

Summary of some approaches to
legislative change in the by-laws area

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SUMMARY OF SOME APPROACHES TO LEGISLATIVE CHANGE IN THE BY-LAWS AREA

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SUBJECT AREA - SECTION 88 - EFFECT ON INDIAN JURISDICTION

SOME APPROACHES TO CHANGE	VALUE TO BANDS	IMPACTS - BAND AND GOV'T	EXISTING LIMITATIONS
<ul style="list-style-type: none"> ● Extensive expansion of Sec. 81 law making powers. Provincial powers would be removed when a valid First Nation law is in place. This approach is implied in several substantive areas (eg. education). It is doubtful that any listing of powers in the Act could be guaranteed to be complete. Rather than a listing a broad enabling statement could be made in combination with an expanded 81 or without any listing. ● Amend Sec. 88 to provide that provincial laws of general application apply on reserves only where they have been declared to be applicable. First Nations could have the right to make this declaration. This could make it clear to courts that application of provincial general laws on Indian land is by exception only. ● State in the Act that provincial general laws do not apply to any First Nation with a valid constitution under the Act if the laws are inconsistent with that constitution, any treaty, jurisdictional agreement, by-law, etc. This approach would recognize the proposed opting in concept for First Nations taking on significant additional powers under the Act. ● More analysis/further examination is needed to devise more effective ways of changing or removing Sec.88 and potentially to acknowledge customary law without implying that customary will be codified. 	<p>Many First Nations feel strongly that provincial laws should not and do not apply to Indian land. Changes with respect to Sec. 88 would afford clearer direction to the courts and enable bands to have a stronger jurisdictional circumference around their land.</p> <p>There are different ideas about what constitutes Indian land. Many feel it must include much more than the standard Government definition of a reserve.</p> <p>First Nations could decide if they want any aspect of provincial law to apply.</p>	<p><u>Band</u> - Since valid First Nation laws must be in place, the level of effort, need for expertise, administrative and adjudicative structures, policies, etc. noted as required to make many of the substantive by-law powers operational could be a major implication for some bands.</p> <p><u>Gov't</u> - In addition to the impacts noted in each of the substantive by-law subject areas, Federal/ Provincial considerations may impact on any approach to change in Sec. 88.</p>	<p>In some circumstances provincial laws of general application will apply to <u>Indians of their own force</u> with or without Section 88. The Supreme Court has advised that if Parliament does not want provincial law to apply it must say so clearly.</p> <p>Section 88 has the effect of enabling some provincial laws to apply on Indian land which would not apply if Sec.88 did not exist.</p> <p>A legal perspective is that provinces have no jurisdiction over Indians or Indian land.</p>

I GOVERNMENT POWERS

- . Section 81 - Preamble
- . Health
- . Education
- . Social Services
- . Environmental Protection
- . Land
- . Economic Development
- . Community Infrastructure
- . Public Safety and Order
- . Administration of Justice
- . Membership
- . Elections

SUBJECT AREA - SECTION 81 PREAMBLE

SOME APPROACHES TO CHANGE	VALUE TO BANDS	IMPACTS - BAND AND GOV'T	EXISTING LIMITATIONS
<p>In keeping with the move towards re- vising Section 81 powers it is desir- able to enact a preamble which would establish the general powers and jurisdic- tion of the Band Council's by law making authority, e.g. - Every Band Council may pass such by-laws for the general welfare of its members as may be deemed expedient and not contrary to law.</p>	<p>This represents a modest revision to Section 81 in that it provides a clearer description of Band Council by-law powers and jurisdiction.</p>	<p>Minimal impact on both Bands and the Department.</p>	<p>In construing the legal nature of Indian Band Council by-law making authority under Section 81; the courts have held that Band Councils have power to regulate administra- tive statutes. The Courts have rejected the suggestion that Band Councils have ex- ecutive powers and have con- cluded that Band Council powers only extend to matters specifically set out in Section 81.</p>
<p>----- It has been suggested that the legisla- tive practice of making Band Council by-laws subject to GIC regulations should be greatly reduced i.e. only areas requiring uniform national stan- dards, co-ordination with other federal departments, etc.</p>	<p>----- This option represents a major opportunity to in- crease the legislative authority of Bands over matters that directly affect Indian communi- ties.</p>	<p>----- First Nations and the federal government will have to agree on the level of legislative power that will be accorded to Indian jurisdiction.</p>	<p>----- Existing Section 73 Regula- tions reduce the authority and accountability of Chief and Council.</p>

SUBJECT AREA - HEALTH

NOTE: National Health and Welfare (NHW) has the mandate for design and delivery of Indian Health Services. Change would involve discussion with NHW.

SOME APPROACHES TO CHANGE	VALUE TO BANDS	IMPACTS - BAND AND GOV'T	EXISTING LIMITATIONS
<ul style="list-style-type: none"> ● A "housekeeping" clean-up of Secs.81, 73 would remove duplication in the health area between the G in C powers and band powers re control of contagious diseases. ● Health related governing powers could be organized under two headings (1) public health, hygiene and safety standards and (2) design and delivery of health care services. G in C could retain authority under (1) for establishing standards, regulations and monitoring. Under (2) First Nations would have authority over both <u>the design and delivery</u> of health services, extended care facilities, etc. Bands, with or without Federal involvement would negotiate with provinces, public and private institutions for delivery. Provincial/Federal jurisdiction would not change. ● Full powers could be given to First Nations subject to meeting minimum world health standards. Would include all aspects of public health, hygiene, design and delivery. 	<p>Health is seen by many Indian people as being an area of critical concern - only Indian control of legislation, funding and policy will result in the improved health of Indian communities.</p> <p>It should be noted that several First Nations have already taken over control of health care delivery by agreements with National Health and Welfare (NH&W) whose policy is to devolve health care program delivery to Indian communities. This does not include control over program design and bands are still accountable to NHW. The second item in Approaches to Change includes First Nation control over program design.</p> <p>A First Nation institution could have authority to establish and/or monitor standards.</p>	<p><u>Band</u> - requires staff expertise, administration, regulation, directives, decision making and appeal structures to cover an array of health functions, depending on the degree of control.</p> <p><u>Adequate funding</u> to support all health activities/ powers would be required. Indemnity insurance would be required.</p> <p>Need for legal powers to contract, negotiate service agreements. Bands/band councils would need the power to sub-delegate to other bodies - health committees, health boards, etc.</p> <p><u>Gov't</u> - Issues/concerns could include: funding; adequate delegation; responsible handling of health standards; development of co-management schemes; need for Indian/Federal/Provincial negotiations and agreements; discussions and agreements on mandate with NH&W.</p>	<p>Sec. 73 and the Indian Health Regulations limit the power provided to band councils in Sec.81(a) and results in confusion as to the distinct powers of council.</p> <p>Federal Government has authority to punish conduct that is dangerous to health (Criminal Code, Occupational Health in some areas). In the Canada Health Act national standards for hospital insurance and medical care programs are a condition for funding to the Provinces.</p> <p>Provinces/Territories have wide authority over public health. All have enacted legislation to govern the standards and administration of health. Provinces regulate the medical professions and make laws in relation to hospitals.</p> <p>Federal government has taken position that there is no legislative requirement for the provision of health services to Indians. Existing health programs are not enacted pursuant to any authority but are seen as discretionary spending items.</p>

SUBJECT AREA - EDUCATION

SOME APPROACHES TO CHANGE	VALUE TO BANDS	IMPACTS - BAND AND GOV'T	EXISTING LIMITATIONS
<ul style="list-style-type: none"> • The AFN is completing an extensive \$6 M study on First Nation Jurisdiction over Education. The results of that study should be brought to bear on any approaches to change in legislation, that would be considered in the law-making/by-law area during Phase III of the LRTR. • The Act could be changed to acknowledge the existing movement toward devolution but provincial standards and jurisdiction would remain. Increased recognition of a percentage of curriculum focused on Indian language and culture could be established and direct Indian control over negotiations with Provinces acknowledged. • Authority: to establish, set standards and control curriculum, teaching methods, funding, etc. from pre-elementary and through to post-secondary education; establish and operate educational facilities, establish school boards, create Indian educational authorities. • Eliminate Sections 114-123 in existing Act, and give full and complete control to First Nations. Regional/National governance if required, would be by Indian education authority. An Indian Education Act could be enacted. 	<p>As for health, education is an area of critical concern to First Nations - control over legislation, policy, funding and operation is vital. Only comprehensive change is likely to be acceptable.</p> <p>During Phase II LRTR discussions bands spoke of control over curriculum, the need to have control over Provincial agreements, that is if such Agreements exist they should be Indian/Provincial. Some bands also described initiatives to develop an Indian Education Act.</p>	<p><u>Band - Level of funding would be a very major concern.</u> Need for staff expertise, administrative structure, policies, regulations, directives, decision-making and appeal/adjudicative bodies. Need legal powers to contract, to acquire and dispose of fiscal assets, negotiate agreements, etc. Bands and band councils would need to be able to sub-delegate to school boards, education authorities, etc.</p> <p><u>Gov't - Concerns/issues</u> would include the requirement for funding; the standards protection to ensure Indian students can transfer to other educational institutions without prejudice to their education; Indian/Federal/Provincial negotiations; and the most effective approach in terms of Indian Education Authorities.</p>	<p>Sec. 114 of the Act traces the delegation of power in relation to education. Starting from the Governor-in-Council, power is delegated to the Minister who then in turn makes agreements with the provinces, etc. It is legal counsel's opinion, that it would be possible for the Minister to pass a regulation under Sec. 115(a) to extend the Indians' powers and influence under the area of education. Nevertheless, there is presently no capacity under the Act for Bands to pass laws concerning the education of Indians.</p> <p>It is likely that some of the delegation to bands in the education area is without any legislative base.</p> <p>A much greater degree of delegated control is required instead of stretching the existing restrictive framework to its limits.</p>

NOTE: This area is not formally part of the LRTR.

SUBJECT AREA - SOCIAL SERVICES/PROGRAMS

SOME APPROACHES TO CHANGE	VALUE TO BANDS	IMPACTS - BAND AND GOV'T	EXISTING LIMITATIONS
<ul style="list-style-type: none"> ● Acknowledge in Sec. 81 power for band councils to pass by-laws with respect to the administration of social services along the lines of what has been provided in AFA's. ● Bands could be given full first level authority over child care and the placement of children in homes of Indians on and off reserve. Institutional care, standards, and inspection would remain with the Provinces. ● Bands could be given complete control over child care and control over welfare rates, criteria for eligibility, fairness, requirement for community work, provision of shelters for homeless/abused, counselling and support programs, etc. Control over family law could be included. May entail different funding arrangements. ● The AFN has a Child Care Enquiry underway which will bring forward recommendations. The whole sweep of social services is broad and complex. More study is necessary to frame approaches to change and their implications. 	<p>Child welfare is seen as area of critical concern to First Nations - control over legislation and policy is regarded as essential.</p> <p>Bands are already moving to exercise more authority in this area and a clear legislative base would underpin their efforts.</p> <p>Some bands have tried to implement approaches such as a requirement to carry out work in the community in order to receive welfare but have been unable to enforce this in the face of provincial legislation.</p>	<p><u>Bands</u> - Need for staff expertise, administrative structures, policies, regulations, directives, decision-making and appeal/adjudicative bodies. Need for physical facilities for child care. Need for legal powers to contract for services, negotiate with provinces, etc. Need to be able to sub-delegate to social service bodies or institutions. Resolution of funding sources would be a major issue.</p> <p><u>Gov't</u> - Range of concerns would include: funding sources/use of existing funding provided to provinces; handling of standards for care/child protection, welfare support, care in shelters, etc.; potentially Indian/Federal/Provincial negotiations; need for Indian Institutions; need for mandate clarification; etc.</p>	<p>Jurisdiction over child welfare and social services lies with the provinces. The Indian Act does not in real terms provide for this area and Section 88 which provides that provincial laws of general application apply to reserves comes into play. Family law is not dealt with in the Indian Act.</p> <p>Specifics of social/welfare regimes differ from province to province and therefore the exact impact on bands differs as well.</p> <p>While the federal government has taken the view that social services are not covered in the scope of Sec.81, legal counsel is of the opinion that child care could fall under 81(1)(a). There is no specific power in Sec. 81 now.</p> <p>Social services is a broad area with child care being only one aspect. No powers are provided for bands to control welfare or any aspect of social services.</p>

NOTE: Aspects of Social Services are under study by DIAND. This area is not formally part of the LRTR. Family law is not, in any way, provided for in the Indian Act.

SUBJECT AREA - ENVIRONMENTAL PROTECTION

- (i) Preservation, Protection and Management of Wildlife, Fish and Game On Reserve
- (ii) Protection and Management of the Environment including: Environment Assessments, Water Pollution, Air Pollution, Forests, Minerals, Flora and Fauna.

SOME APPROACHES TO CHANGE	VALUE TO BANDS	IMPACTS - BAND AND GOV'T	EXISTING LIMITATIONS
<p><u>CATEGORY I</u> <u>Preservation, protection and management of wildlife, fish and game, on-reserve.</u></p> <p>The power to enact by-laws for the preservation, protection and management of wildlife, fish and game on-reserve should be clearly bestowed with First Nations. <u>The commercial harvesting of fish, wildlife, etc. will require some acceptable form of co-management.</u> The power to enact laws to enter into agreements with the federal and provincial governments should be given to First Nations along with the power to delegate statutory authority to an Indian controlled body established to negotiate with these other governments.</p> <p><u>CATEGORY II</u> <u>Environmental Protection</u></p> <p>The Indian Act could be expanded to provide First Nations with the power to enact environmental protection laws <u>on-reserve</u> including: environmental assessment; water pollution; air pollution; forests; flora and fauna; the establishment of parks, etc. First Nations should be given the power to enter into agreements with the federal and provincial governments directly, or to delegate such authority to Indian controlled provincial institutions or tribal councils.</p>	<p>There is a major value to First Nations in both clarifying existing legislative powers and expanding law making powers to encompass the full spectrum of environmental protection matters and better capitalize on economic development opportunities.</p> <p><i>consultation process soon to be underway</i></p>	<p><u>Band</u></p> <p>The organization, management and further development of both categories of environmental protection powers requires a significant degree of expertise at the Band level as illustrated below:</p> <p><u>CATEGORY ONE</u> Bands will require staff, policies and procedures to:</p> <ul style="list-style-type: none"> - establish quotas - ensure enforcement - protect habitat - negotiate commercial fishing agreements and co-management schemes. <p><u>CATEGORY TWO</u> Bands will require the expertise to:</p> <ul style="list-style-type: none"> - conduct environmental assessments - regulate water pollution, air pollution, etc. - regulate the management of forest and mineral resources - negotiate environmental protection agreements with the provinces. <p><u>DIAND</u></p> <p>The Department has a massive leadership and coordinating role to play in clarifying and establishing First Nation legislative powers in the environmental protection area.</p>	<ul style="list-style-type: none"> - The scope of existing Sec. 81 powers are far too limited in scope i.e. wildlife management and noxious weeds in comparison to the far broader legislative categories of environmental protection. - Native fishing rights remain undefined despite numerous actions to resolve them. - The legal jurisdiction of S.81(1)(o) (fur bearing animals, fish and other game) is unclear and has been the source of much controversy with Federal Fisheries Regulations and the provinces. The courts have generally found that 81(1)(o) by-laws oust Federal Fishing Regulations and provincial legislation but do not empower Bands to regulate the <u>sale of fish</u>. There is a direct connection between fishing rights and economic development, particularly for coastal bands. - Indian reserves are not isolated enclaves and effective environmental protection will require cooperation from all levels of government whether Indian Band Council, federal or provincial

SUBJECT AREA - LAND - This is the subject of a separate study in the LRTR. The purpose of this summary is to give only a sense of the scope of law-making issues.

SOME APPROACHES TO CHANGE	VALUE TO BANDS	IMPACTS - BAND AND GOV'T	EXISTING LIMITATIONS
<ul style="list-style-type: none"> ● "Housekeeping" clean-up of Secs.73 81 leaving the G in C building inspection powers for health purposes only, and could entail giving bands much clearer authority for zoning, and land use planning. ● Substantial increase in band/council powers in all areas of land management and control including full transfer of the Minister's authority under Secs.53 and 60, operation of the registry, full control over allotments, etc. but subject to various forms of Government control/superintendency. ● Full transfer of all land powers to First Nations. No further involvement of the Minister. Could include the ability to acquire land and expropriate. ● The Lands project in the LRTR includes such suggestions as: a new Lands Act, transfer of land in fee - simple to bands, a Matrimonial Property Act, amendments to the existing Act, specific Band Legislation and Indian Government Legislation. Full exploration of specific legislative change in the Lands area is the purview of the lands LRTR project. 	<p>From the comments made during Phase II LRTR discussions it is clear that greater if not full control over their land is crucial to First Nations. Depending on the degree of change some advantages include:</p> <ul style="list-style-type: none"> - unimpeded decision-making on land development and use; - control over the basic economic resource, ability to raise funding; - ability to take advantage of business opportunities without the delays inherent in government control; - ability to acquire land off-reserve and to expropriate; - a much greater say over the taking of lands for public purposes. 	<p><u>Band</u> - Need for expertise in land development, use and planning; property management; leasing; expropriation; land valuation; surveying, land registry, etc. Need for legal advice. Provision of mechanisms to adjudicate matters of individual rights, issues with nearby municipalities, provinces, developers, etc. Need for: detailed policies, regulations; ability to sub-delegate to boards/committees; indemnity protection; means to exercise trust function; protection against alienation of lands; legal status to contract; adequate funding.</p> <p><u>Gov't</u> - Major issue - means of managing, reducing or eliminating fiduciary responsibility and legal liability. Need for new approaches for consistency, coordination with provinces, creation of Indian institutions. Funding demands and Indian/Federal/Provincial negotiations.</p>	<p>In addition to items in Secs. 73 and 81 items on land appear in some 27 sections of the Act. The Minister's power is very pervasive and limiting on First Nation decision-making. There is confusion between communal and individual rights; lack of proper delegation from bands to band councils; lack of clarity on scope of land management Minister may delegate; no need for band or band council assent to Sec.35 land taking for public purposes; and there remain residual rights of provinces. Fiduciary responsibility, unless changed, will continue to impact on First Nation autonomy.</p> <p style="text-align: right;"><i>Language</i></p>

SUBJECT AREA - ECONOMIC DEVELOPMENT

SOME APPROACHES TO CHANGE	VALUE TO BANDS	IMPACTS - BAND AND GOV'T	EXISTING LIMITATIONS
<p>The economic powers of Bands could be increased in a number of ways:</p> <p>(i) <u>by defining the legal powers and capacity of bands within the Act</u> i.e. the power to contract, acquire and dispose of property, expend and invest monies, borrow from any source, etc. (Ensure that Bands have same capacity as an Indian person.)</p> <p>(ii) <u>by expanding the management and administration authority of Bands over lands, resources and monies and expanding their economic development by-law powers to include:</u></p> <ul style="list-style-type: none"> . the establishment of long range economic development plans . the management of Indian lands for economic development purposes . the regulation and exploitation of renewable and non-renewable resources . agricultural development . employment training and development programs . the establishment and regulation of business enterprises . the establishment and regulation of consumer protection programs . the regulation of labour relations practices, on-reserve. 	<p>There is a major value to Bands which will result from the expansion of by-law making authority in the economic development area and the removal of obstacles to economic development that are included in the existing Indian Act.</p>	<p style="text-align: center;"><u>Band</u></p> <ul style="list-style-type: none"> - the assumption of expanded by-law powers by Bands/Band Council will require an effective by-law approval process, the establishment of administrative procedures which ensure a fair application of these powers, the creation of a first level appeal process at the community level, etc.; - there will be a substantial increase in the need for professional advice and assistance in the preparation of economic development plans, by-laws, lease agreements, borrowing proposals; - the definition of legal powers beings a corresponding increase to the legal obligations and liabilities of Band Council. <p style="text-align: center;"><u>DIAND</u></p> <ul style="list-style-type: none"> - the impact on the Minister's trust or fiduciary responsibilities which would result from an expansion of Band economic development by-law powers needs to be determined. 	<ul style="list-style-type: none"> - In spite of the critical importance of economic development to Indian communities there is no statutory provision in the Act nor does the Act define the legal powers and capacity of Bands/Band Councils. - During our Field Visits the point was constantly made that you can't separate the creation of economic development by-law powers from the need to amend the archaic and paternalistic sections of the Indian Act dealing with lands, resources and monies. There is scarcely any aspect of the economic life of Bands in which the Minister is not assigned a dominant and potentially intrusive role. intrusive role.

SUBJECT AREA - COMMUNITY INFRASTRUCTURE AND SERVICES

SOME APPROACHES TO CHANGE	VALUE TO BANDS	IMPACTS - BAND AND GOV'T	EXISTING LIMITATIONS
<p>Expand the Community Infrastructure and Services by-law making power of Band Councils to encompass:</p> <ul style="list-style-type: none"> - the planning, regulating, construction and maintenance of community works within the boundaries of the reserve e.g. water and sewer systems - the regulation of the construction, repair and use of buildings owned or leased by individuals - the provision of community services such as garbage collection, snow clearing, fire protection, etc. - the authority to establish fee-for-service rate schedules including the creation of an independent body to rule on rate disputes - the establishment of hydro electric and telecommunication installations, on-reserve - the authority to enter into contractual agreements with any person, government or organization. <p><u>NOTES:</u></p> <p>(1) Bands will require greater legislative power to plan and manage the expenditure of capital monies and the power to borrow money from other sources.</p> <p>(2) Existing Sections 19(c) and 34(1) could be repealed.</p>	<p>Far greater powers to control the establishment, regulation and maintenance of the community infrastructure and services to meet the needs of residents and improve the economic development potential of the reserve.</p>	<p style="text-align: center;"><u>Band</u></p> <ul style="list-style-type: none"> - the planning, administrative and regulatory requirements will increase the need for qualified Band staff and external professional resources; - continued constraints on Capital monies could create pressure to pursue alternative sources of financing, eg. long range borrowing - establishment of an independent body to review fee-for-service rates and resolve disputes. <p style="text-align: center;"><u>DIAND</u></p> <ul style="list-style-type: none"> - increased demand for Capital funds and greater Band power to manage Capital expenditures; - reduced ministerial control over the planning, construction and maintenance of the Community infrastructure, on-reserves. 	<p>The existing provisions of the Indian Act relating to the establishment, regulation and maintenance of the Community Infrastructure and Services on-reserve are extremely restrictive eg.34(1). Bands shall ensure that roads, bridges, ditches and fences are maintained in accordance with instructions from the Superintendent, as well as too narrowly scoped i.e. does not encompass ensuring the adequacy of water supplies, the establishment of fee for service rate schedules, the provision of community services, etc.</p>

SUBJECT AREA - PUBLIC SAFETY AND ORDER

SOME APPROACHES TO CHANGE	VALUE TO BANDS	IMPACTS - BAND AND GOV'T	EXISTING LIMITATIONS
<ul style="list-style-type: none"> ● Clarify Secs.73 and 81 to provide for the powers that could be generally accepted as being the right of band council - prohibition and abating of public nuisances; full authority over trespassing (cancel Sec.30); powers over fire protection, control of open fires, curfews, etc. Amend Sec.81 to allow bands to adopt provincial laws/regulations. ● <u>Traffic</u> - revoke para.(c) in Sec.73 and the Traffic Regulations and give Sec.73 power to bands but provincial law still applies. <u>Amusements</u> - revoke para.(e) in Sec.73 and the Amusement Regulations giving bands Sec.73 power but not control over Bingos. <u>Intoxicants</u> - amend Sec.85.1 to give bands power to regulate the the use of liquor but not liquor sales. ● <u>Traffic</u> - remove the application of provincial highway Acts and either DIAND with First Nations or First Nations themselves enact traffic codes. <u>Amusements</u> - give bands power to license and regulate bingos. State this explicitly in Sec.81 and amend Criminal Code or make jurisdictional agreements with provinces. <u>Intoxicants</u> - amend Sec.85.1 to empower band councils to license and regulate liquor sales. 	<p>Clean-up of Secs.73/81 would result in clearer by-law powers over some basic community functions. Real advantages likely come only with comprehensive change which would remove what is seen as provincial interference and would give First Nations control over important revenue sources without the risk of fines or criminal charges as is now the case.</p> <p>During Phase II discussions Indian people spoke strongly of the need to: remove provincial traffic laws from applying to their land; to enable them to control liquor sales and all aspects of games of chance.</p>	<p><u>Band</u> - Development and full implementation of traffic codes could be costly and complicated. Control over bingo and liquor sales would entail increased administrative structures - licence issuing, inspection, adjudication, regulations/criteria. Need for staff and legal expertise, duly empowered decision-making bodies, legal powers and ability to delegate.</p> <p><u>Gov't</u> - Significant impact if comprehensive changes were effected. DIAND development of full reserve traffic code may not be feasible at time of downsizing/devolution. Indian/Federal/Provincial discussions likely required re bingos as well as Criminal Code amendments. Similarly discussions could be needed if First Nations are to have full control over liquor sales.</p>	<p>Items in Sec.73 limit or confuse council powers in Sec.81. Result has been disallowed by-laws for things such as fire protection, etc. There is no power for bands to define trespassing for example.</p> <p>First Nations may only prohibit use of alcohol and intoxication, etc. may not deal with regulating use or with sales. No power to legally license and regulate bingos, lotteries, casinos, etc.</p> <p>Traffic Regulations both limit council authority in this area and incorporate provincial traffic laws.</p>

SUBJECT AREA - ADMINISTRATION OF JUSTICE

SOME APPROACHES TO CHANGE	VALUE TO BANDS	IMPACTS - BAND AND GOV'T	EXISTING LIMITATIONS
<ul style="list-style-type: none"> ● Fund By-law Enforcement Officers; improve funding authorities for adequate funding policing services. Support or increase support for: band/tribal council Police Commissions; new arrangements between bands and provinces so bands administer some elements such as minor offences/young offenders; development of community dispute resolution mechanisms. Strengthen training activities for bands, DIAND staff and promote training initiatives for the Canadian judiciary. Provide description of prosecution procedures to bands and develop a policy re funding for prosecution/court costs. Begin to increase the appointment of Sec. 107 JOP's. ● Legislative change to expand and clarify jurisdiction of Sec.107 JOP's and to empower bands to appoint their own police forces; continue initiatives identified in minimal change including exploration with Dept. of Justice of use and application of Uniform Ticketing and Fine Options programs. ● Establish an Indian Justice System. ● Throughout changes in this area there is a need to better understand and recognize the use of Indian customary law without implying that customary law should be codified. 	<p>It is clear from the band comments during Phase II LRTR discussions that there is both need and value in these changes. The negative impact, perception and reality of the "unjust" Canadian justice system, high incarceration rates and the imposition of a white man's law that in no way reflects Indian values, traditions or custom have been talked and written about at length. The inadequacy of existing policing arrangements and the inability to enforce band by-laws making enactment of such by-laws all but useless has been well documented.</p> <p>The desire to make greater use of Indian customary law was mentioned frequently during Phase II discussions. Some First Nations do use customary law in their communities.</p>	<p><u>Band</u> - developing means to administer policing, legal and judicial systems and the support structures that will be required such as staff and legal expertise, police commissions, commissions of enquiry on police actions, court constitutions, justice committees, etc. Possibly a need to negotiate shared responsibilities with Federal/Provincial police forces/legal and judicial systems; develop community dispute resolution mechanisms, and community acceptance of by-law enforcement, responsibility for legislation/enforcement/prosecution and sentencing; and need to strengthen/adapt/reinstitute customary law.</p> <p><u>Gov't</u> - need for extensive funding; involvement in Indian/Provincial/Federal negotiations; provision of a statutory scheme for Sec. 107 JOP's - court constitution, defined jurisdiction; administrative support, etc. Magnitude of effort to create new legal, judicial format in the Canadian context is impossible to define as yet.</p>	<p>After examination of 81(c) provision, legal counsel advises that band councils could enact by-laws to appoint administrative officers to enforce band civil by-laws but it is doubtful that band police forces established under para.(c) would have authority to enforce provincial or federal legislation unless appointed under RCMP Act or Provincial Police Act.</p> <p>The Canadian Bar Association in its recent report says that the present legislative jurisdiction of band councils under Sec.81 and 83 is not framed with a view to providing for a coherent justice system.</p> <p>Sec.107 is inadequate in several respects: no statutory or regulatory base for administration of office of JOP's; JOP's jurisdiction is ambiguous; not clear how JOP's are integrated into court system; method of appointment [Indian involvement] needs examination; no provision for JOP training.</p>

SUBJECT AREA - MEMBERSHIP

SOME APPROACHES TO CHANGE	VALUE TO BANDS	IMPACTS - BAND AND GOV'T	EXISTING LIMITATIONS
<p>Amend Section 10(2) to allow Bands to assume control subject to the consent of a majority of the electors who vote on the referendum.</p> <p>Amend the Act to allow for the transfer of individuals subject to the consent of the individual and the recipient Band.</p>	<p>Elimination of a major obstacle which is preventing some Bands from assuming control of their Membership Rules.</p> <p>Individuals would be free to become members of any Band subject to acceptance by the recipient Band and without the approval of the home Band.</p>	<p>Bands would still be required to provide written notice of the intention to assume control of Membership Rules, protect acquired rights and establish a mechanism for reviewing decisions on membership.</p> <p>Band Lists would be more accurate in that an individual would not be registered on two Lists.</p> <p>Funding would be provided to Bands on the basis of revised Band List regardless of whether the home Band has taken these individuals off their List.</p>	<p>Bands may assume control over their Membership Rules pursuant to the consent of a <u>majority of the electors</u> of the band. Bands who follow customary practices find it extremely difficult or impossible to achieve this requirement which is not applied to any other jurisdiction.</p> <p>Bands are experiencing great difficulty in having individuals <u>transferred</u> from the Registry List of one band when the individuals wish to become members of another Band.</p>

SUBJECT AREA - ELECTIONS

SOME APPROACHES TO CHANGE	VALUE TO BANDS	IMPACTS - BAND AND GOV'T	EXISTING LIMITATIONS
<p><u>Provide a by-law power to Bands to develop their own election rules and thereby to control their election process.</u> The by-law could require <u>approval by the electorate</u> (50 + 1 attending a meeting, voting in a referendum after due notice).</p> <p><u>Bands could revert to Sec.74 - 79 of the Indian Act by the same assents as for adopting their own election rules.</u></p> <p><u>Custom bands could elect to use the by-law to make their election rules but there likely would be no reversion to custom afterwards and no further revision to custom at all.</u></p> <p><u>Band election by-laws and rules could be subject to Ministerial approval re the assent of the electorate of elected officials, means to handle election appeals, means to amend the rules and comply with Charter of Rights and Freedoms.</u></p> <p>By-law power could be placed in Election Section of the Act to clearly show dual track approach but would be referenced to Sec.81/Powers of the Council.</p>	<p>First Nation representatives, during Phase II discussions, were <u>virtually unanimous in the need for this by-law power.</u></p> <p>It would enable bands to decide on who comprises the electorate (only on or both off and on reserve members) length of term of office, size of council - in fact all aspects of the election process.</p> <p>Many First Nations have expressed the desire to have this by-law power accelerated without waiting for all other changes in the Act. Some bands are already operating by their own election rules without any legislative validity.</p>	<p><u>Band</u> - developing election rules will require time and effort, on-going operation of the election process will entail the need for expertise and some costs. Provision of an appeal process that is independent from undue influence may be difficult to achieve solely at the individual band level, though some bands feel a council of elders could be used.</p> <p><u>Gov't</u> - Funding may be an issue. Some bands will want DIAND to continue to provide for such matters as an appeal process even after they have a first set of elections rules so that they may gradually evolve the ability to handle all aspects of elections. The Dept./Gov't may not feel that this is appropriate.</p>	<p>There is at the moment no acceptable legal means of allowing bands to develop their own election rules. There is no provision for this in the Act.</p> <p>Further, the Act (Sec. 74 - 79) is outmoded and often unworkable. The ordinarily resident provision is seen as a problem by several bands and the number of election appeals is problematic.</p> <p>The Indian Band Election Regulations (IBER) also are outdated, lack clarity and are not complete in coverage of normal election procedures (eg. advance polls, provisions for recounts.)</p> <p>Suggestions for specific amendments to the Act and the IBER are dealt with in the Elections project.</p>

II EXECUTIVE POWERS

- . Band Council Procedures
- . Powers of Bands/Band Councils
- . Good Government
- . By-law Approval Procedures
- . Certification of By-Laws
- . Financial Management
- . Band Administration

SUBJECT AREA - BAND COUNCIL PROCEDURES

SOME APPROACHES TO CHANGE	VALUE TO BANDS	IMPACTS - BAND AND GOV'T	EXISTING LIMITATIONS
<ul style="list-style-type: none"> • The Act could be amended to enable each band council to establish their own meeting regulations. Sec.80 could be eliminated and the provisions included in an enabling preamble to a new Powers of the Council section of the Act. For example: Every Band Council may pass by-laws for governing the proceedings of the Council, the conduct of its members, the calling of meetings and meeting procedures. • Another approach would be to include in a revised Powers of the Council section of the Act a specific by-law power for enactment of meeting regulations by band council. 	<p>Bands would be able to develop meeting regulations with local variations to meet the needs of the individual council/band. Could contribute to more efficient use of meeting time and more productive meetings.</p> <p>Would eliminate paternalism inherent in present Sec.80 and associated regulations.</p> <p>Bands have raised questions about the role of the Chief as opposed to the role of Councilor - when the Chief votes, aspects of decision-making. They would be able to clarify these issues to suit their own circumstances in tailor-made procedures.</p>	<p><u>Band</u> - Procedural by-laws need not be lengthy but would require some time and effort to develop.</p> <p>Keeping the procedural by-law useful may entail amending it from time to time. Electorate approval of the by-law could be done through readings at open council meetings.</p> <p><u>Gov't</u> - no significant impacts. Dept. may wish to provide guidelines to assist bands in developing such by-laws.</p>	<p>Pursuant to Sec.80 the G-in-C has enacted the <u>Indian Band Council Procedure Regulations (IBPCR)</u>.</p> <p>The Regulations have been criticized as being paternalistic and unclear in a number of areas - who should call the first meeting of a council, role of the Chief as chairperson, etc.</p> <p>There are no general band meeting regulations.</p>

SUBJECT AREA - POWERS OF BAND/BAND COUNCIL

SOME APPROACHES TO CHANGE	VALUE TO BANDS	IMPACTS - BAND AND GOV'T	EXISTING LIMITATIONS
<p>- clear definition of legislative and legal powers of Bands/Band Councils, as recommended by the Powers of Council project in the Phase II LRT Review.)</p> <p>- option of consolidating Band/ Band Council powers in one Section of the Indian Act may warrant consideration. (If not, a separate Summary of Powers could be prepared and distributed to all bands.))</p> <p>- Bands could be given the option of establishing their own Constitution which would divide the legislative powers between the Band and Band Council in accordance with the wishes of the community. This option would be subject to electorate and ministerial approval and likely GIC Regulation.</p>	<p>- major value to Bands and Band Councils in that it would provide a clear description of their respective legislative and legal powers.</p> <p>- major value in that it would allow Bands to exercise a greater role in the determination of the legislative and legal powers of Band Councils.</p>	<p>- No incremental impact on either Bands or the Department in terms of additional staff or procedural requirements.</p> <p>- Approval of Band Constitution and its proposed division of legislative and legal powers by the electorate and Minister.</p> <p>Direct relationship would have to be established between the division of Band/Band Council legislative powers and the By-Law approved procedures.</p>	<p>- No clear definition of the distribution of powers between Bands and Band Councils in the existing Act.</p> <p>- Powers of Bands/Band Councils are widely dispersed throughout the Indian Act.</p> <p>- Confusion cited by many First Nations on the respective powers of Bands and Band Councils during Field Visits.</p> <p>- The legal powers and capacity of Band Councils and Bands not defined in existing Act.</p>

SUBJECT AREA - GOOD GOVERNMENT

SOME APPROACHES TO CHANGE	VALUE TO BANDS	IMPACTS - BAND AND GOV'T	EXISTING LIMITATIONS
<ul style="list-style-type: none"> ● Amend the Act to require that an annual report be made by all Band Council members. DIAND might issue guidelines and/or conduct follow-up activity to ensure band members are fully informed of Council activities. ● Provide a by-law power to band councils for disclosure, conflict of interest and the accountability of the electorate. Each band then can decide on the mechanisms appropriate to their community. By-law could be subject to electorate approval. ● Amend the Criminal Code to include chiefs and councillors as officials. Band members would then have the same protection against breach of trust as is afforded other electors in Canada. This was suggested in the Westbank Report but was not mentioned by Indian participants during Phase II LRTR discussions. ● If bands are taking on significant additional powers there might be a requirement for this type of by-law to be included in a band constitution. ● Additional approaches could be explored during Phase II. 	<p>Mechanisms for accountability, delineation of Council/band responsibilities, and conflict of interest provisions were discussed as requirements by several First Nations during Phase II.</p> <p>Local government would be strengthened and issues of conflict of interest and court cases might be avoided. Those running for office would be fully aware of the nature of the commitment they were making and bands would know what to expect of their government.</p> <p>Outside business, corporations, etc. might have increased confidence in contracting or making agreements with bands.</p>	<p><u>Bands</u> - Actions of elected officials would be more visible and more open to criticism. Accusations of abuse of power could be made more easily. May need to establish bodies to adjudicate on grievances. Elected officials may want indemnity insurance. May be a concern that such matters make band government too rigid, too complex, and that it is an imposition of non-Indian ways of conducting business on Indian communities. May be costs in producing reports, etc. <u>Concerns have been expressed that Band Council would be trapped in dual accountability - to the band members and to the Government, particularly where members' wishes are not in line with program requirements.</u></p> <p><u>Gov't</u> - Need to avoid paternalism or excess dictation of band gov't actions. Funding and monitoring could be involved. Legislative change could involve Criminal Code and Indian Act.</p>	<p>No direct provisions in the Act except Minister can remove chief/councillor from office in Sec.78(2)(b). This is seen by some as too much government control as opposed to band control.</p> <p>There are now a wide range of disclosure provisions for non-Indian legislative bodies.</p> <p>Sechelt and Cree Naskapi Acts both provide for some good government approaches. An elected official, in the Cree Naskapi Act, can be removed from office for reasons of absence on petition by 15 electors and decision at a special band meeting, for example.</p>

SUBJECT AREA - BY-LAW APPROVAL PROCEDURES

{ Bands would be enabled to design their own legislative approval procedures
 { provided that they meet an agreed upon set of national standards. Requires
 { an expansion to the definition of Section 81 to encompass both Band and Band
 { Council powers.

SOME APPROACHES TO CHANGE	VALUE TO BANDS	IMPACTS - BAND AND GOV'T	EXISTING LIMITATIONS
<ul style="list-style-type: none"> ● Remove ministerial disallowance altogether and rely on the court system. ● Increase Band Council by-law making authority under Sec.81 without adjusting the Minister's power of disallowance. ● Bands could be given authority to design their own by-law approval powers provided that they are consistent with national standards. They could include: <ul style="list-style-type: none"> - publication procedures - system of first, second and third reading of by-laws - Band referendum requirements on consequential by-laws - establishment of an independent first level appeal procedure at community level - clearly defined procedures for challenging by-laws through the courts or an Indian controlled adjudicative body or Indian Ombudsman. 	<p>Questionable value to Bands in the absence of a community defined by-law approval procedure.</p> <p><u>Totally unsatisfactory</u> in responding to existing limitations and Band frustrations with disallowance powers of Minister.</p> <p><u>Major value</u> in expanding the authority and accountability of the Band/Band Council in the by-law approval process.</p>	<ul style="list-style-type: none"> - Major implications for Minister's trust and statutory responsibilities. - Protection of individual rights in the passage and administration of consequential by-law powers a significant concern to the Minister. The most significant implications for Band would include: <ul style="list-style-type: none"> - establishment of by-law approval procedures, division of roles between Band and Band Council, creation of First Level Appeal Committee; - increased requirement for legal assistance and its cost; - increased requirement for trained staff and formalized procedures to ensure fair application of powers; -*need for a provincial or tribal council judicial body to adjudicate by-law disputes. 	<p>Under Sec.82(2) any band by-law comes into force within forty days provided that it has <u>not been disallowed by the Minister.</u></p> <p>Minister's power of disallowance is the source of enormous frustration for Bands in that there is a widespread feeling that:</p> <ul style="list-style-type: none"> - the Minister's power is being exercised in an arbitrary manner; - by-laws are being disallowed in ignorance of community objectives and needs; - the disallowance power undermines the authority and accountability of Band Councils; - even the simplest by-laws are subject to enormous complications; - the reasons for disallowance are never clearly communicated to Bands.

*(will require changes to the Statutory Instruments Act)

SUBJECT AREA - CERTIFICATION OF BY-LAWS

SOME APPROACHES TO CHANGE	VALUE TO BANDS	IMPACTS - BAND AND GOV'T	EXISTING LIMITATIONS
<p>Amend Section 86 of the Indian Act to provide for the following:</p> <ol style="list-style-type: none"> 1. Every by-law shall be signed by the Chief of the Council, Council Members and the Secretary of the Council. 2. Every by-law so signed shall be received in all courts without proof of adoption or signature. 3. The Secretary shall maintain an index book on the number and date of all by-laws passed by the Council. 4. A copy of all by-laws passed shall be sent to the Minister. 	<p><u>Significant</u> importance to Bands in terms of the enforcement of by-law infractions through the courts.</p>	<p>Requirement for Band Councils to follow established procedures in signing by-laws and maintaining a formal index book on all by-laws passed by Council.</p>	<p>Courts are often unwilling to take judicial notice of Band by-laws which has a direct impact on their enforcement.</p>

SUBJECT AREA - FINANCIAL ADMINISTRATION

SOME APROACHES TO CHANGE	VALUE TO BANDS	IMPACTS - BAND AND GOV'T	EXISTING LIMITATIONS
<p>The Creation of Financial Administration by-law power under Section 81. Specific elements of the Financial Administration by-law might include:</p> <ul style="list-style-type: none"> - the passage of by-laws on all revenue and expenditure proposals that have a consequential impact on Band members or future Band Councils; - that annual Expenditure Plans are circulated to all members and discussed at an open Council meeting; - that Band Financial Accounts are open to review by members; - that annual Financial Statements are presented in an understandable format, circulated to all members and discussed at a Band Meeting set aside for that purpose; - that the Annual Audit Report is made public and reviewed by an independent Audit Committee who will oversee the implementation of corrective measures; - that a procedure is established to appoint an independent Administrator by the Band in the event that there is a serious disorder in the financial affairs of the Band. 	<p>There is a <u>major</u> benefit to Bands in establishing a clear and effective basis for financial management and accountability.</p>	<p>The major implications for Bands include:</p> <ul style="list-style-type: none"> - the requirement for an experienced, fully qualified Financial Officer and support staff; - an effective budgeting, financial management and reporting system must be in place; - the requirement for an active participation by Band members and community participation on a Finance/Audit Committee; - because the legal responsibilities of the Band council may increase it may be necessary to develop indemnity provisions. <p>From the federal government standpoint, the <u>critical</u> question to be addressed is what form of GIC regulatory/Ministerial approval process is appropriate in relation to the proposed Financial Administration by-law power of Bands.</p>	<ul style="list-style-type: none"> - There is no provision under the Indian Act to establish the financial accountability of Band Council to the electorate for financial administration. - There is little or no statutory reference for financial administration in the Indian Act. - The existing powers of Bands to manage Capital and Revenue expenditures, borrow and invest monies, etc. are very limited. - Further, Minister's trust responsibilities under the Indian Act limit opportunities for accountable financial management.

SUBJECT AREA - BAND ADMINISTRATION

SOME APPROACHES TO CHANGE	VALUE TO BANDS	IMPACTS - BAND AND GOV'T	EXISTING LIMITATIONS
<p>Several Bands identified the value of being able to pass a by-law establishing the internal management administration and personnel practices and procedures on-reserve. The scope of this Band by-law power could encompass:</p> <ul style="list-style-type: none"> - the clear separation of the political and Band administrative functions e.g. Band staff cannot run for elective office; - the responsibilities and authorities of the Band Administrator and senior program staff and their reporting relationship to Band Council; - Band personnel policies and procedures re staffing, remuneration, dismissal, pensions, etc.; - Band administrative policies re purchasing, travel, signing authorities, etc.; - Band planning, budgeting and reporting procedures, etc. 	<p>A clear <u>statutory basis</u> for Band Administration is established (as opposed to the less formalized Band Council Resolution mechanism).</p>	<p>Bands would be required to define and document their internal management and administrative procedures.</p> <p>The Government would view this as a positive development leading to a more formalized definition of Band Administration practices, on-reserve.</p>	<p>There is no specific heading in the Indian Act which enables First Nations to pass a Administration By-law governing their internal management procedures on reserve.</p>