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DISCUSSION PAPER

Revisions to Indian Act:
Introduction

DISCUSSION PAPER - REVISIONS TO THE INDIAN ACT

INTRODUCTION

The purpose of this paper is to present for further consideration a number of proposed revisions to the Indian Act. Its presentation is another stage in the revision process, a process which has encompassed several years, pre-dating even the initiation of the NIB/Cabinet Committee mechanism, has included over a hundred meetings, and has involved a wide range of discussions, related analytical and research projects, and the presentation of various submissions for complete as well as partial changes to the existing Act.

This presentation also reinforces the concept of the primary involvement of the Indian people in the reshaping of the Act. The major emphases in the paper are derived from proposals received from Indian representatives, have been written to incorporate essential elements contained in Indian ideas, and are designed to advance the major expressed desire of Indian people - to exercise Indian control over Indian government, Indian lands, Indian education and other aspects of Indian socio-economic development.

There comes a point in time when all the thoughts, the implications, the options for action need to be pulled together into a format that aids discussion on a broader basis. Consideration by committee must give way to public appraisal.

It is for the purpose of moving towards this larger process that this paper in its present form is advanced.

In the consideration of these proposals, a number of important factors should be borne in mind. In the first place, the submission of the proposals constitutes the next step in the whole of the process of bringing about revisions to the existing Indian Act. It will be followed by their presentation for public study and debate. This will include their presentation before Parliament, and their review by provincial governments and other interested Canadians.

The initial stage of this public review, however, will be the taking of these proposals to the Indian people themselves. Parliament will be asked to give this responsibility for meeting directly with Indian people across the country to the Standing Committee on Indian Affairs of the House of Commons.

This part of the process will have distinct advantages. As well as having some specific proposals for suggested changes to consider, the Indian people will have the chance to meet face-to-face with those Members of Parliament who would be most influential in recommending the form of Indian Act changes to the House of Commons. In earlier approaches, submissions for changes to the Act were heard only before Special Committees in Ottawa, a situation which did not adequately acquaint legislators with the daily reality of Indian concerns. By reversing this procedure, it is anticipated that the context of Indian input into the revision process will continue to be purposeful and direct.

With this commitment to public review, it follows that these proposals are not to be considered as being written in stone. It is anticipated that many positive suggestions for change will be advanced, and that the Standing Committee will include these in the report it makes to Parliament on the reactions it receives to the proposed amendments.

As to the proposals themselves, it will be seen that they are based upon the three main principles outlined at the 6th Annual General Assembly of the NIB at Truro in 1975.

In the first place, the emphasis in these proposals is upon the freedom of choice. While the main aim is to provide in law a basis for a system of tribal government which can be exercised at different levels - Band, Area or District, and Regional - there are built-in mechanisms which will provide that essential flexibility whereby Bands can decide how much power and responsibility they wish to undertake, at what pace they desire to do so, and under what circumstances they can take into their own hands these reins of government. By means of these "opting-in" procedures, Bands will be able to adopt any changes as quickly or as slowly as they themselves wish to do so. If they prefer to remain under the present system, that option is also there.

Secondly, there is outlined a suggested system for the granting of Charters, together with the outline of a Charter Commission which could act as an agency independent of the Department of Indian Affairs in these matters. It will be seen that the work of such a Commission could be central to the achievement

of the desired Indian control over the affairs of Indian people at whatever local level is required, without the omnipresent administrative control of the Department, but still within the overall trust responsibility of the Minister.

Thirdly, there is no attempt to completely revamp the present Indian Act. It was specified that amendments to the Act should be introduced on a phased basis. Consequently, this first phase of the amendment process has been concentrated on the following areas:

- a) Tribal government
- b) Education
- c) Land surrenders
- d) Hunting, fishing and trapping rights
- e) Membership
- f) Anachronisms in the present Act

Through the observance of these principles, through the careful adherence to the stated objectives and desires of the Indian people, the presentation of these proposed revisions to the Act has been arrived at. Now must come the next stage - the wide, thoughtful, open scrutiny of the suggested elements whereby Indian people can exercise firm control of their own political, social, economic and cultural affairs. It is anticipated that the final form of these proposed revisions to the Indian Act will prove to be a positive platform for future, even further-reaching amendments.

September 14, 1978.

INDIAN ACT REVISION

Discussion Paper:
Executive Summary

Indian Act Revision - Executive Summary

I. Tribal Government

The present system of Band government was designed nearly thirty years ago and does not reflect the needs of Indian communities today. It is evident that the degree of regulation in, as well as the intent of, the present Indian Act has inhibited Indian Bands from effectively governing their own communities (e.g. problems of legal status, Ministerial approval of by-laws, etc.).

The proposed concept of TRIBAL GOVERNMENT, recognizing traditional pre-European institutions of Indian government, will encompass the responsibility for a broad range of social, economic and cultural activities effecting the well-being of Indian communities. It will be a form of authority unique to Indians and distinctly different from the usual form of municipal or local government.

The basis of tribal government decision-making authority will rest with individual Bands. District or Regional levels of tribal government will be proposed as mechanisms whereby resources available to Bands can be amalgamated, if desired, for more effective utilization, but the formulation of such second- or third-tier levels of government would stem from the upward delegation of Band authority.

Indian Bands, in addition to having the opportunity to choose or "opt in" to the type of government best suited to their needs, desires and capabilities, will also be able to remain under the basic provisions of the present Indian Act.

Indian tribal government should be based primarily on the principles of responsibility and accountability to Band members. At the same time, the functioning of tribal government must be consistent with the principle of accountability to Parliament.

In consequence, the role of the Department will shift from focussing upon supervision and control to that of providing advice and support.

To assist the whole process, it is proposed that:

- (a) a system of the granting of CHARTERS be created, whereby the nature and extent of assumed tribal government powers can be negotiated and recognized; and,
- (b) a CHARTERS COMMISSION be established, to be responsible for the overall supervision of the negotiating, recommending and reviewing of such Charters.

The Charter would become the central legal instrument of individual tribal governments. They will specify in detail both the matter over which jurisdiction would be exercised (e.g. education; housing; public health and social services; etc.) and the manner in which that jurisdiction would be exercised. They will also detail the Federal government's responsibilities to the chartered authority (funding, etc.).

The Charter Commission, created under new provisions of the Act, would be a separate organization which, without jeopardizing the special responsibility of the Minister, would act as a mechanism independent of the Department to:

- i) review capabilities of Bands requesting charters
- ii) conduct negotiations for charters
- iii) recommend Ministerial approval of Charters
- iv) monitor implementation of charters
- v) act as first level of appeal in disputes arising out of terms of charter
- vi) recommend suspension or cancellation of charters, if necessary.

The Commission would need to enjoy the confidence of the Indian community, and Indian representation on the Commission would be essential. Commissioners would be appointed by the Governor-in-Council. The role of the Commission would evolve in tandem with the development of tribal government, and the Act should specify that it, along with the whole charter system, be subject to a mandatory Parliamentary review within ten years.

II. Education

Proposed revisions to the present "schools" section (to be retitled "Education") of the Act reflect the essence of previous submissions by the NIB and other groups concerning this activity.

The major proposals are that:

- (a) the Minister shall be responsible for the provision of educational services to Indian children resident on reserves;

- (b) the Minister may make regulations to provide for the support of Indians in continuing education programs;
- (c) in addition to the present provisions, the Minister could enter into agreements with Indian Bands, universities, etc. and other Federal departments for the provision of education services;
- (d) all such agreements would require the prior approval of affected Bands;
- (e) there be greater control of specific factors affecting the quality of education services to Indians;
- (f) the ages of compulsory attendance be six to sixteen;
- (g) truancy be dealt with from a positive rather than a punitive position, and that certain abhorrent sections of the Act, including s.120, be repealed;
- (h) provisions be made for the local exercise of choice to include instruction in traditional religious beliefs in the school program; and
- (i) provisions be made for the local inclusion of Indian languages within the school program.

III. Land Surrenders

Based upon the Joint Cabinet/NIB Committee decision of December 12, 1977, to accept and adopt the recommendations of the former Joint Working Group, the proposals advanced take into account discrepancies that were observed upon later examination of the originally agreed-upon revisions.

The major proposals are that:

- (a) the surrender provisions of the revised Act apply only to lands surrendered for sale or other long-term alienation (e.g. easement);
- (b) such surrenders, including those for proposed use by other Crown departments or agencies, require submission to a Band referendum prior to approval being given;
- (c) Ministerial power to enter into leases of reserve land be subject to the approval of the Band concerned, either directly or via specific delegation to the Band Council;
- (d) Chartered Bands or, if so specifically delegated, Band Councils have the power to enter directly into leases;
- (e) Bands may be given powers to extend their authority over lands presently "surrendered" but not permanently alienated.

IV. Hunting and Fishing

The proposed revisions are based upon the two main themes which are essentially important to Indian people in this area of activity. They are:

- (a) increased statutory protection for Indian treaty rights in this area;
- (b) clear Band powers and jurisdiction over the on-reserve management and utilization of fish and game.

It is therefore proposed that:

- (i) the present section 88 of the Indian Act be revised to provide that federal, as well as provincial, laws of general application are subject to the terms of treaties, unless Parliament expressly provides otherwise;
- (ii) Bands be given clear authority to make by-laws concerning the management and use of fish and game resources within boundaries of reserves, together with the clear powers to enforce such by-laws;
- (iii) Bands be given authority, if they so chose, to enter into agreements with other Federal departments to bring into force upon reserves federal regulations concerning fish and game management;
- (iv) Bands be able to request, in agreement with a province, that an Order-in-Council enable provincial game laws to be operative on reserves.

V. Membership

With the Cabinet commitment to end discrimination on the basis of sex in a revised Indian Act, the membership proposals are based upon (a) the effect of marriage upon the status of Indian adults and (b) the effect of mixed marriages upon the status of children.

It is proposed that the status of registered Indians, both male and female, not be affected by marriage to a non-Indian. At the same time, it is proposed that a non-Indian person shall not gain status as a registered Indian upon marriage to an Indian.

On the question of children of mixed (Indian/non-Indian) marriages, it is proposed that:

- (a) the children of such marriages (i.e. first generation) be given Indian status;
- (b) the children of second generation mixed marriages (e.g. first generation Indian above to a non-Indian) may become a "Band beneficiary", at the discretion of the Band concerned (i.e. under the terms of a by-law).

VI. Anachronisms

Certain sections of the present Indian Act appear to be anachronistic in present-day circumstances, and should be considered for repeal or amendment. These include:

- (a) section 32(1) - sale of reserve agricultural produce in Prairie Provinces requiring authority in writing of the superintendent.
- (b) sections 42 & 43 - virtually unlimited Ministerial jurisdiction over Indian wills and estates.
- (c) sections 94, 95 and 100 - concerning the possession of, sale to, or effect of "intoxicants" upon, Indians.
- (d) section 34 - "superintendent" powers over reserve roads, bridges, etc.

Several other sections could also be considered under this heading.

INDIAN ACT REVISION

Discussion Paper:
Tribal Government

INDIAN ACT REVISIONS
PROPOSED CHARTER SYSTEM
FOR TRIBAL GOVERNMENT

SEPTEMBER 22, 1978

1. INTRODUCTION

The present system of band government was designed twenty-seven years ago and does not reflect the needs of Indian communities today.

The 1951 Act provided for a limited increase in the powers of bands (e.g. the capability to pass by-laws), however, the Minister still maintained a considerable degree of discretion and control over band affairs. As a result of the restrictiveness of the Indian Act, bands have not been viewed as independent and legitimate centres of decision-making with powers and responsibilities that are distinct from those of the Federal Government. Although the department has attempted to increase the scope of band decision-making through the transfer of programs, bands have been largely treated as administrative agents of the Department.

It has become evident that the degree of regulation in the present Indian Act as well as its general spirit and intent has inhibited Indian bands from effectively governing their own communities (e.g. requirement for Ministerial approval of by-laws, problem of legal status of band negotiating contracts).

The following proposal for a Charter system of tribal government has been developed in order to provide Indian bands with a more flexible legislative framework that will enable Indians to govern their own affairs within the context of the Canadian community. The Charter system would provide tribal governments with the flexibility to assume powers that would be clearly under the authority of the band. This would establish the required framework for bands to acquire increased decision-making powers in areas such as socio-economic development, housing, education or social services.

The Charter system would be implemented through an institutional framework (e.g. Commission) which would provide for the full representation of Indians in the development of tribal government.

2. OBJECTIVES OF INDIAN TRIBAL GOVERNMENT

A. The aim of Tribal Government*:

The goal of Indian tribal government is to enable the Indian people, in accordance with their capabilities and desires, to make the major decisions regarding the political, economic, social and cultural well being of their communities. This objective will be achieved by:

- (i) providing Indian people with the opportunity to increase the authority and responsibility of tribal government;
- (ii) limiting the degree of control exercised by the Department and the Minister over basic community functions.

B. The basis of tribal government under federal law:

Tribal government under federal law derives its legitimacy from two sources:

(i) The constitution: The British North America Act

The BNA Act provides the Government of Canada with exclusive legislative authority for those matters which relate to "Indians and Lands reserved for Indians". The legal powers and responsibilities vested in tribal government derive their legitimacy from legislation enacted under this authority.

(ii) Historic Precedent:

Indian people had institutions of self-government before the arrival of the Europeans, and treaties provide for the preservation of these institutions.

* The concept of Tribal Government, band, district and regional levels is defined in Section 3.

C. The nature of tribal government:

Indian tribal government will encompass responsibilities for a broad range of functions affecting the social, economic and cultural well-being of Indian communities. This, in addition to the unique relationship between the Federal Government and the Indian people, characterizes tribal government as a form of authority unique to the Indian community and distinctly different from "municipal" or "local" forms of government.

D. Bands as the foundation of tribal government:

The decision-making system at the band level must be the basis for the authority of tribal government. District, regional or national associations or groupings of bands should derive their authority from Indian bands.

E. Flexibility/"Opting-in" principle:

Tribal government must have the flexibility to cope with the wide diversity in economic, cultural, political and administrative development of Indian bands across the country. Indian bands should have the opportunity to choose or "opt in" to the type of government best suited to their needs, desires, and capabilities. Bands, may also choose to remain under the present Indian Act.

F. Responsibility and accountability:

- (i) Indian tribal government should be based on the principles of responsibility and accountability to band members.
- (ii) To as great an extent as possible tribal government should be financed in a way which enables full accountability and responsibility to the community for their own expenditures thus decreasing the need for detailed Departmental control of budgeting and expenditures. At the same time the functioning of tribal government must be consistent with the principle of accountability to Parliament.

G. Departmental Role

In order to assist and support Indian tribal government in the planning development and management of Indian communities DIAND will to as great an extent as possible shift its focus from supervision and control to advice and support.

H. Continuing Federal Obligations:

Tribal government should be able to exercise increased authority without adversely affecting in any way:

- (i) The special relationship between the Minister of Indian Affairs and the Indian people;
- (ii) the unique and continuing relationships of the Indian people to the Federal Government;
- (iii) the responsibility of the Federal Government to meet commitments under law or the various treaties;
- (iv) the special status of Indians and Indian lands;
- (v) the provision of the local services available to Indian people.

3. THE TRIBAL GOVERNMENT SYSTEM

A. Definitions

In order to clarify the definitions relating to Indian government the following terminology will be employed: Indian Tribal Government refers to the overall system of institutions that are proposed to give Indian people the ability to govern their own affairs.

There are three distinct levels at which Indian Tribal Government may operate:

- (i) Band The level that deals with the affairs of an individual Indian band. This level of authority forms the basic foundation of the Indian Tribal Government system.

- (ii) District The level that deals with the common affairs of bands grouped together by their tribal affinity, close geographic proximity or for other reasons.
- (iii) Regional The level that deals with the affairs of a larger group of bands (e.g. a common treaty, province or region).

B. Roles: Bands, Districts and Regions

The Charter system is based on the principle that the band level of authority is the foundation or core of the tribal government system. It is essential to the successful functioning of this system that decision-making and control flow from the band upwards and that higher levels of authority do not impede community autonomy.

Over 80% of bands in Canada have a population of less than 500 people. Most bands therefore are very small units upon which to base strong, and autonomous local control. It is therefore an inescapable reality that size of a community has a significant impact on its capability to govern. Small communities are limited in their financial and human resources and cannot take advantage of the economies of scale available to authorities with larger populations.

One way to overcome the size problem of many Indian bands is to develop District or Regional Councils that can provide administrative, advisory and financial services or other functions such as the development and co-ordination of programs. This will enable bands to increase their management capacity without limiting their autonomy or decision-making authority with respect to their communities.

The proposed Charter system devolves powers and responsibilities directly to band governments. The band, in turn, will be provided with the capability to delegate functions or powers to district or regional Indian groups if they so desire.

4. FRAMEWORK FOR A CHARTERS SYSTEM OF TRIBAL GOVERNMENT

In order to translate the foregoing principles into legislative changes, the Indian Act should continue to embody common provisions for all Indian communities, but at the same time provide the flexibility for bands to choose greater powers according to their requirements.

The proposed framework provides for the creation of charter provisions of the Act within the context of the general statute. Under the authority of the charter portion of the Act, charter agreements would be negotiated with individual bands or groups of bands. Community Program Agreements would also be established to implement the administrative aspects of the charter. The major components of this proposed framework are outlined below.

A. Statute (Indian Act)

- (i) The statute would continue to provide for subject matters that would apply uniformly to all Indians and Indian bands across Canada (e.g. membership, taxation, justice, elections, referendums).
- (ii) The charter provisions would focus on the establishment of the system - for the creation, or amendment of charters. It would include the following elements:

a) Provision for the Creation of Charters

The charter system provisions would establish individual band charters as the central instrument of tribal government powers (subject to the general provisions of the Act). The Act would provide that the charter would be a legal instrument under which the band can exercise local government authorities and responsibilities.

b) Charter Contents and Criteria

The Act would provide for the range of subject matters that could be covered by the charters. For example, powers over education, finance or legal status would be subject to certain minimum conditions. The Charters section of the Act would also specify that certain powers (e.g. those dealing with the alienation of land or the amendment or negotiation of charters) could be exercised only if approved by a referendum. In addition, guidelines concerning the conduct of elections (e.g. basic electoral rights and procedures) will be specified.

c) Negotiation of Charters

The section would: a) provide the guidelines for negotiation of charters; b) outline the role of Charters Commission and bands in negotiation; c) indicate who signs charters (i.e. Minister and Band(s) and possibly Commission).

d) Role of Band or District

A charter would be negotiated with an individual band or group of bands and approved by band members through a referendum procedure provided for in the statute. Representatives of groups of bands could initiate the negotiation of charters on behalf of and with the approval of bands. Once the terms of the charters were negotiated, they would be subject to the approval of the band.

e) Role of the Commission-Terms of Reference

The role of the Charters Commission would have to be specified in general terms within the charter section. In addition, the Act would provide the authority and regulations for such a Commission. A provision could be made within the Act to require a review of such a Commission after a specified period of time (e.g. 10 years).

f) Amendment, Suspension and Cancellation

The charters section would have to outline the amending and review procedures as well as the time periods allowed for charters (e.g. 5 years). A clear procedure for review, cancellation or suspension of charters is also required.

g) Relationship of Charter to General Statute

The present Indian Act provisions will continue to apply unless bands opt for charters. A statutory mechanism would have to be established to ensure that where a band negotiated a charter the terms of such a charter would prevail over the present local government provisions of the Act.

B. Charters

The legal instrument under which the bands would be able to exercise local government authority would be charters. Although individual band charters would be subject to the guidelines imposed by the parent statute, they would, in effect, permit the band to exercise tribal government powers. The charters would be neither statutory provisions nor regulations. They would, by virtue of the statute, have force of law and confer the same on the by-laws passed under such charters.

Once signed, the charter would be the central instrument of individual tribal governments. The band would pass its by-laws and conduct its government operations according to the terms of the charters and the general provisions in the Act.

The charters could also outline overall government funding responsibilities.

C. Community Program Agreements

Pursuant to the charters these Agreements, would provide for contractual, non-statutory arrangements such as annual budgets, program advisory or other services as well as suitable guidelines or accountability requirements. These agreements would be negotiated between the band(s) and the Department.

Such agreements could be modelled on DREE sub-agreements or schedules and could potentially cover a wide range of programs or aspects of local government administration. The program agreements would be with those bands or groups of bands which have negotiated charters.

5. CHARTERS

Although the content of specific charters will be the subject of negotiation it is reasonable to assume that charters will deal with some or all of the following matters:

A. Statement of Principle

The charter would be introduced with a Statement of Principle which would act as a preamble to the charter and would outline the basic underlying guidelines upon which the agreement to enter into a charter is to be based. Although each statement would be negotiated with the particular band concerned it is likely that a typical statement would consist of:

- (i) recognition of the inherent legitimacy of Indian self-government;
- (ii) an acknowledgement of the federal government's on-going responsibilities;
- (iii) other objectives or principles which the concerned band or the government feels are particularly important.

B. Legal Status

In order to discharge the powers and duties granted to bands by the statute and charter it is desirable to establish the band as a defineable legal entity. There are several alternative methods of achieving this aim - including the creation of a special type of legal entity particular to Indian bands by either the statute or the individual charters. The implications of several options must be examined in conjunction with the desired objectives in order to determine which is recommendable.

The creation of the band as a legal entity would generally provide for the following matters:

- (i) name (e.g. The Band Government of White Bay;
- (ii) membership;
- (iii) boundaries within which the government will exercise its powers;
- (iv) on-going nature of the government (perpetual succession);
- (v) power to acquire, hold and alienate property for authorized purposes subject to the terms of the general statute;
- (vi) power to sue and be sued including provisions concerning the liability of the assets of a band;
- (vii) power to contract;
- (ix) exemption of agents from personal liability when acting on behalf of the tribal government;
- (x) decision-making structure;
- (xi) other powers incidental to the exercise of governmental authority.

C. Decision-making Structure -
Exercise of Community Powers

The charter would detail the following elements of the decision-making system:

(i) Center of decision making

The charter would define how community decisions are to be made. Bands could choose among several options: (i) chief and council (ii) community meeting, (iii) referendums (iv) a combination of (a), (b), (c) (v) any other suitable method.

(ii) Structure of Decision-making System

The charter would specify the structure, role and functioning of the decision-making system (e.g. role of chief and council), and outline provisions for the establishment of committees, commissions, boards and any other community structures deemed appropriate, (e.g. provision might be made for a semi-autonomous board to administer the community library).

(iii) Officers

The charter would outline the role and duties of the non-elected officers, (e.g. clerk, band manager, treasurer) and specify mechanisms to ensure that the decision-making structure is held responsible and accountable to the community.

D. Elections

- (i) Elections -- Pursuant to general election guidelines contained in the statute, the charter will detail the electoral code to be used by the band. Such a code would specify which officers are to be elected, the term of office, eligibility to vote, method of elections and other relevant details.

E. Areas of Jurisdiction

- (i) The charter will outline the procedures governing the exercise of legislative power (e.g. the charter would specify that all decisions must be made in the form of by-laws or resolutions).
- (ii) Subject to the provisions of the Charter section of the Act, the charter will specify in detail the matters over which the government will exercise jurisdiction and the manner in which it may exercise such jurisdiction. Some of the general areas of band jurisdiction might be:
- (a) Education;
 - (b) Community planning (master plan, land use plan) etc.;

- (c) Housing;
- (d) Public Health and Social Services;
- (e) Socio-economic development;
- (f) Community Finances; -- including control over revenue and capital funds;
- (g) Regulation of hunting, fishing and trapping;
- (h) Other powers that may be required;
- (i) Agreements: Under their area of jurisdiction band governments would be given authority to enter into agreements with other bodies respecting the exercise of their powers. District and/or regional councils could be established pursuant to this authority.

The charter would specify, in detail, the specific powers which fall under the general areas of jurisdiction noted above.

The powers assumed by a band government would be limited or qualified by the provisions of the general statute which might reserve certain powers to the Federal Government (e.g. certain matters dealing with the disposal of reserve lands). The statute will have to be drafted so that there is no ambiguity as to which matters can be assumed by tribal government and which will be exercised by the Federal Government.

F. Range of Charters

Charters will be negotiated by the Charter Commission with each band.

It is likely that there will be a wide variation in the types of charters adopted. Some charters may cover only one of two matters such as education or housing, while other charters may cover a wide range of powers and provide for a sophisticated system of decision-making.

Although there may be a wide variation between the specific components of charters, it is essential that some common guiding principles be developed that will assist the Commission in the negotiation of charters. These should be provided in the Act. For example, if bands are to assume greater authority for education or economic development, it will probably be necessary for them to become a legal entity. Similarly, if a band council has powers over band capital, some mechanisms will be required to assure the consent of band members. It is, therefore, likely that the minimum requirements or components of a charter would include legal status and election/referendum provisions.

6. RATIONALE AND PROPOSED ROLE FOR A CHARTERS COMMISSION

A. Rationale

In order to facilitate the development of charter agreements and to ensure that both the Federal Government and bands discharge their responsibilities pursuant to charters, it is proposed that a separate organization be created which could be titled -- The Charters Commission.

The rationale for this type of organization is as follows:

- (i) The type of organization that is required is one that provides a flexible framework for Indians to exercise control over their own affairs in accordance with their own desires and capabilities. It is also essential that the organization be representative of and sensitive to the interests of Indian people.
- (ii) Without jeopardizing the special responsibility of the Minister, the Commission would provide a more independent mechanism than the Department to:
 - (a) Review the capabilities of bands to enter into charter agreements;
 - (b) Serve as a catalyst to encourage and assist bands in assuming powers and responsibilities; and
 - (c) Monitor the implementation of charters.

- (iii) The Commission could provide a monitoring role and appeal function that would be difficult for the Department to perform without unduly interfering in the affairs of Indian communities.
- (iv) Since the negotiation of charters will be a complex and time-consuming task it would be desirable to have a specialized agency, free from day-to-day Departmental responsibilities, to conduct these negotiations.

B. Proposed Role

(i) Principles

Several principles govern the development of the proposed role of the Charters Commission.

- (a) The nature of the institutional role of the Department make it an inappropriate instrument for the developing and monitoring the Charter system.
- (b) The Minister must always maintain his special responsibilities for Indians; the Commission cannot replace this responsibility.
- (c) Because the Minister is ultimately responsible to Parliament and Treasury Board for the funds that are allocated to the Department, ultimate decision-making with respect to funding must remain under the direct control of the Minister. At some stage it may be desirable to review the possibility of some form of direct accountability to Parliament.
- (d) The Commission would operate free detailed Ministerial control over its decisions.
- (e) For the Commission to function effectively it must have sufficient powers to assert its independence from the Department.

C. Functions of Charters Commission

On the basis of the foregoing principles, the proposed roles of the Commission in the negotiation, amendment, and monitoring of charters are as follows:

(i) Negotiation of Charters

The Minister, on the advice of the Charters Commission would sign charter agreements with a band or group of bands. To conclude such an agreement:

- (a) The Commission would directly negotiate charters with bands and provide recommendations to the Minister.
- (b) The Commission would be required to hold public hearings with respect to proposed charters. All interested parties including the Minister or his representatives would be able to participate in the hearings.
- (c) The Minister could not unilaterally alter the terms of proposed charters. In the event he wished changes made, he would refer the proposed charter back to the Commission for further negotiation.

(ii) Operational Funding and Community Program Agreements

The overall responsibility and accountability for decisions on funding levels and programs would remain with the Minister and would always be subject to the availability of funds from Parliament.

The Commission could play a mediating or facilitating role in the negotiation of Community Agreements, including those that established funding levels.

(iii) Appeals

The Commission would serve as the first level of appeal regarding:

- (a) Disputes arising out of the general terms of a charter, and

- (b) Disputes regarding the enactment of by-laws. The Commission acting as a quasi-judicial body would be empowered to accept and adjudicate appeals lodged by any person or body (including the Minister) with an interest in the matter.

The next and final level of appeal would be to the courts.

(iv) Reporting/Monitoring

The Commission would provide annual reports, through the Minister, to Parliament on the operation of the charter system. The Commission would also be responsible for the monitoring and registration of by-laws

(v) Amendment of Charters

The Minister could approve amendments to charters on the advice of the Commission and in accordance with stipulations provided in the Indian Act or the charter. The advice of the Commission would be based on negotiations with the band(s) involved.

(vi) Review, Suspension and Cancellation of Charters

A Band or other interested party could request a review of a charter by the Commission or the Courts.

In cases where disputes arose over the Department's fulfillment of the terms of a charter or agreement, the Commission would draw the matter to the attention of the Minister. Bands would also have normal recourse to the courts in the case of contracts between bands and the Department.

The Minister would have the authority to suspend or review a charter upon the advice of the Commission. In addition, in cases where the band was in serious violation of its charter the Governor-in-Council could cancel such a charter.

D. General Characteristics of the Commission

- (i) There would be provisions to ensure that Indian people were represented in the membership of the Commission and that the Commission enjoyed the confidence of the Indian community. Commissioners would be appointed by the Governor-in-Council.
- (ii) The general composition, guidelines, responsibilities and reporting relationship of the Commission to the Minister and Parliament will need to be specified in the Act. It is expected that once the general parameters of the organization are established, the Commission will be provided with a considerable degree of autonomy to define and develop its role and organization.
- (iii) The role of the Commission should be designed so as to evolve with the development of the Tribal Government.
- (iv) A provision should be made in the Act for a mandatory Parliamentary review of the role of the Commission and the operation of the charter system within ten years.

7. CONSTITUTIONAL CONSIDERATIONS

While it is clear that Parliament has exclusive authority to legislate for Indians and lands reserved for Indians pursuant to s. 91(24) of the B.N.A. Act, it must be recognized that there are constitutional outer limits to this jurisdiction. In general, the courts have given a liberal construction to the range of subject matters which could reasonably be considered as relating to "Indians and lands reserved for Indians". Despite this, however, the courts would no doubt intervene where they considered that the federal government had intervened in a provincial sphere of authority under the guise of legislating for Indians and Indian lands or where they considered a matter not to be in "pith and substance" related to Indians and Indian lands. In order to reduce potential constitutional problems, it will be necessary to emphasize the unique Indian and Indian land orientation and rationale behind new legislation for tribal government.

It must be recognized that certain provincial laws of general application apply to tribal government by virtue of Section 88 and common law. As such, tribal government proposals will attempt to reconcile the possible areas of conflict between federal and provincial jurisdictions.

INDIAN ACT REVISION

Discussion Paper:
Education

EDUCATION

The education of Indian children is a major concern of the Indian people. This has been emphasized on numerous occasions, using many different forums. Of particular significance have been the presentations of the NIB policy paper "Indian Control of Indian Education" (December, 1972), and the proposals for revisions to the Indian Act of October, 1974 (Indian Act Study Committee, Indian Association of Alberta) and September 1976 (Education Sub-Committee, NIB).

The philosophies represented by these submissions, together with the essence of their basic proposals, are reflected and incorporated in the proposed changes outlined in this section of suggested revisions to the present Act.

IT IS PROPOSED THAT:

I. General

- a) The provisions under these sections of the Act be entitled "Education" rather than "Schools".
- b) Definitions relating to the educational provisions of the Act be updated to cover such topics as "continuing education", "special education", "language of instruction", etc.

II. Responsibility for Educational Services

- a) The Minister shall assume responsibility for the provision of educational services to Indian children, including the establishing, operating and maintaining of schools on reserves.
- b) The Minister may make regulations to provide for the support of Indians in continuing education programs.

III. Educational Agreements and Charters

- a) In addition to the present provisions of s.114, the Minister be authorized to enter into agreements for the delivery of educational services to Indians with:
 - i) an Indian Band or Bands,
 - ii) private as well as public or separate school board,
 - iii) universities, colleges, and technical or vocational institutes,
 - iv) other Federal Government departments.
- b) All such agreements entered into (except those with an Indian Band or Bands), should require the approval of the appropriate level of tribal government (Band, District or Regional);

- c) In order to facilitate the entering into of such agreements with Indian Bands, provisions relating specifically to the granting of EDUCATION CHARTERS be written into a revised Indian Act.

IV. Quality of Education

- a) In order to make the provisions of the present s.115 more effective, the Minister be authorized, as required, to make regulations concerning specific factors affecting the quality of educational services for Indian children including:
 - i) teacher qualifications,
 - ii) curriculum development
 - iii) program accreditation,
 - iv) professional supervision.
- b) The Minister be authorized to enter into agreements, as required, for the support and maintenance of Indian children attending special schools (e.g. for the physically handicapped, etc.).

V. Compulsory School Attendance

- a) The age of compulsory school attendance for Indian children be lowered to six years from seven, as presently stated in s.116.
- b) No compulsory school attendance should be required of Indian students over the age of sixteen.

VI. Excusable Absence from School

- a) The present term "husbandry" in s.117(b) be replaced by "traditional hunting, trapping or other seasonal family support activities".
- b) The present wording in the same section "with the permission in writing of the superintendent" be replaced with "by prior arrangement with the appropriate Education authority".

VII. Truancy

- a) In order to emphasize the positive encouragement of good school attendance behaviour, s.119 be amended in the following manner:
 - i) references to the appointment and powers of truant officers be deleted and instead the Minister be authorized as required, to make regulations to ensure the attendance of Indian children at school;
 - ii) there be no authority for any person involved in attendance supervision to enter an Indian home without the consent of the residents (s.119(2)(a));

- iii) if parents (guardians) are found guilty of a school non-attendance offence (s.119(3), no double penalty (i.e. fine and imprisonment) be imposed;
 - iv) the present sections 119(4), 119(5), and 119(6) be repealed.
- b) Section 120 of the present Indian Act be repealed.

VIII. Religious Instruction

A sub-section be added to s.121 of the present Act which would establish that, where Indian Bands so desire, instruction in traditional Indian religious beliefs can be given by Band-approved Elders as part of the provisions normally made in this part of the school program.

IX. Use of Indian Languages in Schools

- a) Indian languages be recognized as approved languages of instruction in the instructional program at the kindergarten and elementary school level;
- b) Band approval be sought prior to the adoption of an Indian language as a language of instruction in any Indian kindergarten or elementary school;
- c) Certain standards be required by the Band (e.g. availability of instructional materials and teachers; the role of English or French as second-language subjects; etc.) in the giving of this approval;
- d) Indian languages also be recognized as approved languages of study and enrichment at both the elementary and secondary school level.

INDIAN ACT REVISION

Discussion Paper:
Land Surrenders

REVISION TO THE INDIAN ACT
LAND SURRENDERS

A concern of the Indian population, as expressed by the National Indian Brotherhood (N.I.B.) is the loss of band control over lands surrendered for leasing. It is generally felt that bands should have more authority to approve and to enter into leases. It is also believed that bands should maintain by-law jurisdiction and regulatory control over leased reserve lands.

On December 12, 1977 the Joint Committee of Cabinet and the NIB agreed to accept and adopt recommendations of the Joint Working Group on the Indian Act revisions on the issue of Land Surrenders. The recommendations included suggested mechanisms whereby they could be implemented through revisions to the Indian Act. In preparing this current proposal, these suggestions have not been strictly adhered to in order to maintain the internal consistency of the revised Indian Act. Also, on closer examination it was found that some of the suggested amendments do not bring about the desired results.

Consequently, the approach taken has been to identify four (4) major objectives in the recommendations of the Joint Committee and to look for the best means of accomplishing them. In addition, because of possible implication for all sections of the Act, a decision was made not to change any of the definitions in the current Act, but rather to implement the recommended changes by other means. The work was done under the assumption that only those sections dealing with Surrenders for lease would be changed and there would not be changes to those dealing with surrenders for unconditional sale, for easement, or for other perpetual alienations of interest in reserve land.

Objectives of Amendments

1. TO RESTRICT THE LAND SURRENDER PROVISION OF THE ACT TO SURRENDERS FOR SALE.

Sections 37 to 41 of the Indian Act deal with all land surrenders, be they for sale, lease or easement.

By modifying Section 37, which requires a surrender of reserve lands by a band to the Minister before the Minister may lease, sell or otherwise dispose of the land, the surrender provisions can be limited to apply only to sale or other long term alienation (e.g. easement). A surrender of reserve land for uses by the Crown for purposes other than the administration of the Indian Act may also be desirable. This requirement is considered necessary because of the dual responsibility of the Crown in such situations. Currently, those Departments or Crown Agencies that do not normally have expropriation powers and can not use Section 35, may only use reserve land after entering into agreement with the Department, which generally only does so with the consent of the band council. In the future, to ensure that bands understand fully and are in complete agreement with a proposed Crown use, established surrender provisions should be followed. Another method to ensure complete understanding of such a Crown use would be to require a band referendum prior to the approval of such a use by the Crown.

Since this suggested amendment to Section 37 removes the mechanism of surrendering lands for leasing purposes, the Minister would no longer have the opportunity to lease reserve lands or lands reserved for Indians.

2. TO GIVE THE MINISTER POWER TO ENTER INTO LEASES OF RESERVE LAND, SUBJECT TO THE APPROVAL OF THE LEASES BY THE BAND, OR IF IT HAS DELEGATED THE AUTHORITY, BY THE BAND COUNCIL.

To give the Minister power to enter into leases, it is suggested that Section 53, which now gives the Minister power to manage, sell, lease or dispose of surrendered lands, be amended. The amendment would authorize the Minister to enter into leases of reserve land, but only with the approval of the band, or if they have delegated their approval authority, with the approval of the band council. Provision should also be included to allow the band to revoke any delegation of authority given, as long as the revocation be subject to any interest legitimately acquired under the original delegated authority. A subsection protecting individual interests in reserve land (such as lawful possession) and providing for compensation of these interests should also be added to Section 53.

If a band has entered into a charter agreement with the Minister, part of the referendum vote for or against the charter could include the delegation of the band's authority to consent to Ministerial leases to the band council. The power of the band to revoke this delegation would also have to be built into the charter.

If Section 53 is amended as suggested the Minister would no longer have authority to deal with lands surrendered for sale and those lands under lease already at the time of the amendment to the Act. By modifying Section 41, the Minister or a person appointed by him for the purpose could be authorized to manage, lease or sell surrendered lands.

Minor amendments to Sections 18(2), 28(2) and 58 would allow the Minister to use reserve land, to give permits or to enter into agricultural leases for reserve land only after receiving the consent of the band, or if this power has been delegated, of the band council.

3. TO GRANT POWER TO BANDS TO ENTER INTO LEASES OR THE POWER TO DELEGATE THIS POWER TO THE BAND COUNCIL:

There are two ways of accomplishing this.

The first would be to use the present section 60, which authorizes the Governor in Council, at the request of the band, to grant the band "the right to exercise such control and management over lands in the reserve occupied by that band as the Governor in Council considers desirable." Some provision for the protection of individual interest would have to be added to this Section.

The advantages to this method would be that no further amendment to the Act would be required since leased lands would still be reserve lands occupied by the band. The majority of bands in Canada would be able to take over the management of leases without any change in band structure or status.

It could be argued, however, that if the Minister is going to give bands the power to manage land, he should also make sure that they accept the legal responsibilities associated with that power. Title to reserve lands rests with the Crown, which administers them for the use and benefit of Indian bands. The Crown is responsible for the good management of these lands and is being held responsible, through the claims process, for their bad administration in the past.

It may be irresponsible for the Minister to recommend to the Governor in Council that the Minister's management power be transferred to a band which could not be held legally liable to the lessee or to the band.

To protect the band and its individual members and to protect the possible lessee, it is envisioned that land management be granted by way of charter. Bands who wished to have management power over lands would therefore have to make it part of their charter. A band could then delegate these management powers to the band council, either during the initial referendum to approve the charter, or later. Provisions to allow the band to revoke the delegation would also be included in the charter. It could happen that a band's charter only deals with management of lands.

4. TO EXTEND THE LOCAL GOVERNMENT POWERS OF THE BAND OVER LANDS THAT ARE PRESENTLY "SURRENDERED LANDS" WITHIN THE MEANING OF THE ACT BUT WHICH HAVE NOT BEEN PERMANENTLY ALIENATED BY HER MAJESTY.

The extension of powers could be automatic if done by some amendment to the definitions of either "reserve" or "surrendered lands;" this, however, is not advisable. It would not be in anyone's best interest to alter the status of land without first identifying the interests affected and the implications to those interests. It is suggested that Section 41, part of the present surrender provisions, be amended so that a band could revoke a surrender of lands in the same way that the land was first surrendered. A revocation would have to be accepted by an Order in Council and would be subject to any conditions attached to that Order in Council.

Any future leases, under the revised Indian Act, would not take lands out of the reserve and therefore the lands leased would be subject to band council jurisdiction.

Other Issues

These proposed revisions to the Act raise a number of issues that still have to be considered. Although it is proposed to give bands power to approve of leases and the option to delegate this approval authority to the band council, there is no mechanism the band could use to exercise this power. How the majority of the band or the band council can be seen to be consenting to an exercise of their power could be tied in with other aspects of local government, or could be the subject of specific regulations passed pursuant to Section 73(3).

Lenders may be wary of giving loans to lessees of reserve land because of the uncertainty of the security offered. Lessees could find themselves subject to band by-laws, but have no voice in the making of those by-laws. Many bands may wish to create some limited provincial jurisdiction over leased land in order to facilitate development, and it is not clear that this is possible under the proposed revisions.

A further issue which has been raised by Reserves and Trusts is the requirement to open a third register of "leased Indian lands" in addition to the current surrendered lands and reserve general registers in order to properly register interests in leased reserve lands.

INDIAN ACT REVISION.

Discussion Paper:
Hunting and Fishing

Indian Act Revision -- Indian Hunting and Fishing

Introduction

Hunting, fishing and other land-based activities of the Indian people such as trapping and gathering continue to be activities which are integral to the cultural, social and economic well-being of Indian people, particularly those who continue to live off the land. For those Indians who are following non-traditional lifestyles, these activities often retain a vital cultural and social significance which contributes to their Indian well-being in society by supporting and renewing the sense of Indian cultural identity.

The following proposals for a revised Indian Act revolve around two basic themes which the Government believes are essential if the importance of these activities to Indian people are to be recognized and given practical meaning. The themes are increased statutory protection for Indian treaty rights in this area and clear Band powers and jurisdiction over the on-reserve management and utilization of fish and game. These are the essential elements of proposed revisions of the Act in this area because the Government feels they will provide Indian people with the necessary statutory and jurisdictional base from which to effectively participate in the making of resource-related decisions, plans and policies which will affect them.

Indian people have long expressed their commitment to the principle of conservation. At the same time they have not been provided with an opportunity to participate with government in achieving the conservation objective. There have not been the necessary mechanisms for Indian people to contribute their particular knowledge and expertise to resource management questions. An underlying objective of these proposals on the part of the Federal Government is the encouragement of joint resource management regimes necessitated by modern conditions. The proposed revisions which follow are meant to effect this objective by providing Indian people with a more secure base of statutory and jurisdictional recognition of their rights and powers in this area. This will hopefully enable them to more confidently and effectively participate in such joint resource regimes.

II. Proposals for Revision

1. Section 88 Revision

It is proposed that the present Section 88 of the Indian Act be revised to provide that federal, as well as provincial laws of general application, are subject to the terms of treaties unless Parliament expressly provides otherwise.

Implications:

- A. This would erase the double-standard which has existed to date whereby only the provinces effectively have to respect treaty rights. This would strengthen the "moral" position of the Federal Government with the Provincial Governments and with Indian people in Tripartite talks.
- B. The official policy of the Federal Government to honour the spirit and terms of treaties and to meet its lawful obligations with Indian people would be given meaning.
- C. The revision as proposed would maintain the principle of the sovereignty of Parliament while at the same time ensuring that "negligent" treaty abrogations do not occur as they have done in the past. It would place the onus on Parliament of duly considering treaty obligations and expressing a specific intent to abrogate them if it deemed necessary to do so. It would appear that Parliament would need to do this in some cases to deal with the lack of a proviso for government regulation in some of the treaties e.g. Robinson Huron, Robinson Superior.
- D. The numbered treaties provide for regulation of Indian hunting and fishing by the Federal Government. The scope of this regulatory power has been unclear to date and there has been a tendency on the part of government to consider it as very open-ended. The revision to Section 88 now suggested may serve to delimit in a reasonable and equitable fashion this very broad and uncertain federal regulatory power.

It is still uncertain however whether the courts would find that present federal gun control law, National Parks Act, Migratory Birds Convention Act and Fisheries Act apply to Indian people as valid regulation contemplated by the treaties. Where treaties are silent about government regulation, such laws would appear not to apply to the Indian people entitled to the benefits of these treaties. Accordingly the Migratory Birds Convention Act would not apply to them and Canada would effectively be in breach of international convention through such a revision without a parallel revision of the MBCA and Convention.

- E. The "terms of the treaties" will become increasingly important because of the revision to Section 88 now proposed and because the treaties are couched in very general and unclear language, this may lead to increased litigation.
- F. While the Migratory Birds Convention Act and the Federal Fisheries Act are federal legislation, they deal with areas which the provinces consider to be otherwise within their jurisdiction in the sense that they form part of the natural resources of the province. In that it would be a unilateral federal initiative, the revision of Section 88 now proposed would appear to disregard this constitutional "fact of life" which has until now been recognized by the Federal Government through its practice of giving provinces an almost total free-hand in the formulation of provincial regulations pursuant to these acts. The double-standard which has existed, whereby only provincial and not federal laws of general application are subject to treaties, has been to the Provinces' advantage in this sense and they may be concerned with the loss of this advantage as a further weakening of their resource management capabilities.
- G. It is unclear what the effect of such a revision would be on Indian hunting and fishing on the Prairies. The Courts have not settled the question of the full effect of the Natural Resources Transfer Agreements on the Prairie treaties. Moreover, to what extent are these agreements, which are now part of the constitution, the present source of Indian hunting and fishing rights on the Prairies?

2. Band Powers

It is proposed that the revised Indian Act provide clear authority to Bands to make by-laws concerning the management and use of fish and game resources within the boundaries of reserves and clear powers to enforce such by-laws. As part of this, Bands should be given the authority to enter into agreements, if they chose, with other Federal Departments concerned with fish and game management to bring into force, on the reserve, federal regulations. Provision should also be made whereby, on the resolution of a Band Council and with the concurrence of a province, provincial game laws could be brought into force on a reserve by Order-in-Council.

Implications

- A. This is consistent with the entire thrust of the revision package which is to provide Bands with clear powers over matters that closely affect them.
- B. It will provide Bands with a clear jurisdictional and statutory base which can be used in negotiations to effect Indian participation in resource management issues and policy and program formulation. For example, a Band and Province might agree to ask for an order-in-council to bring provincial game laws into effect on a reserve in return for provincial commitments regarding Indian participation on local game advisory boards. The Band might also seek commitments from a Province that it will appoint Band members as game enforcement officers on the reserve.
- C. On the other hand, most reserves are too small to make reserve fish and game management regimes (by-laws, agreements, etc.) either necessary or effective as a negotiating tool with provinces or other federal departments. Off-reserve Indian hunting and fishing is the greatest concern of Indian people and the area most in need of joint resource management regimes.

Other Options considered

1. Federal Regulation of Off-Reserve Indian Hunting and Fishing through the Indian Act.

Implications

- A. This option is based on the legal opinion that off-reserve Indian hunting, in both treaty and non-treaty areas of Canada is a double aspect area under the Constitution. This means that Parliament could occupy the field through specific Indian hunting and fishing legislation and so supplant otherwise valid provincial legislation by the doctrine of paramountcy.
 - B. This option was rejected because of the uncertainty concerning its constitutional validity and because politically, such federal occupation of a shared field would have adverse federal-provincial implications. It would be bitterly attacked by the Provinces as an unwarranted interference with their resource management responsibilities. The provincial argument, which would likely also be supported by Federal Departments such as Fisheries and Environment would be that it is unworkable and inconsistent with the exigencies of modern resource management to have separate regulatory schemes for hunting over the same area. The Federal Government would not be able to administer and enforce such a separate regime of Indian hunting without provincial cooperation and the political climate created by federal occupation of the field would not be conducive to such necessary cooperation.
2. Extend the System of Rights in the Prairie Natural Resources Transfer Agreements across the whole of Canada

Implications:

- A. Under this option, the revised Indian Act would provide that all registered Indians in Canada would

be subject to the fish and game laws in force within a Province except when hunting or fishing for food on unoccupied Crown land or other lands to which they had a right of access.

- B. While this scheme would regularize the present situation wherein there is a wide disparity in the rights enjoyed by Indians in various parts of Canada, it would represent a unilateral re-writing of Indian hunting and fishing rights in Canada by the Federal Government. Such an option would contradict the Government's stated policy of respecting treaty obligations and could jeopardize present Indian aboriginal claims negotiation by appearing to prejudge the extent of Indian hunting and fishing rights.
- C. It is also unclear from a constitutional standpoint, whether the Federal Government could unilaterally create such a scheme of rights through the Indian Act.

September 14, 1978

INDIAN ACT REVISION

Discussion Paper:
Membership

INDIAN ACT REVISIONS - MEMBERSHIP

1. Introduction

Discrimination on the grounds of sex is found in the registration sections of the Indian Act. Attention has been focused on Sections 12(1)(b) and 11(1)(f) in particular which state respectively that (1) an Indian woman who marries a non-Indian man is no longer entitled to be registered; and (2) a non-Indian woman who marries an Indian man is entitled to be registered.

Revisions to these particular sections of the Act necessarily give rise to consideration of the entitlement to be registered of children of mixed marriages, and hence to the broader question of "membership" in terms of the definition of who is an Indian under the Indian Act.

The Federal government's proposal for revisions to the Indian Act in the area of membership is in two parts, dealing with:

- (a) the entitlement to be registered of spouses of mixed marriages; and
- (b) the entitlement to be registered of children of mixed marriages.

2. Proposal

This proposal has been developed as a basis for discussion of the membership issue following consideration and study of a wide variety of possible revisions to the Indian Act in this area, many of which have been received from Indian groups across the country. While proposing to establish by statute the criteria for entitlement to be registered under the Indian Act, it also seeks to give bands increased discretion.

This proposal might be modified or a new approach developed, to better meet the Indian peoples' desires and concerns with regard to the membership issue.

A. Entitlement to be registered of spouses of a mixed marriage

1. Indians remain entitled to be registered on marriage to a non-Indian.
2. Non-Indians do not become entitled to be registered on marriage to an Indian.

B. Entitlement to be registered of children of a mixed marriage

1. Children of first generation mixed marriages are entitled to be registered.
2. Children of second generation mixed marriages may be "band beneficiaries" depending on the criteria in the band by-laws governing beneficiaries.

3. Beneficiaries

It is being proposed that bands may choose to accept children of second generation mixed marriages, and/or non-Indian spouses, as band beneficiaries.

A. Band by-laws would specify the following with regard to beneficiaries:

1. if a band is prepared to accept as band beneficiaries non-Indian spouses of a mixed marriage, and/or children of second generation mixed marriages,
2. the criteria that potential beneficiaries would have to meet to be accepted as band beneficiaries,
3. the benefits that would accrue to band beneficiaries.

(NOTE: It is proposed that band by-laws governing beneficiaries may be adopted or changed only through referendum and 2/3 majority.

B. Benefits accruing to band beneficiaries might include the following:

1. Residency on the reserve
2. Inheritance

The inheritance provisions of the present Act restrict a person who is not entitled to live on a reserve from acquiring, "by devise or descent", "a right to possession or occupation of land in that reserve" (section 50(1)). If the right to possession or occupation of land in a reserve is passed by descent to a person not entitled to reside on a reserve, "that right shall be offered for sale" (section 50(2)), or "shall revert to the band" (section 50(3)).

If beneficiaries are allowed to reside on the reserve, the question arises as to whether or not they should be able to inherit a right to possession or occupation of land on that reserve.

3. Participation in Band Government

Under the present system of band government, only band members may run for office and vote in band elections .

4. Participation in Band Affairs

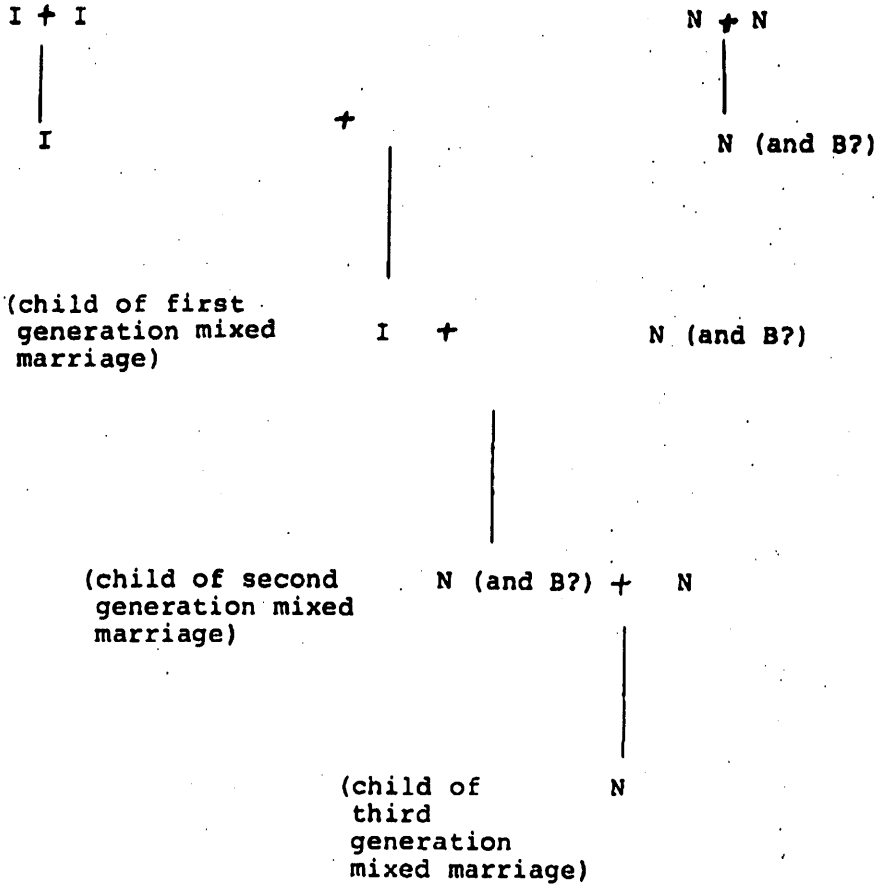
The right of non-Indians to hold office on band agencies or bodies (such as a school board) is not dealt with in the present Act. Bands might specify certain organizations in which beneficiaries may participate, and others which are to be run solely by Indians.

5. Participation in Program Services

Inclusion of beneficiaries in program services such as housing and education. Given that federal funds are limited, the effects of adding beneficiaries will have to be borne in mind.

NOTE: There would be restrictions on the benefits available to beneficiaries in order to ensure that the Minister's trust responsibility in relation to land and other band assets is maintained.

This membership proposal may be diagrammed as follows:



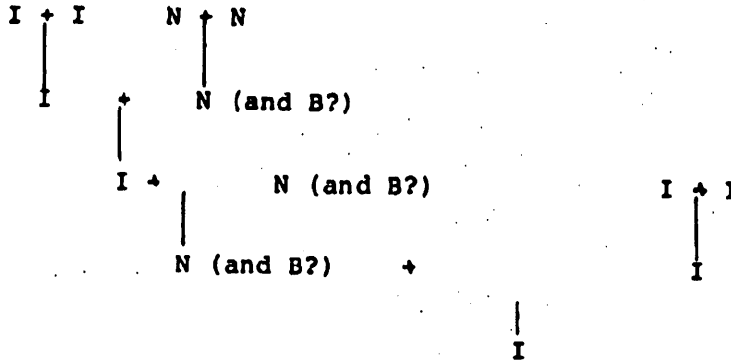
I = Indian

N = non-Indian

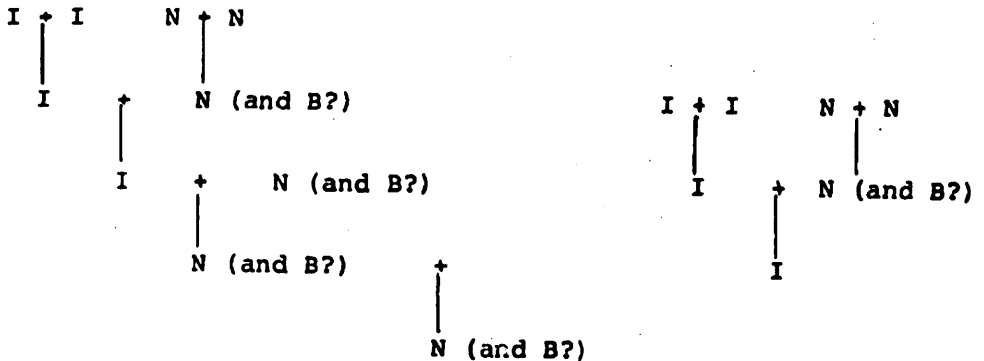
B = Beneficiary

Note: The ancestry rule would apply only to the ancestry of the Indian parent

- (A) If, for example, the child of a second generation mixed marriage (either a non-Indian, or a Beneficiary) was to marry an Indian who was the child of 2 Indian parents, their child would be Indian - the product of a first generation mixed marriage, in terms of the ancestry of the Indian parent .



- (B) If for example, the child of the second generation mixed marriage (either non-Indian or a Beneficiary) was to marry an Indian who was the child of a first generation mixed marriage, their child would be non-Indian, but could be a beneficiary - the product of a second generation mixed marriage in terms of the ancestry of the Indian parent.



4. Demographic Impact

A. Spouses of mixed marriages

The demographic impact of the Federal government's proposal with regard to the entitlement to be registered of spouses of mixed marriages would be as follows:

Approximately 519* Indian women every year now lose their entitlement to be registered when they marry a non-Indian. If they were to retain their entitlement to be registered as per this proposal, there could be an increase in the Registry annually of 519.

Approximately 429* non-Indian women every year acquire entitlement to be registered when they marry an Indian. If they were no longer entitled to be registered as per this proposal, there might be a decrease in the Registry annually of 429.

The total approximate impact on the Registry would be an annual increase of 90 (519-429).

*DIAND Registry: Average number per year 1965 - 1977

B. Children of first generation mixed marriages

Assuming an average of 519 marriages a year of Indian females to non-Indian males and an average of 3** children per marriage, there could be an increase over time of approximately 1,557 (3 x 519) children as a result of the increase in one year of the adult population.

C. Beneficiaries

The demographic impact of beneficiaries would be controlled by individual bands.

5. Adoption

In the case of adoption of non-Indian children by Indian parents, or Indian children by non-Indian parents, the question of the entitlement to be registered of the children must be considered. Should Indian children adopted by non-Indian parents lose their entitlement to be registered? Should non-Indian children adopted by Indian parents be entitled to be registered?

If the principle of ancestry is accepted as a criteria for entitlement to be registered, that same principle might be applied to the adoption of children.

An Indian child adopted by non-Indian parents would remain entitled to be registered, and would remain on the Band list or General list where he or she was registered at birth.

In the case of a non-Indian child adopted by Indian parents, an exact interpretation of "ancestry" could rule that he or she is not entitled to be registered. If this strict approach was followed, it might be modified to allow bands to accept such children as band beneficiaries, pursuant to band by-laws governing beneficiaries.

However, a strong case can be made for a still more liberal and humanitarian approach, i.e. treating an adopted child as a natural child in terms of his or her entitlement to be registered, on the request of the parents. Such an approach is more sensitive to both the needs of the Indian parents who adopt and may well wish to pass on to their adopted children their own Indian heritage; and to the needs of the non-Indian child who must adapt to, accept and be accepted by, a new community and way of life.

6. Other Discriminatory Sections

While the focus of discrimination on the grounds of sex in the Indian Act has been on sections 12(1)(b) and 11(1)(f), there are other discriminatory sections which might be considered in the Indian Act revisions. These include the following:

- (a) Sections 11(1)(c), (d) and (e), and 12(1)(a)(iv) dealing with registration, provide for entitlement to be registered based on patrilineal descent and would have to be changed to be consistent with the principles of the proposed revisions.
- (b) Section 14, dealing with transferral of band membership, stipulates that if an Indian woman marries an Indian of another band, she loses her own band membership and becomes a member of her husband's band. This might be revised to state that no transferral of band membership automatically occurs as a result of marriage between members of two different bands. A spouse could of course apply to be admitted to his or her spouse's band; and bands would retain the authority under Section 13 to reject or accept such an application. In cases where spouses belong to different bands, clarification would have to be made with regard to the band membership of the children of such a couple. In such cases, band membership might depend on residency, i.e. the child would be registered with the band on whose reserve his or her parents reside. In the case of a couple that does not reside on the reserve of either spouse's band, the choice of band membership of the child would rest with the parents.
- (c) Section 10, -- states that "where the name of a male person is included in, omitted from, added to, or deleted from a Band list or General list, the names of his wife and his minor children shall also be included, omitted, added or deleted as the case may be. In order to preserve and uphold the right of individual choice in a matter as personal and important as giving up or gaining status, this might be revised to specify that the inclusion in, addition to, or deletion from a Band list or the General list of one member of a family would not automatically affect the listing of the other members of the family.

In the case of a married couple, if one spouse decides to enfranchise, the other spouse would not need to enfranchise unless he or she so chose. In the case of the children of parents, one or both of whom decides to enfranchise, the children would remain on the Band list or General list,

as the case may be. At the age of majority, they would be free to enfranchise if they so desired.

Consequential revisions based on the same principle should apply to Section 109 which deals with enfranchisement. While Section 109(1) provides in a general way for choice of enfranchisement, it is discriminatory in that it states that the Minister may enfranchise the wife and the minor unmarried children of an Indian man who chooses to enfranchise. This latter provision should be deleted, not only because it discriminates on the grounds of sex but because it denies certain individuals the basic right that each Indian should have to make a free and personal choice to give up his or her status if he or she so desires.

Section 109(1) should be revised not only to delete the above provision, but also to clarify that it applies equally to male and female Indians.

Section 109(2) which states that the Governor in Council may enfranchise an Indian woman who has married a non-Indian, would no longer be applicable and could be deleted in a revised Indian Act if Sections 12(1)(b) and 11(1)(f) are revised to end discrimination on the grounds of sex.

Section 109(3) which gives the Minister discretion in the case of a marriage break-up in enfranchising the wife and minor children of an Indian man who has chosen to enfranchise, could also be deleted as no longer applicable if Section 109(1) was revised to end discrimination on the grounds of sex.

7. Retroactivity

The possibility of making the proposed revisions retroactive has been raised and there will certainly continue to be pressure for retroactivity, particularly from the women who have lost their entitlement to be registered pursuant to 12(1)(b).

There are practical difficulties with retroactivity -- for example, increased demands on Indian lands and cost increases which would result from a larger Indian population. As well, there is concern that retroactivity in whatever reasonable way it is recognized may lead to further inequities. Moreover, granting retroactivity in this case could set a precedent for demands from other groups who have been discriminated against in the past; and could also open the door for demands that there be retroactivity for all the discriminatory sections where revisions are being considered. It would be a difficult, if not impossible, task to right all the wrongs of past discrimination.

INDIAN ACT REVISION

Discussion Paper:
Anachronisms

**Anachronistic Provisions
in the Indian Act**

<u>Section</u>	<u>Comments</u>
<p><u>32. (1)</u></p> <p>A transaction of any kind whereby a band or a member thereof purports to sell, barter, exchange, give or otherwise dispose of cattle or other animals, grain or hay, whether wild or cultivated, or root crops or plants or their products from a reserve in Manitoba, Saskatchewan or Alberta, to a person other than a member of that band, is void unless the superintendent approves the transaction in writing.</p>	<p>Under section 32, an Indian can't sell agricultural produce from a reserve in Manitoba, Saskatchewan or Alberta without permission.</p>
<p><u>42. (1)</u></p> <p>Unless otherwise provided in this Act, all jurisdiction and authority in relation to matters and causes testamentary, with respect to deceased Indians, is vested exclusively in the Minister, and shall be exercised subject to and in accordance with regulations of the Governor in Council.</p>	<p>Under the provisions of sections 42 and 43, the Minister has virtually unlimited jurisdiction with respect to Indian wills and estates.</p>
<p><u>43</u></p> <p>Without restricting the generality of Section 42, the Minister may:</p> <ul style="list-style-type: none">(a) Appoint executors of wills and administrators of estates of deceased Indians, remove them and appoint others in their stead;(b) Authorize executors to carry out the terms of the wills of deceased Indians;(c) Authorize administrators to administer the property of Indians who die intestate;	

- (d) Carry out the terms of wills of deceased Indians and administer the property of Indians who die intestate; and
- (e) Make or give any order, direction or finding that in his opinion it is necessary or desirable to make or give with respect to any matter referred to in Section 42.R.S. C.149, S. 43.

94.

A person who directly or indirectly by himself or by any other person on his behalf knowingly:

- (a) Sells, barter, supplies or gives an intoxicant to
 - (ii) an Indian outside a reserve is guilty of an offence and is liable on summary conviction to a fine of not less than fifty dollars and not more than three hundred dollars or to imprisonment for a term of not less than one month and not more than six months, with or without hard labour, or to both fine and imprisonment.
R.S., c149, s.93.

Under Section 94, it could be an offence to offer an Indian a drink, or for the L.C.B.O. to sell liquor to Indians.

95.

An Indian who

- (a) has intoxicants in his possession
- (b) is intoxicated, or
- (c) makes or manufactures intoxicants,

Under section 95, it is an offence for an Indian to have alcohol in his or her possession off a reserve, or to be intoxicated off a reserve.

off a reserve, is guilty of an offence and is liable on summary conviction to a fine of not less than ten dollars and not more than fifty dollars or to imprisonment for a term not exceeding three months or to both fine and imprisonment. R.S., c.149, s. 94.

100.

In any prosecution under this Act the burden of proof that an intoxicant was used or was intended to be used in a case of sickness or accident is upon the accused. R.S., c.149, S.98.

Section 100 is designed to make it easier to convict Indians for alcohol offences.

120.

An Indian child who

- (a) Is expelled or suspended from school, or
- (b) Refuses or fails to attend school regularly,

shall be deemed to be a juvenile delinquent within the meaning of the Juvenile Delinquents Act.
R.S. c.149, S.119.

34.

- (1) A band shall ensure that the roads, bridges, ditches and fences within the reserve occupied by that band are maintained in accordance with instructions issued from time to time by the superintendent.
- (2) Where, in the opinion of the Minister, a band has not carried out the instructions of the superintendent given under subsection (1), the Minister may cause the instructions to be carried out at the expense of the band or any member thereof and may recover the cost thereof from any amounts that are held by Her Majesty and are payable to the band or such member. R.S., c.149, s.34.

Require bands to maintain roads and bridges as directed by the superintendent. Quite apart from the rather arbitrary power this gives to an official, there is no mention who might be liable for negligent maintenance or non-maintenance due to lack of such direction. Municipal Acts place a heavy onus on plaintiffs in such cases.

50. (3)

Where no tender is received within six months or such further period as the Minister may direct after the date when the right to possession or occupation is offered for sale under subsection (2), the right shall revert to the band free from any claim on the part of the devisee or descendant, subject to the payment, at the discretion of the Minister, to the devisee or descendant, from the funds of the band, of such compensation for permanent improvements as the Minister may determine.

Provides for no tenders being received to purchase the "bequest" to a non-member. The antecedent sub-sections do not specify sale by tender. Compare this to s.111(1).