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This series is intended to provide high level and short, easy to read information about some very complex issues. It should not be used as a substitute for expert advice. Links to sources and further reading suggestions are provided throughout for further exploration of the issues.

Indian Act Roles and Responsibilities of Chiefs and Councils

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A Highly Problematic Law

Have you ever wondered why Chief and Council do or don't do certain things or don't always seem to be very effective? One of the reasons might be that their legal and financial authority is strictly controlled by federal legislation, making it difficult to act on the wishes and direction of the community. Sometimes this can cause fractures, discord and conflict because we don't see they are working within a system imposed on all of us; one we can collectively work to get out from under.

To support effective governance and leadership, First Nations Chiefs, Councillors, and members need to understand the legal landscape within which the band council operates; namely the *Indian Act, 1985* (the Act) which is the primary legislation that governs most First Nations' band councils and reserves.

By understanding the constraints and limitations that this cumbersome and highly problematic legislation places on band councils and band membership, First Nations can focus on effective and efficient administration to make space and create a foundation for self-government under our inherent rights. For example, when councils make maximum use of their by-law and policy-making power it allows for greater control of local matters. When council clearly understands and carries out its leadership role, it can lead to better funding and business opportunities to support the nation's priorities. This in turn builds governance capacity and the

“Band councils are created under the Indian Act and derive their authority to operate...exclusively from the Act. In the exercise of their powers, they are concerned with the administration of Band affairs on their respective reserves whether under direct authority of Parliament or as administrative arms of the Minister. They have no other source of power.”
(Paul Band v. The Queen, 1984, ABCA 540: para 20 quoted in Louie v. Louie, 2015 BCCA 247: para 12)

principles of trust, transparency and engagement within the community. Most importantly, it will facilitate moving beyond the *Indian Act* and rebuilding our nations' governance under our own inherent rights.

Indian Act: Background and Authority

There are two parts of Canada's constitution (1982) that address First Nations governance in two very different ways: Section 91 (24) or Section 35. The first is delegated authority from Canada through the *Indian Act* and related legislation – authority Canada gave itself in the division of powers between the provincial and federal governments when the country was first created in 1867. Specifically, Section 91 (24) gives the Parliament of Canada jurisdiction over “Indians, and Lands reserved for the Indians.” One of the earliest laws under this jurisdiction was the *Indian Act*, enacted in 1876. From the beginning, key decision-making authority was assigned to the responsible federal minister.

At its core, the *Act* is based on a philosophy of assimilation, civilization and extinguishment of First Nations rights (Center for First Nations Governance, *Origin and Content of the Indian Act* presentation). Other than those who are in prison, it is the only federal legislation that regulates the social, political and economic lives of a group of people in Canada (Abele, 2007). While the *Indian Act* has been revised over time and under pressure from First Nations, it remains assimilative and restrictive. Bands can opt out of some of its more restrictive elements by “opting in” to more recent federal legislation created for managing elections, reserve land and finances. [\(For more information on that evolution, see the Shortcuts article entitled *Indian Act: Devolution and Opt-In Legislation.*\)](#)

Section 35, which was added to the Constitution in 1982 following years of struggle by Indigenous peoples, recognizes and affirms “existing aboriginal and treaty rights”. This includes the inherent right of self-government, grounded in First Nations' existence on the land as sovereign and self-governing nations prior to European colonization. Section 35 doesn't grant the right; it merely recognizes it. First Nations can implement it by reclaiming and rebuilding our own forms of government and creating our own laws under our own authority.

Despite the inherent right of self-government recognized in Section 35, most First Nations communities in Canada still administer themselves under the rule of the *Indian Act*.

Key features of *Indian Act* Administration

The *Act* dictates the band council governance structure of a Chief and a specified number of Councillors. The Chief is also a Councillor, with no additional legislated powers¹.

¹ Historically, elections for this structure were sometimes forcefully imposed on the community, suppressing any traditional or culturally relevant forms of governance or leadership selection. See for example: <http://www.akwesasne.ca/the-story-of-john-saiowisakeron-fire/>

It should be noted that the **Chief and Council** as a body created by the *Indian Act* are not rights holders and **have no power to represent rights and title holders**. This has nothing to do with the

The Indian Act sets out the areas in which the band council may act:

- On-reserve municipal-type services and land use
- Make by-laws
- Local taxation, money collection and spending, salaries
- Band membership (not to be confused with Indian Status which is controlled by the federal government under the Indian Registry)

... and where the band council must act:

- Holding elections
- Publishing by-laws passed by the band council
- Passing a by-law before spending money from local tax revenue
- Maintaining roads and bridges
- Holding a membership vote before passing a membership code, land code, financial code, election code

individuals who fulfill these roles - it's because of the law that creates their function. **Rights holders are the collective of people with shared customs, traditions, territory and resources at the time of first contact, meaning: the Nation, not *Indian Act* bands.** Band councils have a legal **fiduciary obligation** to band members, meaning that because of the position they hold, they have a responsibility to act in the best interest of band members. Councillors (including the Chief) are expected to act in a high standard, like other fiduciaries in Canada (*Louie v. Louie, 2015, BCCA*: para 27, 29). These strict standards include avoiding and disclosing situations where the best interests of the band conflict with the Councillor's personal interests. Interests of the band and band members must be put above personal self-interest, and chief and council must not profit or gain advantage from their position as a fiduciary.

Except for a handful of decision areas where the Chief and Council must get the explicit consent of band members, the *Act* is silent on accountability to the people. Councils' primary accountability is to the federal government, mainly for financial management of federal funding. (Centre for First Nations Governance, *Origins and Content of the Indian Act*).

The **federal-First Nations funding relationship has severe limitations**² and in contrast to the federal-provincial fiscal relationship, is quite unfair. First Nations are heavily restricted as to how they can spend money and face significant reporting requirements on money received. Often these controls and restrictions extend to the band's own-source revenue including royalties earned off their resources.

The legal power and authority of the band council is limited to the administration of the *Indian Act* (clarified in *Louie v. Louie 2015 BCCA*) and is strictly confined within reserve boundaries (*R. v. Lewis, 1996, SCC*: para 81, 82). From a legal perspective this creates difficulty for the band council

² For an explanation of how the funding relationship works: IFSD – Expert analysis: Federal funding and First Nations in Canada. Accessed August 30, 2024 https://www.ifsd.ca/web/default/files/Reports/2023-01-19_For%20website_Questions%20for%20federal%20funding%20of%20First%20Nations.pdf

to act as representative of the rights holders in any capacity. The band council's primary area of significant control over reserve lands is the right to distribute allotments of land to band members through Certificates of Possession (s.20). Even this remains subject to the minister's approval.

Limited Powers of Chief & Council: By-laws

A by-law is made by a non-sovereign body (Chief and Council), which derives its authority from another governing body (the Parliament of Canada). By-laws can be made on only a limited range of matters. Section 81 (1) of the *Indian Act* grants band councils the ability to make by-laws for any of the purposes listed in the act. Some examples include:

- Health of residents (including preventing spread contagious disease)
- Regulation of traffic
- Destruction and control of noxious weeds
- Protection from trespassing of animals such as cattle and regulation of beekeeping and poultry raising
- Regulation of construction, and maintenance of roads, bridges, ditches, public wells, cisterns.
- Preservation, protection and management of fur-bearing animals, fish and other game on-reserve
- Removal and punishment of persons trespassing on reserve
- Prevention of disorderly conduct and nuisances

Most types of by-laws were historically subject to final approval of the Minister, resulting in certain by-laws having been disallowed. The disallowance power was repealed in 2014. Section 83 (1) "Money by-laws" continue to require Ministerial approval. It is important for First Nations to remain vigilant to the limitations of their by-law making authority as they move towards self-government.

Legal scholar Naomi Metallic argues that despite the pitfalls of the delegated authority of the *Indian Act*, exercising self-governance through by-law making is the "lesser of two evils." It is better to have some control over matters within the community than none at all (Metallic, 2016).

Effectively Fulfilling the Roles of Chief and Council

In overseeing the administration of the *Indian Act*, Chiefs and Councils are not provided much guidance by the legislation. But there are best practices that can support effectiveness and efficiency.

As elected leaders, Chiefs and Councils can maximize their impact by focusing on the unique political and leadership roles that only they can fulfill while allowing the administrative leader (CEO, CAO or Band Manager) to manage band staff and operations. In an effective organizational structure, Chiefs and Councils provide strategic direction and liaise effectively with the head of the band administration who then carries out that direction. Failure to respect the band's

organizational chain of command by Councillors getting involved directly in administration can lead to staff turnover, poor program delivery and a decline in good governance (Graham, 2007; Ducharme, forthcoming).

As part of their **fiduciary duties**, Council must establish and protect effective controls for band finances and assets and approve budgets and operational plans. Band councils have a responsibility for ongoing communication and consultation with band membership to ensure that they enact the vision, mission and values of the community.

In their **leadership role** Chief and Council serve the First Nation and are expected to effectively address community expectations and standards, lead by example, and support community consensus on strategic priorities.

The political advocacy role requires a strong understanding of the *Indian Act* to ensure its effective administration to strengthen the community. Knowing member interests is essential in representing them politically and to advocate for community needs and concerns. By understanding Section 35 Rights, Chiefs and Councils can pursue and maximize opportunities for community benefit and lobby to address funding gaps.

The **legal role** of Chiefs and Councils requires understanding the *Indian Act*, by-law making powers and limitations, and applicable federal and provincial laws and regulations. Chief and Council are bound by these laws and have no legal authority to act outside of them. These include, as stated above, abiding by fiduciary responsibilities, understanding the limitations of *Indian Act* powers and understanding the legal environment. The legal environment for First Nations is complicated by overlapping jurisdictions where laws sometime apply concurrently. Section 88 of the *Indian Act* states that provincial laws apply on reserve unless they conflict with existing Treaty Rights, any provisions of the *Indian Act*, or existing federal legislation. First Nation law, provincial, federal or common law set out the legal limitations on the powers, decisions and actions of the Chief and Council. Understanding how these different levels of law interact is complex and challenging to navigate. The relationship of laws is both a legal and political issue and it is important to seek legal advice on matters that could cause conflict.

Building and maintaining strong relationships is essential to effective governance. Relationships can be with members, band administration leadership, staff, boards and trusts, businesses and with other governments and political bodies. The failure to maintain good relationships both internally and externally to the band can result in a lack of confidence, ineffective governance, litigation, damage to the band's reputation, its ability to do business, decreased funding and opportunities, and loss of credibility. Best practices include having clear processes for addressing conflict, implementing and following an organizational code of ethics, good governance policies and procedures that apply to elected leadership, effective community engagement, and a strong and healthy relationship with the senior band administrator.

Moving Forward

The *Indian Act* was not designed to sustain First Nations in a good and culturally relevant way, but it is the current operating reality in most communities. The more that leadership, administrators, and members understand its limitations and work to minimize harm and maximize governance within those constraints, the sooner a community can begin to direct its attention to rebuilding governance in a way that does honour to their nation's culture and priorities and works for them.

Read More

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