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A COMMENTARY ON THE INDIAN ACT

Prepared for the Members of the Joint Committee of the Senate and the House of Commons on Indian Affairs

DEPARTMENT OF CITIZENSHIP AND IMMIGRATION
INDIAN AFFAIRS BRANCH

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THE INDIAN ACT

The Indian Act provides the legal framework within which the affairs of the Indians are administered by the Government of Canada in accordance with the exclusive legislative jurisdiction vested in it by the British North America Act. It does not embody all the law applicable to Indians for generally speaking they are subject to the same laws as non-Indians. Rather the Indian Act represents special legislation taking precedence over provincial legislation, which the Government considers is essential to the needs of the Indian people, not only as a safeguard to protect their treaty and property rights, but as a means of promoting their advancement.

Although the present Indian Act does not at a glance bear much resemblance to the early legislation regarding Indians, for instance, to the Indian Act of 1876 which was the first consolidation of the laws pertaining to Indians, closer inspection reveals that the early legislation initiated certain general principles which although modified over the years, are still to be found in the present Act. Among these are:

(1) That Indian status and band membership rights are restricted to certain persons,

(2) That Indians who wish to give up their Indian status and membership rights may do so if they meet certain conditions.

(3) That the resources on reserves shall be under the management of the Government and that sales of land can only be made with the consent of the Indians.

(4) That the revenue derived from the management of the resources shall be held by the Government and used only in the best interests of the Indians.

(5) That bands shall be represented by councils, which shall have the right to pass bylaws on matters affecting the welfare of the Indians on reserves.

(6) That the use of intoxicants by Indians shall be restricted.

(7) That the education of Indians shall be the responsibility of the Federal Government.

(8) That jurisdiction over the estates of deceased Indians shall be vested in the Federal Government rather than in the provincial courts.

(9) That Indians may acquire property rights within their reserves.

The majority of the sections of the Act deal with some phase of these principles and a brief commentary on the Act may be helpful in understanding its complexities. This commentary will be made in relation to the various portions into which the Act is divided by headings, rather than to sections. In addition, where experience has revealed a weakness in a section, where sections have been the target of major objection from Indians, or where the Administration has reason to doubt the desirability of an existing provision these facts will be mentioned.

APPLICATION OF ACT - SECTION 4

This part establishes three principles:

(1) That with the exception of the sections which provide that reserve lands cannot be sold or alienated without a surrender by the band (Sections 37 to 41), the Governor in Council may by proclamation declare that any other section or sections of the Act shall not apply to an individual Indian, to a band or to a reserve or surrendered land.

(2) That the provisions of the Act pertaining to the education of Indian children shall not apply to Indian children ordinarily resident off reserves or Crown lands.

(3) That unless the Minister otherwise orders, the provisions of the Act pertaining to wills and estates of deceased Indians shall not apply to Indians ordinarily resident off reserves or Crown lands.

DEFINITION AND REGISTRATION OF INDIANS - SECTIONS 5 - 17

One of the basic principles set out in the early legislation was that Indian status and the right to membership in Indian bands should not be open to all persons. Over the years questions of status and membership have proved most contentious and the Joint Committee of the Senate and the House of Commons, which investigated Indian affairs in the 1940's made the following recommendation in its report:

> "To replace the definition of "Indian" which has been statutory since 1879 there must be a new definition more in accord with present conditions. Parliament annually votes moneys to promote the welfare of Indians. This money should not be spent for the benefit of persons who are not legally members of an Indian band. Your Committee believes that a new definition of "Indian" and the amendment to those sections of the Act which deal with band membership will obviate many problems".

The difficulties encountered in dealing with status and membership problems prior to 1951 were mainly due to three factors, the first, that the definition of "Indian" was not sufficiently clear, the second, that the provisions of the Act were not broad enough to cover all the problems that arose nor clear enough to avoid the possibility of misinterpretation, and the third, that there was no central record of all Indians in Canada nor up-to-date field lists of the membership of the various bands.

Sections 5 to 17 of the present Act were designed to overcome past difficulties and meet the recommendation of the Joint Committee. They are probably the most important sections in the Act for they decide to what persons it shall apply. Briefly, they provide for an Indian Register to be established at Ottawa (Section 5), the registration therein of all persons entitled to be recognized as Indians (Section 6), the keeping of the Register up-to-date by additions and deletions resulting from births, deaths, marriages, etc., (Section 7), how the initial Register was to be compiled (Section 8), the protesting of additions and deletions to the Register and the appealing of the Registrar's decision on a protest (Section 9), the qualifications for entitlement to registration (Section 11), and the circumstances disqualifying persons from entitlement (Section 12). These are the key sections as the remainder under this heading deal with various matters arising out of the earlier sections.

The 1951 Indian Act does not positively define the term "Indian". It was simply not possible to provide a simple definition of "Indian" for it was necessary to take into consideration not only the basic essential of aboriginal birth or blood, but to make necessary allowances for mixed blood, voluntary election (the taking of scrip), operation of law (marriage or enfranchisement) and all other means by which Indian status may have been lost over the passage of time. In lieu of a simple definition the Act states (paragraph (g) of Sub-section (1) of Section (2)), that "Indian" means a person who pursuant to the Act is registered as an Indian or is entitled to be registered. It is therefore necessary to look to Sections 11 and 12 to ascertain whether a person is or is not entitled.

Section 11 is a very complex section and the following brief summary of its provisions may assist in understanding it. Those persons entitled to

registration are:

(1) All persons who on May 26th, 1874 were qualified to reside on reserves then in existence (paragraphs (a) and (b)), and legitimate children of such male persons (paragraph (d) (1)). For purposes of simplification, persons who qualified on May 26th, 1874 will be referred to herein as "originals".

(2) Males of the second, third and subsequent generations who can trace their ancestry in the male line to a male "original", (paragraph (c)), and the legitimate children of such males (paragraph (d) (2)).

(3) The illegitimate children of a female who was an "original", is the child of an "original" male, or is the child of a male qualifying under paragraph (c), (paragraph (e)).

(4) The wife or widow of any person who can qualify under any of paragraphs (a), (b), (c), (d), or (e) (paragraph (f)).

While Section 11 purports to set out the requirements for registration, it must be read in conjunction with Section 12, which bars certain persons from qualifying for registration even although they meet the requirements of Section 11. In summary, Section 12 bars from registration persons who:

(1) at the time of the signing of the Western Treaties elected to take half-breed land or money scrip in lieu of Indian status unless such persons (or their descendants) were subsequently, at any time up to August 13, 1958, admitted to band membership.

(2) have been enfranchised.

(3) have married non-Indian men.

(4) are of quarter blood, are 21 years of age and were born of a marriage entered into after September 4, 1951.

(5) being the illegitimate children of an Indian woman, have had the paternity of their father established as non-Indian following a protest made pursuant to Section 12 (1a),

unless the person is a woman who has reacquired Indian status by marriage to an Indian.

As mentioned, this is one of the key portions of the Act. Furthermore, unlike most other portions of the Act many of the provisions contained in Sections 5 to 17 inclusive were introduced into the Indian Act for the first time in 1951. It seems proper therefore to make some comment on their soundness, particularly from the viewpoint of whether they adequately meet all the problems that arise and deal with the subjects of membership and status in an equitable manner. As is often the case with legislation, a review of its operation after a lapse of time indicates that it could be improved by an amendment, particularly from the administrative point of view. However, there is a possibility that there are more major criticisms of the sections arising out of the fact that they do not cover

certain problems which are fairly common, or, if they do, cover them in a manner which may not be equitable. There are at least two aspects of the matter which would seem to merit consideration.

The first is the subject of adoption. Insofar as status and membership are concerned the Act does not give recognition to the fact that adoption of Indian children by non-Indians and of non-Indian children by Indians is becoming more common yearly. Under the Indian Act today, an Indian child may be adopted by non-Indians and brought up in a non-Indian community while at the same time retaining his Indian status and the right to share in the funds and property of his band. This situation is not in keeping with the most recent provincial welfare legislation for the trend is to establish an adopted child in law as the child of the adopting parents to the same extent as if it had been born to them in lawful wedlock. Several provinces have made representations that in the case of an Indian child being adopted by non-Indians, provision should be made for the severance of all the child's ties to its Indian parents, band or reserve, and to any rights that may accrue to the child through its former status. Conversely, the adoption of non-Indian children by Indians poses problems, for under the Act they are technically trespassers on the reserve and are not legally entitled to the education, medical, welfare or other services normally provided for Indians on reserves. Nor can they acquire through inheritance the right to take possession of their Indian parent's real property on the reserve.

There would appear to be grounds for suggesting that on the one hand Indian children adopted by non-Indians should forfeit their Indian status and membership rights and that on the other hand non-Indian children legally adopted by Indians should be accorded Indian status and membership rights.

The second aspect deals with the question of illegitimacy and no portion of the Act has proven more difficult to administer than the sections dealing with illegitimacy. At the present time, when a child is born to an Indian woman its name is included on the band list under its parent's number. The Act also requires that public notice be given of any change in the Membership List so that all members may have an opportunity to question the change by means of a protest of the addition or deletion. As a result, the birth of an illegitimate child cannot be kept confidential for public notice must be given of the addition of its name to the Membership List. In the case of non-Indians registration of illegitimate births is kept confidential. The Indian Act is therefore in direct conflict with a well established humanitarian principle.

There is also the problem of whether the Act should provide, as it now does, for removing from Membership Lists, the names of illegitimate children on the grounds that their fathers were of non-Indian status. At law, an illegitimate child acquires its status through its mother but under the Indian Act if evidence of non-Indian paternity can be established, the child may be declared to be of non-Indian status despite the fact that it may be in the custody of the mother on a reserve and will be brought up by her. There are several weaknesses in this practice. In the first place, securing legal proof as to the paternity of an illegitimate child is a difficult matter. About the best that can be done is to secure a declaration of paternity from the person whom the mother names as the father. However, frequently such persons are not prepared to make a declaration either for personal reasons or because they know that as a result the child will be given non-Indian status. In practice, a number of cases have been encountered where non-Indian men living in common-law

relationship with Indian women have made declarations acknowledging paternity of the first and second child and then have refused to make declarations concerning other children born of the union. The result is that some of the children of these couples are in band membership while others are not. There is surely nothing equitable in a law which separates brothers and sisters born under identical circumstances.

In addition, a substantial number of these illegitimate children are born off reserves, are undoubtedly the children of non-Indian fathers, and will be brought up off reserves. The Act presently provides that such children shall be registered in membership and they only lose this right if, as indicated above, a declaration as to non-Indian paternity is secured. If they are being brought up off reserves is it reasonable that they should be given membership rights?

It is doubtful that minor amendments to the Indian Act can meet the problems aforementioned. One such amendment was made in 1956 when Sub-section (1a) of Section 12 was added to the Act but the results have not been entirely favourable. In the view of the Administration the present law does not adequately meet the situation but, due to the complexities of the problem, it is difficult to suggest a clear-cut solution to it. However, there are several possible approaches which are worthy of consideration. The first approach would be to simply provide that all illegitimate children of Indian women are entitled at birth to Indian status and membership rights in their mother's band. The arguments in favour of such an approach would be that all these children would be treated equally, that it would make unnecessary the present status investigations which are often quite inconclusive and that it would do away with protests which are not uniformly used amongst the various bands. One argument against this proposal would be that from experience it is known that some Indian bands would oppose it strenuously as they are very much against the admittance to membership of children whose fathers are of non-Indian status. Another argument against it would be that it would automatically bring into membership a substantial number of part-Indian illegitimate children who are being raised off reserves by their non-Indian fathers. Still another argument against it is that it might tend to promote common-law marriages, for so long as the children of the common-law union were entitled to membership rights and to whatever monetary benefits might accrue therefrom, couples might deliberately refrain from getting married.

A second approach to the problem would be the reverse of the first, namely, that all illegitimate children be refused membership in bands. While this approach might satisfy those of the Indian bands who are opposed to taking illegitimate children into membership, it would certainly not find favour with many other bands who adopt a more humanitarian approach to the problem. In addition, it overlooks the fact that in a substantial number of these cases the father and mother are undoubtedly both of Indian status.

A third approach might be to give all these children Indian status (but not membership rights) at birth. The Act presently makes provision for a General list in which are registered the names of Indians who are not members of bands and it could be provided that the names of illegitimate children of Indian women should be registered on such General list. This would not deny to them the opportunity of acquiring membership rights for paragraph (a) of Section 13 of the Act provides that a person on a General list may be admitted into membership in a band with the consent of the band council. In terms of a particular

illegitimate child this proposal would mean that the child would automatically be registered on the General list at birth and that it would be within the discretion of the mother to apply to the council of her band to have the child taken into membership.

Among the advantages of such a proposal would be:

(1) That it would be in line with the ordinary principle that children acquire status through their mothers.

(2) That it would treat all illegitimate children on an equal basis.

(3) That it would meet the not uncommon situation where Indian women have stated they do not wish to have their illegitimate children admitted to band membership.

(4) That it would preserve the confidential nature of the birth, for the General list is maintained at Ottawa and additions to it are not brought to the attention of bands.

(5) That it would tend to exclude from membership children who are born as the result of a common-law union between an Indian woman and a non-Indian and are being brought up off the reserve.

(6) That it would give band councils some rights in determining who should be a member of a band.

Among the disadvantages would be:

(1) That it would give band councils an authority which they might exercise unreasonably and in a discriminatory manner. Some might refuse to allow any illegitimate children into membership. Others might attempt to make a distinction between children who they believed were fathered by non-Indians and children who were fathered by Indians. Still others might apply varying standards. This difficulty could be overcome in part by providing that an illegitimate child should be admitted automatically to band membership if the mother makes an application for this purpose and can produce evidence that the father of the child was an Indian of the same band.

None of these approaches to the problem is entirely satisfactory and it is doubtful that any one of them would be unanimously approved by the Indians. There are variations of the above proposals that could be suggested but all would have some disadvantages and it was thought that the above comments and suggestions would be sufficient to outline the gravity of the problem and the difficulty of working out a satisfactory solution to it.

RESERVES - SECTIONS 18 AND 19

At an early date in the history of Canada the necessity of protecting the interests of the original inhabitants was recognized and steps were taken to ensure that areas of Crown lands sufficient for their needs were reserved for their use. The policy followed throughout Canada was generally to set aside an area or areas for the use of a band, title being retained in the Crown. Sub-section (1) of Section 18 gives legislative recognition to this policy by providing that reserves shall continue to be held for the same purposes for which they were originally set apart.

Although reserves have been set apart for the exclusive use of the Indians, of necessity, portions of them are required by the Government for the administration of the affairs of the Indians. Sub-section (2) of Section 18 provides the authority for the Government to use reserve lands for such purposes and to pay compensation to Indians whose rights of possession may be affected by such use.

Prior to 1956 the authority of the Minister under this sub-section was much broader than it now is. Originally, reserve land could be made use of for the specific purposes set out in the sub-section and "for any other purpose for the general welfare of the band". However, the section was amended in 1956 to provide that making use of land for the general welfare of the band must be with the consent of the band council.

This sub-section could also be called the band expropriation section, for under its authority, if a band required an individual Indian's land for some purpose in the general interests of the band, the council could ask the Minister to take the individual's land for the purpose. While the section has been rarely used in this manner, the authority for such expropriation is there. It is likely to be more commonly used in cases where reserve roads are being widened and some members of a band may be opposed to the idea and refuse to agree to give up part of their land for this purpose.

Section 19 simply provides authority in the Minister to plan for the orderly development of reserves. The section is virtually unchanged since the first Indian Act and the authorities therein are rarely exercised without the full consent of the band council. Furthermore, there is nothing in the Act to prevent a band council from initiating any of the actions mentioned in the section. In effect, therefore, at the present time the authority vested in the Minister is really only a safeguard to be used if necessary works are not carried out by a band. Of late, there has been considerable criticism of the wide and apparently arbitrary powers vested in the Minister by the Indian Act. While the majority of these powers are not exercised arbitrarily, the fact remains that their existence is a source of grievance. While from the administrative viewpoint the authority conferred by Section 19 may be useful on occasions, it cannot be classified as essential and there would be no objection to substituting the authority of the council of the band for the authority of the Minister.

POSSESSION OF LAND ON RESERVES - SECTIONS 20 - 29

The Indian Act of 1876 provided that individual Indians could acquire property rights within their reserves. Subsequent amendments to the Indian Act have had the effect of establishing a land registry system. While provision for the system has now been in the Act for many years, and its use is expanding gradually, nevertheless, it has not yet been accepted by a majority of the bands across Canada and is particularly opposed by most of the bands in Western Canada.

If as stated above many bands are opposed to the registry system, it could be assumed that they are opposed to the idea of individual Indians acquiring property rights within the reserves. However, this is not entirely the case for most bands who are opposed to the system do recognize individual rights of occupation. The thinking of these bands, on the subject of individual property rights, has never been clearly defined and the anomaly created by their thinking has rendered the task of administering their affairs most involved. The anomaly may be best illustrated by a type of situation which arises quite often. A band council may refuse to make an allotment to an individual Indian of the land on which he is living as required under Section 20 of the Indian Act, thus preventing the Department from giving legal recognition to his right to possession of the land. However, if a provincial highway is to be constructed across the property, and the question of paying compensation for the land arises, the council is almost certain to say that the individual in question is the person to whom the compensation should be paid. Along the same lines, an individual Indian may be opposed to the idea of the registry system but will take strong exception if it is suggested that the land he is occupying is not his.

Opposition to allotments of land under Section 20 seems to be due to two main reasons:

(1) A vague fear that if the registry system is introduced on a reserve and allotments to individuals are made, it will result in the break-up of the reserve.

(2) If land is allotted to individuals eventually all the reserve will be used up and there will be no land available for future generations. Coupled with this latter fear is an additional one, namely, that individuals will not make use of the land and in consequence substantial portions of reserves will be unworked and will be unavailable to other Indians who might be prepared to work them.

The fear that the introduction of the registry system is the first step to the break-up of the reserve is without foundation for under the Act reserve land can only be alienated following a surrender or through the taking of the land for public purposes and whether the reserve is under the system or not has no bearing on the question of surrender or so-called expropriation. Neither is there any valid reason for the fear that allotting lands will mean that there will be no land left for future generations. If band populations

continue to grow that result will follow whether a reserve has the registry system or the informal system of individual Indians occupying certain lands with the consent of the council. There is only so much land on the reserve and if it is all being used individuals who have no land must either seek a livelihood off the reserve or acquire land by purchase from other Indians. It is chiefly Western bands that have this fear. In many Eastern reserves the land was all taken up years ago and the majority of the Indians accept the situation as being normal.

There is some basis for the feeling that allotments may tend to take land out of use, for in the East on reserves where the allotment system is in effect, there is a good deal of unused land registered in the name of individuals. However, it is not correct to assume that if this was not the case the land would be all under use for the experience of the last seventy-five years or more has indicated that Indians generally are not really interested in farming and the fact that there is vacant land on a reserve and young Indians on the same reserve who might be farming, does not mean that they would farm even if assisted to do so.

Another factor that may contribute towards the Indians' opposition to the registry system is that the present legislation may not be clearly understood. The 1951 Act provided for two types of individual holdings, one of a permanent nature evidenced by a Certificate of Possession; the other of a temporary or conditional nature evidenced by a Certificate of Occupation. The change from the previous law which provided for a Location Ticket as it was called, has never been understood or appreciated fully by the Indians.

Another difficulty that has arisen on reserves that have the registry system is the unwillingness of some band councils to formally recognize individual ownership of land that has been in possession of a family for several generations. The failure to act may be due to the animosity of the council to the individual or, as is the case in one band in Eastern Canada, a determination of the council to be as uncooperative as possible with the Department. Whatever the reason it is the individual who suffers and the Department can offer no remedy at present, for Section 20 requires that an individual can be registered on his property only following a resolution of the council of his band.

There is no reason to question the value of having a registry system for reserve lands, nor is there any sound argument for suggesting that Indians should not acquire property rights within their reserves. What then can be done to convince the Indians of the advantages of the system and to make provision for a system which will meet the requirements peculiar to Indian reserves and afford protection to individual Indians for improvements they have made on their holdings?

In the first place, it is believed that the present Section 20 might be repealed and replaced by a new and simpler provision, which would call for allotments of land subject to terms and conditions to be determined by the council of the band with the approval of the Minister in advance of the allotment. Such a proposal would give councils some control over individual allotments, thus ensuring that they were used for the purpose for which they

were requested. However, hand in hand with such a change would appear to be a necessity to give recognition to individual rights now in being. Provision could be made for the Department to give recognition to individual ownership without formal allotments by the council, if an individual Indian or his predecessors have been in peaceful and private possession of land for a substantial period of years. A modified version of this principle is in operation at the present time in establishing title in an estate, where there are gaps in the chain of title from an original locatee to the deceased Indian.

It has been suggested that the Indian Act should be amended to provide for the extinguishment of individual ownership when persons holding certificates have not made use of their land for some years. Such a provision would meet the objections of many bands which oppose the registry system. However, it is questionable whether in practice such a provision would meet with favour for experience has indicated that the very ones who are opposed to the system would be the first to object if they were told that they would lose the property which they consider as theirs. Actually, the remedy for the situation arising through the existence of unused or abandoned land lies in the power of band councils to impose property taxes under the authority of Section 82 of the Indian Act. While the subject of taxation is not popular among the Indians, nevertheless, it is inevitable the day will come when bands will start taxing their members and it would seem more desirable that unused land be acquired by the community (the band) through seizure for non-payment of taxes, as is the case in non-Indian communities, than through an arbitrary act aimed at extinguishing the rights of an individual without consideration being given to the reasons why the land is unused.

TRESPASS ON RESERVES - SECTIONS 30 and 31

As defined in Section 2 an Indian reserve is a tract of Crown land that has been set apart for the use and benefit of a band of Indians. In consequence, only the members of that band have any legal right on the reserve and all other persons, Indian or non-Indian may, if their presence on the reserve is unauthorized, be guilty of trespass.

While it may have been necessary years ago to enact measures to preserve the integrity of reserves for Indians, this action is hardly in keeping with the modern concept of the Indian community taking an active part in the life of the greater community in which it is situated. The repealed Indian Act fostered the segregation principle by providing rather elaborate provisions aimed at controlling the unauthorized presence of non-Indians on reserves. In effect, they vested in Departmental Field Officers the right to summarily try alleged trespassers.

It was believed that this was not the proper function of a Field Officer and that trespass on Indian reserves should be on the same basis as trespass on other private property and should be dealt with by the courts in accordance with the applicable laws. Accordingly, the former elaborate provisions were repealed in 1951 and in lieu thereof there was substituted Section 30, which merely states that a person who trespasses on a reserve is guilty of an offence, thus leaving it up to the courts to determine on the facts of each case whether a trespass had occurred. There have been complaints from Indians that the section is inadequate and that the provisions of the former Act should be reinstated. What these complaints amount to is the desire to set out a special law applicable only to the trespass on Indian reserves. This would be a backward step and a reinstatement of the segregation principle, which is undesirable in the long range interests of the Indians.

Section 31 of the Act provides the machinery for the recovery of lands in a reserve improperly held or occupied by non-Indians. While used infrequently, it is a necessary section, for while the provincial courts have jurisdiction to try a case concerning unlawful possession, the bailiff of the court has no jurisdiction to enforce the judgment against reserve lands. As worded the section applies only to land improperly held or occupied by a non-Indian and it seems desirable that the section should be broadened to include land improperly held by an Indian.

SALE OR BARTER OF PRODUCE - SECTIONS 32 AND 33

The principle embodied in this section has been in the Indian Act for many years and presumably was intended to protect the Indians in Manitoba, Saskatchewan, and Alberta, during the early years following their establishment on Indian reserves.

There have been complaints from Indians that the section is discriminatory in that it applies to the Indians of only three provinces. There is some truth in this complaint for the section implies that the Indians of the three provinces in question are not as capable of managing their own affairs as Indians elsewhere. That may have been true initially but it is certainly not true today.

Possibly the chief advantage of the section was that by refusing permits to sell livestock a sustained development of livestock production on reserves could be encouraged. However, such attempts have brought a substantial increase in illicit sales and has resulted in a few well-to-do Indians taking advantage of other Indians by buying up their livestock cheaply, when they were refused permits to sell to non-Indians.

In general, it is suggested that the section has outlived its usefulness and that insofar as their livestock and produce from their land are concerned the Indians should be free to decide when and to whom they should sell. While it is believed that most bands would favour the repeal of Sections 32 and 33, some may favour the retention of the sections. To meet this situation, Sub-Section (1) could be retained as is and Sub-section (2) could be amended to provide that the council of the band shall decide whether the permit system is to be in effect on its reserves.

ROADS AND BRIDGES - SECTION 34

There seems to be little advantage in retaining Section 34 in the Indian Act. As worded, it presupposes that Indian Superintendents will be giving orders to bands to perform certain maintenance work on reserves. While there may have been some necessity for the section years ago, today band councils are generally quite conscious of their responsibilities in maintaining roads, fences, and bridges.

The section calls for arbitrary decisions by the Minister on local matters which, it is believed, could just as well be left for decision by band councils. In short, it is suggested that the principle set out in the section is archaic.

LANDS TAKEN FOR PUBLIC PURPOSES - SECTION 35

Section 35 is usually described as the expropriation section of the Indian Act, which is a misnomer for the term expropriation implies "taking without consent", whereas the exercise of such a right against reserve lands is not conferred by this section.

In the public interest certain corporations are authorized by federal or provincial statute to take private lands for their purposes without the consent of the owner. Save for this section of the Act such corporations would have no special rights to take reserve lands for their purposes. The section does not in fact permit them to expropriate reserve lands but rather provides that if need for the land has been established, the Governor in Council may consent to it being taken subject to such terms or conditions as are considered advisable. Sub-section (3) further provides that if the taking is consented to, the Governor in Council can excuse the company from going through the normal requirements of expropriation and in lieu thereof issue a Crown grant to the company.

This rather unusual and frequently misunderstood section is necessary because of Section 37 of the Act, which provides that no portion of a reserve shall be alienated without first having been surrendered by the band of Indians for whose use the land was set apart. Save for Section 35 a band of Indians might successfully block some programme of public benefit. In effect the section does not place reserve lands in the same category as private lands, which are subject to expropriation in the public interest. Rather it gives the Governor in Council authority to decide in any particular case whether the public interest shall be paramount to the band interest.

In recent years it has been the practice to require that all companies seeking consent under this section first reach agreement with the band concerning the taking of the necessary land and the price that will be paid for it and there have been few instances where the taking was permitted without the consent of the band. The most recent instance was the taking of land at Caughnawaga required for the purposes of the St. Lawrence Seaway. The Seaway could not have been built in its present location without this land and despite the opposition of the Indians it was deemed necessary in the public interest to permit the land to be taken.

A reference to Sub-section (1) of Section 35 will disclose that the provisions of the section apply to Her Majesty in the right of a province, as well as to corporations having expropriation powers. This right does not extend to Her Majesty in the right of Canada and, except for the limited uses mentioned in Sub-section (2) of Section 18, if Canada wishes to acquire Indian reserve property for its purposes it must negotiate and secure the consent of the band for the alienation of reserve land for the desired purpose.

SPECIAL RESERVES - SECTION 36

As defined in Section 2 of the Act, a reserve means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart for the use of a band. There are a few parcels of land which have been set apart for the use of Indians by private interests, title being vested in trustees on behalf of the Indians. Section 36 provides that the Indian Act shall apply to these lands as though they were ordinary reserves.

SURRENDERS - SECTIONS 37 - 41

This is one of the key portions of the Act in that it affirms the general principle, in existence since the first federal statute regarding Indians and their lands, that no disposition may be made of reserve lands without the joint consent of the band and the Minister.

Is this principle still sound? There can be no doubt that if strict control over the sale of land had been lacking there would be few if any Indian reserves in being today and that Indians would have little to show for their former large land holdings. But is this strict control still necessary? For the majority of the bands the answer is probably yes. The original restriction was undoubtedly aimed at preventing the Indians from improvidently disposing of land in which they were not interested and were not using, and of which they had no idea of the potential value. After a lapse of seventy or eighty years it is now obvious that many bands will never use all the land they hold and that it would not be against their interests to sell off parts of their reserves. However, the danger today is that they might sell at far below the proper value of the land, particularly as the majority of the bands have not reached that stage of advancement where they have sufficient experience to negotiate substantial sales. It is frequently stated that the Indians will never learn to manage their affairs if they do not get a chance to do so but there is a substantial difference between having some management powers as opposed to outright freedom to sell very valuable assets. More and more frequently Indian councils are carrying out most of the negotiations regarding major sales or leases of reserve land. However, these negotiations are at all times subject to review by the Department which usually acts in these matters, not only as an adviser to the band, but, if the need arises, as the authority having the final say. While the day will undoubtedly come when full authority can be given to the bands to manage their own land matters, it is suggested that the present principle should not be changed and with this it is believed there is general agreement among the Indians.

It will be noted that Section 37 commences with the words "Except where this Act otherwise provides", which implies that there are exceptions to the general principle. One of these has already been mentioned, namely, Section 35, the so-called expropriation section. Other exceptions pertaining to leasing of land will be referred to later under the heading "Management of Reserves and Surrendered Lands".

Despite repeated efforts to explain the matter, some Indians still do not understand the legal significance of the term surrender as used in the Indian Act. To the majority the word implies the loss of their land and they are unable to comprehend that in relation to a lease proposal the word merely means a limited disposition of the land. It is essential that the Indians appreciate this difference and to that end it seems desirable to reword the Act. Obviously the word "surrender" should be retained with reference to sales as this is the meaning given to it by most Indians. The problem therefore is to find a new word that could be used in reference to leases and it is believed that the word "release" would be the most suitable.

One or two weaknesses in the provisions dealing with surrenders have become apparent in recent years. The Act is so worded as to require that the only band members eligible to vote on a surrender are adult members ordinarily resident on the reserve. Several instances have been encountered in recent years where a band was so small that none of the members was resident on the reserve. Legally the result was that the land could not be surrendered even though it was known that the Indians wished to sell it. The other weakness is that Section 40 of the Act calls for a surrender being certified on oath by the Chief or a member of the council of a band. There are a few instances where bands do not have councils. Although the point may not come up very often, it seems desirable that the Act be amended to provide that in such cases a certificate from responsible members of the band could be accepted as evidence that a surrender was properly given.

ESTATES OF INDIANS - SECTIONS 42 - 52

Since 1880 jurisdiction and authority in relation to all matters having to do with the estates of deceased Indians has been vested in the Department. The Indian Act of 1880 contained provisions covering the descent of property of deceased Indians who died intestate and an amendment to the Act in 1884 gave Indians the right to devise property by will. This policy of removing Indian estates from the jurisdiction of the courts has been carried forward in successive Indian Acts and the initial brief provisions regarding the matter have been considerably expanded as will be noted by examination of Sections 42 to 50, inclusive.

In addition, jurisdiction over the property of mentally incompetent Indians and of infant Indian children has been vested in the Department by Sections 51 and 52 of the Act.

Descent of Property - Sections 42 - 44

In keeping with the policy established in 1880, jurisdiction and authority in relation to all matters having to do with the estates of deceased Indians is vested in the Minister. Section 44, however, provides that in any particular case a court may with the consent of the Minister exercise jurisdiction over an Indian estate. While the Department is quite prepared to waive its jurisdiction in favour of the courts, if asked to do so requests are infrequent and usually arise only when the estate has substantial assets off an Indian reserve. While Sub-section (2) of Section 44 provides that the Minister may direct that a particular case shall be placed under the jurisdiction of the courts, there have been only a few instances where this was done, since the Act came into force in 1951.

Wills - Sections 45 and 46

As mentioned, Indians have had the right to make wills since 1884 and Sections 45 and 46 of the present Act carry forward this right and at the same time make provision for approval or disapproval of wills by the Minister.

It will be noted that Sub-section (2) of Section 45 provides for the acceptance as wills, of written instruments which might not be accepted in provincial courts, provided the Minister is satisfied that the instrument indicates the true intention of the deceased. This wide latitude has been justified in the past by the fact that the majority of Indians who made wills did not seek legal assistance in so doing and in consequence often made wills which did not comply with provincial requirements, although they obviously represented the wish of the testator. In the majority of such cases the documents were not disputed by the relatives of the deceased and it was thought that in the case of Indians more latitude should be allowed in deciding what is a valid will than is permitted by provincial laws. (See next page. Sections 47-50

Mentally Incompetent Indians - Section 51

While vesting in the Minister jurisdiction and authority in relation to the property of mentally incompetent Indians, Section 51 does not vest in the Minister the right to decide mental competency. Therefore, the Minister's jurisdiction and authority come into being only when an Indian has been found

to be mentally incompetent in accordance with the laws of the province in which he resides. In practice, this has been extended to include administration of estates of Indians who have been admitted to mental institutions or hospitals by certification in accordance with provincial statutes. It is suggested that such practice is reasonable under the circumstances and that it should be legalized by a specific provision in the Indian Act.

It has become apparent that in some instances there is a distinct advantage to be gained by having provincial authorities assume jurisdiction over the management of the property of a mentally incompetent Indian. Informal arrangements of this nature have been made in some instances with the Provinces of Alberta, Saskatchewan and Manitoba and have proved advantageous, and it would seem desirable that there be a provision in the Indian Act enabling the courts with the consent of the Minister to assume jurisdiction over the property of mentally incompetent Indians.

Guardianship - Section 52

This section is frequently misinterpreted as vesting in the Minister the right to appoint guardians for minor Indian children. In fact, it merely provides the authority to appoint someone to administer the property of such children.

Appeals - Section 47

Until 1951 the Act provided no appeal from decisions of the Minister made in the exercise of authority conferred on the Minister by Sections 42, 43 or 46. It seems unfair that a person adversely affected by the Minister declaring a will to be wholly or partially void (Section 46) should have a right of appeal, whereas a person, who considers himself adversely affected by the Minister approving a will, (Section 45), has no right of appeal. It would seem equitable to amend the Act to provide appeals in both instances.

Distribution of Property on Intestacy - Sections 48 - 50

The provisions setting out how the property of a deceased Indian shall be distributed among his heirs upon an intestacy, are based upon provisions suggested some years ago by the Committee on Uniformity of Legislation of the Canadian Bar Association.

It will be noted that Sub-section (16), was amended in 1956 by adding thereto the words "a child adopted in accordance with Indian custom". This was done to meet frequent cases where Indians have adopted non-Indian children without taking the proper legal steps. The phraseology is not altogether satisfactory for there is a good deal of doubt as to the meaning of the phrase "Indian custom" and it would appear that the section could be improved by substituting for the words "Indian custom", general wording which would leave it up to the Minister to decide in each case whether the deceased intended to and thought that he had adopted the child.

MANAGEMENT OF RESERVES AND SURRENDERED LANDS - SECTIONS 53 - 60

It will be recalled that one of the principles appearing in the early legislation on Indian affairs was that the management of the land resources of the Indians should be under the control of the Federal Government. The present Act merely carries forward this principle.

Sections 53 to 57 are merely administrative sections which outline the formalities to be observed in the disposal of surrendered lands and provide the authority for the passing of regulations governing the disposal of timber, mines, and minerals. On the other hand, Sections 58 and 60 are very important sections and require comment.

Section 37 of the Act enunciates the general principle that reserve lands should not be leased, sold or alienated until they have been surrendered by the band - "except where this Act otherwise provides". One of the exceptions, the taking of land for public purposes (Section 35), has already been mentioned. Another is to be found in the Timber Regulations which, under certain circumstances, authorize the granting of licences to cut timber without the necessity of a surrender but with the consent of the band council. Section 58 was drafted with the purpose in mind of gathering together the other exceptions and because of its catch-all nature the section has not been clearly understood by the Indians nor in fact has it proved entirely satisfactory from an administrative standpoint.

Sub-sections (1) and (2) deal with various aspects of the question of utilizing vacant or idle land on reserves and enable the Minister with the consent of the band council to cultivate unused land whether it is band owned or individually held. In practice this authority can be of advantage in preventing weed infestation on vacant lands from endangering adjoining cultivated lands. Action can only be taken with the consent of the band council but generally speaking band councils are alert to the need for overall weed control.

The Minister may also, with the consent of the council, lease for agricultural or grazing purposes vacant or idle land either band owned or individually held.

Sub-section (3) enables the Minister to lease for the benefit of an individual Indian upon his application land of which the Indian is in lawful possession without a surrender by the band or the approval of the band council. From time to time, band councils have objected to this sub-section, chiefly on the grounds that it results in non-Indians being on the reserve without the consent of the council.

Sub-section (4) provides still a further exception in that it makes provision for wild grass and dead or fallen timber being disposed of without a surrender and in some instances without the consent of the council. This provision has been in the Act for many years and is intended to facilitate the making of timely deals to dispose of these items which are often difficult to sell. In practice, councils are consulted before any disposal action is taken unless time is of the essence and the council is not immediately available.

As mentioned previously, there have been some objections raised by the Indians to the provisions of Section 58 and it has not proved entirely

satisfactory from the administrative standpoint. Paragraph (a) of Sub-section (1) enables idle band land to be leased for agricultural or grazing purposes with the consent of the band council. It has been suggested that this exception to the general principle enunciated in Section 37 should be broadened to include leases for purposes other than agriculture and grazing. It is not entirely consistent that individually held lands can be leased for any purpose without a surrender, whereas band lands must be surrendered unless the leasing purpose is for agriculture or grazing. Furthermore, it is frequently difficulty to secure surrenders not because a band is opposed to the idea but because a considerable portion of the members may be away from the reserve or be so indifferent to the proposal that they will not attend surrender meetings. In addition, some bands are opposed in principle to the idea of a surrender, fearing that it means permanent loss of their land, although they are quite in favour of leasing. Such a suggestion is in keeping with the policy of placing more authority and responsibility in the hands of band councils. It is not suggested that the necessity of taking surrenders for leasing purposes should be entirely eliminated. This should be retained for long-term leases, while leasing with band council approval could be restricted to shorter leases. As long as the Department has the final say in approving unused land transactions it is difficult to see that such a change would materially lessen the protective principle established by Section 37.

While some band councils have objected to the leasing of individually held land without their consent, there does not seem to be any valid reason for the Act requiring such consent. Far from restricting the operation of this section, it might be suggested that it should be expanded to permit the individual to execute short-term leases on his own rather than having to apply to the Department to lease his land for him. There is much to be said for such a suggestion from the aspect of training the individual Indian to look after his own affairs, accept personal responsiblity for supervision of the lessee's activities, and the collection of the rental.

Section 60 sets out a principle that was introduced for the first time in the 1951 Act and which, while it has not been used to-date, may prove of increasing importance in the future. Briefly, it provides that where a band of Indians is sufficiently advanced and organized it can be given the right to take over the management of its reserve lands with virtually the same power and authority as are exercised by municipalities. The fact that the section has not been used to-date is not an indication that it is unworkable or unsound in principle. There are various legal implications standing in the way of any band being granted so-called municipal authority and in addition many bands undoubtedly feel they are not sufficiently experienced as yet to assume the responsibilities that would be involved.

MANAGEMENT OF INDIAN MONEYS - SECTIONS 61 - 68A

Another of the principles established by the early legislation was that the revenues derived from the management of reserves should be held by the Government on behalf of the Indians and used only for purposes deemed in their best interests. This principle has been retained ever since and is to be found in Sections 61 to 66A inclusive.

The sections provide, among other things, for the Government to pay interest on the funds it holds for bands; for two types of band accounts, the first a capital account in which shall be placed moneys derived from the sale of land or capital assets, such as, timber, minerals, etc., and the second a revenue account in which all other moneys received on behalf of the bands shall be credited; for the distribution of a portion of capital moneys among band members; the various purposes for which revenue moneys may be expended, and so on.

Generally speaking, these sections of the Act have operated fairly satisfactorily. As might be expected there are complaints from councils from time to time that they are over-restricted in expending their funds, that the Act does not go far enough in permitting expenditures for certain purposes, and, particularly in reference to Sub-sections (2) and (3) of Section 66, that the Department should not have the authority to use their moneys without their consent for the purposes set out therein. In practice there is no desire on the part of the Department to exercise any arbitrary authority over band funds and there are few if any cases today where this action is taken without the council being consulted.

However, there have been instances where in the opinion of the Department councils have unreasonably refused to consent to expenditures which were considered to be in the general interests of the Indians. As an example might be cited a case which gave rise to an amendment to Sub-section (2) in 1956. A band was the employer of various Indians on road maintenance work. Under the Unemployment Insurance Act these employees were entitled to the benefit of the Act but the band refused to pay the employers' contribution required under the Act. In normal circumstances such failure would lead to prosecution but up to now bands are not legal entities and therefore are not capable of being sued nor their band funds attached by way of suit. In order to ensure that bands would comply with the Unemployment Insurance Act, and that their employees would be eligible for the benefits of the same, it was necessary to amend Section 66 to provide that band funds could be used for this purpose without the consent of the band. There have been other instances in the past which were considered sufficiently serious to warrant the Department being given arbitrary power for the specific purposes set out in the section.

It has been mentioned that in 1951, Section 60 provided the first major change in the basic principle that management of reserves should be under the control of the Government. Section 68 provides a similar change in respect to the principle that money derived from the management of reserve resources is to be held by the Government and used by it on behalf of Indians. The pertinent portions of the section are firstly that it applies only to the revenue moneys not to the capital account and secondly that the

granting to a Band of control over its revenue funds may be made subject to regulations passed by the Governor in Council.

Up to 1951 no band had specifically asked for control of its revenue moneys, although several bands had asked for information on the subject previously. However, within the past year the Walpole Island, Moravian, Cowichan, and Tyendinaga bands requested and were given control over the management of part of their revenue moneys. At the present time their authority only covers the expenditure of an annual budget which has been approved by the Department. Once the budget has been approved the moneys are placed in a bank account to the credit of the council, which expends the same, subject to agreed conditions covering contracts, accounting, etc.

LOANS TO INDIANS - SECTION 69

Section 64 of the Act provides for capital moneys of a band being used to provide loans to band members. However, the majority of the bands are not sufficiently endowed with capital moneys that any substantial amount may be used for lending purposes.

To meet the requirements of such bands and their members, Section 69 provides for the establishment of a loan fund of $1,000,000.00 out of Consolidated Revenue and for the making of regulations to provide for Indians, groups of Indians or bands borrowing from such funds. As moneys are loaned to Indians and paid back they are again available for loan. In short, the moneys revolve, hence the fact that the fund is referred to as the revolving loan fund and that the regulations governing its operation are the Indian Revolving Fund Loan Regulations as established by P.C.1957-633 dated May 9, 1957.

Under the terms of Section 69 the purposes for which this money may be loaned are specifically outlined. Originally they were somewhat limited but successive amendments have broadened the scope of the fund and the addition of paragraph (c) to Sub-section (1) in 1956 now provides that the use of the fund may be widened by Order in Council.

While the fund has served a useful purpose, there have been complaints from the Indians that it is too restrictive, particularly in that it does not permit of borrowing for the construction of houses. There are reasons for this omission, namely, the revolving feature of the fund. If moneys are not repaid there is that much less money to loan. In short, repayment is a must if the fund is to be of use to future Indian borrowers. In practice, the majority of the loans for the purposes authorized are for amounts which the borrower can hope to repay within a reasonably short period. House construction loans of necessity would amount to several thousand dollars each and it would be quite impractical to provide for repayment under a period of twenty years. The demand for houses is such that if loans for this purpose were made under the revolving fund a large portion of the moneys would be virtually taken out of circulation as the repayments would be such a small percentage of the amount under loan as to destroy the revolving fund aspect of the fund.

While this difficulty might be overcome in part by enlarging the amount of the fund, a different approach seems preferable, namely, for the Government to make loans to bands from which they in turn could make housing loans to their band members.

Among the advantages of such a proposal would be the fact that the Government would have better security for the loans than now exists under the Revolving Loan Fund Regulations, for the loan will be to the band rather than to an individual and presumably the band will be required to pledge its band funds and/or other band assets as security. In addition, it would promote the concept of self-government for presumably band councils rather than the Department would play the major role in both the lending and collection phases of the proposal.

FARMS - SECTION 70

Under the provisions of this section the Minister may operate farms on reserves, may employ persons to instruct the Indians in farming and may apply any profits from the operation of such farms towards assisting Indians to engage in farming.

The idea embodied in this section was incorporated in the Indian Act in 1930 and while there are few such farming operations on reserves today, there were at one time, particularly in Western Canada, a fairly substantial number. Originally they were designed to meet several objectives, such as, minor experimental farms, farms on which the Indians could be instructed in modern farming operations and in the use of modern equipment, sources of seed for Indian farmers, and probably as a means of bringing into production idle land on reserves. Thirty years afterwards it would appear that their objectives were idealistic rather than realistic for these farms contributed little to the development of agriculture on the reserves in question in the sense that they made successful farmers out of the Indians. Far too often the Indians showed little interest in the farming operation with the result that the majority of the farms have been discontinued or in some cases are now financed from band funds with any profits going to the band.

Possibly the section should be dropped from the Act. However, it is still used to some degree and it is suggested that the basic principle therein might well be expanded to cover other types of commercial venture both on and off reserves which might be operated not only as a method of educating Indians but as a source of funds which could be used for other useful purposes along the same lines on other reserves. The provision contained in Sub-section (2), whereby profits can be utilized in other ventures rather than returned to the consolidated revenue fund, is an excellent one from the administrative standpoint and if extended to other types of business ventures on the reserves would provide a flexibility of operation not otherwise obtainable.

The experience of the last fifty years, particularly in Western Canada, has indicated that the majority of the Indians are not interested in farming and are in fact ill adapted by their cultural background for farming on the scale required under present day conditions. It seems probable therefore that consideration should be given to the possibility of the Indians earning a livelihood in other types of commercial venture on their reserve and the expansion of the present section to permit the Minister to try out business ventures on a modest scale might well provide the means to a better future for many Indians.

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TREATY MONEYS - SECTION 71

Section 71 provides the authority for using moneys from the consolidated revenue fund to meet the annual payments to which the Government of Canada committed itself in the early treaties with the Indians. There are eleven numbered treaties covering Manitoba, Saskatchewan, Alberta, the Northwest Territories, part of British Columbia and the James Bay area. In addition there are the treaties known as the Robinson-Huron, and the Robinson-Superior, which were entered into with the Ojibewa Indians of Lakes Huron and Superior, by the Province of Canada in 1850. While the responsibility for the annual payments under the Robinson Treaties lies with the Province of Ontario, by arrangements the Federal Government makes the payment and is later reimbursed by Ontario.

The amount paid annually to each Indian under Treaties 1, 2, 3, 4, 5, 6, 7, 8, 10 and 11 is $5.00 and each Indian under Treaty 9 and the Robinson Treaties receives $4.00.

REGULATIONS - SECTION 72

Section 72 sets out various matters on which the Governor in Council may pass regulations if it is deemed advisable to do so in the interests of the Indians.

There are only four sets of regulations presently in existence under the authority of this section; The Indian Reserve Dog Regulations; the Regulations governing the operation of pool rooms; theatres, dance halls, and other places of amusement; the Indian Heath Regulations and Indian Reserve Traffic Regulations.

A reference to Section 80 following will disclose that band councils are empowered to make bylaws for any or all of a variety of purposes amongst which fall some of the purposes set out in Section 72. If the Governor in Council has passed regulations on a certain subject, a subsequent council bylaw on the same subject would be effective only insofar as it dealt with aspects of the subject not specifically covered in the regulations.

ELECTION OF CHIEFS AND BAND COUNCILS - SECTIONS 73 - 79

Historically various Indian bands had various means of deciding what members should be in authority over the affairs of the band. While Sub-Section (1) of Section 73 was intended to provide a uniform system which would be applicable to all bands, it will be noted that the wording of it is such that it is applicable only to bands that have been designated as subject to its provisions. The remaining bands continue to elect their Chief and Councillors according to the custom of each band. The majority of the bands do come under the provisions of the Act and progressively fewer and fewer bands are adhering to their traditional election customs.

Two aspects of the election of Chiefs and Councillors have proved somewhat contentious and are worthy of special mention. The first pertains to the term of office. Section 77 provides that Chiefs and Councillors shall hold office for two years. Some councils and spokesmen for Indian groups have complained that the term of office is too short and that it should be extended to three, four or even five years. The same complaint was made when the draft of the present Act was discussed with Indian representatives in 1950 but at that time it was decided to adopt a two-year term as being the most common in municipal practice throughout Canada. The chief argument presented by those favouring a longer term is that too many Chiefs and Councillors are inexperienced when they take office and need more than two years to become acclimatized and accomplish anything worthwhile. This argument overlooks the fact that there is nothing to prevent a band from re-electing a former Chief or council which they are quite likely to do if the council has proved to be a good one. The Department's experience with elected Indian councils has failed to show any strong grounds for extending the term. To the contrary, it has indicated that in some instances a longer term would have proved detrimental to certain bands.

The other aspect of importance is the eligibility of Indians to vote in band elections. Section 76 provides that an elector must be twenty-one years of age and "ordinarily resident on the reserve". Prior to 1951 the word "ordinarily" did not appear in this section. It was added in an attempt to clarify the section and to avoid claims that persons were not eligible to vote because they were not resident on the reserve at the date of the voting. While the addition of the word solved one problem, it raised a new one, for lacking any clear definition as to what is meant by "ordinarily resident" the eligibility of any voters who may be living off the reserve is open to question. It is doubtful whether the section as worded meets the wishes of the majority of the Indians and it is possible that they might favour an unrestricted right to vote for all band members regardless of their place of residence. The increasing Indian population and lack of opportunity on many reserves is compelling more of the younger and better educated Indians to seek employment outside the reserves and establish residence away from the reserve in order to hold employment. However, such residence away from the reserve does not necessarily imply a lack of interest in the affairs of the band as is usually the case where a non-Indian moves from one community to another. There could be a strong argument put forward for suggesting that all band members twenty-one years and over should be eligible to vote.

POWERS OF THE COUNCIL - SECTIONS 80-85

As mentioned previously, the council of a band may make bylaws for a variety of purposes as set out in Section 80. It is important to note, however, that such bylaws may not be inconsistent with the Indian Act or any regulation made thereunder by the Governor in Council. Therefore it is not possible for a council bylaw to amend a section of the Act or a clause in a regulation of the Governor in Council which the band council does not agree with or finds objectionable.

Section 82 provides for councils passing money bylaws to raise funds for the purposes of the band. In practice this authority has been used by only a few bands and for very limited purposes. Generally the idea of taxation does not find favour with Indians or Indian bands and while this section may at some future date be one of the key sections of the Act in terms of Bands managing their own affairs and financing them in the same manner as municipalities by taxation of reserve property, it may be some time yet before there is anything like general use made of the section.

TAXATION - SECTION 86

In the view of the Indians Section 86 is one of the most important sections in the Act in that it guarantees to them freedom from any form of direct taxation on their interest in lands on their reserves or their personal property situated on a reserve. It is important to note, however, that there is one exception to the guarantee, namely, that band councils may impose taxation by bylaws.

In practice the exemption on personal property is not always understood. While the section provides that whatever income is earned by an Indian on a reserve is free from taxation, this exemption does not apply to income which the Indian may earn off the reserve even although he may be resident on his reserve.

There is one other important point covered by the section, namely, that the exemption from taxation does not extend to non-Indians who may inherit an interest in the reserve property of an Indian.

LEGAL RIGHTS - SECTIONS 87 - 89

Section 87 is one of the key sections in the Act for it provides that all laws of general application in force in any province are applicable to Indians in that province, except insofar as they are inconsistent with the Indian Act or any regulation or bylaw made thereunder. Put in ordinary words the section means that the Federal Government has the paramount right to pass legislation applicable to Indians but failing any federal legislation on a particular subject the provincial law shall be applicable. An important aspect of the section and one that is frequently overlooked is that the wording of the section extends the provincial law only to Indians not to Indian reserves or the property of Indians upon the reserve.

Like Section 86, Section 88 is one of the most important sections in the Act from the viewpoint of the Indians. Section 86 states that reserve lands and personal property on reserves are exempt from taxation. Sub-section (1) of Section 88 carries this idea one step further by providing that the same properties are not subject to mortgage, seizure, distress, etc., at the insistence of any person other than an Indian. In effect, a judgment secured against an Indian by a non-Indian cannot be executed against reserve property. Two weaknesses in this sub-section have become apparent. The first is that the sub-section enables an Indian to enforce a judgment against another Indian but does not extend the same privilege to an Indian band. This is a rather serious omission for many bands advance money to their members for a variety of purposes and should be able to take property security and realize on the same if the Indian defaults in repayment of the loan.

In the second place, it has become evident that their inability to pledge personal property on reserves as security for bank loans is preventing the more progressive Indians from securing loans with which to develop economic opportunities on reserves. It is not suggested that real property on reserves should be subject to seizure but it seems reasonable that if an Indian wishes to put up cattle, machinery, etc., as security for a bank loan he should be able to do so and that the band should be able to realize on the security if necessary to do so. The problem could be easily met by enabling individuals to waive the protection of Section 88 in the case of any personal property which they may wish to pledge as security.

Sub-section (2) of Section 88 provides an exception to the general principle stated in Sub-section (1) in that if a non-Indian sells a chattel to an Indian under a conditional sale agreement whereby title remains in the vendor until full repayment is made and the Indian defaults in payment, the vendor may enter on the reserve and recover possession of the chattel.

Section 89 provides that personal property that is given to a band by the Department or purchased by the Department for the band from band funds or appropriation, shall always be deemed to be situated on the reserve and therefore cannot be subject to taxation or seizure and cannot be sold by a band or an Indian without the consent of the Department.

Indian bands are not legal entities at the present time. This situation gives rise to administrative difficulties which are becoming increasingly apparent as bands assume more control over their affairs. It seems essential that the problem should be considered with a view to determining whether bands should be given legal status or be declared legal entities for specified purposes.

TRADING WITH INDIANS - SECTIONS 90 AND 91

Two principles are established by these Sections. The first is that certain items of historic interest on reserves may not be removed without the consent of the Government. This section was designed to put a stop to collectors taking advantage of the Indians in the purchase of articles identified with their earlier culture. In practice, permits are rarely given except to such bodies as museums, provincial governments, etc.

The other principle as set out in Section 91 is that no official of the Government shall trade with Indians without a permit from the Department. While the provision may have been much more necessary in the past than in the present, one or two instances in fairly recent years have indicated the desirability of it being retained. In recent years at least permits have been given only in a few cases.

REMOVAL OF MATERIALS FROM RESERVES - SECTION 92

In keeping with the principle established earlier that reserve resources cannot be disposed of without the approval of the Minister, Section 92 provides that it is an offence for an Indian to dispose of materials from a reserve or for anyone to purchase such materials without a permit and also provides the penalty for such offence.

INTOXICANTS - SECTIONS 93 - 99

This portion of the Act was substantially amended in 1956 and the resulting complex series of sections are rather difficult to understand.

Prior to 1951, the law provided that persons of Indian status could not legally consume or be in possession of intoxicants either on or off a reserve. The 1951 Indian Act introduced the first easing of this absolute prohibition as it provided that the Governor in Council, at the request of a province, could by Order in Council enable the Indians of that province to consume intoxicants in public places in accordance with the laws of the province. That was the situation until 1956 when an amendment to the Indian Act made provision for Indians securing fuller liquor privileges and under certain circumstances full liquor privileges.

The law now provides, as it did prior to 1956, that Indians can be given the privilege of consuming intoxicants in public places. Indians now have this privilege in the Provinces of British Columbia, Manitoba, Ontario, Nova Scotia, the Yukon, and Northwest Territories. Furthermore, as the result of the 1956 amendment, if the provincial law allows it, they can also purchase intoxicants and have them in their possession and consume them off Indian reserves. Finally, pursuant to the provisions of Section 96A, it is possible for Indians to acquire the right to possess and consume intoxicants on reserves. This section has the effect of setting up local option on reserves as the right to have intoxicants on a reserve can only be secured if a band council passes a resolution in favour of it, the province in question does not object to the idea or has previously given the Indians the right to purchase liquor, and a majority of the band members have by way of a referendum signified that they approve the proposal.

To summarize the matter, Indians' rights to consume intoxicants fall into three categories as follows:

(1) At the request of a province they can be given the right to consume intoxicants in public places.

(2) At the request of a province they can be given the right to purchase and be in possession of intoxicants off reserves.

(3) They can possess and consume intoxicants on reserves if the provincial law enables them to purchase intoxicants, if the machinery of Section 96A has been brought into being and a majority of the band have voted in favour of having liquor on their reserve and if the Governor in Council consents.

At the present time, only the Province of Ontario and the Northwest Territories have given Indians the right to purchase liquor and have it in their possession. Several bands in Ontario have held referendums, voted in favour of having liquor on reserves and now have that right. Others have indicated their desire to have referendums. The results of loosening the absolute prohibition against intoxicants initially resulted in some intemperate drinking by Indians but generally they have not abused the privilege. The fact is, of course, that previously there was prohibition in name only. Indians who wished to secure intoxicants illegally had little difficulty in doing so.

FORFEITURES AND PENALTIES - SECTIONS 101 - 107

Various sections throughout the Act provide that certain actions constitute an offence. Section 101 provides the penalty for all such offences and for the disposition of goods and chattels seized in connection with the committing of the offence and for the issue of search warrants.

Sections 102 to 107 inclusive cover various matters in connection with the enforcement of law on Indian reserves, such as, the disposition of fines, (102); description of Indians in writs and summonses (103); jurisdiction of magistrates (104); appointment of justices of the peace (105); Indian agents acting as ex officio justices of the peace (106); commissioners for taking of oaths (107).

ENFRANCHISEMENT - SECTIONS 108 - 112

Early federal legislation pertaining to Indians provided that if they met certain conditions and desired to do so Indians could give up their Indian status and membership rights. This process is known as "enfranchisement" and Sections 108 to 112 inclusive provide the law on the subject. There are four ways in which an Indian may become enfranchised and each requires some comment.

Voluntary Enfranchisement

Sub-section (1) of Section 108 provides that if an Indian can meet certain qualifications he can apply for and be granted enfranchisement, together with his wife and minor unmarried children. In practice, to qualify for enfranchisement an Indian must show that he has dissociated himself from life on the reserve, has lived off the reserve for some years, and is capable of supporting himself and his dependents.

Enfranchisement of Indian Women Upon Marriage to non-Indians

Sub-section (2) of Section 108 provides that Indian women who marry non-Indians may be declared enfranchised as of the date of their marriage. This sub-section complements Section 12, which states that an Indian woman who marries a non-Indian is not entitled to be registered as an Indian.

Band Enfranchisement

Section 111 of the Act makes provision for the Indians of a band being enfranchised as a group, provided more than fifty percent of the electors of the band vote in favour of enfranchisement. While a similar provision has been in the Indian Act for many years, until 1957 there was only one instance - in the 1890's - of a band having been enfranchised following application. However, in the past three years two bands, one in Alberta and one in Ontario, applied for and were enfranchised. In the same period the application of a band in British Columbia was not approved following an investigation of the economic and other circumstances of the group.

Compulsory Enfranchisement

Under Section 112 the Department could single out an individual Indian or a band it considers ready for enfranchisement, appoint a committee to investigate the situation, and, if the committee's report is favourable, recommend the enfranchisement of the individual or band to the Governor in Council regardless of the wishes of either the individual or the band. While this section has been in the Indian Act for many years, there has been no instance where the compulsory feature of it has been used.

Section 110

Under Sub-section (2) of this section an individual who is being enfranchised may be allowed to take with him the reserve land of which he was

in lawful possession provided certain conditions are met. The section has never been used chiefly for the reason that the alienation of the land requires the consent of the band council and band councils generally are opposed to the idea of the reserve being broken up by the patenting of the parcels to Indians who may wish to become enfranchised.

The subject of enfranchisement is a controversial one. Foremost among the points of controversy is the subject of compulsory enfranchisement, which is opposed by Indian bands generally and by many non-Indian groups and individuals who are interested in Indian affairs. Today Indians and non-Indians alike share the view that the Indians must eventually assume more responsibility for their affairs, become self-reliant, and less dependent upon the goodwill of the Government for their livelihood. There is general agreement that progress towards this desirable goal can only be attained through the fullest cooperation between the Indians, governments, and persons and organizations interested in their welfare. It is probably accurate to state that nothing has done more to prevent such cooperation than the compulsory enfranchisement feature of the Indian Act. As indicated, the provision has not been used since it first appeared in the Act, nor is there any indication that it is likely to be used. In addition, there exists doubts that it could be applied in its entirety against bands which signed treaty. Considering all the aspects of the matter, there does not seem to be any justification for retaining it today. Rather, in terms of securing cooperation of the Indians in meeting their problems, there is much to be gained by repealing this feature of the Act.

Another point of controversy arises in connection with minor children, It has been suggested that in lieu of enfranchising them with their parents, as the Act now provides, minor children should be allowed to remain in Indian status and band membership until they become twenty-one years of age when they would then have the right to elect whether to take enfranchisement or remain in Indian status. The chief argument put forward in support of this suggestion is that children should not be cut off from their rights and privileges as Indians at the whim of their parents. Arguments in support of the present law are that the parents should have the right to make decisions that they feel are for the benefit of their children, that it is in the interests of a child growing up and being educated with non-Indians to have the same status as the other children, and finally, that if a child who is educated off a reserve in a non-Indian community is permitted to return to the reserve where the opportunities of earning a living are limited, it is not fair to the children who were brought up on the reserve and through lack of experience may have to look upon reserve resources for a living rather than to outside job opportunities.

Apart from the foregoing, there are certain inconsistencies in the Act concerning the enfranchisement of minor children. It will be noted that under Sub-section (1) of Section 108 minor children must be enfranchised with their parents, whereas under Sub-section (2) if the minors are children of Indian women who marry non-Indians, the Governor in Council has a discretion concerning their enfranchisement. This discretionary feature was introduced in the Act in 1956 to meet the problem that many of these children were illegitimate and were being brought up by relatives or friends on reserves. In practice, the circumstances of each child are ascertained before the mother is enfranchised following her marriage and it is only

where she has the children with her and is caring for them that they are enfranchised. In all other cases enfranchisement action is withheld indefinitely, although an annual check is made to ascertain whether the circumstances of the child have changed. The 1956 amendment has worked fairly satisfactorily. However, it is suggested that a similar amendment should be made to Sub-section (1) to cover those cases where for various reasons a couple may not be bringing up all their children. Although such cases are not numerous, there have been instances where it was necessary to refuse the enfranchisement of a well qualified Indian on the grounds that enfranchisement would adversely affect the situation of a child who was being brought up by someone else on the reserve. It would be a simple matter to amend Sub-section (1) of the Act to provide a discretion similar to that now contained in Sub-section (2).

Another point worthy of comment, although it is not a controversial one, is whether for purposes of enfranchisement under the Act, minors should be considered as persons under eighteen rather than under twenty-one years of age. Between the ages of eighteen and twenty-one an Indian child may be separated from his family and be self-supporting. In such cases it would seem unfair that an application for enfranchisement from the father should affect the child unless he or she consents to join in the application.

Still another point of controversy involves the payment of band funds to Indians who become enfranchised. Some bands while not opposed to the idea of enfranchisement, are very much opposed to the statutory requirement that upon enfranchisement an Indian is entitled to be paid his per capita share of band funds. Statements have also been made that providing for the payment of such a share is tantamount to bribing the Indians to become enfranchised. Paying an Indian his share of band funds has been in the Act since the early days. In fact, at one stage there was a further provision for the Indian being paid a fair share of the value of the common land of the band, although this principle was subsequently dropped. The argument in favour of the present law is presumably that as a member of a band the Indian has a share in the band assets and should be able to realize on that share. It could also be suggested that by applying to give up his membership he is waiving his interest in the land of the band and that under such circumstances his share of band funds is small in relation to the rights he is giving up. Those persons who oppose the idea of the Indian receiving a share of band funds overlook the fact that in the long run it may be far cheaper for a band to pay an enfranchised Indian his per capita share rather than leave the door open for him to return to the reserve and look to the band for future support at a later date.

There is little evidence to support the statement that payment of a share of band funds is tantamount to bribery. In some few instances of wealthy bands the share payable to enfranchised Indians is high enough to perhaps entice a few Indians to become enfranchised who otherwise would not take that action. However, in most cases the amounts payable are not large and in a good many cases are only a few dollars. There would be some merit to the charge if Indians living on reserves could become enfranchised on the spur of the moment. However, such is not the case as to qualify for enfranchisement an Indian must show that he has been resident off his reserve for some years and has been self-supporting during such time. The majority of the Indians who apply for enfranchisement have been living off reserves

for years. In fact, many have never lived on reserves.

Under the existing law a person who has been enfranchised cannot regain Indian status or band membership unless being a woman she subsequently marries an Indian. There have been suggestions that the law is too strict and that it should provide for Indians returning to reserves if they encounter difficulties in making a living off reserves or encounter circumstances, such as a woman being deserted by her non-Indian husband, that might make it reasonable for them to wish to return to the reserve. It has also been suggested that an Indian should be allowed to regain membership if he pays back the share of band funds he received on enfranchisement. Another suggestion is that there should be a delay of some years between the approval of an application and the fianl enfranchisement order. If there is much demand among enfranchised Indians to return to the reserve, that fact has not come to the attention of the Department. Whether the present Act is too severe or not there remains the fact that Indians today know that enfranchisement is an irrevocable step. Under the circumstances it seems safe to assume that the majority who do apply have given the matter serious consideration. This would not be the situation if enfranchisement was something an Indian could "try on for size" and change his mind if he did not like it. If the law permitted such trial period, then it can be assumed that there would be many more applications than there are today and that many of them would be made solely with the thought of securing a share of band funds, thus giving some substance to the claim that the Government is bribing the Indians to be enfranchised. Actually, while former Indians are not encouraged to return to reserves, there is nothing to prevent them from taking up residence there at least on a temporary basis, provided the council of the band gives permission.

There has also been criticism of the qualifications for enfranchisement set out in the Act. It has even been suggested that enfranchisement should be a right which any Indian can exercise at his discretion. Whatever the merits of this suggestion it would not seem desirable at this stage in the development of the Indians to drop the statutory requirements and make enfranchisement open to any Indian on his own decision.

Finally, since the federal vote has been given to all the Indians without qualification, the term enfranchisement is a misleading one, for the ordinary dictionary meaning of the word is "to secure the franchise". To clarify the matter in the minds of the Indians the word "enfranchisement" should be dropped from the Act and replaced by a phrase, such as, "surrender of Indian status and rights" or one with a similar meaning.

SCHOOLS - SECTIONS 113 - 122

While the education of Indian children has been a federal responsibility since Confederation, as provided by Sub-section (3) of Section 4 of the Act, this responsibility does not extend to Indians who do not ordinarily reside on reserves or on Crown lands.

Sections 113 to 122 inclusive provide the authorities and set out the principles governing this phase of the Indian Administration, and embody the following main principles; that the federal government can either undertake the work of educating Indian children - operating schools, etc., or by agreement arrange to have their education assumed by provincial governments, local school boards, religious organizations, etc., (Section 113); that regulations may be made pertaining to all phases of the education programme, that transportation of children to and from schools may be provided and that arrangements may be made for the maintenance of children being educated in schools operated by religious organizations (Section 114); that subject to the exceptions listed in Section 116 all children between seven and sixteen years of age shall attend school and that in the Minister's discretion this age group may be expanded to six to eighteen years (Section 115); that unless the parents consent Protestant children shall not be sent to a school conducted under Roman Catholic auspices or vice versa (Section 117); that action may be taken to enforce school attendance (Section 118); that where the majority of a band are of one religious faith the school on a reserve shall be taught by a teacher of that faith (Sub-section (1), Section 120); that where the majority of the members are not of the same religious denomination, the band may by a majority vote decide that the school shall be taught by a teacher belonging to a particular religious denomination (Sub-section (2), Section 120); that a Protestant or Roman Catholic minority of any band may with the approval of the Minister have a separate school or separate classroom on a reserve (Section 121).

Experience has shown that Sections 113 to 122 do not provide sufficient authority to meet some of the current problems. In the first place, the wording of the Act restricts the provision of education to children between the ages of six and eighteen. In short, there is no statutory authority for the operation of kindergartens for children under the age of six or for sending Indian children to Universities, Business Colleges, etc., beyond the age of eighteen years. Furthermore, there is no authority to enter into agreements with any organization for adult education programmes.

In addition, the wording of paragraph (d) of Sub-section (1) of Section 113 restricts agreements to public or separate school boards, thus excluding highschool boards, business colleges, technical schools, etc.

It is suggested that these discrepancies in the Act arose through oversight rather than through any intention to restrict the educational programme and that the resulting difficulties should be met by suitable amendments to the Act.