Legislative Summary **LS-625E**

BILL C-5: AN ACT TO AMEND THE INDIAN OIL AND GAS ACT

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LEGISLATIVE HISTORY OF BILL C-5

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	28 January 2009	First Reading:	21 April 2009
Second Reading:	13 February 2009	Second Reading:	23 April 2009
Committee Report:	25 March 2009	Committee Report:	5 May 2009
Report Stage:	2 April 2009	Report Stage:	
Third Reading:	2 April 2009	Third Reading:	6 May 2009

Royal Assent: 14 May 2009

Statutes of Canada 2009, c. 7

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

Legislative history by Michel Bédard

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BILL C-5: AN ACT TO AMEND THE INDIAN OIL AND GAS ACT*

Bill C-5, An Act to amend the Indian Oil and Gas Act, was introduced in the House of Commons on 28 January 2009. This bill is identical to Bill C-5, which was introduced in the 1st Session of the 40th Parliament and died on the *Order Paper* when Parliament was prorogued on 4 December 2008. The December 2008 version of Bill C-5 was a reintroduction of Bill C-63, which had died on the *Order Paper* when the 2nd Session of the 39th Parliament was dissolved on 7 September 2008.

Bill C-5 replaces almost all of the provisions of the six-section *Indian Oil and Gas Act*(1) and includes a number of matters that are currently provided for in the *Indian Oil and Gas Regulations, 1995*.(2)

BACKGROUND

The *Indian Oil and Gas Act* and *Indian Oil and Gas Regulations, 1995* provide the legislative framework for the management of oil and gas on First Nation lands. Introduced in 1974, the *Indian Oil and Gas Act* has remained largely unchanged since that time.

A. Governing Structures Related to Oil and Gas on First Nation Lands

Through the Indian Oil and Gas Co-Management Board, the Indian Resource Council and Indian Oil and Gas Canada work together and support the development of oil and gas resources on First Nation 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) R.S.C. 1985, c. I-7.

(2) SOR/94-753.

1. Indian Oil and Gas Canada (IOGC)

In 1987, the Government of Canada established Indian Oil and Gas Canada (IOGC) as an agency of the Department of Indian Affairs and Northern Development. Prior to the establishment of the IOGC, oil and gas on reserve lands was the responsibility of the Indian Minerals Directorate of the Department of Indian Affairs and Northern Development.(3) IOGC has the dual mandate of "fulfill[ing] the Crown's fiduciary and statutory obligations related to the management of oil and gas resources on First Nation lands" and "further[ing] First Nation initiatives to manage and control their oil and gas resources."(4) Part of IOGC's "vision" is to work "in partnership with the IOGC Co-Management Board to develop options to achieve full First Nation management and control."

2. The Indian Resource Council (IRC)

The Indian Resource Council (IRC) was founded in 1987 by chiefs of oil- and gas-producing First Nations. Membership is restricted to First Nations who have or who have the potential for oil and gas production on their lands.(5) The IRC currently has the following mandates:(6)

- to support First Nations in their efforts to attain greater management and control of their oil and natural gas resources;
- to complement initiatives by individual First Nations to gain economic self-reliance and to ensure the preservation of the Crown Trust obligations under treaties with First Nations;
- to coordinate the promotion of initiatives with federal and provincial governments, with industry and with other groups associated with oil, natural gas and related activities to enhance economic benefits realized by the First Nations from resource development;
- to encourage a greater development and utilization of First Nations human resources in oil, natural gas and related activities;

(3) Indian and Northern Affairs Canada, Indian Oil and Gas Canada, "History of Indian Oil and Gas Canada (IOGC)," http://www.iogc-pgic.gc.ca/bins/content_page.asp?cid=2-47&lang=1.

(4) Indian and Northern Affairs Canada, Indian Oil and Gas Canada, "Mandate," http://www.iogc-pgic.gc.ca/bins/content_page.asp?cid=2-37&lang=1.

(5) Indian Resource Council, "The IRC – Who we are," [IRC, "Who we are"], http://www.indianresourcecouncil.ca//index.php?option=com_content&task=view&id=12&Itemid=26.

(6) The IRC website indicates that the IRC is currently reviewing its mandate.

- to transform IOGC into a First Nations institution, working in partnership with the IOGC Co-management Board. To this end, work towards the establishment of an oil and gas business centre, and a First Nations oil and gas institution in the long term.(7)

3. The IOGC Co-Management Board

The IOGC Co-Management Board, which was established in 1996, has nine members: six are appointed by the IRC, and three are appointed by the Government of Canada. The Memorandum of Understanding that established the Co-Management Board "contemplated a three-phase approach – co-management, delegation and full control [but] has focused its attention on the first phase only."(8)

B. The Process Leading to Bill C-5, An Act to amend the Indian Oil and Gas Act

IOGC has indicated that the legislative and regulatory framework governing oil and gas on reserve lands requires modernization, in part to keep up with provincial approaches that better reflect changes to industry and technology.(9) In particular, IOGC states that the *Indian Oil and Gas Act* and regulations need to be modernized "to eliminate the existing regulatory gap. Levelling the playing field between off-reserve and on-reserve oil and gas activities will reduce barriers to economic development and will allow the federal government to better fulfill its obligation to manage oil and gas resources on First Nations lands."(10)

The process to amend the *Indian Oil and Gas Act* was initiated by the IOGC Co-management Board in 1999. IOGC held information sessions in 2002 with Alberta and Saskatchewan First Nations having oil and gas resources, and the IRC and IOGC worked jointly on drafts from 2002 to 2003. As a result of "competing legislative priorities," the joint work was suspended in 2003.(11) It was restarted in 2006, and completed in April 2008.(12)

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(7) IRC, "Who we are."

(8) Indian Resource Council, "IRC Board Structure," http://www.indianresourcecouncil.ca/index.php?option=com_content&task=view&id=14&Itemid=29.

(9) Indian and Northern Affairs Canada, Indian Oil and Gas Canada, "Proposed Changes to Indian Oil and Gas Act and Regulations," [INAC, "Proposed Changes"],http://www.iogc-pgic.gc.ca/bins/content_page.asp?cid=4-73&lang=1.

(10) Ibid.

(11) Indian Resource Council, "Revisions to the Indian Oil and Gas Act," http://www.indianresourcecouncil.ca/index.php?option=com_content&task=view&id=13&Itemid=35.

(12) INAC, "Proposed Changes."

DESCRIPTION AND ANALYSIS

Bill C-5 contains four clauses: clause 1 replaces sections 2 to 5 of the existing *Indian Oil and Gas Act*, clause 2 adds a new subsection 6(1.1), clause 3 adds new sections 7 to 29 and clause 4 is a coming-into-force provision. Bill C-5 does not contain a preamble.

The following section provides a summary overview of selected provisions contained within the clauses of the bill.

A. Interpretation and Application (Clause 1, New Sections 2 and 3)

New subsection 2(1) adds a number of definitions to the *Indian Oil and Gas Act*, some of which relate to the more technical aspects of the bill. New subsection 2(2) allows the council of a First Nation to delegate to any person any power of the council under the bill or any right of the council to be consulted or notified under the bill. This ability to delegate is broader than the "Delegation of Authority" provision contained in section 3 of the *Indian Oil and Gas Regulations, 1995*.

New subsection 3(1) provides that, except in certain circumstances, licences, permits, leases or other instruments granted under other Acts of Parliament for the purpose of exploration for or exploitation of oil or gas situated on First Nation lands are subject to the bill as if they were contracts granted under the bill. New subsection 3(2) allows for the potential exclusion by regulation of the application of the bill to First Nation lands that contain crude bitumen that is capable of being recovered by mining.[13]

B. Royalties (Clause 1, New Section 4)

New section 4 confirms that all oil and gas recovered from First Nation lands are subject to a royalty payable to Her Majesty the Queen in right of Canada in trust for the First Nation in accordance with the regulations. The amount of the royalty payable can be reduced or increased by special agreement entered into by the Minister if approved by the council of a First Nation (new subsection 4(2)).

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(13) Crude bitumen is defined in the *Indian Oil and Gas Regulations, 1995* as "a naturally occurring viscous mixture, consisting mainly of hydrocarbons heavier than pentane, that in its naturally occurring viscous state is not recoverable through a well in commercial quantity." Crude bitumen is found in oil sands.

C. Regulations (Clause 1, New Sections 4.1 to 4.3)

New section 4.1 provides that regulations may be made with respect to a wide array of subjects related to the administration of oil and gas on First Nations land, including:

- contracts (paragraphs 4.1(1)(*a*) to (*f*));
- royalties (paragraph 4.1(*1*)(*g*));
- audits (paragraph 4.1(*1*)(*p*));
- inspections (paragraph 4.1(*1*)(*q*));
- the confidentiality of information (paragraph 4.1(*1*)(*r*));
- the protection of the environment (paragraph 4.1(*1*)(*x*)); and
- the conservation and equitable production of oil or gas (paragraph 4.1(*1*)(*y*)).[14]

Notably, in Bill C-5, new paragraph 4.1(*v*) provides that regulations may be made requiring an operator (defined as a person who is engaged in exploration for or exploitation of oil and gas situated in First Nation lands) to employ persons who are resident on reserves that include First Nation lands on which the exploration for or exploitation of oil or gas is being conducted. This hiring requirement would not be absolute, as it would be limited "to the extent that it is practicable and reasonably efficient, safe and economical to do so."

New subsections 4.1(2), 4.2(1) and 4.2(2) relate to the relationship between the regulations and the provinces. For example, new subsection 4.1(2) provides that regulations made may vary from province to province, and new subsection 4.2(1) allows for the incorporation by reference of provincial laws in certain circumstances. New subsection 4.2(2) allows regulations that incorporate provincial laws to "confer any power or impose any duty that the Governor in Council considers necessary on any provincial official or body, to be exercised or performed on behalf of the federal government in the same circumstances and subject to the same conditions as those governing the exercise of that power or the performance of that duty under the laws of the province."

(14) Under the existing *Indian Oil and Gas Act*, while the regulation-making authority contains fewer specifics, it does appear to provide a fairly broad authority, as paragraph 3(*f*) provides that regulations can be made "generally for the purposes of the Act and for the exploitation of oil and gas in Indian lands."

New section 4.3 states that, unless the regulations provide otherwise, regulations made under the bill prevail over any First Nation laws or by-laws that are inconsistent with them.

D. General (Clause 1, New Sections 5 and 5.1; Clause 2, New Subsection 6(1.1))

1. Powers of the Minister (Clause 1, New Sections 5 and 5.1)

New sections 5 and 5.1 establish the powers of the Minister of Indian Affairs and Northern Development with respect to the bill. For example, new section 5 provides that the Minister may order the suspension of exploration for or exploitation of oil and gas situated on First Nation lands or order a contract holder or operator to take remedial action in certain circumstances (new paragraph 5(1)(*a*)), as well as authorize resumption of those aforementioned activities (new paragraph 5(1)(*b*)).

2. Minister to Consult (Clause 2, New Subsection 6(1.1))

The existing subsection 6(1) requires that the Minister, in administering the Act, consult "on a continuing basis, persons representative of the Indian bands most directly affected thereby." New subsection 6(1.1) establishes that the Governor in Council may, by regulation,

> (a) require that a power of the Minister under this Act in relation to first nation [*sic*] lands be exercised only if prior approval of the council of the first nation is obtained, if the council is first consulted or if prior notice is given to the council, as the case may be;
>
> (b) require that any such power of the Minister be exercised only if prior consent is given by any first nation member who is in lawful possession of the first nation lands; and
>
> (c) require that notice be given to the council of the first nation after the Minister exercises any such power.

The existing subsection 6(2) states that "[n]othing in this Act shall be deemed to abrogate the rights of Indian people or preclude them from negotiating for oil and gas benefits in those areas in which land claims have not been settled."

E. Inspection, Audit and Examination (Clause 3, New Sections 8 to 13)

New sections 8 and 9 establish the designation (new subsection 8(1)) and powers (new subsection 9(3)) of inspectors and their ability to carry out inspections both on First Nation lands (new subsection 9(1)) and outside of First Nation lands (new subsection 9(2)) in certain circumstances. New sections 10 to 12 relate to audits and examinations. Those sections establish, among other things:

- the ability of authorized persons to enter places other than dwelling places (new paragraph 10(1)(*a*));
- the ability to conduct audits or examinations (new paragraph 10(1)(*b*));
- the powers of authorized persons in relation to audits and examinations (new subsection 10(2)); and
- the ability to order the production of documents (new section 11 and new section 12).

F. Search and Seizure (Clause 3, New Section 14), Delegation (Clause 3, New Section 15), and Unauthorized Exploration and Exploitation (Clause 3, New Section 16)

New subsection 14(1) allows the Minister to designate as enforcement officers persons who are public officers for the purposes of sections 487 (information for search warrant), 487.11 (warrant not required when exigent circumstances make obtaining a warrant impracticable) and 489 (seizure of things not specified) of the *Criminal Code* (new subsection 14(2)).

New section 15 provides that the Minister may delegate certain powers to any person employed in the Department of Indian Affairs and Northern Development. New section 16 prohibits the exploration for or exploitation of oil and gas situated on First Nation lands unless authorized by or under the bill.

G. Offences and Punishment (Clause 3, New Sections 17 to 20)

New subsection 17(1) provides that contravening the bill or the regulations (other than provisions that relate to the payment of royalties or other amounts) or failing to comply with a ministerial order is a summary conviction offence punishable by a fine not exceeding $100,000. Under the existing *Indian Oil and Gas Act*, the fine for contravening regulations cannot exceed $5,000 (paragraph 3(*e*)). Knowingly providing false or misleading information or knowingly misrepresenting or failing to disclose a material fact is also a summary conviction offence punishable by a fine not exceeding $100,000 (new subsection 17(2)).

Persons convicted of contravening the prohibition against exploring for or exploiting oil and gas under new section 16 can also be ordered to compensate the First Nation for any ensuing loss of oil or gas or any ensuing reduction in the value of First Nation lands (new subsection 20(1)).

H. Administrative Monetary Penalties **and Reporting to Parliament** (Clause 3, New Sections 21 to 28**.1**)

In addition to establishing that contraventions of the bill are summary conviction offences, the bill also provides that regulations can designate that the contravention of certain provisions may instead be considered violations (new paragraph 21(1)(*a*)). The penalty for such violations is to be prescribed by regulation and cannot exceed $10,000 (new paragraph 21(1)(*b*)). A contravention of a provision that has been designated a violation may be handled either as a violation or as an offence (new subsection 21(4)).

Where a contravention of a designated provision is treated as a violation, and the Minister believes on reasonable grounds that a person has committed a violation, the Minister may issue a notice of violation that is served on the person (new subsection 22(1)). A person served with a notice of violation can pay the specified penalty (new subsection 23(1)) or make representations to the Minister (new subsection 23(2)). If a person served makes representations to the Minister, the Minister determines, based on a balance of probabilities (as opposed to the criminal standard of proof beyond a reasonable doubt), whether the person committed the violation (new subsection 23(2)). A person can appeal that decision to the Federal Court (new subsection 24(1)).

New section 28.1 requires the Minister to table with Parliament a report relating to the administration of the Act at least every two years.

I. Transitional (Clause 3, New Section 29)

New section 29 specifies that new section 5.1 (which establishes the limitation period for commencing an action to collect amounts owing) applies to any amount owing and to any interest owing under the bill on the day on which new section 29 comes into force, whether or not recovery of the money owing was previously barred by an Act of Parliament or a law of a province.

J. Coming Into Force (Clause 4)

Clause 4 provides that the bill comes into force on a day to be fixed by order of the Governor in Council.

COMMENTARY

When Bill C-5 was reviewed by both the House of Commons Standing Committee on Aboriginal Affairs and Northern Development and the Standing Senate Committee on Aboriginal Peoples, concerns were raised that by allowing for the incorporation by reference of certain provincial laws, the bill might affect the Crown's fiduciary relationship with the First Nations communities that have oil and gas resources on their lands. To address this concern, a motion to amend the bill was tabled at report stage in the House of Commons, but it was not selected because it was deemed to require a royal recommendation.(15) The motion to amend the bill would have added the following after new subsection 4.2(7):

> **"(8) In respect of an act or omission occurring in the exercise of a power or the performance of a duty by a provincial official or body under laws of a province that are incorporated by the regulations, the applicable trust or fiduciary obligations of the Minister to first nations will continue as though the Minister has exercised a like power or performed a like duty."**

A similar amendment was proposed during the Standing Senate Committee on Aboriginal Peoples' clause-by-clause consideration of the bill. However, there was no seconder for the motion to amend, and the bill was passed by the Committee without amendment.

(15) House of Commons, *Debates*, 2nd Session, 40th Parliament, 2 April 2009, 1540.