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Political and Fiscal Accountability of Band Governments

Are Band Governments Accountable to Their Members?

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.

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.

- ❖ **Fiscal Accountability:** The Department of Indian Affairs has policies in place that demand fiscal accountability from band governments when administering revenue and capital monies,¹ which are owned collectively by band members. 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.² The policies also require a full accounting and audit of all expended funds.³
- ❖ **Political Accountability:** Under the *Act*, the term of office for elected chiefs and band councillors is two years.⁴ 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

¹ Indian Monies Directorate, Registration, Revenues and Band Governance, Lands and Trust Services, "Manual for the Administration of Band Moneys", (Ottawa, 1997).

² Ibid.

³ Supra, note 4.

⁴ Indian Act, R.S.C. 1985, c, I-5, s. 78(1).

- ❖ convened meeting of the council.⁵ This makes it difficult for chiefs or individual councillors to make unilateral or arbitrary decisions without full participation and debate by the entire council.

- ❖ **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.⁶ Any sale or lease of reserve lands also requires the consent of the federal government, as represented by the Governor in Council.⁷ 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.

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, band governments can 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.

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. 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*.

⁵ Indian Act, R.S.C. 1985, c. I-5, s. 2(3)(b).

⁶ Indian Act, R.S.C. 1985, c. I-5, ss. 37 to 41.

⁷ Ibid.

Accountability Requirements at Common Law - Fiduciary Duties

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. 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 Duty?

One of the key duties imposed on a fiduciary is the duty of loyalty. In *Lac Minerals Ltd. v. International Corona Resources Ltd.*⁸ 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.”⁹

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.¹⁰

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 undue influence, not to misuse property held in a fiduciary capacity, and not to act unreasonably.¹¹

What Fiduciary Duties do Band Governments Owe to Band Members?

The Courts have held that band governments owe the following fiduciary duties to their members:

⁸ [1989] 2 S.C.R. 574, (1989), 61 D.L.R. (4th) 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.

⁹ *Ibid.*, [1989] 2 S.C.R. 574 at 646-647, (1989), 61 D.L.R. (4th) 14 at 28

¹⁰ 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.

¹¹ *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.

- ❖ **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*,¹² the Court held that 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. Band members brought an action against the former chief for breach of fiduciary duty on the basis that her attendance at the meeting where the band council decided to reimburse her for personal expenses 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.¹³ 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 *Silver v. Ned*¹⁴ where 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. 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.¹⁵

¹² [1992] 4 C.N.L.R. 21 (B.C.S.C.).

¹³ *Ibid* at p. 24.

¹⁴ [2002] B.C.S.C. 944.

¹⁵ *Ibid* at paras. 19 and 23.

- ❖ **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*¹⁶ 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 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.¹⁷

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.

¹⁶ (1997) 33 O.R. (3d) 783; (1997) 147 D.L.R. (4th) 615; [1997] 4 C.N.L.R. 28.

¹⁷ *Ibid* at p. 40.