

Indian Act Elections & Custom Governance

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What Process Applies: *Indian Act* or Custom?

- s. 74 of the *Indian Act*.
 - The *Indian Bands Council Elections Order* lists the bands that are governed by the *Indian Act* procedures. See: <http://laws.justice.gc.ca/eng/SOR-97-138/index.html>
- Custom Elections apply if/when the Minister removes the band from the s. 74 Order.

Elections under the *Indian Act*: s. 74-79

- The Council (s. 74)
 - Council of a band is composed of one Chief and one Councillor for every 100 members of the band, with a minimum of two and a maximum of twelve Councillors.

- Nomination of Candidates (s. 75)
 - To become a Councillor, a person must be, and be nominated by, an 'elector' residing on reserve. An elector is a person who is 18 years of age or older, registered on a Band List, and is not disqualified from voting at band elections.
 - A candidate for Chief does not have to reside on reserve, but has to be nominated by an elector.
 - A Chief does not have to be a status Indian or even member of the Band (upheld - *Goodswimmer v. Canada (Attorney General)* [1995] F.C.J. No. 454 (C.A.)).

Elections under the *Indian Act*: s. 74-79, continued.

- Procedural Requirements (s. 76): *Indian Band Election Regulations*
 - Electoral Officers are appointed or approved by INAC (s.2 of the *Regulations*).
 - A voter's residency is determined by where s/he normally sleep (s.3 of the *Regulations*).
 - Voters List are linked to Membership/Band List (s. 4 of the *Regulations*).
 - Procedures for nomination and nomination meetings (s.4 of the *Regulations*).
 - Manner in which voting is carried out, including mail in ballots (ss. 5 - 6 of the *Regulations*).
 - Procedures for appeals (ss. 12-14 of the *Regulations*).
 - Voting is secret (s.15 of the *Regulations*).

- Voter Eligibility (s. 77)
 - 18 years of age and an "ordinary resident on the reserve" (s. 77(1)) ... BUT...
 - In *Corbiere v. Canada (Minister of Indian and Northern Affairs)*, [1999] S.C.J. No. 24 (S.C.C.) - exclusion of non-resident band members from voting is a contravention of the equality rights guaranteed by s. 15 of the *Charter*. The Court struck down the words "ordinary resident on the reserve".
 - *Indian Band Council Election Regulations* provide for mail-in ballots.

Elections under the *Indian Act*: s. 74-79, continued.

- Tenure of Office (s. 78)
 - Chief and Councillors hold office for a two-year period.

- Removal of a Chief or Councillor (s. 78)
 - Position is “deemed vacant” upon:
 - conviction of an indictable offence;
 - death;
 - resignation;
 - is or becomes ineligible to hold office under the *Act*; or
 - Minister declaring that the person:
 - is unfit to continue in office due to a conviction;
 - has missed 3 consecutive meetings; or
 - was guilty of an election offence.

- Contested Elections (s. 79)
 - The Governor in Council can set aside an election if the Minister believes there was corruption, contravention of the *Act*, or a candidate was ineligible.
 - An Appeal is not necessary before the Governor in Council acts.
 - The decision to set aside the election usually occurs after an Investigation, per s. 13 of the *Regulations*.

Indian Bands Council Method of Election Regulations

- Reserve(s) can be divided into electoral sections
 - A possible motivation: to prevent a single, large community from dominating council.
 - This regulation is not well used. To date, only two bands have implemented it.
 - Canoe Creek, B.C., has two electoral sections; and
 - Lac Seul, ON, has four electoral sections.
 - Impact of *Corbiere*?

Custom Elections

- A Band may switch from the Indian Act procedures to a custom election procedure by requesting that a s. 74 Order be repealed.
- INAC's Policy:
 - The Minister will repeal the Order if it is satisfied that:
 - the proposed election code is clear, includes an election appeals process, follows principles of natural justice, is consistent with the *Charter*, and has been reviewed by INAC;
 - the code is approved by the community by a majority vote or another mechanism; and
 - after ratification, supporting documents are sent to INAC.
- *Ratt v. Matchewan* 2010 FC 160
 - Some bands have never been subject to a section 74 Order, and so don't have to meet INAC policy to be removed.

Custom Elections, continued.

- Common changes when moving to custom election codes:
 - eligibility to vote (linkage to membership list);
 - eligibility to be a candidate;
 - how and when the Council is selected;
 - term of office (e.g.: 3, 4 years; staggered terms); and
 - size of council.

- Major changes sometimes made when moving to custom election codes
 - Expanded qualifications (& disqualifications) for council; and
 - Integrating hereditary leaders.

Election Disputes

- Under the *Indian Act & Regulations*:
 - Appeals process available for a candidate or elector:
 - inform the Assistant Deputy Minister of the appeal within 45 days of the election;
 - the Assistant Deputy Minister forwards the appeal to the electoral officer and affected candidates;
 - candidates may respond within 14 days; and
 - Minister prepares a report and the Governor in Council decides whether to set aside election.
 - *Keeper v. Canada* 2011 FC 307 – Minister rejected an appeal; court ordered the Minister to reconsider using “correct standard”

- Under Custom Elections:
 - Three kinds of disputes:
 - Did you follow the custom the right way? (*McLeod Lake Indian Band v. Chingee*, [1998] F.C.J. No. 1185 (T.D.); *Villeneuve v. Beaulieu* 2010 FC 655).
 - Did you follow the right custom? (*Francis v. Mohawk Council of Kanesatake*, [2003] F.C.J. No. 16 (T.D.); *Eikland v. Johnny* 2010 FC 854)
 - Charter challenge? (*Clifton v. Hartley Bay (Electoral Officer)*, [2005] F.C.J. No. 1267; *Thompson v. Leq’a:mel* 2007 FC 707).

Election Disputes, continued.

- Custom or Indian Act?
 - Evidence of community support? (*Salt River First Nation 195 (Council) v. Salt River First Nation*, [2004] 1 C.N.L.R. 319 (C.A.)).
 - Hereditary and elected council? (*Isaac v. Davey*, [1977] 2 S.C.R. 897).

- INAC's role – not to approve, but who to recognize?

Other Legislation

- Treaties – Nisga’a, Tsawassen, Maa Nulth
- Self-Government Agreements – e.g. Westbank
- Jurisdiction over Education in British Columbia Act, S.C. 2006
 - Community Education Authority, Education Law Making Protocol
- Bill C-7: The First Nations Governance Act (2002)
 - Abandoned
- But wait, there’s a Senate Report!