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MEMORANDUM ON SELECTED ISSUES UNDER SECTION 74(1) OF THE INDIAN ACT, RSC 1970, Chapter I-6

Prepared by

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for

Reserves and Trusts

Department of Indian and Northern Affairs

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A REVIEW OF THE BAND ELECTION PROCESS UNDER SECTION 74 AND THE CUSTOMARY SYSTEMS NOW EXISTING ON INDIAN RESERVES

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The following comments are based upon a long familiarity with conflicts arising from the band election process on three Iroquois Reserves, the information I gained from Statutory Requirements Division at Headquarters and a visit to the bands of the Campbell River District of British Columbia. My conclusion is that there should be a temporary suspension of all change in the band elections process until the legal, social, financial and human questions are answered to the satisfaction of both the Indians and the department, or, at least, until present serious problems are recognized and resolved.

General Scope of the Report

This report reviews the band election process governed by Sections 74 to 80 of the Indian Act and the customary systems of election/selection now operating on Indian reserves; complaints and abuses under both systems; the main reason for the reversions from elective to customary

systems; related issues such as the Indians' difficulty with the non-Indian concept of democracy; some of the impacts on Indian communities of these reversions to custom; the concerns of the Department of Indian Affairs; and recommendations to deal with the main issues.

Also, questions are raised about the legality of reversions to custom by revocation of the order which brought the band under Section 74 of the Act. This issue is dealt with separately in the attached memorandum of selected issues under Section 74(1) of the Indian Act, RSC 1970, Chapter 1-6.

The Elective System Under Section 74 Of The Indian Act

Sections 74 to 80 of the Indian Act govern the election of Chiefs and band councils. These sections set out the power of the Minister to deem it advisable that a band council be brought under the election provisions of the Act and to declare this by Ministerial Order; the composition of the council as ordered by the Minister; the powers of the Governor in Council to make orders or regulations governing the method of selecting the Chief and Councillor; how electoral sections shall be established on the reserve; the eligibility of voters and candidates; the election procedures; length of office; how a chief or councillor can be replaced or disqualified; election appeals; and regulations with respect to band and council meetings.

Generally, these sections are analagous to the election and appeal legislation applying to the election of municipal governments, with the exception that the federal government provides the authority through the Indian Act. In municipal elections, the authority is provided by the Provincial Government with recourse to the civil courts of the province and as high as the Supreme Court of Canada.

The elective system was first legislated in 1869, evolving into the present provisions of the Act. Basically, it was designed to bring uniformity to the bands living on reserves where a variety of systems existed across Canada. Numerous bands were governed by life chiefs. Some had strong matriarchal influence, or strong supervision by superintendents and department staff. The elective system was designed to gradually wean Indians away from communalism and to promote the concept of individualism (Indian Government under Indian Act Legislation, 1980).

The Governor-in-Council had the authority to apply the first system, the "three year elective system", (term of office) under Section 10 of the Indian Act (1869).

Under this Act voters had to be male band members residing at an Indian settlement.

In 1880 the Act was amended to limit the number of chiefs and councillors. Throughout, the Indians resented the white man's intrusion into their traditional ways of conducting their affairs, particularly the way they selected their leaders. The white man's system of confrontation, campaigning in opposition in order to gain support conflicted with the Indian concept of how their communities should be controlled and by whom.

Theirs was a consensual system which is understood to be unanimous compliance with or approval of what is done or proposed by the group.

In the 1876 consolidation of all the laws relating to Indians, the residency requirement for voters was eliminated.

In the 1880 Act there was no residency requirement for electors.

In 1884 the one year elective system was established by Indian Advancement Act for the purpose of establishing a municipal type system for those bands that were considered to be sufficiently advanced. It was meant to accustom Indians to the surrounding white communities and help them amalgamate with the rest of the country. Under this Act voters had to be male and resident on the reserve.

The Department's policy, which was considered to be in the best interests of Indians, was expressed in a letter of Commissioner Hayter Reed dated March 5, 1891:

> "From the Department's concluding remarks I am led to infer that it understood me to express a preference for the old system of hereditary Chiefs, but so far from this being the case I have invariably urged the desirability of abolishing the office altogether, wherever possible, as one of the strongest aids towards

the destruction of communism and the creation of individuality". (Indian Government Under Indian Legislation, 1868 - 1951, 1980)

He was also concerned that quite often the bands elected someone incapable and therefore unable to carry out the government's policy of "civilization".

Reed understood that the Department's objective was to educate the Indian so that he could be enfranchised and become a citizen of the state. In order to achieve this the Indians would have to be weaned from the tribal way of life. Reed claimed that the existence of band councils discouraged the inculcation of individualism among the Indians and kept alive the feeling that the Indians were distinct from the whiteman.

Reed thought that Indians would be more amenable to assimilation if the tribal system were eliminated.

In 1906, the Indian Advancement Act was incorporated into the Indian Act as Part II and "electors" meant Indians of twenty-one years of age resident on any reserve to which this part applied.

Before 1951, approximately 67% of 589 bands were under what was called "tribal custom" (Census of Indians in Canada, 1949). Nine were under the one year Indian Advancement Act, 185 were under the three year elective system and 395 were represented by councils elected/selected by custom not governed by the Indian Act but supervised by the department.

From 1906 to 1951 there was no description of an "elector" in the Indian Act.

In 1951 the Indian Act was revised. The two systems of election - the three year system under the Indian Act and the one year system under the Indian Advancement Act - were amalgamated and a two year system was instituted under Sections 73 to 79. The rationale for making the term of office two years was likely a compromise between the two previously existing systems. Other new provisions included the secret ballot and women being allowed to vote. The basic reason was to encourage bands to run their reserves. The government encouraged the most progressive bands to create what the government considered to be the best method of running the reserve, which was under the new provisions of the Indian Act election system.

In 1951, by Order in Council P.C. 6016 dated November 12, 1951, the Governor in Council brought 118 bands under the Section 73 elective system. The following year by Order in Council P.C. 3692 dated August 6, 1952, the Governor in Council declared that 72 more bands would elect their chief and council in accordance with the provisions of the Indian Act.

In effect, the department created a tribal or reserve management team similar to a city or town council, with limited authority over transactions involving land, education, programs and service offered by the government to Indians and supervised by the department. The underlying policy was for the department to gradually relinquish its supervisory role and for Indians to become generally similar to other Canadians over many years.

The present Indian Act in Section 2 recognizes two types of Band Council: those to which Section 74 applies (the elective system), and those to which Section 74 does not apply, the leadership being chosen according to the custom of the band. There are also bands with reserves and band funds but no one living on the reserve. No business can be conducted because there is no legally constituted Council to pass a resolution.

In 1954 the number of bands decreased to approximately 555 (Census of Indians in Canada, 1954) of which approximately 67% were still under custom.

In 1956 Section 73 was amended so that the power to bring a band under the elective system was transferred from the Governor in Council to the Minister. In 1970 the Act was revised and Section 73 became Section 74.

Section 77(1) of the present Act recognizes as electors those band members who are twenty-one years of age and ordinarily resident on the reserve.

Section 78 provides that the chief and councillors shall hold office for a two-year term.

A letter dated March 11, 1983, from Legal Services to Statutory Requirements of Indian Affairs confirms that the Indian Act differentiates between chief and councillors even though together they make up the Council.

Section 74(3)(a)(i) does not require that a candidate for chief be an elector who resides in the section he wishes to represent, which is required for a candidate for councillor in Section 74(3)(b)(ii). Section 75(2) provides that no person can run for chief or council unless his nomination is

moved and seconded by persons who are themselves eligible to run for chief and council. Although parliament never intended it, it would appear that a non-Indian who is not resident on the reserve could be a candidate for chief as long as his nomination is moved and seconded by someone who is also a non-Indian who is not resident on the reserve.

As of December 1982 there were 585 bands. Of these 353 or 60% were under the elective system, and 232 or 40% were under custom selections. However, the bands under the elective system represent 67% of the total Indian population (counting those band members who live off the reserve and are not eligible to vote in elective system elections) and custom systems represent 33% of the total Indian population.

Of the 232 bands presently under custom 176 bands, or 75%, have always been under custom and were never brought under the elective system. Fifty-six reversions to custom have taken place since 1969, meaning that just over 25% of those bands presently under custom were at one time under the Indian Act elective system.

Of those reserves under the elective system, 66% of band members live on reserves and are eligible to take part in elections, while 34% who do not live on reserves cannot take part in elections.

Over the years Indians have boasted of refusing to participate in the "white man's election", by not voting in federal elections and by complaining about the imposition of the Indian Act elective system on bands. They have protested being absorbed as Canadian citizens. Any change was opposed. Furthermore, the Indians never felt a part of the elective system which is based on the white man's form of government. They did not have the same motivations or means to make progress as the white man.

The department introduced Indians to an elective system in which Indians were to elect the most progressive, advanced, aggressive, enlightened, motivated and amenable candidates, or those they could more easily deal with. In some reports the department showed great disappointment and the Indians became very unsettled if their natural support went to those candidates opposed to the department's policy of advancement towards civilization.

A little recognized factor is that through thousands of years the Indian may have developed what is more than a cultural influence, but a way of survival that depended on everybody being equal, and a distrust of the person who was placed above the others. In band elections the capable Indian is often rejected in favour of the less capable Indian. The Indian may feel he has a greater chance to survive by supporting the inferior person, the superior person may not fit into Indian society and Indians may feel betrayed by them.

Election appeal board of the early 1970s

Under Section 79 the Governor in Council on the report of the Minister may set aside an election of a chief or councillor if there was, in relation to an election, corrupt practices, a violation of the Act, or a candidate for election was ineligible. Most appeals are over whether a person who voted in an election was ordinarily resident on the reserve, which is often difficult to determine. Decisions on protests are usually decided on a case by case basis.

Election appeals from Section 74 elections are processed at Branch Headquarters by an officer of the Band Management Division with the investigation being done by the Region or district offices depending on the circumstances. He gathers all information, maker the decision on the appeal and submits his findings and recommendations to the Minister.

In the early 1970's it was felt by department officials that the appeal system did not fulfill the need for objectivity because departmental officials were investigating and reporting on elections which were supervised by other departmental officials. Also, processing the appeals was slow.

In the early 1970s an election appeal board was established to hear appeals from Section 74 elections to improve appeal procedures.

The main idea was to investigate on site and gain the opinion of the people there.

The appeal board consisted of three persons appointed by the Minister - the chairman being a departmental employee, a Registered Indian from the Indian association and a member chosen from the local area of the specific appeal.

Initially, it was to involve election appeals, disputes related to vacancies in councils and recounts of ballots.

The Board could not make any final decision, but reported its findings and recommendations to the Minister.

The appeal board could investigate but had no power. It could not force a person to attend a hearing and be questioned. Upon receiving a request or affidavit, the board reviewed appeals and decided whether or not the appeal should proceed. They convened on or near a reserve and gathered information to recommend to the Minister on the action he should take.

The election appeal board, without any real power, with a biased relationship, operative, from Branch Headquarters was an inefficient concept. An Indian would make an appeal to a board that could do nothing except make a suggestion, and the board members were likely on close terms with the chief and council against whom the appeal would be made. Investigations on site when control and authority on the reserve is at stake by friendly investigators or those who have a vested interested in keeping on good terms with those being investigated did not encourage investigation into all the facts.

The custom method of choosing a chief and band council

Since 1967 the department has encouraged bands to revert to "custom" but has never specifically defined what "custom" is.

Black's Law Dictionary defines custom as "a usage or practice of the people, which, by common adoption and acquiescence, and by long and unvarying habit, has become compulsory, and has acquired the force of a law with respect to the place or subject matter to which it relates".

Osborn's Concise Dictionary defines custom as "A rule of conduct obligatory on those within its scope, established by long usage. A valid custom has the force of law. Custom is to society what law is to the state. A valid custom must be of immemorial antiquity (as far back as can be remembered), certain and reasonable, obligatory, not repugnant to a statute or law, though it may derogate from the common law".

The majority of custom systems operating on reserves today do not conform to the above definitions.

To return bands to customary systems of election/selection the Minister revokes the order which brought the band under Section 74 election sections of the Indian Act. The Interpretation Act, amended on July 7, 1967, provided that such a Ministerial Order can be revoked in the same way that it was first made. (Fischer to Battle, July 21, 1967).

If a band wishes to change from elective to customary system, the department recommends the following steps be taken:

1. That the band discuss the proposed change and an attempt to define as precisely as possible the local custom which is to prevail, the processes by which the custom can be amended and how disputes can be resolved. (The Department does not specify how many electors must be in attendance at such a meeting. In one case 38 electors of a band of over 500 members voted to revert to custom.)

2. That a formal resolution at a Band meeting or referendum should be provided to the department so that the Ministerial Order which brought the band under Section 74 can be revoked.

3. After the Order is revoked that the Band call an election. The band then notifies the Department of the composition of the Band Council.

The Department's view on custom systems is that they can be altered and amended locally and should reflect the demands placed upon it by members of the community. The band in effect is encouraged to choose its own custom to suit its present day needs. It might decide to revert to traditional methods of selecting leaders, or take on a method of elections similar to that of a non-Indian municipality or a combination of traditional and modern systems. The department assumes that any changes in custom are accepted and put into practice by all members of the band.

The proportions under the customary and elective systems have remained fairly stable from the time since the large number of bands came under the elective system during 1951-52 following changes to the Indian Act until 1969. Most of the Councils chosen by custom were located in areas where bands were either economically disadvantaged or the band Council had little responsiblity or activity. In other cases Bands under custom do not have reserves and therefore do not qualify for the Indian Act election system. Section 74 applies to bands on reserves. Those bands on surrendered lands, Crown lands or otherwise without reserves are encouraged to form band councils under custom systems. If surrendered land is in the middle of a reserve sometimes the residents (if they are band members) are given the right to vote.

In the past department officials believed that the electoral system provided an objective and reasonably rapid means of changing community representation to reflect the changing needs and desires of its people. In some places it is contended that the customary system of choice of leaders can also accomplish this.

Enforcement of custom

The department's view is that in relation to custom elections the strength of custom is in its acceptance and support at the local level. Enforcement therefore remains with the people on the reserve where disagreements arise as to application or interpretation of custom. The Minister does not become involved in local disputes and is merely a "friend of the band" and, on an informal basis, assists in bringing different factions together to resolve the problem. Otherwise it is up to the courts to settle disputes involving custom elections.

Or he may bring the Band back again under the electoral provisions of Section 74 to 80 upon local request or where such a course of action is required by local circumstances. This he is unlikely to do unless there is a complete and absolute breakdown of the community fabric.

Legality of reversion to custom

The 1971-72 files of Reserves and Trusts contain opinions in 1971-72 which suggest that the order which brought bands under Section 74 of the Indian Act cannot be revoked. However, a letter dated July 21, 1967 from H. Fischer, Legal Adviser, signed by J. Beckett to R.F. Battle, the Deputy Minister, refers to an amendment to the Interpretation Act said to allow the Minister to revoke his order. There appears to be no written legal opinion supporting this in the files of Reserves and Trusts, Legal Services of the Department of Indian Affairs, or the Legal Services of the Privy Council Office.

On March 8, 1983, J. Beckett of Legal Services of Indian Affairs stated that his letter of September 19, 1967 outlining the wording for the revocation of the order was based on the verbal advice given him by H. Thornton, the Director of Legal Services of the Department of Indian Affairs at the time, who in turn, was advised by telephone by the Legal Adviser to the Privy Council office, H. MacIntosh.

H. Thornton, now with the Government of the Province of British Columbia, advised that he did not recall this event. H. MacIntosh, presently of the Department of Justice also did not recall giving this opinion. The legal position

of the custom council after the order is revoked is discussed in the attached legal opinion. It appears the band is exposed to a legal vacuum, as the old system cannot automatically spring back just as it was before the order, and the new "instant custom" similar to Section 74 election regulations cannot be called "custom". Also, can the interpretation of the Indian Act be altered by a telephone call from Privy Council Office to the Department of Indian Affairs?

DISCUSSION ON REVERSIONS FROM ELECTIVE TO CUSTOMARY SYSTEMS

Complaints and abuses under the elective system

When the Indian Act was first drafted the majority of the Indian population lived on reserves, therefore the election provisions made sense then. Gradually, Indians moved back and forth, on and off the reserve for many reasons and a minority remained on the reserve. The law was never changed to cover this situation. Under the Act only electors residing on reserves can vote in band elections and with respect to any powers granted to a band. The circumstances changed but the law was not amended to keep pace with the circumstances. With 30% of the Indians today living off reserve and others going back and forth to the reserve, power is given to a minority. It is usually the superior who leave the reserve to take advantage of education and employment opportunities, most retaining a concern and interest in their people, lands and assets, and they are deprived of any rights over their interests on the reserve because of the restrictions under Section 74 that they must ordinarily reside on the reserve. This has caused some off reserve groups to pressure for reversion to custom to get around the residency requirements. However, it is the band council that has the authority to apply for reversion and in many cases the residency restrictions are beneficial to

those in power on the reserves. In British Columbia, on many reserves, almost the entire Indian population is living off reserve and so reversion to custom is necessary to create a band council, as Section 74 election sections apply only to reserves.

Main Issues behind reversions to custom

Some bands want to reduce the age of eligible voters to that used by the respective province or federal elections; some bands would like to extend the term of office to three or four years to coincide with local municipal practices or to have overlapping office terms; and some bands would like off-reserve residents to vote in band elections. Some means of providing a choice to individual bands was considered to be desirable.

1. Residency requirements

In 1971 formal application were made by the Chippewas of the Thames Band and two other bands to use Section 4, subsection 2 of the Indian Act to have the Governor in Council declare by proclamation that certain portions of the Act, except Sections 37 to 41, would not apply to any Indians or any group or band of Indians; or any reserve or any surrendered lands or any part thereof. They wanted to extend voting rights to non-resident band members by lifting the words "is ordinarily resident on the reserve" from the Act by using Section 4(2).

After several legal opinions, their formal application could not be approved. An amendment to the Act was considered but rejected. As a result of the rejection of the "1969 white paper" on Indian Policy by Indians, the department's policy at the time was that no substantive amendment to the Act would be underaken until after full consultation with Indian people and the associations, and after various aspects of their rights and claims were clarified and settled. It appeared that some time would elapse before an amendment was possible.

It was suggested that the order bringing the band under the elective sections of the Act be revoked and to allow the band to establish "custom" elections. The band would then be forced to settle matters concerning band elections internally or through the courts.

The restriction as to residence under Section 77(1) has been compared with municipal elections where non-resident property owners can vote because their property interests may be affected by the municipal council. It has been argued that band councils can affect the interests of non-resident band members and thus the residence qualification is unreasonable.

On July 16, 1981, the Associate Deputy Minister of Justice agreed with an earlier interpretation that by using Section 4(2) of the Act, an order in Council can lift the words "and is ordinarily resident on the reserve" in Section 77(1) of the Act. Under this new ruling the exemption applies to voters only and not to candidates for councillors, nominators and seconders.

This ruling affects elections of chief and councillors where the reserve is not divided into sections. If the reserve is divided into sections this section cannot be lifted and so Section 77(2) would have no meaning (referring to residency in a section that has been established for voting purposes to vote for a person nominated to be councillor to represent that section). If a reserve is divided into sections and wishes to have members of the band not ordinarily resident on the reserve vote, the band would have to seek a revocation of the order in council dividing the reserve into sections as provided for in Section 74(4), before proceding with the proclamation under Section 4(2) re Section 77(1) of the Indian Act.

This ruling would appear to eliminate one of the main reasons why bands revert to custom.

2. Age of majority

Many bands would like to lower the voting age, the age when Indians may be candidates for chief and council and the age they can nominate a candidate for office.

3. Rotational or extended terms of office

Many bands would like to alter the length of office terms of chief and council and some would like to have overlapping terms whereby elections would take place for part of the council while others remain in office in order to provide continuity. (Of course, this may allow the stronger group to retain their power in council while the opposition may have difficulty "cleaning out" the council and replacing them with new leaders.)

One band lawyer raised the issue of assertion of Indian sovereignty. He asked whether the non-interference of the department in customary selections meant that they are treating bands as sovereign governments. He stated further that in international law one nation cannot dictate how another nation selects its government. His view is that under custom, the council can exercise supreme authority within the bounds of the Indian Act or without interference from the department.

The department is reluctant to define custom and will accept whatever the Indian band states is their custom for electing their leaders. In many cases custom election regulations resemble the regulations governing elections under the Indian Act with minor changes, usually in such areas as the age of majority, residency requirements and rights of appeal.

Dangers cited in 1972 of reversions to custom

John McGilp said in a letter of January 14, 1972, to the Assistant Deputy Minister, the "use of custom is fraught with danger". He foresaw the resulting instability of band leadership; frequent and radical changes and disagreements between band members; the creation of power blocks on the reserve with differing views on what band custom is; the Minister not being able to settle the arguments as he would not know the custom of the band; the appeal sections of the Act not applying and forcing bands and band members to seek settlement internally or in the Courts; and that many Indians still looking to the Minister to settle their differences and forcing Indians to use the news media or delegations which would force the Minister into arguments whether he wants to be involved or not.

Abuses under custom

Since 1970 the department took the position to accept as custom whatever the band tells them is custom.

Section 2 of the Act mentions that council of a band under custom will determine how the band council is elected but not who does the electing. In one band the custom regulations do not allow anyone of ancestry other than that particular group to run for chief and council or to nominate and second the nominations of candidates for chief and council. A person not qualified under the Indian Act could in fact nominate and run for office and a qualified elector under the Indian Act could be deprived of nominating a candidate or running for office.

In another band, a band member who has been living on the reserve for less than ten years cannot vote.

An Indian would have difficulty legally challenging his dissatisfaction with the acts of the custom/traditional councils because that council makes its own rules and regulations for election. The department's view is that interpretation of custom is a matter for the courts and not the department's administration. The court would ask for the rules by which the chief and council are elected and what their responsibilities are. There would probably be a different interpretation by every member of the band.

Proving something criminal or corrupt when the rules are clearly defined is difficult enough and when it is in the mind and not written it is almost impossible.

In a letter from A.J. Cormier to J.G. McGilp dated February 9, 1971, it was stated that "if the band takes on an electoral framework of a provincial municipal act, Indian people or the courts may feel that "custom" has been stretched beyond reasonable bounds of legal definition".

Besides the department's encouragement to bands to revert to custom, it appears that some enlightened Indians recognize that the council could exercise greater power by reverting to custom and in not being so strictly supervised by the department under the Indian Act election sections and regulations. Today certain groups on the reserves have gained power and retained it. The department has no definite knowledge of how the minority or majority have fared under custom elections which has granted power from the Canadian government to a small group, even one family in some cases, on the reserve.

There are 232 varying sets of custom election rules which makes it difficult to verify that the rules are fair or are being followed. Also, these custom election rules can be changed at any time. Further, it is up to the custom council whether to have written rules. In fact writing them down would probably determine that their custom is not a custom.

When a band is operating on rules made by the strongest, most vigorous and articulate group or family, without interference by the department, those opposed to that group or family are not guaranteed fair treatment, and they are not likely to express their opposition as they do have to live in the community. In all custom elections there is no appeal to the department. The department refers any complaint they receive back to the creator of the system and object of the complaint. If there is an appeal procedure in custom election regulations, it is to a board or committee set up by the band council who are the of object of the complaint.

The Charter of Rights and Custom Systems

Once the department has transferred control of the means of selection of band chiefs and councils over to the band, who then make up the rules, how can the conditions of the Charter of Rights and Freedoms be imposed which, one would think, would be a way of protecting individual Registered Indians whose rights are being violated? It appears that the reversion from Section 74 to custom or traditional systems has not allowed any means for the law to be amended to include the protection of the Charter of Rights.

The Charter of Rights and Freedoms are subject to reasonable restrictions by legislation. If an Indian were to challenge those custom councils for any violation of his rights, the courts may be conservative about holding that the band council violates such rights because the band does have a right to have a custom council under Section 2 of the act. (The situation may be different for those bands which were under Section 74 and reverted to custom.) The deprived Indians would be referred back to the supreme power, the council of the band.

A challenger could invoke Section 3 of the Charter of Rights and Freedoms that he is being deprived due to custom of a right to vote for council or sit on the council, and that Section 3 gives "every citizen of Canada the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein". The custom council could plead that it is not a legislative assembly but a traditional grouping of elders or selected chiefs or whatever. Furthermore, what Indian, other than one with great financial and other resources, would attempt such a challenge which may lead to harassment of himself and his family on the reserve?

Indians, particularly in the Campbell River district, are concerned over the change from the Crown's responsibility over Indians, their property and rights under the Indian Act over to another government system which has a vague description, procedure, and no appeal mechanism. They question the legality of the custom council, the business they have conducted on behalf of the band which could involve surrender and leasing of land of increasing value, oil rights, expensive real estate and so on. Some felt there should be a challenge to the present situation.

Under the elective system they are concerned about the department's lack of concern over the injustices handed out by band councils to keep band members in line. For example, one opponent to the band council was desperately waiting for the band council to send her the school living allowance. When she finally got it from the band council office after being almost evicted, a note, which they forgot to remove, was attached stating "Hold this up for at least six weeks". She complained to the District Office but they referred her back to the council.

On one reserve, the elective council refuses to provide housing on the reserve to their opponents so that they will not live on the reserve and be able to vote. On another reserve, one group of band members was ignored when they continually asked for an accounting of band funds and rental from land leases. When each complained to the District Office of Indian Affairs, officials were forced to refer them back to their band councils to settle the issue amongst themselves.

Complaints of both systems

In Campbell River there are a number of Indians who are frustrated by what they believe is an abuse of power by both elective and custom councils. The department has handed over the administration of programs, services and funds on their behalf to these councils over which they have relinquished a great deal of supervision due to the government's policy of "self-determination" for Indians.

Appeals of injustices in band government and elections being directed back to the band council with whom the objection is raised leaves them frustrated.

The powerlessness of the Department of Indian Affairs is a further frustration.

The department encouraged Indians to revert to custom and at the same time relinquished their authority over custom elections and appeals. They handed funds and power over to both elective and custom council. Indians feel that the source of funds and basic protection of their rights rests with the Canadian government, but when approaching the department, they are faced with a dead-end whereby laws and policies of the councils cannot be opposed and the individual band member has no support from the department.

Band membership and band elections

The proposal that Indian bands will determine band membership really means that three or four persons will decide. This may lead to the right voting group having more power, control, wealth and authority, while those "out" will be mercilessly treated or further deprived.

On one reserve the Indian male is deprived of his membership on the band list, living on the reserve and exercising his rights as an elector because he married a non-Indian woman despite the law permitting him to retain his status and conferring it on his wife. This is an example of abuse of authority by the council.

The proposal that Indian bands will be given the right to decide who will be members, subject to approval by the department is a contradiction. Either the Department decides or the band council decides. If such a proposal comes into being, councils, elective and custom, could, for their own reasons, add 100, 1,000 or 10,000 members to their band lists if they see fit and to eliminate those who have not voted the right way. If the regulation allowed it, the invitation could include anybody for consideration or for other reasons.

As the membership in the band provides the votes, if the person votes, this in due course provides the power and authority to the elected person. It is obvious that changing band memberships or allowing ineligible persons to vote can change control of an Indian band, control over land, employment, programs, services and other benefits.

To have qualifications of band membership and electors decided by the council leads to full control of the band by a few, opens the way for several hundred sets of rules, may increase the numbers of Indians and the cost to the Canadian government.

Elections and band council authority

Selecting a period in the past history of the band as the point from where the customs will come to replace the more precise form under the Indian Act is unsound. Custom councils have not produced better council representation, less abuse, and misuse of power and authority. Under custom there is no way to stop the more aggressive, or self-serving from taking power, developing greater means to control that power, retain it, act without restraint and provide no means of appeal or expression of opposition as they are the final authority.

Under the elective system, the most aggressive, enlightened or capable or disinterested and incompetent can be elected, but the band members can exercise some authority over the chief and council by referring complaints to an authority higher than the council, the Department of Indian Affairs.

DISCUSSION OF RELATED ISSUES

Indian concept of democracy

As a policy, the department assumes that Indians have "representatives" and also that there is "democracy" on reserves.

Culturally, most Indians willing or knowingly or subconsciously do not have "representatives". Many Indians will tell you that the chiefs and councillors do not represent them. The Indian represents himself and most of the time he will not express himself. He even feels ashamed of voting in a council election, particularly if he is opposed to something or someone. In the James Bay Agreement, the Cree Indians who voted were those in favour of the agreement, and most of those who opposed it did not show up at the polls. It therefore appeared there was an overwhelming majority of voters in favour of the Agreement. An Indian's silence indicates that he is opposed, not that he is apathetic. In the past, if he was opposed and remained silent, no decision was made. Confrontation was avoided at all costs.

Indians by nature elect those they feel either equal to or are beneath them. They rarely vote for those who they feel are better educated, qualified, or motivated than they are. Without feeling they are violating the principles of democracy. Indians will vote for direct benefits for their family such as jobs or housing and will avoid helping any opponents or rivals no matter how capable or deserving.

Indians are equal to all other Indians and resent any other Indian having power over them. The idea of votes, representatives, and expression of their views through others is almost as foreign to many of them now as it was 100 years ago.

In the past, concensus was achieved within family or clan members and these strong family and clan allegiances control life on the reserve today. The idea that sound government of a group of Indians by Indians can be achieved by a vote is difficult at best. It may still not be in the heart and mind of the Indian that power over him can be awarded by a vote.

Supervision of band elections by the department may be necessary for sometime to come.

The present situation has allowed a small group and their families to organize virtual "ownership of the business" on reserves. Individual opinions of other members of the band are disregarded. The department does not know specifically whether the band council is truly representative of the Indian people on that reserve.

Individual responsibility

The elective process under Section 74 places responsibility upon the individual Indian. There are written rules, regulations, eligibility, powers and an appeal process. Each individual has a place in the system. While the group, family or combination may function within this system, there is a mechanism for overruling and appealing to a higher authority. Change of those in power is possible either for age, disinterest, misconduct or misjudgement.

Basically the underlying reason for the elective system was to give Indians more individual power to choose their representatives, to remove them if they are not satisfied with them, and to create more individual enterprise and responsibility in the Indian.

That is why the department's encouragement to bands to revert to custom is not logical.

Under the custom/traditional system, power and control over the election process is vested in the council who are also the final authority. Individual rights and responsibility are curtailed . There is no authority above the council, no checks and balances on their actions. If a chief does not call an election for six years, no one can force him to. There is little opportunity for change.

Where the means of choosing who will be in authority is not based on a written process recognized by all and legally enforceable, and is subject to change by those in authority, the possibility for change in control is suppressed. This would deter the development of motivation towards assuming more responsibilities in the Indian and at the same time certain families or groups obtain more and more power over others. The department's policy of devolution to bands with less supervision over band councils would also entrench this power.

Many custom councils will tell you this is the best form of government, that it is good for those governed. They deny there is any oppositon to this system. However, those not in power fear being controlled by a way of government that is either not acceptable to them or unknown to them.

The Indians do not appear to be dissatisfied with the Indian Act election section, but fear control being placed permanently in the hands of a few, particularly under the custom system which does not guarantee right of appeal, or full knowledge of how their affairs are being conducted, or how favours originate, or how decisions are made, or how leaders are chosen, and without recourse to the department.

If there are to be custom/traditional systems of election/selection on Indian reserves, they cannot be based on verbal claims or good faith and with the department concurring that this is in line with their "self-government" policy. The bands must establish at what period in time, by whom, and with what results (if recorded) the form of government existed in the past on that reserve (or for that group of Indians). Otherwise the idea of the custom/traditional system which is supposed to reflect their way of life for an unspecified prehistorical period is only a figment of imagination.

If the department asked bands to revert to their true customs, some bands are so mixed with other Indians and non-Indians that it would be difficult to decide which custom was that particular band's. Some do not remember their past system. Some Indians become fearful and frustrated when asked if they ever had a custom system of election or authority.

Because those "in" (present councils) have established practical working relationships with members of the Department of Indian Affairs, and it is always better and easier to retain good relationships with the knowns, and to keep the reserve "trouble makers" quiet, the department staff in all likelihood support the present incumbents and their way of governing.

If concensus is part of Indian culture, then it conflicts with the elective system which is based on confrontation. In the past, when there was a dispute between factions, one would leave and set up a new community. Today this is not possible. Instead the opposition is either ignored, not provided benefits and services and even threatened and finally driven off the reserve.

THE DEPARTMENT'S CONCERN

The Department of Indian Affairs has become increasingly concerned with the band election process and specifically with band custom elections. The reason is because 25%, or 56 bands, of all reversions from elective systems under Section 74 of the Indian Act to custom selections have taken place since 1969. It appears this trend is continuing. The Department does not know specifically why these reversions are occurring.

Under the elective system, band chiefs and councils are elected in accordance with the Indian Act. Under custom systems the department does not know what the custom is or how it is determined by the band. At the same time, the department's attitude is to no longer involve itself with the custom elections process.

With the freedom allowed under elective systems there are abuses. But under such freedom allowed under custom systems, the most vigorous groups on some reserve have created their own customs and some have modernized it so that it appears acceptable to the department. This, in effect, has allowed the strongest faction on the reserve to make up the rules to suit themselves and bestows upon them almost permanent and final power to do as they wish with the band members, the land, band funds, assets and benefits.

The variations of 232 reserves creating their own rules for residency, age and other requirements is confusing to say the least. There appears to be no authority under the Act to return a council back to custom systems, nor to determine what the custom is, nor to overrule any aspects of the custom they find objectionable. More seriously, the department and band members appear to have no authority over

those elected or what they do when elected. Further, the department has ignored its responsibility to protect the rights of the individual Indian and have left them to the mercy of the band councils.

The Canadian government has allowed bands to revert to custom systems of elections but has not placed an authority above the custom councils as it does under the Indian Act election sections.

With the best of intentions, the department has created the following situations in their efforts to return more power and authority to Indians through their policy of self-government by encouraging Indians to revert to custom.

- Any personal sense of responsibility has been removed from Indians.
- Power has been channelled to the elite.
- In helping Indians to establish a custom system, they have weakened the individual Indian and failed to protect his rights.
- More hostility between factions has been created which does not reach responsible persons in the department.

- An illegal situation has been created whereby revoking the order which brought them under Section 74 has left the custom councils in a legal vacuum. This could be challenged in the courts and the outcome might embarrass the department.
- After being under Section 74, and reverting to custom, the custom councils could be illegally constituted and thus the business they have conducted may be illegal. A valid council is required for such purposes as spending of band funds, leases, land surrenders, passing of by-laws, etc., to name a few.

The argument that "this is working", "this is what the Indians want", that "Indians have more self-government" and "that we have no complaints" is not a sound foundation to continue the present situation or to ignore it. The elective system may not have worked that well, but the reversion to custom and traditional systems provides opportunity for greater abuses than under the elective system.

There are 248,212 registered Indians represented by elective and custom systems. This number excludes band members who live off those reserves that are under the elective system. Of this total number of Indians represented by either system, the elective system represents 142,549 Indians living on reserves, and the custom system represents 105,669 Indians living on and off reserves. This means that of those eleigible to vote or participate in elections of both elective and custom systems, 58% support and participate in the elective system and 42% support and participate in the custom system.

Since 1969 there have been 24 bands placed under the elective system and 56 bands have reverted to custom. There are 353 bands under the elective system and 232 bands under custom. Fully 24% of those bands presently render custom reverted since 1969 and 6% of bands have been placed under the elective system. Of course, prior to 1969 reversion to custom was impossible.

RECOMMENDATION NO. 1 - Review of custom councils

There should be a close examination of whether the custom/traditional elected/selected councils have developed greater enterprise, advancement, educational achievement, progress, business success among those governed by this system compared to the elective system; and also whether it has strengthened the social and financial basis of certain Indian families. Presently it cannot be determined whether those bands that have reverted to custom or have always been under custom are more progressive or have been damaged. Have the individual members of these bands assumed more responsibility and made more progress socially, financially and educationally? How does this compare with those bands under the elective system?

RECOMMENDATION NO. 2 - Suspension of Reversions

Because of the doubt over whether the Minister has the right to revoke his order bringing bands under Section 74 and placing them in a legal limbo, a suspension of processing these reversions for the time being is recommended. (See attached arguments)

RECOMMENDATION NO. 3 - Determine Legal position of "custom" systems of elections

The legal position of custom band councils after reversions from elective to custom systems must be clarified. What is custom in relation to election/selection of leaders? How does it fit into statute law? Is there any real custom law on Indian elections/selections in Canada today?

Motivated by the best intentions "to give Indians more control of their lives, their funds and reserves" bands have been encouraged to revert to custom. At the same time the department has lessened supervision of both elective and custom councils. Under the customary systems, many Indians have become frustrated without appeal or protection, without specific laws or understanding as to how the custom councils are created and enforced. This has created a volatile situation which the department must defuse.

RECOMMENDATION NO. 4 - Amend election sections of the Indian Act

Amendments to the election sections of the Indian Act is recommended to meet the needs of Registered Indians both on and off reserves. Retention of supervision by the department is necessay for some time to come due to the nature of Indians, their circumstances and conditions and the confusion over the band election process.

The age of majority could be amended to conform to the age of majority in provincial elections.

The band can now be exempted from the residency requirements by using Section 4(2) of the Act to lift the words "and is ordinarily resident on the reserve" to allow off-reserve band members to vote in band elections. Of course, this must be requested by the band council (which could be an obstacle).

The office term could be amended to reflect the needs of bands to develop leadership by staggered terms and rotational elections. The bands state this would provide a training period for the positions of chief and council. It would also provide continuity of representation on the council. It could also mean continuity of influence by the faction that may be at odds with band members who want to remove them and put in a brand new council.

RECOMMENDATION NO. 5 - Amend Indian Act to Allow Customary Systems of Elections/Selections

Presently, the department cannot adequately explain the concensual system of selection and has no specific idea of the customary systems that are operating on reserves. In order for the department to meet its responsibilities to individual Indians and to protect their rights, they must know what the limits, checks and balances of the custom council's powers are.

If the department decides to allow customary systems of band elections/selections to continue to exist the act would have to be amended to provide for it. They may have to put the bands presently under custom under the Indian Act elective system and then the band would have to apply for reversion to customary systems. The department could make reversion conditional on the custom regulations being subject to the Minister's approval.

RECOMMENDATION NO. 6 - Establish an Impartial Tribunal to hear election appeals

The establishment of a group, tribunals or board of 8 to 10 elders or representatives appointed by the Minister or by Order in Council to hear complaints of irregularities during elections is recommended. This would require an amendment to the Indian Act, although it would function outside the department. Financing could come out of the federal treasury for operation and travelling to hearings throughout Canada. Appointments should be Indians who have not been involved in politics for at least five years.

The agrieved person could appear first before one member of the board with a lawyer or spokesman. If there is merit in the case, it would be referred to 3 or 5 other members of the board. Appeals could go as far as the Federal Court of Canada. (Similar to the Staff Relations Board of the PSC).

In order for the board to make decisions on cases coming before them, they would need some basic rules to judge them against as to what the council can or cannot do in elections.

Basic rules would have to be set down with certain allowance for custom practices. However, certain basic rights of individual Indians would be guaranteed for those bands under both custom and elective systems. There may be gaps not covered by the Indian Act election section and regulations which some councils have taken advantage of.

MEMORANDUM ON SELECTED ISSUES UNDER SECTION 74(1) OF THE INDIAN ACT, RSC 1970, Chapter I-6

INTRODUCTION

It is evident that over the years, the current Section 74 of the Indian Act has presented some problems of interpretation and application.

This memorandum reviews some of the problems and discusses some of the implications of different interpretations of who can invoke, and whether and how Section 74 and its predecessors can be revoked. It reviews changes in the legislation and refers to related statutes, such as the Interpretation Act, Regulations Act and the Statutory Instruments Act.

This memorandum should not be considered as a definitive study, but as a preliminary review that suggests areas for fruitful study in the future. The objective of such study would be to arrive at a conclusion as to who can invoke Section 74, whether or not it can be revoked once it has been put into effect, and if it can, what, if anything, can or should take its place.

The basic conclusion is that Section 74 is in need of clarification that could best be accomplished by revision.

The memorandum is very basic and assumes minimal knowledge of legal principles or applicable statutes on the part of a reader.

ORDER-IN-COUNCIL P.C. 3692-1952

On August 6, 1952, the Governor-in-Council passed Order-in-Council P.C. 3692 (Exhibit A) pursuant to Section 73 of the Indian Act as it existed at that time, bringing the 72 bands from 22 agencies of the 4 western provinces referred to therein from custom to Indian Act elections, as of August 15, 1952. Several questions have been raised in recent departmental correspondence about this Order hence its significance. Before considering those questions specifically, a review of the legislation would be in order.

RECENT HISTORY OF SECTION 74

Section 73(1) of the Indian Act, R.S.C. 1952, C. 149, reads as follows:

> Whenever he deems it advisable for the good government of a band, the Governor-in-Council may declare by order that after a day to be named therein the council of the band, consisting of a chief and councillors, shall be selected by elections to be held in accordance with this Act.

This section, 73(1), establishes the criteria for and method by which a band is moved from custom to selection of Chief and Council by election. First, the Governor-in-Council must decide it is advisable for the good government of a band. Then it is implemented by an order which specifies the date it takes effect and the fact that the Chief and Councillors are to be elected in accordance with the Act.

The section then goes on in 73(2) to describe who a council of a band, in respect of which an Order has been made under the provisions referred to above shall consist of.

The section further goes on to provide that the Governor-in-Council may make orders or regulations for the purpose of giving effect to subsection 1.

Section 75 provides the Governor-in-Council may make orders and regulations with respect to band elections.

It is clear from reading other sections of the Act as contained in R.S.C. 1952, (which consolidates the Act as found in S.C. 1951, c.29), that the Minister was given the power to make regulations in some situations. However, in the part of the Act which deals with elections of chiefs and band councils, Section 73, there is no reference to the regulation-making power of the Minister. It could therefore

be safely concluded that Parliament was aware of the difference between the Governor-in-Council and the Minister and decided that it was the Governor-in-Council who should have the power to make an Order that would result in the band council being selected by elections to be held in accordance with the Act as stated in Section 73(1). This power, as will be noted below, was later given to the Minister. It is relevant to note the distinction between the Governor-in-Council and the Minister because the question of who has the power, in 1983, to revoke an order made in 1952, has arisen in recent correspondence.

The sections of the Act dealing with the election of chiefs and band councils, as found in RSC 1952 should be compared with those found in the current Act, RSC 1970 c. I-6. The Revised Statutes of Canada 1970 (R.S.C. 1970) consolidated revisions implemented in 1956 (S.C. 1956, c. 40)

Section 73(1) (originally passed in 1951) delegates the power to bring a band into the Indian Act to the Governor-in-Council.

Section 74(1) (passed in 1956 and consolidated in R.S.C. 1970) delegates the power to the Minister.

Section 73(2) (passed in 1951) says that a Council shall consist of a certain number of Chiefs or Councillors.

Section 74(2) (passed in 1956 and consolidated in R.S.C. 1970) says that a council shall consist of a certain number of Chiefs or Councillors but the Minister can alter this within certain limits.

Section 73(3) (passed in 1951) gives the Governor-in-Council the power to make orders or regulations to give effect to the electoral system established in Section 73(1).

Section 74(3) retains that power in the Governor-in-Council.

Interpretation Act R.S.C. 1952, Chapter 158

It might be noted at this point that the Interpretation Act as found in RSC 1952 provided in Section 31(1)(g):

In every Act, unless the contrary intention appears,

> (g) if a power is conferred to make any rules, regulations or by-laws, the power shall be construed as including a power, exercisable in the like manner, and subject to the like consent and conditions, if any, to rescind, revoke, amend or vary the rules, regulations or by-laws and make others.

It should be noted that in this R.S.C. 1952 version of the Interpretation Act there is no definition of "Regulation", and one could ask whether "regulation" includes a Section 73(1) "order".

However, Section 2(1)(b) of the Interpretation Act states:

> Every provision of this Act extends and applies to (b) every order and regulation heretofore or hereafter passed by the Governor-in-Council . . . .

Does this mean that a Section 73(1) "order" is covered by Section 31(1)(g) of the Interpretation Act? If it does, why did Parliament use the phrase "rules, regulations or bylaws" in Section 31(1)(g) and "order and regulation" in Section 2(1)(b)? The answer is not clear. It is submitted that the power to revoke a Section 73(1) order was in doubt at least until this section of the Interpretation Act was amended by S.C. 1967-68, c. 7.

It is interesting to note that the Regulations Act, RSC 1952, chapter 235, in Section 2, provides as follows:

> In this Act, (a) "regulation" means a rule, order, regulation, by-law or proclamation (i) made, in the exercise of a legislative power conferred by or under an Act of Parliament, by the Governor-in-Council, the Treasury Board, a Minister of the Crown, or a board, commission, corporation or other body or person that is an agent or servant of Her Majesty in right of Canada.

It is also interesting to note that the definition of "regulation" in the Regulations Act is restricted solely to that Act as is stated in the opening words of Section 2, of the Regulations Act.

REVIVAL OF CUSTOM

Section 19(1) of the Interpretation Act, RSC 1952, c. 158, reads as follows:

> Where any act or enactment is repealed, or where any regulation is revoked, then, unless the contrary intention appears, such repeal or revocation does not, save as in this section otherwise provided, (a) revive any act, enactment, regulation or thing not in force or existing at the time at which the repeal or revocation takes effect.

The question arises as to whether a customary method of selecting the rulers of a band is a "thing". Presumably it is. If customs are "things" then the section appears to be authority for the principle that, once a regulation is revoked, (if indeed it can be revoked) the status quo (as far as band government is concerned) as it existed at the time the Governor-in-Council made a Section 73(1) order, is not revived.

This question of whether a "custom" is a "thing" for purposes of this section, might be researched further. If a band adopted the election by Order-in-Council in 1952, what custom exists in 1982 or 1983 to replace it?

KAMLOOPS BAND RESOLUTION OF DECEMBER 14, 1981

On December 14, 1981, the Kamloops Band Council passed a resolution requesting the Governor-in-Council to exempt it from the terms of Section 74 of the Indian Act by virtue of Section 4 of the Act.

According to correspondence, the band wished to have it proclaimed that "the custom election regulations" were the custom of the band for the purpose of electing the Chief and Council. It is not clear where the phrase "custom election regulations" comes from and exactly what it refers to. If

there are such things as custom election regulations, where are they, under what authority are they promulgated, and by whom are they promulgated?

Although not having seen the resolution of the band council dated December 14, 1981 reference should be had to Sections 74 and 4 of the Indian Act.

Correspondence suggests that what the resolution means is that the band no longer wishes to have its election of chiefs and band councils carried out in accordance with the provisions of Sections 74 to 80 inclusive.

Section 4 of the Indian Act, RSC 1970, chapter I-6, provides in sub-section 2 as follows:

> The Governor-in-Council may by proclamation declare that this Act or any portion thereof, except Sections 37 to 41, shall not apply to (a) any Indians or any group or band of Indians, or (b) any reserve or any surrendered lands or any part thereof, and may by proclamation revoke any such declaration.

(Note that the instrument by which the Governor-in-Council is to declare the Act not to apply is by way of proclamation.)

In effect, in this particular case, the Governor-in-Council decided in 1952 that it was advisable for the good government of a band, (in this case the Kamloops band), that its chief and council be selected by elections held in accordance with the Act.

Now the band council is asking the same body, i.e. the Governor-in-Council, to proclaim that Section 74 (previously Section 73) not apply. Insofar as legal principles are concerned there would seem to be nothing out of order in the Governor-in-Council making an order and then making a proclamation that would in effect revoke the earlier order.

In fact, as noted above, such a power may be confirmed by Section 31(1)(g) of the Interpretation Act, RSC 1952, c. 158 (quoted above) which later became, in S.C. 1967-68, c.7, Section 26 (now R.S.C. 1970, c. 1-23, Section 26). Section 26(4) of the Interpretation Act reads:

> 26(4) Where a power is conferred to make regulations, the power shall be construed as including a power, exercisable in the like manner, and subject to the like consent and conditions, if any, to repeal, amend or vary the regulations and make others.

It is interesting to note that before S.C. 1967-68, c. 7, the phrase was "rescind, revoke, amend or vary". After, it became "repeal, amend or vary".

Presently, (March 1983) a regulation is defined in Section 2 of the Interpretation Act, R.S.C. 1970, c. 1-23, to include:

> an order, regulation, order-in-council, order prescribing regulations, rule, rule of court, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established (a) in the execution of a power confered by or under the authority of an Act, or (b) by or under the authority of the Governor-in-Council.

Clearly, now (1983) the section does cover an Order-in-Council and an order of the Minister. This was not clear before.

Since the original Order-in-Council was passed by the Governor-in-Council, the logical conclusion is that if it is to be repealed, it should be repealed by the Governor-in-Council, and this is the assumption contained in the draft memo of F.J. Walchli dated November 5, 1982.

The Indian Act of 1952 provides that it is the Governor-in-Council who will make the order that the band be brought into the act on the basis of his opinion that it is advisable for the good government of the band. The current version, Section 74(1), in the Indian Act, R.S.C. 1970, indicates that it is the Minister who has the power to make such an order if he deems it advisable for the good government of a band. This change from Governor-in-Council to Minister was implemented in 1956, as noted above.

The next question, is whether a Minister has the power to amend or revoke an order made by the Governor-in-Council. Presumably he could only get such a power from Parliament and that power does not appear to have been granted specifically in the Indian Act. He could not get the power from the Governor-in-Council because that would violate the rule "delegatus non potest delegare" (one who is delegated by Parliament is not himself able to delegate). In other words, Parliament is the supreme authority and it does have the power to delegate others to exercise its powers. However, the persons or bodies to whom it delegates its powers cannot delegate them again to somebody else.

This issue, however, appears to have been resolved through Section 36(g) of the Interpretation Act, R.S.C. 1970, c. I-23 which says:

> 36. Where an enactment (in this section called the "former enactment") is repealed and another enactment (in this section called the "new enactment") is substituted therefor,
>
> (g) all regulations made under the repealed enactment remain in force and shall be deemed to have been made under the new enactment, in so far as they are not inconsistent with the new enactment, until they are repealed or others made in their stead;

This suggests that an order in council made under Section 73 of the Indian Act in 1952, continues in force through the change made to the Act in 1956. It is presumed (deemed) to be an order made under the new enactment and therefore made by the Minister and so to be repealed by the Minister.

There are no cases on this point but this interpretation would appear to be in accordance with the intent of the Interpretation Act, Sections 34 to 37 inclusive, which point to an interpretation in the case of all orders and regulations which leads to the smooth administration of the law.

In conclusion, it is suggested that the Minister in 1983 has the power to repeal the Order-in-Council P.C. 3692-1952 referring to the Kamloops Band made by the Governor-in-Council in 1952. What replaces it, is another issue.

ORDER OF THE DEPUTY MINISTER, February 16, 1982

On February 16, 1982, according to the draft memo Mr. Goodwin dated November 5, 1982, the Deputy Minister purported to amend Order-in-Council P.C. 3692 of 1952 by deleting from the schedule the name of the Kamloops Band. (Exhibit B)

Reference should be made to Section 23(2) of the Interpretation Act, RSC 1970, Chapter I-23. Section 23(2) reads as follows:

> Words directing or empowering a Minister of the Crown to do an act or thing, or otherwise applying to him by his name of office, include a Minister acting for him, or, if the office is vacant, a Minister designated to act in the office by or under the authority of an order in council, and also his successors in the office, and his or their deputy, but nothing in this subsection shall be construed to authorize a deputy to exercise any authority conferred upon a Minister to make a regulation as defined in the Regulations Act.

(This was amended on August 1, 1972, to change the phase "Regulations Act" to "Statutory Instruments Act".)

The question arises as to the nature of the document executed by Paul Tellier, Deputy Minister, on February 16, 1982, purporting to amend the order in council P.C. dated August 6, 1952.

Firstly, what is a regulation? A regulation is defined in Section 2 of the Regulations Act, RSC 1970, Chapter R-5, as follows:

> Regulation means a rule, order, regulation, by-law, or proclamation (a) made, in the exercise of a legislative power conferred by or under an act of Parliament, by the Governor-in-Council, the Treasury Board, a Minister of the Crown, or a Board, commission, corporation, or other body or person that is an agent or servant of Her Majesty in right of Canada.

This Act, however, was replaced, in 1971, by the Statutory Instruments Act, which defined "regulation" at length, as follows:

2 (b) "regulation" means a statutory instrument

i) made in the exercise of a legislative power conferred by or under an Act of Parliament, or

ii) for the contravention of which a penalty, fine or imprisonment is prescribed by or under an Act of Parliament,

and includes a rule, order or regulation governing the practice or procedure in any proceedings before a judicial or quasi-judicial body established by or under an Act of Parliament, and any instrument described as a regulation in any other Act of Parliament;

(c) "regulation-making authority" means any authority authorized to make regulations and, with reference to any particular regulation or proposed regulation, means the authority that made or proposes to make the regulation; and

(d) "statutory instrument" means any rule, order, regulation, ordinance, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution or other instrument issued, made or established

i) in the execution of a power conferred by or under an Act of Parliament, by or under which such instrument is expressly authorized to be issued, made or established otherwise than by the conferring on any person or body of powers or functions in relation to which such instrument relates, or

ii) by or under the authority of the Governor-in-Council, otherwise than in the execution of a power conferred by or under an Act or Parliament.

Was the order made by Deputy Minister Tellier an order purporting to be made by a Minister of the Crown <u>in the exercise of a legislative power conferred by or under an act of Parliament</u>?

The power under Section 74 of the Indian Act, (formerly Section 73) would seem to be a legislative power conferred by an act of Parliament. The order in council, P.C. 3692 dated August 6, 1952, would appear to be an order made by

the Governor-in-Council in the exercise of a legislative power conferred on it by an act of Parliament.

It would therefore seem that although the Minister has the power to amend or repeal the original order in council, P.C. 3692 dated August 6, 1952, the Deputy Minister does not because of the wording of Section 23(2) of the current Interpretation Act and the wording of Section 2 containing the definition of regulation in the Regulations Act and its successor, the Statutory Instruments Act.

This opinion is re-inforced when one looks at the predecessor section in the Interpretation Act as it existed prior to the passing of the Interpretation Act of S.C. 1967-68, which is now if effect as found in RSC 1970, Chapter I-23.

Section 31(1)(1) of the Interpretation Act, R.S.C. 1952, c. 158 states:

> 31(1) In every Act, unless the contrary intention appears, (1) words directing or empowering a minister of the Crown to do any act or thing, or otherwise applying to him by his name of office, include a minister acting for, or, if the office is vacant, in the place of such minister, under the authority of an order in council, and also his successors in such office, and his or their lawful deputy;

This previous section did not include the limitation on the power of a Deputy Minister found in the current Act (R.S.C. 1970, c. 1-23, Sec 23(2)).

In conclusion, it would appear on reviewing the Interpretation Act that the Deputy Minister does not have the power to take a band out of Section 74 because Section 23(2) of the Interpretation Act does not give him that power.

However, we must also look at Section 3 of the Indian Act, R.S.C. 1970, c. I-6. It states:

ADMINISTRATION

3.(1) This Act shall be administered by the Minister of Indian Affairs and Northern Development, who shall be the superintendent general of Indian affairs.

(2) The Minister may authorize the Deputy Minister of Indian Affairs and Northern Development or the chief officer in charge of the branch of the Department relating to Indian affairs to perform and exercise any of the duties, powers and functions that may be or are required to be performed or exercised by the Minister under this

Act or any other Act of the Parliament of Canada relating to Indian affairs.

This might suggest the Deputy Minister does have such a power. But it is not clear. The difficulty in interpretation is noted in a memo to Chief, Band Management Division, dated June 2, 1971, from H.M. Thornton of Legal Services. On page 3 of his memo, Mr. Thornton makes the following point:

Section 73 - Band Councils to be Elected

There is some doubt in my mind whether the power under the section to "declare by order" is within the words "duties, powers and functions" in Section 3(2). I say this because it is not entirely clear whether the making of the order is an act which is legislative or administrative or even quasi-judicial in nature. Parliament has treated legislative powers, at any rate when enacting subsection 23(2) of the Interpretation Act as not susceptible of delegation. Whichever it is, however, the declaration will be caught to a greater or lesser extent by the new Statutory Instruments Act. For this reason I doubt very much whether it would prove practicable to attempt any delegation of the Minister's powers in Section 73 of the Act.

It is interesting to note that on April 1, 1970, 14 months before Mr. Thorntan's memo that Jean Chrétien, then Minister of Indian Affairs and Northern Development, signed a document purporting to delegate his powers under Section 74 to the Deputy Minister and also to the Director of Community Affairs. (Exhibit C)

REMOVAL OF BAND FROM PROVISIONS OF SECTION 74

The draft letter to Goodwin from Walchli dated November 5, 1982 appears to be questioning the power of the Deputy Minister to take a band out of Section 74, although on a different issue than is raised above. It points out in paragraph 3 that the band council asked the Governor-in-Council to exercise the legitimate powers which it (the Governor-in-Council) has under Section 4 of the Indian Act to cause the band to be withdrawn from the provisions of Section 74.

The letter points out that this request was not pursued. In other words, the matter was never taken to the cabinet for the cabinet to make a decision on. Instead, the Deputy Minister, as is pointed out in paragraph 4 of the letter 'purported to amend' the order in council by deleting the band from the schedule to the order in council.

The letter then goes on to express concern about the social problems that result from a band reverting to custom. The writer of the draft letter points out that such a move by a government official has 'a profound effect upon the life of an Indian band'. It also refers to the fact that individual members of the band are stripped of the certainty and protection of the law. It also points out that no one seems to know precisely what is meant by reversion to custom. As he points out 'the whole area is shrouded in vagueness'.

He then goes on to suggest that the validity of the order made by Mr. Tellier should be reviewed. It seems evident that if the order was reviewed, it might be seen to be invalid, because while the Minister has such a power, the Deputy quite possibly does not.

Another example of a Minister not signing a Section 73(1) order is that signed by Assistant Deputy Minister Battle on August 2, 1966, purporting to bring the Lac La Rouge Band under Section 73. (Exhibit D). Subsequently, in 1966, it was desired to reverse this order and Mr. Beckett of Legal Services urged that this could not be done. In a memo from Beckett to Dr. Fisher he stated "It is... my opinion that order of August 2 is valid and that the Minister has no power to reverse it although neither point is free from doubt".

The two obvious way of taking a band out of Section 74 would appear to be, firstly, the one referred to by the Kamloops band in its resolution: that of having the Governor-in-Council make a proclamation under Section 4. The second method, would be for the Minister to revoke the order, P.C. 3692 of August 6, 1952.

At this point, consideration is not being given to the social issues which might arise but strictly to the legal possibilities which exist.

Some of these issues are raised in a Memo from Mr. Fisher to Mr. R.F. Battle dated January 19, 1967.

ALTERNATIVES TO SECTION 74 BAND ELECTIONS

If the cabinet were to exercise its power under Section 4 of the Act, what might be the result? The first question is, what would be put in place of the provisions of Section 74 if a Section 74 order had been made. The answer would seem to be in some doubt for a number of practical reasons. The first practical reason is that probably some bands do not know what the ancient tribal customs of governing the community were. If this is what is meant by 'custom', then there would be no custom to replace what existed under Section 74. Another possibility is that custom refers to whatever existed before Section 74 was declared to govern the affairs of the band by virtue of an order in council or Ministerial order. There does not appear to be anything in law to suggest that what existed previously must be something that could be sanctioned by anothropologists, sociologists, historians or tribal elders as 'legitimate customs'. For all one knows, before Section 74 was implemented on behalf of any specific band the affairs of the band were governed by rule of the strongest, by the local Indian agent, by the local priest, or by a local dictator. However, as noted above, Section 19(1) of the 1952 Interpretation Act and Section 35 of the current Act suggest you do not revert to the status quo existing at the time of implementing Section 74.

It should also be considered that different bands adopted Indian Act government at different stages in history. Some such as the Oka band, adopted Indian Act government in 1899. Others at much later dates.

All we need in order for the band to be brought under the provisions of Section 74 is the opinion of someone (the Governor-in-Council or the Minister) that it is 'advisable for the good government of a band' that it be done.

Returning back to the original question of what replaces the provisions of Section 74 we must come to the conclusion that it is not clear.

However, this point should be made: when Parliament passed Section 4(2) of the Indian Act it gave the Governor-in-Council (Cabinet) the power to exempt any Indians or any groups or band of Indians from the provisions of the Act except those contained in Sections 37 to 41 which deal with surrender of land.

We have to assume, then, that Parliament contemplated that Section 74 might <u>not</u> apply to any Indians, or any group or band of Indians, under certain circumstances. In other words, that the possibility of an order being made under Section 74 could be withdrawn by the Governor-in-Council making an order under Section 4.

Parliament presumably also considered the fact that there were two situations where Section 73 (now 74) might be proclaimed by the Governor-in-Council not to apply to any Indians or any group or band of Indians, these being: (a) the situation where Section 73 (now 74) had never at any time in the past been applied to those Indians or group or band of Indians; and the situation where a particular group or band of Indians were in fact being governed by Section 73/74.

Where Section 73/74 had never been applied in the past, then obviously the Governor-in-Council would be saying that it would not apply in the future, at least until the Governor-in-Council revoked its proclamation under Section 4. Where the provisions of Section 73/74 had been invoked in relation to a particular band, then it must have been contemplated that the Governor-in-Council could proclaim that Section 73/74 would not apply any further.

In conclusion, it must logically be the case that Parliament envisaged the situation where Section 73/74 was invoked but then made inoperative through Section 4.

Again, the above does not take into consideration the social aspects that would result from applying the law.

The question arises as to whether there is anything in the Indian Act, the Interpretation Act, or any other act that suggests that once a band falls under the provisions of Section 73/74, it cannot be taken out of those provisions.

The logic of the situation from a legal viewpoint is that either there is an election system under Section 74 or there is not an election system. But if there is not an election system, the act does not provide for an alternative.

Perhaps this would be a situation where the Minister should have a keen awareness of his fiduciary obligation as Minister of Indian Affairs. Is he in breach of his trust obligation, assuming he does have trust obligations, if he moves a band from a stable election system to a social vacuum situation?

The assumption basic to Section 74 would seem, to a layperson to be, that originally bands had their own way of governing themselves. Section 74 gave bands the option, albeit an option to be exercised through the MInister, to adopt 'civilized' European ways of governing their affairs through elections.

It should also be considered that different bands adopted Indian Act government at different stages in history. Some such as the Oka band, adopted Indian Act government in 1899. Others at much later dates.

All we need in order for the band to be brought under the provisions of Section 74 is the opinion of someone (the Governor-in-Council or the Minister) that it is 'advisable for the good government of a band' that it be done.

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The assumption basic to Section 74 would seem, to a layperson to be, that originally bands had their own way of governing themselves. Section 74 gave bands the option, albeit an option to be exercised through the MInister, to adopt 'civilized' European ways of governing their affairs through elections.

Probably it can safely be assumed that Parliament never even contemplated the situation where a band would want to go back to the old ways. Certainly when the legislation was originally implemented the Indian people who now say they are 'returning to their roots' and 'traditions' (which ironically have probably been lost in some cases because the band adopted the election system) did not exist.

The entire situation could probably be clarified if Parliament were to state what alternative exist to the band election system. However, as the political climate exists in 1983, it seems unlikely that they would want to do this with the entire issue of band government in issue.

A review of some correspondence within the Department suggests the Department accepts that a band <u>can</u> opt out of Section 74 after opting into it. Some instruction material does exist in the Department which clearly infers that this can be done although it is the "policy of the Department to require the holding of a plebescite or band meeting to determine the majority wishes..."

The wisdom of continuing to adhere to the idea that a band can "opt out" is, from the legal point of view, highly questionable.

COUNCILLORS, SECTION 74(2)

A review of file 672/3-5 makes it clear that in some cases in the 1950's and 1960's, certain Agencies were of the view that a band could have a custom selection of the chief, but adopt Section 73(2) (now 74(2)) criteria for councillors. It is clear from reading Sections 73(1) and (2) (now 74(1) and (2)) that the provisions of Section 73(2) are dependent upon an order being made pursuant to Section 73(1). Orders implementing only Section 73(2) (or now 74(2)) must be considered questionable.

CONCLUSION

It seems evident that there are interpretations of the Indian Act, that are apparently departmental policy, that are questionable, in law, and leave the legality of actions taken in the past open to question.

These include:

- the power of Deputy Ministers and others of lesser rank to sign Section 74 orders;

- the power to revoke Section 74 orders;

- the question of what replaces Section 74 elections if Section 74 orders are revocable;

- the application of Section 74(2) when Section 74(1) has not been implemented.

These problems, their frequency and the seriousness of their implications suggest that:

a) amendments should be made to clarify the Indian Act in Section 74

b) all legal opinions relating to Section 74 should be collated and reviewed and a policy established and followed

c) an inventory of all orders made under Section 74 and its predecessors should be established and vetted so that remedial action can be taken to rectify any legal problems; the entry of Indians in increasing numbers into the legal profession and their willingness to consult with lawyers suggest that this could be a fruitful area for litigation - minded bands.

Some of the ramifications of the above issues which might be studied are:

- The liability of the Crown for actions taken pursuant to illegal or invalid orders;

- The liability of officials who act in opposition to opinions from Departmental Legal Advisors;

- The Crown's trust responsibilities;

- The position of the Department in leaving itself open to criticism by not clarifying and applying the law. If it wishes not to follow the law, it should at least be aware of what it is doing;

- The wisdom of the Department leaving itself open to charges of political expediency by revoking Section 74 orders to satisfy those who might wish to return to ill-defined custom election procedures;

- The wisdom of the Department not maintaining close liaison with its legal advisors in areas of difficulty.

In conclusion, this memorandum, hopefull, has pointed out a number of issues that have arisen over the years, but that have not been carefully examined or resolved. The fact that they have neither been carefully examined nor resolved is reflected in recent (1982/1983) correspondence within the Department.

Perhaps it is time some determined efforts were made to identify, study and resolve the issues.