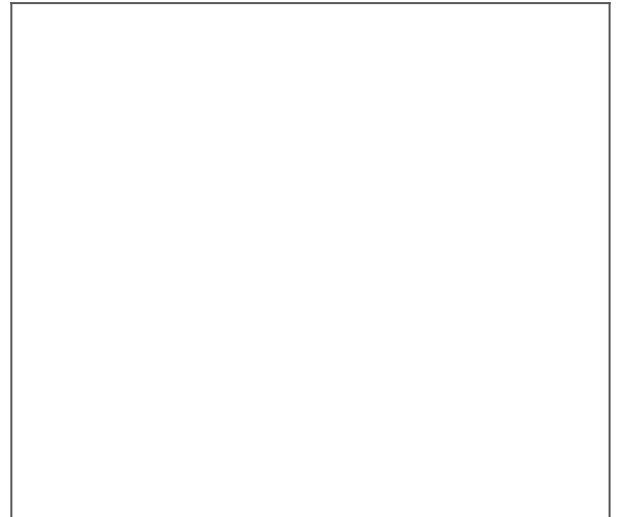


Drafting First Nation Custom Election Codes and Removing Chief and Council

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Increasingly, First Nations across Canada are enacting their own “custom codes” to govern the election of Chief and Council. The general rule is that a First Nation’s election is governed by the *Indian Act* unless a formal order is issued by Canada exempting them from this process and allowing for the First Nation’s custom to take precedence. As of 2010, about 40% of First Nations held elections under the *Indian Act* while 60% of First Nations held elections pursuant to band custom (or in some small cases pursuant to a self-government agreement).



The numbers indicate that First Nations wish to determine issues of governance on their own and do not wish to be subject to the *Indian Act*. In drafting a Custom Election Code, a First Nation will want to create an election code that is reflective of the unique customs, practices and traditions of that First Nation. The governing structure of a Dene community may be quite different from a Cree community.

Election Codes should reflect community needs and interests. Yet, the community will not always have the last word if there is a dispute. That dispute can go to the Federal Court for adjudication. This means that the custom code will be reviewed and interpreted by someone who is not part of the community. In this way, thought should be given to having custom codes being as clear as possible on areas that could be ripe for dispute.

One issue of dispute that is common under Custom Election Codes is that of removing a Chief and/or Councillor from office. Ultimately, it is up to the community to decide whether or not it wants to have some sort of removal process. The benefit of such a process is that it allows the electorate the ability to remove elected officials who have lost the confidence of the community. The substantial problem with the process is that, in some instances, removals are not taken kindly by the elected official. This can lead to a dispute that goes to Federal Court and leads to significant resources being expended in adjudicating that dispute before the Federal Court.

If there is a long term of office for an elected official, it makes more sense to have a removal

process. If the term is short, like two years, it becomes very probable that any litigation will not be resolved before the next election, which then makes the whole exercise of removal both pointless and costly.

If the community wishes to have a removal process, the next question is considering how the removal process should look. Some First Nations allow for a “recall” in which a petition signed by a certain number of people leads to the removal of the elected official. This can be a simple process since all that is required is the collection of signatures supporting a removal of an official. Yet, the issue will be how many signatures should be required to remove an elected official. This is a community decision. The higher the number, the more difficult it will be to remove someone. The lower the number, the easier removal becomes, which, in turn, can make removals a source of abuse and can harm the functioning of government.

Another option is to have a tribunal that can decide whether or not someone should be removed from office. This would be based upon certain stipulated grounds. These tribunals may be able to remove an elected official regardless of that elected official’s popular support. Of course, these tribunals need to act fairly or else their decisions can be set aside.

There are a number of cases dealing with the issue of removing elected officials, which demonstrates that this is a very sensitive topic and one that should be handled carefully. To the extent that a Custom Election Code has removal provisions, it should be drafted in a very clear manner so that the Federal Court can easily determine the intentions of the community on the removal process.

Ultimately, the community will always decide who should govern it. However, every community should be mindful that sometimes disputes will leave the community and will have to be judged by the Federal Court; thus the clearer the election code, the better.

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