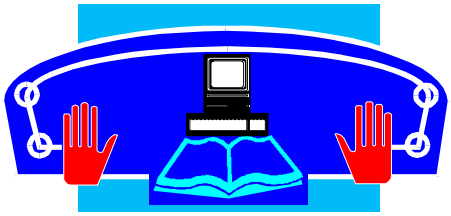

Proposed Amendments To The Indian Act Concerning Condionally Surrendered Land And Band Taxation Powers

Type of Study: Reference Material

Date of Report: 1987

Catalogue Number: 9-5-290

Indian and Northern Affairs Canada
Affaires indiennes et du Nord Canada

Proposed Amendments to the Indian Act Concerning Conditionally Surrendered Land and Band Taxation Powers

Canada

Proposed Amendments to the Indian Act Concerning Conditionally Surrendered Land and Band Taxation Powers

Table of Contents

I am very pleased to provide, through this booklet, further details about proposed amendments to the *Indian Act.*

In 1985 the Kamloops Indian Band, led by Chief Clarence (Manny) Jules, made a proposal to amend the *Indian Act.* Over 115 Band councils passed resolutions of support. Now, two years later, after much consultation and study, that proposal will go before Parliament. These amendments will make important contributions to Indian political and economic self-reliance. They will enable Indian communities to undertake and control development on the reserve without fear of losing the special Indian status of their land. Bands also will be better able to implement taxation if they so choose, which can help to promote development and increase band independence.

Clearly these amendments are consistent with the department's broad goals of practical action on self-government and removal of barriers to jobs and investment to enable economic growth.

The issues behind the amendments are fairly complex. This booklet has been prepared for those who will want a thorough description of the amendments and the rationale underlying them. Comments will be welcomed.

Finally, I want to thank Chief Jules. His contribution has been outstanding and original. He has invested tremendous time and energy in developing a consensus for the first Indian led initiative to amend the *Indian Act.*

The Honorable Bill McKnight
Minister of Indian Affairs
and Northern Development

A. What has happened so far?

Initiative by Kamloops Indian Band

The Kamloops Band in British Columbia first became concerned about the questions of taxation and 'conditionally surrendered land' in the early 1960s when it established an industrial park on a section of the reserve near the city of Kamloops. The cost of developing the land and providing basic services such as roads, water and sewage were and continue to be paid by the band. Yet provincial property taxes have always been levied on the park residents. Park residents were, therefore, put in the position of having to pay service charges for roads, water, sanitation and the like to the band, in addition to property taxes to the province. This situation inhibited the band in setting lease rates, providing services, and generally in competing with other industrial parks.

After many years the band concluded in the early 1980s that it should assert its own powers to levy taxes. In attempting to do so, the band encountered basic deficiencies in the *Indian Act* respecting conditionally surrendered land. Taxation wasn't the only problem. The band was also concerned about its ability to zone and regulate the land it had developed. The band council decided to make a formal request to the Minister of Indian Affairs to amend the *Indian Act* and invited all other bands to join in their petition. Band Council Resolutions began to flow in from across the country, eventually numbering over 115.

Announcement and Consultations

The underlying problem was well known, and getting more and more serious for an increasing number of bands. The expression of broad Indian consensus on a much needed and practical amendment to the *Indian Act* was well received by the government. In the February 1986 Budget Speech the announcement was made that the Minister of Indian Affairs and Northern Development would bring forward amendments to the *Indian Act* to enable bands to levy their own local taxes.

Shortly thereafter, the Honorable David Crombie, together with Chief Clarence Jules of the Kamloops Indian Band, issued a press release and wrote to all chiefs and the provincial governments to explain the Budget announcement further, and to launch a process of consultation. Consultation with Indian leaders was led by Chief Jules, while the Minister and the Department consulted primarily with provincial governments.

A number of themes became clear.

First, band taxing powers are an inevitable part of the growth of Indian government. This seemed to be an idea whose time had come.

Second, the status of conditionally surrendered land should be fully clarified such that no other rights are affected or transferred except as necessary to give effect to the wishes of the band in the surrender process. There should be no accidental loss of band jurisdiction or legal rights under the *Indian* Act.

***Third*, non-Indians on Indian land would be subject to band taxation without having the ability to vote in band elections. Confidence that band taxation would involve appropriate procedures to ensure fairness would be very important.**

Fourth, developing good working arrangements with other governments would be important to bands' success in operating taxation and regulatory regimes.

Fifth, more details would be helpful to everyone.

The remainder of this information booklet is devoted to providing those details and the rationale behind them, so that the required *Indian Act* amendments can be well understood.

B. Why are the amendments needed?

What is surrendered land ?

Under the *Indian Act,* Indian reserves are held by the Crown for the' 'use and benefit" of Indian bands. Bands must "surrender" their rights in reserve land to the federal government before the government can give possession of it, by sale or lease, to non-Indians.

From the first version of the *Indian Act* in 1868 to today, except under certain restricted circumstances, no part of an Indian reserve can be leased or sold on behalf of a band unless it has first been "surrendered."

What is "conditionally" surrendered land?

By 1950, when the last major revision of the *Indian Act* was underway, it was obvious that bands were far more interested in surrendering their land for rent or lease than for sale.

In apparent recognition of this fact, the 1951 version of the *Indian Act* included a new reference to the old concept of surrender. Section 38(2) says, "A surrender may be absolute or qualified, conditional or unconditional. " Nothing more was said as to how a "conditional" surrender should be applied throughout the rest of the Act. The vitally important difference between conditional and unconditional surrender was recognized but not defined. •

Subsequently, the Courts decided that land conditionally surrendered for lease retains a fundamental Indian interest. It remains "land reserved for the Indians" under Section 91(24) of the *Constitution Act* 7867. This means that Parliament has the exclusive power to pass laws affecting such land. Provincial laws or by-laws of municipalities which are land-related cannot be enforced on conditionally surrendered land, even against non-Indian leaseholders. Property taxation is an exception to this general rule for certain reasons discussed below.

What is the problem with conditionally surrendered land ?

Conditionally surrendered land is "land reserved for the Indians" under the Constitution. But does it fall under the provisions of the *Indian Act* pertaining to "reserves"? This is the crux of the problem.

The primary benefit of conditional surrender is clear: It enables land to be leased without losing its status as Indian land. This should mean that Indian bands can develop their land through lease arrangements without having to give up their underlying "ownership" of it, their local government powers over it, or their special rights on it; all of which are fundamental to reserve land status. The only rights that are affected should be those that are necessary to the purpose and conditions of the surrender and the terms of the lease.

None of this was clearly stated in the *Indian Act.* It is thus uncertain whether and when the many different sections of the *Act* that refer to reserves should also refer to conditionally surrendered land. In fact, courts have recently ruled that Indians living on conditionally surrendered land cannot vote in band elections, and that the Indian personal tax exemption does not apply on surrendered land.

Ironically, reserve land in the possession of *individual Indians* can be leased without surrender and maintains full reserve status. Such leases are commonly called locatee leases, and there is a good deal of locatee leased Indian land. In order to avoid surrenders, and the risks they bring due to the lack of definition in the *Indian Act,* bands maybe more and more inclined to attempt to arrange their collective leasing needs by using individual locatee leases. This could bring much confusion because individuals would be put in a complex trust relationship with the band.

What needs to be done?

Surrenders for lease make it possible for bands to put their land into the economic mainstream while remaining as Indian land, thereby dramatically increasing the potential economic viability of reserve-based Indian communities. As time has gone on, this type of surrender has taken on primary importance, while the use of surrender for sale, or other final separation from the reserve, has almost disappeared.

For conditionally surrendered land to remain Indian land in a meaningful way, however, it must clearly come under the provisions of the *Indian Act* as part of the reserve. Band councils should be able to govern it and tax it through their by-law powers (Sections 81 and 83). Band members living on it should be able to vote in band elections (Section 77). Indian cultural property should be protected on it (Section 91). The traditional tax exemption for Indian property on Indian land, which has existed in Canadian laws since pre-Confederation days, should apply (Section 87), and so on.

Without these and other *Indian Act* provisions, conditionally surrendered land would be Indian land in name only.

Furthermore, the application of the provisions of the *Indian Act* to conditionally surrendered land is needed for the land to be effectively governed. The governing of Indian land is done through band council by-laws, for the most part, or federal regulations, as these powers are set out in the *Indian Act.*

For all these reasons it is crucial that the *Indian Act* explicitly recognize conditionally surrendered land as part of the reserve, and deal with it thoroughly. This will remove the "double standard" that now makes it more problematic for a band to lease land than for an individual. And generally, it will ensure that conditionally surrendered land remains Indian land in the full sense.

---

* In this booklet, for ease of reference, unless otherwise indicated, conditional surrender is used to refer to surrender for lease,

C. Why do bands need jurisdiction over their land?

A Regulatory Vacuum

One of the most important Court decisions concerning jurisdiction on Indian land was a 1970 decision of the British Columbia Court of Appeal *(Surrey v. Peace Arch Enterprises Ltd.).* The Court decided that reserve lands conditionally surrendered to the Crown and then leased to developers for an amusement park were not subject to municipal zoning and other by-laws and regulations specifying building, water service, sewage disposal and other requirements with respect to the land and the way it could and could not be used. The lands remained "lands reserved for the Indians" under exclusive federal jurisdiction.

No one can doubt that land use regulations are necessary to safe and orderly development. As such they are also important considerations for investors or insurers. Moreover, if bands are interested in permitting certain types of development on parts of their reserve, they will want the ability to control and regulate. Such regulation is in the interests of all parties: bands, developers, users, adjacent jurisdictions, etc. But at present such regulation is frustrated by the *Indian Act.*

In 1977, the National Indian Brotherhood published the report, *The Socio-Economic Development of Indian Peep/e,* which said:

> The goal of Indian controlled economic development on reserve lands makes certain demands upon the system of local government on reserves. To promote economic development the following goals are important:
>
> 1. A stable political and legal situation;
>
> 2. a reasonably clear allocation of legal authority between the band, the federal government and the provincial government;
>
> 3. effective power in the hands of the band and the band council;
>
> 4. a system which enables maximum economic development in the context of the special legal status of reserve lands,

The Report added:

> The by-law powers which would be of greatest concern for economic development on reserves would be (a) zoning, (b) licencing and (c) taxation, Yet serious unresolved questions exist relating to these very powers. There is disagreement whether an indian band council can tax property, zone or licence and regulate businesses which are located on surrendered lands,

In 1983 a Special Committee of Indian leaders in British Columbia submitted a report to the Department of Indian Affairs and Northern Development on "Land Management and Development Policies Affecting Reserve Lands in British Columbia". The Committee expressed deep concern over the present "regulatory vacuum" affecting surrendered land, and drew special attention "to the vitally important question of health standards". Legal opinions indicated the probability that neither the provisions of the provincial */-/es/th Act,* nor health regulations under the *Indian Act* would apply, leaving a "serious gap in health standard legislation. "

The Committee asked, "who can control the planning and development of Indian lands in British Columbia ?" Considering the *Peace Arch* case and the deficiencies of the *Indian Act,* the answer appears effectively to be -- no one except Parliament itself.

It is obvious that the question posed by this committee is crucial to Indian control of Indian land and to Indian economic development. It is equally obvious who *should* **control the planning and development of Indian land -- Indian governments. And right** now, in the vast majority of cases, that means band councils under the *Indian Act.*

Band councils are the appropriate body to make laws governing the use of reserve land. Central federal laws would be inconsistent with the concept of Indian self-government and impractical as well. Bands will most likely want regimes that are familiar to their locality and that can be administered by locally trained personnel.

D. Why is band taxation needed?

Development and Local Government

Many of the costs associated with the on-reserve needs of Indian bands are supported by federal grants and contributions. However, bands need to develop other sources of revenue, particularly to cover developmental costs that are not federally funded. In this regard, bands are like all local governments in Canada which rely on a combination of grants, taxes, licences, fees, investments and other revenues for their funding needs. Different sources of funds are needed and used for different purposes.

Federal funds, for instance, do not provide for the servicing costs associated with developing Indian land for lease to non-Indians.

As bands become more involved in development on reserves, some are seeing the advantage in having a tax base, to round out their system of local financing.

A tax system is more flexible and more comprehensive than service charges and leasing fees alone. Businesses and individuals are obviously accustomed to paying taxes as well as fees and service charges for different purposes.

As well as covering certain costs related to physical infrastructure and services, property taxes also pay for local administration, i.e. planning, zoning, regulating, inspecting, licensing and so on. These costs cannot be recovered through fees for services. Local improvement taxes are often used to cover the costs of upgrading local services. Here, again, fees or lease charges would be less effective for bands to use. Bands may need the power to levy a local improvement tax to improve the quality of reserve development.

It is worth mentioning that band councils have had the power to tax the property interests of band members since 1951. However, without the clear authority to tax non-Indian interests, this existing power has been of little practical use. Naturally, band councils will continue to be free to use or not use their taxation by-law powers as they choose.

Relationships with Other Jurisdictions

As bands become more active as governments and more involved in various forms of land development (industrial, commercial, residential) they are also being drawn into more complex dealings concerning service provision and cost sharing with provinces and municipalities.

This emerging situation is making it essential for the jurisdiction of the band council to be clearly established, particularly in taxation. Only with clear jurisdiction of its own can a band council deal effectively with the other jurisdictions that surround it.

In regard to taxation there are two different situations that arise: provinces which permit property taxation of non-Indians on Indian land under provincial law and those which do not. In both circumstances, clear taxing jurisdiction for bands is needed.

Provinces Permitting Taxation on Indian Land

In British Columbia it is uniform practice to assess and tax the real property interests of non-Indians on Indian land. In Quebec and the Atlantic provinces such taxation is not prohibited, but it is relatively rare.

The right of provinces to levy these taxes, despite the fact that Indian land itself cannot be taxed, is generally traced to a Supreme Court decision of 1914 *(Smith vs. Rural Municipality of Vermilion Hills).* The Court defined the tax on a non-Crown interest in Crown lands as a tax *in personam,* that is, a tax against the person who occupies or holds the land and not against the land itself. This decision allowed municipalities to tax the property of persons situated on Crown land within municipal boundaries, thereby preventing an unfair avoidance of local taxes by persons benefiting from local government.

When this concept is translated to Indian land, things become more complicated. While the only local government affecting ordinary Crown land is a municipality under provincial jurisdiction, on Indian land there is another local government, namely the band council. Today band councils are increasingly determined to act as the local government within their boundaries; and they are particularly concerned about loss of their jurisdiction by default when their land is leased.

The bands that are most concerned with clarifying their jurisdiction over leased Indian land are naturally those in situations where another jurisdiction is currently collecting taxes. Having their own taxing powers clarified is regarded by bands as necessary to enable them to ensure that taxation on Indian land is fair and effective and responsive to their concerns as local governments.

Taxation is an area where concurrent jurisdiction is often recognized. Naturally, concurrent jurisdiction raises the possibility of “double taxation”. Double taxation has a negative sense if it means that two taxing authorities are acting independently of one another and without regard to the overall tax burden. But double taxation can have a perfectly acceptable sense if it refers to two jurisdictions sharing the same tax room in a coordinated way. This is the case in federal and provincial income taxes.

The possibility of concurrent tax jurisdiction implies the need for band councils to coordinate taxation arrangements with other taxing authorities.

In some cases an Indian government may feel that the most practical arrangement would be to have the province or municipality continue to levy taxes and to transfer an appropriate share to the band. In such cases, clear band jurisdiction will strengthen its bargaining position. In other cases, it maybe more effective for the Indian government to be the taxing authority and to provide its own services or negotiate payment for services with surrounding jurisdictions. Current difficulties of municipalities in collecting taxes on Indian land in B.C. suggests that use of band powers might often be the best arrangement.

Whatever arrangements may ultimately be settled at the local level, cooperation between bands and provinces and municipalities is and will continue to be the key to success. The establishment of effective band

jurisdiction will provide new means by which band/municipal/provincial cooperation can be organized respecting taxation and servicing on Indian land.

Provinces Not Permitting Taxation on Indian Land

In the 1970s the Prairie provinces and Ontario vacated the field of property taxation of non-Indians on Indian land. There appear to have been two main reasons. First, court decisions had established that provincial and municipal laws affecting land use -- such as building codes, zoning, fire standards etc. -- could not be enforced on Indian land. If a government does not have the jurisdiction to govern, it is understandable for it to withdraw as well from taxing and providing services.

Second, taxation is obviously related to the provision of services. If provincial or municipal taxes were being levied on non-Indians on Indian land there would probably be an expectation on the part of taxpayers that services should be provided equal to those provided on land within the provincial domain. These provinces were possibly not prepared for this commitment, given that Indian land was basically an Indian/federal responsibility.

The fact that non-Indians on Indian land in these provinces are not subject to provincial or municipal property taxes leaves a clear field for an Indian government, should it choose to enter it.

Over time it may emerge that non-Indians on Indian land should be subject to some form of property taxation if they expect to receive services that are normally attached to such taxation. If this is the case, only the band council will have the jurisdiction to impose these taxes and to use the revenues to obtain the needed services.

Summary Of Objectives Of Band Property Taxation

The following summarize the objectives of band taxation as derived from the above discussion:

1. **To provide bands with improved powers related to land development and property taxation as part of achieving local autonomy and self-government.**

2. **To encourage development linked to reserves by providing non-Indian occupiers of Indian lands with an established system for contributing to local servicing costs; a system which is clear, fair, affordable, consistently-applied, and appealable to an impartial authority.**

3. **To enable bands to recoup costs which they are present/y incurring relative to servicing non-Indian occupied lands.**

4. **To enable bands to acquire a stable funding source to permit higher quality or additional services to be extended to Indian lands for the purpose of improving service levels for those already occupying these lands and/or improving service levels and development capacity in order to attract additional growth.**

5. **To provide bands with a means of raising additional revenues to be used to defray general costs of governing their land.**

6. **To facilitate *joint* planning and cost-sharing arrangements between bands and the surrounding local jurisdictions (both municipal and provincial/territorial).**

7. **To provide bands with access to a system of revenue generation which is flexible and responsive to special needs, while being worthwhile in terms of yielding significant revenues relative to administration costs.**

E. How would band taxation work?

The Question of a Legal Basis

The *Indian Act* is an unusual piece of federal legislation in that a single Section in the *Act* may deal with matters that are subject to far more extensive coverage in provincial legislation. This is because when legislating in all respects affecting Indians or Indian land (under S.91 (24) of the Constitution *Act, 1867*) the federal Parliament is often active in areas normally assigned in the Constitution to provincial jurisdiction.

To define band taxation powers, there are presently only a few brief sentences in the *Indian Act* in contrast to the various provincial assessment or municipal taxation acts involving hundreds of detailed sections. Furthermore, provincial property tax regimes also include, of course, the administrative and quasi-judicial structures to administer this extensive legislation.

Taxation is one of the most fundamental powers of government and affects individual rights in a very direct way, as everyone who pays taxes knows. In exercising property tax powers over many years, provinces have had experience with a wide variety of situations. They have developed a body of law and procedures to meet these situations and to reduce conflict, promote effective local government, and ensure as much fairness as possible.

The question arises: What will be the legal basis for band taxation regimes under the *Indian Act?*

For many reasons it does not seem desirable for band governments and the federal government to attempt to set up a duplicate system to that of the provinces and municipalities.

In the first place, Indian governments do not see themselves in a municipal style relationship to the federal government.

Second, to impose a uniform national system on bands across the country would not be practical. Bands will be working in the context of surrounding jurisdictions, and property taxation is handled in a wide variety of different ways across the country. Not only are there different provincial systems, but even within a province there are local variations.

Third, the federal government is not set up nor suitable to become heavily involved in the administration of a local property tax system. Such systems depend on highly localized forms of expertise and administration; for example, in assessing or hearing appeals on property values. The federal government does not have the machinery for this, nor is it yet apparent that it should create such machinery.

Finally, the existence of provincial systems should not be ignored even though bands will be operating under separate jurisdiction. Cooperation between jurisdictions may well be possible and practical. It is fairly common for administrative arrangements to be made between federal and provincial governments as a matter of convenience, such that one authority uses the administrative structures of the other. In the case of the income tax system, for example, not only the federal collection system but even the federal statute (*Income Tax Act)* are used by the provinces (except Quebec) as the most practical means of administering this tax.

In a similar manner, at the local government level, one can conceive of arrangements being made whereby Indian governments make use of provincial/municipal systems within Indian taxing or regulating regimes. With provincial cooperation, bands might arrange to use provincial assessment appeal boards, assessors, collection systems, etc. The reverse situation may also occur. Local municipalities may arrange for bands to provide certain services, to collect school and other taxes, etc., particularly if these arrangements might affect non-Indians under Indian jurisdiction. Once band jurisdiction is clarified, many new possibilities will exist for simplifying and enhancing the delivery of local government services on reserves. Naturally, any of the above possibilities would involve a good deal of careful joint planning and cooperation.

The conclusion is that the legal basis for band taxation under the *Indian Act* should:

a) concentrate legal detail at the band level;
b) be flexible and minimal at the federal level;
c) provide the essential tools to both levels;
d) be open to cooperative arrangements with provincial systems.

Band By-Laws

The key to Indian taxation under the *Indian Act* will be band by-laws. Here is where the detailed legal basis will be set out.

Given the basic role that they will serve, all the aspects of a property tax regime will have to be considered in the development of band taxation by-laws. They will have to address each of the various fundamental areas such as: assessment, collection, appeal and enforcement. If bands decide to handle these areas through cooperative arrangements with other jurisdictions, this will need to be reflected in the by-laws as well.

Band councils that have passed taxation by-laws to date have borrowed a great deal from existing provincial laws. Modifications can be made to suit a band's own circumstances. For instance, band by-laws might provide that band members could be appointed as assessors, possibly subject to special training, and so on.

There is no doubt that the quality of by-laws will make an enormous difference in the effectiveness of band taxation -- both in terms of cost and revenue, and of the good will and promotion of development that comes from clear "rules of the game. "

Federal Regulations

The *Indian Act* is often criticized for being inadequate, inflexible, vague and for putting too much power at the discretion of the Minister. It is important that these old problems be avoided in this new field of band taxation. At the same time, the federal government should not "over-legislate" in the interests of too much definition.

The proposed approach to the federal role is to provide basic, flexible tools which are able to respond to needs as they arise, rather than to legislate new rules which may be hindersome or not required.

Thus, a federal regulatory power is proposed as part of the amendments. The *Indian Act* will prescribe the general nature of band taxing powers, and regulations would be used to make the law more complete in its details.

No actual regulations are being proposed at this time. The initiative for any regulation would be up to the Indian Taxation Advisory Board described in the following section. Any proposed regulations would be preceded by public notice and consultation.

Regulations would be used to provide increased certainty, to make practical rules more visible, and to reduce the prospect of matters going to the courts. For example, future regulations might provide rules to prevent singling out individual properties for excessive taxation.

Summary of the Legal Basis of Band Taxation

- **The power to legislate with respect to Indians and Indian land involves the federal government in many fields normally covered by provincial jurisdiction. This is true for property taxation.**

- **Both the federal and the Indian governments have as yet relatively little experience in the administration of property taxation. This calls for a flexible approach that provides both with the basic legal tools they will need.**

- **In the spirit of Indian self-government, and for practical reasons as well, the detailed legal basis for Indian taxation should be located within band by-laws.**

- **Regulations would be used to make the federal law more complete in its details.**

The Question Of Administration

Not everything can be written down in law, and even what is written down must still be administered. Thus the question of a legal basis for Indian taxation is followed by the question of administration: What do we do with these new tools once we get them? How do we make them work for us?

Indian Taxation Advisory Board

Given the fact that property taxation is a new and complex field with many new situations to face and sensitive new questions to answer, it seems a good idea to bring in some help for both the federal and the Indian governments. This is the idea behind an Indian Taxation Advisory Board.

The Department of Indian Affairs has sometimes experienced difficulty in providing the specialized skills necessary to handle its wide range of responsibilities. Through experience and expertise on the Board, this new field should get off to the right start. There would also be guaranteed Indian membership to ensure that the primary purpose of the Board, namely promoting the development of Indian taxation, remains central.

From the point of view of Indian governments, they will be entering a complex field which involves new kinds of relationships with non-Indians located within their boundaries, and with other jurisdictions that surround them. The bands, too, might find it useful to have advice available from those who know the taxation field well.

The Board will be concerned with band interests first and foremost, but will also look at taxation by-laws within the broad context of other jurisdictions and ratepayer interests. The board's advice to the Minister will be in a public written format, thereby ensuring a consistent and visible decision-making process.

Functions of the Indian Taxation Advisory Board

1. **Examine band taxation-related** *by-laws*
   The board will examine by-laws with a view to advising the Minister according to principles of equity and natural justice, comprehensiveness, and conformity with the enabling legislation.

2. *Advise* **Bands**
   The board will provide advice to bands on optional methods and approaches to taxation for band purposes, recommend improvements to by-laws, and generally advise on technical matters.

3. *Advise Minister*
   The board will formally recommend on approval of individual by-laws under S.83, and provide advice on policy and potential regulations.

4. *Advise on Handling Appeals from Assessment*
   The board will advise on various approaches and mechanisms for providing qualified, impartial appeal from assessment. Such mechanisms could include constituting several levels of appeal within band by-laws, including the use of impartial adjudicators at a second level; or adopting existing appeal boarda depending on arrangements that might be made with provincial or federal agencies.

5. *Advise on* **Impact on** *Affected Interests*
   The board will adviae on local impacts and arrangements involving ratepayera and other jurisdictions. It could have a role to play in avoiding or mediating difficulties which may arise.

Five-'Year Review

The initial period of implementing Indian property taxation systems will be a learning experience for everyone concerned. The functions of the Advisory Board may need to change as the federal role is clarified, as Indian government powers evolve, and so forth. Following a five-year trial period, which would be subject to ongoing monitoring, there will be a review of the usefulness of the board in fulfilling its functions, its acceptability to Indian bands and its overall effectiveness. At that time decisions maybe made to modify its role, clarify its legal status, or even to eliminate it.

Appeals

The principles of natural justice are basic to any property tax regime. In the case of band taxation, non-Indian leaseholders of Indian land will be unable to vote in band elections and will therefore rely more than usual on non-political means to safeguard their interests. Of course, they will always be able to take their concerns directly to the band government.

Many different arrangements are possible for bands to hear ratepayer concerns, eg. local service boards or ratepayer associations. These concerns would focus on the fairness of the tax rate imposed by the bands in relation to servicing and other costs.

Besides such political appeals, an administrative appeal process should provide an opportunity for individual ratepayers to lodge appeals against their assessment. Indeed, if such a process were not included in a taxation system, the courts would likely rule the taxing authority to be lacking natural justice criteria and therefore unacceptable.

It should be possible to lodge appeals with respect to:

1. the description of a property,

2. the assessment of a property, based on its relative value.

The process for appeal could be multi-leveled. For example, a committee of the band council could serve as a first level of appeal. A second level, again as set out in the by-law, could involve one or more independent experts. The Indian Taxation Advisory Board might well establish guidelines for appeal mechanisms.

Appeals raising questions of law would go to the federal court. These would raise such matters as whether a by-law was beyond the powers of the band council or was contrary to fundamental laws, such as the Charter of Rights or basic equity.

F. What are the proposed amendments?

Definitions: Amendments to Section 2

Conditionally and Unconditionally Surrendered Land

These terms are not presently defined in the *Indian Act.* This lack of definition has been a large part of the problem in determining whether and when sections of the *Act* apply to surrendered land and to which type of surrendered land.

The amendments will include new definitions making clear:

a) that conditional surrenders are surrenders for a term of years or for a limited purpose wherein the band continues to have a beneficial interest, such as surrenders for lease, rights of way etc.;

b) that unconditional surrenders are surrenders in which all Indian rights and interests in the land are transferred to the Crown such as in surrenders for sale, or turning land over to the Crown for some final form of compensation.

Reserves

At present, the *Indian Act* defines a "reserve" as: " a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of a band. "

In view of the above new definitions, the definition of reserve should be amended to include conditionally surrendered land.

However, conditionally surrendered land cannot be treated as part of the reserve in all the sections of the *Act.*

> **In certain sections the term "reserve" would not include conditionally surrendered land, and these sections would be explicitly identified along these lines: "reserve... includes conditionally surrendered land except for the purposes of Sections 18(2), 20-25, 28, 36-38, 42, 44, 46, 48-51, 58, 60, 64(l)(d), 89, 124. "**

Implications for Sections 87 and 89 require special mention and are discussed separately below.

Explanation for Sections where Conditionally Surrendered Land is not Included in "Reserve"

The *Indian Act* establishes a special Indian land tenure system which governs such matters as how individual Indians may possess lands in a reserve; how bands may manage their own lands; how individuals may transfer lands in their possession to other Indians; the ability of Indians to seize the lands or property of other Indians; how Indian possession of land is disposed of in various other circumstances; how estates of individual Indians on reserves are handled; and so on. These are all land and property relationships among Indians on a reserve or between Indians and the band.

This land and property regime ensures that the property rights it governs remain in the hands of individual Indians or of the band; and it defines how these rights will be allotted, exchanged and generally handled among Indians and the band.

The purpose of surrender, however, is to enable bands to transfer certain of their ownership-type rights in land in exchange for other benefits, at least for a term of years or for a specific purpose. Thus, Section 41 says: "A surrender shall be deemed to confer all rights that are necessary to enable Her Majesty to carry out the terms of the surrender. "

These rights that have been transferred, first to the Crown and then through any leases under the surrender, must be viewed as removed from the Indian land tenure system. They cannot continue to be subject to the land tenure and management provisions that apply before the surrender.

Thus, the common *Indian Act* reference to "Indian possession of lands in a reserve" signifies a land holding system that applies only to Indians and to unsurrendered Indian rights in reserve lands.

This explanation applies to Sections 18(2), 20-25,28, 42, 44, 46, 48-51, 60, 64(l)(d).

In Sections 37, 38, 58, 124, it would be logically self-contradictory for reserve to include conditionally surrendered land as the terms are explicitly used in a mutually exclusive sense.

Sections 22 and 36 refer to land entering reserve status for the first time, and thus necessarily *prior* to any possible surrender.

Implications for Sections 89 and 87

Implications for Section 89

The amendments to the definitions in Section 2 raise implications regarding Section 89 which deserve separate discussion.

Section 89(1) reads: "Subject to this Act, the real and personal property of an Indian or a band situated on a reserve is not subject to charge, pledge, mortgage, attachment, levy, seizure, distress or execution in favour of or at the instance of any person other than an Indian. "

For a number of reasons, it seems most consistent and beneficial not to include conditionally surrendered land under the provisions of S.89. However, it is obviously essential that the Indian community should appreciate and concur with this point of view, If the Indian reaction is supportive, Section 89 would *not apply* on conditionally surrendered land for these reasons.

It would be *beneficial* because one of the major obstacles to Indian economic development has been the difficulty of Indians to obtain loans due to their inability to mortgage their property interests under S.89. The non-application of S.89 on conditionally surrendered land would enable this obstacle to be overcome by allowing for the mortgaging of leases and property on conditionally surrendered land without risk to the underlying title of the land.

It is important to bear in mind that the conditionally surrendered land will remain under band council jurisdiction, including powers to tax interests in it.

Currently very few Indians hold leases on conditionally surrendered land. It is most probable that such leases are already subject to mortgage and seizure etc., given the courts' tendency to distinguish between-reserves and surrendered land.

In addition to having the above benefits, the non-application of S.89 to conditionally surrendered land would be *consistent* with other parts of the *Indian Act* because S.89 is related to the special Indian land tenure system.

Indians can transfer their special possession of reserve land only to other Indians. It follows that they can only pledge or mortgage it to other Indians. ''Indian possession of land in a reserve" cannot be mortgaged to non-Indians because non-Indians are legally incapable of taking over that form of possession.

Rights in surrendered land however are different. Non-Indians are able to obtain possession of these rights. If Indians have possession of rights in surrendered lands, say through a lease, these rights: a) would be held in the same way as for non-Indians, b) could be transferred to non-Indians, and c) are therefore potentially mortgageable to non-Indians.

A practical example maybe helpful. A member of the Kamloops Band might wish to lease one of the lots in the Band's industrial park in order to start up a business. This may be the best location because of the services available, proximity to other businesses and so on. Building on the lot will probably require a loan, normally under a mortgage. At this point Indians are usually forced to turn to the government for assistance if it is available, or to give up the venture, because Indian held property on a reserve is not mortgageable.

But if an Indian's lease on conditionally surrendered land was not affected by S.89, it would be mortgageable. So the Kamloops Band member could apply for a mortgage to build his place of business. And in the future he might take out other loans to expand the business, which would be secured in the same way.

Under a conditional surrender, of course, the underlying rights always remain with the band and revert fully to the band at the end of the surrender/lease period. There is no risk of any absolute alienation of the land from the reserve.

Finally, there is one other aspect of Section 89 to mention. Section 89 prevents seizure of Indian owned property on a reserve by any person "other than an Indian." It seems necessary to add that this phrase should include **"a band or band council."** Since band property is subject to seizure by an individual Indian, the reverse should also apply. The ability to seize is actually implied in the band's power to tax interests in land, but it should be clarified for greater certainty.

Implications for Section 87

Section 87(a) exempts reserves and surrendered land from taxation by any government other than the band council. Section 87(b) gives the same exemption to the personal property of Indians or bands situated on a reserve but does not mention surrendered land.

The amendments will make clear that Section 87(b), as with most other sections of the *Indian Act,* **should apply on** *conditions//y* surrendered land because it remains "reserved for the Indians."

Amendments To Section 83

S.83 defines the money-related by-law powers which are available to those bands who have been declared to have "reached an advanced stage of development." These by-laws include powers to tax the "interests in land in the reserve of persons lawfully in possession thereof," to license businesses, to appropriate and expend monies related to band expenses, and to raise money from band members to support band projects.

Proposed Amendments

1. **Remove the "advanced stage" requirement.**
2. **Amend S.83(1)(a)(i) to indicate that any use, occupancy or interest in land, including improvements thereon, of all persons would be subject to taxation by-laws.**
3. **Require taxation appeal procedures to be included in band by-laws.**
4. **Provide the ability to make regulations with respect to all S.83 matters including: procedures and criteria for assessments, appeals, collections, enforcement, financial reporting, public notice, rate structures and limits, management of tax revenues.**
5. **Amend S.83(1)(e) to modernize the tax penalty provisions and "enable an interest charge to be applied to overdue taxes.**

Rationale

1. The "advanced stage" requirement is paternalistic and outdated. All bands should be able to propose money by-laws.
2. It has been suggested that the present wording of S.83(1)(a)(i) regarding "persons lawfully in possession" *may* refer only to lawful possession as defined in SS.20-25 which is applicable to Indians only. Thus, the extension of S.83 to conditionally surrendered land needs to be accompanied by this clarification that *all* interests in land, Indian or non-Indian, are subject to band taxation by-laws.
3. Access to appeal is a fundamental provision which needs to be specifically set forth in the legislation.
4. Regulations are discussed at length in Section E above.
5. The existing enforcement provision of S.83(1)(e) is inadequate and should be replaced by authority to enable enforcement provisions comparable to modern norms.

G.'What happens next ?

The prospect of amendments to the *Indian Act* prompts many people to think of any one of a hundred other changes that should be made.

One such additional change that is directly related to property taxation would be to improve the Indian lands registry legislation. In fact, proposals on this subject are already being planned and comments on the Indian land registry would be welcomed.

However, these proposed amendments respond to a specific request from the Indian community and to that alone. The risk is great for the amendments to bog down if they are expanded into other areas. There has been much time and effort spent within the Indian community developing concensus on these specific amendments, and that concensus must be respected.

Comments on these specific proposals are invited so that the government can benefit from them in the legislative process. Correspondence or requests for further information should be addressed to:

Indian Act Amendments
Economic Development Branch
Indian and Northern Affairs Canada
Ottawa, Ontario
KIA 0H4