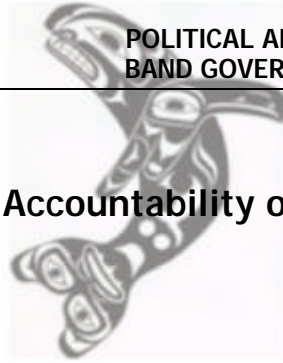


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## Political and Fiscal Accountability of Band Governments



### Public Perception

The Canadian public perceives that there are no legal or other mechanisms in place to ensure the political and fiscal accountability of Aboriginal governments, also known as band governments or band councils, to their members. While there are some gaps in the legislative framework provided for by the *Indian Act*, this perception is not accurate.

### Summary Response

The *Indian Act* contains provisions that require political accountability from band governments when exercising statutory powers over their members. The Department of Indian Affairs also has policies in place that demand fiscal accountability from band governments when handling band assets. However, there are gaps in the regulatory framework provided for in the *Indian Act*, which allow band governments to exercise varying degrees of discretion over individual band members in certain circumstances. For example, the *Act* does not contain any conflict of interest guidelines or codes of ethics to govern the conduct of band governments when exercising statutory powers under the *Indian Act*. Nor does the *Act* contain any provisions to govern the conduct of band governments when delivering programs and services to band members.

The Courts have attempted to fill in these gaps in the *Indian Act* by holding that band governments owe fiduciary duties to band members in certain circumstances. In doing so, the Courts have effectively imposed additional accountability requirements on band governments.

### Statutory Powers and Responsibilities of Band Governments

#### Statutory powers

Under the *Indian Act*, the Government of Canada replaced traditional Aboriginal governments with Aboriginal governing bodies known as band councils. As band councils are creatures of statute, they are only authorized to exercise those delegated

powers set out in the *Indian Act*<sup>1</sup> and are dependent on Parliament for their existence, powers and responsibilities.<sup>2</sup>

The powers that band councils are authorized to exercise under the *Indian Act* can generally be divided into the following categories:

- ❖ **Monies:** Band councils are authorized to make decisions about monies that are collectively owned by members of the band. Monies owned by bands are known as revenue monies and capital monies. Section 69 of the *Indian Act* authorizes band councils to control, manage and expend revenue monies. Sections 64 and 66 of the *Act* authorize band councils to make decisions about expenditures of capital and revenue monies.
- ❖ **Lands:** Band councils are authorized to make decisions about reserve lands that have been set aside for the use and benefits of members of the band. For example, under section 20 of the *Act*, band councils are in charge of making allotments of land to individual band members.
- ❖ **Band Members:** Band councils are authorized to make decisions that affect the rights of individual band members. For example, section 10 of the *Act* authorizes band councils to establish membership rules that set out the eligibility criteria for membership in the band.
- ❖ **By-law Making Powers:** The final category of power that band councils are authorized to exercise under the *Indian Act* is the power to make bylaws over a range of subject matters that are enumerated in sections 81, 83 and 85.1 of the *Act*.

In addition to exercising statutory powers under the *Indian Act*, band governments also act as agents for the Government of Canada in regard to the administration and delivery of certain federal programs and services to band members living on reserve such as housing, social services, education and health.<sup>3</sup>

### **Statutory accountability requirements**

The *Indian Act* and government policies contain some provisions to ensure the political and fiscal accountability of band governments to their members.

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<sup>1</sup> *Paul Band v. R.*, [1984] 2 W.W.R. 540 at 549 (Alta C.A.).

<sup>2</sup> *Whitebear Band v. Carpenters Provincial Council of Saskatchewan*, [1982] 3 W.W.R. 554 at 560-61.

<sup>3</sup> *Ibid.*

- ❖ **Fiscal Accountability:** While the *Indian Act* provides band governments with authority to control, manage and expend revenue and capital monies, the *Act* surprisingly contains no provisions to govern the conduct of band governments when dealing with band monies. However, the Department of Indian Affairs has policies in place that demand fiscal accountability from band governments when administering revenue and capital monies.<sup>4</sup> The policies have specific procedures and documentation requirements in place that must be satisfied before the Department of Indian Affairs will release any revenue or capital monies to band governments.<sup>5</sup> The policies also require a full accounting and audit of all expended funds.<sup>6</sup>
  
- ❖ **Political Accountability:** The *Indian Act* contains procedures for band elections<sup>7</sup> and procedures for council meetings.<sup>8</sup> Under the *Act*, the term of office for elected chiefs and band councillors is two years.<sup>9</sup> This provides band members with an opportunity to demand accountability from band governments every two years at the polls. Section 2(3) of the *Indian Act* requires that decisions made by band councils be made by a majority of band councillors present at a duly convened meeting of the council.<sup>10</sup> This makes it difficult for chiefs or individual councillors to make unilateral or arbitrary decisions. It also ensures full participation and debate by the entire council in the decision-making process.
  
- ❖ **Land:** The *Indian Act* contains numerous provisions that fetter the discretion of band governments when dealing with band lands. For example, band governments cannot sell or lease reserve lands without first obtaining the consent of members of the band.<sup>11</sup> Any sale or lease of reserve lands also

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<sup>4</sup> Indian Monies Directorate, Registration, Revenues and Band Governance, Lands and Trust Services, “Manual for the Administration of Band Moneys” (Ottawa, 1997).

<sup>5</sup> Ibid.

<sup>6</sup> Supra, note 4.

<sup>7</sup> Indian Band Election Regulations (C.R.C., c. 952).

<sup>8</sup> Indian Band Council Procedure Regulations (C.R.C., c. 950).

<sup>9</sup> Indian Act, R.S.C. 1985, c. I-5, s. 78(1).

<sup>10</sup> Indian Act, R.S.C. 1985, c. I-5, s. 2(3)(b).

<sup>11</sup> Indian Act, R.S.C. 1985, c. I-5, ss. 37 to 41.

requires the consent of the federal government, as represented by the Governor in Council.<sup>12</sup> Any allotment of land made by a band council to an individual band member similarly requires the approval of the Minister of Indian Affairs.<sup>13</sup> These provisions provide checks and balances to ensure that band governments are not able to sell or lease reserve lands or acquire individual allotments of reserve lands for their own personal benefit without the approval of band members and the Minister of Indian Affairs.

- ❖ **Band Membership:** While the *Indian Act* authorizes band councils to make decisions about entitlement to membership in the band, the *Act* also contains provisions that fetter the discretion of band governments in determining the eligibility of applicants for band membership. For example, while section 10 of the *Act* authorizes band councils to enact membership codes, band members must approve such codes. In this way, band councils are precluded from adopting membership criteria that does not reflect the will of band members.

In addition to the checks and balances provided for in the *Indian Act*, the Courts have held that powers of the chief and band are to be exercised strictly in accord with the *Act* in the interest of the benefit and protection of Indians.<sup>14</sup>

### Gaps in the Indian Act

However, there are also gaps in the regulatory framework provided for in the *Indian Act*, which allow band governments to exercise varying degrees of discretion over individual band members in certain circumstances. For example, while section 20 of the *Act* authorizes band councils to make individual allotments of land to band members, band councils are not required to do so. Where a band council refuses to make an individual allotment of land to a band member, the band member cannot compel the band council to do so.

Band governments can also potentially exercise considerable discretion over band members when administering and delivering federal services and programs to band members, such as housing, social services, education and health. For example, band governments are in a position to exercise considerable discretion over band members in connection with allocating housing monies to band members.<sup>15</sup> While some bands have

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<sup>12</sup> Ibid.

<sup>13</sup> Indian Act, R.S.C. 1985, c. I-5, s. 20(1).

<sup>14</sup> *Leonard v. Gottfriedson*, (1981) 21 B.C.L.R. 326, [1982] 1 C.N.L.R. 60 (B.C.S.C.).

<sup>15</sup> Reserve lands cannot be mortgaged or offered as security. Therefore, banks generally do not loan monies to Indians for the purchase or construction of homes on reserves. The federal government makes monies available to band governments for housing on reserves.

enacted housing policies which contain objective criteria for allocating housing to band members, there is no requirement under the *Indian Act* for band governments to do so.

Furthermore, there is no requirement in the *Indian Act* for bands to have appeal processes in place for band members to appeal decisions made by band governments regarding the granting or denial of programs and services. In the absence of appeal mechanisms, disgruntled band members have no recourse but to seek relief through the courts, which is costly and often beyond the means of many band members.

Nor does the *Indian Act* contain any conflict of interest guidelines or codes of ethics to govern the conduct of band governments when exercising statutory powers delegated to them under the *Indian Act*.

### **Common Law Duties and Responsibilities of Band Governments**

Where the *Indian Act* is silent, the Courts have attempted to fill in the gaps by holding that in certain circumstances band governments owe fiduciary duties to their band members. By designating the relationship between band governments and their members as a fiduciary relationship and by holding that band governments owe fiduciary duties to their members in certain circumstances, the Courts have effectively imposed additional accountability requirements on band governments. Where band governments breach their fiduciary duties, band members can seek relief from the Courts and in this way hold band governments accountable to their members.

#### **What is a fiduciary relationship?**

A fiduciary relationship must exist before a band government can owe fiduciary duties to its members. In a fiduciary relationship, there is a fiduciary and a beneficiary or beneficiaries. The fiduciary is the person or entity that manages or holds property that is owned by another person or group. The beneficiary is the person or group that owns the property that is managed or held by the fiduciary.

Although it is difficult to provide an exhaustive description of the circumstances in which a fiduciary relationship will arise, the following three conditions must be present before the Courts will impose duties on a fiduciary:

1. The fiduciary has scope for the exercise of some discretion or power;
2. The fiduciary can unilaterally exercise that power or discretion so as to affect the beneficiary's legal or practical interests; and
3. The beneficiary is peculiarly vulnerable to or at the mercy of the fiduciary holding the discretion or power.<sup>16</sup>

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<sup>16</sup> *Frame v. Smith* (1987), 42 D.L.R. (4<sup>th</sup>) 81 (S.C.C.) at 99.

The Courts have designated the relationship between band governments and their members as a fiduciary relationship. In *Gilbert v. Abbey*, the Court held that:

*A duly-elected chief as well as the members of a band council are fiduciaries as far as all other members of the band are concerned. The chief upon being elected, undertakes to act in the interests of the members of the band. The members of the band are vulnerable to abuse by the fiduciary of his or her position, and a fiduciary undertakes not to allow his or her interest to conflict with the duty that he or she has undertaken.*<sup>17</sup>

### **What is a fiduciary duty?**

Where a fiduciary relationship exists, the Court will impose duties on the fiduciary to govern the conduct of the fiduciary when managing and dealing with the property owned by the beneficiary. What are some of the fiduciary duties owed by fiduciaries to beneficiaries?

One of the key duties imposed on a fiduciary is the duty of loyalty. In *Lac Minerals Ltd. v. International Corona Resources Ltd.*<sup>18</sup> La Forest J. noted that the duty of loyalty requires "the avoidance of a conflict of duty and interest, and a duty not to profit at the expense of the beneficiary."<sup>19</sup>

The duty of impartiality is another significant fiduciary duty that has been imposed on fiduciaries by the Courts. The duty of impartiality requires that fiduciaries treat beneficiaries equally where they have similar rights and to treat beneficiaries fairly where they have dissimilar rights.<sup>20</sup>

Other duties that have been imposed on fiduciaries include the duty to act in the best interests of the beneficiary, not to act for his or her own benefit, not to exercise

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<sup>17</sup> *Gilbert v. Abbey* [1992] 4 C.N.L.R. 21 at p. 24 (B.C.S.C.).

<sup>18</sup> [1989] 2 S.C.R. 574, (1989), 61 D.L.R. (4<sup>th</sup>) 14, 69 O.R. (2d), 44 B.L.R. 1, 26 C.P.R. (3d) 97. See also Donovan M. Waters, "Lac Minerals v. International Corona Resources Ltd.", 69 Canadian Bar Review 455-482.

<sup>19</sup> *Ibid.*, [1989] 2 S.C.R. 574 at 646-647, (1989) 61 D.L.R. (4<sup>th</sup>) 14 at 28.

<sup>20</sup> P.D. Finn, *Fiduciary Obligations* (1977) at pp. 15-16 and 78-81 and Mark Ellis *Fiduciary Duties in Canada* (Scarborough: Carswell, 1993) at 2-8.

undue influence, not to misuse property held in a fiduciary capacity, and not to act unreasonably.<sup>21</sup>

While the existence of a fiduciary relationship may give rise to fiduciary duties, it is important to note that not every aspect of the relationship between a fiduciary and beneficiary will result in the imposition of a fiduciary duty by the Courts. As noted by Laskin J in *Canadian Aero Service Ltd. v. O'Malley*, the obligations of a particular fiduciary will depend on the circumstances.<sup>22</sup> Fletcher Moulton L.J. similarly noted in *Re Coomber*<sup>23</sup> that:

*Thereupon in some minds there arises the idea that if there is any fiduciary relation whatever any of these types of interference is warranted by it. They conclude that every kind of fiduciary relation justifies every kind of interference. Of course that is absurd. The nature of fiduciary relations must be such that it justifies the interference.*<sup>24</sup>

### **Breach of fiduciary duty**

What is the significance of band governments owing fiduciary duties to their band members? Where a fiduciary duty is breached, the Courts will step in to protect the beneficiary and the fiduciary must surrender any profit or gain acquired. Accordingly, where a fiduciary relationship exists, band members can sue band governments for any breach of fiduciary duty and seek various forms of equitable relief from the Courts for the actions and conduct of their leaders. This provides band members with an additional mechanism for demanding accountability from band governments.<sup>25</sup>

### **What fiduciary duties do Band Governments owe to Band members?**

What are some of the specific fiduciary duties that band governments owe to their members? Where a fiduciary relationship exists between band governments and band members, the Courts have imposed a number of fiduciary duties on band governments.

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<sup>21</sup> Supra, note 20, Finn at pp. 15-16 and 78-81 and Ellis at 2-2.1, 2-5, 2-17, 2-18, 9-10.7, 9-22, and 9-23.

<sup>22</sup> (1974) 40 D.L.R. (3d) 317 (S.C.C.),

<sup>23</sup> (1911) 1 Ch. 723.

<sup>24</sup> Ibid at p. 728.

<sup>25</sup> While band members can seek relief from the Courts for breaches of fiduciary duties by band governments, this is a costly option that is sometimes beyond the financial means of individual band members.

A review of these fiduciary duties and the relevant case law is set out below in greater detail.<sup>26</sup>

### **Conflict of interest**

The duty of loyalty requires that a fiduciary avoid any conflict of interest in managing or dealing with property that it holds on behalf of a beneficiary. In *Gilbert v. Abbey*,<sup>27</sup> the Court considered whether an elected chief owed a fiduciary duty to band members to avoid a conflict of interest when dealing with monies owned collectively by band members.

In this case, the chief participated in a meeting at which the band council made a decision to reimburse the chief for some personal expenses that she incurred. The reimbursed personal expenses included a student loan, private school tuition for her children and the purchase of a mobile home for her personal use.

Band members brought an action against the former chief for breach of fiduciary duty on the basis that her attendance at these meetings amounted to a conflict of interest. The Court concurred that the former chief's attendance at the meetings amounted to a conflict of interest and that she should have disclosed her personal interest and excused herself from the band council meeting at which the decision was made.<sup>28</sup> The Chief was ordered to repay the band for any monies that she received as reimbursement for her personal expenses.

### **Personal benefit**

The duty of loyalty requires that fiduciaries act in the best interests of their beneficiaries and not profit at the expense of the beneficiary. The applicability of this fiduciary duty to band governments was considered in the following cases.

In *Silver v. Ned*<sup>29</sup> the Court considered whether representatives of a band government owed a fiduciary duty to band members not to profit at their expense in connection with profits they received from a cigarette permit. In this case, while in office, a former chief and a former band councillor obtained a permit to sell cigarettes.

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<sup>26</sup> The review of the case law set out in this paper is not exhaustive and is merely intended to provide examples of situations where the Courts have imposed fiduciary duties on band governments.

<sup>27</sup> [1992] 4 C.N.L.R. 21 (B.C.S.C.).

<sup>28</sup> *Ibid* at p. 24.

<sup>29</sup> [2002] B.C.S.C. 944.



Although the permit was issued in the personal names of the former chief and councillor, band members thought that the defendants obtained the permit on behalf of the band. However, after leaving office the defendants kept the permit in their personal names and received all profits from the cigarette permit.

The Court concluded that the defendants owed a fiduciary duty to the band members not to profit at their expense. The Court further concluded that the defendants breached their fiduciary duty to band members by failing to differentiate between their own personal interests and the band's interests and by failing to cancel the permit in their own names so as to allow the band to obtain its own permit. The Court ordered the defendants to disgorge themselves of any profits earned from the permit.<sup>30</sup>

Similarly, in *Louie v. Derrickson*<sup>31</sup> the Court considered whether a former chief breached his fiduciary duty to band members not to benefit at their expense in regard to compensation he received for a right-of-way that passed through band lands. The band council did not approve the compensation payment made to the former chief and his claim did not meet all of the criteria for compensation that had been adopted by the band council. The Court held that the former chief breached his fiduciary duty to band members by applying the compensation policy to his land and ordered that he repay any funds that he received from the band.<sup>32</sup>

### **Impartiality**

The duty of impartiality requires that fiduciaries treat all beneficiaries equally. The applicability of this fiduciary duty to band governments was considered in *Barry v. Garden River Band of Ojibways*<sup>33</sup> where a band council treated two classes of beneficiaries differently when making a distribution of monies received from a land claims settlement to band members. In particular, the band council required that women enfranchised before 1985 repay any amounts they received from band funds as a result of being enfranchised before receiving any monies from the land claims settlement. The band council also decided not to pay any share of the land claims settlement to children of women enfranchised before 1985 on the basis that such children were not band members at the time of the distribution. The Court held that the band council breached its duty to treat all beneficiaries equally and ordered that

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<sup>30</sup> Ibid at paras. 19 and 23.

<sup>31</sup> [1993] B.C.J. No. 1338 (B.C.S.C.) affirmed by *Westbank Indian Band v. Derrickson* [1995] B.C.J. No. 640 (B.C.C.A.).

<sup>32</sup> Ibid at paras. 46 and 47.

<sup>33</sup> (1997) 33 O.R. (3d) 783; (1997) 147 D.L.R. (4<sup>th</sup>) 615; [1997] 4 C.N.L.R. 28.

the women enfranchised before 1985 and their children were entitled to an equal share of the distribution made to band members from the land claims settlement.<sup>34</sup>

### Exercise of statutory duties

It is also worth noting that the Courts will not impose fiduciary duties on band governments where the band council is exercising statutory powers under the *Indian Act*. In *Scrimbitt v. Sakimay Indian Band Council*<sup>35</sup> the Court held that where a band council acts according to statute, it is exercising public law duties and no fiduciary duty exists.<sup>36</sup>

In *Scrimbitt*, a band member applied for judicial review of the band council's refusal to allow her to vote in band elections. She claimed that the band's decision to deny her the right to vote violated her Charter rights, the *Indian Act* and the band's membership code. She also claimed that the band's decision amounted to a breach of the band council's fiduciary duty to treat all beneficiaries equally in administering the band's membership list. The Court agreed that the band's actions violated the plaintiff's Charter rights, the *Indian Act* and the band's membership code. However, the Court rejected the plaintiff's argument that the band's actions amounted to a breach of fiduciary duty.

### Concluding Remarks

Statutory provisions in the *Indian Act*, government policies relating to the expenditure of band monies and fiduciary duties imposed on band governments by the Courts provide a framework for ensuring the political and fiscal accountability of band governments to their members. While there are gaps in the remedies available to band members in the *Indian Act*, the Courts have attempted to fill these gaps by imposing fiduciary duties on band governments in certain circumstances. In particular, when dealing with band assets, including both monies and lands, the Courts have required that band governments refrain from conflicts of interest, not profit at the expense of band members and treat all beneficiaries equally. While band members can seek relief from the Courts for breaches of fiduciary duty by band governments, this is a costly option, which can be prohibitive for some band members. Nevertheless, there are a number of statutory and other legal mechanisms available to band members to hold band governments accountable to their members.

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<sup>34</sup> Ibid at p. 40.

<sup>35</sup> [2000] 1 C.N.L.R. 205.

<sup>36</sup> Ibid at p. 206.

### **About the Scow Institute**

The Scow Institute is a non-partisan organization that is dedicated to addressing public misconceptions about various issues relating to Aboriginal people and Aboriginal rights. For additional information, please visit our website at [www.scowinstitute.ca](http://www.scowinstitute.ca).