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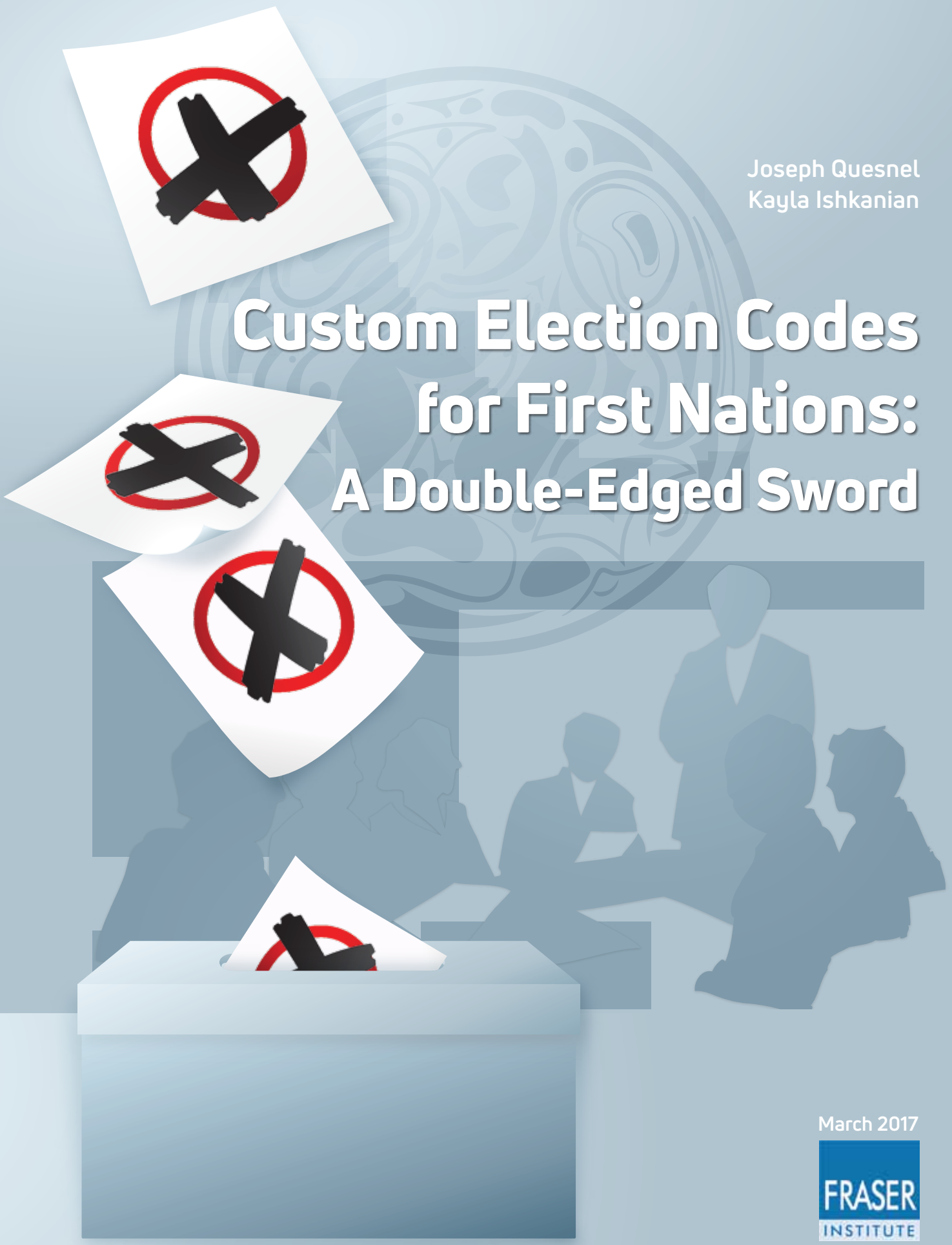
Custom Election Codes for First Nations:
A Double-Edged Sword



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Executive summary

Many contemporary First Nation leaders, and even legal scholars, including the respected authors of a 2010 Senate standing committee report on Aboriginal peoples, have heralded custom election systems on reserves as the foundation for better band governance. Custom systems allow First Nation communities to design and adopt their own election code, albeit with some federal requirements that must be met before final approval. Many of these Indigenous observers believe band elections held under the Indian Act system are inherently "colonialist" and even oppressive of Indigenous peoples' legitimate aspirations. They argue that modern band leaders increasingly view these structures as illegitimate. It is the contention of this study that a thoughtful evaluation of how custom election systems really work shows that there is more than initially meets the eye. This paper calls for sober second thought on this subject. Such considered reflection is especially critical in 2017 because currently, most First Nations in Canada hold band elections under custom code systems. Indian Act systems are now the minority across the country, although some regions still hold to them. Indigenous leaders continue to promote custom election systems as a better alternative to the Indian Act system.

The subject is important because there is a demonstrable connection between governance and improved socio-economic indicators. This paper argues that the end goal of Aboriginal self-government is good governance that elevates community well-being. Drawing on the work of Fraser Institute and other specialists in Indigenous governance, this paper makes the case for comparing custom election and Indian Act systems, evaluating how they favourably rebalance governance, especially in terms of greater democracy and accountability. Good governance helps unleash the economic potential of Indigenous communities, which is something First Nations should consider when they design electoral and governance structures for their impoverished communities.

This paper examines both the favourable and unfavourable aspects of custom election systems for First Nations, especially for modern Indigenous governance. While allowing Indigenous communities to escape the paternalistic aspects of the Indian Act, the study found that without

federal oversight, custom election codes permit various forms of discrimination, such as that based on reserve residency. A wide range of scholars and parliamentarians had assumed that custom election systems could deal with the inherent weaknesses of the Indian Act system. To some extent, they can and have, but they have also introduced problems of their own that are not widely understood or mentioned. The paper also mentions documented cases where once Indigenous Affairs Canada has signed off on a custom code, on-reserve governments act to subvert institutions – such as representative custom councils – that are meant to check excessive chief and councilor power or ensure financial disclosure and accountability to community members. In these cases, it could be argued that self-government has been used inappropriately as a cover for abuse of power. The paper also finds that without any intervention from Indigenous and Northern Affairs Canada (which happens for bands still under the Indian Act), custom bands find themselves thrown into divisive and costly court battles. The study discusses new data from the well-regarded Community Well-Being Index (CWB), which shows that bands adopting custom codes have no better community well-being than those under the Indian Act. Therefore, governments need to better understand these systems before they promote them in a sweeping and universal manner. While custom codes hold the promise of creating accountable and transparent governance structures, this study cautions communities planning to adopt them to think through both their pros and cons.

In the end, this study offers some practical next steps, such as the widespread adoption of band constitutions to prevent residency discrimination and other abuses, and to promote independent dispute resolution. Bands must also share best custom code practices with each other. Lastly, the federal government must help ensure that any movement towards custom election systems definitively improves Indigenous well-being.

Introduction

Section 74 of Canada's Indian Act allows First Nations to opt out of its election provisions and "revert" to "custom electoral systems," by which bands can design their own election laws and create parallel governance structures to better reflect the culture and needs of their community. More than half of First Nations have now taken advantage of this option, and a Senate committee has recommended that the federal government phase out the Indian Act model and make custom government the norm (Canada, Senate, 2010). Yet little has been written about custom government, either at the theoretical level or in empirical studies of how well it performs in practice. This paper attempts to open the debate that should take place before the government takes irrevocable action. Both Indian Act government and custom government have disadvantages as well as advantages, and adopters should be aware of both.

Self-Government and Good Government

The promotion of self-government for First Nations has been official Canadian policy since the 1980s, but self-government is not just an end in itself. Self-government should also offer a voice to members, ensure accountability, protect business investors, and provide independent and fair dispute resolution. In any system of good government, program management, band businesses, and service delivery need to be properly insulated from interference by elected politicians.

Fraser Institute Senior Fellow Gordon Gibson has characterized First Nation governance as "small governments wielding large powers, with few checks and balances and no independent bureaucracy" (Gibson, 2009: 172). He argued that individuals, not just band councils, should be given more say. Professor Tom Flanagan, a frequent expert witness in litigation over aboriginal and treaty land claims, has also argued that transferring power to First Nation governments is not enough (Flanagan, 2006). There need to be external checks, such as independent electoral agencies, ability of the media to cover band meetings, and timely publication of budgets and expenditures. Similarly, John Graham from the Ottawa-based Institute on Governance has argued that band governance is too often "dysfunctional governance," and that First Nation governments lack checks and balances that other governments in Canada take for granted.

First Nation governance systems lack this balance. The executive and legislative functions are fused in the chief and council and there is no official opposition to hold the government to account. And not only are the voluntary and private sectors underdeveloped, but there are few independent review mechanisms such as ombudspersons, First Nation–run courts, auditing agencies, or ethics commissions. Finally, media in First Nation communities—typically community papers or radio stations—are run by the First Nation itself or some other First Nation regional body and are not independent of First Nation governments (Graham, 2012: 34).

Calvin Helin outlined problems with Indigenous governance in his seminal work Dances with Dependency and concluded: "Modernizing tribal governance structures may after all help to unleash the massive economic potential trapped by the current archaic governance structure" (Helin, 2006: 141). Similarly, the Harvard Project on American Indian Economic Development has identified three key insights about economic success: 1) sovereignty matters; 2) institutions matter; and 3) culture matters. Effective institutions are described as follows:

> The Harvard Project emphasizes that economic success requires that sovereignty be operationalized through institutions that can "effectively solve core governance problems." In practice, this would entail stable political institutions and policies, independent court system or other dispute-resolution mechanisms, a capable bureaucracy and the separation of politics from day-to-day business management. What the Harvard theorists conclude from their research is that businesses that are protected from political interference are far more likely to be profitable and to succeed than those that are not. (Simeone, 2007: 4)

First Nations in Canada, especially those governed under or considering the adoption of custom codes, should focus on these three insights and develop their institutions accordingly.

First Nations' Electoral Systems

Good governance for First Nations starts with the choice of chief and council to head the band government. The Indian Act gives the Minister of Indigenous Affairs statutory authority under subsection 74 (1) to declare, when advisable for the good governance of the band, that the council shall be selected under Indian Act rules. Sections 74–80 of the Act set out the framework for band elections. The Indian Band Election Regulations contain detailed rules for nominations, voters' lists, polling stations, casting of ballots, election appeals, and setting aside elections due to "corrupt practices."

There are several contentious areas pertaining to Indian Act elections. The report of the 2010 Standing Senate Committee on Aboriginal Peoples highlights one problem: the "dubious legitimacy of Indian Act governments" (Canada, Senate, 2010: 18). Some First Nations today consider elections held under the Indian Act as vestiges of a colonial past that are not respectful of Indigenous traditions and values. In fact, they sometimes refer to leaders elected under the Indian Act system as "artificial leaders" (Canada, Senate, 2010: 24). This perception partly explains the appeal of self-government agreements and custom election codes.

Another often-criticized part of the Indian Act elections system is the appeals process. Section 79 of the Act gives the Governor-in-Council the power to "set aside" the election of a chief or councilor upon receiving an investigative report from the minister. An election may be nullified due to a "corrupt practice" in connection with a band election or a contravention of the Act or its regulations.

Sections 12–15 of the Indian Band Election Regulations list the procedures for an electoral appeal under the Act. An affidavit must be sent to the assistant deputy minister within 45 days of the election. The assistant deputy minister then sends that appeal to the electoral officer and candidates. The minister may conduct an investigation, although it is not required. If there is an investigation, it can be long: anywhere from six to 18 months. Excessive appeals can destabilize communities.

Naturally enough, First Nations may view the role of the minister in the process as interfering in their internal affairs. The 2010 Senate Report raises this issue because many Indigenous witnesses called for an independent, First Nation-led appeals process that could adjudicate elections held under the Indian Act as well as under custom systems. Many First Nations argued that to increase impartiality, the appellate bodies should have judges from First Nations other than the communities being adjudicated.

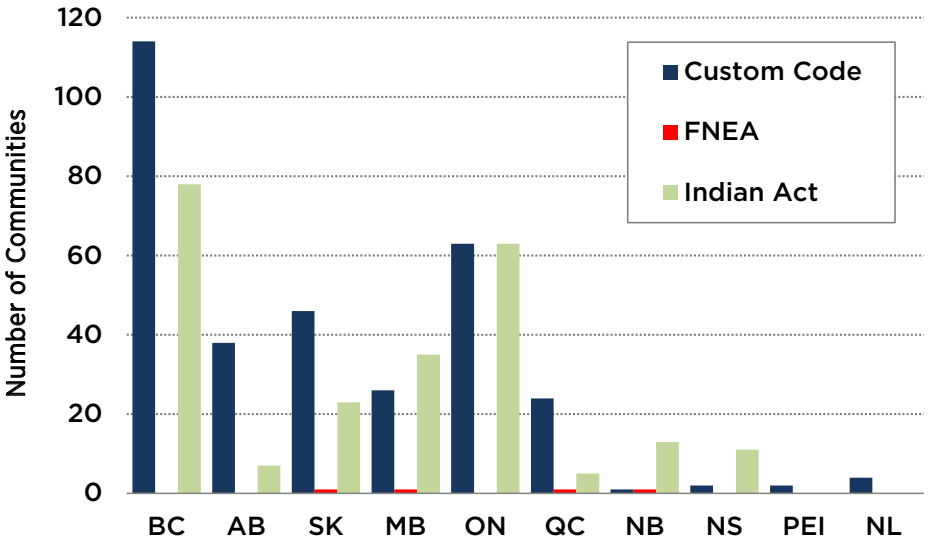
The 2010 Senate committee report summarizes the weakness of the Indian Act elections system:

- administrative weaknesses such as loose nomination procedures and a mail-in ballot system that is open to abuse and fraud;
- excessive ministerial intervention;
- lack of an adequate and autonomous appeals process;
- inadequate removal provisions;
- accountability of elected officials to the department rather than to community members; and
- lack of flexibility to set terms of office and determine the size of Council. (Canada, Senate, 2010: 12)

The federal government's 1988 Conversion to Community Election System Policy introduced custom election codes to address what the Senate report called "the limitations of the Indian Act electoral system" (2010: 1). The policy allows bands to implement a community-designed electoral system while opting out of the Indian Act. Reaffirmed in 1996 with the *Report of the Royal Commission on Aboriginal Peoples*, the Conversion to Community Election System Policy provides bands with a specific framework and conditions that they need to meet to convert to a custom election system. Those conditions include developing a code that is in line with the *Canadian Charter of Rights and Freedoms*, devising an election appeals process, including off-reserve members, and getting approval from the community to implement the custom code (Simeone and Troniak, 2012: 3).

As the desire for First Nation self-government and autonomy has grown among Indigenous communities, custom systems have become more popular, so that bands with customized electoral systems now outnumber those governed under the Indian Act. As of July 1, 2015, most First Nations in Canada operate under custom election systems (Canada, Indigenous and Northern Affairs Canada, 2015b). As figure 1 demonstrates, 57 percent of communities across the country use custom code elections compared to 42 percent of communities that hold Indian Act elections.

Figure 1: Number of Communities Under Each Governance System



FNEA = First Nations Election Act

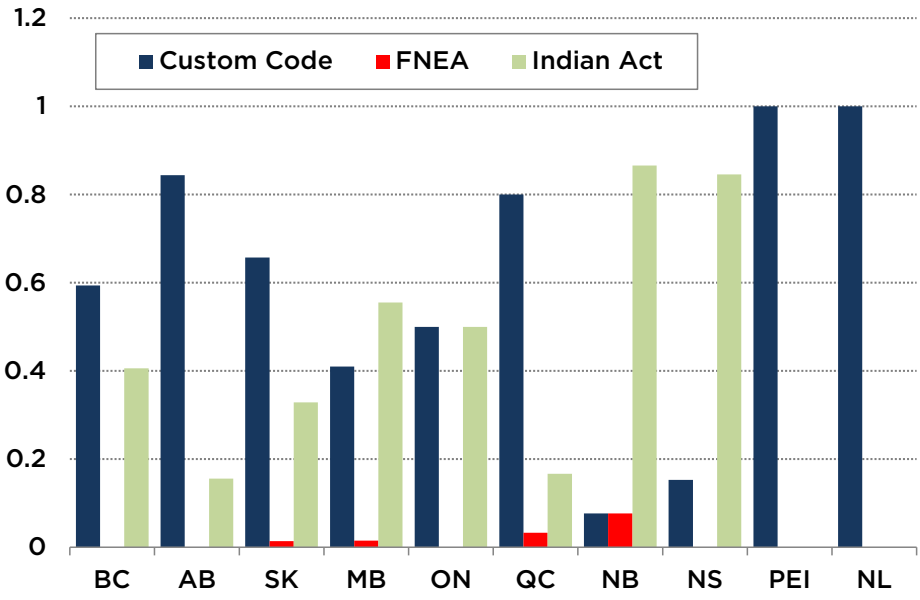
Source: Canada, Indigenous and Northern Affairs Canada (2015b).

The remaining one percent of communities follow the new election guidelines set out by the First Nations Elections Act. In 2014, the First Nations Elections Act received Royal Assent and officially became a federal law. The Act offers a cleaned-up and more modern election system that First Nations governments can consider and opt into, if they so choose, by band council resolution. The framework offers terms of four years instead of two years for chief and council to allow for long-term planning. It also provides for common election dates between bands, creates clear electoral offences and penalties, and takes the minister out of the appeals and investigation process.

Figure 2 shows the number of communities in each province under each type of system.

Custom codes are most popular in Quebec, British Columbia, Saskatchewan, and Alberta, whereas the numbers are more balanced in Manitoba and exactly even in Ontario. Indian Act systems are more popular in Nova Scotia and New Brunswick, while custom codes are dominant in PEI and Newfoundland & Labrador.

Figure 2: Percentage of Each Election System by Province



FNEA = First Nations Election Act

Source: Canada, Indigenous and Northern Affairs Canada (2015c).

The Indigenous and Northern Affairs Canada (INAC) document Conversion to Community Election System Policy specifies that codes must comply with the "principles of natural justice and procedural fairness" (Canada, INAC, 2015a). This policy—along with court decisions—also dictates that off-reserve band members must be allowed to vote through an acceptable system such as a mail-in ballot, and must be allowed to run for band positions. Finally, most members over 18 years of age must approve the adoption of a custom code through a secret ballot or some alternate process agreed to by the band and INAC. All band-developed electoral codes must be submitted to INAC for final approval. Once INAC approves the code, a ministerial order is issued removing that First Nation from the electoral parts of the Indian Act. However—and herein lies a central problem—once a band has been removed from the Indian Act's electoral provisions, INAC no longer "oversees the evolution of the community's election code" (Canada, Senate, 2010: 17). This means that as soon as the federal government signs off on the initial custom election code, it washes its hands of the code and its subsequent evolution.

Pros and Cons of Custom Government

Custom codes may modify the Indian Act system only slightly, or they may be quite elaborate, with parallel governance structures and a made-on-reserve independent appeals process, including electoral officers. Thus, an inherent strength of the custom code system is its ability to tailor laws, policies, and institutions to the First Nation, a departure from the Indian Act system that some First Nations argue makes their governing bodies feel like an externally imposed regime. It would be a positive development if the adoption of custom government could make members of First Nations feel that their governments reflected their own culture and values.

Custom code elections represent a form of responsible self-government that does not require the long and expensive process of reaching a complete self-government agreement and that can ultimately help communities move away from the Indian Act. Some of the governance structures that the Mississauga First Nation has implemented provide a good example of an effective custom code (McSheffrey, 2015). The community now has an effective dispute resolutions mechanism, a system of financial oversight, and an effective land management regime that is friendly to investors.

Over the course of a few decades, the community developed its own written constitution and institutions, including a custom election code. The community also took control over its own land management and education system and hopes one day to have its own court system (Quesnel, 2015). The Mississauga case demonstrates that better governance can be achieved through custom codes that develop parallel or alternative institutions, especially if there is a written band constitution and independent appeals processes that are respected and enforced within the community. According to sources at Mississauga, over 30 Northern Ontario First Nations are now drafting their own constitutions (Quesnel, 2015).

Custom codes can go beyond the modification of electoral processes and voting rights to deal with governance problems created by the Indian Act itself. Gordon Gibson has epitomized those problems as “small

governments with large powers." Band councils have tremendous powers over the lives of members because they control services such as education, social assistance, and housing allocation. Legal scholar Shin Imai argues that the Indian Act paradoxically gives chief and council too little power to make decisions, but also too much power over their own people. He points out that there are 90 provisions that give the Minister of Indigenous Affairs powers over chief and council (Imai, 2012:1). At the same time, chief and council have too many powers and do not have clear lines of accountability under the Indian Act to their own members and citizens. Power needs to be diffused and separated to reduce its ability to do harm or to be abused. Custom codes and laws can create these counterweights by legitimizing Indigenous cultural institutions such as elders' councils, custom councils, or made-on-reserve independent tribunals that review council decisions. In fact, First Nation communities under high-performing custom systems should share their best practices with bands considering reverting to custom arrangements.

While custom codes offer potential for First Nations to achieve more autonomy and balance in their governmental structures, they are not without their own problems and challenges. The lack of INAC oversight can be both a blessing and a curse. Bands under the Indian Act election system have the right to appeal election results and have them investigated and acted upon by the INAC bureaucracy and the minister. Bands under custom codes do not have these rights as it is up to them to determine their community's appeals process. Disputes end up in court, which is time-consuming and expensive.

The 2010 Standing Senate Committee on Aboriginal Peoples urged the federal government to create targets and timelines for bands to gradually phase out Indian Act election systems and replace them with custom election systems (Canada, Senate, 2010: 49–50). However, this recommendation goes too far. Many First Nations are comfortable with the Indian Act system and have no intention of converting to a custom code. Furthermore, while there are some advantages inherent in custom election systems, the 2010 report does not adequately delve into their potential weaknesses, but simply concludes, without critical analysis or empirical evidence, that they are a superior alternative to Indian Act elections systems.

One piece of empirical evidence suggests that custom government may not be superior to the Indian Act variety. The 2011 Community Well-being (CWB) Index (Indigenous and Northern Affairs Canada Canada, 2015c) aggregates census data on income, employment, education, and housing. On average, bands with custom election systems have CWB

scores two points lower than those with Indian Act elections.[1] This small difference is neither statistically significant nor practically conclusive. A more complete analysis would consider the date of transition to a custom code to see if there were any changes after custom code implementation. In any case, it has yet to be demonstrated that switching to a custom election system will make members measurably better off.

[1] Calculations by the authors. First Nations Elections Act bands were not included in this analysis since the sample is too small.

First Nations Governance and the Courts

First Nations governance, whether under the Indian Act or custom codes, raises thorny issues of human rights. While demands for self-government increased from the 1970s to the present**,** Aboriginal peoples were increasingly being affected by the individual rights enshrined in 1982 in the *Canadian Charter of Rights and Freedoms.* Although Aboriginal and treaty rights are collective rights, individual band members have also challenged their own band governments on the grounds of individual rights.

Equality rights cases have been recurrent in First Nations jurisprudence. The landmark 1999 *Corbiere* ruling by the Supreme Court of Canada addressed the issue of off-reserve residency and voting eligibility ([1999] 2 S.C.R. 203). In the *Corbiere* case, some off-reserve members of Batchewana First Nation in Northern Ontario successfully contested Section 77 (1) of the Indian Act, which stated at the time that only band members "ordinarily resident" on the reserve were permitted to vote in band elections. The majority opinion was that this section violated the Section 15 equality rights of off-reserve members based on residency. The Supreme Court held that this residency requirement was discriminatory under Section 15 and was not saved by Section 1 of the Charter. Although the actual section has yet to be amended, Section 77 (1) of the Indian Act is now interpreted in light of the *Corbiere* decision.

Since *Corbiere*, there have been numerous cases dealing with custom election code Charter violations. In *Clifton v. Hartley (Electoral Officer)* in 2005, the applicants wanted a judicial review of Hartley Bay's electoral officer. That officer had said that those who had not resided on the reserve six months prior to an election could not vote or run for office. The applicant argued that these custom regulations violated Section 15 of the Charter. The Gitga'at are governed through both the hereditary clan system (the clan council) and the village council, elected pursuant to the regulations, under subsection 2(1) of the Indian Act. Not surprisingly, the court found that the regulations that kept off-reserve members from participating in the village council elections infringed the Charter and were not saved by Section 1. "The two-tiered governance system in this case

(the Clan Council and the Village Council) did not meet the requirement of a process which 'would respect non-residents' rights to meaningful and effective participation in the voting regime of the community' as discussed in *Corbiere*" ([2005] F.C.J. No. 1267).

Although the Federal Court did not set aside the 2003 band election, as it found that doing so would be too destabilizing, it instead declared invalid the words "resides on Hartley Bay Band Reserve six months prior to election" in the custom regulations, paragraph 2(*c*)(iv) ([2005] F.C.J. No. 1267, p. 5). The community was given time to engage in a consultative process and to create a better voting regime.

Subsequent court judgments have also ruled that candidates for both chief and councillor do not have to reside on the reserve. In 2007, the Federal Court of Canada ruled in *Esquega v. Canada* (The Gull Bay decision) that off-reserve band members could run for the position of band councillor. The court decided that Section 75 (1) of the Indian Act violated the Section 15 Charter equality rights of off-reserve band members and was not saved by Section 1. The federal ruling has significant implications for bands under both Indian Act and custom code election systems. It also emphasizes the principle that First Nations' governmental practices must uphold individual rights as enumerated in the Charter.

Residency is not the only source of discrimination. In 2014, a controversy arose in the Garden Hill First Nation in Manitoba. Its custom code generated controversy due to new restrictions on who could run for office (Bains, 2014; *Thompson Citizen*, March 28, 2014). Candidates for chief would have to be at least 50 years of age and candidates for councilor had to be at least 40 years old. Particularly controversial was the stipulation that anyone in a common-law relationship was ineligible to run. Aboriginal Affairs was clear that it could not get involved because the community was under a custom system, but then Aboriginal Affairs Minister Bernard Valcourt declared that he hoped the community would adopt a code compliant with the *Charter* (Paul, 2014). Unfortunately, the news media did not follow the dispute after the band election.

In addition to issues of discrimination, the Federal Court of Canada has dealt with numerous cases[2] involving the interpretation and proced-

[2] See *Scrimbitt v. Sakimay Indian Band Council* 2000, *Awashish v. Opitciwan Atikamewk First Nation* 2007, *Collard v. Betsiamite Innu Nation Election Code*, 2009, *Lac des Mille Lacs First Nation v. Chapman*, 1998, *Angus v. Chipewyan Prairie First Nation,* 2008, *Pahtayken v. Oakes*, 2009, *Laboucan v. Loonskin*, 2008, *Metansinine v. Animbiigoo Zaagi'igan Anishinaabek First Nation,* 2011, *D'Or v. St. Germain*, 2013, *Samson Cree First Nation v. Bruno,* 2008, *Felix v. Sturgeon Lake First Nation*, 2014, *Watts v. Tseshaht First Nation Band Council*, 2005, *Beardy v, Beardy*, 2016, *Dennis v. Community Panel of the Adams Lake Indian Band*, 2010, *Medzalabanleth v. Abenaki of Wolinak Council*, 2014, *Anichinapeo v. Papatie*, 2014, *Polson v. Long Point First*

ural aspects of custom codes, including the role of bodies and institutions created by the custom codes. Many of these cases also deal with actions of election officials, usually electoral officers, in carrying out their duties under custom code systems. Clearly, much disagreement and many tensions still exist over custom codes and how they are implemented and enforced. The central problem is that disagreements are often not handled well internally. The court has become, as the judge said in the 2009 *Roseau River Anishinabe First Nation v. Roseau River Anishinabe First Nation* ruling, "a regular recourse for band election matters" ([2009] FC 655). Rather than dealing with INAC, as is the case with Indian Act election systems, custom bands must turn to the courts. This is what happened in Roseau River, which will be mentioned below, when one government institution was ignoring another, in violation of the community's custom code and constitution.

In yet another example, the leadership of the Bearspaw First Nation in southern Alberta extended their term of office by two years without holding a formal vote, resulting in community members protesting and eventually going to Federal Court to have a judge intervene (Ashawasegai, 2012). Because this community is under a custom election system, INAC could not intervene or even offer comment. This highlights how First Nations need to take their own codes and procedures seriously, or else they need another independent body that can act as enforcer so that custom code communities do not have to go through costly, divisive, and destabilizing court battles.

The courts, moreover, have held that First Nations must follow their own constitutions when it comes to custom government. The case study of Roseau River Anishinabe First Nation is instructive (Quesnel, 2009). The community was involved in a protracted court battle between two factions: the elected chief and council, and the custom council. The band's constitution vested legislative power in the custom council, which was composed of family representatives from the community. This council had powers to advise the elected chief and council. When the chief and council began ignoring the custom council, that body successfully took them to

Nation Committee, 2007, *Coutlee v. Lower Nicola First Nation*, 2015, *Landry v. Savard*, 2011, *Laboucan v. Little Red River #447 First Nation*, 2010, *Mcleod Lake Indian Band v. Chingee,* 1998, *Muskego v. Norway House Cree Nation Appeal Committee*, 2011, *Primrose v. Spence,* 2003, *Pelican Lake First Nation v. Canada (Minister of Indian and Northern Affairs),* 2000, *Napaokesik v. Shamattawa First Nation,* 2012, *Joseph v. Dzaawada'enuxw (Tsawateineuk) First Nation*, 2013, Wawatie v. Canada (Indian Affairs and Northern Development), 2009, *Seymour v. Anishinaabeg of Naongashiing First Nation*, 2009*, Ballantyne v. Nasikapow*, 2000, *Roseau River Anishinabe First Nation v. Nelson,* 2013, *Prince v. Sucker Creek First Nation*, 2008.

court, including a demand for full financial disclosure. The Federal Court eventually ruled that the chief and council could not decide to ignore the custom council and had to heed its decisions ([2009] FC 655).

The unfortunate part of the Roseau River case was that the community had to go to court to get the chief and council listen to the community's *own community-designed institutions*. The judge even urged the chief and council and whole community to respect its own institutions and advised them to amend their own band constitution and Elections Act to "avoid creating a situation where the court becomes a regular recourse for band election matters" ([2009] FC 655). However, very importantly, the court validated the community's band constitution and legislative systems. This is a good reason for bands to adopt their constitutions only after careful consultation with their citizens.

Legislative change will also increase the future volume of litigation. In 2008, Parliament repealed Section 67 of the *Canadian Human Rights Act*—legislation that prohibits discrimination in employment and services under federal jurisdiction. Section 67 had shielded both band governments and the federal government from discrimination claims. The repeal affected the federal government immediately, but did not come into force for band councils until 2011, to give them time to review and modernize their practices. Since then, band members have filed complaints in growing numbers against both the federal government and their own First Nations governments. Per an INAC report:

> In respect of post-repeal complaints against band councils, the Commission reported that, between June 18, 2011 and March 4, 2014, it received ninety-nine (99) complaints against First Nations governments dealing with subject matters that were previously shielded by section 67, prior to the amendments going into effect for First Nations governments on June 18, 2011. (Canada, Indigenous and Northern Affairs Canada, 2014)

Conclusion and Recommendations

The goal of First Nations governance is to create effective and responsive institutions that improve community well-being. The federal government, in dealing with Indian Act, custom system, and bands operating under the new First Nations Election Act regime, must promote and enforce these principles with First Nations. The evidence suggests that modern Indigenous communities expect their governments to be compliant with the Charter and the federal human rights code.

Custom systems are a double-edged sword, bringing both positives and negatives for these communities. The federal government must work closely with bands with custom systems as they adopt laws and policies, ideally contained within a comprehensive constitution that is the result of extensive community consultation. Also, government or independent parties must provide a stronger foundation of empirical evidence for promoting custom codes over other systems. Preliminary data in this study does not suggest an obvious connection between converting to custom and improved Indigenous well-being.

We conclude with four recommendations for the improvement of First Nations governance:

1. All First Nations, particularly those under custom codes, should develop band constitutions. Those band constitutions should reflect effective governance principles as found in the contemporary literature. Band governments should consult with all segments of the community and ensure that all members know and agree with the laws and policies to be adopted. First Nation constitutions should be compliant with the *Canadian Charter of Rights and Freedoms*, the *Canadian Human Rights Act,* and any other human rights norms. There should be no discriminatory residency requirements or other such provisions. The band must include independent dispute resolution mechanisms in its constitution and should promote widespread respect for these provisions, so that disputes do not have to leave the community for resolution, at the cost of community division and financial expense.

2. High-performing First Nations under custom systems should strongly consider sharing their best practices. By doing so, communities considering reverting to custom codes can learn from the mistakes of those who have already done so.

3. Before Canada requires all First Nations to adopt custom government, it should ensure that such a move will contribute to Indigenous well-being. The Community Well-being Index (CWB) suggests there is no strong evidence that converting to custom codes from the Indian Act will increase the well-being of band members. Governments need to know whether adoption of custom government is likely in practice to improve the lives of First Nations people.

4. Indigenous Affairs Canada should adopt pilot projects to test the practicality of a "First Nations Electoral and Appeals Commission" (Canada, Senate, 2010: 57) operating either nationally or regionally. A pilot project may provide answers to legitimate concerns that election disputes might be prolonged if First Nations end up appealing disputes from this commission to the Federal Court. For such a body to be effective, it must reduce conflict, not exacerbate it.

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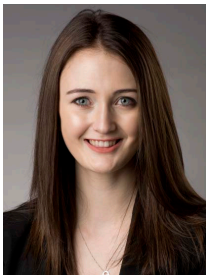

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