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LEGISLATIVE SUMMARY

Bill C-9:

An Act respecting the election and term of office of chiefs and councillors of certain First Nations and the composition of council of those First Nations

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

Legislative Summary of Bill C-9
(Legislative Summary)

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LEGISLATIVE SUMMARY OF BILL C-9: AN ACT RESPECTING THE ELECTION AND TERM OF OFFICE OF CHIEFS AND COUNCILLORS OF CERTAIN FIRST NATIONS AND THE COMPOSITION OF COUNCIL OF THOSE FIRST NATIONS

1 BACKGROUND

Bill C-9, An Act respecting the election and term of office of chiefs and councillors of certain First Nations and the composition of council of those First Nations (short title: First Nations Elections Act), was introduced in the House of Commons on 29 October 2013. Bill C-9 was previously introduced in the 1st Session of the 41st Parliament as Bill S-6, which died on the Order Paper when Parliament was prorogued on 13 September 2013. At the time, Bill S-6 had been read a second time and referred to the House of Commons Standing Committee on Aboriginal Affairs and Northern Development. Pursuant to an Order of the House of 21 October 2013 allowing the government to reinstate bills in the new session at their last completed stage in the previous session, Bill C-9 was deemed read a second time and referred to the House of Commons Standing Committee on Aboriginal Affairs and Northern Development when it was introduced.

The bill establishes a legislative process apart from the *Indian Act*[1] system for the election of First Nations chiefs and councils. Among the key changes provided by the proposed legislation is the extension of the terms of office for chiefs and councils and the possibility for common election days among several First Nations. First Nations may choose to opt in to the new elections regime proposed under the legislation, or they may be brought under the new elections regime by ministerial order in some circumstances.[2] First Nations may also opt out of the legislation by adopting a community election code under certain conditions.

1.1 METHODS OF LEADERSHIP SELECTION

There are three principal methods by which First Nations communities currently select their chiefs and councils. They are:

- elections pursuant to the electoral provisions of the *Indian Act* and accompanying *Indian Band Election Regulations*;[3]
- community-based leadership selection processes held according to custom; and
- elections conducted pursuant to the provisions of self-government agreements.

In addition to these methods, a handful of First Nations (approximately 10 to 15) follow other leadership selection processes, such as the hereditary or clan system.

This mix of leadership processes can be traced to section 74(1) of the *Indian Act*. Under this provision, the Minister has the authority to declare – when it is advisable for the good governance of the band – that the Council of the band be selected according to the procedures set out in the *Indian Act*.

According to Aboriginal Affairs and Northern Development Canada, 240 First Nations hold elections pursuant to the *Indian Act*, 341 First Nations conduct "custom" or community-based elections rather than elections under the *Indian Act*, and 36 First Nations select their leaders according to their self-government agreements.[4]

1.2 *Indian Act* Electoral Framework

Sections 74 to 80 of the *Indian Act* set out the framework for band council elections. The provisions of the Act are quite general, providing only the basic rules governing the size of councils, voting rights of members, terms of office, vacancies in office and setting aside of elections. *The Indian Band Election Regulations*,[5] which accompany the Act, are far more detailed and provide rules for nominations, voters' lists, polling stations, casting of ballots, and election appeals.

Selected electoral provisions of the Act include the following:

- Section 74 provides that Indian bands may be brought under the *Indian Act* election system by ministerial order.
- Section 74(2) provides that the band council be comprised of one chief and one councillor for every one hundred members of the band, but that the number of councillors shall be no less than 2 and no greater than 12 and that no band shall have more than one chief.
- Section 74(3) provides that the chief shall be elected by a majority of the votes of the electors or by a majority of votes of the elected councillors.
- Section 76(2) provides for secrecy of voting.
- Section 77 sets out the requirements for voter eligibility.
- Section 78(1) deals with tenure of office and states that "the chief and councillors of a band hold office for two years."
- Section 78(2) provides for the removal of a chief or a councillor on specific grounds, including conviction for an indictable offence, the death or resignation of the office-holder, or the person's becoming ineligible to hold office by virtue of the Act.
- Section 79 gives the Governor in Council the power to set aside an election in certain circumstances, including where a corrupt practice in connection to the election has taken place, a nominated candidate was ineligible to be a candidate, or there was a contravention of the Act that may have affected the results of the election.

Elections held pursuant to the provisions of the *Indian Act* and the custom code are subject to the provisions of the *Canadian Charter of Rights and Freedoms*.[6]

1.3 Custom Elections

The power of First Nations to establish their own leadership selection processes by community-based elections according to custom (known as "custom elections") is recognized in the *Indian Act* and is in fact the "default" selection process. Historically,

First Nations continued to select their leadership by way of custom until the Minister determined that the election provisions of the Act should apply.[7] Accordingly, for example, when a new band is established, their Council is selected by way of custom, unless the Minister makes a declaration that *Indian Act* election procedures will govern the election processes of that band.

Generally, there are two categories of custom bands:

- bands recognized by the federal government as having always selected their leaders by custom and which never came under the *Indian Act* election process; and
- bands that were once under the *Indian Act* election process but have "reverted" to the custom method by meeting the requirements of federal policy.

In application since 1996, the federal government's *Conversion to Community Election System Policy* requires that First Nations wishing to revert to custom elections from the *Indian Act* election process develop written election codes which provide for, among other things, consistency with the *Canadian Charter of Rights and Freedoms*, provision for the settlement of election appeals, participation of off-reserve members, and community approval of the custom election code.[8]

Every custom election code is different. Some make only minor modifications to the *Indian Act* electoral system, such as lengthening the terms of office, while others may provide for more significant changes. These can include blending traditional forms of governance (Elder councils) with contemporary governance structures (elected chief and council). While the *Indian Act* does not prescribe rules for "custom" elections, at no time have First Nations been permitted to revert to a non-electoral leadership selection regime.

1.4 Federal Role in First Nations Elections

Aboriginal Affairs and Northern Development Canada and the Minister exercise the greatest authority in relation to First Nations who conduct elections pursuant to the *Indian Act*. The Act and its regulations set out the operation of the electoral regime, thereby regulating, to a great extent, First Nations' leadership selection processes. Importantly, under the *Indian Act* system, election appeals are reviewed and investigated by the Department. If a determination is made that there was a corrupt practice in connection with the election, or that a violation of the *Indian Act* or the regulations might have affected the election, the Minister may advise the Governor in Council to set aside the election. Departmental officials also provide training and support for electoral officers.

In contrast, the Department is only minimally involved in the leadership selection process for First Nations under self-government agreements. However, the Department does require that these First Nations develop and ratify constitutions that comply with the *Canadian Charter of Rights and Freedoms* and that the rules governing such leadership selection processes be clear and transparent.

As mentioned, the Department also requires that First Nations "reverting to custom" adhere to the requirements set out in its policy. All electoral codes developed by First Nations must be submitted to the Department for approval. These are subsequently reviewed by departmental officials for compliance with the policy. If a positive determination is made, a ministerial order may be issued to remove the First Nation from the application of the election provisions of the *Indian Act*. Once a First Nation is removed from the electoral provisions of the *Indian Act*, the Department no longer oversees the evolution of the community's election code.

1.5 Parliamentary Examination

In May 2010, the Standing Senate Committee on Aboriginal Peoples released a report entitled *First Nations Elections: The Choice is Inherently Theirs*.[9] The report examined issues relating to band council elections held pursuant to *Indian Act* provisions and regulations. It indicated that the existing two-year term of office imposed on First Nations by the *Indian Act* is too short to provide political and economic stability, often creating deep divisions in communities. The report further noted that *Indian Act* election systems are often fraught with administrative difficulties and inconsistencies, resulting in frequent election appeals.

The committee recommended that immediate steps be taken to create an independent First Nations Electoral and Appeals Commission to strengthen the electoral capacity for First Nations, as well as to provide for an efficient appeals process and to help develop effective and transparent practices. The report also recommended that Aboriginal Affairs and Northern Development Canada help those First Nations that currently hold elections under the *Indian Act* to revert to community-based elections. The report outlined the need for clear targets and timelines for the reversion to community codes. It also recommended that First Nations under the customary method of leadership selection receive funding to permit them to update their codes to ensure consistency with Canadian law and effective governance practices.

1.6 Attempts at Reform

In recent years, there have been a number of initiatives related to First Nations electoral reform.

Attempts to reform the *Indian Act* election system arise from growing First Nations dissatisfaction with the operation of the regime, including its administrative weaknesses, such as loose nomination procedures and a mail-in ballot system that is open to abuse.

Other substantive concerns with *Indian Act* elections relate to the degree of ministerial intervention, the lack of an adequate and autonomous appeals process and the absence of flexibility to set the terms of office and to determine the size of councils.

Another significant source of pressure for reform arises from the legal challenges being brought against First Nations elections under the *Charter of Rights and Freedoms*. Particularly contentious are requirements for on-reserve residency in order to vote in elections or to run for elected office.

1.6.1 Policy Reform

A key attempt at policy reform was the 1998–2001 Assembly of First Nations/Indian and Northern Affairs Canada Joint Initiative on Policy Development (Lands and Trusts Services). The Joint Initiative arose in response to the 1996 *Report of the Royal Commission on Aboriginal Peoples* and was intended to provide policy options on key themes: elections, membership, additions to reserves and environment. With respect to elections, a key proposal was to develop community leadership selection systems and remove the application of the *Indian Act* as a preliminary measure to re-establishing traditional forms of leadership selection. To accomplish this, the following steps were suggested:

- community-level development of custom codes;
- community development of local dispute resolution procedures;
- the establishment of regional First Nations capacity and advisory bodies;
- exploration of the use of section 4(2) of the *Indian Act* to opt out of specific provisions such as length of term and number of councillors; and
- policy renewal to result in reformed conversion to custom policy, opening the system to a wider range of electoral models, and joint development of policies to limit and redefine the Department's role in dispute resolution.[10]

1.6.2 2002 Report of the Joint Ministerial Advisory Committee

In anticipation of federal legislation, in November 2001, the Joint Ministerial Advisory Committee (JMAC) was established to provide the Minister with technical advice about possible amendments to the governance provisions of the *Indian Act*. Specifically, advice was sought in relation to:

- legal status and capacity;
- leadership selection and political accountability;
- governance structures, powers and authorities; and
- financial management and accountability.

In March 2002, after consulting widely with First Nations leadership and with Aboriginal organizations, the JMAC released its report. The committee examined how the *Indian Act* might be amended to improve the current rules concerning leadership selection and voting rights. A range of issues surrounding *Indian Act* band elections were identified, including these:

- voting eligibility rules (including residence and other tests of connection);
- candidate eligibility (including the lack of rules for the office of chief and the residency restriction on candidates for councillor);
- terms of office;
- flexibility in polling times and places and the question of proxy voting;

- community recall/censure provisions;
- candidate regulations (including posting of bonds, election expense limits, etc.);
- chief and council codes of ethical behaviour and remuneration rules; and
- financial and other expertise in the development and operation of modern election regimes.[11]

In addition, the JMAC recommended that the term of office be extended from two years to four or five years.

1.6.3 The First Nations Governance Act (Bill C-7)

On 9 October 2002, the federal government introduced Bill C-7, An Act respecting leadership selection, administration and accountability of Indian bands, and to make related amendments to other Acts (short title: First Nations Governance Act), to enable First Nations to design and adopt codes for leadership selection, financial management and accountability, and the administration of government according to the needs of their communities.[12] With respect to leadership selection, the proposed legislation would have provided for, among other things:

- the size and mode of selection of a band's council, of which the majority of members were to be elected by secret ballot;
- the term of office of elected members, which was not to exceed five years;
- qualifications of voters and candidates;
- mechanisms for appealing election results and removing council members; and
- the procedure for amending the code.

For a variety of complex reasons, Bill C-7 proved to be exceedingly contentious. Testimony provided to the House of Commons Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources revealed sharp differences as to the objectives, merits and effects of the proposed legislation.

From the government's perspective, the intent of the legislation was to "modernize" governance provisions in the *Indian Act* and to address gaps in the regime by providing First Nations with the tools to manage their affairs effectively and responsibly.[13]

First Nations argued that the proposed legislation violated their inherent right of self-government. The legislation's "single option open to section 74 bands [*Indian Act* election bands] might have risked infringing their right to opt for a customary regime, while the time restriction applicable exclusively to custom bands might de facto subject them to a regime not of their selection."[14] The JMAC report noted that "imposing a regime on a band that prefers to select its leaders using some other regime would therefore be an infringement of those rights."[15]

Bill C-7 died on the *Order Paper* with the prorogation of Parliament on 12 November 2003 and was not reintroduced.

1.7 Key Judgments Regarding Residency and Band Council Elections

There have been several cases involving First Nations election processes, both under the *Indian Act* and custom election codes. The *Corbiere* decision, establishing that the *Indian Act* was in violation of the *Canadian Charter of Rights and Freedoms* by limiting voting to citizens living on reserve, is probably the best known.

1.7.1 The *Corbiere* Decision (Section 77(1) of the *Indian Act*)

Section 77(1) of the *Indian Act* sets out the requirements for voter eligibility, stipulating that an "elector" must be a registered band member who is at least 18 years of age and is "ordinarily resident on the reserve."

On 20 May 1999, in *Corbiere* v. *Canada (Minister of Indian and Northern Affairs)*,[16] the Supreme Court of Canada found that the words "and is ordinarily resident on the reserve" were contrary to the equality rights of off-reserve band members under section 15 of the *Canadian Charter of Rights and Freedoms* and that the infringement was not justified under section 1 of the Charter.[17] The Court suspended its decision for 18 months to allow Parliament sufficient time to comply with its ruling; and ordered, if the law was not amended in that time, that the words pertaining to the residency of electors be "read out" of section 77(1). As Parliament has not amended section 77(1) to date, the provision is applied as if these words do not appear. Thus, since November 2000, off-reserve band members are generally eligible to vote in band elections held under the *Indian Act*.

1.7.2 The Esquega Decisions (Section 75(1) of the *Indian Act*)

In 2007, in *Esquega* v. *Canada* (the "Gull Bay decision"),[18] the Federal Court of Canada concluded that section 75(1) of the *Indian Act*, regarding the eligibility of candidates for election, violated the *Canadian Charter of Rights and Freedoms*.[19] The Federal Court of Appeal, however, concluded that the Federal Court's decision to strike down all of section 75(1) was "unnecessarily broad," as it "would [also] remove the requirement that each candidate be an 'elector' … [which] enables individuals under 18 years of age, non-members of the band and other disqualified persons to be nominated for office."[20] The Federal Court of Appeal set aside the 2007 decision, concluding instead that section 75(1) was invalid only "to the extent that it prohibits electors who do not reside on the reserve from being nominated for the office of councillor."[21]

1.8 National Engagement Process

For the past two years, the Assembly of Manitoba Chiefs (AMC) and the Atlantic Policy Congress of First Nations Chiefs (APC) have been leading discussions about electoral reform in their respective regions. These organizations, with the support of Aboriginal Affairs and Northern Development Canada, have engaged local First Nations leaders, governance technicians and community members in a process to examine potential improvements to band council elections held pursuant to the *Indian Act*.[22]

Following regional discussions, the AMC and the APC produced discussion papers, containing recommendations about ways to improve the system of First Nations elections. These recommendations were presented to the Minister of Aboriginal Affairs and Northern Development Canada in April 2010.[23]

In October 2010, a national engagement process led jointly by the APC and the AMC, and in collaboration with Aboriginal Affairs and Northern Development Canada, was launched to help inform the development of new "opt-in" legislation based on the recommendations on electoral reform developed by the AMC and the APC. Between October 2010 and March 2011, the AMC and the APC made presentations to First Nations leaders and organizations across the country and solicited feedback regarding key legislative reforms, including these:[24]

- extending the term of office for chiefs and council to four years from the current two-year term;
- instituting a system of same day or common day band council elections;
- having band councillors appoint electoral officers without ministerial approval;
- sending mail-in ballots to voters only upon their written request;
- including a recall provision that would allow First Nations members to remove elected officials;
- requiring candidates for chief to be band members who are at least 18 years of age, as is required of councillor candidates;
- designating off-reserve councillor positions (optional);
- including election offences and related penalties;
- allowing no role for the Minister in election appeals and possible creation of an independent appeals tribunal;
- requiring that candidates accept their nominations in writing, pay a fee (optional by First Nation), and run for one council position only; and
- limiting the number of nominations any one person can make.

Both organizations made information materials available through presentations and their websites, and they distributed materials by mail to First Nations who hold elections under the *Indian Act*. The APC was responsible for leading the engagement effort in Atlantic Canada, while the AMC was responsible for western regions. According to the APC's *Report of the National Engagement on Electoral Reform*, the level of feedback received from First Nations appears to have been uneven across the country.[25]

2 DESCRIPTION AND ANALYSIS

The bill consists of 44 clauses. The legislation does not replace the election system under the *Indian Act*, but rather proposes an alternative statutory system for First Nations chief and band council elections.

The new election system displays both similarities to and significant differences from the current *Indian Act* election system. For example, the bill is similar to the *Indian Act* in that it allows the Minister, by order, to require that a First Nation with a community election code be brought under the purview of the new legislation. The bill differs and expands on the *Indian Act* election system by, for example, increasing the term of office for chiefs and councillors, expressly providing the courts with jurisdiction to handle election appeals, and establishing offences and penalties in relation to the election of chiefs and councillors.

The key provisions of the proposed legislation, including those outlined above, are described in the following paragraphs.

2.1 Interpretation (Clauses 2 and 43)

Clause 2 lists the definitions of terms that will apply under the legislation, including the following:

- "Council" retains the same meaning as "council of the band" under section 2(1) of the *Indian Act*. However, clause 43 of the new legislation modifies the *Indian Act* definition of "council of the band" to include and account for First Nations under the new election system.
- "Elector" means a person registered on the "Band List," as defined under section 2(1) of the *Indian Act*, who is 18 years of age or older on the date of, as applicable, the election, candidate nomination meeting, or vote on a proposed community election code.[26]
- "Participating First Nation" means a First Nation that is listed in the schedule to the bill.

2.2 Adding to the Schedule (Clauses 3 and 4)

Clause 3(1) states that the Minister may, by order, add a First Nation to the schedule of First Nations participating in the new election system. Section 74(1) of the *Indian Act* similarly allows the Minister, by order, to require that a First Nation comply with its electoral provisions "[w]henever he deems it advisable for the good government of a band." The bill, however, specifies that such an order may be issued only in the following circumstances:

- when the council of a First Nation has, by resolution, so requested (clause 3(1)(*a*));
- when the Minister finds "that a protracted leadership dispute has significantly compromised governance" of a First Nation (clause 3(1)(*b*)); and
- when the Governor in Council has, under section 79 of the *Indian Act*, set aside an election of a First Nation on the basis of the Minister's finding of "corrupt practice in connection with that election" (clause 3(1)(*c*)).

Clause 3(2) of the new legislation, like section 74(1) of the *Indian Act*, requires that the ministerial order specify when the First Nation must hold its next election.

2.3 Timing of Elections (Clauses 5, 6 and 25)

Clause 5 provides guidance on the timing of elections fixed by ministerial order made under clause 3(1) of the bill, including the following:

- For First Nations requesting inclusion under the bill, the date of the first election must not be later than the day on which the term of office of its chief and councillors expires (clause 5(*a*)(i)).
- If a First Nation has requested in its resolution a common election date with five or more other First Nations, the date of the election for these First Nations must be no later than one year after the earliest day on which the term of office of the chief and councillors of any one of those First Nations expires (clause 5(*a*)(ii)).
- For First Nations added to the schedule pursuant to a decision by the Minister or Governor in Council, the date of the election must be no later than six months after the day on which the ministerial order under clause 3(1) is made.

Clause 6 requires that subsequent elections, except for by-elections, be held within 30 days prior to the expiry of the term of office of the incumbent chief and councillors.

The council of the First Nation may, in accordance with the regulations, direct that a by-election be held if a chief or councillor ceases to hold office more than three months before the expiry of his or her term in office (clause 25).

2.4 Composition of Council (Clauses 7 and 8)

Clause 7(1) of the bill, like section 74(2) of the *Indian Act*, provides that council is to generally consist of one chief and one councillor for every 100 members of a First Nation, but the number of councillors must not be less than 2 or more than 12. Clause 7(2) further provides that a council may, by resolution, reduce the number of councillors to any number that is not less than 2, to take effect as of the next election that is not a by-election.

2.5 Nomination of Candidates (Clauses 9 to 13 and 41(*d*))

Section 75(1) of the *Indian Act* states: “No person other than an elector who resides in an electoral section may be nominated for the office of councillor to represent that section on the council of the band.” Clause 9(1) of the new legislation similarly provides that only an elector of a First Nation is eligible to be nominated for the position of chief or councillor of that First Nation. However, the new legislation does not refer to separate “electoral sections”[27] within a First Nation, nor to the requirement that eligible candidates reside on the reserve.[28]

Clause 9(2) expressly prohibits the nomination of a candidate for the position of chief and the position of councillor in the same election.[29]

Additional provisions include information on the nomination process (clauses 9(3) and 9(4)), and the circumstances under which a candidacy fee of up to $250 may be levied (clause 11). The Governor in Council may set out, by regulation, the manner in which candidates may be nominated (clause 41(*d*)).

Certain offences with respect to the nomination of candidates are set out in clauses 10 and 12. Individuals are prohibited, for example, from influencing the nomination of candidates through intimidation or duress, or intentionally disrupting the conduct of a nomination meeting. Electoral officers may order the ejection of an individual who is "committing an offence under this Act that threatens the maintenance of order at the [nomination] meeting." Additional penalties for this and other offences are set out in section 2.11, "Offences and Penalties," in this paper.

2.6 Conduct of Elections (Clauses 14 to 22, 26 and 27 and 41(*f*))

Offences in connection with the conduct of elections under the Act are set out in these provisions.[30] Among the offence provisions are rules to:

- prevent the selling and buying of votes (clauses 16(*f*) and 17(*b*));
- control the use of mail-in ballots (clauses 14(*c*) and (*d*)); and
- prohibit certain activities within polling stations (clause 20).

Penalties for infractions of these rules are contained in clause 21 and in the general offence and penalty provisions under clauses 39 and 40. Rules and procedures with respect to the conduct of voting in elections may also be set out in regulations (clause 41(*f*)).

2.7 Awarding of Positions (Clauses 23 and 24)

The chief and councillor positions are decided by simple majority (clause 23). In the case of a tie vote between two or more candidates for the same position, the electoral officer for the First Nation "must conduct a draw to break the tie" (clause 24).[31]

2.8 Term of Office (Clauses 28 and 29)

Clause 28 provides that the chief and councillors hold office for four years from the expiry of the term of office of the elected officials that they replace. Like section 78(2)(*a*)(i) of the *Indian Act*, clause 28(2)(*a*) provides that a chief or councillor ceases to hold office if convicted of an indictable offence and sentenced to a prison term of more than 30 consecutive days.

2.9 Contested Elections (Clauses 30 to 35)

Unlike the *Indian Act* electoral provisions, which allow the Minister and Governor in Council to set aside the results of an election in certain circumstances,[32] the process for contesting the validity of an election held in accordance with the bill is handled only by the courts.

In order to contest an election under the bill, an elector of the First Nation in question must file an application with the Federal Court or the superior court of a province within which "one or more of the participating First Nation's reserves is located" (clauses 31 and 33). The application must be filed within 30 days of the announcement of the election results (clause 32).

The application must cite grounds related to the contravention of a provision of the bill or regulations that "is likely to have affected the result" of the election (clause 31). The court may set aside the results of the contested election on these grounds (clause 35(1)).

2.10 Recall Petition (Clauses 36 and 41(*g*))

Clause 36 creates an offence prohibiting the buying or selling of signatures on a recall petition. Rules respecting the removal from office of a chief or councillor by means of petition may be set out in the regulations (clause 41(*g*)).

2.11 Offences and Penalties (Clauses 37 to 40)

These provisions set out various offences under the legislation and their associated penalties. Penalties for offences listed in clause 38 on summary conviction are a fine of not more than $1,000 and/or a term of imprisonment of not more than three months. Other offences carry penalties on indictment or summary conviction; conviction on indictment of certain offences carries fines of up to $5,000 and/or terms of imprisonment of up to five years (clause 39). An additional penalty may apply to candidates convicted of offences appearing in the clauses listed in the bill, preventing their candidacy for five years after the date of conviction (clause 40).

2.12 Regulations (Clause 41)

Clause 41 provides the Governor in Council with broad and general powers to make regulations with respect to elections, including regulations on certain enumerated matters and any other matter covered by the legislation (clause 41(*i*)). Most of the rules and procedures with respect to the conduct of elections, and the process of removal from office of a chief or councillor by means of a recall petition are not explicitly described in the bill itself, and may therefore be addressed by regulation (clauses 41(*f*) and 41(*g*)).

2.13 Removal from Schedule (Clause 42)

The Minister may, by order, permit a First Nation to withdraw from the regime if that First Nation adopts a "community election code" that sets out the rules regarding the election of its chief and councillors.[33] The code must satisfy certain conditions, such as approval in a majority vote by a majority of eligible electors of the First Nation (clause 42(1)(*b*)), and publication on a website maintained by or for the First Nation or in the *First Nations Gazette* (clause 42(1)(*c*)).

3 COMMENTARY

From the perspective of Aboriginal Affairs and Northern Development Canada, the new legislation will strengthen First Nations governance, and support social and economic development in First Nations communities. The former minister of Aboriginal Affairs and Northern Development Canada, John Duncan, stated that the new election system "will help First Nations create the political stability necessary for solid business investments," which will, in turn, lead to "increased economic development, job creation and improved quality of life" for First Nations. According to departmental documents, Bill C-9 (formerly Bill S-6) presents an opportunity for First Nations band councils to choose or "opt in" to the new elections framework.[34]

The perspectives of First Nations on elections system reform were, as noted previously, surveyed during the national engagement process, and the resulting report and recommendations were provided to the federal government by the Atlantic Policy Congress and the Assembly of Manitoba Chiefs. Opinions on the ensuing legislation are divided among First Nations organizations involved in the engagement process: while some support the new legislation, others do not view it as reflective of the report and recommendations.

Some First Nations leaders expressed strong support for the proposed legislation. At the December 2011 announcement of the legislation, Chief Lawrence Paul of the Millbrook First Nation and Chief Candice Paul of St. Mary's First Nation, both former co-chairs of the Atlantic Policy Congress, echoed the government's view that the Act will support sound governance and increase economic development in First Nations communities.[35] Ron Evans, Grand Chief of the Assembly of Manitoba Chiefs during the engagement period, has also publicly supported the bill.[36]

The current Grand Chief of the Assembly of Manitoba Chiefs, Derek Nepinak, however, has expressed strong opposition to the proposed First Nations Elections Act. In a written statement, quoted in several media outlets on 7 December 2011,[37] Grand Chief Nepinak stated that the proposed legislation does not fulfill the recommendations put forth by the Assembly of Manitoba Chiefs, and represents an apparent "attempt by the Minister to expand governmental jurisdiction and control of the First Nations electoral processes that are created pursuant to the *Indian Act* or custom code." In particular, Grand Chief Nepinak has the Minister's ability to bring First Nations under the legislation without their consent; the lack of a First Nations appeals process; and the conduct of draws to resolve tie votes in elections for band council chiefs and councillors.

NOTES

1. *Indian Act*, R.S.C., 1985, c. I-5.
2. See discussion of Clause 3(1) in section 2.2, "Adding to the Schedule," in this paper.
3. See the Indian Bands Council Elections Order, SOR/97-138, for a list of the bands that hold elections pursuant to the *Indian Act*.

4. Aboriginal Affairs and Northern Development Canada [AANDC], Fact Sheet – Understanding First Nation Elections.

5. *Indian Band Election Regulations*, CRC, c. 952.

6. See *Cockerill* v. *Fort McMurray First Nation #468*, [2010] 2 C.N.L.R. 80 (F.C.). This 2010 Federal Court ruling held that custom election codes restricting voting rights for chief and council to on-reserve residents violated section 15 of the Charter, but was justified under section 1 in the circumstances. See also *Scrimbitt* v. *Sakimay Indian Band Council*, [2000] 1 F.C. 513 (T.D.) This case dealt with an Indian band that had assumed control of its band membership code. The Court found that Scrimbitt's non-entitlement to vote in elections because she was a "Bill C-31 Indian" violated section 15 of the Charter and was not justified under section 1.

7. This power has been exercised infrequently. A recent example of the issuance of a section 74 ministerial order occurred on 1 April 2010, when then Minister of Indian Affairs and Northern Development Canada, Chuck Strahl, brought the Algonquin community of Barriere Lake First Nation under the *Indian Act* election system. For more information on the ministerial order, see Order Amending the Indian Bands Council Elections Order, SOR/2010-77. Similarly, in 2003, the Sandy Bay Ojibway First Nation was brought under the *Indian Act* election process as a result of protracted and unresolved election disputes under its customary process. In 1924, the federal government used its power under section 74 to replace the traditional Haudenosaunee Council of the Six Nations reserve in Ontario with a chief and council elected under the *Indian Act*. Today, Six Nations has both a traditional government and an elected council recognized under the *Indian Act*. The Haudenosaunee Council is not recognized by the federal government, nor does it exercise any authority under the *Indian Act*.

8. AANDC, *Conversion to Community Election System Policy*. Copies of the policy may be obtained by contacting the Department.

9. Senate, Standing Committee on Aboriginal Peoples, *First Nations Elections: The Choice Is Inherently Theirs*, May 2010.

10. Assembly of First Nations and Indian and Northern Affairs Canada, *First Nations Leadership Selection and Elections*, Discussion Paper, March 2008, p. 3.

11. Joint Ministerial Advisory Committee, *Recommendations and Legislative Options to the Honourable Robert Nault, P.C., M.P., Minister of Indian Affairs and Northern Development*, Final Report, 8 March 2002.

12. Bill C-7, an Act respecting leadership selection, administration and accountability of Indian bands, and to make related amendment to other Acts, was introduced in the House of Commons and deemed referred to the House of Commons Standing Committee on Aboriginal Affairs, Northern Development and Natural Resources following first reading on 9 October 2002.

13. Mary C. Hurley, *Bill C-7: First Nations Governance Act*, Publication no. LS-435E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 18 December 2003.

14. Assembly of First Nations, *First Nations Elections: choosing a path forward from a First Nation perspective*, March 2009, p. 22.

15. Joint Ministerial Advisory Committee (2002), p. 63.

16. *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] 2 S.C.R. 203. Specifically, the Court ruled that the discrimination could not be justified because it was overly broad: While some distinction between on- and off-reserve band members might be accepted in order to protect legitimate interests of band members living on the reserve, it was not demonstrated that a complete denial of the right of band members living off-reserve to participate in the affairs of the band through the democratic process of elections was necessary.

17. While the Supreme Court of Canada's ruling did not directly apply to customary or community-based elections, a subsequent 2005 decision of the Federal Court held that the reasoning outlined in *Corbiere* applies to custom election codes containing residency requirements for participation in band council elections. See *Clifton v. Hartley Bay Indian Band*, 2005 FC 1030, [2006] 2 F.C.R. 24.

18. *Esquega* v. *Canada (Attorney General)*, 2007 FC 878 (2007).

19. Section 75(1) of the *Indian Act* provides that "[n]o person other than an elector who resides in an electoral section may be nominated for the office of councillor to represent that section on the council of the band."

20. *Esquega* v. *Canada (Attorney General)*, 2008 FCA 182, para. 6.

21. Ibid., para. 12.

22. AANDC, "Backgrounder – First Nations Elections Act."

23. See Atlantic Policy Congress of First Nations Chiefs [APC], *Report of the National Engagement on Electoral Reform: Building a Better Election System for First Nation Communities*.

24. See, for example, APC and Assembly of Manitoba Chiefs, *Improving the System for First Nations Elections*, Discussion Paper, 1 October 2010.

25. APC, *Report of the National Engagement on Electoral Reform*.

26. The definition of "elector" in the bill omits the current *Indian Act* requirement that eligible voters for chief and council be "ordinarily resident" on the reserve (sections 77(1) and 77(2)). The Supreme Court of Canada has found this requirement unconstitutional and thus inoperative. See *Corbiere* v. *Canada (Minister of Indian and Northern Affairs)*.

27. Section 74(4) of the *Indian Act* provides for the division of a reserve into various "electoral sections" in certain circumstances.

28. As discussed in section 1.7.2, "The Esquega Decisions," in this paper, the Federal Court of Appeal has found the residency requirement under section 75(1) of the *Indian Act* to be in breach of the *Charter of Rights and Freedoms*, and has declared the provision invalid to the extent that it prevents off-reserve members of a First Nation from running for council of that First Nation. See *Esquega* v. *Canada (Attorney General)*, [2009] 1 F.C.R. 448 (C.A.).

29. The *Indian Act* electoral provisions and regulations do not contain any express limitation in this regard. See *Leaf* v. *Canada (Governor General in Council)*, [1988] 1 F.C. 575.

30. While detailed elections rules and procedures for the *Indian Act* election system are contained in the regulations, there are no defined elections offences or associated penalties. See *Indian Band Election Regulations*.

31. The regulations to the *Indian Act* provide that the electoral officer will cast the deciding vote in the event of a tie vote. See *Indian Band Council Election Regulations*, s. 9.

32. *Indian Act*, ss. 78(2)(*b*)(iii) and 79.

33. Clause 42(5) of the legislation states that, within this section, "community election code" means a written code setting out the rules regarding the election of the chief and councillors of a First Nation.

34. AANDC, *Harper Government Introduces First Nations Elections Act*, News release, 6 December 2011; and AANDC, *Frequently Asked Questions – Electoral Reform*, 2010.

35. AANDC (2011).

36. Mia Rabson, “Tories introduce legislation regulating band elections,” *Winnipeg Free Press*, 7 December 2011, p. A11.

37. See Gitigan Nini, “AMC Opposes Government’s First Nations Elections Act,” *The First Perspective*, 7 December 2011; Mia Rabson (2011); “Grand Chief Derek Nepinak of the Assembly of Manitoba Chiefs will not support Canada’s proposed First Nations elections legislation as it stands,” *Turtle Island News*, 7 December 2011.