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# First Nations "Custom" Governance Disputes: Colonial Entanglement and the Paradoxes of Recognition — Part I: The Courts

Kirsten Anker and William Shipley*

## ABSTRACT

Around half of First Nations in Canada regulated by the *Indian Act* select their "chief and council" through what is known as "custom" according to section 2 of the act. Whether they entail traditional elements or more contemporary practices, custom selection codes stand apart from the *Indian Act*'s provisions on elections and can embody the recognition of Indigenous self-government. When disputes about these custom processes arise, however, the Federal Court may be called on to interpret and apply them; and the federal government, despite eschewing any jurisdiction to interfere in custom governance disputes, has a number of levers that it can, and does, pull to shape the elaboration of custom codes or other key factors contributing to the dispute. Our study falls into two parts: (1) an analysis of Federal Court decisions that illustrates some of the contradictions between the objective of respecting the culture and traditions of Aboriginal peoples and the anxiety felt in relation to ensuring that First

* Kirsten Anker, Associate Professor, Faculty of Law, McGill University. William Shipley, BA (NWU) and BCL/LLB (McGill University). The authors would like to thank Daniel Rück, Joshua Nichols, Amy Swiffen, and the anonymous reviewers for their thoughtful comments.

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Nations communities comply with Western notions of responsible government and (2) a review of Canadian policy with respect to custom elections. Two case studies on instances of intervention, with respect to the Lubicon Cree and the Algonquins of Barriere Lake, help support the argument that this policy, and the legislative structure itself, is a form of colonial entanglement that must be understood in the larger context of claims to land and resources, and arrangements over funding and infrastructure.

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## RÉSUMÉ

Près de la moitié des Premières Nations du Canada régies par la *Loi sur les Indiens* choisissent leur chef et leur conseil selon ce que l'on appelle la « coutume », conformément à l'article 2 de ladite loi. Qu'ils comportent des éléments traditionnels ou des pratiques plus contemporaines, les codes de sélection coutumiers se distinguent des dispositions de la *Loi sur les Indiens* relatives aux élections et peuvent incarner la reconnaissance de l'autonomie gouvernementale autochtone. Toutefois, lorsque des litiges concernant ces processus coutumiers surviennent, la Cour fédérale peut être appelée à les interpréter et à les appliquer; et le gouvernement fédéral, bien qu'il se soit déchargé de toute compétence pour intervenir dans les litiges relatifs à la gouvernance coutumière, dispose d'un certain nombre de leviers qu'il peut actionner — et qu'il actionne effectivement de temps à autre — pour influencer l'élaboration des codes coutumiers ou d'autres facteurs clés contribuant au litige.

Notre étude se déroule en deux parties : (1) une analyse des décisions de la Cour fédérale qui met en évidence certaines contradictions entre l'objectif de respect de la culture et des traditions des peuples autochtones et le souci de veiller à ce que les communautés des Premières Nations se conforment aux notions occidentales de gouvernement responsable; et (2) un examen de la politique canadienne en matière d'élections coutumières.

Deux études de cas portant sur des interventions concernant les Cris de Lubicon et les Algonquins du lac Barrière viennent étayer l'argument selon lequel cette politique, ainsi que le cadre législatif lui-même, constituent une forme d'imbrication coloniale qui doit être comprise dans le

contexte plus large des revendications territoriales et des ressources, ainsi que des accords relatifs au financement et aux infrastructures.

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## INTRODUCTION

IN 1957, one of the more well-known First Nations governance disputes in Canadian history pitted the hereditary chiefs and clan mothers of the Six Nations Confederacy—traditional leadership roles among the Haudenosaunee peoples in Canada—against the council elected under the *Indian Act*.[1] In *Logan v. Styres et al.*, the traditional leadership challenged the validity of a surrender of reserve lands to the Crown negotiated by the defendant band council.[2] The council—its members part of a faction that had developed in opposition to the traditional council of chiefs, and in favour of modernising the community's economy—came to power in 1924 following elections ordered by the deputy superintendent of Indian Affairs, Duncan Campbell Scott, with the federal Cabinet's approval; the validity of the elections was also eventually challenged by the chiefs.[3] The dispute speaks to the heavy-handed strategies used by the Department of Indian Affairs to displace traditional Indigenous governments: the Royal Canadian Mounted Police were deployed to oust the sitting council and even seized the beaded wampum belts used to sanction proceedings.[4] Further, it speaks to the protracted and ongoing efforts by Haudenosaunee to deny the legitimacy of the Crown's assumption of sovereignty over them, asserting the parallel but independent paths represented in the Two-Row Wampum.[5] That said, it also speaks to internal divisions within Haudenosaunee about how best to deal with the realities of the Canadian state, and with the economic marginalization that persists among First Nations.

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1 RSC 1985, c I-5, s 74 [*Indian Act*].

2 1959 CanLII 882 (ON H Ct J) [*Logan*].

3 *Davey et al v Isaac et al*, 1977 CanLII 21 (SCC). See also Darlene M Johnston, "The Quest of the Six Nations Confederacy for Self-Determination" (1986) 44:1 UT Fac L Rev 1 at 19–20; John J Borrows & Leonard I Rotman, *Indigenous Legal Issues: Cases, Materials & Commentary*, 6th ed (Toronto: LexisNexis, 2023) at 31; "Grand River (Ohsweken) Iroquois Reserve" in Bruce Elliott Johansen & Barbara Alice Mann, eds, *Encyclopedia of the Haudenosaunee (Iroquois Confederacy)* (Westport, Conn: Greenwood Press, 2000) 131 at 131.

4 Theresa McCarthy, *In Divided Unity: Haudenosaunee Reclamation at Grand River* (Tucson: University of Arizona Press, 2016) at 191.

5 See Kathryn V Muller, *Holding Hands with Wampum: Haudenosaunee Council Fires from the Great Law of Peace to Contemporary Relationships with the Canadian State* (PhD Thesis, Queen's University, 2008) [unpublished] at 19.

The existence of political factions and governance disputes in any community is not remarkable. What *is* particular to First Nations governance disputes in Canada is, historically, the sheer extent of outside interference—entanglement—and its ongoing ramifications in the present. The power to impose municipal-style "responsible government," dating back to the *Gradual Enfranchisement Act, 1869*,[6] was confirmed by the court in *Logan v. Styres et al*.[7] Colonial officials were keen to disable traditional governance systems in favour of "unchallengeable departmental control,"[8] and did so by installing "Indian Agents" with decision-making power on reserves, as well as outright banning law-ways like the potlatch feast and the Sundance.[9] Traditional law was also undermined by breaking the transmission to children of language and culture generally through the compulsory residential school system,[10] and by suppressing the role of women: for instance, the deposing of chiefs at Six Nations directly usurped the role of clan mothers who have sole responsibility for selecting chiefs and keeping them accountable.[11] Treaties negotiated

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6 *An Act for the gradual enfranchisement of Indians, the better management of Indian affairs, and to extend the provisions of the Act 31st Victoria, Chapter 42*, SC 1869, c 6, s 10. For a history of the provisions, see Kent McNeil, "Challenging Legislative Infringements of the Inherent Aboriginal Right to Self-Government" (2003) 22 Windsor YB Access Just 329 [McNeil, "Challenging Legislative Infringements"].

7 *Logan*, *supra* note 2 at 270.

8 John S Milloy, "The Early Indian Acts: Development Strategies and Constitutional Change" in JR Miller, ed, *Sweet Promises: A Reader on Indian-White Relations in Canada* (Toronto: University of Toronto Press, 1991) 145 at 150–51. Scott R. Trevithick argues that the deposition of the chiefs was a way for the department to "save face" in an embarrassing ongoing confrontation with the Six Nations (see *Conflicting Outlooks: The Background to the 1924 Deposing of the Six Nations Hereditary Council* (MA Thesis, University of Calgary, 1998) [unpublished] at 1, 84).

9 However, these prohibitions were often resisted and ignored (see Douglas Cole & Ira Chaikin, *An Iron Hand upon the People: The Law Against the Potlatch on the Northwest Coast* (Vancouver & Seattle: Douglas & McIntyre & University of Washington Press, 1990)).

10 Truth and Reconciliation Commission of Canada, *Canada's Residential Schools: The Final Report of the Truth and Reconciliation Commission*, vol 1, part 1, *The History, Part 1: Origins to 1939*, McGill–Queen's Native and Northern Series, vol 80, Catalogue No IR4-9/2015E-PDF (Montreal & Kingston, ON: McGill-Queen's University Press, 2015) at 615–42.

11 Renée Jacobs, "Iroquois Great Law of Peace and the United States Constitution: How the Founding Fathers Ignored the Clan Mothers" (1991) 16:2 Am Indian L Rev 497 at 507–09.

with male leaders alone sidelined women's authority over land, while the *Gradual Enfranchisement Act, 1869*, followed by the *Indian Act* in 1876, mandated that women lost their Indian status, and thus the right to live on the reserve or participate in reserve governance, if they married a non-status man.[12]

The explicitly "civilizing" and assimilationist policies behind these interventions have officially been superseded by others promoting self-government, cultural recognition and reconciliation, as evidenced in comprehensive land claim and self-government agreement processes, the recognition of Aboriginal and treaty rights through section 35 of the Constitution and the repeal of some of the most egregious aspects of the *Indian Act*. In "recognition mode," Indigenous traditional governance has been accepted in principle as falling within the Aboriginal rights "recognized and affirmed" by section 35 of the Constitution.[13] In the so-called "custom" governance elections that are the focus of this study, traditional governance practices can also come to have formal legal recognition via the definition of "council of the band" in the *Indian Act*. Nevertheless, this is a compromised form of self-government: outside courts assert their own jurisdiction to accord recognition or non-recognition of Indigenous governments. The *Indian Act* maintains an essentially colonial structure, and at the act's pointiest edge, section 74 continues to allow the minister—in full-throated "entanglement mode"—to oust the customary regime and order that the chief and council be chosen by municipal-style

12 Canadian Advisory Council on the Status of Women, *Indian Women and the Law in Canada: Citizens Minus*, by Kathleen Jamieson, Catalogue No LW31-2/1978 (Ottawa: Supply and Services Canada, April 1978) at 13, 29–30. Although these status provisions of the *Indian Act* were replaced by the gender-neutral section 6 in 1985, the residual discriminatory effects are still being litigated, such as in the Quebec Native Women–Paillé class action certified in 2023 (see *Femmes Autochtones du Québec Inc et Isabelle Paillé c Procureur Général du Canada* (15 June 2023), Montreal, QCSC 500-06-001005-194 (interlocutory judgment)).

13 Canada, "The Government of Canada's Approach to Implementation of the Inherent Right and the Negotiation of Aboriginal Self-Government" (last modified 3 March 2023), online: <rcaanc-cirnac.gc.ca> [perma.cc/T8AY-FSXS] [Canada, "Aboriginal Self-Government"]. For a recent discussion of legislation affirmations of self-government rights, see *Reference re* An Act Respecting First Nations, Inuit and Métis children, youth and families, 2024 SCC 5 [*Reference on Bill C-92*].

elections held in accordance with the act,[14] a power that has been used unilaterally in recent years.

This very particular meaning of custom governance comes about through the definition of "council of the band" in section 2(1) of the *Indian Act*, in which custom is positioned as the default means of selecting leaders: "council" means either the body chosen by elections held pursuant to the electoral mechanisms laid out in section 74, or, for First Nations to which section 74 does not apply, the council or chief "chosen according to the custom of the band."[15] It is the definition of "council" that causes the act's governance provisions—such as the statutory delegation of powers to chief and council in section 81—to apply to leadership selected by either method.[16] The alternative "custom" basis in section 2(1) was added in the 1951 revisions of the *Indian Act* in order to make the act's other provisions on band councils explicitly apply to bands who were not subject to the section 74 electoral provisions. However, the customary selection of leaders does appear to have been accepted prior to that.[17] Although the term suggests "traditional" processes, custom in this context may be of recent origin: custom has been defined simply as the evolving rules and practices of leadership selection established by an Indian "Band" that is not subject to *Indian Act* election procedures;[18] it is, as the Federal Court notes, Indigenous law that is the result of inherent law-making capacity.[19] Cases on custom councils often arise when the losing candidate in an election (or other kind of selection process) disputes whether custom has been properly followed, and requests a review of a

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14 The election mechanism in sections 74–78 provides for formal nomination of candidates, majority voting, secret ballots and a two-year term. As will be discussed, an alternative process is envisaged in section 2(1) where the definition of "council of the band" includes "the council chosen by the custom of the band" rather than through these procedures.

15 See *Gabriel v Nicholas*, [1983] FCJ No 2 at para 5, 1983 CarswellNat 648 (FCTD).

16 See McNeil, "Challenging Legislative Infringements", *supra* note 6 at 337.

17 *Ibid* at 337–38. Ghislain Otis notes that this may have been a way for ministerial officials to exercise de facto control over community affairs, and arose from the assessment that some communities were not "sufficiently evolved" (see "Élections, gouvernance traditionnelle et droits fondamentaux chez les peuples autochtones du Canada" (2004) 49:2 McGill LJ 393 at 400–01 [translated by authors]).

18 See *Mcleod Lake Indian Band v Chingee*, 1998 CanLII 8267 at para 16 (FCTD) [*Mcleod*], citing Jack Woodward, *Native Law* (Toronto: Carswell, 1994) at 164–65.

19 *Whalen v Fort McMurray No 468 First Nation*, 2019 FC 732 at para 32 [*Whalen*].

decision taken by an official—perhaps the council for the way it called an election, an electoral officer in their administration of voting, or a review body for the way they decided an appeal—by the Federal Court.

In addition to custom and section 74 elections, there are now a variety of regimes for leadership selection in First Nations communities across Canada. As of February 27, 2024, out of the 637 recognized First Nations, 374 (i.e., 59 per cent) conduct custom leadership selections, while 123 (i.e., 19 per cent) hold their elections under the *Indian Act*.[20] Approximately 230 of those 374 custom selection "Bands" had been previously subject to the *Indian Act* election procedures, and "reverted" to custom after developing a custom selection code approved by the minister, as per departmental[21] policy.[22] One hundred twelve First Nations had never previously been subject to an *Indian Act* election process, and thus may not have any details of their customary practices recorded in departmental files.[23] Eighty-six First Nations (i.e., 14 per cent) have chosen to have their elections regulated by the *First Nations Elections Act*—opt-in legislation that addresses some criticisms of the *Indian Act* regime—since it came into

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20 For the current list of those communities still subject to INAC election procedures pursuant to section 74, see *Indian Bands Council Elections Order*, SOR/97-138.

21 In 2017 the federal program relating to Indigenous peoples was divided into two separate departments, Crown-Indigenous Relations Canada (CIRNAC, which includes treaty rights and land negotiations) and Indigenous Services Canada (ISC, which includes health care, water, and other services to Indigenous communities). Prior to this division, a number of different names were used, including Indian Affairs from 1880 sometimes under various federal government departments (IA), Department of Indian Affairs and Northern Development or Indian and Northern Affairs Canada from 1966 (DIAND/INAC), Aboriginal Affairs and Northern Development Canada from 2011 (AANDC), Indigenous and Northern Affairs Canada from 2015 (INAC). To avoid confusion, we will use generic terms "department" and "minister" to refer to generic or persisting policies and actions, while actions taken by previous ministers and publications issued under specific departmental names will maintain their names.

22 For the current version of the policy, see Indigenous Services Canada, "Conversion to Community Election System Policy" (last modified 1 June 2015), online: <sac-isc.gc.ca> [perma.cc/MZ94-KE4Q].

23 See Senate, *Proceedings of the Standing Senate Committee on Aboriginal Peoples*, 40-2, No 6 (13 May 2009) at 6:63 (Marc Bovin, Daniel Lang).

force in 2014.[24] The remaining First Nations (i.e., 8 per cent) operate their leadership selection processes under self-government agreements.

Despite the fact that a significant majority of First Nations communities in Canada are living with custom council regimes, there is very little literature addressing them.[25] This article, in two parts, aims to provide a synthesis of, and critical commentary on, first, the Federal Court's approach to reviewing decisions made according to custom as it relates to leadership selection, and second, an analysis of the federal government's policies and practices regarding intervention in leadership disputes, paired with a consideration of the impact of these entanglements on Indigenous communities. Federal courts have held themselves to have jurisdiction to review decisions made by "custom councils," considering them to fall within the categories of a "federal board, commission or other tribunal" under the courts' enabling legislation.[26] In Part I, we assess the ways in which judges inevitably apply their own knowledge and criteria in making findings about Indigenous custom, consider how these cases suggest a need for Indigenous legal perspectives in the interpretation and application of customary legal standards, and question whether the Federal Court is an appropriate forum for adjudicating Indigenous governance disputes. These review mechanisms embody, we argue, a form of recognition that is both asymmetrical and assimilative: as Glen Coulthard writes in his critique of this politics of recognition, "in real world contexts of domination the terms of accommodation usually end up being determined by and in the interests of the hegemonic partner in the relationship."[27] In this case, the terms in question are those that embody majoritarian politics and procedural legitimacy, even when these are absent or

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24 These can be gleaned by visiting the First Nation profiles at Canada, "Search by First Nation" (last modified 14 January 2026), online: <fnp-ppn.aadnc-aandc.gc.ca> [perma.cc/RCR2-WQSB]. See also *First Nations Elections Act*, SC 2014, c 5, Schedule, ss 2–5, 42.

25 Brian A. Crane, Robert Mainville, and Martin W. Mason's *First Nations Governance Law* covers the legislative framework and caselaw in the style of a practice manual (see *First Nations Governance Law*, 2nd ed (Markham: LexisNexis, 2008)), while Ghislain Otis analyzes the *Indian Act* election regimes in terms of their colonial history and the misfiring of their democratic structures in the cultural context of Indigenous communities (see *supra* note 17). Both texts are over twenty years old.

26 *Federal Courts Act*, RSC 1985, c F-7, s 18(1) [*Federal Courts Act*].

27 Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014) at 17.

differently configured in Indigenous polities. However, our findings may be relevant to understanding the recognition of traditional laws or customs in other areas such as land title, group membership or adoption, in which some of the same dynamics play out.

In Part II, we see a shadow version of the recognition of Indigenous autonomy at play: the court has ruled that the federal government *lacks* jurisdiction over custom leadership selection,[28] and so its agents disclaim any place in interpreting custom codes, intervening in disputes over customary leadership or assisting in their resolution; the recognition lies in the policy of *not* interfering in internal governance. Despite this position, there are several ways in which the federal government can and does respond to disputes through funding and other administrative decisions.[29] Part II also places these specific administrative actions in their larger historical, economic and political context for two communities—the Lubicon Cree in Alberta and the Algonquins of Barriere Lake in Quebec. Even more fundamentally, as with the Six Nations dispute, the very structure of the *Indian Act* is part of the entanglement: a striking example in recent years has been the showdown between some Wet'suwet'en hereditary chiefs and clan-based land defenders, on the one hand, and Coastal GasLink, on the other, after the elected *Indian Act* band council—who had been consulted to satisfy the Federal government's fiduciary duties—supported Coastal GasLink's natural gas pipeline across their territory and signed an impact and benefit agreement with the company.[30] Lurking behind the technical analyses of this paper, then, is the larger unanswered question of how it is that Canadian authorities—in the courts or

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28 See e.g. *Lac des Mille Lacs First Nation v Canada (Minister of Indian Affairs and Northern Development)*, 1998 CanLII 7209 at para 4 (FCTD); *Goodtrack v Canada (Attorney General)*, 2006 FC 1297 [*Goodtrack*]; *Francis v Mohawk Council of Kanesatake (TD)*, 2003 FCT 115 at para 4 [*Francis*].

29 Indeed, IAND had previously made public a *Custom Code Election Dispute Resolution Policy* (reprinted in Crane et al, *supra* note 25 at 751, Appendix 30). Amnesty International campaign staff reported in 2011 that AANDC denied having any policy with respect to resolving custom code leadership selection disputes (Amnesty International, (2011) via oral communication [communicated to William Shipley]).

30 Malcolm Lavoie & Moira Lavoie, "Indigenous Institutions and the Rule of Indigenous Law" (2021) 101 SCLR (2nd) 325.

the government—have the power to determine "who is recognized as having the standing, capacity, or authority to speak for the ... people."[31]

In combination, the two parts of this article show how the Canadian courts' and government's approaches illustrate the contradictions between the objective of respecting the culture and traditions of Aboriginal peoples and the anxiety felt in relation to ensuring that First Nations communities comply with Western notions of responsible government. Indeed, they illustrate the paradox of a policy of non-interference that begets interference, and of a policy of recognition that begets assimilation, with serious consequences. Intervention purveys a paternalistic and colonial approach to the relationship between First Nations and the Crown and may infringe Aboriginal rights to self-government. Government interference can also fuel intra-community conflict, which, in turn—as Part II explores in the case of the Lubicon Cree and the Algonquins of Barriere Lake—can significantly inhibit progress in negotiations around land claims, or in economic and infrastructure development, that is of critical importance to the basic rights and needs of Indigenous peoples.

## I. THE PARADOX OF RECOGNITION IN FEDERAL COURT JURISDICTION OVER CUSTOM CODES

The Federal Court's cases on disputed leadership selection decisions governed by First Nation custom raise a number of preliminary questions. First, what is meant by "custom" in this context, and what is its status in Canadian law as an Indigenous governance practice? Second, how is it that the Court came to have jurisdiction over custom, and how are judges identifying and applying Indigenous custom from the outside? In Western legal discourse, custom has been associated with primitivism and "pre-legal" societies, often seen as mere force of habit, divorced from rational and reflective processes, and opposed to the authoritative law of the state.[32] John Borrows lists custom—"practices developed through repetitive patterns of social interaction that are accepted as binding on those

31 Joshua Nichols & Sarah Morales, "Finding Reconciliation in Dark Territory: *Coastal Gaslink*, *Coldwater*, and the Possible Futures of *DRIPA*" (2021) 53:4 UBC L Rev 1185 at 1194 [footnotes omitted].

32 See HLA Hart, *The Concept of Law*, 2nd ed, Clarendon Law Series (Oxford: Oxford University Press, 1994) at 94, 170; H Patrick Glenn, *Legal Traditions of the World: Sustainable Diversity in Law*, 5th ed (Oxford: Oxford University Press, 2014) at 77–78.

who participate in them"—as one source of Indigenous law, alongside sacred, deliberative and natural law.[33] Both civilian and common law jurists cite custom as one of law's historical origins, and both systems give some degree of contemporary deference to it: people are free to regulate themselves according to established patterns unless their behaviour triggers the limits of legality. Custom as informal practice can also itself be transformed into a justiciable source of rights and obligations via various techniques of state recognition: codification or incorporation into formal law, or the delegation of authority to groups of people to make decisions according to their own customs are but some examples.[34] In the case law in this study, "custom" relating to leadership selection becomes justiciable in the eyes of the state via the definition of "council" in section 2 of the *Indian Act*; it may or may not be written, but, as we will see, is generally understood as a practice accepted by a given community as binding.

From the perspective of many Indigenous peoples, customs in the above sense are understood as the result of an exercise of their own inherent and independent lawful jurisdiction that was not superseded by, or subsumed into, the sovereignty of the British or French Crowns during colonization.[35] There is partial recognition of this by state law. In the Supreme Court of Canada's jurisprudence on section 35 of the *Constitution Act, 1982*, "custom" is included in the compendium phrase of things recognized as Aboriginal rights: Aboriginal rights protect the "practices,

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33 John Borrows, *Canada's Indigenous Constitution* (Toronto: University of Toronto Press, 2010) at 51 [footnotes omitted].

34 See Ralf Michaels, "The Re-*state*-ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism" (2005) 51:3 Wayne L Rev 1209 at 1231–35. In a different context, the Supreme Court examined how Hutterite norms of belonging operated as contractual conditions of membership in a community holding property collectively in trust (see *Lakeside Colony of Hutterian Brethren v Hofer*, 1992 CanLII 37 (SCC); Denise G Réaume, "The Legal Enforcement of Social Norms: Techniques and Principles" in Alan C Cairns et al, eds, *Citizenship, Diversity and Pluralism: Canadian and Comparative Perspectives* (Montreal & Kingston, ON: McGill-Queen's University Press, 1999) 177 at 181).

35 See Kent McNeil, "The Jurisdiction of Inherent Right Aboriginal Governments" (2007) [unpublished] at 5–6; Alan Hanna, "Spaces for Sharing: Searching for Indigenous Law on the Canadian Legal Landscape" (2018) 51 UBC L Rev 105; Joshua Nichols, "A Reconciliation without Recollection?: *Chief Mountain* and the Sources of Sovereignty" (2015) 48:2 UBC L Rev 515; Naiomi S Walqwan Metallic, "Aboriginal Rights, Legislative Reconciliation, and Constitutionalism" (2023) 27:2 Rev Const Stud 1.

traditions and customs" that are central to the Aboriginal societies that pre-existed the arrival of Europeans and that have been handed down since that time.[36] "Aboriginal laws" are indicated in several cases as a source of Aboriginal rights alongside the common law.[37] And although litigated claims to self-government or a right to regulate—rather than practice—a particular activity,[38] have not yet been successful, it is widely accepted that self-government *is* an inherent Aboriginal right encompassed by section 35 recognition. Statements from the bench[39] and federal policy since 1995[40] have explicitly confirmed this view. There has been some legislative recognition of inherent jurisdiction in specific domains,[41] and section 2 of the *Indian Act* is readily seen to offer a similar kind of recognition.

Recent decisions from the Federal Court, cognisant of the growing literature providing nuanced ways of thinking about Indigenous legal traditions, have situated the custom of section 2 as a form of Indigenous

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36 *R v Van der Peet*, 1996 CanLII 216 at para 44 (SCC).

37 *Delgamuukw v British Columbia*, 1997 CanLII 302 at para 148 (SCC) [*Delgamuukw*]; *Tsilhqot'in Nation v British Columbia*, 2014 SCC 44 at para 41.

38 The Supreme Court has indicated that establishing a right to regulate under section 35 would require proof of a specific practice of regulation (*R v Pamajewon*, 1996 CanLII 161 at paras 26–30 (SCC) [*Pamajewon*]). It recently affirmed this approach in *Reference on Bill C-92*, *supra* note 13 at para 112.

39 The Supreme Court assumed so without deciding that this is the case in *Pamajewon*, *supra* note 38 at para 24. In *Delgamuukw*, the Supreme Court asserted that the communal dimension of Aboriginal title encompasses collective decision-making about the territory (see *supra* note 37 at para 115), which led the British Columbia Supreme Court to interpret Aboriginal title as including a constitutionally protected right to a political structure for making decisions about land (see *Campbell et al v AG BC/AG Cda & Nisga'a Nation et al*, 2000 BCSC 1123 at para 137). In *Mitchell v MNR*, Justice Binnie's minority opinion stressed that Canadian sovereignty "merging" British colonial and Aboriginal sovereignties did not oust a right of internal self-government for Aboriginal peoples (see 2001 SCC 33 at paras 129–30 [*Mitchell v MNR*]).

40 See Government of Canada, "Aboriginal Self-Government", *supra* note 13.

41 On the recognition of customary adoption in Quebec, see Sébastien Grammond & Christiane Guay, "Le pluralisme juridique au Canada : l'exemple de l'adoption coutumière" [2021] 1:1 Cahiers justice 99 at 107–09. On federal legislation affirming Indigenous jurisdiction over child welfare, see Cindy Blackstock, "Indigenous Child Welfare Legislation: A Historical Change or Another Paper Tiger?", Editorial (2019) 14:1 First Peoples Child & Family Rev 5 at 5.

law-making.[42] However, in the aggregate, the picture that emerges is that the courts effectively treat Indigenous law as a fact to be established in evidence like any other, and not as a distinct form of law or source of legality.[43] This means that larger questions such as the underlying normative frameworks or constitutional logics of Indigenous law,[44] or their potential incompatibility with the institutions and foundational principles of Canadian constitutionalism, are not engaged. The decisions on custom governance disputes discussed below bear this out.

### *A. Federal Court Jurisdiction over Leadership Selection Disputes*

The courts' approach to the customary leadership selection disputes reflects an ambiguity in official positions towards Indigenous law-making. Under their enabling legislation, federal courts have exclusive original jurisdiction under section 18 where relief is sought against a "federal board, commission or other tribunal" (defined in section 2 of that legislation to include anybody exercising jurisdiction or powers conferred by an act of Parliament),[45] but that jurisdiction is limited to the review of decisions made in applying "a law of Canada" by section 101 of the Constitution.[46] "Band councils" per se are a creation of the *Indian Act*, and even though Indigenous leaders acting as chief and council may understand

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42 See e.g. *Gamblin v Norway House Cree Nation Band Council*, 2012 FC 1536 at para 34 [*Gamblin*]; *Pastion v Dene Tha' First Nation*, 2018 FC 648 at para 13 [*Pastion*]. In a recent textbook on Administrative Law, Janna Promislow and Naomi Metallic point out that this leads to "layered" jurisdictions that make administrative law in Indigenous governance unique in Canada: "Realizing Aboriginal Adminstrative Law" in Colleen M Flood & Paul Daly, eds, *Administrative Law in Context* 4th ed (Toronto: Emond Montgomery, 2022) at 163 [Promislow & Metallic].

43 See Kirsten Anker, "Law, Culture and Fact in Indigenous Claims: Legal Pluralism as a Problem of Recognition" in René Provost, ed, *Culture in the Domains of Law*, Cambrdige Studies in Law and Society (Cambridge, UK: Cambridge University Press, 2017) 127 at 148–49. For a potential new direction in judicial treatment of Indigenous law as an interpretive framework, see Justice Bourque's decision in *R c Montour*, 2023 QCCS 4154.

44 See Aaron Mills, "The Lifeworlds of Law: On Revitalizing Indigenous Legal Orders Today" (2016) 61:4 McGill LJ 847 at 854.

45 *Federal Courts Act*, *supra* note 26, ss 2, 18.

46 As per section 101 of the *Constitution Act*, *1867* (UK), 30 & 31 Vict, c 3, reprinted in RSC 1985, Appendix II, No 5. See *ITO–Int'l Terminal Operators v Miida Electronics*, 1986 CanLII 91 at 766, 777 (SCC).

themselves as constituting a traditional or otherwise independent body exercising inherent jurisdiction that is simply given effect through the act, courts have tended to confirm their own jurisdiction over band councils when they exercise powers granted under the act.[47] Consequently, the Federal Court has ruled that band custom "has recognition as law by reason of federal statutory law" conferring *Indian Act* status on the council,[48] with the result that the usual range of remedies in administrative law apply whenever the council or electoral officers purport to apply custom.[49]

However, when band councils are following customary practices in their very selection processes it is less clear how this could be a delegated power; the authority to *enact* custom election codes is certainly not specifically granted by the *Indian Act* or other federal legislation.[50] Thus, in *Bone v. Sioux Valley Indian Band No. 290 Council* (1996), Justice Heald of the Federal Court Trial Division held that section 2 of the *Indian Act* is a "definition" provision rather than an "empowering" provision, such that the power of the band to choose its council via a customary method is "a power [that] the Band has always had" left largely intact by the *Indian Act*.[51] The issue in that case was whether the act of determining the band's selection processes was an exercise of "a power conferred on a band" that under section 2(3)(a) of the *Indian Act* requires the consent of a majority of electors.[52] In *Goodtrack v. Canada (Attorney General)* (2006), it

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47 See *Gabriel v Canatonquin*, in which the court made the point that the powers exercised under section 18 of the *Indian Act* were similar to those of a municipal government (see 1977 CarswellNat 84 at paras 10–15, 1977 CanLII 3146 (FCTD), aff'd 1980 CanLII 4125 (FCA)). See also *Ratt v Matchewan*, 2010 FC 160 at para 103 [*Barriere Lake*]; *Gamblin*, *supra* note 42 at para 40. Concomitantly, the court would have no jurisdiction where the decision made by an *Indian Act* band council under traditional authority exceeds the powers conferred by the Act, such as when it extends beyond the reserve territory (see e.g. *George v Heiltsuk First Nation*, 2023 FC 1705 at para 3).

48 See *Frank v Bottle*, [1993] FCJ No 670 at para 19, 1993 CarswellNat 469 (FCTD); *Francis*, *supra* note 28 at para 17.

49 See *Bone v Sioux Valley Indian Band No 290 Council*, 1996 CarswellNat 150, [1996] 3 CNLR 54 (FCTD) [*Bone*].

50 *Pastion*, *supra* note 42 at para 7; *Kennedy v Carry the Kettle First Nation*, 2020 SKCA 32 at para 7 [*Kennedy*].

51 *Supra* note 49 at paras 32–33.

52 *Ibid* at para 29. While the power to make by-laws is delegated to the Council, it is the membership as a whole which holds the inherent power recognized in section 2 (see *Whalen*, *supra* note 19 at paras 68, 77). The "inherent jurisdiction" position is

was argued by extension that custom leadership selection processes "are not held under the authority of an Act of Parliament," which is why the minister has no oversight over or authority with respect to them.[53] Justice Mandamin has characterised First Nations' capacity to make election laws in even stronger terms as "a result of the exercise of the First Nation's aboriginal right to make its own laws concerning governance."[54]

The Federal Court's position on the federal government's jurisdiction seems to confirm this stronger characterisation: because the First Nation is exercising an authority that does not originate in a law of Parliament, the department has no role in establishing or interpreting customary law with respect to leadership selection.[55] By the same token—and from a broader perspective in which, historically speaking, Indigenous peoples in Canada have not voluntarily ceded their sovereignty even as some accept being part of Canada through treaties—it is hard to justify why an outside court would have jurisdiction either. Indeed, many would understand those treaties as setting *Indigenous law*s as the grounds by which newcomers were historically invited into the territory.[56]

The Federal Court has not been sympathetic to these arguments, ruling blankly, for example, in the case of the Algonquins of Barriere Lake, that "irrespective of whether or not the selection process flows ... from ancient custom, or from custom developed pursuant to the revocation of an order under section 74 of the Act[,] ... this Court has jurisdiction."[57] In their reasoning, band councils exercise powers under the *Indian Act*, and

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consistent with the Supreme Court's dictum that customary law survives the Crown's assertion of sovereignty and intervening legislation in the context of Aboriginal rights (see *Mitchell v MNR*, *supra* note 39 at para 10).

53 *Goodtrack*, *supra* note 28 at para 8.

54 *Gamblin*, *supra* note 42 at para 34.

55 *Goodtrack*, *supra* note 28 at para 8.

56 Shiri Pasternak, "Jurisdiction and Settler Colonialism: Where Do Laws Meet?" (2014) 29:2 CJLS 145 at 161. On treaties as emerging from Indigenous legal orders, see generally Aaron Mills/Waabishki Ma'iingan, "What Is a Treaty?: On Contract and Mutual Aid" in John Borrows & Michael Coyle, eds, *The Right Relationship: Reimagining the Implementation of Historical Treaties* (Toronto: University of Toronto Press, 2017) 208.

57 See *Barriere Lake, supra* note 47 at para 106. See also *Ermineskin Cree Nation v Minde*, 2008 FCA 52 at para 33 [*Minde*]; *Bellegarde v Poitras*, 2009 FC 968 at paras 27–28 [*Bellegarde*], aff'd 2011 FCA 317.

the proper application of traditional leadership selection codes is taken here as a "condition precedent ... to the recognition of a band council under that Act,"[58] making those decisions subject to judicial review. Even the decisions of bodies such as an elders council that is not a creature of the *Indian Act* are reviewable if they pertain to the selection of the council: jurisdiction of the court is "based on the [Indigenous body's] authority to decide" a matter that will take effect under the *Indian Act*.[59] Formal recognition thus appears to have the effect of transforming inherent jurisdiction into an exercise of federal power—in the same way that Aboriginal rights became the law of Canada in the meaning of section 101 of the Constitution,[60] "[A]boriginal customary law ... is an emanation of the federal common law"[61] for certain purposes. Further, where there are no appeal mechanisms internal to the First Nation or where they are not being followed, the court sees itself as at least making a remedy available.[62]

The status of customary leadership selection—an exercise of inherent jurisdiction—as an Aboriginal right, raises the question of whether both or either the *Indian Act* regime and/or subsequent judicial review of decisions, constitute an infringement of practices protected by section 35(1) of the *Constitution Act, 1982*. As Justice Mandamin implies, practices for determining leadership and related decision-making processes can be readily understood as being integral to the distinctive culture of the Aboriginal group, and may, if long-standing, be continuous with customs practiced prior to contact with Europeans, both elements of the test for Aboriginal rights in *R v. Van Der Peet*.[63] If a right to a leadership custom is established, then any governmental interference would have to pass the *Sparrow* test that requires a valid objective, as little infringement as

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58 *Barriere Lake, supra* note 47 at para 103.

59 *Minde*, *supra* note 57 at para 33. See also *Kennedy*, *supra* note 50 at para 33.

60 JM Evans & Brian Slattery, "Federal Jurisdiction—Pendent Parties—Aboriginal Title and Federal Common Law—Charter Challenges—Reform Proposals: *Roberts v. Canada*", Case Comment (1989) 68:4 Can Bar Rev 817 at 832, cited in *Barriere Lake*, *supra* note 47 at para 102.

61 *Barriere Lake*, *supra* note 47 at para 102.

62 *Beardy v Beardy*, 2016 FC 383 at para 58 [*Beardy*].

63 *Supra* note 36. Further, leadership selection is a specific practice capable of proof, not an ambit claim to self-government like the one that the Court rejected in *Pamajewon*, *supra* note 38. Note that the "Aboriginal rights" argument in *Francis* was rejected because the custom in question was not "traditional" (see *supra* note 28 at para 78).

possible in order to achieve that objective, and consultation with the Aboriginal group affected with respect to achieving the objective for justifiable infringement.[64]

In discussing legislative infringements of the inherent right to Indigenous self-government, Kent McNeil argues convincingly that there seems to be prima facie infringement in cases like that of the Six Nations, where the imposition of the electoral system through section 74 impacted the ability of the hereditary chiefs to act in their traditional role. However, he continues, for cases in which customary leaders prevail but, due to the operation of the *Indian Act*, their power is only recognized by the government in terms of delegated statutory powers, infringement would depend on whether the statutory powers "curtailed or replaced" the authority of leaders under their traditional form of government, rather than merely complementing them.[65] He concludes that since the *Indian Act* does not purport to take away any inherent powers, the statutory authority appears to be an addition to those powers, and so not an infringement of a right to self-government.[66] Nevertheless, this analysis leaves open the possibility that some of the administrative actions discussed in Part II of this article may not pass the *Sparrow* test.

As for whether judicial review might itself constitute infringement, the courts are not usually considered actors who have the capacity to infringe constitutional rights. *Charter* rights *can* be enforceable against courts when they relate to actions that are their responsibility—the guarantees to criminal defendants in section 11,[67] or where the court's action is public in nature—such as when a judge issued an injunction under his own motion in *British Columbia Government Employees Union v. British Columbia (Attorney General)*.[68] While the text of section 35 does not state its own reach in this respect, it has been taken to have the purpose of reconciling pre-existing Aboriginal societies with the assertion of Crown sovereignty through the duty to consult or the requirement that infringement

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64 *R v Sparrow*, [1990] 1 SCR 1075 at 1111ff, 1990 CanLII 104 (SCC) [*Sparrow*].

65 McNeil, "Challenging Legislative Infringements", *supra* note 6 at 342. This may not be the case, of course, for ministerial decisions to impose section 74 elections.

66 *Ibid*.

67 See Peter W Hogg, *Constitutional Law of Canada: 2013 Student Edition* (Toronto: Carswell, 2013) at 37–21.

68 1998 CanLII 3 (SCC).

be justified.[69] In the jurisprudence on these principles, it is implicit that the judicial branch is excluded from the term "Crown": for example, when government bodies are exercising quasi-judicial functions, rather than policy ones, they are held not to be subject to fiduciary duties lest the independence of the judicial function be compromised.[70] None of this jurisprudence addresses the larger question of how Canadian courts come to have jurisdiction over Indigenous governments through the power to review leadership decisions based on custom, of course, although the courts have uniformly dismissed any claims that Indigenous peoples are not subject to the laws of Canada and thus the authority of the courts.[71]

A problem of a different order is that the assertion of de jure capacity to decide in disputes about custom codes does not mean that federal courts are necessarily well prepared to determine the content of Indigenous law. Many contemporary First Nations governance institutions operate as a hybrid of Western democratic traditions and Indigenous traditions.[72] The applicable law governing the dispute may be in oral form only, embedded in practice, or in a language for which the court will require translations.[73] The conventional understanding of law as prescriptive rules may lead to the articulation of custom in the abstraction of propositional form, divorced from its procedural and cultural context.[74]

In the years since this research began (around 2010), the Federal Court has developed better expertise: Justice Mandamin, an Anishinaabe jurist with experience developing alternative Indigenous peacemaking in

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69 *Sparrow*, *supra* note 64 at 1119; *Haida Nation v British Columbia (Minister of Forests)*, 2004 SCC 73.

70 *Quebec (Attorney General) v Canada (National Energy Board)*, [1994] 1 SCR 159 at 183–84, 1994 CanLII 113 (SCC).

71 See *Mitchell v MNR*, *supra* note 39 at para 133; *R v David*, [2000] OJ No 561 at para 19, 2000 CarswellOnt 540 (ONSC); *R v Yellowhorn*, 2006 ABQB 307 at para 33.

72 The hybridity of Indigenous institutions is noted by Justice Grammond in *Pastion*, *supra* note 42 at para 14.

73 For instance, Aaron Mills comments that Anishinaabe law lies more in the "how" (living practice) than the "what" (substantive content like rules) (see "Driving the Gift Home" (2016) 33:1 Windsor YB Access Just 167 at 168).

74 For criticisms of courts' reception of evidence of tradition in the context of Aboriginal rights, see Val Napoleon, "*Delgamuukw*: A Legal Straightjacket for Oral Histories?" (2005) 20:2 CJLS 123.

the criminal law context, sat from 2008 until his retirement in 2019 on a number of custom election cases; Justice Mainville, co-author of the textbook *First Nations Governance Law*, brought his career-long experience in Aboriginal and Indigenous law to the bench in 2009; and, a former professor specializing in the recognition of Indigenous law in Canada, Justice Grammond, has helped situate the jurisprudence in the growing scholarship on Indigenous legal orders since his appointment in 2017. Thanks to improved legal education in this area, other judges are also making more informed decisions. Nevertheless, the judiciary as a whole tends not to appreciate—or are unable to act on—the deeper level at which Indigenous constitutional logic or legality may not be amenable to determinative rulings as to the "content" of Indigenous law. The following sections explore the ways in which the judiciary has attempted to define, identify, and apply custom in a range of governance issues that have been brought before the courts.

### *B. Judicial Definition of Custom*

The leading jurisprudence on custom elections demonstrates the tensions in judicial determinations of custom between the recognition of Indigenous legal thought and the overarching application of contemporary administrative law or democratic principles such as procedural fairness, transparency, and accountability. There are difficulties in the way the collective practices and understandings of First Nations communities are translated into the evidentiary and procedural context of the Federal Court. In particular, there is a great deal of variability in the means for determining whether a Band has adopted a practice or custom code, the normative character of the rules, and the source of their authority.

The case accepted as laying out the basic definition of custom in this context is *Bigstone v. Big Eagle*, in which Justice Strayer stated that unless it is defined otherwise, custom includes "practices for the choice of a council which are generally acceptable to members of the band, upon which there is a broad consensus."[75] As elaborated by Justice Martineau in *Francis v. Mohawk Council of Kanesatake (T.D.)*, there is an objective component—the practice must exist as something adopted or established by the band as a whole and be identifiable (by implication by outsiders)—and a

75 [1992] FCJ No 16 at para 21, 1992 CarswellNat 721 (FCTD) [*Bigstone*].

subjective component—the group *accepts* to be governed in this way, such that the custom is a manifestation of its members' will.[76] Formulated this way, custom is thus a question of empirical reality and of "political ... legitimacy"—understood as a matter of will—rather than as a result of any given procedure.[77] Consistent with the usual meaning of custom, electoral customs do not necessarily have to be written,[78] and a customary practice can be established through repetitive acts in time: customs are "firmly established, generalized and followed consistently and conscientiously by a majority of the community."[79] However, Justice Martineau cites with approval the earlier case of *Mcleod Lake Indian Band v. Chingee* (*Mcleod*) in which a single "adoption" of an electoral code or leadership selection practice can constitute custom if it can be said to represent the will of the band,[80] stamping custom with a distinctly legislative cast.[81]

Given that most First Nations operating under custom leadership selection have codified their customs, identifying custom has in many cases become an exercise in statutory interpretation. For example, in deciding that the Algonquins of Barriere Lake Elders Council had acted outside the limits of its authority in appointing a facilitator to hold a leadership selection, Justice Mainville cited § 3.10 of their codified custom, the *Mitchikanibikok Anishinabe Onakinakewin*, which gave them only a limited mandate to *review* election of members of the board of directors.[82]

Although unwritten customs may supplant or amend the written code from time to time, the weight of the written word means the courts tend to look to the code as the primary indicator of the collective will of

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76 *Supra* note 28 at paras 23–26.

77 *Pahtayken v Oakes*, 2009 FC 134 at para 55 [*Pahtayken* FC 2009], aff'd 2010 FCA 169 [*Pahtayken* FCA]. Justice Russel held that procedural irregularities in a referendum establishing a new electoral code did not negate the broad support of the community (see *Pahtayken* FC 2009, *supra* note 77 at para 83).

78 See *Bone*, *supra* note 49 at paras 26, 56.

79 *Francis*, *supra* note 28 at para 36.

80 *Ibid* at para 24.

81 Indeed, Justice Grammond notes that "the written product[s] of public deliberation" still fall squarely within Professor John Borrows's typology of Indigenous legal sources in contemporary Canada, such that "'Indigenous legislation' would be more apt than 'custom' to describe ... Election Regulations" (see *Pastion*, *supra* note 42 at para 13).

82 *Barriere Lake*, *supra* note 47 at para 35.

the band if it has been adopted by a majority at a duly convened meeting.[83] In *Bruno v. Samson Cree Nation*, the community's election appeal board annulled an election result on the basis that the electoral supervisor had contravened an established practice of that band and of neighbouring Cree communities that individuals would be turned away when poll booths closed at 6:00 p.m. unless ballots had been issued to them.[84] In overturning the board's decision, the Federal Court of Appeal pointed to the preamble to the election law which declares the code to represent "current customs and traditions with respect to the establishment and selection of their Chief and Council" and to section 109 that requires a majority vote to amend the election law, holding that alternative practices that develop are not "customs" in the relevant sense.[85] Similarly, in *Basil v. Moses* (*Basil*), a claim that a panel of elders had inherent traditional jurisdiction to impeach sitting council members independently of the provisions of the written electoral code was rejected since the code was found to "cover the field" regarding impeachment.[86]

Further, the regular standards of judicial review applied to decisions made under custom codes pit the interpretive expertise of the court against that of Indigenous decision-makers. Following the Supreme Court's 2008 decision in *Dunsmuir v. New Brunswick* (*Dunsmuir*),[87] in the absence of special expertise or a "privative clause" that deems the decisions of electoral bodies to be final, a strict standard of correctness—requiring decision-makers' interpretation of legal questions to be legally correct according to the court's own interpretation—might be applied. For example, in one case, decided shortly after *Dunsmuir*, the elected

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83 *Mcleod*, *supra* note 18 at paras 18–19.

84 *Bruno v Samson Cree Nation*, 2006 FCA 249 at para 4 [*Samson Cree Nation*]. Section 58 of the *Samson Cree Nation Election Law* stated: "All voting locations shall be open at 9:00am and shall be open until 6:00pm" (*ibid* at para 10). At 6:00 pm, the electoral supervisor had allowed all those present at the voting location to enter the premises, the doors of which were then locked, and to after cast their vote (*ibid* at para 32).

85 *Ibid* at paras 34, 36, 39. Although the relevant section of the election law was open to an interpretation consistent with the longstanding practice, the court's decision was that the election supervisor's alternative interpretation was an appropriate exercise of her discretion under section 16 of the law as the "person authorized to conduct the entire administration and process of the election" (*ibid* at paras 10, 39).

86 2009 FC 741 at para 65.

87 *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 55.

council was considered to have no more expertise than a court in interpreting their own written custom codes.[88] However, more recent cases take *Dunsmuir's* rationales for presumptive deference to administrative decision-makers to be especially pertinent in the case of Indigenous bodies who are nearly always in a better position to understand the purpose and context of Indigenous laws than a court, and whose decisions should thus prevail unless they fail the standard of reasonableness.[89] Deference is considered, additionally, to be part of the respect owed to Indigenous self-government rights.[90] Nevertheless, if a decision by such a body cannot be supported by the words of the code accepted to represent the custom it may be deemed unreasonable.[91]

Sometimes, though, informal practices might hold more sway. In contrast to *Samson* and *Basil*, Justice Parrett in *Napoleon v. Garbitt* held that although the *Saulteau Indian Band Government Law* included strict amendment procedures, the fact that, as one affidavit put it, Saulteau "custom [has] always been more informal" than the written terms of the law indicated[92] meant that a succession of more informal attempts to seek consensus on amendments to the law could effectively demonstrate a change in custom.[93] Evidence was submitted relating to a number of occasions in which amendments had apparently been made, after which a majority of band members participated in elections organized on the basis of those changes and did not object.[94] Thus, as Justice Martineau put it, "[i]t is

88 See *Salt River Nation #195 (Salt River Indian Band #759) v Martselos*, 2008 FCA 221 at para 30.

89 *Johnson v Tait*, 2015 FCA 247 at para 28; *Lavallee v Ferguson*, 2016 FCA 11 at para 19; *Henry v Roseau River Anishinabe First Nation*, 2017 FC 1038 at paras 72–73; *Pastion*, *supra* note 42 at paras 18–28. This approach of deference to Indigenous decision-makers has continued following the reformulation of standards of review in *Canada (Minister of Citizenship and Immigration) v Vavilov, 2019 SCC 65*: see Promislow & Metallic, *supra* at 169.

90 *Commanda v Algonquins of Pikwakanagan First Nation*, 2018 FC 616 at para 19, aff'd 2019 FCA 76.

91 *Fort McKay First Nation v Orr*, 2012 FCA 269 at paras 11–12. See also *D'Or v St Germain*, 2014 FCA 28 at para 13.

92 The law having been codified, after all, only as a requirement of Indigenous and Northern Affairs Canada in order to repeal the section 74 designation.

93 *Napoleon v Garbitt*, 1997 CanLII 3663 at paras 45–57 (BCSC) [*Garbitt*], cited in *Francis*, *supra* note 28 at para 33.

94 *Garbitt*, *supra* note 92 at paras 47–48.

quite common that behaviours arising through attitudes, habits, abstentions, shared understandings and tacit acquiescence develop alongside a codified rule and may colour, specify, complement and sometimes even limit the text of a particular rule."[95] This is always a question of fact: even if multiple affidavits attest to the existence of a custom, for example, a practice contradicting those statements will undermine the appearance of consensus.[96]

Consensus is key, then, but can be demonstrated in a variety of ways, such as voting or tacit acquiescence. But while the courts tend to take a majority vote as proxy for broad consensus, the most important criterion seems to be that consensus is attained via conditions related to procedural fairness and democratic principles. In *Mcleod*, a dispute arose over election procedures—adopted at a general meeting of the band—that purported to alter the customary process. Justice Reed held that while an absolute majority of adult band members is "probably a safe indication of a broad consensus," a majority of those present at a meeting would only safely constitute consensus if reasonable notice had been provided, the meeting was held in a practicable location, and proxy voting was made available for those unable to attend.[97] In *Bone v. Sioux Valley Indian Band*, the fact that slightly less than half of all eligible members voted in the election of chief organized according to a drafted custom election code and that apparently no member objected to the conduct of the elections in this manner, was read as endorsing the code as band custom.[98] In *Pahtayken v. Oakes*, there was an active boycott of the vote on the adoption of the *Nekaneet Constitution* and *Nekaneet Governance Act* by members who

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95 *Francis,* supra note 28 at para 35.

96 In *Beardy*, the respondents' assertion that a custom that a member of council who resigned would not qualify to run in the resulting election was supported by multiple affidavits; the fact that the applicant chief had resigned and run for re-election multiple times previously meant the custom could not be considered to have been practiced consistently and accepted by a majority of band members (*Beardy*, *supra* note 62 at para 102). Justice Strickland was not willing to accept that the broader principle of elders being respected advisors in election matters covered the matter even in the absence of evidence about the specific practice: "[I]t is the practice pertaining to a particular issue or situation that must be established to demonstrate accepted custom" (*ibid* at para 103).

97 *Mcleod*, *supra* note 18 at paras 18–19.

98 *Supra* note 49 at para 65.

disagreed with it, with a petition signed by 113 people.[99] However, unlike the petition, the adoption of the constitution by the same number of votes (with voting by less than a majority of eligible voters) took place publicly by secret ballot under independent supervision, and with notice providing a range of opportunities to all band members to participate.[100] Thus, even in a community observed as being "deeply divided," the court found "broad consensus" by favouring processes that were "broadly in line with current notions of open and transparent democratic practices."[101]

Even very low levels of participation have been held sufficient to establish custom absent significant opposition, provided the process establishing the custom was sufficiently open or transparent. Justice Blais in *Awashish v. Opitciwan Atikamekw Band Council* stated that "it was [not] necessary for the Council to proceed by referendum in order to ensure that it had the support of a majority of the public before adopting the Electoral Code" since it had followed an open process allowing for public input, and adoption of the code by acclamation at a public assembly, and voters subsequently acquiesced to its operation in the following election.[102] Low voting levels may be acceptable particularly where, as in *Lac des Mille Lacs First Nation v. Chapman*, "[t]here is a pattern of general non-participation even by known members who are eligible to vote" or where there are difficulties in locating members, if they are balanced by subsequent acquiescence to the use of the code.[103] On the other hand, the practice pertaining to the rule in question must be "generalized and followed consistently"[104] so as to exclude merely "sporadic behaviours," ad hoc adjustments or changes aimed at remedying punctual and exceptional difficulties, and "other practices which are clearly understood within the community as being followed on a trial basis."[105] Although band officials or other individuals do not have the power to change custom on their own, acquiescence

99 *Pahtayken* FCA, *supra* note 77 at para 6.

100 *Ibid* at para 7.

101 *Ibid*.

102 *Awashish v Opitciwan Atikamekw First Nation*, 2007 FC 765 at para 40.

103 1998 CanLII 8004 at para 29 (FCTD). See also *Bone, supra* note 49 at para 65.

104 *Francis*, *supra* note 28 at para 36.

105 *Ibid*. See also *Vollant v Sioui*, 2006 FC 487 at para 39.

to or inaction in relation to a procedure initiated by one or more individuals can constitute custom in this context.[106]

While it might be familiar to judges, using majority voting as a proxy for consensus is controversial. As the defendants in *Mcleod* argued, initiating a majority vote procedure to determine how selection takes place may itself impose a method inimical to custom.[107] Traditional governance through consensus for Haudenosaunee peoples, for instance, together with the importance of individual autonomy, is interpreted as excluding majority voting as a process of decision-making since no one, even in majority, should have the power to force their decisions on others.[108] Yet courts' interpretation of written codes is infused with legal principles drawn squarely from Canadian law on this and other matters. In *Ratt v. Mattchewan*, Justice Mainville's decision that the elders council had demonstrated bias—in resisting review of Chief Maurice Matchewan's leadership over the years, and initiating a leadership selection to dislodge the leader of the opposing faction, Chief Casey Ratt—relied on § 3.11(4), which states that "[n]o member of the Council of Elders shall vote or support any candidate in the Election."[109] But he also imposed a public law duty of fairness and impartiality on the elders council, finding "comfort" in unspecified aspects of the *Mitchikanibikok Anishinabe Onakinakewin* itself, which "incorporate the cultural values of respect, unity and good faith."[110] As Lorne Sossin comments, while there may be features of administrative law with a claim to universality, others ultimately reflect a view of justice in a particular time and cultural setting. It may be, for example, that the presumption that a decision maker can only act fairly when there is no connection to the parties affected by the decision is not only impractical in small communities but contradicts an

106 See *Wanderingspirit v Marie*, 2003 FCT 670 at para 47; *Bone*, *supra* note 49 at para 29; *Mcleod*, *supra* note 18 at para 13.

107 *Mcleod*, *supra* note 18 at para 17.

108 See Kahente Horn-Miller, "What Does Indigenous Participatory Democracy Look Like?: Kahnawà:ke's Community Decision Making Process" (2013) 18:1 Rev Const Stud 111 at 116–18; Amber Meadows Adams, "Seyakhikwatakwénnis ne Tehontatenentshonteronhtáhkwa: Grasping the Chain Again" (2025) 20/21:1 Ind LJ 144 at 20–21.

109 *Amendment to the Codified Custom Concerning the Board of Directors*, § 3.11(4), reprinted in *Barriere Lake*, *supra* note 47, Schedule.

110 *Barriere Lake, supra* note 47 at para 134.

Indigenous view that fairness is enhanced by relationships and responsibilities between the parties.[111]

In sum, although a lot of weight is given to written codes, especially if they purport to exclusively represent the band's custom, as Justice Martineau ruled in *Francis*, "[t]he relevant question is whether a particular rule in an electoral code also exists as a customary rule, either because the code has merely codified the custom of the band, or caused it to 'crystallise,' or because [the code] has influenced [the] subsequent adoption [of the customary rules]."[112] The courts appear to be attempting to recognize, and give normative force to, the "customary" law of Indigenous communities. At the same time, the factors they use to determine the validity of purported custom or changes to custom seem to refer less to Martineau's description of the "behaviours, attitudes, habits, abstentions, [and] shared understandings"[113] that might reflect customary law of the community in question, and more to an electoral equivalent of the administrative law standards of procedural fairness (including meeting availability, sufficient prior notice, disclosure of information necessary for participation and the availability of proxy voting), and democratic notions of openness and transparency.[114] The interpretation of a custom code electoral system is thus made "with an eye to the preservation of democratic principles and outcomes,"[115] even, as we saw in the case of the Algonquins of Barriere Lake, when the custom involves "ancient" practices rather than contemporary electoral-style codes, or when democracy is not majoritarian.

The larger issue is, of course, the extent to which electoral models are lived, not as welcomed democratic initiatives but as ushering in divisive politics for communities with consensus-based traditions—an arithmetic that favours larger family groupings, and an egalitarianism that

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111 Lorne Sossin, "Indigenous Self-Government and the Future of Administrative Law" (2012) 45:2 UBC L Rev 595 at 605–06.

112 *Supra* note 28 at para 34.

113 *Francis,* supra note 28 at para 35.

114 See *Pahtayken* FCA, *supra* note 77 at para 7. Colleen M Flood and Paul Daly, for instance, write that procedural fairness includes notice, disclosure, participation and reason-giving: "A Map for the Complex World of Administrative Decision-Making and Law" in Colleen M Flood & Lorne Sossin, eds, *Administrative Law in Context* (Toronto: Emond Montgomery, 2022) at 26.

115 *Oakes v Pahtayken*, 2010 FC 1266 at para 19.

undermines the standing of hereditary chiefs, elders or clan mothers.[116] But within the more narrow issue of review by the Federal Court, the examples also beg the question of whether decisions on custom should be subject, instead, to the interpretive guidance of bodies consistent with more traditional forms of dispute resolution or guidance such as elders councils.[117] On this point, it seems that the recognition of custom can never satisfactorily be reduced to the cognizance of a particular fact, but always returns to the question of jurisdiction, or juris-diction: who gets to speak the law.

### C. *Defining Membership*

In the terms of the cases discussed above, custom might be seen as the law spoken by a community through its practices. But if a band's custom is a practice "generally acceptable to members of the band" as demonstrated by a "broad consensus," the question of who is included in the calculus of consensus is crucial. Although prior to 1985 a member of a "band" under the *Indian Act* was necessarily a "registered Indian," the Bill C-31 amendments to the act's status provisions created the possibility for First Nations, following a majority vote of eligible electors, to maintain a separate membership register based on their own criteria that might differ from—and thus be more or less inclusive than—the act's status rules.[118] Bands who did not opt out continue to have their band membership lists overseen by the department. However, the question of who has "membership" depends on context. For instance, because the Mohawks of Kahnawà:ke did not seek ministerial approval for their membership law, the membership list used by the Mohawk Council of Kahnawà:ke differs from that held by the department. Although the

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116 Otis, *supra* note 17 at 407. See also Horn-Miller, *supra* note 108.

117 For more regarding the role of elders councils in matters of resolving disputes, see *Report of the Royal Commission on Aboriginal Peoples*, vol 2, *Restructuring the Relationship*, Catalogue No Z1-1991/1-2E-PDF (Ottawa: Canada Communication Group, 1996) (Chairs: René Dussault & Georges Erasmus) part 1 at 126–27. See also Tim Plumptre & John Graham, "Governance and Good Governance: International and Aboriginal Perspectives" (Ottawa: Institute on Governance, 1999) at 13–14. For examples of litigation involving elders councils, see e.g. *Barriere Lake*, *supra* note 47; *Wawatie v Canada (Indian Affairs and Northern Development)*, 2009 FC 374 at paras 10–14; *Bellegarde*, *supra* note 57 at paras 5–8.

118 *Indian Act*, *supra* note 1, s 10.

council asserts the right to determine the recipients of band-controlled benefits, since the band's funding agreements with the federal government clearly anticipated that beneficiaries would be those on the ministry's band list who were "ordinarily resident" on the reserve, this group was therefore held to constitute the "members" for the purposes of distributing government benefits and services.[119] In contrast, eligibility to vote in Mohawk council elections was held to be governed by the ministerial order permitting the council to conduct its elections in accordance with the Mohawk law, which implicitly accepted the Mohawk membership law's criteria as governing membership of the voting public.[120]

When a band requests acceptance of a membership code under section 10, a double majority of eligible electors under the *Indian Act*—that is, status Indians with membership of the band—must approve.[121] But what about the case where eligibility to participate in a consensus on custom itself is a matter of custom? The statement by Justice Strayer in *Bigstone*, accepted in subsequent cases, was that a "majority consensus" is determined with respect to "those who, on the existing evidence, *appear to be* members of the band."[122] That case involved the creation of a new band and corresponding reserve, where voting on a new constitution and election of chief and council took place in a transition period in which individuals were transferring their band membership from the old band to the new one. Since the definition of band member in section 2 of the *Indian Act* includes persons "*entitled* to have [their] name appear on a band list,"[123] the band list itself was not determinative. However, because the issue concerned voting on the new constitution itself, the criteria for membership had not yet been determined. Essentially, writes Justice Strayer, the question is "one of political, not legal, legitimacy," and the

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119 *Jacobs v Mohawk Council of Kahnawake*, 1998 CanLII 3994 (CHRT).

120 *Ibid* at 23, 26.

121 See *Abenakis of Odanak v Canada (Indian Affairs and Northern Development)*, 2008 FCA 126 at paras 40–46.

122 See *Bigstone*, *supra* note 75 at para 21 [emphasis added]. It should be noted that in that case, which has provided the standard cited in subsequent jurisprudence, the question of majority consensus was difficult in particular because it dealt with two bands that were dividing from one another after having previously been combined ninety years earlier.

123 *Supra* note 1, s 2 [emphasis added].

applicants in the case had not raised any serious doubts as to the ineligibility of impugned individuals to vote.[124]

In *Eikland v. White River First Nation*, a majority of "citizens" eligible to vote, as defined in the nation's written constitution adopted in the context of yet-to-be completed comprehensive land claim, were not even residents of Canada.[125] When one party in an election sought to change the eligibility criteria by proposing a referendum, the judge decided that—given that White River First Nation was an Indian band under the *Indian Act* and that the constitution was adopted in anticipation of a self-government agreement that would oust the *Indian Act*—allowing only status Indians to vote would enable the appropriate pool of members to demonstrate a consensus.

The recurrent issue of whether or not off-reserve members constitute part of the polity that determines customary practice has been largely dealt with as a question of *Charte*r compliance.[126] In *Corbiere v. Canada (Minister of Indian and Northern Affairs)* (*Corbiere*), the Supreme Court found that *Indian Act* elections that disqualified off-reserve band members for voting or running for office were discriminatory pursuant to section 15(1) of the *Charter* on grounds analogous to race, namely "aboriginality-residence."[127] Subsequent decisions by the Federal Court have held that residency requirements in custom codes that limit candidates for chief and council, or electors, to community members who live on reserve or on traditional territory are discriminatory for the same reasons.[128]

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124 *Bigstone, supra* note 75 at paras 20–22.

125 The White River First Nation provisional self-government agreement provided that beneficiaries/citizens did not have to have Indian status or be registered as a member of the band within the meaning of the *Indian Act* but were instead defined on the basis of sufficient connection to the first nation. Because of this, 138 of 232 eligible voters under the act were residents of Alaska, whereas others were in the lower 48 states. The decision to exclude Alaskan residents as "non-status citizens" in the subsequent referendum was not opposed by any of the parties to the dispute (*Eikland v Johnny*, 2010 FC 854 at paras 15–19).

126 See *Francis*, *supra* note 28 at paras 31, 76.

127 *Corbiere v Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC).

128 See *Gros-Louis v Nation Huronne-Wendat (Conseil)*, [2000] FCJ No 1529 at para 4, 2000 CarswellNat 3355 (FCTD); *Hall v Dakota Tipi Indian Band*, 2000 CanLII 14944 at para 2 (FCTD); *Gabriel v Mohawk Council of Kanesatake*, 2002 FCT 483 at paras 13–14; *Clifton*

Relying on standard electoral practices—such as registration of eligible electors or secret ballot—as the guarantee of broad participation can have negative consequences if they overlook Indigenous legal practices or lived realities. The *Corbiere* requirement that mail-in ballots be used to allow participation by off-reserve members has been criticized for the potential for ballot manipulation.[129] Verifying residence to the satisfaction of governmental authorities may exclude those Indigenous persons living a more "on-the-land" based or traditional lifestyle. One chief whose First Nation operates with a custom election code testified to the Senate Standing Committee on Aboriginal Peoples in 2012 as to the problems that arise when regulatory authority over elections lies outside any decision-making authority of the First Nation:

> [C]hanges made by the provincial cabinet meant we, as a First Nation, could not confirm our voter identity of our own band members because many of our band members live off the land and many do not have fixed addresses on their identification ... [which] was a major barrier to participation in voting.[130]

Secret ballots, also a seemingly uncontroversial good governance practice in other contexts, actually prevent some customary practices of leadership selection "at the higher leadership levels ... [where] it is still common that people will stand behind their chosen leader."[131]

## CONCLUSION

These cases show that in the court's recognition of Indigenous custom, the question of the "meta-custom"—the custom for modifying or identifying custom—has generally been disregarded in the pursuit of an understanding of "broad consensus" in familiar terms as a process of

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*v Hartley Bay Indian Band*, 2005 FC 1030; *Thompson v Leq'a:mel First Nation*, 2007 FC 707; *Joseph v Dzawada'enuxw (Tsawataineuk) First Nation Band Council*, 2013 FC 974.

129 See Senate, Business Committee, *First Nations Elections: The Choice Is Inherently Theirs; Report of the Standing Senate Committee on Aboriginal Peoples* (May 2010) (Chairs: Hon Gerry St Germain & Hon Eva Dyck) at 12, online (pdf): <sencanada.ca> [perma.cc/J764-TD74].

130 The changes made by the provincial cabinet referred to are those that impose the requirement of a fixed address as a pre-requisite to voter eligibility (Senate, *Proceedings of the Standing Senate Committee on Aboriginal Peoples*, 41-1, No 12 (29 February 2012) at 12:38 (Tammy Cook-Searson)).

131 *Ibid* at 12:42 (Derek Nepinak).

representative democracy.[132] We might even put it more strongly as a matter of ignoring Indigenous theory about what constitutes law in favour of rather vague and under-theorized notions of custom as the will of the majority. The examples demonstrate the dangers of imposing even a seemingly straightforward requirement such as mail-in ballots, secret ballots, and voter registration, without consultation with First Nations. The rules can be insufficiently calibrated to the needs and ways of life of the Indigenous peoples to whom they are applied. The argument, then, is that the recognition of Indigenous custom cannot simply be a question of fitting Indigenous "perspectives" into a dominant framework of legal principles, criteria, and understandings of law and governance, but should enable that framework to be put into question: at the very least, judges called to adjudicate custom governance disputes should be attuned to what they may be missing, and adopt a posture of circumspection and humility.[133] This is the case particularly where the issue at stake is the interpretation of standards for determining the membership of political communities. More strongly, there should be maximal support for facilitating the adoption of home-grown governance models that include internal dispute resolution processes.[134]

The limited scope of Part I of this article has been to analyse the Federal Court jurisprudence on "custom" methods for selecting a council of chiefs who exercise powers under the *Indian Act*; it cannot stand in for an understanding of the larger struggle of Indigenous nations to exercise jurisdiction in their territories or to put their own distinct legal orders into practice. Nevertheless, especially for the large numbers of First Nations who live with custom selection regimes, focusing on these cases sheds light on one particular dimension of that struggle and provides a cautionary tale for judges and others about the paradox that even best efforts at recognising the distinctiveness of another's law can smuggle in our own

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132 See *Mcleod*, *supra* note 18 at para 17; *Francis*, *supra* note 28.

133 See Lindsay Borrows, "Dadaadendiziwin: Practices of Humility in a Multi-Juridical Landscape" (2016) 33 Windsor YB Access Just 149.

134 See, for instance, the recently inaugurated Kahnawà:ke Administrative Tribunal that works in parallel to a restorative justice program, Skén:nen Aonsón:ton, to deal with justice issues internally in the community (Maeve Haldane, "A New Milestone in Indigenous Legal Self-Governance" (25 February 2026), online: <mcgill.ca> [perma.cc/9L5X-36A5]).

unacknowledged expectations and standards. Another aspect of the broader context for custom governance disputes is that, as with the Six Nations in *Logan v. Styres et al.,* many First Nations must deal with the imposition of the *Indian Act* over their traditional governance institutions, and with the way it structures and exacerbates internal disagreements. It is to this aspect of custom leadership selection under the *Indian Act* that Part II of this article will turn.