Legislative Summary **LS-520E**

BILL C-71: FIRST NATIONS COMMERCIAL AND INDUSTRIAL DEVELOPMENT ACT

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LEGISLATIVE HISTORY OF BILL C-71: FIRST NATIONS COMMERCIAL AND INDUSTRIAL DEVELOPMENT ACT

HOUSE OF COMMONS	
Bill Stage	**Date**
First Reading:	2 November 2005
Second Reading:	18 November 2005
Committee Report:	22 November 2005
Report Stage:	23 November 2005
Third Reading:	23 November 2005

SENATE	
Bill Stage	**Date**
First Reading:	23 November 2005
Second Reading:	25 November 2005
Committee Report:	
Report Stage:	
Third Reading:	25 November 2005

Royal Assent: 25 November 2005

Statutes of Canada: 2005, c. 53

N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

Legislative history by Peter Niemczak

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BILL C-71: FIRST NATIONS COMMERCIAL AND INDUSTRIAL DEVELOPMENT ACT*

INTRODUCTION

Bill C-71, An Act respecting the regulation of commercial and industrial undertakings on reserve lands (the First Nations Commercial and Industrial Development Act, or FNCIDA), was introduced in the House of Commons on 2 November 2005. It was referred to the House of Commons Standing Committee on Aboriginal Affairs and Northern Development at second reading on 18 November 2005. The Committee reported the bill back to the House of Commons without amendment on 22 November, following its only meeting on the bill held on 21 November. The bill was passed by the House of Commons on 23 November and received first reading in the Senate on the same day. On 25 November, on a motion pursuant to Rule 38 of the *Rules of the Senate*,(1) the bill was read a second time, debated, read a third time, and passed without amendment. The bill was also given Royal Assent on that day.

The bill enables First Nations communities to request that the Government of Canada make regulations relating to specific commercial and industrial development projects on their reserve lands.

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* Notice: For clarity of exposition, the legislative proposals set out in the bill described in this Legislative Summary are stated as if they had already been adopted or were in force. It is important to note, however, that bills may be amended during their consideration by the House of Commons and Senate, and have no force or effect unless and until they are passed by both Houses of Parliament, receive Royal Assent, and come into force.

(1) Rule 38 states:

> 38. At any time while the Senate is sitting, the Leader of the Government in the Senate or the Deputy Leader of the Government in the Senate may state from his or her place in the Senate, that there is an agreement among the representatives of the parties in the Senate to allot a specified number of days or hours to the proceedings at one or more stages of any item of government business. At the same time, without notice, the said Leader or Deputy Leader may propose a motion setting forth the terms of such agreed allocation and every such motion shall be decided forthwith without debate or amendment.

BACKGROUND

Economic development is viewed as a key factor in improving the standard of living of First Nations people. Some undertakings that would enhance a community's economic development, such as commercial and industrial development projects, however, face potential barriers due to the lack of a regulatory framework for such projects on reserve lands. This regulatory gap contributes to uncertainty faced by investors, which may discourage investing in projects on reserve lands.(2)

The lack of a regulatory framework is because, for the most part, regulations that relate to commercial and industrial development are provincial. As a result of section 91(24) of the *Constitution Act, 1867*, which assigns Parliament exclusive jurisdiction over "Indians, and Lands reserved for the Indians," provincial laws and regulations that relate to commercial and industrial development do not apply on reserve lands. In some instances, such as environmental regulations, federal regulations are in place but are not as complete as provincial ones. In other cases, there is a clear absence of regulations relating to industry-specific technical operations, such as how to hook into a power grid.(3)

It is believed that most First Nations do not have the authority to establish regulations to fill this gap. First Nations that do have that authority are impeded by lengthy process requirements.(4)

Bill C-71, which has been described as a First Nations-led initiative, was developed cooperatively with the following First Nations to close the existing regulatory gap: Squamish Nation of British Columbia, Fort McKay First Nation and Tsuu T'ina First Nation of Alberta, Carry the Kettle First Nation of Saskatchewan and Fort William First Nation of Ontario.

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(2) Fiscal Realities Economists, "Expanding Commercial Activity on First Nations Land: Lowering the Costs of Doing Business on Reserve," November 1999, p. 40, http://www.itab.ca/ English/documents/Research%5CECA_Final.pdf.

(3) First Nations Commercial and Industrial Development Initiative, "Examples of Regulatory Gaps," http://www.fncidi.ca/examples.html.

(4) Fiscal Realities Economists (1999).

DESCRIPTION AND ANALYSIS

Bill C-71 contains a preamble and 13 clauses. The bulk of the bill relates to the Governor in Council's power to make regulations, at the request of a First Nation, that will govern specific projects on reserve lands.

A. Preamble

The preamble notes that First Nations are planning commercial and industrial undertakings on reserve lands, and that they have asked the Government of Canada to provide for the establishment of the regulations required to govern those undertakings. Such regulations will be made only at the request of a First Nation.

B. Interpretation (Clause 2)

Clause 2(1) defines the following terms as they are used in the bill: "first nation," "Minister," and "reserve lands."

C. Regulations (Clauses 3 to 7)

Clause 3(1) establishes that the Governor in Council may make regulations governing commercial and industrial undertakings that are located on reserve lands. These regulations may "confer any legislative, administrative, judicial or other power on any person or body that the Governor in Council considers necessary to effectively regulate the undertakings" (clause 3(2)(*b*)). Regulations may also incorporate laws of the province by reference (clause 3(3)).

A number of the regulatory powers refer to provincial laws to describe the power. For example, clause 3(2)(*c*) provides that a regulation may confer the power to make orders to cease work, comply with the regulations, or remedy the consequences of failing to comply with the regulations, or to do any work considered necessary and to recover the costs of that work, in similar circumstances and subject to similar conditions as under the laws of the province. Clause 3(2)(*i*), which allows regulations to confer on any person the power to inspect and search places and things and to seize and detain property, is qualified in the same way. Other potential

regulatory powers that are shaped by provincial law include the ability to establish summary conviction offences for contravening the regulations "where similar acts or omissions constitute an offence under laws of the province" (clause 3(2)(*g*)) and the ability to establish administrative monetary penalties for contravening the regulations "where similar acts or omissions are punishable by similar penalties under laws of the province" (clause 3(2)(*h*)).

Regulations may also:

- Fix or prescribe the fixing of royalties (clause 3(2)(*d*));
- Fix or prescribe fees or rents to be paid (clause 3(2)(*e*));
- Prescribe rules relating to the confidentiality and disclosure of information (clause 3(2)(*k*));
- Prescribe or confer power to prescribe rules of procedure for hearings (clause 3(2)(*l*));
- Require an assessment of the environmental effects of an undertaking where the *Canadian Environmental Assessment Act* does not apply (clause 3(2)(*n*)); and
- "provide for the relationship between the regulations and aboriginal and treaty rights referred to in section 35 of the *Constitution Act, 1982*, including limiting the extent to which the regulations may abrogate or derogate from those aboriginal and treaty rights" (clause 3(2)(*q*)).

Clause 5 establishes that regulations may be made only if (1) the Minister has received a resolution of the council of a First Nation requesting the making of the regulations (clause 5(*a*)), and (2), in cases where the regulations specify that a provincial official or body may exercise a power or perform a duty, an agreement has been concluded between the Minister, the province and the council of the First Nation for the administration and enforcement of the regulations by the official or body (clause 5(*b*)).

Clauses 6 and 7 deal with conflicts of laws. Clause 6 establishes that, unless otherwise provided for, regulations made under any other Act of Parliament prevail over regulations made under clause 3. Clause 7 establishes that, unless otherwise provided for, regulations made under clause 3 prevail over any First Nation laws or by-laws.

D. Other Acts (Clauses 8 to 10)

Clause 8 provides that the *Statutory Instruments Act* does not apply to instruments made under clause 3. Clause 9 provides that a provincial official or body exercising a power or performing a duty under regulations made under clause 3 is not a federal board, commission or other tribunal for the purposes of the *Federal Courts Act* (clause 9(1)), and that the exercise of provincial law powers that are incorporated by reference into the regulations (as provided by clause 3(3)) can be reviewed by or appealed to the provincial courts.

Clause 10 provides that any payments collected by a provincial official or body pursuant to the regulations are not Indian moneys for the purposes of the *Indian Act* or public money for the purposes of the *Financial Administration Act.*

E. Limits on Liability, Defences and Immunities (Clauses 11 and 12)

Clause 11(*a*) provides that the Crown has the same limits on liability, defences and immunities relating to acts or omissions under the regulations as under the laws of the province. Clause 11(*b*) provides that, unless otherwise provided by the regulations, the person or body exercising a power or performing a duty under the regulations is entitled to the same limits on liability, defences and immunities as under the laws of the province.

Clause 12 prohibits any civil proceeding from being brought or any order, fine or monetary penalty from being imposed in relation to reserve lands against the Crown.

F. Coming Into Force

Clause 13 provides that the bill will come into force on a day to be fixed by order of the Governor in Council.

COMMENTARY

Bill C-71 received virtually no media attention, perhaps due in part to how quickly it was passed in both the House of Commons and the Senate: only one week elapsed between second reading of the bill in the House of Commons and the day the bill received Royal Assent.

The House of Commons Standing Committee on Aboriginal Affairs and Northern Development heard witnesses on the bill on 21 November 2005. Three of the five partnering First Nations were represented at that meeting: Chief Jim Boucher appeared for Fort McKay First Nation, Peter Manywounds appeared for Tsuu T'ina First Nation, and Councillor Harold Calla appeared for the Squamish Nation. The Parliamentary Secretary to the Minister of Indian Affairs and Northern Development and Federal Interlocutor for Métis and Non-Status Indians, the Hon. Sue Barnes, also appeared with officials from the Department of Justice and the Department of Indian Affairs and Northern Development.

Peter Manywounds noted that while other approaches for resolving the regulatory gap issue had been examined (including *Indian Act* by-laws), "[n]one met or could meet the immediate and pressing needs that FNCIDA will address."(5)

The extent to which other First Nations had been consulted was raised as an issue by Bernard Cleary, Member of the Bloc Québécois.(6) Peter Manywounds and Harold Calla explained that consultation had not been managed by the Department of Indian Affairs and Northern Development; rather, it was carried out by the partnering First Nations at those Nations' request. Outreach relating to the First Nations Commercial and Industrial Development Initiative included letters and information packages sent to all First Nations chiefs. Mr. Manywounds noted that for some reason, there was no contact from Quebec.(7)

The House of Commons Committee proceeded to clause-by-clause consideration of the bill on the same day that witnesses appeared. Pat Martin, Member of the New Democratic Party, proposed six amendments, all of which were defeated.

As a result of the anticipated dissolution of Parliament in late November, Bill C-71 was not referred to a Senate committee for study. Instead, to expedite the bill's passage, Senator William Rompkey, Deputy Leader of the Government in the Senate, moved:

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(5) House of Commons Standing Committee on Aboriginal Affairs and Northern Development, *Evidence*, 21 November 2005.

(6) The Assembly of First Nations of Quebec and Labrador had expressed concerns that it had not been consulted with respect to the bill. It was invited to appear before the Committee, but was not able to appear on the only date set aside for the meeting (*ibid.*).

(7) *Ibid.*

> That, pursuant to rule 38, in relation to:
>
> …
>
> Bill C-71, An Act respecting the regulation of commercial and industrial undertakings on reserve lands;
>
> no later than 2:45 p.m. Friday, November 25, 2005, the Speaker shall interrupt any proceedings before the Senate and all questions necessary to dispose of all remaining stages of the above-mentioned [bill] shall be put forthwith and successively without further debate, amendment, or adjournment and that any votes on any of those questions be not further deferred; and
>
> That if a standing vote is requested, the bells to call in the Senators be sounded for fifteen minutes.

The motion carried. During an abbreviated debate on the bill, the fact that some First Nations had expressed concern that they had not been consulted was raised again. Bill C-71 was read a third time, however, and passed.