male or female member of a band who wishes to withdraw from membership (1) is of the full age of 21; (2) has resided continuously away from the reserve for not less than, say, three years; and (3) is capable of supporting himself (or herself) and his (or her) dependents or can show evidence that he (or she) is being supported.

A woman who does not meet the above conditions but who is married to a person who is not a member of a band might reasonably be made eligible to apply for withdrawal if she has been married not less than some stipulated period of time, say two years, and is living with her husband. This would be a matter of voluntary withdrawal. In other words, Indian women who marry non-Indians would not automatically lose their membership in the band. They could still retain their membership rights as long as they wished.

It has been suggested that, unless they are living apart, neither a husband nor a wife should be able to withdraw without the other joining in the withdrawal application. Their minor unmarried children might retain their band membership rights, or be included in the withdrawal application, according to the wishes of the parents.

The above suggestions refer to voluntary withdrawal. In addition, it has been suggested that provision should be made for automatic withdrawal from membership in cases where Indian children are legally adopted by non-Indians. While in theory there may be no reason why an Indian child adopted by non-Indians should forfeit its membership rights, yet the retention of such rights conflict with the confidentiality that is maintained in adoption matters and would be inconsistent with the principle that adoption severs the child's ties with its natural parents and any rights that it may have from them.

It has also been suggested that provision be made for automatic withdrawal from membership in cases where the birth of an illegitimate child of an Indian woman is legitimized by the subsequent marriage of its Indian mother and non-Indian father.

Distributions on Withdrawal

The present Act recognizes that a band member has an interest in the assets of his band. Upon enfranchisement, he is entitled to receive a share of band funds and annuity moneys, where these are payable. It has been suggested, therefore, that the existing entitlements following enfranchisement might also apply in the case of a withdrawal from membership. Exceptions to this might be made as in the case of illegitimate children who are struck off a band list because their births have been legitimized. It has been suggested, however, that an adopted child who ceases to be a member of the band by reason of adoption should receive the usual entitlements.

It has also been suggested that no person who withdraws or was previously enfranchised or commuted should be paid the entitlements more than once.

Withdrawal of Bands

In the present Act provision is made for bands to become enfranchised. If the enfranchisement provisions are removed, this would no longer be possible. Some provision could be made which would enable a band to withdraw from the operation of the Indian Act, if it so desires. For example, a band might wish to incorporate and receive title to all its assets and be free to administer them in accordance with provincial laws in the same manner as any company or partnership or it might wish to acquire the status of a separate municipality. Presumably, some provision could be worked out to meet this.

Schools - Sections 113 to 122

The importance of education was stressed by the Joint Parliamentary Committee on Indian Affairs, which stated in its final report in 1961 that education is the key to the full realization by Indians of self-determination and self-government. Indians generally, and parents in particular, are recognizing more and more the need for a good education as a basis for economic and social development.

Sections 113 to 122 of the Indian Act provide authority and set out principles governing Indian educational services. For instance, the federal government may itself operate schools, or may enter into agreements for the education of Indian children with provincial governments, school boards or religious or charitable organizations; it may make regulations covering various phases of the educational program, provide for transportation to and from school, and arrange for the maintenance of children at schools operated by religious organizations. These sections also cover such matters

as school-age limits, rules regarding the school to be attended, truancy, and the religious denomination of the teachers at Indian day schools.

More than 40% of Indian students now attend provincial schools with non-Indians, and attendance at day schools on reserves is also higher, relative to residential schools. Experience has shown that Sections 113 to 122 do not provide sufficient authority to meet some of the current problems; for example, it has been pointed out that more elastic provisions are needed to meet the various aspects of joint agreements with local and provincial school authorities, and to facilitate agreements with private schools and the education of non-Indians in Indian schools. Also the provisions covering the support and maintenance of Indian pupils might be broadened to ensure that there is adequate authority to deal with this important matter.

In non-Indian schools, there are variations between provinces in the rules and procedures covering school attendance and truancy. On the other hand, at present Indian pupils are governed by relevant sections of the Indian Act. However, it has been suggested that in these matters Indian pupils in each province might be made subject of the same rules and procedures as non-Indian pupils. It has also been pointed out that the choice of the school to be attended should rest with parents to a greater extent than it does at present.

Kindergarten classes for children under six years of age, and educational assistance for Indians over 16, including university courses and technical training and adult education, are already provided. It has been pointed out, however, that specific authority should be provided in the Indian Act for educational services to Indians under and over the school-age group.

School committees are operating on a number of reserves, where they are carrying out valuable functions, and it has been suggested that such committees be recognized formally by including a provision in the Indian Act.

Local Self-Government

There is a quickening desire on the part of many Indian leaders for local control.

One of the basic problems, therefore, is to meet in the Indian Act the varied conditions and needs of Indian people across Canada. One way by which this might be met is to provide for a broadened system of local or municipal self-government, which might be adopted to the needs of various Indian bands. The exact manner by which this could be accomplished would have to be worked out. In broad terms any Indian band residing on a reserve might, with the approval of the Governor in Council, have the right to organize for their common welfare and advancement and may adopt an appropriate constitution and by-laws by a majority vote of the members of the band of the full age of twenty-one years, at a special meeting or referendum held for the purpose. Such constitution and by-laws could become effective upon approval by the Governor in Council and may be revoked or amended by a majority vote of the members of the band with the approval of the Governor in Council.

The Governor in Council upon application by the council of a band could issue a charter of incorporation to such band provided that such charter would not have force or effect until ratified by a majority vote of the members of the band, of the full age of twenty-one years, voting at the meeting or referendum held for the purpose.

A charter, when granted by the Governor in Council, might convey to the incorporated band the power to purchase, take by gift, or bequest or otherwise own, hold, manage, operate and dispose of property, real and personal, including power to purchase the interest of Indian owners in reserve lands and such further powers as may be necessary in the conduct of corporate business not inconsistent with the provisions of the Indian Act or any other act of the Parliament of Canada. A proviso could be included that no reserve land would be sold or granted without the consent of the majority of the voting members and approval of the Governor in Council.