AN ANALYSIS OF PROPOSED AMENDMENTS TO THE INDIAN ACT

prepared for:
The Assembly of First Nations

October 10, 1984

Melody Morrison &
Stephen Walsh
2-196 James Street
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Peter Manywounds
Deputy to the National Chief
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222 Queen Street, Suite 500
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Dear Peter:

Re: Draft Revision of Bill C-47

Further to your instructions of September 19, 1984, we have reviewed the AFN draft revisions to Bill C-47, entitled An Act To Amend the Indian Act, and have prepared the enclosed analysis.

Attached is an invoice for services rendered. Should you be interested in discussing further the matters addressed in our report, we would be pleased to do so at your convenience.

We very much enjoyed addressing the issues raised by the "C-47" process, and would like to thank you for providing us the opportunity to do so.

If you feel we may be able to provide similar assistance in the future, please do not hesitate to contact us.

Sincerely,

Melody Morrison
Melody Morrison

Steve Walsh per MM
Stephen Walsh

A. GENERAL COMMENTS

Following are a number of general comments, observations, considerations and assumptions related to the removal of the discriminatory provisions of the Indian Act. Cumulatively they provide the backdrop against which our analysis and recommendations are made.

1. The Need For a Strategy

On April 17, 1985, s.15 of the Charter comes into force and there is a consensus that this will expose the discriminatory provisions of the Indian Act to a successful legal challenge. The previous Liberal government did not want to face the uncertainty resulting from a judicial ruling that the provisions were discriminatory. Rather, their preferred strategy was to remove the offending clauses and replace them with provisions for reinstatement prior to the April 17 deadline. Recent indications are that the new federal government will adhere to the same strategy, at least to the extent of removing the discriminatory provisions. In this respect it is assumed that the new government will be assisted by the same all-party support which existed a few months ago.

With less than seven months to go until the April cut-off date, and much less than that when other factors are taken into account, it is essential that the AFN develop and quickly implement a strategy so as to ensure that the fundamental principles it espouses are reflected in any new legislation.

2. The First Minister's Conference

One of the "other factors" referred to above is the upcoming First Minister's Conference on Aboriginal Rights. We assume that the AFN does not wish to see a replay of last year's conference where the agenda was almost entirely circumvent as a result of the continuing focus on the equality issue.

In tactical terms the equality issue is tailor-made for the Provinces. They h no difficulty supporting the concept, thus appearing to be progressive-minded; it

costs them nothing since s.15 will wipe away the discriminatory provisions anyway. At the same time this issue has had a publicly divisive effect on the Aboriginal groups at the conference table and, in particular, has made the AFN appear intransigent and reactionary.

To avoid a replay this year it's essential that an active game-plan be implemented (benign neglect not being an attractive strategy) and include careful consideration and planning with regard to the things AFN hopes to accomplish at the upcoming First Minister's Conference. More specifically, the plans should reflect the place (if any) that the equality issue will have at the Conference. Should it be decided that the conference agenda should focus on other issues, then that suggests that many of the outstanding matters will have to be satisfactorily resolved in advance of the conference, thus shortening the time available.

3. The Tory Version of C-47

Since C-47 died on the Order Paper, the Tory government will have to prepare new draft legislation. From an AFN perspective, this is both good and bad; it's good, obviously, because it provides a fresh opportunity to achieve the basic objectives AFN has established. The down-side in our view, however, is that although David Crombie is seen as being a progressive man, the Tory government as a whole is committed to cost-cutting and holding the line on expenditures.

During the time that will have elapsed between the election call and serious discussions on this issue with the new government there will have been adequate opportunity to reflect on the problems of re-instatement, particularly on the potential public costs involved. Should the government's scheme for reinstatement come under too much fire (e.g. from AFN, NWAC, NCC) it may be that they would feel that they could safely decide to remove the discriminatory provisions without

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providing for reinstatement. Their rationale for so doing, if it came down to it, would be twofold; first, they are under no legal obligation whatsoever to reinstate anyone; and, second, given the multi-million dollar costs of any reinstatement scheme, it would be foolish to proceed when the affected groups do not support the proposals.

To our minds the foregoing emphasizes the need for a strong and detailed agreement between the AFN and NWAC as to what type of reinstatement scheme should be adopted. It's likely that both groups will oppose the initial Tory plans. If, however, this opposition is based on mutually exclusive, or contradictory ground the prospects of the aforementioned scenario becoming reality are substantially increased. On the other hand, should AFN and NWAC (and NCC if possible) have a single counter-proposal then the political effect would be to remove the government escape route.

4. An AFN-NWAC Common Front

For purely tactical reasons, as mentioned in part above, we are encouraged to note the emergence of an AFN-NWAC alliance on the equality/reinstatement issue. In our view such a coalition is mandatory if both groups wish to enjoy real prospects of achieving their most fundamental objectives. Indeed, to put it in overly simplistic terms, we believe that the prospects of success are proportionately tied to the strength of the alliance. For this reason alone we are somewhat concerned, from a tactical perspective, about the apparent divergence of views between the "Edmonton AFN/NWAC Accord" and the AFN in-house draft amendments. Unless and until the AFN and NWAC are of the same mind as to what the position is, there will remain the distinct possibility of an "11th hour" fallout and subseqyent resumptionof hostilities; this in our view could do irreparable

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damage to your prospects for success and, as discussed earlier, also threaten the plans for the First Minister's Conference.

5. The Merits of Preparing Draft Legislation

Generally speaking it is our view that the preparation of draft legislation is an extremely useful approach to take, the main advantages being as follows:

(i) It clearly establishes the position being taken by the organization and, when cast in a legislative format, allows for an easy comparison with the government's proposed legislation. One result of such comparison is that the contentious issues are clearly highlighted, and another being that it becomes easier to weigh the relative propriety of the competing positions.

(ii) Similarly, when cast in a legislative format the position becomes a ready alternative to the government's proposed legislation, not only in eyes of the legislators, but also to those others whose views on such matters are important.

(iii) The AFN draft legislation, when finalized, represents the definitive AFN position on the various issues. As such it can be used to help ensure that various AFN spokesmen are saying the same things on the same issues.

(iv) Should NWAC agree with and support the AFN draft legislation then the arguments made in the preceding paragraph would also apply with respect to maintaining uniformity between the public statements made by the two groups.

Notwithstanding the foregoing, the AFN should give careful consideration to just how far they wish to go with their draft legislation, i.e. is it only to be used for in-house purposes, or, will it be released publicly and submitted to government as the official AFN position? We raise this only because there has been a growing trend in Canadian courts, especially since the mid-70's, to judicially consider wider classes of extrinsic evidence when interpreting statues. This has meant that the statements made by a given Minister before a Standing Committee are now admissable as evidence and, therefore, so too are the formal positions tabled by the AFN.

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Given the many advantages of going public with draft legislation, the foregoing might be taken not so much as a caution against so doing, but rather as a recommendation that the contents of the draft be carefully reviewed to ensure that you are not boxing youself in down the road. For example, as is discussed in more detail later, the present draft incorporates large tracts of Bill C-52, the Self-Government Bill, and we wonder whether this may be later construed as an endorsement of that particular piece of legislation?

In conclusion, after considering the pro's and con's we are in the end convinced that once a final draft has been prepared (and it's felt that it will receive the membership's support) it should be publicly released.

B. REINSTATEMENT

1. Introduction

It is evident from a reading of Bill C-47, as well as the statements made by the Minister upon its introduction, that the government had accepted the principle of reinstatement; C-47 had it been enacted would have provided for both the removal of the discriminatory provisions of the Indian Act, and for the reinstatement of many who had lost their status through the application of those provisions. For the Assembly of First Nations and, especially, the Native Women's Association of Canada this principle is fundamental and the organizations have jointly called for the reinstatement of all who have lost, or never had, status as a result of the discriminatory provisions.

Keeping these facts in mind we approached an analysis of the reinstatement provisions contained in the AFN draft amendments to the Act under the following headings:

(i) the new lists scheme

(ii) the generational cut-off

(iii) s.109

(iv) immunity

(v) land/money considerations

(vi) who's in (s.11) - who's out (s.12)

2. The New Lists

Central to the AFN scheme for reinstatement is the establishment of three lists - the Active Band List, the General Band List and the General List - on one of which the name of every status Indian person will be registered. Our views and observations on this aspect of the draft amendments are as follows:

(i) The addition of the "General Band List" is an appropriate, effective

mechanism for planning and regulating, the changes that will inevitably wrought at the Band level by reinstatement. In the absence of such a buffer the social and economic disruption that would follow wholesale reinstatement would, in all likelihood, rapidly escalate to unmanageable, extremely serious levels and continue for many years to come.

We view the General Band List as the planning tool that will be employed to avoid the realization of such scenarios.

(ii) In some of the background material we were provided, it is suggested that being on the General Band list does not confer membership in the Band. This squarely contradicts the definition of "member of a Band" on page 1 of the draft amendments; there a Band member is defined as a person whose name appears on either the active or general Band lists. Moreover, the first "note" on page 2 of the amendments suggests that there is a consensus between AFN and NWAC "...that being on the General Band List does confer membership, although certain rights, i.e. residency and voting, are denied".

We are not so much concerned, at this point, whether being on the General Band List confers or doesn't confer membership. Similarly, the question as to whether it should isn't at issue here, although it is addressed later. What is important are the big problems which may flow from the dichotomy between defining a "general Band member" as a "member of the Band", and then systematically ensuring that such a person cannot exercise or enjoy any of the rights flowing from such membership.

The rights denied to general Band members, pursuant to the AFN draft amendments, are not merely limited to residency and voting as was suggested above. Rather, the list of denied rights appears to be exhaustive. This analysis is based on our view of the implications of the great many proposed amendments which consist solely

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of the addition of the word "active" to modify the word "member".

The very real problems that this may create are; first, that to create two such disparate classes of membership may very well be an infringement of s.15 of the Charter; second, whether or not it's actually in breach of the Charter the Feds will likely argue that it is, and thereby refuse to agree to AFN's proposed amendments (such an argument has considerable superficial appeal); and, third, it appears to be in breach of the understanding reached with the NWAC.

Although there is more said on various aspects of this problem later, the two competing solutions to the issue at hand are either to modify the AFN draft so that being on the General Band List clearly doesn't confer membership, or alternatively, modify the amendments so that the general Band members are not guarantee to be denied all membership rights.

For reasons discussed later we prefer the latter option.

(iii) Section 11.1(3) at the top of page 5 of the proposed AFN amendments is apparently in conflict with later provisions found in sections 14 and 15.1. These latter provisions establish that a person will not be admitted to the Active Band List until certain conditions have been met. They conflict with the former provision in that it establishes that persons shall be entered on the Active Band List, without condition, two years after those persons names were entered on the General Band List.

If the conditions contained in ss.14 and 15.1 are retained then ss 11.1(2) and (3) should be redrafted to make it clear that the shift from the general to the active list is subject to compliance with terms of the later sections.

3. The Generational Cut Off

As already mentioned, we have assumed that AFN's fundamental objective is the reinstatement of all generations who have either lost, or never had, recognition

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of their Indian status as a result of the application of the discriminatry provisions of the Indian Act. In reading the draft AFN amendments we have come to the conclusion that the proposed wording doesn't meet this objective. Indeed, it appears to us that the AFN draft is more restrictive in this respect than is Bill C-47.

The AFN drafters rejected s.11(4) of C-47 because it would limit reinstatement to only certain classes of grandchildren. Given the deletion of s.11(4) it then becomes necessary to also drop s.11(3),(found both in C-47 and on page 4 of the AFN draft) because this section requires s.11(4) in order for it to have any relevance, otherwise it only serves to confuse. With these sections gone (or, for that matter, even if you keep s.11(3)) none of the clauses allow for reinstatement of anyone beyond the first generation.

The problem could be remedied in our view simply by changing the opening words of the presently redundant s.11.3 to read something along the lines of "...Subject to sections 11.1 and 12, a person is entitled to be registered if that person;"

All of the foregoing is premised on the assumption that the blank space in the present s.11(3) was intended to include a reference to s.11(4), as it did in the C-47 version.

A final comment on the "generational cut-off" issue is that it seems to us that it may in all likelihood be constitutionally impossible to reinstate only certain generations. To attempt to restrict reinstatement in this manner would appear to be prima facie discrimination and thus contrary to s.15 of the Charter. Therefore, either everyone gets back in, or no one does.

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In tactical terms, this suggests to us that the question of who gets back in should not be broached until after the government has publicly committed itself to the concept of reinstatement (the Tories haven't done this yet). Once the Tories have done this, and the AFN has subsequently taken whatever steps necessary, if any, to ensure that the commitment is abundantly clear, then the issue of "who gets in" can be more effectively discussed: It is politically difficult to wriggle out of commitments concerning fundamental principles simply because it may cost more than had been, initially calculated. Conversly, it's a more difficult commitment to get when the real potential costs are appreciated.

4. Section 109, The Voluntary Enfranchisement Issue

We have considered the question raised by the drafters in the "note" on page 3 of the draft amendments; that being whether people who ostensibly enfranchised themselves voluntarily pursuant to the terms of s.109 but, in fact, did so under duress should be entitled to reinstatement?

We aren't sure how many people such a provision would speak to, but as a matter principle we would think that its probably a good idea to provide for the reinstatement of people whose enfranchisement was truly the result of duress, mistake of fact, undue influence etc.

Assuming that it is decided that such persons should be offered an opportunity to gain reinstatement, the more difficult question is how to make amendments that will achieve this, without rewriting vast segments of the Act. In sections 5 to 9 of the Act there already exists mechanisms whereby an individual can appeal the deletion of his name from the lists. Arguably this might embrace an appeal made on the grounds that the deletion resulted from an enfranchisement vitiated by duress, mistake, etc. The problem with this solution is that there is a prescribed

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limitation period within which such appeals must be lodged, otherwise no appeal is possible. Although we are not certain, it would appear that this limitation period expired years ago in respect of the class of persons we are currently discussing.

Perhaps the best solution, albeit a partial one, would be to add a new subsection, numbered as s.11(1)(e), which reads something along the lines of the following:

> (e) notwithstanding any other provision of this Act, that person enfranchised pursuant to s.109 and can demonstrate, on the balance of probabilities that such enfranchisement was vitiated by duress, mistake of fact or undue influence.

The "notwithstanding" phrase is probably required to shield this provision from both the limitations provision referred to earlier, as well as to the "immunity" provisions discussed in the next part.

We referred to the foregoing as a partial solution because it leaves hanging the question as to whom theperson would be required to demonstrate the vitiating circumstances; some administrative panel, a Band, the courts? We aren't at all sure of the course to advise.

5. Immunity

With regards to the proposed s.11.2 found on page 5, it is understandable why the AFN drafters have altered the C-47 wording so as to exclude "...Her Majesty in right of Canada" and "the Minister" from the legal immunity provided by this section. The rationale, we assume goes something like this: The government is responsible for the discriminatory flaws in Act and should not, therefore, be immune from their consequences.

Notwithstanding the inherent logic in this view, the fact remains that government would never agree. The clause might, nonetheless, be retained as

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a "throw-away", something to give up in exchange for something else. Even in this respect, however, we question its value, if only because it is so blatently unacceptable.

If the AFN has decided for some reason that the government must be exposed to legal liability, then the best course in our view would be to drop the clause entirely. At least this way the Feds aren't conspicuous by their absence, although new problems would surface in the shape of potential liability on the part of Bands.

6. Land/Money Considerations

Given that reinstatement will inexorably result in larger numbers of people on the active Band lists (substantially larger numbers in some cases) the needs of the Bands in terms of land and financial resources should be expected to increase correspondingly.

When Bill C-47 was introduced last June the government made a commitment to provide additional funds required to implement the proposed amendments to the Act. As well, the Minister outlined various principles to guide the development of funding criteria. These proposals, general and vague in nature, did not represent any guarantee that sufficient resources would be made available to the Bands. For example, see the June 18th government news release entitled "Minister Introduces Legislation to Eliminate Discrimination" which, in part, reads as follows:

> It is recognized that the actual distribution of available funds will have to be equitable and take into consideration the demographic characteristics of reinstated Indians, as well as varying social, economic and geographic conditions across the country. The federal government will be consulting Indian leaders and representatives; of native women and non-status Indians on the detailed funding criteria and procedures.

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Having made the foregoing commitments, the government attempted to pass C-47 in the absence of any agreement as to what the real costs would be, much less who would pick up the tab.

The AFN, in its draft amendments, has attempted to address this issue through provisions which would guarantee the acquisition of the additional resources, both land and money, which would be required in the post-reinstatement era. These are set out in sections 15.1 and 18 of the amendments.

It is our opinion, for reasons discussed more fully in the following section on "Band Jurisdiction", that the objective of achieving the guarantees required may not have been achieved in the draft provisions, and other possibilities should be considered.

At this point, however, it is worth noting that the Tory government has declared that cost-cutting is one of its major objectives and, in light of this, it may be more than a little difficult to achieve the types of guarantees being sought in the draft amendments. A possible compromise alternative would be to include a provision in the new legislation whereby the government commits itself to negotiate a fixed per capita sum to be paid for every person admitted to the Active Band lists, and that until such sum is agreed to there will be no transitions from the general to the active lists.

7. Who's in/Who's out

Most of the issues which could have been raised under this heading have already addressed elsewhere (e.g. generational cut-off, voluntary enfranchisement) but there remains one rather thorny problem; that being the problem raised in the first "note" on page 6 concerning whether white women could keep the status they acquired through marriage. Subsection 12(1)(c) at the top of page 6, if enacted,

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would create a situation whereby such women would lose their status if they became separated, divorced or widowed. If they stayed married they would keep it.

It is difficult not to share the view of the AFN/NWAC people who assert that it was wrong in the first place to allow these individuals to acquire status, especially when viewed against the backdrop of Indian women losing theirs. Moreover there is a lot to be said in favour of the 12(1)(c) proposal because status would be lost in the same way it was originally attained (gained through marriage, lost through the dissolution of that marriage).

As the drafters pointed out, the other side of the argument is that there exists the distinct possibility that such an amendment could not survive a challenge based on s.15 of the Charter since it appears to clearly discriminate based on marital status.

Another argument against 12(1)(c) is that the fundamental purpose of amending the Act is to reinstate status, not to take it away and, therefore, this provision runs contrary to the spirit of the process.

It may be politically wiser to live with the results of not having such a provision particularly in view of the fact that there will be no new cases of people gaining status through marriage inthe future; the women who now enjoy it as a result of marriage can't transmit it to anyone; and, natural attrition will gradually but inevitably make this class of Indian extinct. To retain the provision will certainly attract Charter challenges (in the event that the Feds decided to enact it - an unlikely proposition in our view) and protest from human rights groups, groups whose support you may like to have on issues more important than this.

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C. BAND JURISDICTION

1. Introduction

At the outset of this section we feel it appropriate to make two comments: First, we take the view that the matter of Band jurisdiction is one of the two fundamental topics raised by the amendment process, the other being the reinstatement issue discussed above; and, second, that underlying our analysis, conclusions and recommendations there is the assumption that Band or First Nation jurisdiction is essential and ought to be maximized to the extent possible in the circumstances.

In the following paragraphs we address the proposed provisions respecting Band jurisdiction. Thereafter, we discuss a number of ancillary issues, such as the "buy-in" and "land acquisition" provision set out in the AFN draft amendments.

2. Band Control Over Membership

The appropriate starting point here is to discuss the two alternate options for Band control over membership as set out in pages 16 to 21 of the AFN draft. The first option is simple and straightforward providing, in essence, that the Band may make membership by-laws so long as certain criteria are met. The criteria include (a) conformity with the Charter and International Human Rights Conventions; (b) the support of the Band's membership for the by-law, demonstrated in a vote; and (c) the inclusion within the by-law of an independent appeal mechanism. Additionally, this option also sets out the necessary contents of a Band membership code (by-law?) which includes membership criteria, membership rights and benefits, rights and benefits of non-members, institutions of membership. and, an independant appeal process.

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In our view, as is discussed in more detail below, we prefer this option as against the one that follows.

The second option, as the drafters indicate, is much more detailed and is "borrowed" from Bill C-52 the Self-Government Bill. (The first option is also borrowed from C-52 and, as one can see on page 17, is contained within the second option.)

In essence the second option speaks to three broad issues which in simple terms may be described as follows:

(i) How to get jurisdiction over membership

(ii) What that jurisdiction will consist of; and

(iii) The structure, role and other ancillary details respecting the "Panel", presumably the Recognition Panel from C-52.

With respect to the matter of acquisition of jurisdiction over membership, this option sets out in detail the hoops through which a Band must jump in order to secure the competence to enact membership by-laws. In addition to meeting the basic criteria which is common to both options, this option sets out the order in which the Band must do things, who they have to make their applications to, and when.

Regarding the nature of the jurisdiction, this option is the same as the first in that so long as the various criteria are met the Band has jurisdiction to enact by-laws concerning membership. In both cases, with one exception, the Bands have a free hand to design and enact their respective membership laws. The exception is that the second option provides for the manner in which amendments to Band membership by-laws shall be made, whereas the first option is silent on this matter. Presumably amendments under the first option would be made pursuant to the present terms of s.82 of the Indian Act, that is they would come into force after 40 days,

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if during that period they hadn't been disallowed by the Minister.

The third aspect of the second option is the "Panel". The panel is the recognition panel which would have been created through Bill C-52. It is resurrected here to deal with Band membership matters and, because one cannot merely refer to the role of a body that doesn't presently exist, there are a number of sections devoted to explaining what the Panel is, how it will be structured, how it will operate, renumeration for its members, its headquarters, its relationship with the Minister, etc.

Regarding the actual powers of the Panel we are of the view that they are no more and no less than those currently exercised by the Minister in respect of Band by-laws. That is to say that, in essence, the panel has been delegated the power currently wielded by the Minister.

As stated earlier we prefer for a variety of reasons the first option over the second. In the first option the Band's jurisdiction over membership is confirmed immediately, in the second option the Band has to jump through a number of hoops (successfully) before its jurisdiction will be recognized by government (see s.81.3) While the Bands would have to be able to demonstrate the same things in both options (e.g. compliance with the Charter, etc.) in the second option the Band's jurisdiction won't be recognized until it has done this, whereas in the first, a failure in this respect would only mean that the by-law (not the jurisdiction) would not be recognized.

Although it may at first glance appear otherwise, we are of the opinion that the practical effect of this distinction is of some importance. Consider, for example, what would take place shortly after reinstatement occurs. Hypothetically,

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if C-47, as it stands now, was amended to include the second option, the situation would be one wherein literally hundreds of Bands would be rushing to prepare membership codes and by-laws which conform to the criteria in this option. They would then be submitting them to the Panel to achieve two ends; (a) to secure recognition of their jurisdiction over membership; and (b) to bring their membership laws into force. With hundreds of such applications coming in it would be months and perhaps years before they could all be processed. The Panel, of course, would want to review each of them in detail and, as well, they would be submitted to Justice for an opinion regarding, amongst other things, whether they conform with the Charter. One application would take a long time, relatively speaking and, therefore, one can only speculate how long it may take to process a few hundred.

If on the other hand the same hypothetical situation is envisaged, but this time C-47 has been amended to include the first option, then the results are somewhat different. As of the moment C-47 came into force the Band would have jurisdiction. In order to exercise this jurisdiction it would have to adopt a membership by-law code, as is also the case in the second option. However, after the by-law has been prepared, passed by the Chief and Council and submitted to the Minister it becomes law in forty days unless it is disallowed pursuant to s.82.

It can, of course, be correctly argued that the Miniter can simply disallow all of the by-laws as they enter his office, thereby providing his officials with adequate time to review them. The counter to this, however, would be that it may be very difficult, politically speaking, to defend all of these rejections so soon after having legislatively recognized the Bands' authority to make such laws.

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Another factor in favour of the first option is its relative simplicity. It's straightforward, easy to understand, and to the average person it would appear to be fair. All of this could become important both in selling and defending the concept of Band jurisdiction. The second option, while not overly complicated per se, simply doesn't have these qualities, to the same extent as the first.

The simplicity of the first option is also preferable in another sense, that being that it helps to keep the issues down to a manageable level. In our view the second option may dangerously and unnecessarily widen the grounds that the AFN is fighting on. The mere introduction of the panel, for example, could become an issue. So, too, could the Panel's role, make-up, relationship with the Minister, the Panel Chairman's role, etc. Consider, as well, something like the proposed s.81.12 which says that the Statutory Instruments Act won't apply to Band membership codes and amendments. This could be an issue, as could many other provisions contained in the second option.

The AFN and the Bands have a lot riding on the line on this issue and, as was mentioned at the beginning of this report, time is a very large factor here. Given this state of affairs, it would be adviseable to try to keep the contentious issues to the absolute minimum; at this point there's no percentage in joining battle over non-essential matters.

Another important aspect of the same point is that it may not be in the AFN's interests to mix issues. While we clearly appreciate that the reinstatement debate by its very nature is, in large part, a self-government issue, we would submit this to adopt the second option may have the effect of prejudicing the AFN's positions

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on self-government at some point in the future. To adopt the second option (which is clearly an extract from C-52), is to suggest by inference an acceptance of the contents of Bill C-52. Assuming that the main debates on Indian self-government will occur in some other context, it seems to us that to signal an acceptance of C-52 at this point in time is premature. For this reason we would also suggest that the wording in the first option, if its adopted, be modified such that it's not easily recognizeable as an extract from C-52.

Although it is our opinion that for reasons stated above the first option is to be preferred over the second, there are some comments we could make that apply equally to both.

First of all, in both options the words "member" or "members" are never modified by the "Active/General" distinction which is employed everywhere else in the draft amendments. We assume (but are not sure) that this has been done out of a recognition that such distinctions would, in this context, be in breach of the Charter's equality provisions.

Our second comment on the two options stems from a review of the legal opinion we were provided as part of the background material for this assignment. In that opinion, dated July 17, it was held to be important that the Bands somehow find a way to shield themselves from the application of the Charter, otherwise their membership codes may be held to be discriminatory. Both of the AFN options, however, expressly state that the Charter will apply to Band membership by-laws. We are not suggesting that there is anything wrong with this, but it does entail extremely important implications in respect of a variety of issues raised throughout

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this paper and should be kept in mind.

2. "Buy-ins", "Land Acquisition" and Related Provisions"

In this part we address the "buy-in" provision (sec.15.1,pp.8-9), the "land acquisition" provisions (sec 18.1, pp.10-11) and a number of related provisions found in the AFN's draft amendments.

(i) The Buy-In Provisions

As mentioned above in the section on "Reinstatement", we understand the buy-in provisions to represent an attempt to ensure that the Bands will acquire the additional financial resources required as a result of large numbers of people being reinstated. We appreciate and totally agree that the existing funding available to Bands is barely adequate for present purposes and simply cannot be stretched to accommodate large numbers of new members. It is the government who created that status/non-status division in the first place, it is the government who is now attempting to remedy this problem and, therefore, it is the government not the Bands who should cover all of the costs that will be generated by the implementation of their solutions.

Having said this, we are nonetheless of the opinion that the buy-in provisions set out on pages 8 and 9 of the draft amendments are not appropriate for a number of reasons. First of all, as the drafters imply in their "notes", the buy-in provisions may be seen as a substantial intrusion into matters that should properly fall under Band jurisdiction. Indeed, in the Edmonton joint statement, these matters were to be under the "exclusive jurisdiction" of the Bands. If the legislation were to include these provisions there would undoubtebly arise situations wherein a Band could not admit a person it wanted to,simply because the person and/or the government could not (or would not) meet the buy-in

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provisions. If individual Band jurisdiction over matters such as membership is considered to be a fundamental principle, then these provisions should go because they are clearly in breach of this principle.

The buy-in provisions are problematic from another perspective as well. Consider subsections 15.1(1)(a), 15.1(1)(b)(i) and (b)(ii); the cumulative effect of these three paragraphs is that there would have to be 3 payments made in respect of only one person's readmittance to the Active Band List. The individual himself would have to pay back the amount he/she got by way of a s.15 payout upon their enfranchisement. On top of this, by virtue of s.15.1(1)(b)(i) the government would have to pay to the Band an amount equal to one per capita of the trust monies held by the government on behalf of the particular Band. Additionally, pursuant to the terms of s.15.1(1)(b)(ii), the government would also have to pay an amount equal to the amount the person was originally paid out, or, in other words, the same amount that the person himself would have to also pay back pursuant to 15.1(1)(a). Clearly, therefore, it is being suggested by the AFN that 3 payments would have to be made before an individual could be re-admitted. In our opinion, (even setting aside the obvious conflicts with Band jurisdiction) this proposal seems counter productive: We can't envisage any government agreeing with it, and even if they would it is not apparent that it would accomplish what it's designed to do. What about the large number of people (i.e. minor children) who never received pay outs? These aren't addressed. Further, and more important, what about the people who either never received pay outs, or only received nominal amounts, because they came from poor Bands, i.e. the majority of Bands? In this situation, and there should be a great many such

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cases, the person will not have to pay much, if anything, simply because he never received much, if anything, by way of an s.15 pay out. Moreover if his Band is still poor the Government will not be obliged by the terms of these provisions to provide anything. These provisions allow for the re-admittance of a great many people to the Active Band list without providing any of the additional monies required by the Band.

Another problem, a large one, raised by these provisions is to be found by comparing the paragraphs on page 8 with the s.15.1(2) on the top of page 9. In the latter provision the persons to whom it applies require only one payment to be made by the Government on their behalf. Presumably this is because these are people who never received a direct pay out, but there are also such people to whom the previous sections apply. That is to say that, depending which of these two groups one falls under (the group identified on page 8 or the one on page 9) one will require either 3 payments or one payment to get back in notwithstanding that in both cases the person never received a s.15 pay out. This strikes us as being a tough one to defend, both publicly and privately.

In addition to the foregoing problems it can be added that the page 9 "buy-in" clause in no way guarantees that a Band will get the extra money it requires as a result of admitting another member; if you're one of the many poor Bands this clause won't do much for you.

A final observation in respect of the buy-in provisions is that in all likelihood they will be opposed by the NWAC because in a great many cases they may represent a de facto bar to Active Band membership and, therefore, may be viewed as a breach of the joint position.

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To summarize the arguments thus far, the buy-in provisions are, in our opinion, problematic because:

(i) they intrude into areas of Band jurisdiction and may forever preclude the admittance of people the Bands want;

(ii) they make unachievable demands on government;

(iii) they may be unacceptably discriminatory (pg.8 vs. pg.9); and,

(iv) they may not actually work to provide many Bands with the extra money they require.

Our recommendation would, in light of the above, be to withdraw these provisions entirely. Instead we would suggest that the Bands be left with the authority to insist on the repayment of s.15 pay outs if, in the view of the particular Band, such is warranted.

With respect to the larger issue of extra funds required for re-instatement in general, it is our opinion that the better course would be to draft provisions calling for the payment of a flat per capita sum for every person reinstated. Additionally, the AFN might also consider calculating and negotiating a flat "global" sum (i.e. "X" millions of dollars) to be used to plan for the transition to larger Bands.

(ii) <u>The Land Acquisition Provisions</u>

The proposed land acquisition provisions, as set out on pages 10 & 11 of the AFN draft amendments, may raise some problems similar to those identified in the foregoing discussion on the buy-in provisions. That is to say that:

-they impinge on matters which would ostensibly fall under Band jurisdiction; and,

-they may represent demands which are unacceptable to government

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Further, there is a potentially larger problem, that being that unless the provinces agree to these provisions they may not be constitutionally possible to achieve. With the exception of the lands north of 60° all the lands affected by these provisions are located in the provinces and are held by the provincial governments. The federal government has no jurisdiction over these lands and, generally speaking, can't acquire jurisdiction simply by enacting provisions such as are being discussed here. The AFN drafters have attempted to circumvent this problem by including s.18.3 on page 11, which suggests that the new lands could be acquired through recourse to the Expropriation Act.

We have not had enough time to adequately research this proposition; a cursory review, however, suggests to us that the Expropriation Act probably cannot be legally employed to take lands from the provinces in order to increase the size of Indian reserves. The judicial interpretations as to what constitutes a "public work" give no indication that actions such as those contemplated in the draft amendments would be included in the definition. Our recommendation, therefore, would be that the AFN acquire a legal opinion regarding the legal prospects of being able to use the Expropriation Act for the purpose suggested.

Notwithstanding all of the foregoing, we are of the opinion that the acquisition of new land is fundamentally justifiable. If new lands are not acquired then it will be the Indian peoples who will have to bear the costs (in terms of overcrowding and social disruption) that result from the discriminatory practises of the federal government. As in the case of the added financial costs, it should not be the Bands who have to shoulder the burdens generated solely by the decades of discrimination practised by Ottawa.

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Having said this, we have to admit to a lot of uncertainty regarding the best means to acquire the new lands required. For reasons already stated we are not certain that the existing draft amendments will work, and any variations would probably fail for similar reasons. Ultimately, because of the strong position of the provinces it may be that provincial agreement is necessary in order to make any solution viable. The validity of this assessment would, in our view, be subject only to the existence of some means whereby the Canadian government could unilaterally acquire provincial lands for the purpose of new reserve lands. This is an issue which we do not feel competent to comment on.

(iii) Related Provisions

There are a great many provisions in the draft amendments, perhaps the bulk of the amendments, which differ from the existing provisions of the Indian Act only insofar as the word "active" has been added to modify the word "member". Although we stand to be corrected, it would appear that what has occurred is that the drafters have gone through the Act and, whereever the word "member" has appeared, have added the word "active". The obvious objective in so doing is to make clear the distinctions between the respective rights of "general Band members" and "active Band members" in the post-reinstatement era.

From the perspective of increased Band jurisdiction everyone of these proposed amendments could be challenged on the grounds that they would clearly operate to restrict the Bands' ability to define membership rights. As such, it appears to us that they would also be in conflict with the terms of the AFN/NWAC accord reached in Edmonton, which in paragraph 7 reads as follows:

> The management of residency rights of Indian people on Indian lands is the exclusive jurisdiction of each First Nation. The determination of any privileges of residence on Indian land for all non-members is the exclusive jurisdiction of each First Nation.

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Further, the closing sentence of that document states that, "In making these amendments Parliament must recognize that the jurisdiction to determine Indian status is the right and prerogative of each First Nation."

If the jurisdiction of the individual First Nations is seen as a guiding principle, it becomes difficult, sometimes impossible, to reconcile this with the terms of the proposed amendments. Consider, for example, the new section 64 proposed on pages 12 and 13. The only changes here are that the word "active" has been added to modify the word "member". The result of this change is to severly restrict the individual Band's ability to spend its money as it sees fit. We have no opinion as to whether, ultimately, this is good or bad per se. Rather we are merely concerned to emphasize the degree to which provisions such as this reduce Band jurisdiction.

Another example which could be considered is the proposed amendment to section 77, found on page 14. Here voting rights are addressed, and once again the word "active" has been added so as to make clear that only "active members" can vote for Chiefs and Councillors. Setting aside the question whether this is an infringement on Band jurisdiction, we wonder whether this new section can be attacked as an infringement of the equality provisions of the Charter. Further, it is our view that, in any event, the addition of the word "active" is somewhat gratuitous in the context of s.77 because as the section now reads one must be a member and be "ordinarily resident on the reserve" before one can vote. At least for the time being this would effectively bar so-called "general Band members" from voting since they have not yet acquired the right to reside on the reserve. Further, the "Band Jurisdiction" amendments to s.81 as discussed earlier would, if enacted, give the

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respective Bands the ability to legislate in this respect.

Finally, it may be argued that in light of the above arguments, this class of amendments represents one of those non-essential issues which could become highly contentious and, thereby, widen unnecessarily the grounds upon which the AFN feels compelled to take a stand.

Our recommendation here is that the AFN review all of the amendments which involve the simple insertion of the word "active". Such a review might be most effectively conducted after decisions have been made on two basic issues; the first being how much weight should be attached to achieving increased Band jurisdiction over the various matters raised in the amendments; and, the second being (as was discussed earlier) whether inclusion on the general Band list confers membership in the Band.

D. ENFRANCHISEMENT & PAYOUTS

1. Introduction

Throughout the AFN draft amendments to the Act the drafters repeatedly raise the question as to whether both the enfranchisement (ss 109-113) and "pay-out" (s.15) provisions should be maintained. Although no explicit recommendations are made by the drafters in this respect, it seems to us that their clear preference would be abolish both provisions and, further, that this should be accomplished in the context of this legislation rather than in other legislation at some future date. We would strongly concur.

2. Enfranchisement

As you know, sections 109 to 113 of the Indian Act provide for the enfranchisement of individual Indians, Indian families and entire Indian Bands. It is our view that these provisions, the predecessors of which were enacted in the 19th century, are unjustifiable anachronisms, having no honourable rationale in modern law. As a legal concept the very word "enfranchisement" represents a continuing affront (of monumental proportions) to the social, political and legal goals that Indian people have worked for and, in part, achieved during recent decades. Consider, for example, that in the "Concise Oxford Dictionary" (5th Ed.), enfranchise is defined, in part, as meaning "to set free" or to admit persons "to electoral franchise". In "Black's Law Dictionary (5th Ed.), the word enfranchisement is said to mean:

> "The act of making free (as from slavery); giving a franchise or freedom to; investiture with privileges or capacities of freedom, or municipal or political liberty. Conferring the privilege of voting upon classes of persons who have not previously possessed such."

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In the french version of the Indian Act the title of ss. 109-113 is "Emancipation".

As recently as three decades ago the concept of enfranchisement as defined above had some validity (legal validity, not moral) in respect of the peoples' of the First Nations. Today, however, the application of ss. 109-113 does not emancipate anyone, or provide any rights that are not already exercised by the First Nations. Rather, the modern day effect of these provisions is to disclaim, permanently, one's legal identity as an Indian as well as all the rights, privileges and benefits which are ancillary to such. To allow such actions to continue is one thing, but to label them as "enfranchisement - emancipation" is quite another. To use such terms to describe the act of denying one's birthright is extraordinarily insulting. Although we make other recommendations below, it is appropriate to say here that, at the very least, the terminology used to describe the results of ss.109-113 must be changed.

Notwithstanding the foregoing, we would somewhat relunctantly submit that there is a need to have in the Indian Act provisions whereby one could apply to have one's name removed from the lists of registered Indians if one so desired. (The reasons for this point-of-view are not so much legal as philosophical in nature; if someone sincerely wants to take his/her name off the list, should they not be allowed to do so? Further, do the Bands want to keep people on their Band Lists who would rather disclaim their Indian identify, particularly when after reinstatement there will be many people extremely anxious to be admitted?) To this end we would suggest that the AFN's draft amendments to the Act should contain provisions which repeal ss 17(c) and 109-113* and in their place

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* as a consequence s.17(c) would also have to be repealed

substitutes a new section which provides for not "enfranchisement", but rather the voluntary removal of one's name from the list. For purposes of example the new section might read as follows:

109(1) Subject to subsections (2) and (3), ~~109(1)~~ on the report of the Minister that an Indian, of the full age of nineteen years, has applied to have his name struck from the Indian Register, the Governor in Council may by order direct that the Indian's name be struck from the Indian Register.

(2) An order made pursuant to subsection (1) shall not take effect until ninety days after such order was made.

(3) An Indian who has made an application pursuant to subsection (1) may not revoke such application after it has taken effect pursuant to subsection (2).

All of the foregoing centers on enfranchisement of the individual. There has been no discussion of either the enfranchisement of families or of entire Bands for two reasons, first, with respect to families, both C-47 and the AFN draft amendments would remove the provisions which enfranchise families; and, second, we have assumed that the concept of entire Bands, entire First Nations, enfranchising is both so abhorrent and, in today's terms, so improbable as to not warrant serious discussion on our part.

3. Pay-outs

As mentioned above, the drafters of the proposed AFN amendments to the Act questioned whether "pay-outs" pursuant to s.15 should continue. In their view, there exists two good reasons why the entire pay-out scheme should cease:

> "...It is probably a good idea to do away with pay outs even if enfranchisement is kept. Pay outs have 2 disadvantages: (1) it is an incentive to becoming non-Indian; (2) it is a drain on band capital" (pg. 7, Draft Amendments, 2nd Note)

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Both of the arguments made by the drafters are very compelling in our view. Payouts, like enfranchisement, are vestigal remnants of an era when "assimalationist" policies respecting Indians were openly, vigorously and unashamedly pursued. Like enfranchisement, the section 15 payouts represented a significant inducement to abandon one's Indian status and, as the AFN drafters noted, they continue to play such a role today.

It could perhaps be argued that after the repeal of the discriminatory provisions of the Indian Act, the rate of pay outs will decline dramatically, simply because the only remaining way to lose status will be through the voluntary endranchisement provisions of s.109, or, if that section is repealed as we recommended earlier, through the voluntary removal of one's name from the list. If this were in fact the case, then it might be subsequently argued that pay outs would become a less important issue, with future opposition being based more on symbolic rather than substantive grounds.

To a certain extent the foregoing is true; it's obvious that when the discriminatory provisions are abolished, so too will be the pay-outs that are made pursuant to them. However, in our opinion C-47 as it presently stands spawns the potential, if not probability, of a new generation of payouts.

Under C-47, as we understand it, a person will be admitted to Band membership two years after he/she has applied for reinstatement. Thereafter, there is nothing which would stop that person from becoming voluntarily enfranchised pursuant to s.109 and, thereby, becoming entitled to a pay-out. Assuming for the moment that such a loophole is allowed to exist, then one has to assume that it will be taken advantage of. In our view it is not cynical

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to predict that among those who become eligible for reinstatement there may well be a significant minority who have no affinity for the First Nations they will become entitled to join. Combine this with the previously mentioned loophole, add the prospects of being able to pocket substantial sums of money, and then attempt to devise plausible arguments which suggest that this situation won't be repeatedly exploited.

Clearly the AFN drafters recognized this problem, for on page seven of the AFN draft amendments there are provisions which are designed to reduce the possibility of this sort of thing occurrring. At the same time, however, there is another serious problem which springs up in respect of any attempts to limit pay-outs; that being whether the provisions might be in breach of the equality provisions of the Charter of Rights and Freedoms. For example, consider the proposed 15(2) (c) on the bottom of page seven. Here the drafters have attempted to state that a certain segment of the reinstated individuals will not be eligible for pay-outs until they have lived on the reserve for 10 years. We assume that this is premised on the sound logic that if a person makes it through all the hoops required to get on the reserve in the first place, and then lives there for 10 years, that person is likely to have an affinity for, and be accepted as part of, the First Nation, and therefore, is not a likely candidate for enfranchisement.

We accept this logic, but worry as do the drafters, whether such provisions are in breach of the Charter. Is it not prima facie discriminatory to say that person A has to live on the reserve for 10 years before he is entitled to a pay-out, while person B has no such restriction even though he may have never

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lived on the reserve in his entire life? There are rationales, of course, which could be put forward to justify such unequal treatment, but again the basic question is whether these arguments could stay the application of the Charter. In the absence of any high authority no one can give more than an educated answer to this question and, therefore, in the very least there exists a substantial element of risk should the AFN decide to gamble and proceed with such provisions.

It is our view and, we believe, the view of the AFN drafters, that the better course would be to repeal s.15 and thereby abolish pay-outs. By this simple act a number of very important benefits or advances would be immediately realized:

-there would be no more risks of the type mentioned above,

-people who might pursue band membership only to have a chance at a pay-out would no longer have a reason to do so,

-the biggest remaining inducement to become non-Indian would disappear,

-the drain on band funds as a result of pay-outs would cease,

-if one accepts that pay-outs and enfranchisement are very closely related,then one's arguments to abolish enfranchisement are immediately strengthened; and,

-finally, the heavy burden on the AFN drafters is eased considerably.

4. Possible Problems

We have identified two possible sources of problems regarding our recommendations on the enfranchisement and pay-out issues. They are:

(i) that there are reasons that we are not aware of, whereby First Nations are reluctant to abolish enfranchisement and/or pay-outs; and

(ii) that Canada may take the position that these are issues separate and apart from the purpose of C-47, that being to end discrimination.

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There is not much we can say to the first of these potential problems, other than we hope it doesn't exist. Regarding the second, we would argue that while there may be some merit to that position, it is eclipsed by the negative implications of not dealing with these issues, particularly pay-outs.

E. HOUSEKEEPING ISSUES

Set out below is a list of comments related to relatively minor aspects of the draft amendments such as typo's, missing words, etc. This list isn't exhaustive.

All references are to the section numbers of the Indian Act as opposed to the section numbers of the draft amendments; the page numbers refer to amendments:

General

In many cases there are cross references to other sections which have been left blank; these should be completed, otherwise it's difficult and sometimes impossible to appreciate the full meaning of a given provision.

Pg.1 (1st para.)

-the reference to "subsection 1(1)" should read to 2(1)

-is there a reason why the definition of "child" does not include a reference to "...an Indian child adopted in accordance with Indian custom."

Pg. 4, s.11(3)

-this provision should be tossed out; it's existence was promised in s.11(4) in C-47 which the AFN drafters did not keep. It serves no useful purpose to keep it.

Pg. 4, s 11.1(2)

-the work "in" is apparently missing from the last line of the page, just before the word "accordance".

Pg.5,s.12(a)

-the word is "scrip", not "script".

pg.8, s 15.1(1)

-should be prefaced by adding words such as, "Section 15 of the said Act is further amended by adding thereto, immediately after subsection (5) thereof, the following subsection:"

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Pg.8, s.15.1(1)(a)

-is the last word supposed to be "and" or did you mean "or".

Pg.8, s.15.1

-the word "not" appears to be missing after the word "shall".

Pg. 9, s.15.1(2)

-why is there no reference to s.11(2)(G) people?

Pg.21, last para.

-should read "109(1) to (3)"