

DECISION-MAKING PROCESSES WITHIN FIRST NATIONS COMMUNITIES

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I. Introduction

Engagement and consultation with First Nations is an emerging and dynamic area of Aboriginal law at the moment. This engagement or consultation ranges from discussions regarding resource development initiatives on traditional territories of First Nations to on-reserve economic developments. As such it is important to know who you are dealing with and how to approach different aspects of your dealings with First Nations communities. Some decisions require only the involvement of the Band Council and some require the involvement of the band as a whole. As you will see, most of your everyday business type of discussions will only require the involvement of the Band Council. The intent of this paper is to provide an overview of those issues and it will also set out what is required to have a binding agreement with a First Nation community.

For the purposes of this presentation I will focus only on contemporary governance processes leading to decisions based on provisions of the *Indian Act*. It is important to note briefly that the *Indian Act* does not formally recognize nor refer to the traditional governance structures of First Nations that involved hereditary leadership or consensus decision-making processes that First Nations historically employed. The *Indian Act* does provide some deference to customs of First Nations in some decision-making areas.

II. Indian Act vs. Band Custom Processes

One important factor that one must be cognisant of is whether the First Nation in question governs itself in accordance with the *Indian Act* or pursuant to custom that has been codified (or not) through, typically, an election act or a council procedure regulation or policy. Some Band Councils do not conduct their elections pursuant to the *Indian Act* and, accordingly, have developed their own election acts or codes and Band Council procedure rules, policies or guidelines.

III. Band Council Decisions

As stated above, assuming the First Nation is governed by the *Indian Act*, one must review the provisions of the *Indian Act* to determine the scope of authority of the Band Council.

a. Legislation

The form of decision making authority for a Band Council is found in section 2(3)(b) of the *Indian Act*:

Unless the context otherwise requires or this Act otherwise provides,
(b) a power conferred on the council of a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the councillors of the band present at a meeting of the council duly convened.

This formality of decision making is also followed by Band Councils who are elected in accordance with the custom of the First Nation. We will review these formalities later on in this paper.

In addition, a Band Council governed by the *Indian Act* election system can also utilize the provisions of the *Indian Band Council Procedure Regulations*, C.R.C., c. 950 (the “*Regulations*”). for decision-making procedures. It is important to note that the Regulations do not apply to Band Councils elected by custom: *Balfour v. Norway House Cree Nation*, [F.C.J. No 269] (F.C.).

b. Subject Areas

Possession of Lands in a Reserve

Section 20 of the *Indian Act* provides that in order for an Indian to lawfully possess land in a reserve, the Band Council must have granted the land to that First Nation member. The decision must then be approved by the Minister. These arrangements are called certificates of possession and have been granted in the past. They are not granted as a matter of course presently.

In *Joe v. Findlay*, [1981] B.C.J. No. 366 (BCCA), the court held that individual possession of reserve land must be obtained via an allotment by the Band Council. It was further noted in *Parker v. Okanagan Indian Band Council*, 2010 FC 1218 that the Band Council has absolute discretion in determining whether to allocate land or not.

The court in *MacMillan v. Augustine*, 2004 NBQB 160 [*MacMillan*] described the significant power of the Band Council when enforcing and assigning the lands in the reserve. Where there is no certificate of possession pursuant to the *Indian Act* indicating possession of a particular property, the court held that the Band Council had the authority to possess the land. This could be done through the forced surrender of land by one Indian so that the Band Council could assign the land to someone else.

The rules governing possession of reserve lands are fairly strict. In *Paul v. Cooper*, 2009 BCSC 515, there had been a verbal sale of land on the reserve, followed by 20 years of occupation. Despite the longstanding occupation, the court held that the sale had not been completed in accordance with the *Indian Act* and therefore did not constitute a valid transfer of the rights of possession.

However, there are certain exceptions. It was found in *Stoney Band v. Poucette*, [1999] 3 C.N.L.R. 321 (ABQB) that certificate of possession was not always necessary to establish valid and lawful possession of reserve land. In that case, the Poucettes had purchased the land prior to it becoming reserve land. Therefore, pursuant to section 22 of the *Indian Act*, the Poucettes were determined to have been in lawful possession of the land, and they could not be forced to surrender their land to the Band Council.

Use of Reserve Land by Non-Band Members

The Minister is granted the power via section 28(2) of the *Indian Act* to permit a person who is not a member of that Band to reside or use reserve land of the Band for a period of one year. However, if there is a desire to extend the use of reserve land for a period longer than one year, consent of the Band Council is required.

In *Opetchesaht Indian Band v. Canada* (1997), 147 D.L.R. (4th) 1 (SCC), Major J. explained the seeming overlap between sections 28(2) and 37 of the *Indian Act*. Major J. described that the two sections were aimed at different situations:

“In the case of sales, dispositions and long-term leases or alienations permanently disposing of any Indian interest in reserve land, surrender is required, involving the vote of all members of the Band. On the other hand in the case of rights of use, occupation or residence for a period of longer than one year, only Band Council approval is required” (*Opetchesaht* at 17).

McLachlin J., dissenting in *Opetchesaht*, opined that section 28(2) had been intended for things of a temporary nature, rather than “long term alienations of Indian interests in their reserve lands”.

Granting Authority to the Minister

Section 57(a) of the *Indian Act* allows the Band Council to give permission to the Minister to grant licenses for the purpose of cutting timber on reserve lands.

Where there is unused or uncultivated land on a reserve, the Minister may have the authority to lease that land or employ people to cultivate or improve the land. Pursuant to section 58, the Band Council has the authority to grant or withhold consent from the Minister for such purposes.

Subsection 58(4)(b) allows the Minister to permit the disposal of non-metallic substances on or under reserve lands, so long as such disposal has been approved by a majority of the Band Council.

With the consent of the Band Council, section 59 provides the Minister with the ability to reduce or adjust the amount owing to the Crown in respect of designated or surrendered lands. The Minister also has the authority, with the consent of the Band Council, to reduce the amount of debt owing by an Indian who had borrowed money from the Band.

The Minister needs the consent of the Band Council, pursuant to section 64, to direct the expenditure of capital moneys of the Band in certain situations. This same power is granted to the Minister upon approval by the Band Council under subsection 66(1) for the expenditure of revenue moneys. However, in the case of revenue moneys, the Minister has greater discretion in determining when and how that money can be spent.

Electing the Chief of the Band

Section 74 of the *Indian Act* provides the Minister with the ability to call an election to create a Band Council. The Minister may make regulations, pursuant to section 74(3), that give the power to solely the Band Council to elect the Chief of the Band. To my knowledge this is not presently practiced in Saskatchewan.

Creation of By-Laws

Section 81 of the *Indian Act* provides an enumerated list of purposes for which the Band Council has the authority to create by-laws. The list is expanded via in section 83 with regards to by-laws concerning money.

In *R. v. Lewis*, [1996] 1 S.C.R. 921 (SCC), the court explained that by-laws made under the *Indian Act* only applied on the reserve.

c. Formalities Required for a Valid Decision

Section 2(3)(b) of the *Indian Act* requires that Band Councils make decisions in “duly convened” meetings by majority vote. The court in *Leonard v. Gottfriedson* (1980), 21 B.C.L.R. 326 (BCSC) held that the requirements set out in section 2(3)(b) needed to be followed. It was further stated that there is no authority for an individual of the Band Council to consent to a resolution in writing. According to *Abénakis de Wolinak Band Council v. Bernard*, [1998] F.C.J. No. 1639 (FC) a Chief is also not able to make decisions unilaterally on behalf of the band without a meeting in accordance with s.2(3)(b).

There are two main purposes for requiring “duly convened” meetings to be held. Firstly, it supplants Band customs which may require consensus or unanimity in decision-making, thereby making the decision-making process more efficient.

Secondly, it prevents the Band Council from passing resolutions in writing without holding a formal meeting. As noted in *W Downer Holdings Ltd. v. Red Pheasant First Nation*, 2012 SKQB 468, the purpose of the required meeting is to provide an opportunity for all members of Band Council who may disagree to voice their opinion on important points. Not only does this allow an important debate to ensue, but also the requisite meetings help to ensure accountability of the Band Council in the eyes of the public.

The requirements for these meetings are outlined in the *Regulations*, and were reiterated and explained by the British Columbia Supreme Court. In *Wewayakai Indian Band v. Chickite*, [1998] BCJ No 2775 (BCSC), the court determined that three main prerequisites must be met in order to constitute a valid meeting, pursuant to section 2(3)(b).

Firstly, the meeting must be called at the request of a majority of the councillors. Section 4 of the *Regulations* also provides that the Chief or superintendent may summon a special meeting of the Band Council at any time.

Secondly, members must be given advance notice of the meeting. The *Regulations* establish that the superintendent is responsible for providing each member of the Band Council with such notice.

It is also required that a quorum of the Band Council attend the meeting. According to s.6 of the *Regulations*, satisfying a quorum requires a majority of the Band Council. However, quorum will be met with five members where a Band Council consists of nine or more members.

The Regulations also include further procedural requirements for the meetings. Sections 7 through 31 outline procedures such as choosing a presiding officer and chairman for the meeting, how to conduct the order of business at each meeting, the creation and operation of standing committees, and the establishment of the voting process.

Guidelines are also included for bringing resolutions before the Band Council in a requisite meeting. Section 12 of the Regulations provide that resolutions must be presented or read by the mover and seconded before becoming open to consideration by the Band Council.

Section 18 of the *Regulations* explains that each resolution will be voted upon by the Band Council. Where there is a tie in the votes, the presiding officer of the meeting will cast the ultimate vote. It is interesting and important to note that all present members of the Band Council are required to vote, unless they have a personal interest in the matter. According to s.20, a member who chooses not to vote will be deemed to have voted in the affirmative.

While the above processes apply to Band Councils governed by the *Indian Act*, Band Councils elected pursuant to custom of the Band also follow the requirements of holding duly convened Band Council meetings and majority approval of a decision. In both situations, the formality of such a decision is documented by way of a Band Council Resolution or a BCR as it is commonly known.

IV. Decisions that Require Ratification by the Band

a. Legislation

Section 2(3)(a) of the *Indian Act*, RSC 1985, c I-5 provides as follows.

Unless the context otherwise requires or this Act otherwise provides,

- (a) a power conferred on a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of a majority of the electors of the band.

See also the *Indian Referendum Regulations*, C.R.C. 1978, c. 957 (the “Referendum Regulations”).

b. Subject Areas

Control of Band List and Membership Codes

Section 10 of the *Indian Act* allows the Band to assume control of its own membership. This decision must be made with the consent of a majority of the electors of the Band. Once this has been accomplished, the Band can then vote on the establishment of membership rules and a mechanism to review membership decisions.

The Federal Court set out important requirements regarding the Band's vote to assume control of Band membership in *Abénakis of Odanak v. Canada (Indian Affairs and Northern Development)*, 2008 FCA 126. The first requirement is that the Minister must provide the Band with a "useful and reliable" list of electors who are eligible to vote. Secondly, the Minister has the ability to strike the names of some people off the voting list if, for example, the Minister was unable to locate them. As its final requirement, the court held that a majority of those members eligible to vote must vote, and that a majority of those members that did vote must have voted in approval of the Membership Code.

It is also important to note that the court in *Omeasoo v. Canada (Minister of Indian Affairs & Northern Development)*, [1988] F.C.J. No. 1001 (Fed. T.D.) held that the proposed Band membership rules could not be amended by a Band Council resolution. This ensures that the ability to control the Band List and Membership Codes rests with the Band as a whole, and not just the Band Council.

Rather than the Band having control of Membership Codes, the Band is able to leave control of its Band List with the Minister. Pursuant to section 13.1, this action would also require consent by a majority of the electors of the Band.

If the Band has control of the Band List but a majority of the electors of the Band no longer desires to retain control, section 13.2 also grants the Band the ability to return control of its Band List to the Minister.

Amalgamation with Other Bands

Pursuant to section 17 of the *Indian Act*, the Band can request for the Minister to approve amalgamation with another Band. For the Minister to grant an amalgamation, a majority of the electors of the Band must consent to the request and amalgamation.

Allege Trespass

The Band as a whole has the ability to allege certain claims without the approval or consent of the Band Council. These decisions are enumerated in section 31, and include allegations against persons other than Indians that are or have been in unlawful occupation or possession of reserve lands, claiming an adverse right to occupation or possession of reserve lands, or trespassing upon reserve lands. It was held in *The Queen v. Devereux*, [1965] S.C.R. 567 that the Attorney General can then bring proceedings on behalf of the Band.

Land Designations and Surrender

Subsection 38(1) of the *Indian Act* allows reserve lands to be surrendered to the Crown absolutely in order to be sold. This was employed frequently by the Crown in the past to alienate reserve land but it is not a practice that is used presently except in a land exchange between a First Nation and the Crown.

Subsection 38(2) allows a band to designate reserve land or rights and interests in reserve land to the Crown in order for the land to be leased or the rights to be granted to someone else. This is also known as a non-absolute surrender. This is how many economic development projects on reserve are initiated since leasehold interests are created. Those leasehold interests can then be pledged as security for loans and mortgages.

Section 37 of the *Indian Act* outlines that reserve land cannot be conveyed in any manner – sold, leased, or otherwise – except pursuant to subsections 38(1) and 38(2) of the *Indian Act*.

Section 39 outlines the conditions for the valid surrender of reserve lands. It was confirmed and reiterated in *Lac La Ronge Indian Band v. Canada*, 1999 SKQB 218 that a majority of the electors of the Band must assent to surrender.

There are three ways this vote can be held. Firstly, the Band can vote at a general meeting of the Band called by the Band Council. A second option is to vote at a special meeting of the Band called by the Minister. The third option is to hold a referendum pursuant to the Referendum Regulations.

Control of Reserve Lands

Section 60 of the *Indian Act* allows the Band to request the right to exercise control and management over reserve land. If the Minister considers such a request to be desirable, the Band then obtains full control over the reserve land occupied by the Band.

Electing Band Council

As noted above, the Minister may make regulations which provide that the Band Council members will elect the Chief of the Band. However, subsection 74(3) of the *Indian Act* also provides for the Minister to make regulations which would allow the Band as a whole to elect the Chief of the Band.

Subsection 74(3) further provides that the Band members are entitled to elect the Band Council. This may be done by all members of the electorate of the Band, but may also be accomplished by each electorate having its own separate vote for representatives.

By-laws Involving Intoxicants

Sections 81 and 83 of the *Indian Act* give power to the Band Council to make by-laws affecting the Band on the reserve. However, section 85.1 provides that the Band, rather than the Band Council, has the authority to make by-laws relating to intoxicants. This includes prohibiting the sale, supply, or manufacture of intoxicants, the regulation of intoxicated people, and the possession of intoxicants. In order to make a by-law regarding the above criteria, a majority of the electors of the Band must first assent to the by-law during a special meeting called by the Band Council.

c. Formalities Required for a Valid Decision

With respect to the surrender of reserve lands to the Crown, both the *Indian Act* and the *Referendum Regulations* provide guidelines for voting in order to complete such an objective.

An absolute surrender is void unless it is assented to by a majority of the electors of the band pursuant to subsection 39(1) of the *Indian Act*. If the majority of Indians that did vote at the original meeting or referendum assented to the surrender, the Minister has the ability to call for a new vote. The Minister must also give 30 days' notice of the second meeting or referendum to be held to determine the surrender of the reserve lands. As stated above the absolute surrender provisions are rarely used except in a land exchange situation.

As for designations for leasing purposes, s.39.1 of the *Indian Act* requires only a simple majority of the electors of the band voting at a referendum to assent to the designation.

It is important to note the finding of the court in *Linklater v. Peter Ballantyne Cree Nation*, [2001] 1 C.N.L.R. 156 (Fed. T.D.). The court held that referendums of the Band only needed to comply with the *Referendum Regulations* where the referendum was brought pursuant to sections 38 or 39 of the *Indian Act*. Other referendums, like those voluntarily undertaken by the Band that do not concern either section 38 or 39, do not need to follow the rules of the *Referendum Regulations*.

d. First Nations Land Management Act (“FNLMA”)

Please also note that other federal legislation affects or augments how decisions on land allocations and leasing are to be undertaken. The FNLMA is optional legislation that a First Nation may wish to participate in. The FNLMA provides that 34 sections of the *Indian Act* related to land matters no longer apply. It further provides that all authority, control and administration of reserve lands are transferred from the Minister to the First Nation.

Before the self-government powers under the FNLMA take effect, the First Nation’s community members over the age of 18 must approve, by referendum, the terms of the Land Code. This Land Code will contain sections that require only Band Council approval and which sections require community approval.

V. Conclusion

This paper sets out a general overview of what decisions can be made by a Band Council and what decisions need to be made or approved by the Band as a whole. When doing business with a First Nation community you need to determine whether they are governed pursuant to the *Indian Act* or the custom of the First Nation. Whether governed by the *Indian Act* or pursuant to custom you will need to review the *Indian Act* or the rules/laws/policies enacted by the First Nation in order to determine how decisions are made in order that you can have a legally binding agreement with the First Nation.