THE INDIAN BAND ELECTION APPEAL PROCESS PROBLEMS UNDER THE INDIAN ACT, R.S.C. 1970, CHAP. I - 6, SECTIONS 76 AND 79 AND UNDER THE INDIAN BAND ELECTION REGULATIONS

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PREFACE

PROBLEMS OF THE INDIAN BAND ELECTION APPEAL PROCESS UNDER SECTIONS 76 AND 79 OF THE INDIAN ACT, R.S.C. 1970, CHAP. I-6, AND UNDER THE INDIAN BAND ELECTION REGULATIONS, CHAPTER 952, INDIAN ACT

This is a preliminary report on problems in the Indian band election appeal process pursuant to sections 76 and 79 of the Indian Act, R.S.C. 1970, Chap. I-6, and the Indian Band Election Regulations thereunder.

Sections 74 to 80, inclusive, of the Indian Act cover the Election of Chiefs and Band Councils.

Under Section 74 the Minister may declare by order under certain circumstances that the council of a band, consisting of a chief and councillors, shall be selected by elections to be held in accordance with the Act.

Section 74(2) stipulates the number of chiefs and councillors in relation to the population of the band. As a minimum, every council must have one chief and two councillors. No band can have more than one chief. The maximum number of councillors is twelve.

Section 74(3) provides that the chief and the councillors may be elected in one of two different methods.

Section 74(4) provides for the division of a reserve into electoral sections.

Section 75(1) provides that no person other than an elector who resides in a section may be nominated for the office of councillor to represent the section on the council of the band, and that a candidate for election as chief or councillor must have his nomination moved and seconded by persons who are themselves eligible to be nominated. They must therefore satisfy the residency criteria.

Section 76 stipulates that the Governor-in-Council may make orders and regulations with respect to band elections and may make regulations with respect to (a) meetings to nominate

candidates, (b) the appointment and duties of electoral officers (c) the manner in which voting shall be carried out, (d) elections appeals, and (e) the definition of residence for the purpose of determining the eligibility of voters.

Section 77 provides for age and residency requirements for electors.

Section 78 provides for a two year term for chiefs and councillors and further provides for the vacating of the office of chief or councillor under certain circumstances, and further provides for the ineligibility of persons to be a candidate in elections and for special elections.

Section 79 specifically provides that the Governor in Council may set aside the election of a chief or councillor on the report of the Minister that he is satisfied (a) there was corrupt practice in connection with the election, (b) there was a violation of the Indian Act that might have affected the result of the election, or (c) a person nominated to be a candidate in the election was ineligible to be a candidate.

Section 80 provides that the Governor in Council may make regulations concerning band meetings and council meetings.

According to the records of Membership and Statutory Requirements Section of Reserves and Trusts, Indian Affairs, from 1979 to 1982, there have been approximately 81 appeals of elections of Indian band councillors elected under section 74 of the Indian Act. Of this number, approximately 27 or 33% were successful and an order in council was issued setting aside the election that was appealed.

This subject was examined because of the many problems in relation to the appeal of band elections including delays over the rendering of decisions on appeals, complaints by Indians about the decisions themselves and some of the past approaches taken by the Department to improve the appeal procedure which have failed. There is also a major question of whether it is appropriate for Indian band election appeals to be lodged under Section 76 of the Indian Act, and then, if successful, for the election to be set aside by the Governor in Council under Section 79 of the Indian Act. The legality of this procedure is examined.

The first part of the report deals with the above issues in general terms.

The second part of the report covers that part of the Indian Band Election Regulations which has to do with elections. One of the major causes of appeals is the argument over the definition of ordinary residency on the reserve for the purpose of determining the eligibility of electors (Section 3). Alleged discrepancies in the voters' list is the usual basis of election appeals and a revision of the residency requirements would probably eliminate a majority of the appeals. Many aspects of the problems related to the nomination of candidates for band elections are discussed. The question of a recount and the procedure to conduct a recount are not spelled out in the regulations.

The third part of the report covers that part of the Indian Band Election Regulations made under Section 76 of the Indian Act governing appeals. The lodging of an appeal on the grounds that the regulations per se were violated cannot, even if successful, result in a remedy under the regulations. But an election held under the regulation may be set aside by way of Section 79 if there is a violation of the Indian Act. This confusion is discussed in greater detail. The conclusion is that no amendment to the Indian Act is necessary for a remedy to be provided for a violation of the Act but that an amendment to

the regulations is necessary to remedy a violation of the regulations.

The fact that there is no hearing and no explanation of the decision of an appeal made to the appellant are sources of dissatisfaction to the Indians.

Finally, there is a discussion on general issues such as the Indians' and the Department's attitudes towards election appeals, the reasons for the increase in the number of appeals and other policy questions.

The report describes three alternative approaches to remedy the problems set out in the body of the report. The first suggestion is to delegate complete authority over appeals to the regions except for recommending that the Minister apply for an order in council to set aside an election as a result of a successful appeal.

The second suggestion is to set up an Indian Band Election Appeals Directorate within the department which would hear appeals and make recommendations to the Minister. No amendment to the Indian Act or regulations would be required and the establishment of a Directorate could be done as a matter of administrative procedure. However, this would still not provide a remedy if there was a successful appeal as a result of a violation of the Indian Band Election Regulations.

The alternative to this directorate within the department is an independent Indian Band Elections Appeal Board which would not require an amendment to the Indian Act but would require an amendment to the Indian Band Election Regulations. The Appeal Board would have full power to hear appeals, call for recounts, and the appeals officers could make final decisions without reference to the Minister or the Governor in Council.

The final approach would be to retain the present system but to shorten the appeal period wherever possible, and make it more effective.

The report is lengthy and part of the report has been divided into sections according to the sections of the Indian Band Election Regulations so that each regulation can be examined separately.

There are three appendices: The approximate number of elections of chiefs and band councils under section 74 of the Indian Act by province for the years 1979, 1980, 1981 and 1982; the numbers and a list of orders in council setting aside the elections of Indian band council chiefs and councillors elected under section 74 of the Indian Act, 1979 to 1983, by year; and the number and list of election appeals filed from 1979 to (August) 1983.

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Lastly, I would like to give recognition to D. Novak of the British Columbia Regional Office for his special advice and guidance and for explaining the significance of the election appeals process to me. He gave me a deeper insight to the subject and helped me recognize that appropriate elections and appeals procedures are integral to developing Indian self-government.

A.

PROBLEMS OF THE INDIAN BAND ELECTION APPEAL PROCESS UNDER SECTIONS 76 AND 79 OF THE INDIAN ACT R.S.C. 1970, CHAP. I-6

PROBLEMS OF THE INDIAN BAND ELECTION APPEAL PROCESS UNDER SECTIONS 76 AND 79 OF THE INDIAN ACT R.S.C. 1970, CHAP. I-6

Many problems have arisen continually since the consolidation of the Indian Act and the Indian Advancement Act in 1951 which established the present band election sections of the Indian Act, Sections 74 to 80, and the Regulations enacted in 1954 governing band elections and appeals under Section 76 of the Indian Act.

1. DELAYS BETWEEN FILING OF AND DECISION ON ELECTION APPEALS

Under the Indian Act the following administrative process and approximate time frame applies to the band election appeals:

1. Appeals must be filed within 30 days from the date of the election (Regulations, Section 12(1));

30 days

2. Copies of the appeal must be forwarded by the Department to the electoral officer and candidates within 7 days of receipt (Regulations, Section 12(2));

7 days

3. Within 14 days after he receives the notice of appeal a candidate may file an answer to the appeal. (Section 12(3) does NOT refer to "electoral officer"). (Regulations, section 12(3)). To allow time for mail delivery, this is extended in practice to 20 days;

20 days

4. 2 to 3 weeks later the Regional Office is asked to investigate and verify facts that are received (must be after the appeal period is past)

21 days

5. Once all of the facts are received a recommendation is made and the appeal file goes to Legal Services, which takes at least 2 weeks;

14 days

TOTAL: 92 days

In 75% of cases, the file is not sent to Legal Services if it is decided there is not sufficient evidence to warrant the Minister reporting the matter to the Governor in Council to set aside the election. The Director of Membership and Statutory Requirements simply sends a letter that the result of the election stands.

6. If the appeal is to be upheld by setting aside the election, an Order-In-Council is required (Section 79(b)). This involves a minimum of 5 to 6 weeks.

43 days

TOTAL: 135 days

The average time between receipt of the appeal and notification of the decision if the appeal is not allowed is 60 days if no investigation is required and Legal Services' opinion is not required.

If an appeal requires an investigation and is then not allowed, at least 74 days are required, or 2 1/2 months. The reason being additional information and verification of the facts must be obtained generally from the field after rebuttals are received. Field staff investigate appeals as part of their duties but are not specifically trained or assigned to investigate.

2. CURRENT PROBLEMS CAUSING DELAYS

The number of appeals is increasing every year and the grounds for appeal are becoming more complex. They are generally related to residency or the allegation that the election processes have not been followed correctly which results in frivolous appeals. Once filed they, however, must proceed in the same manner as serious appeals.

The appeals for a specific band election arrive at different times and often in groups. In addition, elections are held at different times across the country. There were approximately 182 elections of chiefs and Councillors in 1979, 164 in 1980, 214 in 1981 and 166 in 1982. There is no control over the fluctuations in timing on appeals or the number or types of bands holding elections at any given time. The workload, therefore, is not constant.

Most elections are now run by local electoral officers who are often Indian band members who are in many cases untrained and over whom the department has little direct control as it does over departmental staff. Delays often result from delays in returning information to the department, resulting in incomplete records.

Headquarters staff directly involved in processing appeals and actually recommending decisions consists of one employee at the WP-3 level with the assistance of a Clerk 4, when necessary. This same staff is also involved with by-laws, other regulations, commissioner for taking oaths, etc., although the appeals are given priority.

In 1971 an investigative board consisting of a representative of the Legal Adviser, a staff member and field representative, with the WP-3 staff member acting as executive secretary, was established. It was disbanded on the recommendation of the Legal Adviser who was of the opinion "... the group ... lacked any legal status or powers, and that this posed a real problem in practice. The group could not either compel the attendance of witnesses or hear evidence on oath ..." (to file 1/3-5, October 2, 1972).

Band political activity and awareness of local elections appears to be increasing. Also more control of services and programs is devolving to the bands. To some bands the Indian Act and its regulations are out of date. The Act is vague on some matters or silent on others. This contributes to the possibility of local misinterpretations, which leads to appeals. For example, there is no reference to a recount or the definition of "ordinarily resident" which is vague and, both of which continue to be problems.

3. NATURE OF COMPLAINTS

Most complaints received from Indians are badly put together but have recently improved because of assistance by lawyers. Many Appeals tend to be complaints against the band council's administration of band business and do not specifically deal with infractions of the election regulations. On the other hand, investigators are instructed to look at whether the Act or the regulations were adhered to or broken.

The basis of most appeals is residency status of electors. The appeal requires a judgement decision which is difficult to make in relation to residency because while the Act and regulations attempt to spell out who is a resident on a reserve they are not comprehensive.

Other common bases of appeals are band membership status, irregularities in posting notices, advertising, or undue influence on the voters.

Some appeals have been filed because candidates and their representatives were not allowed to see or be present at the counting of the ballots; the polls for the election were not open at the times specified in the regulations or the poll closed before the proper time; an electoral officer was not present during the voting; candidates whose names were not seconded at the nomination meeting; neglect to include a candidates name on the ballot; a ballot was improperly rejected by the electoral officer or ballots were marked with a "V" instead of an "X".

Because of a legal opinion in the early 1970's that an election cannot be set aside for a violation of the regulations only but that there must be violation of the Indian Act which might have affected the results of the election, today most appeals that are filed relate to violations of the Act.

Appeal investigators often find irregularities which violate the regulations which do not form part of the appeal directly. For example, one band member in Ontario appealed on sixteen grounds, only three of which had something to do with the election process. If asked before

the appeal is filed the investigators advise and interpret to the Indian people whether there are sufficient grounds for the appeal to be upheld.

One or two weeks are needed to investigate an appeal in order to give an unbiased picture. It may be routine process for the department employee to investigate an appeal, but the entire process is important to the Indians people, not only how the appeal investigation is conducted but how the decision was arrived at. In all cases, the appellant and candidates are given only the decision that is rendered without an explanation of why and how the decision is made. The decision given to the appellant and candidates is usually a one paragraph letter with no explanation. Many Indians feel that more details should be given.

4. COMMENTS ABOUT DECISIONS MADE AT HEADQUARTERS

Regions are sometimes surprised with decisions made in Ottawa, that headquarters has not been as firm as they could have been and have sometimes ignored certain facts submitted by regions.

J. Beckett of Legal Services has taken a strong interest in appeals because he felt it was important to both the Indians and the department. If it was held up for too long, it could embarrass the Minister and the band could not effectively conduct business. The fact that the appeals are handled by departmental personnel far down the bureaucratic line could be an advantage because they are outside of the political sphere.

The appeal packages go to Legal Services for their opinion but the package is only as good as the information contained therein. Beckett sometimes feels that he does not get all of the facts and has to give his opinion on inadequate information. He agrees that many appeals are badly put together,and they tend to be more complaints against the administration of the band council and not specifically in relation to the election.

Sometimes bands will appeal directly to the Minister. This, of course, ends up in Regional Office as a docket to be dealt with.

Headquarters informs the Regions that an appeal is to be investigated and investigators spend one to two weeks on an appeal to get an unbiased picture. It is a routine matter to the department employee but it is very important to the Indian appellant.

Both Indian people and Regions do not receive headquarters' reasons for the decisions. If Regions do have the reasons, they do not divulge their findings to the band.

The department informs the Indian appellant that there are no grounds to set aside an election but does not explain the reasons for the decision. He is often not consulted during the investigation.

5. SLOWNESS OF DECISIONS

Once the documents on the election appeal are in headquarters, some regions feel that the decision can be made in one day. Some decisions reach the council nine months after being filed, almost half the term of the council having gone by.

What happens after nine months if the appeal is allowed and a band has to elect a new council? Is the new council bound by the decisions of the elected council which has been set aside?

In the English version of the Indian Act, the election is set "aside". In the French version you "reject" the election of the council.

The Department always acts on the assumption that the decision to set aside the election of a council is effective on the date the Order in Council is signed by the Governor in Council. (Beckett, June 2, 1983).

There are many legal opinions in departmental files on various aspects of election appeals. It is usually an opinion of a lawyer from the department's Legal Services. These letters usually do not cite authorities or give reasons for the opinions.

For example, there does not appear to be a provision in the regulations under section 76 to set aside an election for a breach of the regulations. Before 1970 elections were set aside as a result of a violation of the regulations. But presently, if a complaint fits into section 14 of the

regulations and then fits into section 79 of the Act, the election can be set aside. No reason is given in a letter from Legal Services for this change in practice.

6. 1970 ELECTION REGULATIONS AMENDMENTS COMMITTEE

Over the years many attempts were made to make the necessary changes in the Act and Regulations. In 1970 a small committee was established to review the current regulations in depth over a period of months. It eventually prepared a series of drafting instructions for the Legal Adviser. Field offices were asked for their comments.

In 1974 the Legal Adviser's Office prepared a series of proposed amended regulations. After several drafts, by 1976 the matter was dropped. No explanation was found for dropping the matter.

It can only be speculated that it could have been because Indian input was limited.

Also, the regulations were to be amended to reduce the voting age, eliminate the need for residency of electors, etc. which would conflict with the provisions in the Indian Act on voting age, ordinary residency, etc.

At the same time a training program was suggested for departmental staff involved with band elections including any local band electoral officers who may be appointed at that time. This training program was to be completed by the time the new regulations became effective. It was suggested that the new regulations be brought into force sometime after their actual consideration by the Governor-in-Council.

There have been no major amendments to the Indian Band Election Regulations since 1954 (P.C. 1954-1367, 17 September 1954) except for one in January 1973 (P.C. 1973-139). This concerned the council being prohibited from functioning during an appeal. This amendment was revoked in April 1974 (P.C. 1974-761). (Roberts to Connelly, September 2, 1975).

B.

INDIAN BAND ELECTION REGULATIONS

CHAPTER 952, INDIAN ACT

1. AGE OF ELECTORS

Section 2(b) of the Indian Band Election Regulations provides that an "elector" means a person who is of the full age of 21 years.

Several provincial governments changed the voting age and age of majority for legal purposes to 18 or 19 years of age and on June 26, 1970 the federal government reduced the voting age to 18 years for federal elections. Some Indian bands sought to change the age requirements without amending the Indian Act.

One attempt to amend the Act was made in October 15, 1974, when Bill C-294 was introduced to lower the voting age to 18 years from 21 years of age in elections under the Indian Act to conform with the legal voting age in federal elections and in some provinces. (Gran to McGilp, November 5, 1974, 1/3-5).

It was an attempt to rectify the provision in the Indian Act that electors be 21 years of age which is inconsistent with the federal and provincial legislation on eligibility for election purposes.

The bill was not compatible with other sections of the Indian Act. It was considered preferable to make an amendment to the Indian Act that would be more comprehensive in its treatment of the voting age and age of majority questions. It was meant to reduce a developing trend by some bands of reverting to "custom" elections as a way of circumventing the voting age restrictions of the Indian Act. Also it was seen by the National Indian Brotherhood (now the Assembly of First Nations) as a violation of the agreement by the government not to amend the Indian Act without full consultation with Indian people. For these reasons, it was decided not to proceed with this bill. (Lesaux to Kozar, November 15, 1974, 1/3-5).

To get around the requirement that electors be 21 years of age and ordinarily resident on the reserve, in 1971 the department recommended, that either the Act be amended or the bands be encouraged to revert to custom systems of elections by revoking the order which brought them under the Elections Sections of the Indian Act. The election provisions of the Act would then not apply to a band who

would then be free to choose their council by custom and set their own age and residency requirements. (Poupore to McGilp, January 13, 1971, SPG 28, 1/3-5).

In 1971 the department developed another way to get around the age requirement in the Act and Regulations by trying to exempt the Chippewas of the Thames Band from the provisions of Section 77(1) of the Act concerning "ordinarily resident" and "of the full age of 21 years" by use of Section 4(2) of the Act. This section provides that "The Governor in Council may by proclamation declare that this Act or any portion thereof, except sections 37 to 41 shall not apply to any Indians or any group of Indians or any reserve or any surrendered lands or any part thereof, and may by proclamation revoke any such proclamation".

This Order in Council was issued in 1974 but the proclamation was not made as the Department of Justice would not recommend it. Finally in July 16, 1981 the Associate Deputy Minister of the Department 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" and "of the full age of 21 years" in section 77(1) of the Act.

AGE OF ELECTORS

Some bands, particularly in Ontario, argue that all people including Indians 18 years of age or more can vote in provincial and federal elections, and therefore they should be able to vote for a band councillor. The difference between the two elections is vast. If lowering the age is so important, if the band members feel so unhappy about this restriction, that it drives them into reverting to custom elections, then perhaps Parliament should comply and amend the law as the law should serve people rather than making life unpleasant. On the other hand, some Indians have strong views against lowering the voting age from 21 to 18 years. To some Indians until the age of 21, children are not considered to be adults. Some Indian people would prefer to have their children at home and remain under their authority, and therefore the current age of majority is fine for them. There seems to be a symbolism in the age of 21. The Indian Act implies that an elector is an adult. Throughout the world age of majority is 21.

If the bands are anxious to lower the voting age, they could apply for the order in council under section 4(2) of the Act. However, up to the present few bands have done so .

Is there a difference between federal, provincial and band elections? In small bands, there may be as few as 30 electors and one vote makes a difference. In federal elections, one vote may not make that much difference. The members of the band deal directly with the band council on a one to one daily basis. The average Canadian citizen does not have regular close contact with the prime minister or his member in Ottawa. Many Canadians do not know who the various Ministers of the government are. There is no comparison between the two elections and the arguments to change the age are unconvincing to some.

A change of age would affect not only the right to vote in band election but every section of the Act where the word "elector" appears - surrenders, land for subdivision, development, election to band council, filing election appeals, management of revenue monies, or power given to the band which is exercised by a majority of electors such as deciding on a budget. The band could have an 18 year old chief.

INDIAN BAND ELECTION REGULATIONS

II. SECTION 3. DEFINITION OF RESIDENCE FOR THE PURPOSE OF DETERMINING THE ELIGIBILITY OF VOTERS

1. ORDINARY RESIDENCY IN ELECTORAL SECTIONS

In relation to electoral sections, Section 74(4) of the Indian Act determines that a reserve shall consist of one electoral section or that the reserve shall be divided into not more than six electoral sections.

Section 77(1) provides that where the reserve for voting purposes consists of one section, an elector must be ordinarily resident on the reserve in order to vote for persons nominated for chief and councillors.

Section 77(2) provides that the elector must reside in a section that has been established for voting purposes in order to vote for a person nominated as councillor to represent that section.

Section 76 provides that the Governor-in-Council may make orders and regulations with respect to band elections and may make regulations with respect to meetings to nominate candidates (76(a)); the appointment and duties of electoral officers (76(b)); the manner in which voting shall be

carried out (76(c)); election appeals (76(d)); and the definition of residence for the purpose of determining the eligibility of voters (76(e)).

2. REGULATIONS FOR DETERMINING RESIDENCY FOR THE PURPOSES OF BAND ELECTIONS SECTION 76(d), INDIAN ACT

Disputes over residency of band members is the most common ground for an election appeal. Residency is defined in the band election regulations, section 3, pursuant to section 76(d), Indian Act.

In cases of disputes at the time of election, the electoral officer must use his discretion in applying the regulations as set out in section 3 of the band election regulations which define ordinary residency for the purposes of voting:

(a) subject to the provisions of this section, the questions as to where a person is or was ordinarily resident at any material time or during any material period shall be determined by reference to all the facts of the case;

(b) the place of ordinary residence of a person is, generally, that place which has always been, or which he has adopted as the place of his habitation or home, whereto, when away therefrom, he intends to return, and specifically, where a person usually sleeps, in one place and has his meals or is employed in another place; the place of his ordinary residence is where that person sleeps;

(c) a person can have one place of ordinary residency only, and he shall retain such place of ordinary residence until another is acquired;

(d) temporary absence from a place of ordinary residence does not cause a loss or change of place of ordinary residence.

Residency as defined in the regulations is vague. A thorough search of file number 1/3-5, dating back to June 1972, failed to show any legal opinion on the "Guidelines for Determining Residency for the Purposes of Band Elections".

During an election the electoral officer usually asks the elector to make an oath that he fulfills these qualifications, and then the electoral officer allows the band member to vote.

However, in cases of appeals following the election, more evidence is usually sought through an investigation.

Although the definition in section 3 is considered by many concerned with band elections as narrow, the opinion is that the definition of residence should not be made so broad that it covers situations in which the facts have no real resemblance to any kind of residence. If this definition was deleted, the courts would interpret "ordinary residence" much more broadly than they can under this definition. (Beckett to McGilp, July 20, 1971, 1/3-5 (C23)).

In deciding ordinary residence for voting purposes, residence has been based on actual physical presence in a place from some appreciable period of time together with an intention to remain there. The intention may be inferred from the circumstances surrounding his presence or from the

relationships which he bears to the place. Also, the circumstances by which a person remains absent from a locality may determine whether he has ceased to reside in a locality.

In 1955 the Turmer and Beaverton case was cited (24 O.L.R. (C.A.) in establishing a residence qualification for voting purposes: "Where a voter maintained a furnished house in the municipality to which he intended to return on the completion of the business which had obligated him to move with his family to another municipality for three months, it was held that the voter had not lost his residence qualification". (Jones to Thomas, February 9, 1955, 1/3-5). This qualification has not been accepted in determining residency in cases of appeals of Indian band elections.

In another case: "In order to establish the residence qualification it is necessary to have continuous residence but this does not mean residence from day to day and the qualification is not lost by a mere temporary absence, as for instance by going to another place to do harvesting work with the intention of returning". (Jones to Thomas,

February 9, 1955, 1/3-5). This definition was the basis of determining residency on the reserve in the Canard case which allowed the Minister to carry out his responsibility under the Indian Act to probate the will of the deceased Indian who had been living and working off the reserve at the time of his death. The Minister did not give his consent to allow the family to have the will probated in the provincial court.

In another case, it was held that there was an elector on the voters' list as a tenant who had a short time before the election left the municipality leaving his family in the house, and there was no evidence to show whether his absence was permanent or temporary. His vote was considered valid although there was evidence to show that the voter had ceased to be a resident. (Jones to Thomas, February 9, 1955, 1/3-5).

It appears that each case can only be determined by a reference to all of the relevant facts.

Over the years since the consolidation of the Act in 1951 and enactment of the Indian Band Election Regulations in 1954, many bands have questioned the ordinary residency requirements for electors.

In 1955, Chief O. Peters of the Hope Band wanted to know why an Indian who has property on a reserve but lives off the reserve is barred from voting in band elections. He stated that an Indian whose occupation takes him a few miles from the reserve should be able to vote even though he may not be eligible to hold office. (Fairholm to file, October 17, 1955, 1/3-5).

At a meeting held September 1963 the Six Nations Council suggested that subject to the other provisions of this section on ordinary residency, the question of where an elector is or was ordinarily resident at any material time or during any material period should be determined by the council of the band with reference to all facts of the case. Where more than one electoral section has been established on a reserve, the council of the band should define the place of ordinary residence of an elector with reference to a particular section. Also, they suggested that a person can have one place of ordinary residence only, and he shall should retain such place of ordinary residence until another is established.

At that time the Regional Supervisor suggested that all registered band members who own or are renting property on the reserve should be allowed to vote at band elections - provided, however, that an elector must be in ownership of or have been renting such property a clear 30 days (including Sundays) prior to the date of the election.

In 1973 a suggestion was made that all persons over 21 years of age on the band list should be electors. Some non-resident band members felt it is inconsistent to pay them a share of the band funds if they become enfranchised, while denying them the vote to help select a council who will control expenditures of these same band funds. (Aquin, Supt., Sault Ste. Marie Agency to Regional Supervisor, North Bay, 12/3-5, September 19, 1973).

The opposite opinion was given in 1963 that band members regardless of where they live own a per capita share of band funds. However, in some instances non-resident band members could unjustly interfere with the effective administration of the band. (Supt., Skeena River Agency to Indian Commissioner for B.C., 208/3-5, September 5, 1963.

There has been a continuing debate over whether to broaden or narrow the definition of ordinary residency. J. Beckett of Legal Services was asked by the Community Affairs Branch to persuade senior Justice officials that while the Minister cannot choose whether a band is to come under the narrower or broader definition, the band council might be allowed to make this choice with the resolution being approved by the Minister.

J. Beckett was not sure whether this proposal would be accepted. He felt that this proposal to amend section 3 of the regulations by adding to it would have a better chance of acceptance if the choice was made by a band rather than by a band council as it would be even less like the redelegation from the Governor-in-Council of the power which Parliament has given him to create the definition. He indicated he would point out when he made this proposal that it would be much easier administratively if the choice were made by a band council.

Community Affairs wanted the narrower definition of residency to apply unless the Indians expressly chose the broader one. (Beckett to Community Affairs, November 23, 1973, 1/3-5).

3. SUGGESTED AMENDMENTS TO ORDINARY RESIDENCY DEFINITION

In 1964 it was suggested that for the purposes of these regulations, any person who is a member of the band shall be deemed to be resident on the reserve; and where a reserve has been divided into electoral sections, electors shall be deemed to be resident in the electoral section in which they live, or from which they came, or with which they have closest connection, but in no case shall any elector be deemed to be resident in more than one electoral section.

This change would have required a consequent change in the definition of "elector" appearing in section 2(e) of the Indian Act where "elector" is defined as a person who is qualified pursuant to section 76 of the Act, to vote at band elections. (Legal Adviser to Director, Indian Affairs Branch, 1/3-5, March 16, 1964).

In 1964 it was also suggested that any member over 21 years of age who is recognized as owning land or having an occupational interest in the land on the reserve should be deemed to be ordinarily resident on the reserve for election purposes.

In 1964, it was suggested that a change of residence is not caused by a temporary absence but can only be brought about by an act of removal to another place joined with the intent to remain in such other place. It was felt all band members have the right to vote and "ordinary resident" must be more clearly defined.

In 1971 it was suggested that the regulations be amended to cover any member of a family, not solely the head of the family, where the wife may have left her husband and lives off reserve.

There is also the situation where young couples are living in rented accommodation off reserve simply because there is no housing available on reserve. Their intent is to reside on the reserve. Some councils will not provide housing to persons who do not support them in elections.

The decision as to whether a person can vote or not is a personal judgement exercised by the electoral officer regarding the person's intentions. (Goodwin, B.C. Region, April 29, 1971, 974/3-5).

In the 1971 attempt to amend the Band Election Regulations to give a broader definition of residence in respect of the eligibility of voters for the specific bands in questions, it was contended that depending upon all the circumstances, it might be possible to make a valid regulation under this provision that would largely achieve the ends that are sought. It was suggested to delete completely the definition of residence in the regulations to make a much more general definition of residence that, while not detracting from the provisions of section 76 of the Indian Act would allow more leeway in all such cases. (Deputy Minister to Robinson, May 3, 1971, 471/3-5).

4. USING SECTION 4(2) OF THE INDIAN ACT

In the 1960's an effort was made to use section 4(2) of the Indian Act whereby the Governor-in-Council could make a proclamation that the Act or a portion of the Act would not apply to a particular band.

Three band council resolutions were received from the Chippewas of the Thames, Munceys of the Thames and Walpole Island and processed. They asked for a proclamation to

lift the words "ordinarily resident" in section 77 of the Act so that off-reserve residents could vote in band elections. By using Section 4(2) of the Act, the Order-in-Council would lift the words "ordinary residency" in section 77 of the Act. A by-election followed the submission and acceptance by the department of the band council resolutions and the submission of the Order-in-Council.

Justice officials in the Privy Council office, who reviewed all Orders before printing, did not concur that Section 4(2) could be used legally in this way and stopped the process of issuing the Order. One Order-in-Council was signed but never published in the Canada Gazette and therefore was not effective.

As a result of this misapprehension, other bands submitted requests to have the Minister request that the Governor in Council issue a similar Order-in-Council. These bands were advised of the Privy Council Office's decision and advised to revert to band custom to bring about the desired change of the definition of "ordinarily resident". Some bands in fact did.

Early in 1979 Alberta Region forwarded a proposal to use section 4(2) to permit an individual Indian to use his personal property as a collateral for a loan. The

Associate Deputy Minister of Justice reviewed the legislation and came to the conclusion that the portion of 89(1) dealing with personal property could be lifted by section 4(2) of the Act.

This opinion was passed to the Legal Advisor of the Privy Council Office to make sure an Order would be published if it was approved. On December 6, 1979, wording for the Order was submitted and published.

Based on this opinion Legal Services of the Department of Indian Affairs were asked to ascertain whether the same interpretation would now apply to the use of Section 4(2) of the Act and "ordinary residency" as provided in Section 77. On July 16, 1981, the Associate Deputy Minister of Justice agreed that the same interpretation applied. Wording for an Order and a Directive to all Regional Directors General were drafted.

The following arguments were used:

> In municipal elections, at least in Ontario, a rate payer having a financial interest in a municipality (e.g. owning a house or business) has the right to

> vote in that municipality even though he may live in a different municipality and would have a right to vote there also. Similarly a band member living off-reserve may well have a right to vote in the municipality in which he lives, but he also has a financial interest in the reserve and the band funds, which the Indian Band Council may be administering, by virtue of being a member of that Band.

Surely a non-resident band member and his "band rights" is just as affected as a resident band member in respect to such items as the amalgamation of bands, appeals to band lists, enfranchisement of a band and the surrender of reserve lands. (Sections 17(1)(b), 9, 112(2) and 39(b)).

It would also affect the exercise of a "power of a band" under Section 2(3)(a) of the Act, but no one has been able to ascertain how such powers are to be exercised.

The results are no different than for those bands which select their council by custom and allow off reserve members to vote. It would regularize the practice of those bands which although they are under the Act allow off-reserve members to vote.

Under the new ruling whereby Indian bands can now ask for a proclamation under section 4(2) of the Act to permit lifting the portion of the Act dealing with ordinary residency:

i a voter would be a band member of the full age of 21 years (section 77(1)), and would be eligible to vote at elections for chief and councillor. Residence would not be a factor;

ii an elector is anyone who is registered on the band list, is twenty years of age, and is not otherwise disqualified from voting (section 2(1) of the regulations;

iii the reserve must be one electoral section (section 74(4);

iv a candidate for councillor must be an elector who resides on the reserve, section 75(1);

v the mover and seconder of the nomination of a candidate must be an elector who resides on the reserve, section 75(2);

vi the regulations do not apply in determining "ordinarily resident on the reserve".

5. ARGUMENTS AGAINST USING SECTION 4(2)

Section 77(1) of the Indian Act determines the eligibility of voters for chief and council, that an elector must be a member of a band, who is of the full age of 21 years, and is ordinarily resident on the reserve. The definition of "ordinarily resident" is outlined in section 3 of the Indian Band Election Regulations.

In 1970 there appeared to be authority to make an Order-in-Council exempting a band and a reserve from the application of subsection (1) of section 77 of the Indian Act only. (Fischer to Chief, Bands Management Division, July 15, 1970, 1/3-5).

This application arose from an band council resolution (984/04-4, Kitamaat Band) to make the following changes:

"Subject to this section, chiefs and councillors shall hold office for a period of 2 years with one half of the present council hereinafter named holding office until the expired date of their particular term, and the balance of the council presently in office terminating twelve months prior to the above mentioned termination date, at which time an election shall be held to fill those offices for a period of two years. All other terms and conditions of Section 78 shall apply to the Kitamaat Indian band".

The band was aware that the act could only be changed by Parliament, but wanted to take advantage of the "permissible nature" of the Indian Act as illustrated by section 4(2). (Terrace Indian District to Tully, file 986/3-5, July 12, 1977).

The Kitamaat Band requested that the Governor in Council exercise his authority under Section 4(2) of the Indian Act and proclaim that section 77(1), 77(2) and 78(1) shall not apply to the Kitamaat band. It was understood that all other sections of the Indian Act would continue to apply to the Kitamaat Band.

They did not wish to replace these provisions directly by other provisions. They would adopt certain requirements locally, that electors be 19 years of age and not ordinarily resident on the reserve.

This would result in the band being neither "fish nor fowl". (Tully to Director of Legal Services, July 28, 1977 986/3-5(LG12). The band would be under the Indian Act, and its regulations for election purposes except for the term of office and the qualifications for voters. This may create conflict, misunderstanding or administrative difficulties with other sections of the Act.

For example, the definition of elector would remain (Section 2(1))which would mean that candidates for council would have to be 21 years of age (Section 75(2)), the nominators of such candidates would also have to be 21 years of age (Section 75(1)). The preparation of the voters' list involves the name of "electors" (Regulations, Section 5(1)). If these implications were well understood by the band members, it may work from their point of view, but it is questionable.

In addition, how would this affect the Minister's ability to consider appeals? For example, Section 79(b) in this respect refers to a violation of the Act, and the voting qualifications (age and residency) would in effect, no longer be part of the Act, or would they? If not, residency could not be a ground for an appeal; nor could a 19 year old voter appeal as this is limited to an "elector" or candidate (Regulations, section 12(1)). It was considered that a complete change to custom would be more appropriate.

In 1977, this proposal to issue a proclamation under section 4(2) of the Act could not be supported. Those sections affected are a component part of the election provisions and exemption from them, without some means to impose other conditions for eligibility to vote, would lead to the difficulties pointed out. (Cullinan to Tully, August 11, 1977, 986/3-5).

6. AG OF MANITOBA V. CANARD ET AL

The issue of ordinary residency was given a great deal of attention in the case of Attorney General V. Canard et al, 1975. This case went to the Supreme Court of Canada. It

deals with Sections 42, 43 and 44 of the Indian Act which give the Minister jurisdiction over probating of wills of Indians. Section 43 in particular giving the Minister specific powers to deal with Indian estates was attacked as ultra vires and contrary to the Bill of Rights.

The case was commenced by the department under section 44 of the Indian Act purporting that the Minister must give his consent for an Indian to have his estate probated in the provincial court.

It was contended that the Minister's powers of administration provided in the Indian Act was unlawful, that probating of wills is the responsibility of the court and that section 44 of the Indian Act was ultra vires.

One of the deciding issues in the case was ordinary residence on the reserve of the deceased. The Minister has exclusive jurisdiction over the wills of those Indians who are ordinary residents of the reserve. If they are not resident on the reserve, he does not have exclusive jurisdiction over their estate and with the Minister's consent his executors can apply to the court of the province.

The trial court found the deceased, a farm labourer, was not resident on the reserve at the time of his death. Apparently when he left the reserve to work on a farm off the reserve, he took his wife and family with him, returning to the reserve when the farming season was over. The Manitoba Court of Appeal overturned that decision. The court recognized that he was ordinarily resident on the reserve because he was a seasonal worker.

The Supreme Court of Canada agreed with the Manitoba Court of Appeal. It would appear that the reason for determining ordinary residency could apply to both testamentary and election matters.

On the question of "intention", if an Indian's ordinary residence is on a reserve but he lives in Regina, although he intends to return to the reserve in the future, the evidence may indicate he lives in the city and not on the reserve. When a person has two residences and spends more time at one than the other, permanent residence may be where he spent less time. For example, a home in the country and room in town - the only reason for having the room in town is for employment, but it may not be his ordinary residence.

Temporary absence does not cause a change of residence, if for example an Indian man works on a farm off the reserve and takes his wife and children with him. He intends to return to the reserve when his job is over.

To make a rule or definition on such a matter is difficult. All the facts must find that ordinary residence is one place. If the evidence is split down the middle then the decision has to be in favour of the reserve.

7. DISCUSSION ON ORDINARY RESIDENCY

Most appeals are based on who is an elector which is defined as a band member who must be ordinarily resident on the reserve. Since section 76 of the Indian Act specifically mentions that the Governor in Council can make regulations on the eligibility of voters, this section should be used to widen the right to vote as far as it goes without offending the Indian Act. This could be accomplished by amending section 3 of the regulations.

Parliament provided in Section 77(1) that an elector must be an ordinary resident on the reserve. In section 76 the governor in Council can define 77(1) in the regulations who is an ordinary resident on the reserve. The definition can be wide or narrow, such as anyone who has an interest in land on the reserve could be deemed to be resident on the reserve. Or the person who is on a waiting list for a house could be deemed to be resident on the reserve. Unless the language is completely violated, the definition could stop short of cases which are obviously far-fetched. Off-reserve residents who have an interest in the land or a separated spouse could be allowed to vote. Each and every eventuality should be included by prefacing the regulation with the term "without restricting the generality of the foregoing...".

8. AMEND DEFINITION OF ORDINARY RESIDENCE

Without offending the Indian Act, section 3 of the Indian Band Election Regulations which defines ordinary residence can be redrafted to create constructive residence for the purpose of voting in a band election.

And Parliament has provided in section 76 of the Indian Act a means by which ordinary residence can be broadened or narrowed in the regulations. Otherwise there would appear to be no purpose for defining residence at all. It is therefore presumed that it should be so specific that it would eliminate unnecessary appeals and arguments. At the same time it will not offend section 76 of the Indian Act.

INDIAN BAND ELECTION REGULATIONS

III. SECTION 4. NOMINATION MEETING

1. CANDIDATE RUNNING FOR CHIEF AND COUNCILLOR

Section 4(3) of the Regulations states that a person can be nominated to "serve as a chief or councillor". This has been interpreted by the department to mean that a candidate could run for both chief and councillor on the same ballot. This practice is questionable and is supported by Section 7(b) which, states that the electoral officer may declare a ballot paper containing the names of candidates for more than one office to be void, meaning that an elector cannot vote for one person for two offices. "Or" means one or the other, not both.

The practice has been that if the candidate is elected to both offices, that he resign from one office. Then an election must be called to fill the vacated office. The Act and Regulation do not allow a candidate to legally hold two offices at the same time. How, therefore, can he resign from one of them since the law prohibits holding two offices at one time?

2. APPOINTMENT OF ELECTORAL OFFICERS

The Indian Band Elections Regulations provide that "electoral officer" means the Superintendent OR the person appointed by the Council of the Band WITH the approval of the Minister.

In 1966 a directive was forwarded to the regions that in many cases Superintendents have allowed Band Councils to appoint an electoral officer and to proceed with a nomination meeting and an election prior to approval of the appointment as provided in the Regulations. This practice was considered undesirable and led to unsuccessful appeals of an election by band members.

From 1966 on Band Council Resolutions appointing electoral officers had to be forwarded to Headquarters in advance of an election being held so that the appointment could be approved.

The directive also stressed that everything possible was to be done by district offices to encourage band councils to appoint electoral officers. Superintendents were to only act if a band council refused to make an appointment. It was also added that a person whose appointment was approved as electoral officer would continue to act until such time as a new officer was appointment by the band council.

The band council cannot appoint a departmental employee to be an electoral officer. The band council can ask the department employee if he will act as an electoral

officer. A formal appointment by the band council, other than an employee of the department, must be approved by the Minister.

3. APPOINTMENT OF INDIAN BAND ELECTORAL OFFICERS AS COMMISSIONERS FOR THE TAKING OF OATHS

Indian band elections are conducted by electoral officers appointed by the council of the band with the approval of the Minister pursuant to paragraph (f) of Section 2 of the Indian Band Election Regulations. This section defines "electoral officer" as meaning "the superintendent or the person appointed by the Council of the Band with the approval of the Minister".

Normally, the persons so appointed are members of the Indian bands concerned and do not have the authority to take an oath as required by Section 5(14) of the Indian Band Election Regulations which provides: "At the request of any candidate or his agent or any elector, an oath or affirmation in the form prescribed as to his rights to vote shall be administered to any person tendering his vote at any election".

It was thought that this disadvantage of persons so appointed as electoral officers not having the authority to take an oath could be overcome by appointing electoral officers as commissioners for the taking of oaths pursuant to Section 108 of the Indian Act which provides:

> "108. For the purposes of this Act or any matter relating to Indian Affairs
>
> (a) persons appointed by the Minister for the purpose,
> (b) superintendents, and
> (c) The Minister, Deputy Minister, etc.
>
> are ex officio commissioners for the taking of oaths."

In other words, Section 108 of the Indian Act provides the "(a) persons appointed by the Minister for the purpose," are ex officio commissioners for the taking of oaths "For the purposes of this Act or any matter relating to Indian Affairs". It was felt preferable to have an electoral officer appointed as a commissioner for the taking of oaths only for the purpose of the Indian Band Election Regulations. It was also thought that the appointee should be appointed as a commissioner for the taking of oaths at the same time as his appointment as an electoral officer by the band council is approved by the Minister. (Fairholm to Departmental Legal Adviser, December 20, 1965, 1/3-5(A.2)).

ELECTION HELD UP TO AUGUST 1983

Standing Buffalo	Sask.
Okanese	Sask.
Sooke	B.C.
Carry the Kettle	Sask.
Peepeekisis	Sask.
Kwickwutaineuk	B.C.
Nut Lake	Sask.
Ashcroft	B.C.
Gitwangak	B.C.
Okanagan	B.C.
Edmundston (St. Basile)	N.B.
Frog Lake	Alberta
Samson	Alberta
Mistawasis	Sask.
O'Chiese	Alberta
Enoch	Alberta
Little Grand Rapids	Man.
Chippewas of Nawash	Ont.
Duncan	Alberta

TOTAL: 19

APPEALS 1979 - 1983 GRAND TOTAL: 101

Section 108 of the Indian Act does not authorize the Minister to appoint persons commissioners for the taking of oaths. What it does is to authorize persons holding the offices mentioned therein to be commissioners by virtue of their office.

The office of electoral officer is filled by a person appointed by the band council although the appointment is subject to the Minister's approval. Even if a band election is a "matter relating to Indian Affairs" within the meaning of Section 108, the appointment of an electoral officer is not made by the Minister, and therefore Section 108(a) could not have any application here. (Williams, Legal Adviser to Assistant Deputy Minister Indian Affairs, January 31, 1966, 1/3-5).

Department staff who have the necessary authority continue to administer the necessary oaths (as to residence, age, etc.), and sometimes band employees are commissioners for taking oaths.

Most electoral officers use a form signed by an elector which they witness but they have no right to administer an oath. Basically, they are asking a potential elector to sign a form containing information which the electoral officer uses to make a decision as to whether he can vote.

The electoral officers appointed are usually untrained band members, who have acted as assistant electoral officers. They can call on the assistance of the employees of the department. Today, many call on the assistance of lawyers or appoint lawyers to be electoral officers.

It has always been the belief that if electoral officers were better trained, the numbers of appeals would probably not be significantly decreased, but the number of election irregularities would be.

4. QUALIFICATIONS OF ELECTORAL OFFICER

There are conflicting opinions on whether there is a conflict of interest if the electoral officer is a band member. Some feel he is too close to the situation and therefore it is more difficult for him to be objective. He is subject to pressures which may make it possible for him to yield. On the other hand, he knows the band members on a personal basis and can talk to band members in their own language.

Ideally he should be divorced from the electorate. He has an official position which is governed by the regulations, and he is responsible only to the Minister. He must be impartial. The voters' list, which seems to be the most contentious item, is controlled by the electoral officer and if he is under the influence of the ruling clique who are on the band council and if it is in the interest of the present council to be re-elected and they want to keep some of the electors on or off the voters' list, they will use the electoral officer as a tool.

Under the present regulations with the confusion over the definition of ordinary residence the electoral officer has a great deal of discretion. An electoral officer could compose a voters' list to suit the wishes of the band council if he is under their influence or is unable to stand up to the pressure. As a result of this discretionary power to put voters on or off the voters' list based on ordinary residency appeals are filed.

5. NOMINATION MEETING

Section 4(1) of the Indian Band Election Regulations provides that when an election is to be held, the electoral officer shall post a notice of the meeting of the electors

in order to nominate candidates for election, six clear days before the date of the proposed nomination meeting and at least 12 clear days before the date of the election.

Section 4(2) provides that when it is not practical to hold a nomination meeting according to section (1), the Assistant Deputy Minister may order that the meeting be held less than six days before the date of the election.

A band in British Columbia asked the department to waive the six clear days between the nomination meeting and election date which would allow for one trip by employees of the department to hold the nomination meeting, the election the next day and then to leave the reserve. Not only would this save time but expense to the department.

Section 4(3) provides that a meeting shall be held for at least two hours to receive nominations, that an elector may propose or second the nomination of candidates; and if the number of nominations does not exceed the number required to constitute a council the electoral officer must acclaim as elected those candidates so nominated.

6. PROTEST OF ELECTION BY ACCLAMATION

There is no provision under the regulations for protest of an election made by acclamation. It is contended by Legal Services that the electorate have an opportunity to prevent acclamation by nomination of candidates.

The other problem is that under the regulations the only persons who can appeal are candidates or electors who tendered their vote at the election. Section 12 of the regulations provides that "any candidate at the election or any elector who gave or tendered his vote at the election", not "any candidate or elector" may lodge an appeal. If no one voted and the candidate was acclaimed elected, then there could be no appeal lodged. Also if he tried to vote and was denied the opportunity to vote that would give him a right of appeal.

With some Indian bands, if the chief and councillors are elected by acclamation - meaning without opposition, they may immediately decide to change this and take another vote. This is their way of making an appeal. Voting or re-voting is not allowed under the regulations but is done by those bands who select their leaders by band custom.

There is no choice. Section 4(3) of the regulations makes it mandatory to acclaim. If five people are nominated and for two hours nothing happens, that is the end of it.

Under the present regulations persons can be nominated who are not present at the nomination meeting. The candidate's name can be put on the ballot, and he does not have to withdraw and so his name stands for election. In one case a person at the nomination meeting said he did not want to run for election but he did not file a written withdrawal. He then changed his mind and decided to run on election day but the electoral officer did not put his name on the ballot. This was subject to appeal because his name was left off the ballot. He had not filed a written withdrawal and his name therefore should have been placed on the ballot.

7. ACCEPTING AND REFUSING NOMINATIONS

If a person is nominated for the office of chief who is not eligible to hold that office or has not signified his assent, it is the electoral officer's duty to refuse to receive such nomination.

If, on the other hand, the person nominated is eligible to be nominated, but has not signified his assent, there is no method by which the electoral officer can remove the candidate's name from the ballot. The candidate may withdraw his name under section 5(6) of the regulations, or, upon election, resign under section 78(2)(a)(ii) of the Act. If an ineligible candidates stands for election, the Governor-in-Council may set aside the election under Section 79(c) of the Act.

Under Section 4(5) the electoral officer declares the time and place where an election will be held. Section 78(1) provides that chiefs and councillors hold office for two years. The election date is set by the Order-in-Council which brought the band under Section 74 whereby elections are to be held in accordance with The Indian Act. Section 5(10) of the regulations provide that the poll shall be kept open from 9 o'clock in the forenoon until 6 o'clock in the afternoon. Or, if necessary, to keep the poll open until 8 o'clock.

INDIAN BAND ELECTION REGULATIONS

IV. SECTION 5. MANNER IN WHICH VOTING SHALL BE CARRIED OUT

1. VOTERS' LIST

Section 5(3) of the Indian Band Election Regulations provides that "Any elector may apply to have the voters' list revised on the ground that the name of the elector is incorrectly set out therein or the name of a person not qualified to vote is included therein."

Section 11(6) provides that an elector whose name does not appear on the voters' list may be added if the electoral officer is satisfied that he is qualified to vote.

Bands have raised the question about the preparation of the voters' list and whether objections should be made to the voters' list when it was posted insofar as ineligible voters are concerned, and failure to do so by a band member would stop him from challenging the voters' list after the election. Although the Indian Band Election Regulations specify how the voters' list is to be drawn up, it is the Indian Act which specifies that a person eligible to vote in an election should be 21 years of age and ordinarily resident on the reserve.

In 1979 Legal Services determined that if there were a large number of ineligible voters placed on the voters' list, this would not be sufficient for the Governor in Council to set aside the election unless these ineligible voters actually voted in the election. Therefore, an elector need not concern himself with who is on the voters' list since ineligible voters may not necessarily attend the election to vote. However, he should, though, to avoid a later time wasting appeal.

The Indian band election regulations are drafted so that every person who might be eligible to vote can have a chance to exercise his right to do so. When an elector arrives at the poll to vote the electoral officer does not have enough time to investigate whether a person fits within the definition of section 77(1) of the Indian Act, and the best he can do is take a sworn statement to that effect. After the election when the electoral officer has an opportunity to make inquiries, and the facts indicate a voter was ineligible, an elector can appeal the election and it will be set aside if in the opinion of the Minister, such a vote may have effected its outcome. (Bryant to Smith, August 31, 1979, 1/3-5).

It is not correct that the candidates or their agents can decide whether or not to include particular names on the voters' list and if no one objects to them prior to the selection that the voters' list should stand. The Indian Act does not allow bands to decide who will be able to vote in elections. It specifically sets out qualifications of voters and the band cannot waive any sections of the Indian Act.

Most election appeals are not filed by voters, but by candidates who read the regulations and base their appeals on the right of a band member to vote.

Section 5(5) of the Indian Band Election Regulations provides that ballot papers shall be prepared in the prescribed form containing the names of the candidates for chief and for councillors, which names shall be listed on the ballot papers in alphabetical order.

If there is an error on the voters' list before and at the time of the election, it becomes a matter for the electoral officer to decide whether the band member has a right to vote. Then it is subject to appeal (if he voted and had no right to vote). If the electoral officer made a mistake and did not allow someone to vote and if he appeared at the

poll and attempted to vote, then the Department must accept the appeal even though the member did not vote. Having voted is a qualification for filing an election appeal Having attempted to vote and being denied the right to do so is also qualification for filing an election appeal.

2. WITHDRAWAL OF NOMINATION

Section 5(6) of the Regulations provides that any candidate who has been nominated may withdraw at anytime after his nomination, but not later than forty-eight hours before the opening of the poll by filing a written withdrawal with the Electoral Officer.

The regulations are silent on where withdrawals must be filed. In the meantime the following procedures are usually carried out:

At the nomination meeting the Electoral Officer informs the candidates that withdrawals of nominations must be filed with the Electoral Officer at the band office. A notice of this information must be posted on the reserve immediately following the nomination meeting.

Where a candidate wishes to withdraw his nomination but does not do so within the prescribed time, the Electoral Officer shall not in any circumstances give any notice, either written or oral, with respect to the attempted withdrawal.

Where a candidate wishes to withdraw his nomination and files his withdrawal with the Electoral Officer within the prescribed time, the Electoral Officer immediately posts a notice to that effect and ensures that each elector, at the time he is given his ballot paper is informed of the name of the candidate appearing on the ballot paper who has withdrawn his nomination.

No instructions are given in the regulations on the procedure to follow when a candidate wishes to withdraw his nomination. Is the Electoral Officer to be available on the reserve forty-eight hours before the poll is opened to receive the withdrawal papers? If so, such would result in extra time and traveling by an electoral officer from the office of the department.

On the other hand, this would not be a problem where the electoral officer is located on the reserve.

Other problems have arisen over the time limits imposed over the withdrawal of nominations. It was recommended in 1963 that the person wishing to be nominated for chief or councillor complete a nomination form stating which position he is applying for, to be signed by two voting members and filed with the Electoral Officer one or two weeks before the election. This would overcome the problem of people being nominated who have no interest in administration or even sufficient interest to withdraw their names. Electors have moved and seconded nominations for no better reason than to hear themselves talk, but the candidates name stands and sometimes he is even elected. He may be of questionable value to the council for the next two years. (Hett, Supt., Williams Lake Agency to Indian Commissioner, B.C., August 31, 1963, 208/3-5).

According to the department when someone runs for both chief and councillor (there is uncertainty over whether this is possible) and is elected in both positions, he has to resign one or the other. This creates a by-election. This ruling is not stipulated anywhere in the Indian Band Election Regulations.

Since the government is promoting local government on Indian reserves, the Indian Band Election Regulations should be similar to municipal elections, whereby a person nominated must accept his nomination either in writing or personally before the close of nomination. In the regulations the person need not decline until forty-eight hours prior to the election and this does not include acceptance. Therefore, if the person nominated has no knowledge that he was nominated (or if he has no interest one way or the other) his name could stand for election and, if elected, he usually does not participate in Band Council activities. This means a possible by-election if he misses three consecutive meetings or a totally ineffective council. (LeVert to Gran, December 3, 1974, 493/3-5)

INDIAN BAND ELECTION REGULATIONS

V. SECTIONS 6 to 10. THE POLL

1. VOTE OF NON-INDIAN ELECTORAL OFFICER IN CASE OF TIE

In the case of an election which resulted in a tie, in 1980 the Cook's Ferry Band in British Columbia challenged the right of an electoral officer to cast a vote to break a tie. They stated he was not an Indian and therefore not a qualified elector as provided in section 77(1) of the Indian Act, which stipulates that an elector must be a member of the band. The regulations therefore conflicted with the definition of an elector in section 77(1) of the Act in allowing a non-Indian to vote in band elections and therefore made the regulations ultra vires.

In December 1980 the Federal Court of Canada decided that the electoral officer could break a tie by virtue of the Indian Band Election Regulations and the regulations were therefore intra vires because the electoral officer can cast a vote according to section 9 of the regulations.

Section 77(1) of the Act provides that "A member of a band who is of the full age of twenty-one years and is ordinarily resident on the reserve is qualified to vote for a person nominated to be chief of the band".

Regulation 9 of the Indian Band Election Regulations provides that "Where it appears that two or more candidates have an equal number of votes, the electoral officer shall give a casting vote for one or more of such candidates, but the electoral officer shall not otherwise be entitled to vote". (Judgment of Hon. Mr. Justice Gibson, Federal Court of Canada, Re: Cook's Ferry Band, Dec. 11, 1980).

Should the electoral officer break a tie so as not to involve any exercise of his choice? Should the names be thrown in a hat? Should the electoral officer cover his eyes and pull a name out of a hat? No procedure is prescribed as to how a tie is broken or whether it must be done impartially. Regulation 9 says he has to vote, and so he has to be "partial" if he votes.

2. OATH OF OFFICE

The Indian Band Election Regulations and the Indian Act do not provide that elected candidates shall take an oath of office upon assuming their offices.

Having an appropriate ceremony and an oath is an administrative policy, not a matter of law or of higher policy.

An oath means something in itself or is required for a definite purpose such as registration and the determination of the exact time upon which a councillor assumed his office. In this respect Section 78(1) of the Act provides that the term of office of a chief and councillors is two years. (Couture to Fairholm, JUly 20, 1956), 1/3-5).

In appears that the taking of an action as solemn as an oath of office was reduced to a voluntary action or a requirement in some administrative area and not in others.

In view of the conflict and the fact that the oath is not a requirement of the Act or Regulations, it was suggested that the requirement be dropped. (Note to file 1/3-5, June 30, 1967).

Legal Services questioned the time and work involved, particularly when the action itself has no legal significance under present legislation. (Brown to Acting Head of the Secretariat, January 2, 1968, 1/3-5).

Some felt that such an activity should not be engaged in merely for the sake of appearance. To be meaningful any such oath or declaration must incorporate penalties for

non-compliance and people generally, in the long run, do not take kindly to public declarations which are not meaningful or enforceable.

An oath or declaration of office is a serious solemn act. This cannot be imposed without the full concurrence of the Indian people both regarding the necessity for a declaration and an acceptable general text.

However, there is a penalty under the Criminal code for fraud, which is making a false statement in an extra-judicial proceeding.

Opinions from the field supported the idea of having a declaration of oath of office, one in particular, because: "Not only does it lend dignity and prestige to the position and occasion, but it gives the elected person a sense of loyalty to our Sovereign Lady the Queen from her representatives. This, I feel, as some do that the office to which they are elected is of importance and cannot be taken lightly". (Purser to Regional Supt. of Administration, Ontario, April 25, 1967, 478/3-5).

Sometimes nomination meetings, and nominated and elected candidates are not treated respectfully or seriously by Indian people. This is discouraging for the persons elected who sometimes have little idea of the significance of the office. Consequently, they are bored with council meetings, do not attend regularly, nor do they take an active part in discussions. Sometimes, and far too often, those elected do not express themselves in relation to decisions. If the dignity and importance of the office is not known nor upheld, then council meetings lack the essence of basic parliamentary procedure. Some department personnel felt therefore that the oath of office played an important part in enhancing the office of chief and councillors. They requested that it be continued with more emphasis on the importance of the overall role of chief and councillors, which in turn is conducive to good band management, good band civil servants, and ultimately "good responsible citizens with the pride of race". (Purser to Regional Supt. of Administration, Ontario, April 25, 1967, 478/3-5).

Until 1967 a Declaration Form 1A-202 was used to take the oath of office of chiefs and councilors upon assumption of office but was discontinued because it was not a legal requirement.

3. TERM OF OFFICE

The Indian Act provides that the term of office for chiefs and councillors is two years (Section 78(1)). As the term of office is fixed, so is the date upon which the council takes office.

Some bands want to change this date so that elections can be held at times more suitable to the band. It was therefore suggested that Section 78(1) be amended to give the Minister authority to allow the extension or reduction of the current term of office for a period of 6 months, at the request of the band with the consent of the majority of the electors of the band.

To ensure that no band would be without a council, an amendment was requested to provide that whenever a band fails to hold an election prior to the scheduled date, the office of the incumbent council would be prolonged until an election is held. The amendment would also provide that the incoming council could not hold office for more than two years less the number of days in which the outgoing

council had served beyond the normal time. (Acland to Executive Assistant, Senior Administrative Officer, June 6, 1962, 1/3-5).

There was another suggestion that the term of office be extended to six years, with one-third of the council being elected every two years. This was to allow for continuity in the council. The chief, however, would be elected every two years. (Brown, Superintendent, Hobbema Agency to Regional Supervisor, Alberta, 112/3-5, September 5, 1963). On the other hand, election every two years is a safeguard against misconduct and a new-born council can be elected.

The section determining the term of office has never been amended. The present practice is that the term of office of chief and councillors is two years and ends at the termination of the two year term. The new council takes office after the two year term is completed. On the other hand, if the election is held after the end of the two year term, there may be no council between the end of the two year term and the election of the new council.

4. RECOUNT

Section 7(c) of the Indian Band Election Regulations provides that, subject to review on recount or on an election appeal, the electoral officer or his deputy shall take note of any objection made by any candidate or his agent to any ballot paper found in the ballot box and decide any question arising out of the objection.

This provision does not in itself appear to entitle an elector to a recount.

There is no formal recount procedure in the regulations. The reference to recount in the regulations, section 7(c), does not state when a recount may be requested, or by whom and under what circumstance. Neither does it state who may conduct a recount, except it would presumably not be the person who officiated at the election in question.

Section 11 of the regulations provides that the electoral officer shall deposit all ballot papers in sealed envelopes with the superintendent, who shall retain them in his possession for eight weeks, and unless otherwise directed

by the Minister or by a person authorized by him shall then destroy the ballot papers in the presence of two witnesses who shall make a declaration that they witnessed the destruction of those papers.

The purpose of retaining the ballots for eight weeks is to allow for the appeal provided for in section 12 of the regulations.

Often, all that is needed to satisfy a complaint is a recount as mentioned in section 7(c) of the Regulations. Some effort should be made to encourage recounts rather than entertaining an appeal and possibly going through another election. The original election was probably lawfully held but because of a poor count a person might have lost. Instead of recounting the ballots, in effect, the band is being asked to do it over again. It could happen that the candidate who lost could ask for a declaratory judgment that the first election was lawful and the second election was illegal because the first election was legal but the counting was done poorly.

A recount, done as a matter of administrative procedure, calls for the appointment of somebody from the department, or a panel of two people made up of one from the department and one from the band, who conduct the recount. A new election would not remedy the original complaint, because the election was conducted lawfully and it was the counting of the ballots that was faulty. To appeal the election and to set it aside would appear to aggravate the complaint rather than remedy it.

The count by the electoral officer could be declared a nullity and the Electoral officer would have to do the count over again.

When an appeal is lodged as a result of spoiled ballots, should the Governor in Council set aside the election by way of Section 79? This would be unnecessary if a recount took place. An appeal should be subject to a recount or review.

5. DRINKING

An electoral officer cannot disallow anyone from voting because he has been drinking alcohol. If he is under the influence of alcohol he can vote, as no electoral law is being violated. It would be difficult for the electoral

officer to decide the degree of inebriation, and even if the elector was inebriated the electoral officer could not disallow him from voting. If he causes a disturbance he could be arrested under section 171 of the Criminal Code, which is a matter unrelated to the election.

6. ADVANCE POLL

Section 6(1) provides that where a person presents himself for the purpose of voting, the electoral officer or his deputy shall, if satisfied that the name of such person is on the voters' list at the polling place, provide him with a ballot paper on which to register his vote.

Section 6(1) appears to allow for more than one poll, although the practice has been to not allow advance polls.

The election of Chiefs and Councillors is the focus of political life on the Indian reserves. The bureaucracy should function so that elections will accommodate to some extent the life and culture of Indians, such as allowing advance polls for those whose occupations do not allow them to be present on the reserve on the day of the election.

C.

INDIAN BAND ELECTION REGULATIONS

APPEALS

VI. SECTION 12. ELECTION APPEALS

1. APPEALS - PROCEDURAL REQUIREMENTS

Section 12 of the Indian Band Election Regulations provides that (1) Within thirty days after an election any candidate at the election or any elector who gave or tendered his vote at the election who has reasonable grounds for believing that (a) there was corrupt practice in connection with the election; (b) there was a violation of the Act or these regulations that might have affected the result of the election; or (c) a person nominated to be a candidate in the election was ineligible to be a candidate, may lodge an appeal by forwarding by registered mail to the Assistant Deputy Minister particulars thereof duly verified by affidavit.

The following procedural requirements as set out in section 12 of the regulations must be followed before the merits of an appeal can be considered.

An appeal is commenced by filing an affidavit by registered mail with the Assistant Deputy Minister within 30 days after an election. An affidavit is a written statement of facts confirmed by the oath of the person making it, taken before an officer having the authority to administer such

an oath (Solicitor or notary public or commissioner for taking affidavits). A person making a deliberate false affidavit could be charged with perjury and for this reason an affidavit is required by the regulations.

No officer of the department has the power to extend the 30 day period of appeal.

No other document but an affidavit is mentioned in the regulations. In addition, only a person who was a candidate or an elector who gave or tendered his vote at the election can appeal.

Any departure from these basic procedural requirements would result in the proceedings being invalid and beyond the jurisdiction of the Assistant Deputy Minister.

Often inquiries regarding election appeals are directed to district employees. Based on the correspondence expressing frustration and anger from those persons who lost an appeal due to noncompliance with the procedures, it seems that Indian people should be adequately and correctly informed of the procedures if they wish to appeal. "A decision

based on the merits of an appeal will often leave somebody dissatisfied or unhappy, but unless the basic procedural steps have been first taken, there is no appeal to consider." (Novak to District Managers, B.C. Region, March 18, 1982, E4218-2).

With regard to the filing of appeals by affidavit, in 1966 Legal Services expressed a different opinion. They state that the purpose of an affidavit is to give added weight to the evidence of the appellant and this purpose is served almost as well by a statutory declaration and because Section 12(1) says that an appellant "may lodge an appeal" by submitting particulars of his objections verified by affidavit. The use of "may" was considered less binding than if "shall" were used. (Fisher to Battle, September 29, 1966, 152/3-5).

In 1979 Legal Services expressed the opinion that in the courts very strict adherence to rules of procedure is required in appeal proceedings but such a strict approach would be unsuitable in the case of Indian Band Election Appeals. Many electors cannot read or write English as it

is not their mother tongue and the workings of the legal system is foreign to many Indian band members. Therefore, if strict compliance with all procedures was required the department might have to reject legitimate election appeals.

It would be preferable if all election appeals contained a clear reference to the sections of the Indian Act which the applicant feels were violated and it would certainly make the department's job of reviewing these election appeals much easier.

Legal Services felt it was unreasonable to expect Indian people when appearing before a notary to swear out a "Statutory Declaration" and to put together several complex sections of the Indian Act so that the Minister may make his judgment. It is sufficient if an eligible Indian elector offers enough information to establish the likelihood that the Act was violated in a manner which could upset the outcome of the election, that the Minister should investigate his appeal, and, if the facts are substantiated he relies on advice from the Department of Justice to determine whether it is a violation of a nature as described in Section 79 of the Indian Act and should set aside the election.

2. PROCESSES OF ELECTION APPEALS

The three main areas of an election appeal in a non-Indian community are:

1. Preparation of the voters' list prior to an election and an appeal system to finalize such a list by the addition or deletion of names;

2. A method for a formal recount of the votes (normally by judge in case of municipal elections);

3. A procedure for contesting the validity of an election, the qualifications of the candidates, bribery, corrupt practices, etc.

The Indian Band Election Regulations include the finalisations of the voters' list (not including the step by step directions); but does not provide a procedure for a formal recount. It has a means of appealing the validity of the election, qualifications of the candidates, bribery, etc.

The municipal systems follow the same general pattern of election but differ in the appeal process. For example, in contesting the validity of an election, the appellant makes an application to a judge who after following a set procedure and a trial declares the election in general, or specifically in respect to a particular candidate to be void or otherwise. If void, it creates a vacant position or positions which may be filled in specified ways. However, the period of time in which the appeal may be lodged, the amount of the security deposit to be submitted by the petitions, the type of court, the actual procedures, etc. may vary.

Indian band election appeals are submitted to the Assistant Deputy Minister, an administrator, and certain procedures for informing candidates and investigations are authorized by the Minister but are carried out by employees of the Department of Indian Affairs. Departmental employees assess the information and make a recommendation to the Minister who informs the Governor in Council. There is no hearing.

3. HOW IS BAND BUSINESS CONDUCTED WHEN THE COUNCIL IS SUSPENDED AS A RESULT OF AN APPEAL OF AN ELECTION

The early practice was that the council could conduct band business while their election was under appeal. In 1972 the question arose as to when the suspension took effect if an appeal was lodged against all those declared elected or a number that would constitute a quorum.

Although the Minister had committed himself not to propose any amendments to the Indian Act until consultations with Indian people was complete, he amended the Indian Band Election Regulations by Order in Council P.C. 1973-139 which came into force on January 24, 1973 and which read as follows:

> 14.1 Where an appeal has been lodged pursuant to section 12 in respect of a chief and councillor, that chief or councillor shall not, until the appeal has been disposed of, perform any of the duties or functions for that office or receive any benefit therefrom.

As a result of this amendmenmt, band councils under appeal could not carry out their duties until the appeal was settled.

This order in council suspended the election of chief and councillor when the appeal was actually lodged. The wording of Section 12(1) of the regulations provides that the appeal is lodged at the moment when the documents are forwarded by registered mail. (Thornton to Gran, April 2, 1973, 1/3-5).

The date when a suspended chief or councillor can resume office, where the appeal is dismissed, is at the moment when the Minister signs the approval for dismissal of the appeal, and in theory the chief or councillor can perform the duties of their offices from that moment. In practice the chief or councillor would not attempt to do so until they had been informed officially of the Minister's decisions.

The Minister explained his reasons for amending the regulations in the following telex to the Union of Nova Scotia Indians on April 25, 1973:

> "...previously newly elected Chiefs and Councillors could take office, transact business, and commit Band Funds even if an appeal was lodged against their individual or collective election. If the appeal(s) were subsequently upheld by me, the net effect was to declare the person or persons not elected and therefore unable to hold office. If a quorum of a Band Council were so affected, the Band business they transacted was deemed to be illegal. In order to prevent this eventuality and to protect the interests of the Band, Order in Council No. 1973-139 dated January 24, 1973 was passed. Its main effect is to add the following Section, immediately after Section 14 of the Indian Band Election Regulations:..." (Connelly to Walsh, May 11, 1973, 1/3-5).

The suspension of the whole council only applied if the appeal was lodged against all those declared elected or at least against a number that would constitute a quorum. Where the appeal was lodged against one or more candidates whose total constituted less than quorum, the quorum members could conduct band business as though the entire council were present.

Band staff hired by band councils usually had authority to carry out day to day administrative duties, and in a normal case, this authority continued during the appeal period. Where a quorum of the council members was not possible, matters involving new decisions on policy were not dealt with during the appeal period. It was difficult to draw the line between routine matters and matters requiring the attention of the council itself. This depended on the extent of authority given by any band council to their administrative officers.

An example is the case of an appeal of a Kamloops Band election. Order-in-Council PC 1973-139 prevented the newly elected council from carrying on band business. In order not to paralyze the on-going business of the band, staff salaries and other approved costs were met from the District office budget. These costs were recovered from the band's budget when the duly elected council assumed office. (Connelly to Ciaccia, April 18, 1973, 1/3-5).

The turning over of departmental programs to be adminitered by bands is delegation of departmental responsibility. If there is no valid council, then so the required band council resolution cannot be passed asking the Minister to turn funds over to the band.

Problems developed as a result of this amendment. When an appeal was lodged under section 12 of the regulations the process could take several months before a final decision was established. During this time, unless a quorum existed, the band council could not function. The District Office continued to ensure that the day to day requirements of band members were met until the day when council could again take responsibility.

Complaints were made that the amendment was instituted without prior consultation with Indian people, band councils or associations.

By Order in Council No. P.C. 1974-761, dated April 2, 1974, Order in Council P.C. No. 1973-139 was revoked to allow chiefs and councils whose elections were under appeal to function during the appeal period. (Lesaux, April 11, 1974, 1/3-5).

P.C. 1973-139 was repealed so that Indian band elections were brought once again in line with municipal practices; the repeal of the amendment overcame the connotation of "guilty until proven innocent." With a greater awareness of the Indian people and their involvement in local

matters, the number of appeals appear to be increasing so that the situations of "no council" for periods of time were likely to increase, and this repeal overcame this problem. The situation reverted to that which had existed for the 19 years prior to PC 1973-139 and with which the Indian people were more familiar.

According to Legal Services, the successful appeal of the election of a chief or councillor is retroactive to the date of the election. What then is the status of the business the Chief and Council have conducted since their election and the time their election is set aside?

The acts of Chief or Councillors when an election is set aside by appeal are valid because the Councillors acted on the presumption that they were lawfully elected. The retroactive effect of the appeal does not affect the acts of council but rather the status of the persons whose elections were successfully appealed. A contrary view would create chaos. On the other hand, can this presumption be rebutted if the election is obviously illegal?

4. VALIDITY OF COUNCIL UNDER APPEAL

If an election of one councillor is set aside or even if the election of all council members is set aside, then the acts of the council are deemed to be valid. When an election of a person is set aside, it is directed toward the person, not towards the act performed by the office. The offices are filled by officials who are elected by lawful means in spite of the fact that the official was found to be improperly elected. Since he was elected and since he took office, he would exercise the function of chief or councillor and his acts should remain. Where the election of Councillors has been set aside, all the powers exercised by the council of which he or they were members are valid because the Councillors acted on the presumption of law that they were lawfully elected.

The acts of the council are not a nullity just because council turns out to be set aside as a result of an appeal.

5. BAND COUNCIL QUORUM

Legal Services examined the question of whether the chief is to be considered in calculating the number of members on

"The general rule is that the total number of all the duly-elected and qualified members of the body elected is to be taken as the basis of reckoning the quorum". (Rogers, The Law of Canadian Municipal Corporations, 2nd ed., Vol. 2, No. 48.12)(Sabourin-Hebert, Legal Services to Smith, Statutory Requirements, June 19, 1/3-5)

When an entire council resigns, the newly elected council which is elected to replace them hold office for the remainder of the term of the resigned council. (Gran to Regional Director, B.C., November 1972, 1/3-5).

6. WITHDRAWAL OF ELECTION APPEAL

On the withdrawal of an election appeal, Legal Services stated on February 10, 1982 that any candidate or elector may appeal an election within 30 days of the election if he or she has reasonable grounds to believe that there were election irregularities. Once an appeal is made, the Assistant Deputy Minister is required, within 7 days, to forward a copy of the appeal and supporting documents to the electoral officer and to each candidate in the electoral section.

a council under the provisions of the Indian Act required to form a quorum as defined under the Regulations Respecting Procedure at Band Council Meetings.

The whole council includes the chief, and therefore the chief must be counted in determining the quorum. Both Sections 2(1) and 74 of the Indian Act indicate that the council of the Band consists of a chief and councillors. As Section 6 of the Regulations Respecting Procedures at Indian Band Council Meetings indicates that "a majority of the whole council shall constitute a quorum...", the chief cannot be excluded in ascertaining the quorum out of a majority of the whole council.

It was argued by Legal Services that since the chief cannot vote, according to Section 17(2) of the Indian Band Council Procedure Regulation, he cannot be considered in deciding the quorum. However, when there is a tie, the chief can vote; therefore he does have some voting power. He can also participate in deliberations of the council. As there are no provisions excluding the chief from the count in determining the quorum, it seems that this unambiguous provision of the Act should be relied upon.

The other question is whether, following the withdrawal of the appeal, the Minister is still obliged to conduct an investigation into the alleged election irregularities. There is nothing in the Indian Act or Indian Band Election Regulations which requires the Minister to conduct an investigation when election irregularities are suspected but no appeal has been made. However, it is possible that the Minister may be held liable for actions of a band council or for actions the Department may take which require prior band council approval where the Minister had notice that election irregularities were suspected and did not investigate. It is not clear what the potential liability, if any, would be but it would be advisable to conduct an investigation when serious irregularities have been suggested. But if the irregularities claimed in a case are not serious irregularities, the Minister is under no legal obligation to investigate them. (Myers to Roberts, February 10, 1983, E4218-D14).

In 1963 the following amendment to section 12(1) of the regulations was proposed:

> "12(1) Within thirty days after an election any candidate at the election or any elector who gave or tendered his vote, or any elector who would have been entitled to tender his vote at the election who has reasonable grounds for believing that..."

If an appeal is made, the appeal can be withdrawn as long as the Assistant Deputy Minister has not yet forwarded copies of the appeal as required. The Act or Regulations are silent on the question of whether an appeal may be withdrawn, but it was felt reasonable to allow withdrawal of the appeal as long as nobody is prejudiced by the withdrawal. It could not be seen how anyone could be prejudiced if the Assistant Deputy Minister had not yet forwarded copies of the appeal. The right remains open to all other electors or candidates to file an appeal of their own. However, if the copies had already been sent out, an appeal should not be allowed to be withdrawn as it is possible someone may be prejudiced by the withdrawal. For instance, if notice of the appeal has already been given by the Assistant Deputy Minister, another elector or candidate who might otherwise file an appeal may not do so knowing one is already in progress. If the appeal is then withdrawn, the others could easily be out of time to then file their own appeal.

In one case the appellant withdrew his appeal the day after it was filed and no action had yet been taken on the appeal. Legal Services felt that he should then be allowed to withdraw his appeal.

If the Minister was to report all appeals to the Governor in Council, the decision of the latter in the case of those appeals where the Minister is not satisfied that infractions have taken place would seem to be obvious, since, if the Governor in Council were to allow an appeal in spite of the Minister's contrary opinion, it would be in danger of overreaching its discretion under section 79. If indeed it is as suspected, only the Minister's duty to report to the Governor in Council cases where he is satisfied infractions have taken place, then his power to dismiss appeals would seem to follow. While no express power appears either in statute or regulation the effect of the statute implies such a discretion.

The Minister reports to the Governor-in-Council where there appear to be grounds for setting aside the election. However, there appears to be no provision in the regulations for the Minister to dismiss appeals where such grounds do not appear to exist.

The Minister may still report to the Governor-in-Council pursuant to section 79 of the Indian Act that he considers the election should be set aside because of the Minister's power to make such a report is independent of the provisions in section 12 of the regulations providing for the filing of an appeal.

An added provision was proposed in 1963 to allow the Minister to dismiss appeals where he is not satisfied that grounds for them exist:

> "14(2) Where the Minister is not satisfied that any of the facts described in paragraphs (a), (b) or (c) of subsection (1) are present, he shall dismiss the appeal."

Both these proposed amendments were not accepted.

In 1971 the matter of dismissal of appeals by the Minister without referral to the Governor in Council was discussed in a letter from Cormier to Spiro, dated January 29, 1971, 1/3-5. The practice to date in the dismissal of appeals was to use what was felt to be an implied discretion on the part of the Director (Assistant Deputy Minister), to decide that there was inadequate evidence to advise the Minister to recommend to the Governor in Council, to allow an appeal. At the top, the Governor in Council's power under section 79 is clearly permissible to set aside or not, an election where the Minster is satisfied that statutory infractions have occurred. The Minister is required to report to the Governor in Council under section 14 of the Election Regulations but only it would seem where 'it appears' that these infractions have indeed taken place.

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7. SETTING ASIDE ELECTION

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8. FORWARD APPEAL DOCUMENTS TO ELECTORAL

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affidavit as required by section 12(1) of the Regulations. The department had so much information showing that at least some of the nominations were not seconded that there was an obligation to investigate the election and to recommend a course of action to the Minister.

If an election is invalid, such as nominations of candidates not being seconded as in the case of the Cowichan band council election, the officials of Indian Affairs could not treat the election as invalid unless they were proceeding with a recommendation to the Minister that he report to the Governor in Council that in his opinion the election should be set aside. If the band recognizes that the election is invalid and steps were being taken to hold a new election, it might not be necessary to have the Governor in Council formally set aside the election. This is because Section 75(2) of the Indian Act makes the election of an ineligible candidate void from the beginning without any additional act necessary by the Minister or the Governor-in-Council or a court or any other body to make that ineligibility inoperative.

The contrary opinion is that only a court of law can make such declaration that the election was a nullity. There is no legal power in the Minister or the department to declare

not feel comfortable with the system. If someone is outraged or unhappy because he lost an election by one vote, he will take the offensive by complying with the system because he has an axe to grind. But the other candidates are on the defensive and may not respond.

9. RESPONSE FROM CANDIDATES

The system is cumbersome and mysterious to an Indian, particularly one living in an isolated area. The candidate receives by Registered Mail a copy of the affidavit with a form letter from the department asking him to answer the allegations within two weeks. The form letter does provide some guidance. But he often does not understand it. Why does not the appellant serve a copy of his affidavit on the Band Council or post it on the Band Council hall or office at the outset?

The candidate would probably ask a district employee, or, if he has the money, a lawyer, to analyse the legal documents and he might get the wrong answer.

Does the district or regional employee have enough training to look at the affidavit and sort out the facts from the legal issues? When he picks out the relevant issues to the

Section 12(3) of the regulations provides that any candidate may within fourteen days of the receipt of the copy of the appeals forward to the Assistant Deputy Minister by registered mail a written answer to the particulars set out in the appeal together with any supporting documents relating thereto duly verified by affidavit.

Many candidates have difficulty answering the allegations contained in many affidavits since they are not clearly spelled out nor do they refer to specific sections of the Indian Act. It has been suggested that the department could indicate the main issues raised by the appeal documents when it forwards them to the candidates for their comments. For example, if the question of residency seems to be an issue, the department might direct the candidates' attention to that issue. After all, it is in the band's best interest to have as much information before the Minister when he makes his recommendation to the Governor in Council.

In practice, the affidavit goes to the Assistant Deputy Minister and form letters are sent out to the candidates and the electoral officer to answer the allegations. Often the answer does not come back because the individuals do

comfortable presenting their responses in person at a hearing rather than by documents. Expecting the majority of Indians to provide written material is unrealistic. Even if he speaks sufficiently well, writing is an obstacle. Indians have rights which are not exercised due to indistinct requirements or conditions difficult for the average Indian to meet.

appeal, he has already made a decision as to what is relevant and what is not. He could request an investigation when none is required. He may advise the Indian to file an answer to it in a certain manner. Can the Indian be sure he has been properly advised on the issues or that the true meaning of the regulations have been explained? Even if the relevant issues have been found and it has been answered, it still can be confusing.

On the other hand, if he takes it to a lawyer, the lawyer usually has no experience with Indian band election appeals and makes inquiries to the regional or district employees, who in turn are not specially trained in this special field.

The question is, how does the Indian get prepare an affidavit in 14 days when it would take him that long to figure out what the document means or to find someone to explain it to him? He has no incentive to answer it, nor does he have the money or access to a lawyer to defend himself. In the end, he is not provided an opportunity to be properly heard.

The regulations deprive the Indian of his right to defend himself from accusations due to the complexity of the conditions required to respond. Many Indians feel more

1. INVESTIGATION OF APPEALS

Section 13(1) of the Regulations provide that the Minister may, if the material provided is not adequate for deciding the validity of the election that is being appealed, conduct an investigation into the matter as he deems necessary and in such manner as he deems expedient.

When the Minister receives an appeal the onus is on him to take reasonable steps to ensure that the applicant's allegations are properly investigated and if they prove to be true, and do violate section 79 of the Indian Act, he has the duty to inform the Governor in Council and request that the election be set aside. Section 13(1) of the Band Election Regulations allows him to carry out any further examinations he deems necessary.

The extent of discretion of the Minister again is not clear in cases where the evidence points to a dismissal. Where an appeal is obviously invalid the Minister dismisses it; not because he has express authority to do so but because he is not expressly required by regulation or statute to do anything else. Where there is some doubt about the appeal

INDIAN BAND ELECTION REGULATIONS

VII SECTION 13. INVESTIGATION OF APPEALS

circumstances, this may give the impression to the Indian people that the judge as investigator is exercising the Minister's own quasi-judicial function in the appeal. (Connelly to Ciaccia, April 18, 1973, 1/3-5).

The regulations do not specify any procedure for designating the person to carry out the investigation.

There is little established direction, procedure or policy respecting election appeal investigations.

Election appeals are processed at Headquarters by the Statutory Requirements Division. The Division is responsible for gathering together all pertinent information, making the initial decision on the appeal, and submitting the findings and recommendations to the Director of Membership and Statutory Requirements Directorate.

It is provided in the Indian Band Election Regulations that where it is established that the material filed on an appeal is not adequate for deciding the validity of the election the Minister may conduct such further investigation into the matter as he deems necessary, and in

the Minister has the discretion by regulation to pursue the enquiry. Where evidence clearly points to a valid appeal, the Minister is required to report to the Governor in Council. (Cormier to Spiro, January 29, 1971, 1/3-5).

Section 13(2) provides that such an investigation may be held by the Minister or by any person designated by the Minister for the purpose.

When required, the Minister has the right to appoint someone to make the fact-finding investigation with the final decision being his. It was felt that the appointee should be acceptable to those making the appeal as well as to those against whom the appeal is raised. In fact, appeals could involve a large number of persons. On this basis the Minister would have to impose a time limit after which if there was no consensus he would have to make the appointment so the appeal process would not be too prolonged.

A further observation respecting the designation of a person to investigate appeals, that being the choice of a judge to investigate appeals. Except in very special

2. DISCLOSURE OF APPEAL INVESTIGATION INFORMATION

It is the department's practice not to disclose information obtained during the course of an appeal investigation and review.

In 1974 Membership and Statutory requirements Directorate asked Legal Services on the advisability of providing an appellant's lawyer with copies of written material filed during the course of an appeal. The Legal Adviser's response, in part, was as follows:

> "There may be some basis for saying the Minister's decision to set aside or not to set aside an election on the basis of an appeal is a judicial one and would therefor be open to judicial review. However, until such a decision is actually made by a court you may wish to assume that the Minister's decision is administrative and therefore final. An administrative decision made by the Minister does not necessitate having a hearing or revealing the basis of his decision to the parties involved."

such a manner as he deems expedient. Such investigation may be held by the Minister or by any person designated by the Minister for this purpose.

In an election dispute at Kamloops Reserve in British Columbia, the Minister decided that a further investigation would be required and he designated Judge Van Male of Kamloops to conduct an enquiry into the election held on December 21, 1972 in accordance with election regulations. There were political implications involved in this instance and he did not recommend that the designation of a judge be used as a precedent for investigating similar cases by other bands across Canada. The Department assumed responsibility for the expenses in this investigation.

In investigating an appeal lodged against the election of the Fishing Lake Band, Saskatchewan, held on December 15, 1972, the Branch favoured the appointing of a person within the Department in order to reduce possible costs but one not directly involved on a day to day basis with this Band. An appropriate person within the Department is favoured for carrying out investigations except where serious political implications are involved such as the Kamloops situation. (Connelly to Ciaccia, May 29, 1973. 1/3-5).

provide a review process and not to set up an adversary system. (Chapman to Leask, April 11, 1980, 1/3-5).

The Elections Act, Canada, automatically provides for a "review" so that two sides are heard and so the system is adversarial.

It is interesting to note that the Dominion Controverted Elections Act, specifically provides in Section 9(2) that the other side should be given particulars of the complaint. Is there a valid basis for Indians being treated differently, or is this due to a penchant for secrecy on the part of department officials? Are department officials trying to carry out their duties and to avoid difficulties at the same time? Or did the department decide that it is better for Indians if the department retained this level of secrecy?

On the question of whether an election should be set aside for "minor" matters, compare the Canada Elections Act, section 83 with the department's practice in relation to Indians:

> "I should warn you that if you start a precedent by forwarding the information on which the Minister makes his decision to candidates you may soon find many of these appeals in the courts. (In other words, that the appeals are being carried out improperly). Therefore, perhaps you should inform ..... that you received affidavits from all of the persons alleging irregular practices except one; that these affidavits satisfied the Minister that the election was properly held; and the vote of the one person who did not reply by affidavit would not have affected the outcome of the election."

This practice does not allow the Minister to know the evidence on both sides.

There was a request to circulate all of the affidavits because the affidavit outlining the appeal was circulated. The Directorate was advised to point out that the only reason the affidavit outlining the appeal was circulated was to inform the persons involved of the nature of the appeal so that they could answer the statements in the appeal; that they are not set up like a court and are not equipped to provide documents received in answer to various appeals and that the intention of the regulations was to

INDIAN BAND ELECTION REGULATIONS

VIII. SECTION 14. MINISTER REPORTS TO GOVERNOR IN COUCIL TO SET ASIDE ELECTION

"No election shall be declared invalid...if it appears to the tribunal that in considering the question that the election was conducted in accordance with the principles laid down in the Act, and that such non-complaince did not affect the results of the election."

3. PROVIDING REASONS FOR APPEAL DECISION

If there are revisions made to the present election appeals system, Regulations should include a duty to give sufficient reasons for a decision on an appeal. There appear to be no valid reasons not to do so.

There should also be a right to appeal beyond the Governor in Council.

Presently the Governor in Council's decision on Indian band election appeals is final. Indians often go to the Minister if they disagree with the Governor in Council's decision.

1. SETTING ASIDE OF AN ELECTION

Section 14 of the regulations provides that where it appears that (a) there was corrupt practice in connection with an election; (c) there was a violation of the Act or these regulations that might have affected the result of the election; or (c) a person nominated to be candidate in an election was ineligible to be a candidate, the Minister shall report to the Governor in Council accordingly.

Several questions have arisen over whether the governor in Council can set aside an election if there was violation of the regulations and not a violation of the Act.

Is a breach of the present Indian Band election Regulations a breach of the Indian Act?

In a letter from H. Fisher to G. Poupore, January 20, 1971, the opinion was that a violation of the Indian Band Election Regulations is not a violation of the Indian At.

Can the Indian Band Election Regulations be amended to provide that a breach of the said Regulations is a breach of the Indian Act? H. Fisher of Legal Services states that

the Indian Band Election Regulations either by way of allowing an appeal or dismissing an appeal. Such a provision in the said Regulations, would be ultra vires. When the Governor in Council sets an election aside pursuant to Section 78 (now 79) of the Indian Act he is, in effect, allowing an appeal. Conversely, if the Governor in Council does not set aside the election, he is dismissing the appeal. (1.4.0.704)

However, on April 14, 1966, by Order in Council P.C. 1966-688, R.F. Battle Assistant Deputy Minister of Indian and Eskimos Affairs informed an appellant of the Timiskaming Indian Reserve that the election held on December 20, 1965, was set aside by the Governor in Council because "the notice for the holding of the poll was not posted at least six clear days in advance of the election as required by the regulations. Therefore, another election will be necessary". (Fischer to Assistant Deputy Minister, May 4, 170, 274/3-5(C34)).

It is clear that these practices are contradictory and that there are obviously no clear guidelines.

there is no power given to the Governor in Council in the Indian Act to make regulations to set aside elections and any such provision in the Indian Band Election Regulations, would be ultra vires the powers of the Governor in Council.

Can the Indian Band Election Regulations be amended to provide that the Governor in Council could set aside an election for breach of the said regulations? H. Fischer answered that a provision in the Indian Band Election Regulations which would provide that (a) a breach of the said Regulations would be a breach of the Indian Act, (b) authorized the Governor in Council to set aside an election for breach of the Indian Band Election Regulations would similarly be ultra vires the powers of the Governor in Council.

Can the Indian Band Election Regulations be amended to provide that the Minister of Indian Affairs and Northern Development could dismiss an election appeal? H. Fischer answered that the Governor in Council is the only body authorized under section 78 (now 79) of the Indian Act to set aside an election; it would not be possible to authorize anyone else to deal with an election appeal, in

concluded to be an entirely different power. There is no reason why section 76 could not permit a regulation empowering the affirmation of, setting aside of, or correcting the result of an election. Section 79 includes no power to affirm or amend or any of the power needed for an appeal. Section 76 provides the power to alter, vary and affirm the result of an election. For example, if candidate A is ineligible, B's election should be affirmed. Section 79 appears to quash the election and 76 implies that you can correct the result of an election.

2. SETTING ASIDE ELECTION WITHOUT AN APPEAL

Under section 79 of the Act, the Minister can report an imperfect election to the Governor in Council in order that he can set the election aside without an appeal being lodged. The department considers this to be a rather drastic action that would upset the Indian bands. In practice, the department endeavours to convince those who have been improperly elected to resign their offices after the implications have been fully explained to them. At the same time they stress emphatically to the Regional Office and District managers concerned that at future elections the provisions of the Act be followed in every particular, even going so far as to detail the steps by which this

Although Section 4(1) of the regulations states that the electoral officer "shall" post a notice and there is nothing in the regulations which could be used to turn this mandatory obligation into one whose omission could be excused, there is nothing in the regulations or the Act which attaches any consequences on a failure to comply with the posting requirements, as, for example, by rendering the election invalid either automatically or if challenged. (Fisher to Battle, May 10, 1967, 271/3-5).

H. Fischer, legal counsel, stated it would be ultra vires for the regulations to set aside elections because 79 does it. Section 76 is the only section in the whole of the Indian Act including section 79 where election appeals is mentioned. Consequently it is the only section which deals with election appeals. If regulations governing election appeals do not include the power to set aside or correct a result of an election, what kind of an appeal is it?

In both Sections 76 and 79 it is the Governor in Council who has these powers.

In Section 76(1)(d), by specific express language the words "election appeals" are spelled out. Section 79 is silent and speaks of a Minister's report. Consequently, it can be

Governor in Council to set aside the election of one or more successful candidates on the grounds that the ineligible candidates' name on the ballot might have affected the election of the individual persons named. Had that name not appeared, the electors who voted for him might have voted for one or more of the other candidates.

It has been suggested that such a redistribution ought not to be made. If the candidate who was ineligible was successful the recommendation would be made only to set aside his election. If such a candidate was not successful, the appeal, at least on these grounds, would be dismissed. In each case the vote received by that candidate would be ignored.

The latter proposal would have the effect of disenfranchising those electors who voted for the ineligible candidate as their votes would not be considered, even though at the time of the election they would have had every reason for believing that person was a qualified candidate. (Smith to Director, Legal Service, October 29, 1979, 1/3-5)

might be accomplished. (Churchman to Assistant Deputy Minister, May 29, 1967, 159/3-5).

If there was serious evidence of a serious violation, the Minister could set aside the election without an appeal being filed. If there is weak evidence, or it is not a clear violation, the Minister can probably close his eyes. It is not clear he has to act when it is not a clear violation.

Who calls a by-election if an election has been set aside? This is not stated in the act or regulations. In the past by-elections have been called by the band council or by the Minister. In 1980 the Tyendinaga Band refused to call a by-election after the election of a councillor was set aside. The Minister called the election.

3. REDISTRIBUTION OF VOTES

Where a person nominated to be a candidate was declared, on appeal, ineligible to be a candidate, it has been the practice to redistribute the votes he received at the election among the other candidates to ascertain the greatest impact those votes might have had on the election. This could lead to a recommendation to the

The practice of redistributing votes, allows many permutations.

5. SECRECY OF VOTING

Section 15(a) of the regulations provides that every person at the poll shall maintain and aid in maintaining the secrecy of the voting.

Secrecy of voting is so important that it is covered separately in the Indian Act under Section 76(2). The voter should be free of duress, etc., so that he will not be threatened in any way.

A candidate may provide food and drink to potential supporters, which does not guarantee that the elector will vote for him because he may vote for somebody else, because votes are secret.

In Section 76(2) of the Act the Governor in Council has the power to make a regulation to provide for secrecy of voting, as spelled out in section 15 (a) of the regulations.

4. DISCUSSION ON THE PRACTICE OF REDISTRIBUTING VOTES

There is usually one political party on the reserve, which provides little choice to the electors. Under the present system, an appeal of a federal or provincial election may not mean much because it may not upset anything. A decision on an appeal of an Indian band election must be determined in light of whether a breach of the act might have affected the result of the election. The term "might have" affected the result of the election has allowed departmental employees to speculate and juggle votes that have been cast by redistributing the votes of those who were not eligible to vote or the votes of those who voted for an ineligible candidate. They speculate what would have happened to the other candidates if the votes had been cast for them. If another candidate could have won, then the election is set aside. Why don't they just declare the other candidate the winner?

Or if five people voted who were not eligible to vote, they speculate what would have happened if the votes had not been cast for the candidates. They conclude that it might have affected the result of the election. Once again why don't they declare the other candidate the winner rather than calling for a new election?

The only way to stop such conflict of interest acts is to stop them at the time they are happening, which is often impossible. Basically when one is in power one should not use that power for personal benefit. With Indian bands, short of suing them, members have raised a hue and cry.

Such a qualification as there being no conflict of interest could probably be created in the regulations but this would discourage leadership on reserves. The few potential leaders on Indian reserves would consequently be forced to choose between business and band council leadership.

7. REMEDYING VIOLATIONS OF THE REGULATIONS BY WAY OF SECTION 102, INDIAN ACT

"Every person who is guilty of an offense against any provision of this act or any regulation made by the Governor in Council or the Minister for which a penalty is not provided elsewhere in this Act or Regulation, is liable on summary conviction to a fine not exceeding $200 or to imprisonment for a term not exceeding three months, or to both."

Some Indian bands have reverted to custom systems of elections. Some Indian bands use open voting by show of hands or open declaration as the means of selecting their leaders. This could lead to election by fear and undue influence. It is naive to entertain reversion to custom elections where there is no secrecy of voting. But then secrecy of voting is not a custom of Indian bands. The department must protect the rights of the individual Indian as well as that of the Indian people as a whole. Ensuring secrecy of voting is one means of protecting the rights of individual band members.

6. CONFLICT OF INTEREST

Conflict of interest only comes about when the person acquires the office. On one reserve, a councillor was allotted a large piece of land on the reserve. As long as he is a councillor he cannot gain advantages through his position on the council. This kind of corruption is difficult to stop by regulation. The band, in this case, sued its own member in the provincial courts by asking for a declaration that the allotment of land was in conflict of interest and the court agreed.

D.

INDIAN BAND ELECTION APPEALS

GENERAL DISCUSSION

Section 76 of the Indian Act gives the Governor in Council the power to make regulations only insofar that it stops short of the Minister's report which then results in using Section 79 of the Indian Act to set aside the election. Section 76 is sufficient to create regulations. There are no regulations joining Sections 76 and 79. That regulation 12(1) joins Sections 76 and 79 of the Act indirectly has not been established in any legal opinions.

Section 79 should be ignored for the purposes of filing election appeals and new regulations under section 76 should provide the mechanism for appealing and remedying complaints on Indian band elections.

2. REASONS FOR INCREASE IN NUMBERS OF APPEALS

Becoming a band chief or councillor has become a financially rewarding position as a result of the local government policy of the federal government which commenced in 1970. Previously the chief or council received $25 a year and so he had to be dedicated and committed to his people to take such an unlucrative position with the attendant criticism from the electorate. Now salaries range from $12,000 to $20,000 a year tax-free and elections tend to attract more candidates, some for financial remuneration. More candidates are nominated for positions than previously. Though it is often a thankless position, it is a better paid one with larger budgets and programs to administer.

With more people competing for the same few positions, there are bound to be more appeals. The appeals reflect the atmosphere and situation on the reserve are often filed by people just to complain about things other than the election.

1. ATTITUDES TOWARDS ELECTION APPEALS

An appeal of a band election is a specific complaint to be addressed and answered to the satisfaction of all parties involved. The basic assumption is that the election was conducted lawfully. The band election regulations and the Indian Act provide that there must be tangible evidence to support a complaint. Otherwise those running for office would lose confidence.

Most election appeals are lodged by a candidate who lost an election, usually a complaint that someone voted who had no right to vote. Sometimes rules are broken because the electoral office is not experienced about what the appeal is about in the perspective of the whole election.

A basic understanding of the election and appeal process by the Indian reserve electorate would greatly lessen the conflicts and confusion that presently exist among them.

3. PROPOSED BAND ELECTION APPEAL GROUP, 1970

In 1970 a proposal was made by the Department of Indian Affairs to improve the election appeal procedures. A Band Election Appeal Group was set up consisting of officials in the department which was to study the Election Appeal System and recommend improvements.

At that time the main problems were:

1) An officer in the Band Management Division was alone responsible for gathering all information, making the initial decision on the appeal and submitting the findings and recommendations to senior management. This took time.

2) The investigation was on an "ad hoc" basis, with little, if any, established direction, procedure, policy or training to guide the investigating officers. There was therefore no uniform application of the regulations.

3) Regional Directors objected to the role of Regional and District offices as investigators because it affected or could affect their daily working relationships with the Indian people.

4) In many cases departmental personnel were investigating and reporting on elections which were administered or supervised by them or by other departmental officials to whom they were directly responsible. Such an investigation was viewed by the Indians as not being objective. Additionally, the people who made the final decision on the recommendations to the Minister were not those who made the on site investigation and were seen by the Indians as "someone in Ottawa".

The conclusion was that a more uniform and permanent investigate and appeal system should be established. The purpose was to have a system which appeared more objective, and which made an investigation on site where the participants in an appeal could voice their opinions. The proposed revision was also to discourage frivolous appeals.

The body and procedures used was to be sufficiently informal to encourage free expression of opinion and flexible enough to meet varying needs and circumstances. It had to be respected by the Indians. Over a period of time an "expertise" was to develop in election appeals.

Several alternatives for operating such an appeal body were suggested including (a) one established by the Department and operated from Branch headquarters; or operated from each Regional Office; or operated over a combination of more than one region; (b) one that was part of the judicial systems of the provinces; (c) one that involved setting up appeal bodies of a quasi-judicial nature such as the provincial municipal appeal bodies; or (d) organizations functioning as part of regional Indian associations.

The body recommended the provincial judicial or quasi-judicial bodies but (i) the use of provincial bodies would require lengthy negotiations with the provincial governments and the Indian people, and the Minister has no authority over the courts involved; (ii) the more formal atmosphere of courts might inhibit the free exchange of views; (iii) court costs would be involved; and (iv) an attitude might be fostered that a legal representative was needed before putting appeals forward, which would involve additional costs and inhibit discussion.

The use of boards at the regional level was not recommended because of the limited number of appeals in any given region; the possible close working relationship with the various band and the regional or other field officers; and a possible lack of a uniform approach to recommendations to the Minister by seven different boards.

As the system was refined or expanded, the workload increased, and the Indian people became more accustomed to using such a body, the delegation to regional offices may be warranted, or, as an interim step to the provincial system.

It was recommended that an appeal group be established by the department having the following form, powers and duties, and to operate from Branch Headquarters.

The group would consist of three persons, any two forming a quorum:

a) The chairman, being a departmental employee, knowledgeable in law and court procedures and preferably whose daily responsibilities did not involve him to any extent in direct contact with the Indian bands. His appointment would be continuing.

b) One member, being a registered Indian. His appointment would be by contract on an annual basis. He could not sit on a hearing involving his own band or where he had a conflict of interest. Another person would be appointed on a short-term contract.

c) A member chosen by the chairman in consultation with the Indian member, and regional or district office from the local area of the specific appeal. He could be a local judge, magistrate, lawyer, doctor, band manager, businessman, etc. on a contract or the one hearing only.

The group would have an executive secretary who would be a headquarters departmental employee but not a voting member. The executive secretary would keep files, send notices, keep minutes of hearings, oversee correspondence, make arrangements for hearings, etc.

All appointments would be made by the Minister since the Minister has the power and no amendments to the statutes would be necessary.

The band election appeal group was to deal mainly with 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 was mainly an investigative group. It had no real power to force a person to attend any hearing and answer questions. The Board would receive an affidavit, review the application and decide whether or not the appeal should be processed. They held hearings on or near a reserve and gathered information to make a recommendation to the Minister on the action he should take.

The reason for the failure of the band election appeal board is that the board had no real power, it had, or was perceived to have a biased relationship with the department and the Indians. For example, an Indian would make an election appeal to that board that had no power to do anything except make suggestions. Also, board members were likely on close terms with the chief and council against whom the election appeal would be filed. Investigations on

the reserve when control and authority on the reserve is at stake by investigators who were friendly or had a vested interest in remaining on friendly terms with those being investigated would not encourage investigation into all the facts. The board heard two cases and was then dismantled.

4. APPEALS OF ELECTIONS UNDER BAND CUSTOM

In connection with band elections under "custom", a band member cannot file an appeal with the department for a violation of the Indian Band Election Regulations.

The department cannot interfere in custom elections of leaders nor can the Minster enforce custom election regulations. Any appeals that come to the Minister in such cases are referred back to the band to be settled among themselves.

If the chief or councillor elected under custom is guilty of any of the infractions related to an election under custom, the Minister cannot accept the election appeal and the Governor in Council has no authority to set aside the election. The band would have to appeal under their own regulations. Most bands under custom do not include appeal procedures in their regulations.

If, the chief or councillor whose election is under custom is guilty of dishonesty, intemperance, immorality or incompetence while in office, the Minister has no authority to remove him from office.

5. EACH BAND TO MAKE THEIR OWN ELECTION REGULATIONS

In the past bands have proposed that each band, that so desired, should be able to make their own election regulations. Is there is any legal basis for preventing a band, through its council, from proposing a set of regulations, within the context of the Indian Act, which is subsequently enacted by Order in Council under section 76 of the Indian Act and which would apply only to that particular band?

Regulations have been made from time to time that apply only to some bands, but it has never been the practice to make separate and different regulations on the same subject matter for different bands. There is no precedent for the Governor-in-Council to hold consultations or invite representations before making regulations in the Indian Act. This is practiced in relation to industry where a Minister proposing regulations may invite comments. Other times, bodies hear about proposed legislation and make their own representations.

When Parliament conferred the regulation-making power on the Executive by enacting section 76 of the Indian Act, Parliament gave no indication, as it could have done, that the Governor-in-Council was to exercise that power only in ways sanctioned by the Indian Bands. If Parliament had intended bands to make their own regulations, the power would have been put in section 81 instead of section 76. This, of course, does not mean there cannot be consultation or agreement.

If the Governor-in-Council were to make not only different regulations for different bands, but were to make for any band the regulations requested by that band, this would be a most unexpected and unusual exercise of the regulation-making power, and thus would result in an instrument that failed to meet the test laid down in paragraph 3(2)(c) of the Statutory Instruments Act. (Thornton, Legal Services, to Gran, march 22, 1973, 1/3-5(C25)).

6. POLICY QUESTION

Appeals are important to Indians and they are entitled to know the reasons for decisions. But department policy is to not provide an explanation of the decision.

Sometimes the appeal is narrow and concerns one person and one situation. The department may broaden the appeal. This would not happen in court.

Appeals are technical and a basic understanding of the judicial system is needed to decide on the evidence.

E.

INDIAN BAND ELECTION REGULATIONS

APPEALS AS JUDICIAL PROCEDURES

I. CONFLICTS OF SECTIONS 76 AND 79 OF THE INDIAN ACT

Section 79 of the Indian Act provides the grounds for setting aside aside an election, and Section 12(1) of the Indian Band Election Regulations made under Section 76 of the Act provides the grounds for filing an appeal. Both grounds are identical except that in (b) of the regulations "or these regulations" has been added as follows:

> "(a) there was corrupt practice in connection with the election,
>
> (b) there was a violation of the Act or these Regulations that might have affected the result of the election, or
>
> (c) a person nominated to be a candidate in the election was ineligible to be a candidate."

Under Section 79(b) of the Act the Governor-in-Council may set aside an election if there is a violation of this Act that might have affected the result of the election.

However, Section 76(1)(d) of the Act provides the Governor-in-Council may make regulations in relation to election appeals. Under the regulations an appeal may be filed under Section 12(1) "if there was a violation of the Act or these Regulations that might have affected the results of the election". These regulations do not provide a means for setting aside an election for a violation of these three grounds. Also no reference is made to Section 79 in the band election regulations.

On the other hand, Section 79 of the Act provides the authority for setting aside an election for breach of the Act, but not for breach of the regulations.

The question is whether "Act" includes regulations. There seem to be conflicting legal opinions on this, within the Department.

Section 79 appears to be intended for different purposes than Section 76.

Section 79 may not be an election appeal section at all. It may provide the means by which an election can be set aside for other reasons without an appeal being filed, and

may stand on its own. For example, if the Minister finds out there has been an irregularity but no appeal has been filed, he can ask the Governor-in-Council to set aside an election. There was a case where no affidavit or notice of appeal were filed, just a complaint, and the Minister was able to ask the Governor-in-Council to set aside the election. No time limit would be necessary in such a case. The Minister can acquire the knowledge as he sees fit and make a recommendation to the Governor-in-Council.

Section 12 of the Indian Band Election Regulations appears to have no power. For example, the failure to post the voters' list does not violate the Act but consitutes a violation of the regulations, and therefore cannot provide the grounds for setting aside an election.

What are the implications?

Indians are lead to believe they can file an appeal for a violation of the regulations, even though department policy is to not set aside an election for violations of regulations unless they can be related to a violation of the Act.

For example, a candidate may have been an Indian at the time of his election to council but enfranchised, changed bands, or lost his status. His election may need to be set aside: In the opinion of Staturoy Requirements, such an election cannot be set aside because at the time of his election he was qualified to run, but at the end of his term he cannot run again for election. Contrarily, his election would not need to be "set aside", as he would have lost the right to hold office. If he continued to sit as councillor and refused to leave, a declaration would be required that he is no longer qualified to hold office and declaring the office vacant. Only electors can be nominated, electors must be Indians and the office is vacant by virtue of section 78(2)(iii) when he becomes ineligible, and he appears to have no right to "finish out his term". The legality of the present practice is therefore questionable.

2. SHOULD ELECTION APPEALS BE VIEWED AS AN ADMINISTRATIVE OR JUDICIAL PROCESS?

There is a fundamental misunderstanding on the part of the department of what election appeals are about. An election appeal is an objection to the process of an election of an Indian band government as being unlawful or faulty.

The Indian election appeals process comes closest to a judicial proceeding than any other area of the Minister's responsibility. The Minister has the responsibility to administer justice in relation to Indian band elections by reporting infractions to the Governor in Council. However, the department feels that their responsibility is to manage and supervise Indian band elections and the election and appeals are part of this process. If the department so decides the enforcement of the rules of the procedures can be relaxed or stringent. At the same time there are no safeguards against arbitrary decisions of department administrators who handle appeals.

In a letter from Nissan to Regional Supervisor, Alberta, dated September 30, 1963, file 205/3-5, reasonable flexibility in administering the regulations was urged by the department because "trying to clarify the various regulations respecting the conduct of band elections requires the services of a genius when dealing with the more primitive bands in a word by word translation". The reason was because restrictions and conditions placed before the more primitive bands only brought confusion and mistrust.

A body functioning outside the department handling election appeals would be less likely confused by the Indians with the department's administrative role. Such a function would develop expertise and jurisprudence and provide consistency in application.

The department's basic approach to election appeals should be clarified. Does the department presume that the election process on a reserve was done lawfully? Does the department enhance this presumption by discouraging flimsy appeals? It is always possible to find mistakes as no one is perfect. But sometimes Indian band councils are subject to appeals of their elections because somebody lost an election and wants "to make trouble"?

An appeal of one person's vote could affect the results of the election because of the small number of electors in band elections.

Should administration of the regulations be flexible or formalistic?

An example of administrative flexibility is the question of accepting an appeal by way of an "affidavit" which is sworn under oath. The department accept the majority of appeals by way of statutory declarations. Is there a difference? An ordinary letter signed with a stamp at the left bottom corner has been accepted by the department as an affidavit. Such a document definitely does not become an affidavit?

Under the Criminal Code, under Section 122 it would be possible to prosecute for perjury in the case of the swearing of a false affidant or the making of a false statutory declaration. A statement in a statutory declaration is the same as a statement made under oath under the Canada Evidence Act and therefore can be prosecuted.

Why would the regulations specifically require an affidavit? Was it so the person would tell the truth and not start an appeal lightly?

Does the Minister exceed his jurisdiction if he deals with a statutory declaration as an affidavit, which is the first document he receives from the appellant. If he processes the appeal based on such a document, is the entire process in excess of his jurisdiction. Is the order made under section 79 setting aside an election then a nullity?

JUDICIAL VS. ADMINISTRATIVE APPROACH

In all the transactions or processes that come before the department nothing comes as close to a judicial proceeding as the band election appeals.

The following comments were made in 1969 following the Chippewas of the Thames election appeal: "...I was concerned on two grounds. The first had to do with the general reaction to the handling of this kind of matter by Indian Affairs. In normal municipal practices the decision as to whether or not an election is valid is reserved for the judiciary. Provincial officials tend to hold that this kind of discretionary authority should not be in the hands of administrators. Their views are based on the principle of the separation of administrative and judicial powers - a fundamental premise of our constitutional system. In the case of local government, decisions about the law and the fact of challenged elections are made by the administration

under Section 78 (now 79) of the Indian Act. This authority should obviously be used carefully, since the normal safeguards of judicial procedures do not apply. At least no decision should be made by the administration without some sort of a quasi-judicial hearing, at which objections to an election are considered before those to whom objection is taken."

"...it is within the Minister's powers to appoint an investigator to recommend as to the decision to be taken. It seems reasonable that such an investigation could include the conducting of a hearing before interested parties; that an investigation outside of the department could provide an objective non-bureaucratic view of the matter. This was felt, would not only reduce my initial concern but would be a step towards reduction in Indian Affairs administrative activity, and a small move towards the placing of an Indian community in a similar position to its non-Indian counterparts". (Nicholls to Director of Operations, September 26, 1969, 471/3-5). It appears that the question of the department's administrative approach to election appeals has been raised before with the conclusion that a body outside the department would better serve the interests of Indians.

3. DELEGATION OF POWERS

Section 13 of the Indian Band Election Regulations provides that the Minister may designate persons to investigate questions on the validity of elections.

In view of the importance of the matter, and of the fact that the Minister will ultimately make a quasi-judicial decision and in making that decision will rely on the report made to him by the investigator, Legal Services in 1971 was of the opinion that if the Minister is not himself to designate the investigator, he should delegate the power of designation formally, under subsection 3(2) of the Indian Act (the delegation being subject to the section's limitations).

The Minister also has the duty under section 14 of the Regulations to form an opinion whether there has been an election violation. This is a quasi-judicial matter, and if the duty is to be delegated, it must also be under section 3(2) of the Indian Act (and be subject to that section's limitations).

The Minister also has power under the Regulations to make orders and issue instructions (under section 16), which depends on what is being delegated. In so far as the section can be constructed as conferring legislative powers on the Minister, however, it was Legal Services' opinion that delegation of power might prove impractical for the reasons given in their observations about section 73 (now section 74) of the Act.

In connection with section 73 (now section 74) of the Indian Act, H.M. Thornton of Legal Services in a letter to the Chief of the Band Management Division dated June 2, 1971 stated: "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). 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."

"The document dated April 1, 1970 was ineffective to confer any authority on Mr. McGilp in those cases where an authorization was necessary under subsection 3(2) of the Indian Act, nonetheless Mr. McGilp, or any other officer of the Department can in appropriate cases be authorized to act for the Minister."

"The difficulty lies in establishing what are the appropriate cases. I do not think that I can define these for you by referring to particular sections of the Act. The best I can do is to say that Parliament and the Governor in Council are presumed, when they grant authority to the Minister to do things, to have intended that in some circumstances the Minister would not apply his mind to the matter personally. It seems reasonably clear that in this way officials can be authorized to do certain acts provided they are not legislative, not judicial, not important, and are numerous, detailed and of a purely administrative nature." (Thorton to Chief, Band Management Division, 1/3-5, June 2, 1971).

F.

INDIAN BAND ELECTION APPEALS

ALTERNATIVE APPROACHES

ALTERNATIVE I - DELEGATION TO REGIONS

District staff do not like to deal with appeals because of their close working relationships with the people on the reserves which they do not wish to disrupt. They feel that Regional office should handle these complaints and conduct the investigation so that it will not interfere with the work of the district office.

Regional offices are one step removed from the district office. They can look at the complaints from a fresher and less biased viewpoint. They do not know the personalities involved as well as the district offices who deal with Indians on a day to day level.

Often a political motive underlies the complaint with the involved personalities. Sometimes some of these people have something at stake such as jobs or programs which they are in a position to give out to their supporters.

The complaint is received at headquarters who then notify regional office of its receipt. The regional office advises district offices to assign one of their staff to investigate the complaint on the reserve.

Headquarters puts all of the information together and passes it on to Legal Services. When they receive the appeal file they usually do not remake the package. Legal Services advice therefore is only as good as the facts before them. Some of the appeal packages sent from regional offices to headquarters are well put together.

It is felt that the entire package should be done in the regions. More staff in the regions would be required but personnel problems should not get in the way of efficiently processing the election appeals.

Authority to handle election appeals could be delegated to the regional offices similar to the handling of estates by regional offices. The Assistant Deputy Minister can transfer the authority concerning appeals to the regions and only retain the final decision.

Regional office could develop all the capabilities and look after all aspects of election appeals including the recommendations and advice to the Minister. It could be checked over by Statutory Requirements and Legal Services and, if it is in order, pass it on to the Minister to arrange for an Order-in-Council.

The advantage of this alternative is that it would not drastically change the present system and approach to the election appeals process. That is, it would remain as a responsibility of the Minister to be administered by the department. The disadvantage is that there would be no uniformity on how appeals are handled across the country.

ALTERNATIVE II - INDIAN BAND ELECTIONS APPEAL DIRECTORATE Set Up Under Present Regulations

There are two main problems with the regulations on Indian band election appeals - (1) an appeal can be filed but there is no redress, and (2) no hearing is provided.

If the Governor in Council may make orders and regulations concerning election appeals there is an inherent power in the Governor in Council to provide redress as a result of a successful appeal.

Surely if there is a right of appeal, there is inherent in this power to provide in the regulations stipulations that can set aside those elections. If it is possible to establish these regulations the Governor in Council can provide under these regulations a redress procedure, that is, the setting aside of an election if it is found to be vitiated by violation of the Act or Regulations.

Under this very general provision of the Indian Act, Section 76, there is nothing to prevent the setting up of an administrative body similar to the 1970 Election Appeal Board, although there is no reference in the Act to an "appeal to a board". The structure of the board would be different but the authority for setting it up would be the same. The board could only be administrative unless there is another provision in the Act which provides for the board to take on greater responsibilities and make decisions.

There is a problem which arose in the previous appeal board, is that it was purely administrative and not judicial or quasi-judicial in nature. It could only recommend to the Minister who then asked the Governor in Council to act by issuing an Order in Council to set aside an election if the Act was violated in relation to a band election. The provisions in

ALTERNATIVE III

AMENDING REGULATIONS

To Set Up

INDIAN ELECTION APPEAL BOARD

Because the Indian Band Election Regulations are so badly drafted, inconsistent, do not adequately serve Indians, give too much discretionary power to department officials to decide on election appeals, and lack power in section 79 of the Indian Act to set aside an election as a result of an appeal filed under regulations made under section 76 of the Indian Act, the Indian Band Election regulations require amendment to rectify these inconsistencies, inadequacies, and conflicts.

Presently the department supervises and manages Indian band elections. If the Indians do not do it right, then they have to do it over again. This would make the Indians think the first election is a trial run, that there will be an appeal and then the second election is the real one.

One inconsistency in particular is found in the power of the Minister to investigate an appeal. Section 13(1) of the regulations states upon receiving the affidavit and all the documentary evidence, if the Minister feels there is inadequate

evidence to decide on the "validity of the election", he can investigate the validity of the election. The appeals that are filed under Section 12(1) asking the Minister to investigate the validity of an appeal conflicts with the Minister's powers to investigate the "validity of an election" as set out in Section 13(1). If he does otherwise he exceeds his jurisdiction.

The vote is a franchise, the means of expressing or exercising that right is by casting a vote. If the Indian is refused the right to vote or the ballot is rejected for the wrong reasons, the elector is deprived of exercising that right and invalidates the whole election. The very tool by which a person exercises his right has been destroyed. Some of the departmental correspondence refers to voting as a privilege. There is a vast difference between a right and a privilege. Qualified to vote means he has a legal right to vote and if he is deprived, he can go to court for redress.

The underlying concept of the appellate process is that fundamental principles of natural justice must be adhered to - (1) the right to be represented, (2) the right to be heard, and

the regulations are to the effect that individuals can appeal to the department and the department can allow individuals to appeal to a board set up by the department.

If the department decides to create an appeal board with no quasi-judicial powers, at least people who come before that administrative board could testify. The information could be gathered by the officiating individuals that preside over that particular board. Th board would then make recommendations to the Minister. However, if there is an appeal on a violation of the band election regulations, there is a problem as no redress is provided in the regulations for a violation of the regulations.

The Indian Act speaks of a "violation of the Act". The Regulations provides for "violation of the Act and these Regulations".

It seems that if the legislation has enacted a right of appeal surely there is an inherent power to set the matter straight. The department, it seems, has taken a narrow interpretation of section 12 of the regulations which in effect amounts to nothing. All you have is a right of appeal with no redress. On the other hand, Section 79 of the Act provides redress but does not mention a right to file an appeal.

The Indian Band Election Appeals Directorate set up without an amendment to the regulations would be similar to the Indian Band Elections Appeal Board with the exceptions in form indicated and also would require an amendment to the Indian Band Election Regulations.

(3) the right to be provided with a decision which gives reasons. If the appellant says something is wrong then the accused party must have an opportunity to be heard.

Further, the right of appeal of a decision. Presently, the decision on an election appeal is final. However, under Section 9 of the Indian Act, regarding the protest of the registration of a person on the Indian Register, the Registrar is given wide powers to make a decision. However, his decision can be referred to a judge for review who may exercise the powers of a Commissioner under Part I of the Inquiries Act.

It could be argued that under the present process the Indian has a right to be represented and a right to be heard. However, there is no accountability in the present system. Under the present system the Minister's report is written by an officer in the department. If the band or an individual is unhappy with a decision, they are referred to an order in council put together by the Privy Council office but they are not told what went into making the decision. How and to whom does the Indian complain? The Privy Council is far away and so high that he cannot see how high it is.

Although there is a provision in section 7(c) of the regulations for a recount, it does not specify by whom it is to be done, where, how or when it takes place. It is presently done in an ad hoc fashion under the Minister's perogative. Usually district offices appoint an employee to conduct a rather informal procedure. For these reasons appeals requesting a recount are rare.

The regulations on ordinary residency in Section 3 of the regulations are badly drafted. There are clear omissions as covered in the body of this report.

What the amended regulations should do

Without amending the Indian Act and using the powers provided in Section 76 for the Governor in Council to make regulations on band elections and appeals, the regulations could be redrafted to remedy the above noted problems.

By regulations, an Indian Election Appeal Board can be created with precise jurisdiction and powers, such as the right to call for a recount, to establish who is entitled to vote and to guarantee secrecy of voting. If any rights set out in the

regulations are violated, the board should have the power to provide a remedy such as automatically setting aside or declaring a candidate's or council's election, call for a recount, or to remedy the violation of the individual's right to secrecy of voting.

Section 76 is wide enough to deal with election appeals in this manner if the regulations are redrafted. Section 79, on the other hand, provides the power to set aside an election without an appeal and is not connected to Section 76 at all.

The election appeal board should have jurisdiction so that another election is unnecessary. The regulations should be drafted in such a way as to save time, effort, money, confusion and abuses. In other words, election appeals should set right what went wrong without setting aside an election. Only in extreme cases where someone was ineligible to run should a by-election be called if there was not a second candidate.

There must be a mechanism in the regulations for a recount. The recount would in effect be a form of appeal. As a matter of fact, one of the grounds of appeal should be a request for a recount, and one of the main jurisdictions of the appeal board

would be a right to call for a recount. The filing of an appeal should be restricted to a candidate unless an ineligible voter was deprived of his right to vote. He could sue if his rights were violated. In municipal elections an appeal comes before a judge of the county court which has jurisdiction over the Election Act, and it is done at the request of a candidate.

There is the question of extending the 30 day period for filing an appeal by way of an affidavit. Under the present regulations, thirty-one days is too late. The board should be given statutory power to extend this time along with justification for it. It should be done honestly rather than by accepting a letter from an appellant with information that an affidavit is forthcoming subsequent to the expiration of the appeal period. The regulations should allow the appeal board to receive appeals within 30 days, with the power to extend the period another thirty days.

The board might consist of more than one officer. The appeals can be handled by appeals officers. There could be several across Canada. One in British Columbia where there are numerous appeals, one in the Prairies, and another in Ottawa. They would have to travel to the reserves to conduct open hearings.

THE INDIAN BAND ELECTION APPEALS BOARD

The Indian Band Election Appeals Directorate could either be part of the Reserves and Trusts Branch or could function as a separate body outside of the Department, but set up by the Department.

The Appeals Board would be made up of one or more persons to be appointed by the Governor in Council on the recommendation of the Minister. Candidates with a legal background could apply for these positions.

As often as possible hearings would be held in or near the reserve of the persons making the election appeals though there may be cases where the appeal may be heard elsewhere, perhaps off-reserve in a nearby town which might be more neutral particularly if the election was contentious.

The Indian Band Election Appeals Directorate would have five main functions:

1. To receive appeals from Indian band elections;
2. To provide a hearing on the appeals received;

3. To gather background information on the appeal;
4. To make decisions as a result of the hearing; and
5. To provide impartial feedback on appeal decisions to interested persons.

The hearing is basically an inquiry and the procedure is less formal. The rules of evidence are not strictly adhered to as in a court of law, but the basic rules apply. Evidence would not be given under oath.

Appeals Board Hearing Procedure

The Appeals Board Officer explains the relevant provisions of the Indian Act, Indian Band Election Regulations and the procedure for the hearing.

The director or directorate representative explains the facts of the election appeal. The directorate calls witnesses such as the other candidates in the election, the electoral officer, and any electors who can provide relevant information. Documentary evidence can also be filed. The representative or the persons making the appeal may cross-examine the witnesses.

The person making the appeal is asked to state the grounds of the appeal and presents evidence through witnesses and documents. The director or directorate's representative may cross-examine these witnesses.

The director or directorate representative can present further evidence, which will be subject to cross-examination by the other side. This could be followed by another presentation of evidence by the person making the appeal followed by further cross-examination by the director or directorate representative.

The appellant may be represented by a lawyer or a spokesman.

Once all the evidence has been received both are invited to present a summary. The officer may adjourn the hearing and call for more evidence, or he may close the hearing.

If he closes the hearing the officer makes a decision immediately at the hearing or within ten days after the hearing that the appeal has not been allowed or the election is to be set aside, or there is to be a recount. The officer's recommendation or decisions with an explanation is sent to all concerned as soon as possible after the hearing is closed, within ten days, if possible. The appellant would arrange for their own witnesses to attend the hearing.

Differences between the Directorate and the Board

The Indian Band Election Appeals Directorate set up without an amendment to the regulations would be similar to the Indian Band Elections Appeal Board except for the following differences:

- The Appeals Directorate would be headed by an Appeals Director
- The Appeals Director would not make a decision at the hearing, but could only make a recommendation to the Minister if he decides to close the initial hearing. The Minister either advises the Governor in Council that the appeal has been allowed or the Minister advises him to set aside the election. The Director's recommendations to the Minister with an explanation would be sent to concerned persons as soon as possible after the hearing is closed.
- The appeals considered by the Directorate would be restricted to those complaints that violate the Indian Act and there would still be no redress for appeals filed as a result of violations of the Indian Band Election Regulations.

ALTERNATIVE IV

SHORTENING TIME PERIOD WHEREVER POSSIBLE

For all practical purposes, the time period indicated in the Election Regulations cannot be changed without amendments.

The only time period over which some control can be exercised is during the investigative period; the consideration of the facts by Legal Services; where required, the obtaining of an Order-in-Council; and mail which relates to appeals is often sent by Indians directly to the Minister's office.

Since no control can be exerted over Legal Services, emphasis should be placed on reducing the investigative period, and when required, the time involved in obtaining Orders-in Council.

In effect, this means finding a way around the present system of forwarding and receiving Orders-in-Council to reduce the time without disrupting the system in general and impressing upon the field staff the need for obtaining immediate response to inquiries. Consideration should be given to a new system of obtaining this information and to the whole concept of appeals. For example, local investigative body could be located in the regional offices of Indian Affairs or in regional department of Justice offices; or regional offices of Federal Courts.

The workload is highly variable. Sometimes the headquarters processers of appeals may be on holidays, ill or on language training which creates havoc.

If this alternative of continuing the use the present election appeal procedure is decided upon, the following action would be required:

Alert the Regional Directors General of the necessity of getting an immediate detailed response to inquiries for information concerning appeals.

At the same time, this would require providing Regional Directors General with guidelines as to the kind of information that is required.

Start a training program on election procedures for regional staff involved with the election process, electoral officers appointed by the bands and departmental advisers to the bands. This would decrease the number of unnecessary appeals.

Establish a faster procedure for obtaining order in council.

If necessary, appoint a person knowledgeable in election procedures and with knowledge of the judicial process.

Send reminders by telephone, letters or telex if responses from the regions are late.

Advise the section in charge of the urgency of amending the Band Election Regulations, which should include redress as a result of a successful appeal, hearings of evidence and the feasibility of using the Federal or some other court to handle election appeals.

RECOMMENDATIONS

Alternative III would conform more closely with the stated policy of the government that Indian People shall assume direct reqponsibility for matters of particular concern to them. In the matter of Indian band election appeals, the setting up of an Indian Band Election Appeal Board would reinforce the process of devolution and foster band development and responsibility and local Indian government. In other words it would also remove the Department Administrators' power over this fundamental process.

CONCLUSION

Changes should be made to the Indian Band Election Regulations, firstly, to allow Indians to have more control over their band elections, and, secondly, so that there will be a minimum of election appeals. At the same time, the regulations should provide the mechanisms required to protect the rights of individual Indians, and also a form of redress if there is a violation of the individual's rights. Finally, the Department of Indian Affairs should relax while Indian people are learning to take over their own affairs.

APPENDIX A

APPROXIMATE NUMBER OF ELECTIONS OF CHIEFS AND BANDS COUNCILS UNDER SECTION 74 OF THE INDIAN ACT BY PROVINCE FOR THE YEARS 1979, 1980, 1981 and 1982*

PROVINCE	1979	1980	1981	1982
Nova Scotia	4	7	6	10
New Brunswick	8	8	9	7
Quebec	5	10	4	11
Ontario	55	41	52	41
Manitoba	25	31	28	30
Saskatchewan	19	18	32	21
Alberta	18	16	24	16
British Columbia	48	33	59	30
TOTAL	182	164	214	166

The above figures were found in the records of Membership and Statutory Requirements, Reserves and Trusts Branch.

NUMBER OF ORDERS IN COUNCIL SETTING ASIDE THE ELECTIONS OF INDIAN BAND COUNCIL CHIEFS/COUNCILLORS ELECTED UNDER SECTION 74 OF THE INDIAN ACT, 1979 to 1983, BY YEAR*

REGION	1970	1971	1972	1973	1974	1975	1976	1977	1978	1979	1980	1981	1982	1983	TOT
ATLANTIC	2			1	1				1		1	2	1	1	10
QUEBEC					1					1					2
ONTARIO	2	4		1	1	1		1	1	4	1		1		17
MANITOBA											2		1	2	5
SASKATCHEWAN					1	2		5	3	3	3		1	2	20
ALBERTA		2		1		1		1					1		6
BRITISH COLUMBIA		2	1	2	1			4	1	1		1	3		16
	4	8	1	5	5	4		11	6	9	7	3	8	5	76

Three orders in council not counted: two for Atlantic Region (1962 and 1968); one for Ontario (1968).

This information was found in the records of the Program Reference Centre, Program Planning and Policy Co-ordination Branch.

LIST OF ORDERS IN COUNCIL SETTING ASIDE THE ELECTIONS OF INDIAN BAND COUNCILS/COUNCILLORS ELECTED UNDER SECTION 74 OF THE INDIAN ACT 1970 to 1983**

REGION	BAND	P.C. NUMBER/DATE
Atlantic	Annapolis Valley, N.S.	P.C. 1970-1169, June 30, 1970
		P.C. 1978-509, Feb. 23, 1978
		P.C. 1982-2115, July 15, 1982
	Eskasoni, N.S.	P.C. 1962-1084, July 25, 1962*
		May 28, 1970
		P.C. 1981-1639, June 18, 1981
		P.C. 1981-3168, Nov. 5, 1981
	Pabineau, N.S.	P.C. 1974-1791, Aug. 6, 1974
	Wycocmagh, N.S.	P.C. 1968-1830, Sept. 24, 1968*
		P.C. 1973-455, Feb. 1973
		P.C. 1983-458, Feb. 17, 1983

* These Orders in Council were before 1970.

Note: No bands in Northwest Territories and Yukon are elected under Section 74 of the Indian Act. All are elected by custom systems of election.

** This information was obtained from the records of the Program Reference Centre, Program Planning and Policy Co-ordination Branch.

REGION	BAND	P.C. NUMBER/DATE
	Eel Ground, N.B.	P.C. 1980-2844, Oct. 23, 1980
QUEBEC	Betsiamites	P.C. 1970-756, Mar. 15, 1979
	Restigouche	P.C. 1974-2779, Dec. 17, 1974
ONTARIO	Chippewas of Kettle Point & Stoney Point	P.C. 1982-3789, Dec. 9, 1982
	Chippewas of Nawash	P.C. 1977-3277, Nov. 17, 1977
	Fort Hope	P.C. 1971-1468, July 20, 1971
	Gibson	P.C. 1974-2710, Dec. 10, 1974
	Gull Bay	P.C. 1979-152, Jan. 25, 1979
	Hiawatha	P.C. 1973-1407, June 5, 1973
		P.C. 1979-2320, Sept. 6, 1979

* These Orders in Council were before 1970.

Note: No bands in Northwest Territories and Yukon are elected under Section 74 of the Indian Act. All are elected by custom systems of election.

REGION	BAND	P.C. NUMBER/DATE
	Lac Seul	P.C. 1968-2070, Oct. 29, 1969*
	Muncey	P.C. 1970-889, May 19, 1970
		P.C. 1971-1247, June 23, 1971
	Rat Portage	P.C. 1975-1244, June 3, 1975
	Sault Ste. Marie	P.C. 1971-383, Mar. 2, 1971
	St. Regis	P.C. 1978-3469, Nov. 16, 1978
		P.C. 1979-2129, Sept. 24, 1979
	Tyendinaga	P.C. 1980-1778, July 3, 1980
	Walpole Island	P.C. 1970-1823, Oct. 21, 1970
	Wabigoon	P.C. 1971-1631, Aug. 11, 1971
	Whitefish Bay	P.C. 1979-2591, Sept. 27, 1979

* These Orders in Council were before 1970.

Note: No bands in Northwest Territories and Yukon are elected under Section 74 of the Indian Act. All are elected by custom systems of election.

REGION	BAND	P.C. NUMBER/DATE
MANITOBA	Fort Alexander	P.C. 1983-666, Mar. 3, 1983
	Lake Manitoba	P.C. 1980-1562, June 12, 1980
	Little Grand Rapids	P.C. 1982-695, Mar. 4, 1982
	Norway House	P.C. 1980-427, Feb. 8, 1980
	Nelson House	P.C. 1983-1085, Apr. 14, 1983
SASKATCHEWAN	Keesekoose	P.C. 1979-1861, July 12, 1979 P.C. 1983-1534, May 26, 1983
	Key	P.C. 1979-1862, July 12, 1979
	Kinistino	P.C. 1977-3027, Oct. 27, 1977
	Mosquito-Grizzly Bear's Head	P.C. 1978-2801, Sept. 6, 1978
	Muscowpetung	P.C. 1977-1456 P.C. 1980-630, Mar. 12, 1980 P.C. 1980-2569, Sept. 25, 1980 P.C. 1982-2866, Sept. 22, 1982

REGION	BAND	P.C. NUMBER/DATE
	Muskowekwan	P.C. 1980-139, Jan. 11, 1980
	Nut Lake	P.C. 1977-3030, Oct. 22, 1977
	Pasqua	P.C. 1975-1243, June 3, 1975 P.C. 1977-2403, Aug. 31, 1977
	Pelican	P.C. 1978-760, March 16, 1978
	Poorman	P.C. 1978-2377, July 26, 1978
	Red Pheasant	P.C. 1977-2404, Aug. 31, 1977
	Salteaux	P.C. 1974-621, Mar. 19, 1974
	Sturgeon Lake	P.C. 1979-2392, Sept. 6, 1979
	Waterhen Lake	P.C. 1983-1783, Jan. 16, 1983
	White Bear	P.C. 1975-1888, Aug. 6, 1975

REGION	BAND	P.C. NUMBER/DATE
ALBERTA	Blood	P.C. 1971-252, Feb. 9, 1971
		P.C. 1975-552, Mar. 11, 1975
	Cold Lake	P.C. 1982-3670, Dec. 2, 1982
	Kehewin	P.C. 1971-1094, June 8, 1971
	Montana	P.C. 1973-3506, Nov. 6, 1973
	Peigan	P.C. 1977-1394, May 19, 1977
BRITISH COLUMBIA	Alkali Lake	P.C. 1982-2629, Sept. 3, 1982
	Burrard	P.C. 1977-1921, July 7, 1977
	Chemainus	P.C. 1973-1785, June 26, 1973
	Comox	P.C. 1977-1055, Apr. 21, 1977
	Kamloops	P.C. 1973-1137, May 15, 1973
		P.C. 1979-2669, Oct. 4, 1979

REGION	BAND	P.C. NUMBER/DATE
	Kispiox	P.C. 1977-3109, Nov. 3, 1977
	Kitwanga	P.C. 1971-1415, July 13, 1971 P.C. 1972-263, Feb. 17, 1972
	Lower Nicola	P.C. 1981-2367, Sept. 9, 1981
	Masset	P.C. 1982-2116, July 15, 1982
	Nitinaht	P.C. 1982-3790, Dec 9, 1982
	Ohiaht	P.C. 1971-1093, June 8, 1971
	Soowahile	P.C. 1977-1586, June 9, 1977
	Stoney creek	P.C. 1974-2711, Dec. 10, 1974 P.C. 1978-3842, Dec. 21, 1978

Number of Orders in Council setting aside
the elections of Indian Band Councils/
Councillors elected under
Section 74 of the Indian Act, 1970-1983

REGION	NUMBER
Atlantic	12
Quebec	2
Ontario	18
Manitoba	5
Saskatchewan	20
Alberta	6
British Columbia	16
	79*

* including 3 orders in council before 1970 - 2 in Atlantic Region (1962 and 1968) and 1 in Ontario Region (1968)

NUMBER OF ELECTION APPEALS FILED BY PROVINCE 1979 to August 1983*

REGION	1979	1980	1981	1982	To August 1983	TOTAL
Atlantic	1	2	3	5	1	12
Quebec		1		1		2
Ontario	4	6	3	4	1	18
Manitoba	3	1	3	4	1	12
Saskatchewan	4	5	1	7	6	23
Alberta	2	4		3	5	14
British Columbia	1	4	3	7	5	20
TOTAL	15	23	13	31	19	101

This information was taken from the records of Membership and Statutory Requirements, Reserves and Trusts Branch.

LIST OF APPEALS AS A RESULT OF BAND COUNCIL ELECTIONS HELD UNDER SECTION 74 OF THE INDIAN ACT BY YEAR, ELECTION HELD, 1979 - 1983

ELECTION HELD 1979	PROVINCE
Carry the Kettle	Sask.
Red Pheasant	Sask.
Long Lake No. 77	Ont.
Sturgeon Lake	Alta.
Cross Lake	Man.
Muskowekwan	Sask.
Enoch	Alta.
Annapolis Valley	N.S.
Naicatchewenin	Ont.
Blue Berry River	B.C.
Norway House	Man.
Muscowpetung	Sask.
Lake Manitoba	Man.
Moose Deer Point	Ont.
Mohawks Bay of Quinte	Ont.

TOTAL: 15

Election Held 1980

Port Simpson	B.C.
Enoch	Alta.
Alexis	Alta.
Muskeg Lake	Sask.
Gitannaax	B.C.
Muscowpetung	Sask.
Alexis	Alta.
Eel Ground	N.B.
Walpole Island	Ont.
Cowessess	Sask.
Matachewan	Ont.
Wikwemikong	Ont.
Gull Bay	Ont.
Kipawa	Que.
Paul	Alberta
Thessalon	Ont.
Ebb & Flow	Man.
Fort Nelson	B.C.
Oneidas of the Thames	Ont.
Key	Sask.
Thunderchild	Sask.
Eskasoni	N.S.
Lower Nicola	B.C.

TOTAL: 23

ELECTION HELD 1981

Henvey Inlet	Ont.
Gitwangak	B.C.
Big Cove	N.B.
Moricetown	B.C.
Red Pheasant	Sask.
Lake St. Martin	Man.
Kingsclear	N.B.
Rainy River	Ont.
Little Grand Rapids	Man.
Long Lake No. 58	Ont.
Oxford House	Man.
Annapolis Valley	N.S.
Masset	B.C.

TOTAL: 13

ELECTION HELD 1982

Truro	N.S.
Alkali Lake	B.C.
Odanak	Que.
Mosquito-Grizzly Bear's Head	Sask.
Muscowpetung	Sask.
Shubenacadie	N.S.

ELECTION HELD 1982

Northwest Angle	Ont.
Sioux Valley	Man.
Poorman	Sask.
Gordon	Sask.
Muskeg Lake	Sask.
Nitanaht	B.C.
Chippewas of Kettle & Stoney Point	Ont.
Cold Lake	Alberta
Nelson House	Man.
Lake Manitoba	Man.
Fort Alexander	Man.
Keesekoose	Sask.
Waterhen Lake	Sask.
Fort Nelson	B.C.
Wycocmagh (2 appeals)	N.S.
Woodstock	N.B.
Stoney Creek	B.C.
Lakahamen	B.C.
Sarcee	Alberta
Chippewas of Kettle & Stoney Point (2 appeals)	Ont.
Nitinaht (2 appeals)	B.C.
Cold Lake	Alberta

TOTAL: 31

ELECTION HELD UP TO AUGUST 1983

Standing Buffalo	Sask.
Okanese	Sask.
Sooke	B.C.
Carry the Kettle	Sask.
Peepeekisis	Sask.
Kwickwutaineuk	B.C.
Nut Lake	Sask.
Ashcroft	B.C.
Gitwangak	B.C.
Okanagan	B.C.
Edmundston (St. Basile)	N.B.
Frog Lake	Alberta
Samson	Alberta
Mistawasis	Sask.
O'Chiese	Alberta
Enoch	Alberta
Little Grand Rapids	Man.
Chippewas of Nawash	Ont.
Duncan	Alberta

TOTAL: 19

APPEALS 1979 - 1983 GRAND TOTAL: 101