

# The Legal Obligations of Band Councils

## The Exclusion of Off-Reserve Members from Per-Capita Distributions

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*The growing population of off-reserve First Nations members poses unique challenges to the traditional band council system, which was developed as a reserve-centric institution. Commentators have paid generous attention to the constitutional protection of off-reserve members in determining the leadership of their respective bands. The fiscal management of those bands, on the other hand, has mostly been left to the scant governing sections of the Indian Act and to private law.*

*Of particular importance is the ability of band councils to distribute money directly to the band membership, often after the resolution of a land claim and the receipt of large entitlements from Canada. In comparison to discriminatory voting procedures, the body of jurisprudence concerning the exclusion of off-reserve members from per capita distributions is scattered and without coherence. Yet because these distributions are quite common in contemporary First Nations life, the issue is one that deserves focus.*

*I argue that a mixture of constitutional, statutory, and private law principles form a “dual barrier”: a combination of procedural and substantive protections that prevent the unequal distribution of funds to the band membership. Adhering to the jurisprudence of the courts, I explore the nature of the power of band councils and how they interact with the judicial system, before exploring how these safeguards operate. I conclude with a practical application of these safeguards.*

## **I Introduction**

It is now well established that the Aboriginal population in Canada is larger, younger, and more urban than ever before. In 2006 the Canadian Census reported that the Aboriginal population had grown by 45 percent in the previous ten years, reaching a record population count of over 1 million.<sup>1</sup> Of that num-

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<sup>1</sup> The Environics Institute, *Urban Aboriginal Peoples Study* (Toronto: Environics Institute, 2010) at 24.

ber, almost half were under the age of 24. It is not surprising, with a youthful demographic exploding in size, that more and more Aboriginals are choosing to live off reserve. On average, just less than 70 percent of the Canadian Aboriginal population lives beyond the confines of a reserve, including in major urban centres.

The impact of this residential shift has been felt strongly in Ontario, where band membership is now often substantially higher than the number of on-reserve residents.<sup>2</sup> For example, the Serpent River First Nation, located approximately 30 kilometres south of Elliot Lake, reported a total band population of 1,118, but only 340 on-reserve residents (30.4%).<sup>3</sup> The Whitefish River First Nation, about 20 kilometres south of Espanola, lists a population of 1,032, with only 379 residents (36.7%).<sup>4</sup> The North Spirit Lake First Nation, on the shores of Sandy Lake near the Ontario-Manitoba border, reports a total band population of 411, only 259 (63%) of which reside on the reserve.<sup>5</sup> This trend of migration has created two classes of Aboriginal people, divided solely on the basis of residency, which many First Nations have not reconciled.

Band councils, which govern reserve life, have noticed the diverging nature and interests of on- and off-reserve members. At times, they have seen the latter as less deserving both of the band's limited resources and of leadership opportunities. This view appears informed by common sense: by limiting resources to on-reserve members and activities, band councils may focus on improving life on the reserve, which is often wrought with infrastructural inadequacies. By restricting voting and leadership to members ordinarily resident on the reserve, councils are procedurally ensured that only those most familiar and connected with band and reserve life are put in direct positions of governing it. While this idea is contentious, it is never more so than when the band stands to receive a large sum of money, often, though not always, in response to a land claim settlement. The ability of band councils at that

2 I make this comment even if the effect may have been greater or lesser in other provinces.

3 The total band population can be found at Aboriginal Canada Portal, *First Nation Connectivity Profile—Serpent River*, online: Aboriginal Affairs and Northern Development Canada <<http://www.aboriginalcanada.gc.ca>>. The total population and dwelling can be found at StatCan 2006 Canadian Census, *Aboriginal Population Profile—Serpent River*, online: Statistics Canada <<http://www12.statcan.gc.ca>>.

4 The total band population can be found at Aboriginal Canada Portal, *First Nation Connectivity Profile—Whitefish River*, online: Aboriginal Affairs and Northern Development Canada <<http://www.aboriginalcanada.gc.ca>>. The total population and dwelling can be found at StatCan 2006 Canadian Census, *Aboriginal Population Profile—Whitefish River*, online: Statistics Canada <<http://www12.statcan.gc.ca>>.

5 The total band population can be found at Aboriginal Canada Portal, *First Nation Connectivity Profile—North Spirit Lake*, online: Aboriginal Affairs and Northern Development Canada <<http://www.aboriginalcanada.gc.ca>>. The total population and dwelling can be found at StatCan 2006 Canadian Census, *Aboriginal Population Profile—North Spirit Lake*, online: Statistics Canada <<http://www12.statcan.gc.ca>>.

point to restrict per capita distributions to the on-reserve membership shows extreme prejudice against those living off reserve. While the case law has provided a general direction, it is for the most part piecemeal, scattered among various levels of court. The lack of concrete guidelines has left holes in the applicable jurisprudence, although financial compensation of this kind is an issue that arises frequently and holds great practical importance for Aboriginal peoples as more land claims are settled.

The legality of band councils' ability to restrict per capita distributions on the basis of residency constitutes the focus of this article. As I will show, a band council has various obligations in constitutional and statutory law, as well as in common law, that prohibit the unequal distribution between on- and off-reserve members. The *Charter of Rights and Freedoms* and the *Indian Act*, on the one hand, and the common law of trusts, on the other, form what I call the "dual barrier". The former provides for a procedural restriction while the latter establishes a substantive one, the breach of either of which results in a remedy. For practical purposes, this essay will be divided into two sections. In part 1, I explore the nature of per capita distributions and the money-management authority of band councils. This includes how their actions are reviewed and by what standard. In part 2, I will assess the body of recent case law and provide analyses and critiques. Using the case law, I will establish a framework that respects the general state of the law and its direction. I will then conclude with a practical application of the dual-barrier analysis and the established framework.

## II Band Councils, Membership, and Per Capita Distributions

### Money-Management Powers and Per Capita Distributions

First Nations have no obligation to distribute any of the money they receive directly to their membership instead of spending it on programs and services.<sup>6</sup> Yet the expectation that a First Nation will release a portion of a settlement directly to the membership has become the norm.

In August 2011, the Fort William First Nation settled a land claim with Canada for \$149,442,595, with an additional \$5 million supplemented from Ontario. Of the total sum, \$25,000 was granted to each of the approximately 1,900 members.<sup>7</sup> The voting members of Fort William had previously ap-

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6 *Blueberry River Indian Band v Canada (Department of Indian Affairs and Northern Development)*, 2001 FCA 67, [2001] 3 CNLR 72 at paras 22–23 [*Blueberry River*], cited by *Blueberry Interim Trust (Re)*, 2011 BCSC 769 at para 24 [*Blueberry Interim Trust*].

7 Reporting Centre on Specific Claims, *Status Report on Specific Claims—Fort William First Nation*, online: Aboriginal Affairs and Northern Development Canada <<http://www.aandc-aadnc.gc.ca>>; Tanya Talaga, "Surrendering claim: Fort William close to ending 160-year fight,"

proved the settlement agreement, which contained the distribution allotment, with a vote on January 22, 2011.<sup>8</sup> The Cote First Nation, located about 225 kilometres northeast of Regina, recently settled various claims with Canada extending back to 1905, 1907, 1913, and 1914. The agreed amount, including fees for negotiation, totalled \$130,700,361.<sup>9</sup> While the majority of that money has been placed into trust for future revenue, the band's 3,500 members became eligible on June 20, 2012, to receive \$20,000 each.<sup>10</sup> The choice to disburse around \$70 million to the membership directly was approved by a vote to ratify on October 15, 2011.<sup>11</sup>

For this article I use the term “distribution” to refer to a finite per capita distribution of funds to the membership to be held individually. This allotment of funds commonly, but not always, follows large receipts of money by a band. The most obvious example is the settlement of specific claim negotiations with the government. The claims by Fort William and Cote are both examples of specific claim negotiations where the settlements resulted in a per capita distribution of funds. Distributions can also follow civil actions between First Nations and commercial enterprises, which often arise when a business has adversely affected reserve lands such as through flooding or the unlawful extraction of resources.<sup>12</sup> Distributions can also draw on moneys that have accumulated in the band's capital and revenue accounts as a result of land rental or sale, oil and gas activity, or bylaw fines. It is necessary to identify from which of these processes the band has accumulated the wealth it intends to distribute in order to assess any particular procedural safeguards for that specific process.

Any settlement reached between a First Nation and either a government or a commercial entity will include directions on the details of financial re-

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*Toronto Star* (14 January 2011) online: Toronto Star Newspapers Ltd. <<http://www.thestar.ca>>.

8 Ministry of Aboriginal Affairs, News Release, “Canada, Ontario, and Fort William First Nation Celebrate Historic Land Claim Settlement” (16 December 2011) online: <<http://www.news.ontario.ca>>.

9 “First Nations members eligible for \$20,000 each in land claim deal,” *CBC News* (12 June 2012) online: CBC News <<http://www.cbc.ca>>; and Kerry Benjoe, “Members of Cote First Nation receive settlement payouts,” *The Leader Post* (21 June 2012) online: Postmedia Network <<http://www.leaderpost.com>>.

10 *Ibid.* The amount increases to \$25,000 for those older than 65.

11 See a copy of the agreement summary: Cote First Nation Negotiation Team, *1905, 1907, 1913, and 1914 Surrenders Settlement Agreement and Cote Legacy Trust Agreement*, online: Cote First Nation <[http://cotefirstnation.net/pdfs/Summary%20of%20Settlement%20Agreement%20\(11-8-23\).pdf](http://cotefirstnation.net/pdfs/Summary%20of%20Settlement%20Agreement%20(11-8-23).pdf)>.

12 While there does not as of yet seem to have been a distribution, in May 2009 Red Rock First Nation settled a grievance with Hydro One for an undisclosed amount. The claim centered on reserve flooding caused by Hydro One. See Ontario Power Generation, Media Release, “Red Rock First Nation and Ontario Power Generation Sign Settlement Agreement” (26 May 2009) online: OPG Media Relations <<http://www.opg.com>>; and Ministry of Finance, *Annual Report and Consolidated Financial Statements*, vol 2b (Toronto: Ministry of Finance, 2011) at 2–32.

muneration. The choice is typically whether or not the band will use a set of revenue and capital accounts within the Consolidated Revenue Fund of Canada or will utilize external trusts.

### *Revenue and Capital Accounts*

The default money-management system is essentially contained in nine sections of the *Indian Act*, sections 61–69.<sup>13</sup> In this system, the Crown is deemed to hold all money in common for a First Nation, and only on an approved application can the First Nation have it released to itself. For the purposes of the *Indian Act*,<sup>14</sup> any money Canada holds for First Nations is referred to as “Indian moneys,” while for the purposes of the *Financial Administration Act*,<sup>15</sup> it is called “public money.” These moneys are deposited into interest-bearing trust accounts within the Consolidated Revenue Fund to the credit of the Receiver General. Two different trust accounts are authorized to hold band funds: revenue accounts and capital accounts. The distinction comes from section 62 of the *Indian Act*, which defines capital moneys as those derived from the sale of surrendered lands or the sale of the capital assets of a First Nation, and revenue moneys as essentially everything else. Capital moneys include profits derived, such as royalties, from the sale of non-renewable resources (e.g., oil, gas, or aggregates). On the other hand, revenue moneys include the sale of renewable resources, fine moneys from bylaws, rights-of-way and property leasing, as well as interest accrued on the capital and revenue account funds.<sup>16</sup> The basic management of these accounts, until altered by subscription to particular regulations, continues to be governed by sections 61–69 of the *Indian Act*.

The overarching feature of the default money-managing provisions of the *Indian Act* is the requirement of ministerial consent. “The Crown cannot simply transfer funds,” Rothstein J underscored, speaking for a unanimous Supreme Court in 2009. “In accordance with its fiduciary obligations . . . it must be satisfied that any transfer is in the best interests of the band.”<sup>17</sup> This

13 These sections are reviewed at length in *Ermineskin Indian Band and Nation v Canada*, 2009 SCC 2, [2009] 1 SCR 222 [*Ermineskin SCC*].

14 *Indian Act*, RSC 1985, c I-5, s 2(1).

15 “‘Public money’ means all money belonging to Canada received or collected by the Receiver General or any other public officer in his official capacity or any person authorized to receive or collect such money, and includes . . . money received or collected for or on behalf of Canada.” See *Financial Administration Act*, RSC 1985, c F-11, s 2(c).

16 The method for determining the interest rate currently payable on band accounts is pursuant to an order in council, PC 1981-3/255. Specifically, “interest rates are based on Government of Canada bonds having a maturity of ten years or over, using the weekly yields published by the Bank of Canada.” See Canada, Indian Moneys Estates and Treaty Annuities Directorate (IMETA), *Manual for the Administration of Band Moneys* (Ottawa: Public Works and Government Services Canada, 2010) ch 2 at 6 [*Policy Manual*].

17 *Ermineskin SCC*, *supra* note 13 at para 152.

consent is only granted, under the shadow of section 61(1), when Indian and Northern Affairs Canada (INAC) believes that a benefit to the release of funds indeed exists.<sup>18</sup> Both section 64(1)(a), which governs per capita distributions using capital moneys, and section 66(1), which governs per capita distributions using revenue moneys, require that the minister of INAC exercise discretion before the release of funds.<sup>19</sup> The purpose of these provisions is to recognize Crown discretion at the expense of that which resides with the band council. Unsurprisingly, the case law seldom addresses distributions made under the authority of sections 64 or 66, most likely due to the high level of departmental oversight by INAC.<sup>20</sup> The case law has burgeoned when a First Nation has subscribed to subsequent federal legislation that shifts the discretion to control funds back into Indigenous hands.

Section 69 of the *Indian Act* allows INAC to delegate management authority over revenue moneys within the Consolidated Revenue Fund to the respective First Nation. Section 69(2) allows INAC, by virtue of the governor general, to enact a regulatory scheme for the management of these funds by band councils. From there, under the authority of section 69(1), the governor general can add or remove bands from the schedule of authorized bands by an order in council.<sup>21</sup> The present regulatory scheme is the *Indian Bands Revenue Moneys Regulations*,<sup>22</sup> whose aim is to create accountability for the First Nation's actions through safeguards, such as requiring an annual auditor's report,<sup>23</sup> or by authorizing only three members to sign cheques or withdraw funds.<sup>24</sup> To find the schedule of First Nations to which these regulations apply, we must look to either the schedule of bands listed in the consolidated *Indian Band Revenue Moneys Order*, where bands are delegated full financial

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18 The Department of Indian and Northern Affairs Canada is commonly referred to as Aboriginal Affairs and Northern Development Canada (AANDC-AADNC) under the Federal Identity Program. See Treasury Board of Canada Secretariat, *Registry of Applied Titles*, online: TBS-SCT <<http://www.tbs-sct.gc.ca>>.

19 "64. With the consent of the council of a band, the Minister may authorize and direct the expenditure of capital moneys of the band (a) to distribute per capita to the members of the band an amount not exceeding fifty per cent of the capital moneys of the band derived from the sale of surrendered lands"; and "66. With the consent of the council of a band, the Minister may authorize and direct the expenditure of revenue moneys for any purpose that in the opinion of the Minister will promote the general progress and welfare of the band or any member of the band." See *Indian Act*, *supra* note 14.

20 A notable exception to this is the case of *Ermineskin SCC*, *supra* note 13, where the Crown refused to distribute money to the Ermineskin First Nation under section 64(1)(k) of the *Indian Act*, which contains the residual ability of the Crown to capital account money for a purpose it sees as a benefit to the nation. The Supreme Court acknowledged the duty of the Crown to withhold money where there is sufficient prior evidence of mismanagement.

21 *Sawridge Band v Canada (Minister of Indian Affairs and Northern Development)*, 2009 FCA 245, [2009] 4 CNLR 340, leave to appeal to SCC refused, [2009] SCCA No 430 (QL).

22 CRC, c 953 [*Revenue Moneys Regulations*].

23 *Ibid*, s 8(1).

24 *Ibid*, s 6(1).



administration authority, or to any other particular order in council for partial authority.<sup>25</sup> The INAC policy manual outlines the necessary process for obtaining section 69 authority, and it includes, among other things, demonstrated fiscal responsibility and consent of the band.

Aside from section 69 authority, First Nations can also subscribe to ancillary money-management legislation. The *First Nations Oil and Gas and Moneys Management Act* (the Oil, Gas, and Moneys Act), for example, essentially replaces sections 61–69 of the *Indian Act* with its own scheme.<sup>26</sup> The Oil, Gas, and Moneys Act is the legislative manifestation of a long-standing goal between the federal government and many First Nations, many of whom seek greater control of oil and gas activities and revenues.<sup>27</sup> One would expect that to partake in the Oil, Gas, and Moneys Act the First Nation must have oil and gas resources located on reserve land. However, the Oil, Gas, and Moneys Act is a two-pronged legislative scheme, the two parts of which operate independently of each another. The first part deals with oil and gas management, allowing the First Nation to manage and regulate its exploration and exploitation.<sup>28</sup> The second branch is a finance-management scheme that can be joined into *without* these natural resources. Unlike section 69 authority, the financial scheme under the Oil, Gas, and Moneys Act enables the subscribed First Nation to control all of its Consolidated Revenue Fund money, including capital moneys, without ministerial approval.<sup>29</sup> This constitutes the widest-ranging control a First Nation can obtain of its revenue and capital moneys without using external trusts.

It is important to recognize which procedural hurdle a First Nation has surmounted to distribute money because the legal capacity to apportion funds changes according to the procedure, and the process of challenging a distribu-

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25 PC 1990-899, (1990) C Gaz II, 2183 [*Revenue Moneys Order*]. Prior to 1990, separate orders in council were created to allow First Nations to take advantage of section 69(1) authority under the *Indian Act*, *supra* note 14. Now it is INAC policy to amend the *Revenue Moneys Order* when granting a First Nation full authority over its revenue money, and to create separate orders for those who are granted partial authority. See *Policy Manual*, *supra* note 16, ch 3 at 6.

26 SC 2005, c 48, s 60. This strategy of voluntary opt-in legislation appears to be the preferred avenue of *Indian Act* reform, rather than outright amendment. For a similar example, see the *First Nations Fiscal and Statistical Management Act*, SC 2005, c 9, which invalidates the taxation provisions of the *Indian Act* for its own regime.

27 *Summative Evaluation of the First Nations Oil and Gas and Moneys Management Act Implementation*, online: Aboriginal Affairs and Northern Development Canada <<http://www.aandc-aadnc.gc.ca>>.

28 The language of “exploration and exploitation” is used in s 6 of *First Nations Oil and Gas and Moneys Management Act*, *supra* note 26. The *Indian Oil and Gas Act*, RSC 1985, c I-7 places initial responsibility for these tasks in Indian Oil and Gas Canada.

29 *First Nations Oil and Gas and Moneys Management Act*, *supra* note 27, ss 7 and 30(1). Also see *Fact Sheet—First Nations Oil and Gas and Moneys Management Act (FNOG MMA): Moneys Provisions*, online: Aboriginal Affairs and Northern Development Canada <<http://www.aandc-aadnc.gc.ca>>.



tion changes in tandem. The normal control mechanisms found in sections 61–69 of the *Indian Act*, for example, provide for significant departmental oversight into the release of any money to the First Nation and impose fiduciary obligations on the Crown, which I will explore below. The use of section 69 or of the Oil, Gas, and Moneys Act shifts the fiduciary obligation to the band council, relieving the Crown of the burden of ensuring, for example, the fairness of the distribution of per capita funds to band members.

### *External Trusts*

Unless the First Nation decides that it would like the money to be kept in the Consolidated Revenue Fund accounts and managed by the Crown, settlement money from a government or private corporation often goes into an external trust. An external trust (that is, a trust outside the Consolidated Revenue Fund) is a versatile tool a band council can use to respond quickly and effectively to the needs of the First Nation. Due to the nature of a trust, the trustees (often a board composed of band members) are subject to all the normal obligations imposed at common law and statute. However, the trustees are also subject to the individual stipulations laid out in the instrument, and in this respect trust agreements can differ widely. For example, the 1907 Surrender Trust Agreement of the Fishing Lake First Nation in Saskatchewan sets out the detailed powers of the trustees in section 12, such as the ability to engage an auditor or retain independent advisors.<sup>30</sup> Further, the agreement limits the ability to distribute funds to the membership by allowing for a onetime only per capita distribution totalling \$3,000,000.<sup>31</sup>

The main difference between an external trust and a Consolidated Revenue Fund trust account is INAC's ability to oversee the expenditures of the First Nation and ensure they comply with section 61(1) of the *Indian Act*. Any money placed into an external trust is not held by Canada on behalf of the First Nation and therefore does not constitute Indian money qualifying for INAC oversight. The Crown is relieved of its administering position with regard to funds and INAC loses any jurisdiction to review the performance of an outside trustee. The Crown thus has no further involvement with the funds, which now have become the full responsibility of the First Nation and the trust company.<sup>32</sup> The Crown must therefore be satisfied that relieving itself of such monetary control lies in the best interests of the First Nation, in line with its fiduciary obligations as a trustee.<sup>33</sup>

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30 Fishing Lake First Nation, *Fishing Lake 1907 Surrender Trust Agreement*, online: Fishing Lake First Nation <[http://www.fishinglakefirstnation.com/pdf/FL\\_Trust\\_Agreement.pdf](http://www.fishinglakefirstnation.com/pdf/FL_Trust_Agreement.pdf)> at s 12.1(a)-(k) [*Fishing Lake Trust*].

31 *Ibid*, ss 3.01(a)(vii) and 3.02(a).

32 *Policy Manual*, *supra* note 16, ch 2 at 4.

33 *Ermineskin SCC*, *supra* note 13 at para 152.

To establish an external trust to house settlement funds coming from the Crown, the band must satisfy certain procedural criteria that conform to the policies of INAC, namely, the membership's ratification of the trust agreement after they have obtained independent legal and financial advice, the trust agreement's ratification with the membership's informed consent, and the design of the trust with the benefit of the nation as its ultimate objective.<sup>34</sup> Such procedures attempt to ensure that a First Nation as a whole is legally aware of the obligations of administering a trust. Proof of the fulfillment of these criteria is contained in the resolutions of the band council, which serve as records for any authority requiring the consent of the band council or the band as a whole. For moneys acquired through a judgment in a civil action, no such procedural criteria need to be fulfilled, of course, as the money never passes through the hands of the Crown.

### The Powers of the Band Council and Band Council Resolutions

In the cases of Fort William and Cote, the band memberships were called on to vote in a referendum to ratify their respective settlement agreements. As in any large-scale vote, obtaining the majority votes of the entire band electorate makes for a cumbersome, time-consuming, and costly endeavour. For these reasons, such votes are reserved for the most fundamental of decisions. For day-to-day decisions, band councils act on simple, internal-majority votes.

The *Indian Act* provides a legislative scheme that authorizes the band council and the band as a whole to act only by virtue of majority vote. As was required in the ratification of the Fort William and Cote settlement agreements, at times it is the power of the band's entire electorate—rather than that of the band's councillors and chief—that must be exercised. This division of powers is set out in section 2(3), where subsection (a) provides for the powers of the band and (b) provides for the powers of the band council.<sup>35</sup> The division is strict; any encroachment from the band council onto the powers of the band will be declared *ultra vires* and devoid of effect.<sup>36</sup> Similarly, any resolution of the band council compromised due to a conflict of interest, or not consented to by the required majority, is null.<sup>37</sup> Yet once a majority of the

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34 *Policy Manual*, *supra* note 16, ch 2 at 4.

35 "2(3) Unless the context otherwise requires or this Act otherwise provides (a) a power conferred upon 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, and (b) a power conferred upon 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." See *Indian Act*, *supra* note 14 (emphasis added).

36 See *Lac La Ronge Indian Band v Canada*, 1999 SKQB 218, [2000] 1 CNLR 245 at para 200, rev'd on other grounds 2001 SKCA 109, [2002] 1 WWR 673.

37 See, e.g., *Kamloops Indian Band v Gottfriedson*, 12 BCLR 326, [1982] 1 CNLR 60 [Gottfriedson].

band councillors have passed a valid motion at a duly convened meeting, an enforceable resolution has come into existence. The resolution codifies the details of the agreement, down to the date and time. Similar to resolutions passed by directors in a corporation,<sup>38</sup> once a band council majority agrees to exercise a power under section 2(3)(b), the resolution thus created represents the council's authority to act.<sup>39</sup>

In some ways, band council resolutions are to band councils as council decisions are to municipal governments: they represent ways of exercising authority delegated to them by the respective legislature. They also have the supplementary function of explicitly encoding the band council's choices. This additional function means that the band council's actions may be challenged by calling the resolution into question. For example, to even accept funds on negotiation with Canada, never mind distribute them, any First Nation would have to pass a resolution similar to those of Fort William and Cote. Likewise, a restriction of a disbursement on the basis of residency and an exclusion of members from participation in a per capita distribution would be codified in a resolution as well.

Even without the grant of additional financial authority to the band council via section 69 or via Oil, Gas, and Moneys Act authority, the band council holds significant power through stipulations in the *Indian Act*. Its competencies are in fact quite diverse and include the bylaw powers set out in sections 81, 83, and 85, as well as the financial powers in sections 61–69. They range from the regulation of traffic,<sup>40</sup> the prevention of disorderly conduct and nuisances,<sup>41</sup> to the enforcement of other bylaws punishable on summary conviction.<sup>42</sup> In addition, with the narrow exception of certain fundamental powers that engage the surrender of reserve land, band councils hold immense residual power under the *Indian Act*.<sup>43</sup> “Band councils are created under the Indian Act and derive their authority to operate qua band councils exclusively from that Act,” stated Belzil JA speaking on behalf of the Alberta Court of Appeal in 1984; “they have no other source of power.”<sup>44</sup>

Yet Belzil JA's notion that a band council's power must be found explicitly or implicitly within the *Indian Act* has become antiquated. There is now a

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38 See, e.g., the *Business Corporations Act*, SBC 2002, c 57, s 1, for the definition of “resolution”, and ss 139–40 regarding the proceedings of directors in passing and revoking resolutions.

39 Though the actual term “resolution” is not present in the *Indian Act*, it is referred to in the *Indian Band Council Procedure Regulations*, CRC, c 950, ss 12, 13, and 22.

40 *Indian Act*, *supra* note 14, s 81(1)(b).

41 *Ibid*, s 81(1)(d).

42 *Ibid*, s 81(1)(r).

43 See, e.g., *Pitawanakwat v Wikwemikong Tribal Police Services*, 2010 FC 917, 376 FTR 272, where the band council of Wikwemikong First Nation, in agreement with the provincial and federal government, established an Indigenous police force. Zinn J found that the police service depended on the band council for its existence and was therefore judicially reviewable.

44 *Paul Band v R*, [1984] 1 CNLR 87 at 94 (Alta CA).

growing line of jurisprudence for the proposition that band councils also hold a host of inherent private powers. Particularly when a band council acts in a purely private, commercial, and contractual nature, it cannot be said to draw this authority from the *Indian Act*. Similar to the inherent right to contract vested in the Crown, it is safe to say that band councils have attained the ability to act privately and conduct business.<sup>45</sup> This influences the reviewability of certain band council actions, but for the immediate purposes of this article, it demonstrates that band councils have become powerful entities as they pursue and develop self-sufficiency. But as with all institutions vested with power in the Canadian state, band councils are not granted untrammelled discretion to use that power.<sup>46</sup>

### Challenging the Decisions of Band Councils

Understanding band council resolutions is therefore integral to understanding what oversight is provided for in the law, and crucial to understanding the role of the courts when intervening into their affairs. The band council's ability to affect the lives of the band's membership through resolutions and, to some extent, through band-wide majority votes (either in referenda, general meetings, or special meetings) proves significant.

#### *The Federal Municipality Analogy*

The band council and reserve system is a unique political arrangement in Canada, with a long-standing history predating confederation. In 1869, under the constitutional authority of section 91(24),<sup>47</sup> the newly created Parliament of Canada enacted the *Gradual Enfranchisement Act* to force the adoption of the band council system on all First Nations.<sup>48</sup> Seven years later, in 1876, the first *Indian Act* consolidated all extant piecemeal legislation regarding Aboriginals and Aboriginal lands, in the process creating a comprehensive legislative framework to control these band systems.<sup>49</sup> This constant legislating meant to allow the government systematic interference in the pockets of Indigenous

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45 *JG Morgan Development Corp v Canada (Minister of Public Works)*, [1992] 3 FC 783; *Devil's Gap Cottagers (1982) Ltd v Rat Portage Band No 38B*, 2008 FC 812, [2009] 2 FCR 812; *Wood Mountain First Nation v Canada (AG)*, 2006 FC 1297, 55 Admin LR (4th) 293; *Algonquins of Barriere Lake v Algonquins of Barriere Lake (Council)*, 2010 FC 160, 362 FTR 285; *Peace Hills Trust Co v Saulteaux First Nation*, 2005 FC 1364, 281 FTR 201.

46 The famous proposition that the rule of law despises untrammelled discretion comes from *Roncarelli v Duplessis*, [1959] SCR 121.

47 *Constitution Act, 1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, App II, No 5.

48 *An Act for the Gradual Enfranchisement of Indians, the Better Management of Indian Affairs, and to Extend the Provisions of the Act*, 1869 (31 Vict), c 42.

49 *An Act to Amend and Consolidate the Laws Respecting Indians*, 1876, c 18 [*Indian Act* 1876].

self-government. Practically speaking, band councils were designed to be local mouthpieces for the federal government for the primary purpose of realizing control over the Aboriginal population, which still remains highly dispersed across the most remote areas of the massive Canadian land.<sup>50</sup>

Created to resemble local municipalities, band councils share similar mandates, obligations, and constraints. In much the same way that municipalities are subordinate to the province, band councils are subordinate entities of the federal government. This federal municipality conceptualization captures the essence of the largely autonomous role that chiefs and band councillors play in a band's management, while still acknowledging that their devolved authority ultimately has its roots in the Constitution. "As municipal councils are the 'creatures of the Legislatures of the Provinces,'" said Cameron JA of the Saskatchewan Court of Appeal, "so Indian Band Councils are the 'creatures' of the Parliament of Canada."<sup>51</sup> Likewise, we can look to the band itself as resembling electors in a municipal context, or shareholders in a corporate one.<sup>52</sup> On many occasions the federal courts, as well as appellate courts throughout Canada, have made these analogies, at times using the functional similarities to rely on case law from decisions involving traditional municipalities to justify a judgment.<sup>53</sup>

While it can be argued that it is inappropriate for courts to criticize the decision-making processes of band councils—processes often cultivated from history and culture—the courts have never accepted this. Jerome ACJ, in the case of *Ermineskin v Ermineskin Band Council*, summarized the law's attitude best when he declared that at "the very least, the [band] Council must exercise its discretionary powers fairly and failure to do so will, in the appropriate circumstances, warrant judicial intervention."<sup>54</sup> Yet the courts have in the past disagreed on where the proper jurisdiction rested for such intervention.

50 Martha Walls describes the rationale behind the band council system as "twofold": first, to "curtail the authority of chiefs selected by Aboriginal custom," and second, to "strengthen Ottawa's ability to monitor and direct Aboriginal political activities." See Martha Elizabeth Walls, *No Need of a Chief for This Band* (Vancouver: University of British Columbia Press, 2010) at 63.

51 *Re Whitebear Band Council and Carpenters Provincial Council of Saskatchewan et al*, 135 DLR (3d) 128, [1982] 3 CNLR 181 at para 13 [*Whitebear*].

52 *Sabattis v Oromocto Indian Band* (1986), 32 DLR (4th) 680, [1987] 3 CNLR 99 (NB CA) at 684 [*Sabattis*]. By that same reasoning, the band as a whole, when exercising its powers, does not fall under the *Federal Courts Act's* purview.

53 *Canadian Pacific v Matsqui Indian Band*, [2000] 1 CNLR 21 at paras 99, 100 (FCA); *Whitebear*, *supra* note 51 at paras 13–14 (Sask CA); *Sabattis*, *supra* note 52; *Chadee v Ross* (1996), 139 DLR (4th) 589, [1997] 2 CNLR 48 at para 35–36 (Man CA); *Deer v Mohawk Council of Kahnawake*, [1991] 2 FC 18, 41 FTR 306 (TD); and *Corbiere v Canada*, [1994] 1 CNLR 71 [*Corbiere Trial*] (FCTD).

54 (1995), 96 FTR 181, 55 ACWS (3d) 888 at para 11 [*Ermineskin-1995*] (FC).

*Jurisdiction of the Federal Court and the Superior Court*

It is trite law that for a court to have jurisdiction, it must have jurisdiction over the parties, the subject matter, and the remedy.<sup>55</sup> Section 17 of the *Federal Courts Act* grants concurrent original jurisdiction over civil matters that involve the federal Crown to the Federal Court.<sup>56</sup> Section 17(2) gives several relevant examples, without restricting the generality of 17(1), such as when the Crown has possession of land, goods, or money of a person, or the claim arises out of contract by which the Crown is a party. By having concurrent jurisdiction, the plaintiff has the option of framing the action as she or he wishes, and of choosing the forum. For example, in *Matsqui First Nation v Canada (AG)*, Fenlon J of the British Columbia Superior Court rejected a claim by the federal Crown to strike out a claim of the Matsqui First Nation, stating it encroached on the exclusive jurisdiction of the Federal Court. He disagreed, and while he acknowledged that the Federal Court did have certain exclusive jurisdictions, this was not such a case.<sup>57</sup> He applied the recent Supreme Court case of *Canada (AG) v TeleZone Inc.*<sup>58</sup>, which acknowledged that the *Federal Courts Act* was not written with the intention to oust the jurisdiction of the provincial court system to deal with civil matters, even if it involves the federal Crown.

Where the Federal Court does have exclusive jurisdiction is in judicial review. By virtue of section 18(1)(b), only the Federal Court may grant an application to review the actions of a “federal board, commission or other tribunal” under section 2(1) of the *Federal Courts Act*.<sup>59</sup> The provincial courts have no jurisdiction, due to section 18(1)(a), to grant relief against these entities, including injunctions, writs of *certiorari*, prohibition, *mandamus* or *quo warranto*, or granting declaratory relief. However, early jurisprudence by the Supreme Court of Canada shows that the court was hesitant to place band councils within the scope of this definition.<sup>60</sup>

Laskin J, as he then was, in the early case of *Canada (AG) v Lavell*, reflected on the thoughts of Osler J from the Supreme Court of Ontario. He worriedly speculated that a “Band Council has some resemblance to the board of directors of a corporation, and if the words of s. 2(g) [now section 2] are taken literally, they are broad enough to embrace boards of directors in respect of powers given to them under such federal statutes.”<sup>61</sup> These comments were strictly *obiter dicta*, as Laskin J was not only speaking in dissent but

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55 *R v Mills*, [1986] 1 SCR 863 at para 53.

56 RSC 1985, c F-7 [FCA].

57 2012 BCSC 492 at para 29.

58 2010 SCC 62, [2010] 3 SCR 585 [TeleZone].

59 FCA, *supra* note 56.

60 *Canada (AG) v Lavell* (1973), [1974] SCR 1349 [Lavell].

61 *Ibid* at 1379.



also refused to comment conclusively on the issue. The case law has since rejected this position in waves. Beginning with the provincial superior courts in Quebec as early as 1975, support has grown behind the characterization that band councils indeed come under the jurisdiction of the Federal Court.<sup>62</sup> This gives the Federal Court, along with the concurrent jurisdiction to hear matters that claim relief from the Crown, the exclusive jurisdiction to review band council resolutions that do not concern the purely commercial acts of the band council.

At times, these two jurisdictions seemingly overlap. For the purposes of challenging a discriminatory per capita distribution, individual band members must know whether they are actually seeking damages or to have an unlawful resolution quashed. It does not suffice that the band council is a federal body to invoke the exclusive jurisdiction of the Federal Court. For example, in *Sakchekapo-Gabrie v North Caribou Lake First Nation*,<sup>63</sup> the defendant argued on a motion to the Ontario Superior Court that the action, while framed as a private wrong, was in fact a judicial review that engaged the exclusive jurisdiction of the Federal Court. The same issue of impermissible collateral attacks constituted the central focus of the Supreme Court in *TeleZone* and of the British Columbia Superior Court in *Matsqui*, mentioned above. Binnie J, speaking for a unanimous Supreme Court in *TeleZone*, acknowledged that the judicial review process in the *Federal Courts Act* is designed for the “litigant who wishes to strike quickly and directly at the action (or inaction) it complains about.”<sup>64</sup> But as long as the cause of action is reasonable, it should continue in the general jurisdiction of the Superior Court. J. S. Fregeau J, applying this sentiment to the *North Caribou* case before him, decided that the private action for damages by Ms. Sakchekapo-Gabrie had reasonable substance, and therefore was not a judicial review in disguise.

The case law that will be presented in part 2 of this article spans private actions for damages, judicial reviews to challenge a band council’s decision (either on its procedure or on its merits), and criminal actions against those who would defraud the band as a whole. Where part 1 explained where the band council sits in relationship to its membership, part 2 explores how the case law has evolved around this relationship, and how it responds to it. The case law not only defines the limitations of a band council’s ability to act but also the nuances of that ability.

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62 *Rice v Council of the Band of Iroquois of Caughnawaga*, February 13, 1975, unreported, Superior Court of Quebec, No 500 05-015 993-742; cited in *Canatonquin v Gabriel*, [1978] 1 FC 124, aff’d [1980] 2 FC 792 at para 1 (CA); and *Ermineskin—1995*, *supra* note 54.

63 2011 ONSC 1070, JS Fregeau J.

64 *TeleZone*, *supra* note 58 at para 26.



### III Recent Case Law

More than one legal mechanism has developed in the case law to bind the hands of band councils when making per capita distributions to the band membership. As explained in the previous section, distributions of this nature are complicated because they involve numerous discrete steps, all of which are open to judicial scrutiny. While the specific powers invoked will differ situationally—for example, distributing revenue moneys under section 66(1) or through section 69 authority of the *Indian Act*—distributions inevitably involve the exercise of two distinct powers: a procedural and a substantive one. The distinction becomes pragmatically relevant depending on the exact point of the distribution process: the procedural power deals with the decision to act, the substantive one with the act itself. I call this phenomenon of procedural and substantive safeguards working in tandem the “dual barrier”.

#### The Dual Barrier: Procedural Safeguards

The focus of any procedural safeguard is to protect the process by which decisions are made. Off-reserve Aboriginal people, similar to minority shareholders, not only require the fundamental ability to voice their concerns but also must not be unduly kept from exercising their voting power. Restricting this exercise has raised equality concerns that have engaged section 15 of the *Charter*.

#### Aboriginal Residence

On May 20, 1999, the case of John Corbiere, Charlotte Syrette, Claire Robinson, and Frank Nolan, on their own behalf and on behalf of all non-resident members of the Batchewana First Nation, finally concluded with the Supreme Court of Canada releasing its reasons in *Corbiere v Canada*.<sup>65</sup> Mr. Corbiere had served for more than a decade as chief of the Batchewana First Nation.<sup>66</sup> He challenged the constitutionality of section 77 of the *Indian Act*, arguing that the requirement for band members to be “ordinarily resident on the reserve” to participate in band elections was inconsistent with section 15(1) of the *Charter of Rights and Freedoms*.<sup>67</sup> The heart of the challenge, in the

65 [1999] 2 SCR 203, [1999] 3 CNLR 19 [*Corbiere Supreme Court*], aff’g with modified remedy [1997] 3 CNLR 21 [*Corbiere Appeal*] (FCA). The statement of claim was originally filed nearly a decade before, on November 19, 1990. See *Corbiere Trial*, supra note 53 at para 1. The standing of John Corbiere was approved of by Joyal J of the Federal Court in 1991, [1992] 2 CNLR 31 [*Corbiere Standing*].

66 Batchewana First Nation, *Batchewana First Nation Chief and Councillors ~1948 to 2000~*, online: Batchewana First Nation of Ojibways <<http://www.batchewana.ca>>.

67 *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11. Section 15(1) reads that “[e]very individual is

original statement of claim, was repeated by Joyal J when he adjudicated the issue of standing. “The statement of claim alleges,” he stated, “*inter alia*, that non-resident members comprise a two-to-one majority in the band membership but by reason of the residency rules, they have no say in the management of band moneys, property and lands held in common.”<sup>68</sup> It was clear that such a blanket ban created a distinction between those who lived on the reserve and those living off it, which the majority opinion held to be discriminatory and unsalvageable as a justifiable limit under section 1. The words remain in the statute as a testament to Parliament’s inactivity, though now, pursuant to the remedial section of the *Charter* and the supremacy clause of the *Constitution Act, 1982*, they no longer hold force or effect.

The subject matter of the judgment was remarkably narrow because it only dealt with section 77, but the effect was wide reaching. By creating the concept of Aboriginal residency as an analogous ground of discrimination, the Supreme Court triggered a process of policy review that would influence subsequent actions of the federal government and heavily impact a new body of case law on discrimination in First Nation communities.<sup>69</sup> For example, the Federal Court had no trouble striking down customary band election practices, which were not governed by the *Indian Act*, using the reasoning articulated by the Supreme Court.<sup>70</sup> The Federal Court of Appeal eventually applied *Corbiere* to declare that the same “ordinarily resident on the reserve” words found in section 75(1), which prevented off-reserve band members from running in elections, were also unconstitutional.<sup>71</sup> It did so in all of 12 paragraphs, the majority of which was more concerned with the issue of remedy.<sup>72</sup> In *Thompson v Leq’a:mel First Nation Council*,<sup>73</sup> the Federal Court widened the ground to include any distinction in off-reserve residence. “To the extent

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equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.”

<sup>68</sup> *Corbiere Standing*, *supra* note 65 at 32.

<sup>69</sup> In line with the decision, the federal government amended the *Indian Band Election Regulations*, CRC, c 952, and the *Indian Referendum Regulations*, CRC, c 957, to allow off-reserve band members to vote in elections and referenda, respectively. Furthermore, this decision was particularly influential in developing the federal government program known as the First Nations Governance Initiative. For more information on the influence of *Corbiere*, see the comprehensive article by John Provart, “Reforming the Indian Act: First Nations Governance and Aboriginal Policy in Canada” (2003) 2 *Indigenous LJ* 117.

<sup>70</sup> See, e.g., *Cockerill v Fort McMurray First Nation #468*, [2011] FCJ No 1736 (QL) (FCA); *Thompson v Leq’a:mel First Nation*, 2007 FC 707, 333 FTR 17 (additional reasons at [2007] FC 1136) [*Leq’a:mel*]; *Clifton v Hartley Bay Indian Band*, 2005 FC 1030, [2006] 2 FCR 24.

<sup>71</sup> *Esquega v Canada (AG)*, 2008 FCA 182, [2008] 3 CNLR 115, *aff’d* 2005 FC 1097.

<sup>72</sup> The decision focused on whether or not reading down the particular words “ordinarily resident on the reserve,” as opposed to the trial remedy of striking the whole provision, was appropriate on appeal.

<sup>73</sup> *Leq’a:mel*, *supra* note 70.

that there may be some symbolic value in the Leq'a:mel voters living in the traditional Stó-lo territory," said Strayer DJ, "the effect of denial of the vote to persons living outside that territory is clearly disproportionately severe."<sup>74</sup> Even though these cases all dealt strictly with election provisions, either in the *Indian Act* or in custom election regulations, it did not take long before the application of the concept of Aboriginal residence was expanded even further.

One such case from the Federal Court of Appeal in 2003, *Ardoch Algonquin First Nation v Canada (AG)*,<sup>75</sup> demonstrates this expansion. The case dealt with a constitutional challenge to a program implemented by the Department of Human Resources and Development Canada.<sup>76</sup> The program excluded "non-band communities," First Nations not designated as "Indian Bands" within the *Indian Act*, from local control of their labour-training programs. Rothstein JA agreed with Lemieux J of the Federal Court that the decision to restrict the program to only First Nations with a reserve would invoke the analogous ground of Aboriginal residence. He declared, "Lemieux J. drew on *Corbiere*, *Lovelace*, and the Royal Commission on Aboriginal Peoples to find that government's refusal to enter into the first type of [agreement] with the Respondents' communities perpetuated the historical disadvantage and stereotyping of off-reserve Aboriginal communities."<sup>77</sup> Yet *Ardoch* implicitly widened the concept of Aboriginal residence; where *Corbiere* had struck down a line between members of the same First Nation, *Ardoch* did the same to the line drawn between different First Nations. The case law strongly implied significant malleability when applying the Aboriginal-residence concept.

It is important to note that some post-*Corbiere* jurisprudence from the Federal Court of Appeal did put in place limitations on the applicability of Aboriginal residence as an analogous ground. In particular, the case of the *Chippewas of Nawash First Nation v Canada (Minister of Fisheries and Oceans)*<sup>78</sup> determined that Aboriginal residence per se is not an analogous ground, but that it should be defined more narrowly as "off-reserve status." A reconciliation of *Chippewas* and *Ardoch* would lead to the confusing implication that a division between two First Nations, both of whom have reserves, can be drawn, while one between a First Nation with a reserve and another without cannot. Another limitation arose in *Horn v Canada (Minister of National Revenue)*,<sup>79</sup> which considered the tax-exemption section of the

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74 *Ibid* at para 24.

75 *Ardoch Algonquin First Nation v Canada (AG)*, 2003 FCA 473, [2004] 2 FCR 108 [*Ardoch*].

76 The department has since been renamed Human Resources and Skills Development Canada (HRSDC).

77 *Ardoch*, *supra* note 75 at para 36.

78 2002 FCA 485, [2003] 3 FC 233.

79 2008 FCA 352, leave to appeal refused, [2009] SCCA No 8 (QL) aff'g 2007 FC 1052, 286 DLR (4th) 524.

*Indian Act*, section 87.<sup>80</sup> The trial judge held that *Corbiere* did not apply to the context of the location of personal property such as the location of an employer, and simply would not include an immutable characteristic to demonstrate discrimination. The Federal Court of Appeal did not comment on the particular issue, but affirmed the judgment, again ironically, in 12 short paragraphs.

Clearly, while there have been attempts at limiting the ratio in *Corbiere*, the courts in general have quite generously applied it. Taking *Corbiere* outside the context of the band council and the review of resolutions and voting is where the case law on limitations seems to build. Nonetheless, the case law has consistently reinforced that Aboriginal residence can be raised as a ground of discrimination in voting procedures. When considering a vote on something other than electoral reform, such as a per capita distribution, the case law has applied equally as forcefully to the formation of resolutions.

#### *Application of Aboriginal Residence to Non-election Band Council Resolutions*

Band council resolutions can be declared illegal, both on judicial review and in civil actions, for a variety of reasons. A resolution that does not properly authorize the power which it seeks to grant is deficient, and therefore void. Unless a specific action does not require the prior resolution of the band or the membership, the person who exercises the power will encounter liability.<sup>81</sup> *Kamloops Indian Band v Gottfriedson*, for example, regarded the sale of a parcel of reserve land to the defendant under section 20 of the *Indian Act*.<sup>82</sup> The defendant, August Gottfriedson, took possession of what were about 98 acres of land from the Kamloops Indian Reserve No. 1. The court challenge revealed hefty evidence of foul play. It was bad enough that the defendant took possession although the minister had not approved the resolution, as

80 “87. (1) Notwithstanding any other Act of Parliament or any Act of the legislature of a province, but subject to section 83 and section 5 of the *First Nations Fiscal and Statistical Management Act*, the following property is exempt from taxation: (a) the interest of an Indian or a band in reserve lands or surrendered lands; and (b) the personal property of an Indian or a band situated on a reserve.” See *Indian Act*, *supra* note 14; and *First Nations Fiscal and Statistical Management Act*, *supra* note 26.

81 Recently, the Quebec Court of Appeal in *Crevette du Nord Atlantique inc v Council of the Malécites de Viger First Nation*, 2012 QCCA 7, [2012] 3 CNLR 34, leave to appeal refused, [2012] SCCA No 107 (QL), read the introductory words of s 2(3), particularly “[u]nless the context otherwise requires,” as allowing First Nations to ratify contracts without resorting to s 2(3)(b). In that case, the court said that a liberal approach should be taken to the *Indian Act* (*supra* note 14 at para 62), and that on the particular facts, which involved the sale of shrimp in a very limited fishing season, a contract could be made out. The court realized that it was either overturning or significantly widening a long precedent of case law. See, e.g., *Heron Seismic Services Ltd v Muscowpetung Indian Band* (1991), 86 DLR (4th) 767, [1992] 4 CNLR 32 (Sask CA), *aff’d* (1990), 74 DLR (4th) 308, [1991] 2 CNLR 52 (Sask QB); *Isolation Sept-Iles inc c Bande des Montagnais de Sept-Iles et Maliotenam* (1987), [1987] RJQ 2063, [1989] 2 CNLR 49 (CS) [Maliotenam]; *Brass v Peepeekisis Cree Nation #81*, 2004 SKCA 40, 254 Sask R 3.

82 *Gottfriedson*, *supra* note 37.

required for any land transfer under section 20; but the defendant also sat on the band council, and his father was chief. Because he had breached the trust of the band, equitable defences were not open to him. The defendant was held to be unlawfully in possession of the land because the resolution was unenforceable. Similarly, in *Isolation Sept-Iles inc c Bande des Montagnais de Sept-Iles et Maliotenam*,<sup>83</sup> the plaintiff insulation company brought an action against the First Nation for the specific performance of a contract. There was no band council resolution, though evidence existed to support the agreement. Tourigny JCS saw this as fatal to the plaintiff's claim and dismissed it.<sup>84</sup>

Both the *Gottfriedson* and the *Isolation Sept-Iles* decisions predate the *Charter*, but they demonstrate that resolutions must comply with the statutory authority they attempt to authorize. Once the *Charter* came into existence, courts slowly adopted the argument that band council resolutions fell under their scrutiny because band councils exercised authority delegated from the *Indian Act*. In his supplementary reasons in *Horse Lake First Nation v Horseman*, Lee J of the Alberta Court of Queen's Bench cited various authorities for this proposition, including P. W. Hogg's analysis of section 32.<sup>85</sup> In conclusion, he held that the "Charter should apply to any decision or by-law or action the Band Council or the Band makes under the authority of the Indian Act because the Band is using its statutory authority to regulate the life of its members."<sup>86</sup> Since all reviewable powers of the band council are found in the *Indian Act*, all such resolutions are subject to *Charter* scrutiny, including discrimination on the ground of Aboriginal residence under section 15.

In 1996, the Ginoogaming First Nation of Ontario settled a claim with what was then Ontario Hydro for the construction in 1937–38 of a 300-foot wide, 50-foot high concrete dam on the Kenogami River, which caused flooding on the reserve.<sup>87</sup> The settlement agreement totalled just over \$4 million, with recurring annual payments to the First Nation.<sup>88</sup> Just as the Fort William and Cote had to ratify their settlement agreements with the federal govern-

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<sup>83</sup> *Maliotenam*, *supra* note 81.

<sup>84</sup> Tourigny JCS, at paragraph 16, made the oft-cited analogy between band councils and municipalities. In this context she referred to unauthorized municipal work being unenforceable, citing then Professor Thérèse Rousseau-Houle's work, *Les contrats de construction en droit public et privé* (Montreal: Wilson & Lafleur/SOREJ, 1982) at 141.

<sup>85</sup> 2003 ABQB 152 at para 12 [*Horseman*]. Also see P. W. Hogg, *Constitutional Law of Canada*, loose-leaf ed. (Toronto: Carswell, 1997) at 34-12.1: "[t]he distinctive characteristic of action taken under statutory authority is that it involves a power of compulsion that is not possessed by a private individual or organization. . . . Where the Parliament or Legislature has delegated a power of compulsion to a body or person, then the Charter will apply to the delegate"; *Nakoochee v Linklater* (1993), 40 ACWS (3d) 56 (CJ-GD) at para 45.

<sup>86</sup> *Horseman*, *supra* note 85 at para 29.

<sup>87</sup> For more information, see Susan Campbell, "'White Gold' versus Aboriginal Rights" in Bruce W. Hodgins, Ute Lischke & David T. McNab, eds, *Blockades and Resistance: Studies in Actions of Peace and the Temagami Blockades* (Waterloo, ON: Wilfrid Laurier Press, 2003) 127 at 131.

<sup>88</sup> *Medeiros v Ginoogaming First Nation*, 2001 FCT 1318 at para 49 [*Medeiros*].

ment because the agreements extinguished all claims arising out of a specific incident, the Ginoogaming had to do the same. Yet the Ginoogaming chose to exclude from the ratification process off-reserve members who lived in the town of Hornepayne, even though the chief had assured them of their participation in mutual communications.<sup>89</sup> Further, the Ginoogaming established trusts that only benefitted on-reserve members. In response, off-reserve members brought an application for judicial review on the basis of discrimination. Even though the decision in *Corbiere* had been released two years earlier, the members did not invoke the *Charter*.

In his judgment, Lemieux J reviewed the principles in *Corbiere* and found that excluding off-reserve members from a settlement ratification vote was discrimination based on Aboriginal residence. Although there was no per capita distribution in this case, Lemieux J found this to have no import: when funds are acquired by a First Nation on settling a land claim, the entire band has an interest in the extinguishment of that claim.<sup>90</sup> He found that the case before him, as in *Corbiere*, was “an illustration of the off-reserve Aboriginal peoples’ vulnerability and in the way their needs and perspectives have been cast aside.”<sup>91</sup> The exclusion thus was a procedural error that violated the *Charter*, and any trust that arose from it would become *ultra vires* the powers of the Ginoogaming band council.<sup>92</sup> While Lemieux J did not acknowledge that his was a unique way of applying the ratio in *Corbiere*, it was the first time it had been applied to a discriminatory procedural error neither found in a provision of the *Indian Act* nor related to election rules. In the case of a per capita distribution, invoking *Corbiere* in the same manner as *Medeiros* would prevent an unequal distribution between on- and off-reserve members.

#### *A Pragmatic Look at Procedure*

The first barrier within the dual barrier is the procedural safeguard. This barrier aims to ensure that there is no distinction between on- and off-reserve members in the case of a vote affecting the band as a whole, such as a settlement ratification. What makes this safeguard so effective is that if a ratification vote includes the entire band membership, with the majority of band members now living off reserve, the enactment of a discriminatory trust agreement running against their own pecuniary interests would become unlikely. There is thus

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<sup>89</sup> *Ibid* at para 19.

<sup>90</sup> *Ibid* at para 119.

<sup>91</sup> *Ibid* at para 91.

<sup>92</sup> Sharlow J, in an application for an order to extend the time to bring an application for judicial review, determined that there was no arguable case to review Ginoogaming’s decision to ratify the agreement, just the substance of subsequent trusts: *Medeiros v Ginoogaming First Nation*, [1999] FCJ No 745, 88 ACWS (3d) 946. For that reason, Lemieux J focuses on the procedure only insofar as it invalidates the trusts.



greater likelihood of discrimination against the off-reserve membership in a First Nation where most members continue to live on the reserve.

Despite the apparent usefulness of Lemieux's J's judgment, the ruling in *Medeiros* has been an anomaly. While there has been litigation over ratification processes,<sup>93</sup> the exclusion of off-reserve members from a vote is a rarity. I look at settlement ratification processes pragmatically to understand the lack of litigation in this area. The most powerful logic on why the case law on discrimination in First Nations voting is lacking would be because of the time limitation on judicial review, which according to section 18.1(2) of the *Federal Courts Act* is 30 days. Furthermore, with the majority of First Nation members now living off reserve, and settlement agreements often highly publicized even among off-reserve members, intense political pressure comes from the off-reserve perspective. As the focus shifts to the growing urban Aboriginal population, it becomes harder to discriminate against it. At the second step, the procedural barrier is coupled with the substantive safeguard, which looks at the context of the distribution, rather than at the way it was enacted.

### The Dual Barrier: Substantive Safeguards

The second barrier is rooted in the concept that the band council sits in a position of trust and authority in relation to the band as a whole. The relationship between the band council and the band is built on many of the same principles that characterize the relationship between the First Nation and the federal government. Band councils have frequently found themselves liable for not adhering to the high obligation that fiduciary duties impose on them, particularly in respect to the way they manage the band's finances and resources. The recent increase of per capita distributions by First Nations to their respective memberships makes it pertinent that First Nations are aware of these responsibilities and ensure that the actions they take do not unfairly disadvantage any part of the band's population. To understand the nature of the relationship between the band and the band council, which mirrors this section's format, it is necessary to first look at the fiduciary obligations in general, and then at the evolution of duty within band councils and how it applies practically.

#### *Fiduciary Obligations in General and to First Nations*

The word "fiduciary" describes a relationship of utmost trust, one where the law will go to great lengths to maintain balance between the parties involved. Tamar Frankel in her recent work on fiduciary law argues that the basic ele-

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93 See, e.g., *Randall v Caldwell First Nation of Point Pelee*, 189 FTR 182; *Strikes with a Gun v Canada (Minister of Indian Affairs and Northern Development)*, 2003 FCT 431; *Albert v Norway House Cree Nation*, 75 ACWS (3d) 984.



ments of all fiduciary relationships involve an entrustment of property or power from one party to another, and because of that entrustment, the entrustor bears risk that requires legal protection.<sup>94</sup> Paul Miller agrees in essence and comments that the concept of a fiduciary relationship and its theoretical building blocks hinge on what is known as “the duty of loyalty.”<sup>95</sup> This common law, and at times statutory duty, as the title suggests, require the trustee to show an unwavering loyalty to the entrustor, thereby promoting the latter’s best interests on the entrustor’s behalf.

In *Galambos v Perez*, the Supreme Court of Canada distinguished between per se fiduciary relationships and ad hoc fiduciary duties. The former describes a categorized relationship that naturally spawns fiduciary duties, while the latter is a factual situation that gives rise to duties without that pre-established relationship.<sup>96</sup> While not every legal claim between the Crown and an Aboriginal will be defined as being fiduciary in nature, it is a relationship that the courts have recognized as one that attracts these duties. Though not wholly applicable to per capita distributions, which involve the band council in lieu of the Crown, fiduciary principles in the Aboriginal context cannot be discussed without mentioning the sui generis duties unique to the Crown-Aboriginal relationship.

The Supreme Court, beginning with the case of *Guerin v Canada*,<sup>97</sup> has held that the Crown was in a fiduciary relationship with First Nations when it held land under section 18(1) of the *Indian Act*.<sup>98</sup> While the holding of land did not become a true “trust in the private law sense,” according to Dickson J, the obligation in section 18(1) to deal with the land “for the use and benefit of the band” was absolutely of a fiduciary nature.<sup>99</sup> Shortly after, in the case of *R v Sparrow*,<sup>100</sup> the Crown was held to be in a fiduciary relationship under section 35(1) of the Constitution in enacting legislation that may have a negative impact on Aboriginal rights.<sup>101</sup> Once again, despite *Guerin* and *Sparrow*, clearly not every interaction between Aboriginal peoples and the Crown will have a fiduciary character; more recent case law from the Supreme Court has

94 Tamar Frankel, *Fiduciary Law* (New York: Oxford University Press, 2011) at 4.

95 Paul B. Miller, “Justifying Fiduciary Duties” (2013) 58:4 McGill LJ 969.

96 *Galambos v Perez*, 2009 SCC 48, [2009] 3 SCR 247 [*Galambos*].

97 *Guerin v Canada*, [1984] 2 SCR 335 [*Guerin*].

98 “18(1) Subject to this Act, reserves are held by Her Majesty for the use and benefit of the respective bands for which they were set apart, and subject to this Act and to the terms of any treaty or surrender, the Governor in Council may determine whether any purpose for which lands in a reserve are used or are to be used is for the use and benefit of the band.” See *Indian Act*, *supra* note 14.

99 *Guerin*, *supra* note 97 at paras 83–84.

100 *R v Sparrow*, [1990] 1 SCR 1075.

101 *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11, s 35(1). “The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed.”

shown that the nature of the relationship is the key determining factor, not the actors.<sup>102</sup> Yet there is no doubt that when the Crown is engaged in “trust-like” behaviour, such as in the management of moneys held in the Consolidated Revenue Fund, it will be impressed with the same fiduciary characteristics as a trustee at common law.<sup>103</sup>

Because of the development of an onerous relationship between the Crown and First Nations, INAC has taken the policy position that it must act to a high standard of impartiality and in the best interests both of a specific First Nation and of its individual members.<sup>104</sup> Whenever the Crown confronts First Nations with a position for the management of their held funds that goes against their wishes, with the exception of where that position is authorized by statute,<sup>105</sup> it has found itself liable. For example, in the recent 2012 case of *White Bear First Nations v Canada (Minister of Indian Affairs and Northern Development)*, the Federal Court of Appeal found that the minister’s choice to release funds to only one band and not to two others resulted in a breach of duties as a fiduciary and trustee.<sup>106</sup>

The Crown undoubtedly still maintains a powerful role in the management of band funds where revenue and capital moneys are kept in Consolidated Revenue Fund accounts. Pragmatically speaking, however, the choice to make a per capita distribution does not reside with the Crown. The Crown rarely breaches its fiduciary duties in circumstances where a per capita distribution has been agreed to because funds are first transferred to the control of the band, either by their own management authority (e.g., section 69 author-

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102 In both *Gladstone v Canada*, 2005 SCC 21, [2005] 1 SCR 325, and *Wewaykum Indian Band v Canada*, 2002 SCC 79, [2002] 4 SCR 245, the Supreme Court acknowledged that the court requires a trust-like fact situation to impose a fiduciary duty between the Crown and Aboriginal people. “Although the Crown in many instances does owe a fiduciary duty to Aboriginal people, it is the nature of the relationship, not the specific category of actor involved, that gives rise to a fiduciary duty,” said Major J in *Gladstone* at para 23. “Not every situation involving Aboriginal people and the Crown gives rise to a fiduciary duty.” Also see *Polchies v Canada*, 2007 FC 493, [2007] 3 CNLR 242 and *Canada (AG) v Virginia Fontaine Memorial Treatment Centre Inc et al*, 2006 MBQB 85, 203 Man R (2d) 48.

103 *Ermineskin SCC*, *supra* note 13 at paras 72–74. Also see *Manitoba Métis Federation Inc v Canada (AG)*, 2010 MBCA 71 at para 737: “The test for determining whether a fiduciary obligation exists within a Crown-Aboriginal relationship is composed of two parts; a specific or cognizable interest, and an undertaking of discretionary control by the Crown in the nature of a private law duty.”

104 *Policy Manual*, *supra* note 16, ch 1 at 7.

105 See, e.g., *Ermineskin SCC*, *supra* note 13 at paras 72–75, where the First Nation wanted their oil and gas royalties invested on par with the duty of a common law trustee to do so. The court agreed that such a duty would normally exist, however, “legislation may limit the discretion and actions of a fiduciary, whether that fiduciary is the Crown or anyone else.” In this case, the *Indian Act*, *supra* note 14, the *Financial Administration Act*, *supra* note 15, and the *Indian Oil and Gas Act*, *supra* note 28, prohibited the investment of the royalties; therefore, it was reasonable for the Crown to refuse.

106 *White Bear First Nations v Canada (Minister of Indian Affairs and Northern Development)*, 2012 FCA 224, 434 NR 185.

ity) or through an authorized resolution under the relevant sections of the *Indian Act*. The majority of the substantive safeguards in place to protect band members from unequal per capita distributions are therefore born from the duty that has developed between the band council and the band as a whole, rather than from between the Crown and Aboriginal peoples.

### *Evolution of Fiduciary Duties in Band Councils*

Just as the Crown stands in the position of a fiduciary to First Nations, so do the band councillors and chief stand in a fiduciary position with respect to the band as a whole. Elected officials in general, in municipal councils or otherwise, have been found by various levels of court to stand in a fiduciary relationship with their electorate.<sup>107</sup> As early as 1992, in *Gilbert v Abbey*, Skipp J found that band councils were not exempt from this rule's general application. "There can be no question that a duly-elected chief as well as the members of a band council are fiduciaries as far as all other members of the band are concerned," he stated. "The chief upon being elected, undertakes to act in the interests of the members of the band," he continued.<sup>108</sup> While it did not involve a per capita distribution, this case concerned the actions of Chief Abbey of the Williams Lake Band involving herself in resolutions to pay off her children's student loans, a clear conflict of interest. These same fiduciary principles also require that band councils, prior to being trustees, not act in a way that would compromise the financial interests of those to whom they owe a duty by, for example, setting up a per capita distribution to the exclusion of off-reserve members. The Ontario Court of Appeal dealt with the specific issue of unequal per capita distributions and fiduciary principles in the 1997 case of *Barry v Garden River Band of Ojibways*.<sup>109</sup>

Ten years before the case reached the Ontario Court of Appeal, the band had settled an outstanding claim with the federal government for more than \$2.5 million, from which \$1.3 million was placed into a revenue account within the Consolidated Revenue Fund.<sup>110</sup> In 1987, as now, the Garden River

107 *Toronto Party for a Better City v Toronto (City)*, 2011 ONSC 3233, 84 MPLR (4th) 335 citing *Guerin*, *supra* note 97 at para 102: "I do agree, however, that where by statute, agreement, or perhaps by unilateral undertaking, one party has an obligation to act for the benefit of another, and that obligation carries with it a discretionary power, the party thus empowered becomes a fiduciary. Equity will then supervise the relationship by holding him to the fiduciary's strict standard of conduct"; *Sims v Fratesi*, 141 DLR (4th) 547, 19 OTC 273 at para 80: "It is argued, and this Court does agree, an elected official stands in a fiduciary relationship with the electorate. The Mayor was under a duty to act in the electorate's best interest and not to permit any conflict between his duty to so Act [*sic*] and his own interest. This included his desire to obtain for himself the position of [Chief Administrative Officer]."

108 *Gilbert v Abbey*, [1992] 4 CNLR 21 (BCSC) at 32.

109 *Barry v Garden River Band of Ojibways*, 33 OR (3d) 782, 147 DLR (4th) 615 [*Garden River*].

110 The remainder was earmarked for two things: first, repayment of Crown loans, and second, the repurchase of Squirrel Island. See *ibid* at para 5.

First Nation was listed in the *Indian Band Revenue Moneys Order*. Therefore, by virtue of this order and section 69(1), the band was entitled to control, manage, and expend in whole its revenue moneys, without departmental oversight. Shortly after the settlement agreement, the band council passed a resolution that set aside \$1 million of the \$1.3 million available as a per capita distribution to its members. Although the resolution named the entire band as the beneficiary, the band council subsequently chose to exclude or reduce the portion of certain women who were enfranchised due to the “loss of status” provisions of the old *Indian Act*, as well as their children. This situation was the subject of the claim. Yet since the resolution, as the trust instrument, identified the entire band membership as beneficiaries, the band council could not discriminate between members. The court cited various authorities for the proposition that the trust obligations of a trustee were to treat all beneficiaries equally.<sup>111</sup> Courts soon augmented these trust obligations with general fiduciary obligations.

In *Samson Cree Nation v Canada (Minister of Indian Affairs and Northern Development)*, the Federal Court made a similar judgement based on a comparable set of facts, save for some interesting remarks in *obiter*:

In the matter of things like per capita distributions, the band council *simply must deal equitably with each of the Band members*. It could not, to take a simple silly example, direct that all members whose names began with letters from A to L should receive a per capita distribution and those whose names began with letters from M to Z should not. It must deal equally, fairly and in accordance with normal fiduciary principles with its members. That being so, it seems to me that it is for the Band to show that it has not acted in breach of its fiduciary obligation *in entering into the agreement*, as it did. It has not made any such showing, in fact it has not made any showing at all with respect to that agreement.<sup>112</sup>

In *Barry*, the Ontario Court of Appeal made most of its decision based on the view that if the resolution undertook a per capita distribution to the band membership, it could not violate the trust instrument by differentiating between the beneficiaries. In *Barry*, recall, the resolution was written to include the entire membership. The obvious downfall of this strict interpretation was that if the trust instrument were to identify one select group of beneficiaries, such as off-reserve members, then theoretically the band council could discriminate against one subgroup. In *Samson*, the Federal Court alluded to the fact that in any agreement dealing with funds, let alone their distribution, a general fidu-

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111 *Ibid* at paras 32–34. Finlayson, Charron, and Rosenberg JJA cited several older sources, including *Benoit v Tisdale* (1925), 28 OWR 477 (H Ct J) and *Re McClintock* (1977), 12 OR (2d) 741, 70 DLR (3d) 175 (H Ct J).

112 *Samson Cree Nation v Canada (Minister of Indian Affairs and Northern Development)*, 2002 FCT 1299, 226 FTR 65 at para 11 (emphasis added).

ciary obligation exists to treat all band members equally, regardless of what is stated in the trust instrument.

Bowden J of the British Columbia Supreme Court in *Blueberry Interim Trust (Re)* read *Barry* and *Samson* as standing for the same proposition:<sup>113</sup> since the land is held by the band as a collective, with settlement moneys being an extension of the interest in the land, the band council has no authority to distribute funds unequally.<sup>114</sup> “In my view,” Bowden J explained, “*Samson* and *Barry* are persuasive authority that a distribution of settlement funds held by a collectivity must be done in a fair and equal manner . . . the distribution of trust property in anything other than equal portions would be a breach of the underlying fiduciary obligations.”<sup>115</sup> In his view, the fiduciary obligation to exercise discretion evenly was created as soon as the settlement money was received, though in the alternative he acknowledges it existed, at the latest, when the band council had decided to make a per capita distribution.<sup>116</sup> Clearly courts are willing to interpret fiduciary obligations between a band council and membership liberally, especially in instances involving per capita distributions. Yet courts have taken a more conservative approach in the development of on-reserve projects.

If we recall the *Ginoogaming* case, the First Nation undertook an initiative from the settlement trust to finance on-reserve projects and a per capita distribution solely to on-reserve elders. In comparing the facts of *Ginoogaming* to the case of *Barry*, Lemieux J made the point that even the development of on-reserve projects could be viewed as discriminatory. “It will be up to the First Nation to achieve the proper balance in project selection which cannot be limited to on-reserve projects when administering the trust fund, being attentive to the needs of all of its members both on and off-reserve,” he stated. “It cannot be limited to on-reserve individual members as it was with the Elders living in Hornepayne. It is this exclusion which has the badge of discrimination.”<sup>117</sup> The extreme of this position would have the courts reviewing any project initiation using settlement funds in trust—a significant and costly detriment to the band council’s ability to govern. Yet absent a discriminatory per capita distribution, any court oversight seems unlikely regarding a band council’s choices to upgrade housing, improve plumbing, spur on-reserve business ventures, or repair flood damages. Rather, given the ruling in *Corbiere*, no practical way exists in which legitimate on-reserve projects could ever discriminate against off-reserve members because, as L’Heureux-

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113 *Blueberry Interim Trust*, *supra* note 6.

114 For the proposition that land is held in the band as a collective, see *Blueberry River*, *supra* note 6 at paras 22–23; and *Joe v Findlay*, 122 DLR (3d) 377 at p 379, [1981] 3 WWR 60 (BCCA).

115 *Blueberry Interim Trust*, *supra* note 6 at para 61.

116 *Ibid* at para 50.

117 *Medeiros*, *supra* note 88 at para 119.

Dubé J stated in *Corbiere*, off-reserve members are presumed to benefit from all the improvements made to reserve land.<sup>118</sup> The band council is essentially deemed to have discharged its fiduciary obligations when it spends money to further on-reserve initiatives.

#### *A Pragmatic Look at Substantive Safeguards*

Normally, as laid out in the *Indian Act*, the Crown maintains the responsibility for managing the Consolidated Revenue Fund capital and revenue accounts of individual First Nations. The Crown's responsibility is toward bands as a whole and to the respective band councils as the representatives of those individual bands. When the band council has acquired the power normally reserved for INAC, it steps into the Crown's shoes; the council assumes both its power and the responsibilities and liabilities in its relationship with the band membership. Even if settlement moneys have not been set aside for a per capita distribution, as a per se fiduciary relationship, the band council assumes broad and general fiduciary obligations in its dealings with the band. It would be perverse to think that First Nations who refuse to authorize per capita distributions are exempt from any fiduciary responsibility for the management of moneys that are held both collectively and in trust for the band. General fiduciary obligations prohibit a band council from entering into a per capita distribution that would distinguish between off- and on-reserve members. Once a per capita distribution has been agreed to, the band council becomes an express trustee by virtue of the trust instrument itself, and assumes a specific obligation to distribute those moneys fairly to all beneficiaries.

Though the trend is urbanization, not all First Nations' members are concentrated off reserve. For bands that retain larger on-reserve populations, chances are greater to have a discriminatory resolution enacted because the interests of those off reserve are poorly represented. This is where the substantive safeguard particularly shines. Both the general fiduciary duties and the specific trust obligations allow disadvantaged members to bring an action to equalize payments. A per capita distribution thus cannot discriminate substantively between on- and off-reserve members without the band council, or another entity, finding itself liable to breach of trust and breach of fiduciary duty actions, if not criminal sanctions.<sup>119</sup>

It is important to note that none of the cases have thus far stood for the proposition that there is a requirement, in the absence of specific language,

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118 "Expenditures by the band council may include matters like education, creation of new housing, creation of facilities on reserves, and other matters that may affect off-reserve band members' economic interest in its assets and the infrastructure that will be available to help them return to the reserve if they wish." See *Corbiere Supreme Court*, *supra* note 65 at para 77.

119 *R v Gopher*, 2005 SKQB 243, 265 Sask R 1; *R v Solar*, 2012 SKQB 113, 392 Sask R 167.



for a band council to make a per capita distribution.<sup>120</sup> The point of the substantive safeguard, rooted in fiduciary and trust principles, is that once the undertaking to distribute occurs, the band council endures obligations that ensure fair dealings.

#### IV Application

When it comes time for a First Nation to conclude its land claim negotiations with the federal and respective provincial governments, the band council will have to take the settlement agreement to the band membership. Because the First Nation will be permanently extinguishing its interest in land, a majority of the band must assent to the agreement under section 39(1)(b) of the *Indian Act*.<sup>121</sup> Following the requirements of subsections (i), (ii), and (iii), this can be done by a general meeting called by the band council, a special meeting called by the minister of INAC, or by a referendum as per the *Indian Referendum Regulations*. The agreement will direct the federal government to deposit the settlement moneys either into the Consolidated Revenue Fund capital account (or revenue account, as the Garden River First Nation did) or into an external trust of the First Nation's choosing. At this point, the First Nation could elect to include a per capita distribution agreement within the settlement agreement, as several First Nations have already done.<sup>122</sup> The use of an external trust is almost guaranteed if the First Nation lacks section 69 authority to control revenue moneys; with just the basic *Indian Act* money-management provision, placing funds directly into the Consolidated Revenue Fund capital or revenue accounts would reduce that nation's ability to control the funds without departmental oversight. This decision would be included in the package put to vote before the membership when ratifying the agreement.

Presuming that the band council will have settled on using an external trust, it then has two opportunities to exclude the off-reserve membership from an entitlement to the settlement moneys: either in the ratification of the settlement agreement itself (which would contain the exclusion) or in the administration of it (which may or may not include an exclusion). The ratification involves a procedural and a substantive aspect, while the latter involves only a substantive element.

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120 "There was no requirement in the Settlement Agreement that the fund was to be distributed to the members of the band." *Garden River*, *supra* note 109 at para 10.

121 INAC has subsumed section 39(1)(b) into a policy stance; for any trust agreement to be agreed to by the federal government, it must be ratified with the informed consent of the membership. See *Policy Manual*, *supra* note 16, ch 2 at 4.

122 Recall that Fort William First Nation, Cote First Nation, and Fishing Lake First Nation included per capita distribution agreements within their respective specific claim settlements. Garden River First Nation placed \$1.3 million into their Consolidated Revenue Fund revenue account without a per capita distribution because they could freely do so under section 69 authority.



### The First Barrier: Procedural Safeguards

The procedural safeguards affect solely the manner in which the trust agreement comes into existence. When a First Nation brings the settlement agreement to the band membership for ratification, it is not necessary that a majority of the eligible voting population consent, but a majority of the electors who vote must vote in favour if the settlement is to be ratified.<sup>123</sup> If the majority of the membership resides off reserve, a First Nation could attempt to disqualify or deter the off-reserve members from voting. Disqualification is an outright denial of the right to vote, whereas deterrence may consist of failing to notify the off-reserve membership of the ratification vote. The difference between disqualification and deterrence is a matter of directness: both achieve the goal of disproportionately reflecting the majority's wishes in the vote. Both the direct and indirect denial of voting rights on the basis of Aboriginal residency violates section 15 of the *Charter*,<sup>124</sup> and the resolution would be quashed as a result, following the ruling in *Medeiros*.<sup>125</sup>

### The Second Barrier: Substantive Safeguards

The substantive safeguards may arise in one of two ways. In the first, a trust agreement may contain a discriminatory provision; in the second, the band, although no discriminatory provision exists, administers the trust in a manner that excludes the off-reserve membership.

Presuming that a First Nation does not attempt to disqualify or deter members living outside the reserve from voting in the ratification procedure, the substantive elements of a discriminatory agreement may still be ratified. This is unlikely for most First Nations, but for bands with substantial on-reserve populations, the voice of the on-reserve members may greatly outweigh that of the off-reserve members. A trust enacted that contains a per capita distribution clause naming only the on-reserve members as beneficiaries violates the obligation that exists because of the per se fiduciary relationship between the band council and the membership as a whole.

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123 Section 39(2) of the *Indian Act* provides for ministerial discretion to call a subsequent vote where the first vote did not include the majority of electors voting. Section 39(3) provides for only one subsequent vote. See *Indian Act*, *supra* note 14.

124 "[G]overnment cannot do indirectly what it cannot do directly." See *R v Kapp*, 2008 SCC 41, [2008] 2 SCR 483 at para 114.

125 *Garden River*, *supra* note 109 at para 88. The courts are generally more hesitant to nullify elections as an appropriate remedy for which there is broad discretion, because such a remedy might not be in the public interest: see *Grand Rapids First Nation v Nasikapow* (2000), 197 FTR 184, 101 ACWS (3d) 660; *Leq'a:mel*, *supra* note 70; and *Ominayak v Lubicon Lake Indian Nation*, 2003 FCT 596, 233 FTR 254 at paras 51–58. There would be no reason for this hesitation to import into votes regarding per capita distribution arrangements.

If the trust includes the band membership as beneficiaries, the band council could yet authorize via a resolution a per capita distribution to the on-reserve population. Essentially, this is what occurred in *Barry*; the resolution explicitly stated, “these monies are required for per capita distribution to the Garden River Band Members.”<sup>126</sup> “Once the decision was made by the Band Council that there should be a per capita distribution of the sum in issue,” said the three judges of the Ontario Court of Appeal in agreement, “then it is apparent that the Band Council has an obligation to treat all members equally.”<sup>127</sup> The remedy in *Barry*, which I would assume to be typical if the trust fund can support it, is a declaration that each of the disentitled individuals is in fact entitled to an equal share. Otherwise, the resolution would be quashed.

## V Conclusion

In deciding that Aboriginal residence would be an analogous ground, L’Heureux-Dubé J in *Corbiere* acknowledged that from “the perspective of off-reserve band members, the choice of whether to live on- or off-reserve, if it is available to them, is an important one to their identity and personhood, and is therefore fundamental.”<sup>128</sup> Aside from the legal arguments, it seems inherently unjust that an Aboriginal individual would be denied the equal share of the land she or he holds as part of the band collective. Fortunately, all levels of law accord with this intuition.

No band council has the authority to create a per capita distribution that excludes off-reserve members from receiving their equal portion. By virtue of section 15 of the *Charter*, band councils are barred procedurally from excluding off-reserve members from votes that would prejudice them if they were not entitled to participate. Further, a band council stands in a per se fiduciary relationship with the band membership as an elected body. If a discriminatory provision were legitimately enacted, perhaps by a First Nation with a higher on-reserve population (despite the trend to the contrary), any substantial deprivation of an off-reserve member to an equal share would be a breach of its duties as a trustee and fiduciary. These two barriers, the procedural and the substantive, provide avenues by which traditional causes of action and applications for judicial review alike can be brought by aggrieved members to challenge the decisions of their band councils.

Whatever the relationship between band members and their councils has been in the past, individual Aboriginal persons are now clearly willing to hold their respective band councils accountable. The off-reserve membership of all First Nations is entitled to its fair share of any per capita distribution.

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126 *Garden River*, *supra* note 109 at para 9.

127 *Ibid* at para 34.

128 *Corbiere Supreme Court*, *supra* note 65 at para 62.