Briefing Book:

Current Federal Legislative Amendments Affecting First Nations

Prepared by
Lorraine Land, Andrea Bradley and Liora Zimmerman
Olthuis Kleer Townshend LLP
December 21, 2012

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OLTHUIS, KLEER, TOWNSHEND LLP

MEMORANDUM

DATE: December 21, 2012

FROM: Lorraine Y. Land, Andrea Bradley and Liora Zimmerman

RE: **Analysis of Bill C-45 (The Second 'Omnibus Budget Bill")**

Bill C-45: Omnibus Budget Bill #2 (November 2012)

Status

- This bill was tabled in October, passed by the House of Commons on December 14, 2012, and proclaimed into law that same day.
- It is the second of two government 'budget' bills, implementing the 2012 federal budget. (The other is Bill C-38, passed by the House of Commons and Senate and proclaimed into law in June).

Overview

This 'budget' bill is the second half of the federal budget legislation. It is over 450 pages long and changes 44 federal laws, many of which had no direct connection with the 2012 budget.

On a practical level, amendments to the *Fisheries Act* and *Navigable Waters Act* are likely of most concern to First Nations (as they reduce the potential scope of protection of Aboriginal commercial fisheries, and radically reduce the level of protection of navigation and environmental reviews for most rivers and lakes in Canada). The *Indian Act* amendments in this particular bill are likely to have a positive impact for most First Nations governments, by greatly reducing the bureaucracy and shortening the process for First Nations seeking to 'designate' reserve lands for lease. The key concern about the *Indian Act* amendments, however, is the lack of consultation about these changes.

The passage of this bill in early December, in addition to all the other current proposed legislative amendments, has spurred the "Idle No More" campaign in First Nations communities across Canada.

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Key Provisions

- The second budget implementation act, amends or affects 44 federal laws.[1] Of key concern for First Nations are the changes to the *Indian Act*, the *Fisheries Act*, and the *Navigable Waters Protection Act*.

- The *Fisheries Act* is amended by changing the definition of Aboriginal fishery.[2] This definition narrows the definition of Aboriginal fishery to a food, social and ceremonial fishery or one recognized in a modern land claims agreement. This amendment is in addition to a wide scope of changes to the *Fisheries Act* implemented by the first budget bill. (See analysis below).

- The 'surrenders and designations' portion of the *Indian Act* is changed by this second budget bill. The process for designating reserve lands for lease will be easier (by changing the threshold of the number of votes required to a simple majority of those who vote in the referendum rather than a majority of all eligible band electors) and removing the need for Cabinet approval. (See analysis below).

- The *Navigable Waters Protection Act* is changed. These changes are in addition to substantial changes made in 2009, which already seriously reduced the scope of water protections under this Act. The amended Act allows the Minister to exempt most rivers and waters from navigation protection under the Act, and takes away the federal environmental assessment triggers (based on navigability) for 99% of Canada's waterways.

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[1] The federal legislation changed by the bill is: Income Tax Act, Excise Tax Act, Jobs and Economic Growth Act, Federal-Provincial Fiscal Arrangements Act, Trust and Loan Companies Act, Bank Act, Insurance Companies Act, the Jobs, Growth and Long-term Prosperity Act, Canada Shipping Act, 2001, Canada Deposit Insurance Corporation Act, Payment Clearing and Settlement Act, Fisheries Act, Schedule I of the Bretton Woods and Related Agreements Act, Canada Pension Plan, Department of Human Resources and Skills Development Act, Indian Act, Judges Act, Canada Labour Code, Merchant Seamen Compensation Act, Customs Act, Hazardous Materials Information Review Act, Agreement on Internal Trade Implementation Act, Crown Liability and Proceedings Act, Employment Insurance Act, Immigration and Refugee Protection Act, Fees Act, Canada Mortgage and Housing Corporation Act, Navigable Waters Protection Act, Canada Grain Act, An Act to amend the Canada Grain Act and the Agriculture and Agri-Food Administrative Monetary Penalties Act and to Repeal the Grain Futures Act, International Interests in Mobile Equipment (aircraft equipment) Act, Canadian Environmental Assessment Act, 2012, Canada Employment Insurance Financing Board Act, Canada Employment Insurance Financing Board Act, Department of Human Resources and Skills Development Act, Schedule III to the Financial Administration Act, Canadian Forces Superannuation Act, Members of Parliament Retiring Allowances Act, Public Service Superannuation Act, Royal Canadian Mounted Police Superannuation Act and Canada Revenue Agency Act.

[2] The amendment says *"Aboriginal", in relation to a fishery, means that fish is harvested by an Aboriginal organization or any of its members for the purpose of using the fish as food, for social or ceremonial purposes or for purposes set out in a land claims agreement entered into with the Aboriginal organization"*

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Analysis

- Like the first budget omnibus bill passed in June, this legislation makes major changes to federal laws without going through the regular Parliamentary hearings and amendments process.

- A key concern for both of these budget bills is the broad scope of impacts they have on First Nations' rights without any Aboriginal consultation.

- ***The Fisheries Act Changes:***
    - The bill changes the Fisheries Act again (sweeping changes were also made in the first budget bill, as discussed below).
    - The budget bill defines "Aboriginal" fisheries as food, ceremonial and social fisheries, and not as commercial fisheries.
    - This new definition of "Aboriginal" as it relates to fisheries does not capture First Nations fisheries that are based on commercial fishing. This means that those Aboriginal commercial fisheries will not be protected by the *Fisheries Act*'s prohibition on harming fish habitat.
    - The changes also set up an Environmental Damages Fund, where the newly-increased fines under the *Fisheries Act* will go. First Nations have unique rights and responsibilities and are specific resource users with fisheries that may be over looked by fund administrators in favor of larger commercial or recreational fisheries.
    - These changes are in addition to the sweeping changes made to the *Fisheries Act* in the first budget omnibus bill six months ago. The first budget bill (Bill C-38) seriously reduced the scope of which fish are protected under the Fisheries Act by:
        1. Restricting the prohibitions on harmful destruction of fish habitat to species already being commercially harvested or harvested by a First Nation. This means that fish which are not currently being harvested are not protected;
        2. Changing the language regarding the probation on harming fish habitat has altered to make it weaker (see more detailed analysis of Bill C-38 in separate memo);
        3. Allowing the Minister discretion to exempt many works and activities from the protections under the Act; and
        4. Downloading more fisheries responsibilities onto the provinces.

- ***The Navigable Waters Act Changes***
    - The budget omnibus bill amends the *Navigable Waters Protection Act* to remove federal oversight from most of the lakes and rivers in Canada.

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- The Minister of Transport will now review the projects that affect the navigability of only 3 oceans, 97 lakes and 62 rivers in the entire country.[3] This is a reduction of the number of protected waterways from 32,000 lakes[4] and 2.25 million rivers across Canada.
- In determining whether and how to protect navigable waters, the Minister will not need to take into account First Nations rights, title, perspectives or interests.
- The practical effect of these changes is that proponents will no longer have to tell government if they are building anything that interferes with navigation on most of Canada's lakes and rivers, and works affecting the navigability of these 99% of Canadian lakes and rivers will no longer trigger federal environmental assessment.

- ***The Indian Act***
  - The omnibus bill changes the *Indian Act* requirements for designating Indian lands for lease. Leased lands remain the property of the band but are leased for use by others. The provisions related to surrender of Indian lands remains the same (as a result of some changes to the draft legislation from the initial proposals).
  - The amended process changes the process for First Nations to designate lands for lease by:
    - Removing the requirement that Indian lands must first be surrendered to the Crown before they can be leased;
    - Allowing a process for designations to be approved by a simple majority of band members who actually vote in a referendum on a designation rather than a majority of all eligible band electors; and
    - Removing the requirement for Cabinet approval of the designation.
  - In the situation of a proposed surrender, the amendments makes it easier for a surrender to be approved by the First Nation's community. If a referendum is called and the majority of band members who vote are in agreement with the surrender but the majority of the band has not voted (because not everyone votes), the Minister can immediately call second vote. If, after the second vote, there is again an assent by the majority of those who actually vote (not necessarily the majority of all eligible voters), the surrender can proceed. A surrender of Indian lands (rather than designation) still requires Cabinet approval.

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[3] The proposed list of waters which will now be protected can be found here: http://www.tc.gc.ca/media/documents/mediaroom/proposed_list_of_scheduled_waters.pdf

[4] The federal government lists the number of known lakes in Canada at 31,752. Natural Resources Canada, *The Atlas of Canada: Lakes*, online: Natural Resources Canada <http://atlas.nrcan.gc.ca/site/english/learningresources/facts/lakes.html>. However, the federal government's data is based on a 1973 study; by comparison, the Ontario government claims that there are 250,000 lakes in Ontario alone: Ontario Ministry of Natural Resources, *Water Resources*, online: Ontario Ministry of Natural Resources

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- The effect of these changes is that it will now be easier for Bands to designate their reserve and Indian lands for lease to third parties. On a practical level, this will be a benefit to most First Nations as the current designation process has been extremely cumbersome and time-consuming, and has restricted the ability of First Nations to lease lands to on-reserve businesses or for the purpose of economic development. The amended lease provisions will also allow for increased First Nations jurisdiction over decisions about the use of reserve and Indian lands.

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OLTHUIS, KLEER, TOWNSHEND LLP

MEMORANDUM

DATE: December 21, 2012

FROM: Lorraine Y. Land, Andrea Bradley and Liora Zimmerman

RE: **Analysis of Bill C-38 (The First 'Omnibus Budget Bill")**

Bill C-38: Omnibus Budget Bill #1 (Spring 2012)

Status

- The bill was tabled in March, passed by the House of Commons and Senate in June 18 and proclaimed into law on June 29, 2012.
- This is the first of two government 'budget' bills, implementing the 2012 federal budget. (The other is Bill C-45, which was just passed by the House of Commons and Senate, and proclaimed into law on December 14).

Overview

This 'budget' bill was the first half of the federal budget legislation. It was over 450 pages long and changed more than 70 federal laws.

The suite of amendments was nicknamed the "Environmental Destruction" bill in the media, as it made significant changes to a number of federal laws involved with environmental, water and fish protection.

Key Provisions

- Some of the federal laws changed by Bill C-38 and which are of particular concern to First Nations include:
    - ***The Fisheries Act***
        1. The Act changes the definition of what "harm' to fish habitat is prohibited. (It is changed from "harmful alteration, disruption or destruction of fish habitat" to "serious harm".
        2. The Minister is given a broader scope of discretion to allow serious harms to fish habitat.
        3. Few fish habitat areas protected. Protection of fish habitat is now limited to only those areas where there is <u>already</u> a commercial or Aboriginal fishery for those particular species (and the species they depend on).
        4. As part of the budget implementation, the federal government reduced the funds available for fish science, monitoring and enforcement.

    - ***The Environmental Assessment Act***
        1. The bill abolished the existing *Canadian Environmental Assessment Act* (CEAA) and enacted an entirely new piece of legislation within this budget bill.

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2. The new act more narrowly defines environmental impacts.
3. The new act gives Cabinet the discretion to 'remove' a particular component (such as water, fish or birds) from the definition of 'environment' (thus removing the need to review any impacts in that area).
4. The amended act restricts who can participate in EA hearings to 'interested parties'.
5. The new CEAA imposes new strict and much shorter time limits on environmental assessment.

- ***The First Nations Fiscal and Statistical Management Act***
  1. This Act was changed to the "First Nations Fiscal Management Act" and abolished the First Nations Statistics Institute.

- ***The Species at Risk Act***
  1. The legislation removes time limits on Species at Risk permits.
  2. The amendment give the government (including the National Energy Board) more discretion to allow the destruction of endangered species.

Analysis

Many of the legislative changes made in this first omnibus budget bill had no direct connection with the 2012 budget. In other words, major legislative changes were made without going through the regular Parliamentary hearings and amendments process.

A key concern with this legislation, as with the second omnibus bill and the suite of other current proposed legislation on Aboriginal matters, is the lack of Aboriginal consultation.

Some of the key impacts are as follows:

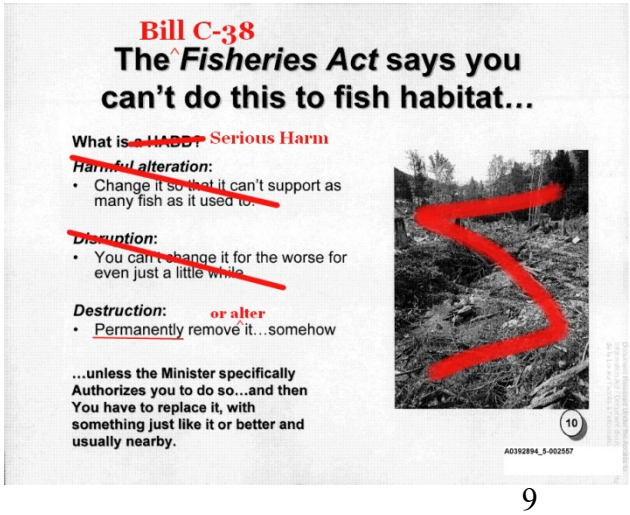
<u>The Fisheries Act</u>

The changes weaken the protection of fish habitat by:

1. Changing the language regarding the probation on harming fish habitat has altered to make it weaker (see graphic to right.)

2. Giving more discretion to the Minister to allow serious harms to fish and fish habitat, based on the Minister's wishes, rather than on science or technical analysis.

3. Protecting fish habitat only where there is already a commercial or Aboriginal fishery for those particular species (and the species they depend on). This means that areas where there is no commercial fishing happening today, or no current Aboriginal harvesting, will not be protected. Also, only the species



currently being harvested (or those they depend on) are protected. For First Nations, this could mean that fishing rights are 'frozen in time'.

The revised *Fisheries Act* has no recognition of Aboriginal commercial fisheries. While the amended Act will recognize Aboriginal food, social and ceremonial fisheries, and will recognize regular commercial fisheries, it does not recognize Aboriginal commercial fisheries.

As part of the budget implementation, the federal government also drastically reduced the fund available for fish science, monitoring and enforcement.

Canadian Environmental Assessment Act

Under the new CEAA, there will be far fewer federal environmental assessments, and the scope of the assessments will be reduced.

The new act also has a much narrower definition of environmental impacts. It also gives Cabinet the discretion to simply 'remove' a particular component (such as water, fish or birds) from the definition of 'environment' under the Act (thus removing the need to review any impacts in that area).

The new Act contains very weak Aboriginal consultation obligations, even though as a new piece of legislation, better consultation obligations should have been included to reflect the changing common law in this area.

The amended act also restricts who can participate in EA hearings (only 'interested parties') in a way which will likely exclude many First Nations.

The new CEAA also imposes new strict and much shorter time limits on environmental assessment.

The First Nations Fiscal and Statistical Management Act

This Act was changed to the "First Nations Fiscal Management Act" and the First Nations Statistics Institute was abolished.

The FNSI was a First-Nations led Crown corporation that played a key role in tracking demographics of First Nations, in order to understand the social and economic conditions of First Nations.

The information from FNSI was previously used as a basis for understanding where changes needed to be made for better education, housing and other social supports for First Nations. The source of the statistical data used to substantiate where the emerging needs are in First Nations communities is now gone.

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The Species at Risk Act

The legislation takes away time limits on Species at Risk permits. This means that there will no longer be opportunities to modify permits to deal with changes in species numbers (for instance, to loosen restrictions if a species recovers, or tighten restrictions if a species declines).

The amendments give the National Energy Board the discretion to allow the destruction of endangered species.

This means that there will no longer be opportunities to modify permits to deal with changes in species numbers (for instance, to loosen restrictions if a species recovers, or tighten restrictions if a species declines).

The amendments give the National Energy Board the discretion to allow the destruction of endangered species.

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OLTHUIS, KLEER, TOWNSHEND LLP

MEMORANDUM

DATE: December 21, 2012

FROM: Lorraine Y. Land, Andrea Bradley and Liora Zimmerman

RE: **Analysis of Bill C-27 (The First Nations Financial Accountability Act)**

Bill C-27: The First Nations Accountability Act

Status

- This is a government-sponsored bill.
- The Bill has passed all three readings in the House of Commons.
- It has also passed first reading in the Senate, and has been referred to the Senate Standing Committee on Aboriginal Affairs for further review. After that it will go to second and third reading in the Senate, and if passed, will be proclaimed into law.

Overview

The bill's stated purpose is "to enhance the accountability and transparency of First Nations."

In accordance with provisions in their funding agreements, First Nation band councils are already required to provide Aboriginal Affairs and Northern Development Canada with audited consolidated financial statements and a schedule of salary, honoraria and travel expenses for all elected band officials.

Key Provisions

- Requires each First Nation to prepare a consolidated financial statement, and:
    - Have it audited by a chartered accountant;
    - Include a list of all salaries, honoraria and non-monetary benefits, and all expenses for each Chief and Councillor in their capacity as elected official;
    - Include a list of all payments to Chiefs and Councillors in their personal capacity;
    - Include a list of all salaries and all expenses of all employees of Band-owned entities; and
    - Publish the information on the band's internet site within 120 days of the end of each financial year, and leave that information on the website for at least 10 years.
- Requires disclosure all these documents to any band member who requests it.
- Requires the Minister to publish this information on the Indian Affairs website "without delay' after receiving it from the First Nation.
- Allows band members and the government to obtain a court order if the band does not comply with the reporting obligations.
- If the First Nation breaches the reporting obligations, the Minister can require a remedial action plan, or can withhold funding under any contribution agreement with any federal government department, and can even terminate any funding agreement.

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Assessment

- The government made First Nation "transparency and accountability" a key focus in the last election, raising it as a campaign issue and announcing in the Speech from the Throne that it would enact legislation in this area.

- The political push for this legislation arises from the common non-Aboriginal misconception that First Nations governments are more corrupt and unaccountable than other governments, less financially accountable, and that Band elected officials are paid inflated salaries. These publicly held views are contrary to statistical evidence:
    - There is no statistical evidence that First Nations government are more corrupt than non-Aboriginal governments, or that there is any corruption epidemic in Aboriginal governments.
    - According to the Government of Canada, the Prime Minister's gross salary is $315,462.[5] Canada's Premiers earn on average between $150,000 and $210,000.[6] The average Canadian's salary is $46,345.[7] Comparatively, First Nation elected officials earn an average salary of $36,845.[8]
    - First Nations governments already have more onerous reporting and audit requirements than other governments. Indeed, the Auditor General of Canada has repeatedly identified the overly rigorous reporting obligations on First Nations governments as a problem which must be addressed. The AG has repeatedly expressed concerns that First Nations are expected to in excess of 150 financial reports and audits with federal departments each year, at great administrative cost. [9] A Treasury Board panel recently also investigated the matter and recommended that reporting obligations on First Nations be reduced, not expanded.[10]

- The legislation requires more onerous reporting obligations than required for any other public government officials in Canada (requiring reporting on not only salaries, or expenses, but of all income of band officials and band entities).

- Band-owned business enterprises will now be at a competitive disadvantage compared to non-Aboriginal businesses, as all incomes and expenses will be publicly available for band businesses (but not non-Aboriginal businesses).

- A key concern in the harsh penalties imposed if a First Nation fails to meet the reporting obligations. In addition to band members or the Minister being allowed to get a court order demanding compliance, the Minister can also require an action plan or withhold moneys under contribution agreements with AANDC or any other federal Ministry, or can simply terminate any funding agreement with the Band (and has no obligation to reinstate the funding if the issue is remedied.

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[5] Parliament of Canada, 2010. *Indemnities, salaries and allowances: Members of the House of Commons*.
[6] Based on 2009 figures, and as reproduced in the AFN document, "The Straight Goods on First Nation Salaries".
[7] Calculation based on 2008 data appearing on the "Living in Canada" website: www.livingin-canada.com, and reproduced in AFN document, "The Straight Goods on First Nation Salaries" available at: http://www.afn.ca/uploads/files/accountability/5_-_the_straight_goods_on_first_nation_salaries.pdf.
[8] Calculation based on original figures provided to the Canadian Taxpayers Federation, and reproduced in the AFN document "The Straight Goods on First Nation Salaries".
[9] See the Auditor General's Reports of 2002, 2006 and 2011, particularly: AG Report 2002, http://www.oag-bvg.gc.ca/internet/English/parl_oag_200212_01_e_12395.html, AG Report 2006, http://www.oag-bvg.gc.ca/internet/English/parl_oag_200605_05_e_14962.html and Auditor General's Report 2011 http://www.oag-bvg.gc.ca/internet/English/parl_oag_201106_04_e_35372.html#p71
[10] Treasury Board of Canada, 2008, "Government of Canada Action Plan to Reform the Administration of Grant and Contribution Programs."

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OLTHUIS, KLEER, TOWNSHEND LLP

MEMORANDUM

DATE: December 20, 2012

FROM: Lorraine Y. Land, Andrea Bradley and Liora Zimmerman

Bill S-8: *Safe Drinking Water for First Nations Act*

Status

- Passed on to committee by the Senate on April 25, 2012
- Passed with observations by the Standing Committee on Aboriginal Peoples on June 7, 2012
- Now in its Second Reading in the House of Commons; there had been three sittings on this bill as of November 26, 2012

Overview

Bill S-8 is "umbrella" legislation, which means it doesn't actually set specific rules for the provision of drinking water. Instead, it gives Canada the power with which rules will be made through the creation of binding regulations (s. 4), and defines their scope. The regulations will govern anything to do with providing drinking water on reserve, including protection of source water (s. 4(1)(b)), and they will override any band council resolutions or by-laws that conflict with them (s. 7).

The regulations are not yet drafted. Seeing as they will set the rules for delivering drinking water, obviously the content of the regulations matters a great deal. The federal government has said in the preamble to Bill S-8 that they "have committed to working with First Nations to develop proposals for regulations to be made under this Act". This promise has been repeated on the record in the House of Commons.

Key Provisions

- Bill S-8 has a clause that potentially derogates from (that is, annuls or destroys) Treaty and Aboriginal rights "to the extent necessary to ensure the safety of drinking water on First Nation lands" (s. 3). It is unclear how, or even if, this clause would ever actually be used. But even if it will never be used, the clause sets a dangerous precedent. First Nations organizations have strongly opposed the derogation clause, without success.
- Bill S-8 contains a clause limiting the federal government's liability for anything to do with providing drinking water on reserve (ss. 11, 13).
- The regulations may make First Nations (or any other person or body) the owners of water treatment facilities on reserve (s. 5(1)(q)), and/or the regulations can confer on any person or body the power, exercisable in specified circumstances and subject to specified conditions, to appoint a manager independent of the First Nation to operate a drinking water system or waste water system on First Nation lands (s. 5(1)(c)(iii)).

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- The regulations can also determine the obligations of any person or body that exercises powers or performs duties under the regulations (i.e. who manages a water treatment facility), and specify the penalties that apply if that person or body fails to meet these obligations (s. 5(1)(n)).
- Bill S-8 allows for the incorporation of provincial laws and regulations on water (s. 5(3)).
- Bill S-8 allows the federal government to create regulations on fees for access to clean drinking water (s. 5(1)(d)). These fees could be imposed regardless of what Chief and Council want, because regulations under Bill S-8 overrule any band council resolutions and by-laws. This could be quite problematic for many First Nations members.
- Bill S-8 provides authority for Canada to make regulations protecting source water (s. 4(1)(b)). This has wide potential scope, but seeing as most source water is off-reserve it is not clear that this has any significant impact on the scope of First Nations authority as band councils.
- The Bill also allows for regulations requiring permits to be obtained as a condition of engaging in "any activity on First Nation lands that could affect the quality of drinking water" (s. 5(1)(p)). This will have implications for any construction on reserve.

Assessment

The problem with this Act is more about governance than the worthiness of the aim. Nobody disputes that clean drinking water is important. But does the federal government need to overrule First Nations governments to accomplish this aim, or would it be better to work in partnership with them?

There are various ways that Bill S-8 may implicate First Nations' water rights. If the water is unsurrendered and subject to First Nations' jurisdiction, Canada's legislation may be in violation of Aboriginal Title. If there is a Treaty right to governance over drinking water on reserve, the legislation will override that right "to the extent necessary to ensure the safety of drinking water on First Nation lands," and require First Nations to follow the federal law instead. If clean drinking water is a Treaty right, the legislation may not have much of an effect, seeing as it is aimed at getting clean water to First Nations homes.

The regulations may make First Nations responsible for water treatment on reserve and any problems that arise from it, including a failure to meet the requirements of the regulations. However, it is difficult to predict what will actually be contained in the regulations, although Canada has committed to "working with" First Nations during regulation drafting.

Nothing in the bill indicates if or how additional funding will be made available to First Nations. This is a concern as water infrastructure is expensive to construct and maintain, and this may present a barrier for First Nations which already face severe infrastructure and funding gaps.

OLTHUIS, KLEER, TOWNSHEND LLP

MEMORANDUM

DATE: December 21, 2012

FROM: Lorraine Y. Land, Andrea Bradley and Liora Zimmerman

RE: Analysis of Bill S-2 (Family Homes on Reserve and Matrimonial Property Rights on Reserve)

Bill S-2: An Act to Amend the Indian Act (Publication of By-Laws) and to Provide for its Replacement

Status

- Introduced in the Senate on September 28, 2011 by Claude Carignan and passed by the Senate on December 1, 2011.

- Introduced in the House of Commons on December 8, 2011 and currently being debated at the second reading stage.

- NB: Three previous bills have been introduced regarding matrimonial property rights on reserve, none of which were passed: Bill S-4 (2010), Bill C-8 (2009), and Bill C-47 (2008).

Overview

This bill intends to address the "legislative gap" that currently exists regarding matrimonial property on reserve. This is the fourth version of the bill that has been introduced in recent years. Although the government conducted consultations with NWAC and AFN (who in turn, consulted First Nations), the concerns of these organizations were largely not accounted for. AFN indicates that three broad principles needed to be addressed: (1) First Nation jurisdiction, (2) access to justice, dispute resolution and remedies, and (3) systemic issues, such as housing shortages. Unfortunately, the bill does not address these broader issues.[11]

If the bill is passed, First Nations would have a one-year period to enact their own laws on matrimonial property, after which the provisional laws in the bill would apply. In order to pass their own laws, a First Nation would need to obtain a majority of votes at a meeting with 25% of eligible electors. If a First Nation does not pass its own laws within a year, the extensive rules laid out in the bill would apply until the First Nation enacts its own laws.

Key Provisions

- Section 2: defines "court" as a provincial court.

- Sections 5-6: confirms that the Act does not affect title to reserve lands and that it only applies if at least one of the spouses or common-law partners is an Indian or band member.

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[11] "Bill S-2: *Family Homes on Reserves & Matrimonial Interests or Rights Act*", AFN Technical Update, January 27, 2012, online: http://www.afn.ca/uploads/files/mrp/bill_s-2.pdf.

- Section 7: provides that First Nations have the power to enact their own laws respecting matrimonial property. The only requirement is that they must have procedures for amending and repealing them.

- Sections 8-11: provide the method of approving First Nation laws. They must be approved by a majority at a community meeting attended by at least 25% of eligible voters. The Minister must be notified of the laws and any future amendments, but does not need to approve of the laws. The laws come into force on the date they are approved at the community meeting (i.e. there is no delay caused by notification to the Minister).

- Section 12: the provisional rules apply to a First Nation if it has not enacted laws under s. 7 (with different rules for those under the *First Nation Land Management Act* and self-government agreements).

- Sections 13-52: these are the "provisional rules". Sections 13-15 provide for the occupancy rights of common-law partners and spouses of the matrimonial home during the relationship and after death. Sections 16-18 provide for emergency protection orders where violence has occurred or a person is at risk of harm. Sections 20-21 provide for exclusive occupation orders of the matrimonial home. Sections 28-40 give the rules for the division of matrimonial property after a relationship breaks down or a spouse dies. Sections 41-42 give the council of the First Nation where the property is situated the right to receive a copy of most applications filed under these provisions and to make representations to the court about the cultural, social, and legal context related to the application.

- Section 56: the provisional federal rules come into force one year after s. 7 comes into force (meaning First Nations will have one year to enact their own laws before the provisional rules apply).

Assessment

This bill has improved somewhat over previous incarnations of the legislation. First, the bill gives more time for First Nations to develop their own laws (i.e. one year before the provisional rules apply). This is a positive change, but one year will likely not be enough time for many First Nations to develop comprehensive matrimonial property laws and the capacity necessary to implement them. Second, the bill makes it easier for First Nations to pass their own laws (a majority of 25% of eligible voters needed to approve, meaning only 12.5% of all electors are needed to approve the laws). Third, it removes a level of government oversight that was present in former incarnations of the bill in the form of "verification officers". These are all positive changes from previous bills.

There are some concerns with the provisional rules themselves. Primarily, the rules give jurisdiction to the provincial courts for enforcement. This constitutes a failure to recognize self-government rights. It also means that the rules will be difficult to enforce, as provincial courts are often not readily accessible from reserves. For example, if a spouse requires an emergency protection order due to domestic violence, under proposed section 16, he or she may not have the resources to access a provincial court on an urgent basis.

Overall, it will be easier for First Nations to pass their own laws under this bill than in previous versions, but the larger issue remains that the bill fails to recognize First Nations' jurisdiction. It does so in several ways, for instance:

1. The bill does not generally recognize inherent rights to self-government over matrimonial property on reserve.
2. The bill does not recognize traditional methods of decision-making (e.g. consensus) in the mandated approval process.
3. The bill does not recognize First Nations' existing dispute resolution systems, but gives jurisdiction to the provincial courts to enforce the provisional rules.

These issues are among the concerns raised in the consultation process that preceded this bill and which have not been addressed.

OLTHUIS, KLEER, TOWNSHEND LLP

MEMORANDUM

DATE: December 21, 2012

FROM: Lorraine Land, Andrea Bradley and Liora Zimmerman

RE: Analysis of Bill S-6 (First Nations Election Act)

Bill S-6: First Nations Election Act

Status

- Introduced in the Senate on December 6, 2011.
- Passed first reading in the House on May 5, 2012.

Overview

This bill provides an alternative First Nations elections regime to the one under the *Indian Act.* There are three ways that this regime could apply to a First Nation:

1. The First Nation's council can pass a resolution adopting the regime.
2. The Minister can impose the regime if he or she "is satisfied that a protracted leadership dispute has significantly compromised governance of that First Nation".[12]
3. The regime is imposed if the Minister has deemed that there was a "corrupt practice in connection with the election" and the election has been set aside under s. 79 of the *Indian Act.*

A First Nation can be removed from the regime if it submits a proposed community election plan that meets certain criteria, including approval by a majority of electors, and a resolution requesting removal.

The regime is, in some ways, more comprehensive than that provided under the *Indian Act.* There is a more comprehensive system of offences and penalties, for example. Four of the other significant differences from the *Indian Act* are that (1) terms of chiefs and councillors are increased from two to four years, (2) chiefs must be band members, (3) election appeals are made to a court rather than the Minister, and (4) there is to be a "petition" process for removal of a chief and councillors, to be laid out in regulation. Many of the detailed provisions on procedures related to nominations and elections remain to be established through regulations (as in the *Indian Act* system, which places detailed procedural provisions in the *Indian Band Election Regulations*).

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[12] Note that this provision means that the Minister could order that a First Nation with a custom election system be governed by the regime proposed by this bill.

Key Provisions

- Section 2: Defines First Nations as *Indian Act* bands. Defines electors as persons on the band list who are 18 years of age or older on the relevant day (whether it be election day, a petition to remove a chief/councillor, a nomination, or a vote on a community election code). Note that there is no requirement for electors to be "ordinarily resident" on reserve.[13]

- Section 3: Provides the three ways that the regime could apply to a First Nation (opting in, imposition by Minister due to protracted leadership dispute, or imposition due to corrupt election practice and election being set aside under s. 79 of the *Indian Act*).

- Section 5: Establishes when the first election under the regime is to be held. For First Nations that opt to elect into the regime, the first election will be no later than the day on which the term of the existing chief and council would have expired. If it is imposed, the first election occurs no later than six months after the ministerial order.

- Section 7: Imposes the same requirements for number of councillors as in the *Indian Act* (between two to twelve and one councillor for every 100 members), but allows a council to reduce the number of councillor positions by resolution (to a minimum of two), effective as of the next election that is not a by-election.

- Sections 9-13: Govern nomination of candidates. There are some differences from the *Indian Act.* For instance, only electors (i.e. band members) can be nominated for chief or councillor. The *Indian Act* system did not require that a chief be a band member.[14] A person cannot be nominated for both chief and councillor in the same election, under s. 9(2). There is also no reference to "electoral sections" in this bill. Unlike the *Indian Act*, the bill outlines offences related to nomination under ss. 10-13, such as a prohibition against influencing the nomination of candidates through duress.

- Sections 14-22: These sections govern ballots and voting procedures. Section 15 provides that only electors of the First Nation may vote (see above for definition of elector). Section 18 requires that an election be by secret ballot. The remainder of the provisions govern prohibited behaviour, such as purchasing ballots (s. 14(c)), voting more than once (s. 17(a)), and disorderly behaviour in polling stations (s. 20).

- Sections 23 & 24: Provide that chief and councillors win by simple majority. In the event of a tie, the electoral officer "must conduct a draw", whereas under the *Indian Act*, the electoral officer would cast the deciding vote.

- Section 25: Allows for a by-election to be held if a chief or councillor ceases to hold office within three months of the expiry of their term.

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[13] The requirement that electors and councillor nominees be resident on reserve still appears in the *Indian Act*, but has been "read out" due to judicial decisions that determined these residency requirements were unconstitutional: *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203 & *Esquega v. Canada (Attorney General)*, 2008 FCA 182.

[14] See s. 75 of the *Indian Act* and *Sturgeon Lake Indian Band v. Canada (Minister of Indian Afairs & Northern Development)* (1995), 123 D.L.R. (4th) 93 (F.C.A.).

- Sections 28 & 29: Provide that chief and councillors hold office for four years, as opposed to two years under the *Indian Act.* Similar to the *Indian Act*, a chief or councillor will cease to hold office if they commit an indictable offence and are convicted to a prison sentence of at least 30 days, die or resign, or are convicted of an offence under this Act. They can also be removed from office by petition (process to be laid out in regulations) or by the court (see ss. 30-35).

- Sections 30-35: These provisions govern contested elections. Unlike the *Indian Band Election Regulations*, which allows for an appeal process to the Minister, this bill provides that elections are to be contested in court and outlines the procedure to bring an application.

- Section 37-40: These sections govern offences and penalties. Sections 37 and 38 list the sections under which offences are found. For example, there are offences related to voting when not entitled, inducing others to vote (s. 16(a) and (b)), refusing to leave a polling station when ordered to do so (s. 21(2)), obstructing elections (ss. 26-27), and inducing others to sign a petition for the removal of a chief or councillor (s. 36). Section 39 provides the penalties for those found guilty of an offence. The maximum penalty provided is a fine of $5,000 or imprisonment of not more than five years. For certain offences, a person is not eligible for election for five years following the date of conviction, pursuant to s. 40.

- Section 41: Gives broad regulatory power to the Governor in Council to make regulations respecting elections (the Governor in Council also has broad regulatory powers under the *Indian Act*).

- Section 42: Allows a First Nation to be removed from the schedule (i.e. from the application of this Act). To be removed, the First Nation must provide a proposed community election code that meets certain criteria (including approval by a majority of electors) and a resolution requesting that the First Nation be removed from the schedule.

Assessment

Negative: Inadequate Consultation on Imposed Legislation

A national engagement process was led by the Assembly of Manitoba Chiefs and the Atlantic Policy Congress of First Nations Chiefs. These organizations made presentations and solicited feedback from First Nations across the country, however the extent of this engagement process, and the extent to which the bill reflects the feedback received through this process, is not clear. Support for the bill has been mixed and the current Grand Chief of the Assembly of Manitoba Chiefs, Derek Nepinak, has expressed opposition to the bill.[15]

The potential lack of adequate consultation is particularly troubling as this new elections regime can be imposed on First Nations who currently fall under the *Indian Act* or who have a custom elections system. Further, many of the detailed provisions in this new regime remain to be fleshed out through regulations. Some of these provisions could have significant ramifications for self-government, such as the system for petitions to remove elected chiefs and councillors.

[15] Legislative Summary of Bill S-6, pg. 13, available online: http://www.parl.gc.ca/Content/LOP/LegislativeSummaries/41/1/s6-e.pdf.

Given the government's track record on consultation to date, it seems unlikely that these regulations will be developed through consultation.

It should, however, be noted that this legislation will generally be "opt-in" legislation. The Minister has less discretion to impose this elections regime than he does to impose the *Indian Act* regime. Under s. 74 of the *Indian Act*, the Minister can impose the *Indian Act* system "whenever he deems it advisable for the good government of a band". Under this bill, the regime can only be imposed if a protracted leadership dispute has significantly compromised governance or there has been a corrupt practice in connection with an election.

Positive and Negative: Offences and Penalties

The offences and penalties detailed in this bill are much more extensive than those provided under the *Indian Act* elections system. Many of the offences are appropriate to ensuring fair elections (such as prohibitions against influencing others to vote a certain way, or using duress to force a person to sign a petition for the removal of a chief and/or councillor). On the other hand, the penalties for these offences are very stringent, exceeding those required of other federal, provincial and municipal systems. The imposition of these offences and penalties could be considered an infringement on First Nations' self-government rights.

Positive: Appeal Process & Increased Independence from Ministerial Oversight

The *Indian Act* allows for an appeal process to the Minister, and provides certain circumstances in which election results can be overturned in the *Indian Band Election Regulations* and s. 79 of the Act (corrupt practice, violation of the Act, or ineligible candidate). This bill provides for an appeal process to the courts, where an elector alleges that there was a contravention of the Act or regulations that was likely to have affected the result. Ministerial oversight over election appeals is therefore removed under this new regime, which is a positive development.

Note, however, that there is also reference in the bill to a "petition" process for removal of a chief or councillor, which is to be detailed by regulation.

Positive: Longer Terms

This bill would increase the terms of chiefs and councillors to four years, instead of two. This could strengthen governance, as it would allow for more consistent, long-term policy development and implementation for First Nation communities.

OLTHUIS, KLEER, TOWNSHEND LLP

MEMORANDUM

DATE: December 21, 2012

FROM: Lorraine Y. Land, Andrea Bradley and Liora Zimmerman

RE: Analysis of Bill C-428 (Indian Act Amendment and Replacement Act)

Bill C-428: An Act to Amend the Indian Act (Publication of By-Laws) and to Provide for its Replacement

Status

- Private member's bill, introduced on June 4, 2012 by Rob Clarke (Desnethé —Missinippi— Churchill River)

- Referred to Standing Committee on Aboriginal Affairs and Northern Development at second reading on December 5, 2012

Overview

There are two key parts to this bill. First, the bill attempts to force a process of replacing the *Indian Act*. Section 2 requires the Minister to report to the House of Commons every year on progress in developing legislation to replace the *Indian Act*, "in collaboration with First Nations organizations and other interested parties". The preamble states that "the Government of Canada is committed to continuing its work of exploring creative options for the development of this new legislation in collaboration with the First Nations organizations that have demonstrated an interest in this work."

Second, the bill introduces changes to the *Indian Act.* One of the more controversial changes would modify the by-law making powers of First Nations. The bill removes the requirement of forwarding copies of by-laws to the Minister, but instead imposes publication requirements on First Nations under a new s. 86.1. The bill also removes the by-law making power over intoxicants on reserves. The bill addresses some aspects of the *Indian Act* that may be less controversial (putting aside the complete lack of consultation), including removing the Minister's jurisdiction over wills and estates, provisions related to residential schools, and the prohibition on the sale of agricultural products from reserves in Manitoba, Saskatchewan and Alberta.

Key Provisions

- Section 2: requires the Minister to report to the House of Commons committee responsible for Aboriginal affairs on progress, in collaboration with First Nations organizations and other interested parties, in developing legislation to replace the *Indian Act*.

- Section 5: repeals the provisions on sale of agricultural products from reserves in Manitoba, Saskatchewan, and Alberta (*Indian Act*, ss. 32-33).

- Section 6: replaces the section on "special reserves" (lands set apart for a band but for which legal title is not vested in the Crown) with a provision that recognizes existing special reserves, but does not contemplate their creation in the future (*Indian Act*, s. 36, to be replaced by proposed s. 36.1).

- Section 7: repeals the provisions that give the Minister jurisdiction over the wills and estates of deceased Indians (*Indian Act*, ss. 42-47).

- Section 8: repeals the requirement that copies of by-laws be sent to the Minister, that by-laws come into force 40 days after being forwarded to the Minister, and the Minister's power to disallow a by-law within that period (*Indian Act*, s. 82).

- Section 9: repeals by-law making power over intoxicants (*Indian Act*, s. 85.1).

- Section 10: replaces the provision covering "proof" of valid by-laws with a requirement that councils publish copies of all by-laws on the band's website, the *First Nations Gazette*, and in a newspaper with general circulation on the reserve. By-laws would come into force on the date of publication in any of those three sources. By-laws would have to be provided to band members on request (*Indian Act*, s. 86 – would be replaced by proposed 86.1).

- Section 11: removes requirement that Department employees, missionaries, and school teachers obtain a license to trade on reserve (*Indian Act*, s. 92).

- Section 12: broadens the seizure powers of peace officers, superintendents, or other persons authorized by the Minister, to include property related to a by-law violation (*Indian Act*, s. 103.1).

- Section 13: adds a clarification that fines imposed under by-laws belong to Her Majesty for the benefit of the band (*Indian Act*, proposed s. 104(3)).

- Section 15-19: removes the Minister's power to make agreements with religious or charitable organizations for the education of Indian children, and their support and maintenance while at those schools (*Indian Act*, ss. 114(1)(e) and 115(c) and (d)), removes the power to compel an Indian child older than 16 to attend school (*Indian Act*, s. 116(2)(b)), and removes other provisions regarding religious schools, the denominations of religious schools, and truant officers (*Indian Act*, ss. 118-122).

Assessment

Negative: No Consultation

The key issue with this bill is the complete lack of consultation that preceded it. There is also troubling language in the bill that indicates this lack of consultation would continue. The preamble includes a commitment to collaborate with "First Nations organizations that have demonstrated an interest in this work", rather than with all First Nations, as the duty to consult would require for an overhaul of the *Indian Act.* The body of the bill uses more inclusive language, requiring "collaboration with First Nations organizations and other interested parties" at s. 2, but the preamble's language and the previous lack of consultation are both troubling indicators.

Neutral (with caveat): Residential Schools and Colonial Anachronisms

As for the substantive changes that the bill would impose, some could be considered neutral in their effect. The bill removes the provisions related to residential schools, which are not being enforced at present. As these provisions are not being enforced, their removal would not likely

have much impact. However, the bill would remove these provisions without consultation, and specifically, without having consulted residential school survivors. Although the residential school provisions in the *Indian Act* should be addressed, it is unacceptable that this be done without consulting survivors, and First Nations generally.

Aside from the residential school provisions, the bill removes various colonial anachronisms, such as the requirement that missionaries on reserves acquire a license to trade and the ban on sale of agricultural products from reserves in the prairie provinces.

Positive and Negative: Estates and By-laws

There are two substantive changes that would certainly have an effect. The first is the removal of the Minister's jurisdiction over Indian wills and estates. This may be a positive change, as it potentially expands the jurisdictional powers of First Nations. However, First Nations would need to enact their own testamentary laws in order to avoid the application of existing laws, which may be an issue depending on each First Nation's capacity. There may be some confusion as to whether provincial or federal laws apply.

The second major substantive change deals with by-law making powers. The bill removes the requirement that by-laws be sent to and approved by the Minister. As with the change to the provisions on wills and estates, this change could be considered positive, in that it increases First Nations' jurisdiction. Again, though, the benefit is mixed. The bill imposes requirements for the publication of by-laws that are far more onerous than those imposed upon other governments. By-laws would need to be published on the Nation's website, in the *First Nations Gazette*, and in a newspaper with general circulation on the reserve. The bill replaces accountability to the Minister with accountability to the public, but it retains the assumption that accountability needs to be imposed on First Nations through the *Indian Act.*

Overall

As a private member's bill that has generated controversy in the House, it is possible that this bill will not become law. The Harper government has, however, announced that it supports the bill "in principle".[16] Although there are some potentially positive aspects to the bill, the complete lack of consultation prior to the introduction of this bill is very problematic. A process for amending the *Indian Act* will not succeed if there is not full involvement of First Nations communities in developing the alternative structures being proposed.

[16] "Harper Government Supports Bill C-428, the Indian Act Amendment and Replacement Act", online: http://www.aadnc-aandc.gc.ca/eng/1350586700997/1350586739766.

OLTHUIS, KLEER, TOWNSHEND LLP

MEMORANDUM

DATE: December 21, 2012

FROM: Lorraine Y. Land, Andrea Bradley and Liora Zimmerman

RE: Summary of Bill S-207

Bill S-207: *An Act to amend the Interpretation Act*

Status

- Sponsored by (Inuit) Senator Charlie Watt
- Passed its second reading and was transferred to the Standing Senate Committee on Legal and Constitutional Matters on June 7, 2012

Overview & Key Provisions

This act is extremely short. Here is the entire act:

> Her Majesty, by and with the advice and consent of the Senate and House of Commons of Canada, enacts as follows:
>
> **1. The *Interpretation Act* is amended by adding the following after section 8.2:**
>
> ABORIGINAL AND TREATY RIGHTS
>
> **8.3** No enactment shall be construed so as to abrogate or derogate from the aboriginal and treaty rights of the aboriginal peoples of Canada that are recognized and affirmed by section 35 of the *Constitution Act, 1982*.

Assessment

The *Interpretation Act* is only relied upon where another piece of legislation is not clear and the court or others need help interpreting what it means. If an enactment clearly intends to abrogate or derogate from Aboriginal or treaty rights, this provision would not prevent that. Section 3 of the existing *Interpretation Act* indicates that it applies to every enactment "unless a contrary intention appears." This means that this new clause preventing annulment or destruction of Aboriginal or treaty rights will not actually prevent a law from altering Aboriginal or treaty rights **if** it has a clear intention to do that.

OLTHUIS, KLEER, TOWNSHEND LLP

MEMORANDUM

DATE: December 21, 2012

FROM: Lorraine Y. Land, Andrea Bradley and Liora Zimmerman

RE: **Bill S-212 (First Nations Self Government Recognition Act)**

Bill S-212: *An Act Providing for the Recognition of Self-Governing First Nations of Canada*

Status

- Senate bill, introduced by Senator Gerry St. Germaine (a Métis senator who just retired).

- Senator St. Germaine introduced this bill on three previous occasions (2002, 2004 and 2006). It never passed. It will likely not pass now, as it no longer has a sponsor in the Senate.

- Introduced and had first reading in the senate on November 1, 2012

Overview

This Act has the potential to transfer a significant number of provincial powers and responsibilities to First Nations, and provides for a financial transfer agreement with the crown to enable First Nations to run such programs. However, First Nations must first submit a proposal and have a referendum to come under the Act as a "recognized First Nation" (this term alone is problematic – what will First Nations be if they do not participate? Unrecognized First Nations?). Once that step is completed, many other powers are on the table, but are not required to be undertaken.

The Act preamble discusses its purpose to honour the intent of the Royal Proclamation and the United Nations Declaration on the Rights of Indigenous Peoples, in particular the right of self-determination, and Canada's desire to "reconcile with First Nations by recognizing the governance of self-governing First Nations over their lands, peoples and resources." However, and quite ironically, the bill has been drafted without consultation with First Nations. This Act also ignores the authority First Nations already have under their own laws, and the work already done by First Nations and First Nation organizations to articulate their own goals and visions for self-determination.

Key Provisions

- A First Nation can chose to come under this Act or not. If the First Nation wants to be a "recognized First Nation" under the Act it must submit a proposal to its eligible voters and hold a referendum (s. 5(1)). This must include a proposed constitution for the First Nation.
- In order to pass the referendum, at least 50% of eligible voters must vote and at least 50% of those voting must be in support of becoming a "recognized First Nation." This means that a vote of support from 25% of voters would be enough.
- If there are irregularities or concerns regarding the validity of the voting process, members (or the Minister) only have five days in which to report the problem (s. 10(2)).

- Once a First Nation has been "recognized" under the Act, they have the potential to take over authority and to make laws in many areas, including the following list. If a federal law conflicts with a First Nation law on one of these topics, the First Nation law prevails (s. 15(2), 15(4) and 15(5)):
    - definition of citizenship in the First Nation
    - education
    - wildlife and habitat management
    - adoption of children
    - guardianship, custody, care and placement of children of its citizens
    - solemnization of marriage
    - matrimonial property (i.e. division of property upon break-up of a marriage)
    - inheritance, wills, intestacy (what happens if someone dies without a will), and administration of estates (property belonging to someone who has died)
    - use, management and control of lands and natural resources
    - control and prevention of pollution
    - licensing and regulation of professions and trades
    - residency rules (housing)
    - trespass on reserve
    - public works and infrastructure
    - raising of revenues (e.g. taxation of members or non-members on First Nation land)
    - other "local or private" matters relating to the First Nation
- "recognized First Nations" can also take on authority for the management and making of laws regarding the following topics, however, in these areas if there is a conflict with a federal law the federal law will prevail (s. 15(6) & 15(7)):
    - health care
    - emergency preparedness
    - transportation, including construction and maintenance of roads
    - fishing and protection of fisheries and fish habitat
    - control, prohibition, manufacture, sale, etc. of intoxicants (e.g. alcohol)
    - gaming
    - establishment of courts and tribunals
    - agriculture
    - labour relations
- A "recognized First Nation" can also make laws creating offences that punish people who break any of the First Nation's other laws, and this punishment can include fines or imprisonment, community service or "other means for achieving compliance" (s. 16). This power applies only to summary conviction offences (i.e. minor offences).
    - terms of imprisonment and fines cannot be any more severe than the corresponding punishment under s. 787(1) of the *Criminal Code* (a fine not over $5,000 or imprisonment for no longer than six months) and no greater than the punishment for a similar offence under federal or provincial law (s. 16(6)), for example, an environmental offence cannot have a more severe punishment than under federal law per s. 16(2)
    - summary conviction procedures in s. 787 of the *Criminal Code* must be followed (s. 22)
    - laws can also address enforcement measures such as inspections, searches, seizure, etc.

- The process to create the laws mentioned above requires that the First Nation first notify the Minister (INAC) of its intention to exercise its authority in a given area. When this happens, INAC *must* enter into negotiations with the First Nation to reach an agreement regarding the exercise of those powers (s. 17 & 36)
    - the Minister must use his or her best efforts to negotiate an agreement, including terms and conditions related to the First Nation's exercise of their law making power, and any financial transfers associated with the implementation and enforcement of those laws
    - A "recognized First Nation" *may* receive money from the federal or provincial crown or other entities (s. 34)
    - The purposes of federal fund transfers are to promote equal opportunities, reduce disparities and ensure that "recognized First Nations" can provide services to their citizens at a level reasonably comparable to services provided to other Canadians; however, the First Nation's capacity to raise its own funds *must* be considered in determining federal transfer amounts (s. 37).
    - The Governor in Council may make regulations regarding the terms and conditions of federal transfers of funds to "recognized First Nations" – this section *does not* require First Nation input into the regulations (s. 62(d)).
- Note that law-making authority relates to First Nation citizens and lands. The Act's definition of First Nation lands *does not* include traditional territory, except where the First Nation has successfully established an Aboriginal title claim (recognized by the crown or a court).
- The laws of a "recognized First Nation" must be in writing and available to the public (s. 20)
- Judicial notice will be taken of the laws of a "recognized First Nation" (i.e. in court a judge will consider and apply these laws) (s. 20(7))
- The Act indicates that it does not affect title to First Nation lands (s. 27(1)) and that no First Nation lands can be alienated to another government except in exchange for other land (s. 30). However, where First Nation land is leased or subject to a license or other interest, the responsibility for overseeing the lease or license is transferred to the "recognized First Nation" and removed from INAC (s. 28(3)).
- The Act says that it will not alter the Indian status of First Nation citizens (s. 42).
- Section 87 and 89 of the *Indian Act* continue to apply to "recognized First Nations," their lands, and citizens who are Indians (i.e. property on reserve is exempt from tax, and not subject to seizure).
- Aside from the sections noted above, the *Indian Act* will cease to apply unless the First Nation does not enact its own law to replace specified sections (s. 47).
- The fiduciary relationship between First Nations and the crown continues (s. 51). However, the Act states that "as a recognized First Nation exercises its law-making powers and authority following recognition, fiduciary obligations owed by Her Majesty to the recognized First Nation will be as determined by the common law respecting fiduciary relationships."

Assessment

The Act has the potential to transfer powers and responsibilities equivalent to a province to a First Nation, at least in respect of its own citizens. However, the Act also states that when a First Nation wishes to create laws to use this authority, it must negotiate with the Minister, and funding must also be negotiated. Lack of funding could limit the extent to which this is actually carried out.

The Act states that it seeks to recognize First Nations' right to self-determination; however, no consultation occurred in developing the Act (to date; it is still in early stages). In addition, when the crown wants to make a new bill that would impact a "recognized First Nation's" rights or to amend this Act, it is only required to provide "recognized First Nations" with an opportunity to consider the proposed changes and to give "due consideration" to the First Nation's input. There is no requirement for free, prior and informed consent – a key aspect of self-determination as provided in the United Nations Declaration on the Rights of Indigenous Peoples – and no requirement for agreement. The Act is also unclear regarding what would happen to First Nations who do not seek "recognition."

Despite the powers provided for above, the Act indicates that "nothing in this Act affects the enforcement of federal or provincial laws on the First Nation lands of a recognized First Nation." So it appears that any First Nation laws would apply concurrently with Canadian or provincial laws, although the Act does indicate in which cases First Nation laws would prevail if the laws conflict (see above).

In addition, with regard to the administration of justice and enforcement of laws, the Act assumes that First Nations will structure their system of justice the same way as the Canadian system, making provisions for Commissioners for taking oaths (s. 21(1)(b)), justices of the peace (s. 24), and courts and tribunals where judges *must* apply provincial rules of evidence (s. 25), et cetera.

This private bill introduced by Senator St. Germaine will likely proceed further now that the Senator has retired.