

Proposed Indian Act Amendments

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What, if any, impact will the Indian Act amendments have on First Nations in British Columbia or elsewhere? First Nations will have to confront these amendments, until such time as the inherent act of self government is implemented or the Act is replaced, in whole or in part, by a Treaty under the BC Treaty Process, a comprehensive claims settlement, or by other legislative means (Sechelt Act).

Bill C-79 to amend the Indian Act (Indian Act Optional Modification Act) was tabled in Parliament just before Christmas, which will go to Committee and work its way through the various readings before enacted. Approximately 75 amendments to sections or subsections of the Act are being tabled. The Minister claims that these amendments merely eliminate the most "archaic and objectionable provisions of the Act" without fundamentally changing Canada's fiduciary obligations and treaty rights. The National Chief has rejected the amendments in their entirety and has called upon all Chiefs for action in opposition, asserting that these amendments are, in effect, the implementation of the 1969 White Paper. Other regional Chiefs have seen the merit of some of these changes as necessary to eliminate some of the obstacles under the Act to economic development, band governance and more efficient band administration. What then, in summary, are the proposed amendments?

Application of Amendments

As currently drafted, these amendments only apply to those First Nations who, by majority vote of the Council, choose to adopt them. The existing provisions of the Act remain and apply to those First Nations who do not adopt the amendments. (4&5 of Bill)

Preamble/Treaty and Inherent Self-Government Protection Clause (new clause)

1. The preamble or introduction to the Bill highlights that these amendments are interim measures until the successful implementation of inherent right of self-government.

- This is based on Canada's respect for its treaty and fiduciary obligations.
- As well as Canada's respect for the right of First Nations to protect their languages, cultures and traditions.

2. The treaty and inherent self-government protection clause (non-derogation clause). (4(3) of Bill)

- The Bill provides that for those First Nation's that adopt these amendments then nothing in the Indian Act will take away from existing aboriginal or treaty rights or the inherent right of self-government.

Elections, Band Council Business and Authority

1. Band Business

- Band Councils can use BCRs to do business, without a duly convened meeting, as long as all Councillors sign the BCR. Otherwise a Band Council meeting must be held. (2(3)(b))
- The Band now has legal status to do business. They have the same legal capacity as a person. (16.1)
- Officers of the Band can now verify copies of their own bylaws and not just the Superintendent. (86(2))
- Bylaws are not invalid due to minor defects. (86(1))
- All fines for offences under the Act, Regulations or Bylaws are paid to the Band and not Her Majesty for the benefit of the Band. (104)

2. Band Elections

- 3 year election term (78(1)) and must be elector to be Chief or Counsellor. (75)
- Can request elections under the Indian Act which the Minister must approve if members support this decision. (74.1)
- Can request custom elections which the Minister must approve if members support this decision and there is an election code. (80.1)
- Within certain limits, the Band can vary the size of Council and how the Chief is elected. (74.2(1)(2))
- Canada not liable if Band chooses elections under the Indian Act or by custom. (80.2)

3. Bylaw Options

(a) Band Councils can pass new bylaws dealing with: (81)

- Residential tenancies (leasing of houses to Band members by Band and between Band members). (h.1)
- Timber harvesting and management of natural resources, including water. (0.1)
- Forest conservation and forest fire prevention. (0.2)
- Financial management, personnel, audits, conflict of interest, accountability. (p.1)
- Appoint bylaw enforcement officers. (q)

(b) Band Councils can pass a bylaw by which bylaw enforcement officers are appointed to enforce liquor bylaws and designate how these

bylaws will be enforced.

Lands

- Band Councils can manage surrendered or designated lands with Ministers consent and approval by the majority of the electors. (53(1.1))
- Band Councils can manage reserve lands with Minister's consent and by majority vote of electors. (60)
- Governor in Council's powers are expanded to include passing regulations to deal with the cutting, removal, and disposal of timber on surrendered and reserve land (57(a)(b))
- The Minister can grant Band Councils authority to grant licenses to harvest timber on surrendered or designated and other reserve lands. (57(a)(b))
- Governor in Council's powers are expanded to include powers to regulate the development, mining, processing, and disposition of minerals on or under surrendered or reserve lands (57(c)(d))
- The Minister can grant Band Councils authority to grant leases to explore or develop mines and minerals on or under designated lands. (57(c)(d))
- Land held by the Band to be set aside in the future as a reserve can be conditionally surrendered for lease (this will help additions to reserves for specific claims and Treaty Land Entitlement Bands who have to satisfy third party interests). (38(2))

Wills

- Where a Will or part of a Will is declared to be invalid a prior good Will takes over (46(2)).
- Definition of "widow" replaced by "surviving spouse" which includes a person of the opposite sex the deceased lived with for 2+ years but not separated for 12 months prior to death (definition "surviving spouse" includes person married by Indian custom). (48(15))
- Can appeal Minister's decision on Will or distribution of the property within six months. (47)
- Makes clear that for CP holders of reserve land, when they die without a Will, the CP land first goes to spouse, then parents or brothers or sisters or grandparents and if none living then land goes back to the Band. (48)
- Makes clear also that other property belonging to a person that dies without a Will first goes to the spouse, then parents, brothers or sisters, then grandparents and if none living then to nieces, nephews or next of kin. (48)

Education

- The Minister can now allow First Nations to enter into education funding agreements. (114(1))

Penalties/Enforcement

- General penalties for offences under the Act, Regulations or Bylaws are increased to \$5,000 and 30 days or 3 months or to both. (30, 57(f), 81(r), 83(1.1), 85.1(4), 102)
- Other penalties could be the cancellation of licenses or permits, seizure of equipment, destroying buildings or correcting environmental damage. (57(f), 81(2))
- Bylaw enforcement offices have authority to enforce bylaws, including powers of search and seizure, as well as power to issue notices of violation. (103,103.1)
- Peace officers have new powers to search and seize and can enforce certain regulations. (103)

Other

Certain old and paternalistic provisions are to be removed from the Act.

- The Minister will no longer manage Band farms. (71)
- The Minister no longer needs to approve the sale of grain or cattle in Alberta, Saskatchewan, and Manitoba. (32 and 33)
- Supervision by the Superintendent no longer required to maintain roads and bridges on reserve. (34)
- The Minister will no longer be regulating wild grass on reserve. (57(a)(b))
- The Minister will no longer deal with unused or uncultivated reserve land. (58)
- Loans will no longer be made under the Act but under other legislation. (70)
- The Minister will no longer have authority over sacred objects and sites on reserves. First Nations will have exclusive jurisdiction to decide these matters. (91(1) and (4))

Conclusion

After a more careful review of the Bill to amend the Indian Act, First Nations will be faced with the choice of adopting these changes or living with existing provisions. Either way, until the Act is repealed or replaced, First Nations will still have to deal with the Indian Act as it currently exists or as amended once adopted. First Nations are advised to closely examine the amendments before enacted.

This paper is intended to provide general comments and is not intended to be a comprehensive review of all developments, nor is it intended to provide legal advice. Readers should not act on information in this paper without seeking specific advice on the particular matters which are of concern to them. For further information, please contact Davis & Company.