

McGill Law Journal accessible summary:

How Canadian courts recognize First Nations' custom governance

By Kirsten Anker and William Shipley

Published in Volume 71, Issue 3, at pages 967–1000

Topic and importance

The first of two parts, this paper examines the role of the Federal Court of Canada in recognizing First Nations custom governance. As opposed to the standard elections legislated under the Indian Act, custom governance systems refer to leadership selection processes based on First Nations' own rules and traditions.

Because a majority of First Nations use custom governance systems, instead of Indian Act elections, leadership selection by custom is an important expression of Indigenous self-government. The issue, however, is that Canadian courts are called upon to settle disputes about the custom systems. This results in assessments of Indigenous self-government that filters the system to be understood through Western norms and principles of government. Even when courts have good intentions, this effect assimilates the custom systems through the Canadian legal standards of judicial review.

Main arguments

The Federal Court of Canada asserts jurisdiction over custom councils by classifying them as federal boards. This means that the Court treats them as administrative bodies of the federal government and subjects them to Canadian law, not Indigenous laws.

Courts privilege written electoral codes and use Canadian standards of reviewing a First Nation council's decisions when they try to interpret or define the applicable custom. This may distort the community's own understanding of the custom.

Courts do not treat customary law as an independent source of law; they approach customary law as an evidentiary fact that has to be proven. This reinforces the reliance on Western principles to understand the customary laws.

Conclusion and additional considerations

The current approach of understanding Indigenous customary law through a Western legal lens is incompatible with the genuine recognition of Indigenous self-government. Canadian courts should give more deference to First Nations when settling leadership disputes and rethink the current approach.

Interventions by courts can worsen internal community division and negatively affect negotiations of land claims or economic and infrastructure investments. The dynamic highlighted in this paper can also be found in land title cases, adoptions of Indigenous children, or membership disputes and can help reevaluate courts' approaches to those issues.