McGill Law Journal — Revue de droit de McGill

First Nations "Custom" Governance Disputes: Colonial Entanglement and the Paradoxes of Recognition — Part II: The Federal Government

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 s 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.

© Kirsten Anker and William Shipley 2026

Citation: (2026) 71:4 McGill LJ 1219 — Référence : (2026) 71:4 RD McGill 1219

This is an Open Access article distributed under the terms of the Creative Commons License CC-BY-ND (://creativecommons.org/licenses/by-nd/4.0/).

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.

* * *

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.

Introduction 1223

I. Entanglement: The Department's Non-Intervention as Intervention 1225
A. The Department as a Record Keeper: Band Lists, Customs Codes, and Election Results 1228
B. Third-Party Management 1233
C. Imposition of *Indian Act* Elections Through s. 74 1235

II. A Tale of Two "Non-Interventions": Consequences for First Nations 1239
A. Lubicon Cree 1240
B. Algonquins of Barriere Lake 1251

Conclusion 1258

INTRODUCTION

THIS is the second part of an article that addresses some of the paradoxes of the recognition of Indigenous law by state institutions, and the colonial entanglement that arises even when those institutions purport to be uninvolved in matters of the internal governance of Indigenous communities.[1] It focuses on one very specific part of that colonial infrastructure—"band councils" exercising powers under the *Indian Act* ["the *Act*"][2]—and one avenue in which Indigenous law is thereby recognised—the ability of First Nations to use their own "customs" to select those councils in lieu of the municipal-style elections of s. 74 of the *Act* or, since 2014, the *First Nations Elections Act*.[3] Part I gave an overview of the historical context for introducing "custom" as a means of selecting a chief or council via the definition of council in s. 2 of the *Act*, analysed the Federal Courts' jurisdiction, under s. 18 of its enabling legislation,[4] over disputes arising out of the application of that custom by Indigenous decision-makers, and reviewed the jurisprudence representing the Courts' exercise of that jurisdiction. It argued that judicial decisions about the content of custom—the "consensus of the band"—were largely and often implicitly made according to the norms of majoritarian politics and procedural legitimacy familiar to administrative lawyers, rather than an understanding of Indigenous peoples' own legalities. In that way it presented the

---

1 Kirsten Anker & William Shipley, "First Nations 'Custom' Governance Disputes: Colonial Entanglement and the Paradoxes of Recognition—Part I: The Courts" (2026) 71:3 McGill LJ 967 [Part I].

2 *Indian Act*, RSC 1985, c I-5, s 74.

3 *First Nations Elections Act*, SC 2014, c 5 [*FNEA*]. Note that we use the term Indigenous—prevalent in scholarship and International law—to refer collectively to the original peoples of Turtle Island / Canada, First Nations to refer to the sub-set of Indigenous peoples that are neither Inuit nor Métis and share the fact of being subjected to the *Indian Act*, Indian only in the title of that Act, Aboriginal in the context of constitutional rights that are held by First Nations, Métis and Inuit peoples, and First Nations' names and endonyms when referring to specific groups, nations or peoples: for an overview see Chelsea Vowel, *Indigenous Writes: A Guide to First Nations, Métis and Inuit Issues in Canada*, 2nd ed (Highwater Press, 2026) at 18–23.

4 Section 18 gives the Federal Court jurisdiction where relief is sought against a "federal board, commission or other tribunal," defined in s 2 to include any body exercising jurisdiction or powers conferred by an Act of Parliament (*Federal Courts Act*, RSC 1985, c F-7, ss 2, 18). *Indian Act* Band Councils—even those selected by customary means—are considered to be such a body (see Part 1, *supra* note 1 at 4–5).

assimilative paradox of a politics of recognition which promises a move away from a colonial paradigm and yet retains the power to decide for Indigenous peoples according to terms that are set unilaterally.

In contrast to the direct engagement with Indigenous custom selection processes that judicial recognition provides, in Part II, we will examine the exercise of what we call a "shadow version" of recognition: since the Court has ruled that the federal government *lacks* jurisdiction over custom leadership selection,[5] its agents disclaim any place in interpreting custom codes, intervening in disputes over customary leadership or assisting in their resolution. In this way, the recognition lies in the policy of *not* interfering in internal governance. In what follows we will lay out the ways in which, despite this position, the relevant federal department—currently Indigenous Services Canada (ISC)[6]—can and does respond to disputes.[7] In the past, for example, it has provided funding for mediators to help communities resolve tensions on their own. More significantly, it has used a range of administrative measures—including the recording of band membership, custom codes and election results, the imposition of third-party management over band funds, and the resort to an order

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

6 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.

7 Indeed, IAND had previously made public a *Custom Code Election Dispute Resolution Policy*, reproduced in Brian A Crane, Robert Mainville & Martin W Mason, *First Nations Governance Law*, 2nd ed (Markham: LexisNexis, 2008) [Crane et al]). Amnesty campaign staff reported in 2011 that AANDC denied it ever had a policy with respect to resolving custom code leadership selection disputes: personal communication with William Shipley.

under s. 74 to impose *Indian Act* elections—that arguably constitute intervention with respect to the community's custom. We round out the study by looking closely at governance disputes in two Indigenous communities: the Lubicon Cree and the Algonquins of Barriere Lake, in order to demonstrate that in the current situation of colonial entanglement, the government's non-intervention position has been selective, disingenuous, and largely directed towards facilitating status quo policies.

The *Indian Act* is an archetype of colonial control. This paper shows how even with amendments to roll back that control and afford greater measures of Indigenous self-determination, the archetype persists in subtle and not-so-subtle ways. In addition to the interventions just mentioned, the *Indian Act*'s technocratic framework, purporting to simplify and streamline the governance of Indigenous communities, has created a dizzying array of laws, procedures and structures that produce ramifying contradictions and complexities: this in itself sucks the energy of Indigenous peoples and works to disenfranchise them. Our analysis of Indigenous governance disputes thus speaks to wider critiques of state power, and to calls for alternative approaches to Indigenous law and governance, with greater normative space for Indigenous laws, as well as alternative institutional frameworks through which they can work.

I. ENTANGLEMENT: THE DEPARTMENT'S NON-INTERVENTION AS INTERVENTION

As explained in Part I, the courts have held that the federal government has no jurisdiction to interpret Indigenous custom in the context of leadership selection, nor to intervene in governance disputes that are the result of disagreement over custom. Consistently with this, the Department maintains that it has no involvement in custom elections or the resolution of such disputes.[8] Nevertheless, a Custom Election Dispute Resolution Policy, provided by the Department of Indian Affairs and Northern Development (IAND) in 2005 to the authors of a leading text book, *First Nations Governance Law*, for inclusion as an appendix,[9] provided for three stages of response by departmental Regional Director Generals

8 See e.g. Indigenous Services Canada, "Leadership Selection in First Nations" (last modified 3 March 2022), online: page: <sac-isc.gc.ca> [perma.cc/W8F5-RXND].

9 Crane et al, *supra* note 7 at 751.

(RDGs)[10] to help them "manage the disputes at the regional level": (1) assessment of the dispute (2) "tools" to be offered to resolve the dispute, including ensuring compliance with election codes, mediation and arbitration, and (3) "intervention."

In this policy, RDGs were encouraged to actively intervene "if a [governance] problem does exist that is not being resolved locally" through third-party assistance or litigation. The tools may be combined, as occurred in the Barriere Lake dispute where a mediator who was brought in to help resolve the differences between two groups also assisted in the codification of customary practices.[11] The most intrusive stage, "intervention," is indicated in "situations where a real crisis has developed" and "mediation and/or arbitration fail," or where "it is impossible to get agreement to mediation or arbitration from the parties."[12] Intervention consists of two options, the first being a referendum in which the community in question could be asked, for example, to choose between two customs or whether it would prefer to be subject to the election provisions of the *Indian Act*. The second option, as a "last resort, in a situation where a community is in chaos," is the exercise of the power to impose an *Indian Act* electoral regime via ministerial order under the authority of s. 74(1) of the *Indian Act.* The policy notes that such a measure would be the "very antithesis of self-government." Since the release of that document, the *First Nations Election Act* 2014 has also made provision for a First Nation to be forcibly brought under that Act if "the Minister is satisfied that a protracted leadership dispute has significantly compromised governance of that First Nation."[13]

The original development of the Custom Election Dispute Resolution Policy and the extent to which it was ever implemented by the Department are shrouded in ambiguity.[14] However, regardless of any official

---

10 This position continues to exist within both CIRNAC and ISC.

11 *Elders of Mitchikanibikok Inik (Algonquin of Barriere Lake) v Algonquins of Barriere Lake Customary Council*, 2010 FC 160 at paras 14–16 [*Elders of Mitchikanibikok Inik*].

12 *Ibid*; Crane et al, *supra* note 7 at 753–54.

13 *Supra* note 3, s 3(1)(b).

14 In her note accompanying Appendix H, Dietlind Bork recounts her difficulties in ascertaining any information about the policy: *Framing the Intervention: How Canada Staged its Takeover of the Lubicon Lake Nation* (MA Thesis, University of Alberta, 2012) [unpublished] at 173 [Bork].

record of the role it plays, the factual records in judicial decisions, official statements concerning particular disputes, testimony before Parliament—in particular the Standing Senate Committee on Aboriginal Peoples—as well as other sources, provide examples of the Department's actions in the context of these disputes. These examples serve as an empirical basis for analyzing the Department's responses to such disputes, and for extrapolating a *de facto* policy with respect to customary governance. Despite the principle and rhetoric of non-interference, the accounts of First Nations leaders and scholars suggest that the experience of First Nations in exercising their right to self-governance is profoundly impacted by Department decisions.

There are several administrative measures that can affect the parameters of Indigenous governance disputes, such as the maintenance of membership lists, the recording of custom and the oversight of elections or referenda on custom. The role of the Department in recording the results of customary elections is also significant, since it can result in the formal recognition, and the grant of control over funding and programs that comes with it, of one of the disputing factions within a community as Band Council.[15] Ministerial Orders under s. 74 of the *Indian Act* (and now s. 3 of the *First Nations Elections Act*) are the most intrusive measure and s. 74 has been invoked on three recent occasions to intervene directly through the imposition of an electoral governance regime.[16] However, we consider that financial interventions under the Federal Default Prevention and Management Policy (DPMP)—such as the third-party management of a First Nation band's finances—are also highly influential and problematic factors in governance disputes.[17]

---

15 Registration in the Band Governance System has been held to be a "purely administrative act" (see *Wood Mountain*, *supra* note 5 at paras 8-11; *Mitchikanibikok Inik v Canada (Indian Affairs and Northern Development)*, 2008 FC 975 at para 16, rev'd in part 2009 FC 8) [*Mitchikanibikok Inik*].

16 Mentioned in Senate, *Proceedings of the Standing Senate Committee on Aboriginal Peoples*, 41-1, No 11 (15 February 2012) at 41 (Hon John Duncan) online: <sencanada.ca> [perma.cc/G4W3-QE94]. These cases are those of the Sandy Bay Ojibway, the Dakota Tipi in Manitoba, and the Algonquins of Barrière Lake in Quebec, discussed below.

17 Freedom of information requests reveal that between 2008 and 2016, between 150 and 185 First Nation bands were placed under the DPMP (see Shiri Pasternak, "How Colonialism Makes its World: Infrastructure and First Nations Debt in Canada" (2023) 113:6 Annals Am Assoc Geographers 1290 at 1291 [Pasternak, "First Nations

This section of the article argues that state administration plays a substantive role in the ways in which Indigenous peoples can exercise their self-government rights, and that there is a potential conflict of interest inherent in the Department's dual functions as an administrator of government benefits and the guarantor of good governance procedures. Indeed, one of the arguments that will be developed further in Section II is that the federal government's self-interest in governance disputes is neither to respect Indigenous self-government or custom, nor purely to maintain neo-colonial control (although these may be factors), but rather to immunize itself from criticism and both political and legal liability. By discussing the ways in which financial management and leadership selection are intertwined, Section II will set up the background for the argument that First Nations governance disputes need to be understood in a comprehensive context.

A. The Department as Record Keeper: Band Lists, Customs Codes, and Election Results

The Department has a registry function that, although appearing to be "purely administrative," entails inherent discretion—brought to light in situations of conflict—that can have a substantive impact on the adoption and conduct of governance initiatives. For instance, in continuity with the long-standing bureaucratization of Indigenous identity,[18] the Department maintains a register of all persons with Indian status, and of the names of the members of each band for First Nations who have not resumed control of their membership under s. 10 of the *Indian Act*. As discussed in Part I, many disputes have centered on who is a bona fide member of the First Nation for voting purposes.[19] In those cases, the availability of a definitive membership list can be crucial in determining

---

Debt"]). Since June 2023, the first two levels of the DPMP are no longer applied. However, third-party management is retained as "last resort" (see Government of Canada, "Default Prevention and Management" (27 March 2023), online <sac-isc.gc.ca> [perma.cc/J9TH-WF43]).

18 See Bonita Lawrence, "*Real" Indians and Others: Mixed-Blood Urban Native Peoples and Indigenous Nationhood* (Vancouver: UBC Press, 2004); Mariana Valverde, *Law's Dream of a Common Knowledge* (Princeton: Princeton University Press, 2003) at ch 8.

19 See *Ominayak v Lubicon Lake Indian Nation*, 2003 FCT 596. See also *Jacobs v Mohawk Council of Kahnawake*, 1998 CarswellNat 2233 at para 142 (Canadian Human Rights Tribunal) [*Jacobs*].

the pool of people who may vote in elections or who count in an assessment of "broad consensus." Moreover, a First Nation's own membership code will not take effect officially within the Department until notice is given by the minister, conditional on assent of the written code by "a majority of electors of the band."[20]

The minister exercises some discretion as to the fulfillment of this condition. When the Mohawks of Akwesasne adopted their membership code in 1987, 739 out of 1,412 qualified voters cast a ballot, with 567 consenting to the code. Approximately 75% of non-voters were traditionalists who had participated in consensus decision-making processes that largely supported community control of membership. The Minister decided that the requirement of "a majority of electors" was fulfilled by the 567 favourable votes (that is, 40% of the electors) together with the consensus of the traditionalists. In the same year, when the Viger band had no members entitled to vote under the *Indian Act* as they all lived off-reserve,[21] the minister accepted the authorization of a majority of non-resident band members over 18 years old.[22]

The department's maintenance of the band list in itself can affect a First Nation's ability to manage a legitimate voting process. When the Abenakis of Odanak attempted to organize a consent process by postal vote for their membership rules, the band council did not have addresses for more than 21% of people on the band list supplied by the Minister, where 85% of members lived off reserve. Although Departmental officials had undertaken to deactivate the names of persons presumed dead or for whom there was no known address, six months later they had still not provided the band council with a revised number to be counted as the band's electoral base. The council concluded its consent process with the results that, out of 1,555 electors successfully located, 770 voted, with 95% in favour. However, the Registrar retroactively removed the names of only 10 non-voting persons over the age of 100 presumed to be deceased,

---

20 *Indian Act, supra* note 2, s 10(1).

21 Note that this condition on eligibility to vote in the *Indian Act* was later struck down as unconstitutional (see *Corbière v Canada (Minister of Indian and Northern Affairs)*, 1999 CanLII 687 (SCC) at para 23).

22 The Akwesasne and Viger examples are both mentioned in the letter from Minister Andy Scott cited in *Band Council of the Abénakis of Odanak v Canada (Minister of Indian Affairs and Northern Development)*, 2008 FCA 126 at para 4 [*Abénakis*]).

and it was on this basis that the Minister determined that a majority had not been reached.[23] One of his stated concerns was that removal of individuals from the Band list without confirmation on his part would incur liability because of the loss of benefits that would follow removal.[24] As discussed in Part I, membership for the purposes of distribution of government benefits and services may be distinct from membership of the voting community whose practices are being assessed to determine the relevant custom.[25] But the Department's interest in managing its responsibility for the former may affect its decisions regarding the latter, in a way that subsumes robust efforts at self-government into the managerial interests of the state.

A second registry function is in the maintenance of a register of the custom election codes that First Nations are required by the *Conversion to Community Election System Policy* to submit when they revert from *Indian Act* elections—largely so that they can be scrutinized for procedural justice and *Charter* compliance.[26] As we saw in Part I, registration itself is significant in that registered codes are, to a certain extent, taken as authoritative statements of custom by the courts. However, there is nothing preventing bands changing their custom immediately after the code is approved by the Department, and the latter is not required to keep any record of current custom codes or changes made to them.

As discussed, according to the case law, the Department can have no role in determining the content of band custom for the purpose of a custom election.[27] Nevertheless, it is within the Minister's power to take proactive measures to determine applicable custom and potentially even

---

23 *Ibid* at paras 4, 22–28. Note that in *Abénakis*, the application for judicial review of the Minister's decision was accepted, with Desjardins JA holding: (1) that the Minister was obliged to cooperate in updating the band list, including deactivating band members who had not given notice of their change of address; and (2) that the requisite majority under s10(1) must be the majority of a majority of voters, noting that an absolute majority requirement could put undue power in the hands of those who did not trouble to vote (see *ibid* at paras 42, 47–48).

24 *Ibid* at para 4.

25 See e.g. *Jacobs*, *supra* note 19 at paras 16–17.

26 The current version is available at Indigenous Services Canada, "Conversion to Community Election System Policy" (last modified 1 June 2015), online: <sac-isc.gc.ca> [perma.cc/PDL7-D7Y9].

27 See *Mcleod Lake Indian Band v Chingee*, 1998 CanLII 8267 (FC) at para 13.

push the community to decide explicitly on the system that they adopt.[28] A pro-forma "custom election code" is offered by the department with blanks to be filled in by the First Nation, for example, concerning the terms of office.[29] The Department has on a number of occasions appointed or funded a mediator to assist First Nations in articulating and codifying their leadership customs, even where the band in question is not required to do so because, for instance, they have never been subject to s. 74.[30] Other pro-active measures have included administering surveys and referenda. For example, the Mohawks of Kanesatake were impacted by an ongoing dispute initiated by a group within the community—the Comité pour le changement or "Committee for Change"—over whether to continue the traditional leadership selection practices (in which chiefs were appointed by clan mothers) or convert to a new democratic custom electoral system. While initially refusing to intervene on the basis that the Committee for Change did not represent a majority, Indian and Northern Affairs Canada (INAC) eventually conducted a house-to-house survey, and as a result, ordered a referendum on the issue.

A third registry function is that of recording the names of chief and council. Although the Department has no jurisdiction to oversee custom elections, it must record the result of custom processes so that an official band council can be formally recognized and accorded its powers and responsibilities under the *Indian Act*. In the *Wood Mountain First Nation* case,[31] the position of the Department, upheld by Justice Strayer in that case, was that its role in recording the results of custom elections was a passive one, and therefore not a "decision" subject to judicial review. Similarly, in litigation pursuant to the protracted Barriere Lake dispute, the Federal Court initially ruled that the act of registering the results of a leadership selection process in the Band Governance Management system was "a purely administrative act [of] mechanically recording the information which was provided on behalf of the [Algonquins of Barriere

---

28 See *Six Nations Traditional Hereditary Chiefs v Canada (Minister of Indian and Northern Affairs)*, [1991] ACF No 141, 43 FTR 132 at 7, cited in *Francis*, *supra* note 5 at para 25.

29 Senate of Canada, *Proceedings of the Standing Senate Committee on Aboriginal Peoples, Evidence*, 40-2, No 6 (13 May 2009) (Brenda Kustra), online: <sencanada.ca> [perma.cc/5PNF-Z56Y] [*SCAP Proceedings*].

30 See *Goodtrack v Lecaine*, 2008 FC 771. See also *Elders of Mitchikanibikok Inik*, *supra* note 11 at para 16; *SCAP Proceedings*, *supra* note 29.

31 See *Wood Mountain*, *supra* note 5 at para 8.

Lake]," and not a discretionary decision.[32] In 1996, the Department had made a similar decision even when those recorded as the Interim Council for the Algonquins of Barriere Lake had declared that they were selected via a process that had ousted the previous council by a new, modified custom of petition.[33]

Where there are alternative processes producing competing leaders, or when a question arises as to the legitimacy of the process, it is harder for Department officials to maintain that they are not exercising discretion. On appeal in the above request for review of the Minister's recognition of a rival band council in the Barriere Lake dispute, it was held that the Department *had* evaluated the likelihood that one of the competing factions had followed the selection process correctly, and had thus exercised discretion, triggering the possibility for judicial review.[34] Similarly, in a case involving the Kwakiutl Nation Band, the Department had declined to take note of an election that took place following a vote of no confidence in the incumbent chief and council because the election had not been called by the latter, a decision that clearly involved an assessment of the custom code and its application.[35] In fact, we would argue that the recognition of a customary council is *always* a "decision" in the technical administrative law sense because it necessarily involves a preliminary judgment by the department as to the legitimacy of the claim to have been selected as council, if not in terms of the First Nation's custom, then in terms of other measures of legitimacy. This becomes particularly clear in Government responses to an election dispute in the Lubicon Lake Cree Nation in 2009, discussed below in Section II.

Finally, these "purely administrative acts" are clearly not innocuous to the community in question. In the case of Barriere Lake, Justice

---

32 See *Mitchikanibikok Inik,* 2008 FC 975, *supra* note 15 at para 16.

33 See *Algonquins of Barrière Lake v Canada (Attorney General),* [1996] FCJ No 175, 1996 CarswellNat 137 at paras 2, 4.

34 *Mitchikanibikok Inik,* 2009 FC 8, *supra* note 15 at paras 20–24.

35 See *Kwakiutl Nation Band v Anderson*, [2001] FCJ No 877, 2001 FCT 558 at para 15. The situation of Buffalo Point First Nation, where an inaugural custom election in April 2014 to oust the reigning hereditary chief was similarly denied recognition by INAC even though the elected chief Andrea Camp was recognized by Manitoba's Southern Chiefs Association (see also Bill Curry, "Buffalo Point Band Plans to Oust Hereditary Chief", *The Globe and Mail* (26 August 2014), online: <theglobeandmail.com> [perma.cc/97AS-RYUE]).

Mainville observed in 2010 that the decision to recognize the Interim Band Council in 1996 had "resulted in a major political crisis within the community" that deepened over the next fifteen years.[36] Given what is at stake in the recognition or non-recognition of an Indigenous governing body that will have control over resources dedicated to the band, it is worth considering whether recording of election results should be reviewable. It seems inconsistent with the role of the Court as a dispute resolution body to refuse jurisdiction over an issue of such singular importance to these disputes on narrow administrative law grounds.

B. Third-Party Management

One of the most significant contemporary forms of intervention in the internal affairs of First Nations is through the imposition of third-party management (TPM), usually through an external accounting firm paid to take control of a band's finances, a role that would otherwise be undertaken by the band council.[37] In general, First Nations programs and services are the subject of funding agreements between the Department and the recipient First Nation. Under the Default Prevention and Management Policy dating from 2013, when First Nations are in default of their agreements—for example, where obligations under the agreement are not met, an auditor has flagged concerns with the annual financial statements or the delivery of community programs is at risk—the Department could adopt a range of responses by way of "default management," including requiring remedial steps by the First Nation, implementing Recipient-Managed Management Plans, and withholding funds. TPM is the most extreme form—the "last resort"—to be used in the "highest risk cases".[38] While recent changes have been made to the policy following a commitment signed in 2016 between Canada and the Assembly of First Nations to enter a new era of fiscal relations[39]—namely an increased focus on prevention and capacity building for sustainable economic

---

36 *Elders of Mitchikanibikok Inik*, *supra* note 11 at para 13.

37 Indigenous Services Canada, "Default Prevention and Management" (last visited 13 November 2024), online: <sac-isc.gc.ca> [perma.cc/RCP5-4UKH].

38 *Ibid*.

39 See Indigenous and Northern Affairs Canada, News Release, "Signing of a Memorandum of Understanding on a New Fiscal Relationship with the Assembly of First Nations" (12 July 2016), online: <canada.ca> [perma.cc/6CSS-BDPA].

development—TPM remains a key tool for the government. And problems with it remain, too: the sheer logistics of having an external accounting firm, often located hundreds of kilometers from the reserve, be responsible for approving expenditures, paying bills and organizing services frequently makes for an unworkable system.[40] For many nations subject to TPM, it has become a long-term fixture of their community instead of a transitional measure.[41] Finally, concerns have repeatedly been expressed about a lack of accountability for the performance of these managers or demonstrable means for First Nations subject to their control to extricate themselves from the arrangement.[42]

The federal government often stresses the link between leadership disputes and the financial problems that give rise to the imposition of TPM. The Director General of the Governance Branch for Lands and Trust Services of INAC testified before the Senate Standing Committee on Aboriginal Peoples in 2009 that "if there is a community that has a governance dispute that in fact compromises the delivery of essential programs and services, then a decision might be made to put the community into third-party management because there is no leadership in the community, and the essential services are being compromised."[43] Another INAC official specified that the decision to impose TPM is "automatic … [but] really based on the ability of the community to continue to serve its

---

40 See Heather Scoffield, "Third-Party Management: An Imperfect Solution to Complex First Nations Problems", *The Canadian Press* (14 December 2011), and the analysis in Pasternak, "First Nations Debt", *supra* note 17 at 1294–95.

41 In 2010, 42% of First Nations under some form of intervention had been under intervention for ten or more years (see Indian and Northern Affairs Canada, *Evaluation of the Intervention Policy: Project No: 09082*, (Ottawa: INAC, 2010) at 26, online :<publications.gc.ca> [perma.cc/LP3F-BAAK]. Each year from 2012 to 2017, between 10–12 First Nations were under TPM (see House of Commons, *Default Management and Prevention 2017: Report of the Standing Committee on Indigenous and Northern Affairs* (May 2017) at 3 (Chair: Hon. MaryAnn Mihychuk), online: <ourcommons.ca>) [perma.cc/Q5NH-5GBE] [*SCINA Report*].

42 See House of Commons, Auditor General of Canada, "Chapter 5: Management of Programs for First Nations", *A Status Report of the Auditor General of Canada to the House of Commons* (May 2006), online (pdf): <oag-bvg.gc.ca> [perma.cc/V87R-ASV2] ("Gaps in the Third-party Manager Policy have not been addressed" at 5.47–5.49). The 2017 *SCINA Report* highlights similar criticisms (*supra* note 39 at 8).

43 *SCAP Proceedings*, *supra* note 29.

members."[44] This statement suggests that there is some discretion on the Department's part in assessing whether these services are threatened by the dispute sufficiently to warrant imposing a third-party manager.

Consequently, it is not simply financial mismanagement *per se* that can prompt the imposition of TPM.[45] An INAC spokesperson, Mike Murphy, was reported in 2002 as saying that "ten to fifteen per cent of First Nations who are in third-party management are in that circumstance for reasons other than financial," with most of those involving governance issues.[46] With respect to the Sandy Bay Ojibway, the Department explicitly tied the administrative release of funds to the band's acceptance of written leadership selection guidelines.[47] Similarly, in *Elders of Mitchikanibikok Inik v. Canada (Minister of Indian Affairs and Northern Development)*,[48] the litigation for the imposition of third-party management of the Algonquins of Barriere Lake was entwined with their leadership selection dispute, amidst claims that the breakdown in governance had been greatly exacerbated by the imposition of TPM. In the case of the Lubicon Lake Nation, AANDC's refusal to recognize either elected council led necessarily to a situation where there was no formal leadership, and in which the department determined it was then obliged to intervene in order to guarantee the delivery of services. As we will see in Section II, the community's financial problems emerged some time before the contested elections, yet the Department persistently represented the leadership dispute as the causal problem.[49]

C. *Imposition of* Indian Act *Elections Through s. 74*

The final possible level of response is the invocation of s. 74 of the *Indian Act* to issue an order bringing a First Nation under the electoral

---

44 *Ibid.*

45 This is a concern expressed by First Nations witnesses to the Standing Committee on Indigenous and Northern Affairs (see *SCINA Report*, *supra* note 41 at 2).

46 Paul Barnsley, "Minister's Decision Angers Two Bands in Manitoba" (2002) 20:1 Windspeaker Publication 3, online (article): <ammsa.com> [perma.cc/7AUT-BWKQ].

47 *Sandy Bay Ojibway First Nation v Canada (Minister of Indian and Northern Affairs)*, 2004 FCA 229 at para 8 [*Sandy Bay Ojibway*].

48 *Elders of Mitchikanibikok Inik*, *supra* note 11.

49 See discussion in Section II below.

provisions of the *Act*; it is discretionary, and to be used "whenever [the Minister] deems it advisable for the good governance of the band." The Federal Court of Appeal has gone so far as to say that the Minister can disregard the guidelines set out in Departmental policy—such as using s. 74 as a last resort when mediation fails—in deciding to impose an *Indian Act* election system.[50] Nonetheless, a review of interventions in custom code leadership disputes provides evidence of a typical sense of scale in the exercise of discretion, such as the threshold question of what constitutes a "last resort." Although the *First Nations Election Act* similarly provides for its terms to be imposed by the Minister under s. 8, to our knowledge this power has never been exercised.[51]

There have been three high-profile instances of the use of s. 74 in recent decades: the Sandy Bay Ojibway in 2003 and the Dakota Tipi in 2002 (both in Manitoba), and the Algonquins of Barriere Lake in Quebec in 2010. However, according to one official, the use of s. 74 to force an election and impose TPM is more common than most would think, since the policy is not to discuss TPM publicly unless the First Nation does so.[52] In the *Sandy Bay Ojibway* case, complaints arising from four previous elections between 1998 and 2003, including accusations of vote buying and other corrupt practices, were never definitively resolved due to an absence of an appeals mechanism in the custom code. The immediate reason for the invocation of s. 74(1) was the failure of the First Nation to establish an acceptable appeals policy within the deadline it was given by the Manitoba Regional Office.[53] The fact that a lack of tangible progress in amending the custom code was, according to the Ojibway leadership, partly due

---

50 See *Sandy Bay Ojibway*, *supra* note 47 at para 30.

51 Note the Assembly of First Nations' opposition to s 3(b) and (c) expressed before the SSCAP during its consideration of Bill S-6, *An Act respecting the election and term of office of chiefs and councillors of certain First Nations and the composition of council of those First Nations* (see Senate of Canada, Standing Senate Committee on Aboriginal Peoples, "Bill S-6, An Act respecting the election and term of office of chiefs and councillors of certain First Nations and the composition of council of those First Nations", 2nd & 3rd readings, *Proceedings of the Standing Senate Committee on Aboriginal* Peoples, 41-1, No 12 (28–29 February 2012) at 12:12 (Jody Wilson-Raybould)).

52 Barnsley, *supra* note 46.

53 The custom code appeals policy required regulations that would allow for an appeals procedure and the appointment of officers; it was these regulations that had not been enacted (see *Sandy Bay Ojibway*, *supra* note 47 at paras 2–8).

to the continual disruption of meetings by the rival faction was not deemed by the Department to be a sufficient excuse.[54]

As with the historic case of the Six Nations discussed in Part I where a faction of "Reformers" in the early 1900s sought the Department's help in deposing traditional leadership,[55] there can be groups within First Nations communities that request the assistance of the Minister in adopting *Indian Act* elections. In the case of the Dakota Tipi First Nation, INAC intervention arose after a campaign initiated by Dakota Tipi members against their long-serving chief Dennis Pashe. The Dakota Tipi followed a custom of consensus support for leaders. Certain individual members of the First Nation appear to have requested INAC to intervene in light of allegations of financial improprieties, criminal behaviour and systematic rights violations by the hereditary chief.[56] In the wake of acts of violence in the community, INAC imposed a s. 74 order on the Dakota Tipi First Nation in 2002, which does not appear to have been contested, and which remained in effect until the Dakota Tipi voted to be brought under the *First Nations Elections Act* in 2018.[57] In contrast, another Manitoba community, Buffalo Point, members of which had approached the Minister requesting that an election be imposed in lieu of the hereditary system in place, was deemed by the department to be engaged in a purely "internal dispute" for which the applicable policy is that intervention would only take place when requested by both parties. According to one

---

54 *Ibid* at paras 4, 11. The Federal Court, in an unreported decision (June 13, 2003), had initially stayed the Minister's Order to allow the Band 30 days to draft appeals regulation and an additional 30 days to submit it to the membership by way of referendum. It was only after this referendum again failed to approve the changes that the Minister's Order was restored (see *ibid* at para 12). This result was upheld by the Federal Court of Appeal (*ibid* at para 31).

55 Scott Trevithick, *Conflicting Outlooks: The Background to the 1924 Deposing of the Six Nations Hereditary Council* (Master's Thesis, University of Calgary, 1998) at 55–62, online: <ucalgary.scholaris.ca> [perma.cc/6VN7-6HWF].

56 See Disabled Women's Network Ontario (DAWN), "Dakota Tipi First Nation – Urgent Call for HELP: Misuse of Power & Abuse/Victimization of Aboriginal Women by Self-Proclaimed 'Chief' Dennis Pashe" (28 March 2002), online: <web.archive.org> [perma.cc/22M2-CGDH]. See also *Lounsbury v Dakota Tipi First Nation*, 2011 MBQB 96. In that case, the Court of Queen's Bench of Manitoba upheld a health care services coordinator's wrongful dismissal suit against Dakota Tipi First Nations (*ibid* at para 1).

57 See *Dakota Tipi Band Council Elections Order*, SOR/2002-316, as repealed by *Dakota Tipi Band Council Elections Order*, SOR/2018-155, s 1.

proponent of the change, the issue has been ignored by the department because the community members had chosen peaceful means of protest over the violence of the Dakota Tipi protestors, and because the current chief, John Thunder, "doesn't cause problems" for the government.[58]

The Algonquins of Barriere Lake (ABL) are the most recent First Nation subject to the involuntary imposition of a s. 74 order. The case is also the most demonstrative of the range of the Department's policy with respect to intervention in customary leadership selection processes, and the degree of controversy and dysfunction surrounding its interventions, the details of which will be discussed in the next section. A community of approximately 400 people in Québec, the ABL had a customary selection process and had never been subject to *Indian Act* elections. A dispute that emerged in the 1990s between two rival groups—including two sets of chief and council, and two elders councils—produced repeated instances when INAC recognized the results of the custom leadership selection process that was later disputed and funded several rounds of mediation. In the end, INAC refused to recognize either leader and subsequently imposed a deadline to amend the custom code to bring it in line with departmental policy. When the deadline passed, and even though both parties were united in their resistance to s. 74 and had demonstrated a genuine attempt to reconcile and join forces to work on amending the code, an order was made on April 1, 2010.

The Assembly of First Nations' statement that the Department's ability to replace a customary leadership selection process with an election system amounts to little more than modern-day colonialism dressed in the guise of peaceful dispute resolution is characteristic of the hostility that many First Nations feel towards this regime, and demonstrates the lack of trust in the Department as an agent of dispute resolution and in the federal government more generally.[59] Such interventions bear the shadows of the darker chapters of Canada's colonial legacy of imposing governance regimes on Indigenous peoples. They also work in conjunction with more violent techniques of control in what Crosby and

---

58 Barnsley, *supra* note 46.

59 For an example of a response to the Barrière Lake dispute, see Office of the National Chief, Assembly of First Nations, "Open Letter to the Minister of Indian and Northern Affairs Canada" (13 August 2010), online (pdf): <turtletalk.files.wordpress.com> [perma.cc/ET7R-FB3S].

Monahan call "(in)security governance"; that is, an overarching settler mode of governing that perceives manifestations of disruptive Indigenous agency as a security threat, both to the ability to secure access to Indigenous lands, and to the possibility of becoming "post-colonial" and thus gaining political legitimacy for the Canadian state.[60]

In conclusion, despite the formal position that the department has no role in deciding issues with customary governance, there are a number of ways in which government action—or inaction— plays a significant role in the augmentation or resolution of disputes. These include facilitation in the identification and documentation of the applicable customary law; mediation; direct surveys; facilitating public meetings; conducting referenda on customary law, procedures, or leadership elections; and, at the extreme end, the imposition of outside financial management or a legislative electoral regime. Let's look now at how these mechanisms become entangled in the larger struggles around jurisdiction and territory.

II. A TALE OF TWO "NON-INTERVENTIONS": CONSEQUENCES FOR FIRST NATIONS

> Something was amiss. INAC was using their apparent need to *not* ... interfere in the internal affairs of the Lubicon Lake Nation as justification for taking over the affairs of the Lubicon Lake Nation.[61]

While Section I outlined a number of different responses available to and used by the Department to address internal governance disputes in Indigenous communities, the claim that these can constitute a substantive intervention *in* First Nations governance requires some elaboration. In fact, a sense of the extent to which disputes can be exacerbated by the above policies, and of what is at stake in government "non-intervention," can only be had by a more detailed analysis of governance disputes in their broader political and historical contexts. To that end, we present a contextualised account of governance disputes in two communities, the

60 Andrew Crosby & Jeffrey Monaghan, "Settler Governmentality in Canada and the Algonquins of Barriere Lake" (2012) 43:5 Security Dialogue 421 at 423–27.

61 Bork, *supra* note 14 at 11 [emphasis in original].

Lubicon Cree in Alberta, and the Algonquins of Barriere Lake in Québec (and Ontario).

A. Lubicon Cree

The traditional territories of the Lubicon Cree people lie in Alberta in an area covered by Treaty 8, although their ancestors were missed by the treaty commissioners in 1899 and were never enrolled.[62] When the oversight was investigated in 1939, the community was formally recognized as a band under the *Indian Act* with 127 members.[63] The promise of a reserve at Lubicon Lake based on these numbers—as per the Treaty—never materialized. A community developed at Little Buffalo Lake that included a number of non-status residents who, during the years of World War II, had been struck from the register by a zealous federal official.[64] In the context of the discovery of large mineral deposits in the region in the 1950s, Lubicon title to the land was treated as non-existent, with attempts made by INAC officials to get the remaining status Lubicon to merge with other bands.[65] Unchecked oil exploration caused hunting and trapping territories—on which a large number of Lubicon people continued to depend for their livelihood—to be decimated, and animal populations to drop radically. Members of the community receiving welfare payments increased to about 90% by 1984.[66] Rates of miscarriages, infant mortality and birth defects from that time were staggeringly high.[67]

---

62 Darlene Abreu Ferreira, "Oil and Lubicons Don't Mix: A Land Claim in Northern Alberta in Historical Perspective" (1992) 12:1 Can J Native Studies 1 at 2–3.

63 Ward Churchill, *Struggle for the Land: Native North American Resistance to Genocide, Ecocide, and Colonization* (San Francisco: City Lights, 2002) at 191.

64 John Goddard, *Last Stand of the Lubicon Cree* (Vancouver, BC: Douglas & McIntyre, 1991) at 22, 29 [Goddard].

65 Churchill, *supra* note 63 at 194–95.

66 Larry Pratt & Ian Urquhart, *The Last Great Forest: Japanese Multinationals and Alberta's Northern Forests* (Edmonton, Alberta: NeWest Press, 1994) at 111. See also Andrew Huff, "Resource Development and Human Rights: A Look at the Case of the Lubicon Indian Nation of Canada" (1999) 10:1 Colo J Intl Envtl L & Pol'y 161 at 170–71.

67 Lubicon advisor Fred Lennerson is cited for the statistic that 19 out of 21 pregnancies in the year 1985–86 ended with a still birth (Sara Jean Green, "A Nation Under Siege: Lubicon Lake Crees Fighting for a Future" (14 March 1997), online: <nationnewsarchives.ca> [perma.cc/M3A5-F6NB]).

In the early 1970s, the Lubicon began to mount a legal campaign for recognition of their Aboriginal rights to the land that was fought vigorously in the courts by Alberta and Canada.[68] It also planted seeds of division in the community. During the hearing for an interim injunction against oil companies named in the litigation, some non-status members of the Little Buffalo Lake community submitted an affidavit that they opposed the application for the injunction, anxious that they would be forced to leave if a reserve were granted.[69] In the result, Justice Forsythe declined to grant the injunction, unconvinced that an "Aboriginal lifestyle" was at risk of irreparable harm.[70] The band had to pay the defendants' legal costs.[71] A request for funding for litigation was rejected by Ottawa and the band's annual operating budget halved: the Minister is reported as having said there would be "little help from the department ... as long as they pursued an aboriginal-rights position".[72]

In 1984, following a complaint lodged with the United Nations Commission on Human Rights (UNCHR) by Lubicon Chief Bernard Ominayak,[73] a period of sporadic negotiations between the Lubicon and the

---

68 Initial attempts in 1975 by the Lubicon to stay development by requesting a caveat through Alberta's land titles system were thwarted by retrospective changes to the provincial *Land Titles Act* (Boyce Richardson, "The Lubicon of Northern Alberta" in Boyce Richardson, ed, *Drumbeat: Anger and Renewal in Indian Country* (Toronto: Summerhill Press, 1989) 229 at 237–39); a declaratory action in Federal Court launched in 1980 against the federal government, Alberta, and several oil companies was held inadmissible against all defendants except the Crown in right of Canada (*Lubicon Lake Band v Canada,* 1980 CanLII 4144 (FCTTD); and a claim for federal funding for legal fees incurred in the litigation was struck in part (*Ominayak v Canada (Minister of Indian Affairs and Northern Development),* 1987 CarswellNat 8911) [*Ominayak v Cabada*]; in 1982, the Lubicon Cree sought an interim injunction against multiple energy corporations: the application was dismissed in 1983 and the refusal was upheld on appeal in 1985 (*Lubicon Lake Indian Band v Norcen Energy Resources Ltd*, 1985 ABCA 12 (CanLII)) [*Lubicon Lake v Norcen*].

69 Goddard, *supra* note 64 at 111–12.

70 *Ominayak et al v Norcen Energy Resources Ltd* et al, 1983 CanLII 1120 (ABKB) at paras 18–19, aff'd *Lubicon Lake v Norcen*, *supra* note 68 at paras 38–39.

71 An application for interim cost award failed. The plaintiffs had incurred unpaid liabilities of $1,400,000 and estimated that further expenses of $2,000,000 would be required (*Ominayak v Canada, supra* note 68 at paras 5, 14).

72 Goddard, *supra* note 64 at 103.

73 The claim was accepted in 1987 on the grounds that it appeared to raise issues under article 27, the right to participate in the cultural life of the community (see *Lubicon*

federal government began. One of two intractable issues was that the Lubicon considered that their Aboriginal rights had never been extinguished, while the Crown refused to entertain the idea of unextinguished rights in an area covered by a treaty. The other was that in respect of the creation of the reserve, the Crown wanted initially to provide land based on the number of status Indians on the band list only, or at most equivalent to the reserve surveyed in 1940, while band representatives said that membership had to include every person of Lubicon descent living in the territory (478 individuals in 1988).[74] The report in 1986 of an inquiry by Davie Fulton, a federal "special envoy" appointed to facilitate negotiations, largely supported the Lubicon claims on three key points: (1) the size of the reserve; (2) entitlement to compensation for damage due to resource development; and, (3) the provision of wildlife management authority.[75] Further, at his suggestion, a codified version of Lubicon governance practices, including membership criteria, was produced. In spite of continued resistance from both federal and provincial governments, Ominayak's efforts to raise public support—including a successful boycott of an Indigenous art event associated with the 1988 Calgary Winter Olympics—and direct action tactics such as road blocks used to enforce a Lubicon royalty fee from oil companies, led to a deal with Alberta in October 1988 committing to a ninety-five square mile reserve based on a full membership count.[76]

In November 1988, formal negotiations towards a land settlement began with the federal government. Ottawa eventually committed to accepting a band membership list of (then) 506 people and to the reserve size agreed to with Alberta, but the question of compensation and funding for economic development remained contentious. Essentially, since the Lubicon were treating this as a comprehensive land claim (CLC) agreement, they demanded that damage to their traditional economy had to be compensated by providing infrastructure and resources to build a

---

Lake Band v Canada, Communication No 167/1984 (26 March 1990), UN Doc Supp No 40 (A/45/40) at 1 (1990), ss 13.4–14).

74 Goddard, *supra* note 64 at 185.

75 E Davie Fulton, *Lubicon Lake Land Claim: Discussion Paper* (1986), reprinted in part in (1988) 4:1&2 Native Studies Rev 181.

76 The proposition was for 79 square miles with full subsurface rights, and a further 16 over which the Lubicon retained veto over the Province's exercise of its subsurface rights (Churchill, *supra* note 63 at 203, 206–07).

new one. The federal government, in contrast, saw negotiations as attempting to resolve the outstanding question of a reserve under Treaty 8, and establishing services on that reserve, with a small amount of economic development funding included purely to allow the Lubicon to apply to existing federal programs, but no compensation. Meanwhile, the registrar at Indian Affairs was refusing Indian status to over a third of the people on the Lubicon membership list who were unable to supply further documentation. In January 1989, the federal government made a take-it-or-leave-it offer that did not include compensation or any significant funding for economic development. Convinced that the offer would give the Lubicon the reserve but no livelihood, Ominayak rejected it.[77]

It is at this point that the government's strategy with respect to the Lubicon leadership emerged. According to journalist John Goddard's account of events:

> [T]he federal unit tried to identify a dissident faction within Lubicon ranks that might be used to overthrow Ominayak. When such a faction proved non-existent, federal players tried to create one, attempting to overthrow Ominayak or, alternatively, split the band. When that attempt also failed, federal players recruited native people from all over northern Alberta to create a new band designed to lay claim to Lubicon territory and accept the federal offer. The idea was [to] … divide the native people in the interior against each other so that the Lubicon people could never again mount an effective aboriginal rights challenge.[78]

Goddard recounts that the federal negotiator, Brian Malone, had been approached during the negotiations by a group of people who were "not really excited about the Ominayak deal" and who requested land apart from the rest of the reserve. A petition with 182 names was produced (all apparently written in the same hand), indicating that they would accept the federal offer. Malone pursued talks with three men residing at Little Buffalo Lake who, although they had close ties to the community, had all, for various reasons, chosen membership in other bands. The theme emerged, nevertheless, that it was Ominayak who had removed them from the band membership list before the Ottawa

---

77 Goddard, *supra* note 64 at 196–201.

78 *Ibid* at 203.

negotiations, and Malone arranged for a lawyer to register them as Lubicon members.[79]

Ominayak called an election for May 1989. The "dissenters" did not have sufficient time to register, and no-one ran against him. In August, a new band, the Woodland Cree band, was fast-tracked into existence by the Department. Canada submitted to the UNCHR that a group of 350 Indigenous peoples had come forward during the Lubicon negotiations to request separate band status and resolve its rights under Treaty 8 independently of the Lubicon Lake Band. The group included some former Lubicon Lake Band members, and other "native individuals living within the community."[80] Members of the new band voted on the federal government's January offer in July 1990, with the land allocations to be subtracted from the Lubicon offer.[81] A similar agreement with residents at Loon Lake, 40 miles from Lubicon Lake, was reached, the new band also containing former Lubicon members. The Lubicon nation was being fractured.

Following the UNCHR decision upholding Ominayak's allegations in 1990, the UN took the unusual step of appointing a Special Rapporteur to monitor the Lubicon situation, and in June 1991, a non-partisan commission was struck to try to resolve the Lubicon's claim. In the *Lubicon Settlement Commission of Review Final Report 1993*, the commissioners found that the federal and provincial governments had not acted in good faith, noting the conflict of interest within the mandate of the Minister of Indian Affairs, who, on the one hand, has the capacity to judge the validity of the Lubicon's land claim in the negotiation process while on the other, stood to benefit via royalties flowing from licencing decisions with adverse impacts on Indigenous lands.[82]

---

79 *Ibid* at 204–06.

80 *Ominayak (Lubicon Lake Band) v Canada*, CCPR, 38th Sess, UN Doc C/38/D/167/1984 (1990) CCPR Dec 167/1984 at 26.7.

81 Churchill, *supra* note 63 at 210.

82 Lubicon Settlement Commission of Review, *Final Report* (Edmonton: Lubicon Settlement Commission of Review, 1993) cited in Dawn Martin-Hill, *The Lubicon Lake Nation: Indigenous Knowledge and Power* (Toronto: University of Toronto Press, 2008) at 24.

When negotiations with Ominayak broke down for good in 2003,[83] the federal government reported that the impasse was due to the overbroad and vaguely defined right to self-government that the Lubicon required as a starting point for any agreement, and their insistence on dealing with socio-economic and infrastructure issues as part of a land claim and self-government arrangement.[84] They considered that the Lubicon had simply refused all the government's offers. The Lubicon in turn characterized the Government's approach as an intransigent refusal to engage the question of self-government and found the absence of any discussion of compensation unacceptable.[85] Although pressure on the federal government from domestic and international human rights agencies mounted to resume negotiations with the Lubicon and to initiate a moratorium on development in the interim, this did not happen. In 2010, a new explanation as to the lack of progress emerged in a report to the UN Rapporteur on Indigenous Peoples: an internal governance dispute.[86]

On April 29, 2009, the Lubicon Lake Nation was scheduled to hold an election governed by provisions of their constitution, *Government of the Lubicon Nation* (GLN). When the electoral officer arrived, a group of Elders requested that he use the INAC status-only band member list rather than the list determined according to the Lubicon Membership Code, adopted under the constitution in 1989 whose criteria did not specify that members had to have Indian status. Using the more restricted INAC list would have disqualified several community members from voting or running for election, including a candidate for chief, Steve Noskey. Further, if non-status individuals were removed from the band as members in consequence of this request, they risked losing any future benefits arising out of the unfinalised Lubicon land claim. Finally, since the land set aside for the reserve was calculated based on Lubicon criteria for membership, use of the federal list would result in a smaller reserve. The

---

83 Bork, *supra* note 14 at 23.

84 Government of Canada to UN Special Rapporteur on the Rights of Indigenous Peoples, (24 September 2010), archived online: <unsr.jamesanaya.org> [perma.cc/TG5K-75VE], cited in Bork *supra* note 14 at 100.

85 Ominayak to Chuck Strahl (INAC Minister), May 19, 2008, cited in *Ibid* at 26.

86 *Ibid* at 33.

electoral officer cancelled the election, leaving the Lubicon without an elected government.[87]

The electors present on the day convened a meeting and concluded that the question of membership would have to be put to a community decision by way of majority vote at an open general meeting, as had happened in the past with respect to issues of individual membership in accordance with the GLN. The subsequent meeting—one not sanctioned by the incumbent chief Ominayak or the Elders Council—decided to keep the rules the way they were so as not to jeopardise the rescheduled election on June 5, 2009.[88] That process returned five councillors, with Noskey as chief. Noskey subsequently notified INAC of the results, including, in his letter, mention that the past chief, Bernard Ominayak, had been trying to change election rules at the last minute.[89] He, in turn, received a letter that dated from the period in which there was no elected council, outlining financial irregularities in the band over the previous 3 years and urging remedial action. Despite the apparent urgency of this matter, INAC officials did not respond to Noskey's efforts to engage them on it.[90] In echoes of the Six Nations Dispute 60 years earlier, the media characterised this dispute as a fraught electoral contest between the traditional ways represented by Ominayak and the modernizing agenda of Noskey and his involvement with oil and gas exploration, as unfounded as this dichotomy might be.[91]

On June 25, another election was held, this time called by the Elders Council, who claimed that none of the electors at the June 5 elections were Lubicons.[92] At this new election, Chief Ominayak was elected for life (instead of the 5 year term stipulated in the GLN) and the Elders Council

87 *Ibid* at 161.

88 *Ibid* at 64.

89 *Ibid* at 66–67.

90 *Ibid* at 68–70.

91 *Ibid* at 113–15. Bork argues that this dichotomy is unfounded, given the alignment of Noskey and Ominayak on land claim negotiations and opposition to a pipeline (see the text accompanying note 395).

92 Michelle Huley, "Lubicon Election Controversy Continues: Elder's Council Calls Vote for June 25", *Peace River Record-Gazette* (23 June 2009), cited in *ibid* at 164.

given powers that superseded those of chief and council.[93] A notice that the election of Ominayak and five "headmen" had taken place "under First Nations jurisdiction and law" was sent to INAC. The first communication from INAC since the June 5 election came on July 30, informing both Noskey's councillors and Ominayak's headmen that "it is not possible to make a determination as to the legitimately elected leadership in the Lubicon Lake First Nation."[94] The RDG suggested that the dispute be settled internally, with potential mediation assistance from INAC, or taken to the courts. In the absence of a determination of a legitimate leadership for a protracted period, warned the letter, the department may intervene to provide for alternative service delivery. Third-party management was in fact imposed later that year.

In her detailed analysis of these events, Dietlind Bork suggests that the department was disingenuous in framing these two elections as equivalent—and thus incompatible—events. Beyond the label "election," INAC officials suggest that the two events were contemporaneous, that both were held "under the custom code" and that the department was not involved in either. They followed up by treating both the Noskey and the Ominayak council as equivalent, sending correspondence concerning Lubicon Lake to both groups. In Bork's terms, the context in which two elections were held—namely the attempt at the April 29 election to alter, at the last moment and without following the procedures of the GLN, the voter list—becomes wallpaper, something irrelevant to the department's registration of chief and council if they are not to interfere in the internal affairs of the band.[95]

But the division of events into "Lubicon business" and "INAC business" is, Bork argues, effected by the disparate application of two interpretive principles. The wallpaper—community determination of membership issues—is to be decided according to "the Nation's established

---

93 Michelle Huley, "Elders Take Control", *Peace River Record-Gazette* (30 June 2009), cited in Bork, *supra* note 14 at 165.

94 Letter from Spencer Philippo (Direct, First Nations Relations Treaty 8, INAC) to Noskey council and Ominayak headmen (30 July 2009), cited in *Bork, supra* note 14 at 72.

95 *Ibid* at 90.

rules and traditions."[96] INAC business—the decision to validate (or not) persons named in the election report and provide them with funding—is made, in this case, according to the principle that the department cannot get involved in matters of custom. But, given that the department's own policy suggests that one of the first ways that regional officials may respond to an apparent leadership dispute is by "reviewing the code and ensuring that the actions taken by the person or persons claiming power in the community complied with it," the refusal to look into the application of the code means that the version of non-intervention being enacted here is really a policy of neutrality or even-handedness in the face of two competing groups.[97] In anticipation of criticism from the group that "loses" and unwanted media attention that may follow, INAC have adopted a set of self-generated "rules outlining how [department] officials can avoid any grounds for complaint," Bork argues, which effectively boils down to the principle that "*everyone* has to agree to this."[98] Thus although INAC appears to instruct the community to resolve the issue by following their own custom, this clashes with the implicit rule that "everyone must agree" that in practice determines acceptable election outcomes for INAC. The policy of non-interference morphs into an attempt to supplant custom with an alternative rule.

Other consequences of this "non-interference" policy are worth noting. First, the department might end up effectively acting as an appeals board for disgruntled community members, even when custom has originally been correctly followed. Second, when the custom code election system is presented as being inherently incapable of responding to unilateral attempts to supplant its terms, this sets up outside intervention as the only workable way out of the impasse. In this perspective, the community is the source of their own troubles and the need to impose third-party management. Commenting on the refusal of both sides of INAC's offer of mediation in December 2009, the then regional director George Arcand said:

---

96 Letter from George Arcand Jr. (Alberta Regional Director General, INAC) to Noskey council (11 December 2009), cited in *ibid* at 91.

97 INAC, *Custom Election Dispute Resolution Policy*, section 2.21, Crane *supra* note 7 at 751.

98 Bork, *supra* note 13 at 95–98 [emphasis in original].

> For many years, (I told them), you've told us get out of your way. You're going to determine your own governance and how you elect your people. Now that you have a problem, you want the government to come in? … Well, it doesn't quite work that way.[99]

As Bork observes, the quote makes the Lubicon appear childish and inconsistent, "not able to handle their own affairs when the situation becomes difficult."[100] Finally, the irregularities of the Lubicon finances in the term 2005-2009—including overdue financial statements, and failure to provide proof of expenditure under some funding agreements leading to funds being subject to recovery by Canada under the agreements—and the subsequent disruption in the delivery of services is characterised by INAC as being *caused* by the leadership dispute.[101]

But something curious happened to the de facto implicit requirement that "everyone must agree." In July of 2012, Noskey and Ominayak reconciled,[102] and Noskey sent a letter to AANDC (the new Departmental name) saying that he was stepping down and recognized Ominayak as the legitimate leader.[103] They claimed that a consensus was reached "in accordance with custom [and ratified in writing] by the majority of Lubicon voters."[104] INAC refused to recognize Ominayak's council and to accede to the request to remove third-party management, stating that without a formal election, they would not consider the dispute resolved.[105] A facilitator appointed by the Department, Lorne Ternes,

---

99 Elise Stolte, "Who's Outside Administrator Assigned to Lubicon Community", *Edmonton Journal* (4 December 2009), cited in Bork, *supra* note 14 at 193 [parentheses in original].

100 *Ibid* at 113.

101 Government of Canada to UN Special Rapporteur on the Rights of Indigenous Peoples (24 September 2010), archived online: <unsr.jamesanaya.org> [perma.cc/TG5K-75VE], cited in Bork, *supra* note 14 at 100.

102 The website of the Lubicon Lake Nation states that this was after a consensus decision ratified by a majority of Lubicon voters, see Lubicon Lake Nation, "Chronology of Lubicon Fraudulent Election" (accessed 10 July 2019. The page is no longer active), online: <lubiconlakenation.ca> ["Chronology of Fraudulent Election"].

103 Mark Blackburn, "Lubicon Finally Unite", *APTN News* (26 July 2012), online: <aptn.ca> [perma.cc/H4RT-MFTM].

104 "Chronology of Fraudulent Election", *supra* note 102.

105 Erin Steele, "Lubicon Members Seeking Changes" *Record Gazette* (26 September 2012). The archive is no longer available, but the INAC refusal was also reported in

reported on the creation of a body called the "Lubicon Lake Membership Society" which undertook to redesign the election code.[106] An election was called for February 2013 in Cadotte Lake, outside of the traditional Lubicon territory, for the first time by secret ballot and allowing non-resident members to vote. At this event, Billy Joe Laboucan was elected chief.[107] Laboucan had been part of a group seeking separate recognition as the Little Buffalo Lake Band through an action in Federal Court.[108] In December 2014, Canada announced the signing of a negotiation framework with the Lubicon Lake Band headed by Laboucan that would settle Lubicon claims on the basis of outstanding treaty entitlements, including the creation of a reserve at Little Buffalo.[109] As of the date of writing, the comprehensive land claim of the Lubicon Lake Nation is not being considered by Canada.

This case study shows how internal community disagreements arose as a response to circumstances that are not of the community's making: the division of a people along lines of status and non-status, the destruction of a traditional way of life, and the apparent failure of the political strategy chosen by Lubicon leadership. There are many reasons why Lubicon people might have preferred to take a Treaty deal rather than hold out for the more ambitious land claim and self-government position.

Elise Stolte, "The Fight is Over. Now the Lubicon Band Must Decide What's Next", *Edmonton Journal* (7 December 2018), online: <edmontonjournal.com> [perma.cc/J2PZ-TS9R].

106 Lubicon Lake Nation, "Lubicon Lake Nation Standing Strong Against Fraudulent Election: Demands Aboriginal Affairs Cease Assimilation Tactics in Nation" *Cision* (20 February 2013) (accessed 15 November 2024), online: <newswire.ca> [perma.cc/R5FG-RU8V].

107 Erin Steele, "Lubicon Lake Nation Elects New Chief and Council in Member-Called Election, Receives Federal Recognition" *Record Gazette* (20 February, 2013) (accessed 15 November 2024), online: <prrecordgazette.com> [perma.cc/8MCT-S7QM].

108 See *Ominayak v Returning Officer for the Lubicon Lake Indian Nation Election*, 2003 FCT 596. Because of their application to the Federal Court, Laboucan and 32 others had been ruled ineligible to vote by the electoral officer in a 1999 Lubicon Lake election (para 13) on the basis that they were "persons enrolled as members on the Lubicon Lake Indian Nation membership list but who chose instead to become a member of [another] band" which under the GLN requires them to be removed from the membership list of the Lubicon Lake Indian Nation (at para 9).

109 Government of Canada, "Canada and Lubicon Take Major Step Forward with Signing of Negotiation Framework", *PR Newswire* (1 December 2014), online: <newswire.ca > [perma.cc/8M98-KS25].

Further, there are internal reasons for dissent: the actions of Ominayak at the April 2009 election do seem suspect and self-serving, and concerns about financial accountability during his tenure as Chief remain. However, what is clear is that in its "non-intervention," the federal government has deliberately fostered the consolidation and formal recognition of groups that were more amenable to their preferred way to resolve the outstanding settlement of the Lubicon legal claims.

B. Algonquins of Barriere Lake

The story of the Algonquins of Barriere Lake—Mitchikanibikokinik ("people of the stone weir")—is strikingly similar to that of the Lubicon Cree in many respects. Their ancestors also never signed a treaty surrendering their territory, which extends over the Ottawa River watershed straddling the Quebec/Ontario border. However, collective Algonquin memory recalls an agreement, represented by the three-figure wampum, embodying the principle that there was a nation-to-nation relationship between the Algonquins, the British and the French, and that "any dealings with the land would involve [the consent of] Indian nations."[110] The incursion of French and English hunters in the late 1700s, logging from the 1840s, and dams and hydroelectricity from 1871 dramatically affected hunting grounds and forced many communities to abandon their settlements. After the creation of the Dominion of Canada in 1867, Québec pursued Algonquin harvesters as illegal poachers, while securing, between 1870 and 1913, revenues of over $20 million from timber licencing in regions covered by traditional ABL territories, or 59% of Québec's total timber revenues for that period.[111]

The increasing impoverishment of the Mitchikanibikokinik led to the creation of a game preserve for their use in 1928, but prohibitions on non-Indigenous hunting were not enforced, and in 1940, the construction of a

---

110 Chief Jean-Maurice Matchewan, "Algonquins North of the Ottawa: Our Long Battle to Create a Sustainable Future" in Boyce Richardson, ed, *Drumbeat: Anger and Renewal in Indian Country* (Toronto: The Assembly of First Nations/Summerhill Press, 1989) 137 at 142.

111 Peter Di Gangi, "Algonquins of Barriere Lake: Man-Made Impacts on the Community and Fish & Wildlife, 1870-1979," Prepared for the Algonquins of Barriere Lake, March 2003, 4, online (pdf): <web.resist.ca/~barrierelakesolidarity> [perma.cc/D5BJ-G73B].

road simply facilitated access to non-Indigenous poachers. In 1961, after the Hudson's Bay Company and the Catholic church had moved their posts from Barriere Lake to Rapid Lake to be closer to the road, the federal government, without consulting the community, formally established a reserve at that site under the *Indian Act* for Mitchikanibikokinik. By all accounts the twenty-four hectare reserve, on the sands of the bank of a reservoir whose shoreline is constantly changing, is inadequate to the needs of the community, the population of which is currently at about 400 people. While the government appeared to consider, optimistically, that the creation of the reserve would satisfy Mitchikanibikokinik claims for land, the ABL saw it merely as a temporary location set aside from the incursion of settlers and their activities.[112] Many continued living "in the bush," although ongoing timber operations—as well as the spraying of pesticides and herbicides that poisoned flora and fauna—made it increasingly difficult to sustain a living from hunting and fishing.[113]

By the 1980s, the impacts of overhunting and fishing by commercial operators, reservoir operations and extensive clearcut logging, as well as the exclusion of Mitchikanibikokinik from decisions about the use of land, led the community to use direct action to attempt to get the ear of the government.[114] Inspired by the United Nations Report of the Brundtland Commission on Global Environment and Development in 1987, the Mitchikanibikokinik, led by Chief Maurice Matchewan, decided to forgo the usual comprehensive land claim route in favour of developing a co-management strategy that consolidated both concerns for environmental conservation and the traditional uses of the territory by Mitchikanibikokinik. They blocked both highways and logging roads in their territory and, in 1988, established a protest camp opposite Parliament in Ottawa, although this was quickly dismantled and participants arrested for trespass.[115] Neither Federal nor Provincial officials would meet with them, and an attempt to stop logging through an injunction

112 Matchewan, *supra* note 110 at 151–55.

113 Pasternak, *Grounded Authority*, *supra* note 111 at 126.

114 Elisa Shenkier & Thomas Meredith, "The Forests at Barrière Lake: Euro-American and Indigenous Perceptions of the Natural Environment" in Alex Wellington, Allan Greenbaug & Wesley Cragg, eds, *Canadian Issues in Environmental Ethics* (Peterborough, Ontario: Broadview Press, 1997) 67 at 70–73.

115 John Borrows, *Crown and Aboriginal Occupations of Land: A History & Comparison* (Toronto: Ipperwash Inquiry, 2005) at 28.

action in Federal Court was unsuccessful.[116] Politicians only began paying attention when blockades of Highway 117 by Mitchikanibikokinik coincided with the dramatic events of the Oka Crisis involving the Mohawks of Kanasetake and Kahnawà:ke in 1990, and John Ciaccia, Québec Minister for Native Affairs, flew to Barriere Lake to discuss an agreement.[117]

Although negotiations were difficult, the Mitchikanibikokinik, Québec, and Canada eventually signed the Trilateral Agreement (TLA) on 22 August 1991.[118] In it the parties agreed to initiate a process to enable Québec and ABL "to prepare a draft integrated management plan for renewable resources… with the objective of sustainable development." The process was to include a study of existing resources and their uses, the management plan, and recommendations for carrying out the plan. The preamble included the statement that the purpose was to ensure rational management of resources, while ensuring the "pursuit of traditional activities by the Algonquins of Barriere Lake." Funding was to be made available for the Mitchikanibikokinik to carry out the traditional land use studies, and the parties were stated as acting "within their respective jurisdictions." A report on the Trilateral Agreement commissioned by the Royal Commission on Aboriginal Peoples praised it as a potential model for cooperative sustainable development, in particular for the partnership it established between government and the Indigenous community.[119]

In practice the implementation of the Agreement has been a disaster. In the first few years, Québec simply asserted its jurisdiction over forests and mostly ignored or rejected Mitchikanibikokinik input on the forestry

---

116 *Algonquins of Barriere Lake v Bacon*, 1990 CarswellQue 1461, [1990] RJQ 1144 at paras 80–81.

117 Pasternak, *Grounded Authority*, *supra* note 111 at 132.

118 *Trilateral Agreement*, Algonquins of Barriere Lake, Government of Quebec & Government of Canada, 22 August 1991, online (pdf): <web.resist.ca/~barrierelakesolidarity> [perma.cc/A7QP-MX5H].

119 Claudia Notzke, *The Barriere Lake Trilateral Agreement* (Ottawa: Royal Commission on Aboriginal Peoples, 1993) at 88–90, online (pdf): <publications.gc.ca> [perma.cc/HYG2-K75X].

and cut plans,[120] as well as the idea of co-management.[121] The federal government resisted funding the land use studies up front in favour of retrospective reimbursement of receipts, which led the ABL to use other band funding to pay for field research. As emerged from federal government documents obtained by journalists at the *Dominion* newspaper, one reason for the lack of support seems to have been resistance to the idea that Mitchikanibikokinik are using the TLA, rather than the courts or established negotiation processes under the comprehensive land claim policy, as a means to assert their rights to land.[122] The appointment of Justice Réjean Paul as a mediator brought Québec back to the table, and after periods of hostility, the parties managed to produce an interim management regime that would implement the TLA. During 1993 ABL completed studies of sensitive areas to ground so-called "measures to harmonise" logging with Algonquin land use and began to accompany logging crews in order to protect sensitive areas such as animal breeding grounds.

However, this progress was not consistent and perhaps hard to perceive. As with the Lubicon Cree, certain members of the ABL community must have been asking themselves whether the lack of concrete results from negotiations and money spent was not the fault of their leader, his confrontational approach or his hard line on compromise. In 1994, a dissident group led by Joseph Wawatie formed the "Kitiganik Anicinabek Provisional Government," and began a campaign against Matchewan and his council, with allegations of fraud and domination. Their attempt to gain recognition from INAC of a new council via a petition failed: the department replied that "[i]n light of the submitted documentation we cannot come to the conclusion that the custom of the Barriere Lake Band has been followed nor that the provisional council has the majority

120 Pasternak, *Grounded Authority*, *supra* note 111 at 158.

121 Discussed in an exchange between Christos Sirros (Quebec Minister of Native Affairs) and Chief Jean-Maurice Matchewan on June 22, 1992, cited in *ibid* at 155).

122 Martin Lukacs, "Minister's Memo Exposes Motives for Removing Algonquin Chief", *The Dominion* (27 March 2009), online: <dominionpaper.ca> [perma.cc/937F-9YVK] [Lukacs]. One reason Mitchikanibikokinik state that they have rejected the CLC process is that the government insists on versions of extinguishment or non-assertion of Aboriginal rights and title as a condition of signing the agreement (Michael Thusky, former band administrator, conversation with Kirsten Anker (14 June 2008) via oral communication during visit to Rapid Lake [communicated to author]).

support of the community"[123] and stated that the department had "no authority to intervene" in the selection of Chief and Council under custom. However, since the Mitchikanibikokinik had never been subject to s. 74 elections, and their custom process had never been codified, INAC was not in a position to judge whether it had been followed in this case.

Meanwhile, in 1995, Matchewan and band administrator Michel Thusky were arrested by the Québec police (the Sûreté du Québec), the former on allegations of assault made by members of the dissident group, and the latter for detaining police officers in the band council office. Their bail conditions prevented them from returning to the community while Trilateral agreement issues were brewing over. Multiple allegations of sexual abuse of children in the community were made (one person was eventually charged), as were unproven allegations of financial misconduct.[124] Amidst a growing picture of a dysfunctional community, Québec walked away from the TLA. Finally, a group calling themselves the "Interim Band Council" (IBC) presented a petition to INAC, claiming that Algonquin custom had evolved into "election by petition."[125] The council, with Casey Ratt as chief, was declared by INAC in January 1996 as the legitimate band council, approving the appointment of a third-party manager on that day and claiming a mandate to codify the customary governance process. Given that the IBC had challenged the leadership of the council that had been in place for sixteen years pursuant to band custom, a necessary implication of INAC's declaration is either that it interpreted band custom, or that it disregarded it entirely in making its decision, both of which contradict its stated policy of non-intervention out of respect for band custom.

A period of growing hostility between the factions ensued. Matchewan's supporters maintained logging blockades and prevented the IBC from setting up office on the reserve; the latter were forced into "exile" in Maniwaki, while federal funds for services were cut off—no power, no

---

123 Jérôme Lapierre (Associate Director General, Indian and Northern Affairs Canada) "Letter to Joseph Junior Wawatie" (25 April 1994) Algonquin Nation Secretariat archives [communicated to Joseph Junior Wawatie (spokesperson for Provisional Government)] cited in Pasternak, *Grounded Authority*, *supra* 111 at 167.

124 Pasternak, *Grounded Authority*, *supra* 111 at 168-69.

125 *Mitchikanibikok Inik v Thusky*, 1999 CanLII 8724 at para 6 (FC).

medical services and no school were available for over a year.[126] Québec, feeling the effects of disruption to logging, pressured the federal government to resolve the leadership dispute.[127] Two facilitators were appointed to assist, and in a community consultation process, Matchewan supporter Harry Wawatie was affirmed as chief, and he and his council recognized by INAC in April 1996. Justice Paul was appointed to facilitate the codification of oral governance customs, which produced the Mitchikinabikok Anishnabe Onakinekawin (MAO), and confirmed that the petition was not a legitimate evolution of custom.[128]

While some progress was made over the next five years with respect to the implementation of the TLA, in 2001 the federal government announced that, having spent $5 million, it would no longer commit more funds to the agreement, although it expressed interest in discussing any future economic development projects that might arise from the management plans developed through the TLA.[129] In 2004, the ABL were asked to implement a financial recovery plan relating to band programs and services, but when they fired their co-manager in June 2006, INAC imposed third-party management. Chief Wawatie resigned over this, and in a process led by elders, Maurice Matchewan was re-selected as chief. However, a parallel process was also held, selecting George Nottaway as chief. INAC refused to recognise either council. In 2007, a second mediation process led by Justice Paul again confirmed that only the selection of the Matchewan council had followed the *Mitchikanibikok Anishinabe Onakinakewin*.[130]

A third disputed customary selection took place in January 2008 after Matchewan stepped down pending the investigation of criminal charges against him, which were eventually dropped. Two parallel selection processes produced two chief and council, one led by Benjamin Nottaway, a

---

126 Pasternak, *Grounded Authority*, *supra* note 111 at 175-79.

127 *Ibid* at 180.

128 This 1997 report of Justice Paul is referenced in a second 2007 report (see Réjean Paul, "Algonquins of Barriere Lake Mediator's Report" at 4–5 (last visited 13 November 2024), online: <web.resist.ca/~barrierelakesolidarity>) [perma.cc/RM9C-ZGBD].

129 Indian and Northern Affairs Canada, "Backgrounder: Federal Initiatives to Support the Algonquins of Barriere Lake" (15 November 2001) (last visited 8 October 2026), online: <ainc-inac.gc.ca> [perma.cc/5TV6-KAWL].

130 Pasternak, *Grounded* Authority, *supra* note 111 at 175-79.

former Matchewan councillor, the other by Casey Ratt, a member of the dissident group. This time, INAC recognised Ratt and his council. When, on judicial review of this action, the Minister tried to claim that the result was simply recorded and thus there was no discretionary "decision" to review, Justice Zinn held that there had indeed been an exercise of discretion.[131] What is revealed in departmental memos is that the discretion was clearly exercised on the basis of an evaluation that the Ratt council would be more collaborative with INAC and the third-party manager, and "less dogmatised and more concerned by the well-being of the community."[132] The Matchewan faction, on the other hand, is described by the Ministerial Special Representative during this period, Marc Perron, as being fixated by the TLA as a "mythical" treaty. He recommended that INAC should abandon the TLA completely, lest other First Nations begin to question why they should engage in the comprehensive land claim negotiation process when co-management of traditional territories could be achieved by partial accords like the TLA.[133]

A final customary selection process was conducted in June 2009 by the elders council aligned with Matchewan after they had failed to engage the Ratt council in a resolution of their conflict. The Minister refused to recognise this result, and in response, issued an ultimatum that the groups would have to resolve their differences and adopt an amended code that provided for secret ballots and an appeals process (in line with the reversion to custom elections policy) or he would impose s. 74 elections on the community. At the same time, the selection process was challenged by the Ratt council in Federal Court. Justice Mainville held that the June 2009 process was tainted with bias and had breached principles of procedural fairness. He found that in the recent history both parties to the dispute had manipulated the *Mitchikanibikok Anishinabe Onakinakewin*,

---

131 *Mitchikanibikok Inik,* 2008 FC 975, *supra* note 15 at paras 20–24.

132 "Barriere Lake – Leadership (Decision by Minister)" Departmental Briefing Note, (18 February, 2008) [government document on file with the authors]. See also Pasternak, *Grounded Authority*, *supra* note 111 at 195 and Lukacs, *supra* note 122.

133 Submitted to the Honorable Chuck Strahl, minister of Indian and Northern Affairs Canada, see Marc Perron, *Rapport du Représentant Spécial du Ministre auprès des Algonquins du lac Barrière (ABL)* (20 Decembre 2007) at 5–6 (INAC 2010-2705 at 94–113: <policingindigenousmovements.ca> [perma.cc/U567-6XNX]). See also Lukacs, *supra* note 122; Andrew Crosby & Jeffrey Monaghan, *Policing Indigenous Movements: Dissent and the Security State* (Halifax & Winnipeg: Fernwood Publishing, 2018) at 100.

for instance by using the selection process to oust a sitting chief and council when the leadership review process was supposed to be distinct and preliminary to a selection.[134] Although by the Spring of 2010 both sides had reconciled somewhat, united partly against the imposition of s. 74 and demonstrating a willingness to meet together and discuss, they were not able to draft an approved amendment by the deadline. Since 1 April 2010, they have operated with s. 74 elections.

As with the Lubicon, one side of the leadership dispute was involved in protracted negotiations with the government concerning a recognition of inherent rights that did not fall within the government's usual policy (treaty adhesion for the Lubicon, comprehensive land claims for the Algonquins of Barriere Lake). These leaders generally insisted on attaching funding for the short-term development of the reserve to more fundamental issues of self-determination and the management of a larger territory and refused to compromise on that. The other side of the dispute appears concerned to secure immediate benefits for communities that were suffering from extreme poverty and need. Disagreements over priorities like these are a normal part of the political life of any community. However, in the cases we have examined, much of the impetus for the political choices has been created not only by settler colonial practices of the past that are easily identified as unjust because they largely ignored Indigenous claims to their territory, but also by government strategies in the present that are designed to minimise the impact of those claims on resource extraction. As such, the Canadian government is always already entangled in First Nations governance disputes.

CONCLUSION

150 years after its introduction, it is widely accepted that the *Indian Act* is "an anachronistic, paternalistic and discriminatory piece of legislation" that gives virtually no place to treaties or inherent Aboriginal rights,[135] although it remains, for the moment, one of the primary

134 *Elders of Mitchikanibikok Inik*, *supra* note 11 at para 122.

135 John Provart, "Reforming the *Indian Act*: First Nations Governance and Aboriginal Policy in Canada" (2003) 2 Indigenous LJ 117 at 120, echoing the terms in which Harold Cardinal responded to Chretien's White Paper in 1969 (see Harold Cardinal, *The Unjust Society: The Tragedy of Canada's Indians* (Edmonton: MG Hurtig, 1969) at 140).

vehicles for the federal government's relationship with Indigenous peoples in Canada. In multiple ways, the *Act* stymies the exercise of inherent self-government rights, and even basic good governance.[136] Most funding is made available through federal targeted funding programs in which spending priorities are determined by a central bureaucracy and for which the *Indian Act* council is responsible to the Department. This structure has largely reduced Indigenous leadership, as one Chief put it, to being administrators of "Indian Affairs money."[137] Although the space in s. 2 for the recognition of band councils selected by custom has provided some means for First Nations of amending the more dysfunctional and alien aspects of *Indian Act* elections, and of exercising their inherent right to choose the way their leaders are selected, as we have seen, the Minister and departmental officials retain oversight and control over several areas impinging on leadership selection processes. Some of these are not amenable to judicial review. But even when they are, judicial review itself can involve subjecting Indigenous law-making to external assessments of best practice in governance, as we demonstrated in Part I. In Part II, we have surveyed other mechanisms deployed by the Department that constitute a normative influence in, if not outright manipulation of, community disputes relating to governance.

Since the failed and contentious 1969 White Paper proposal to abolish the *Indian Act*, there have been many attempts to work out the appropriate shape of reform. The most sweeping recommendations—grounded in self-government and a new relationship with the Canadian state—were articulated in the Penner Report of 1983, which recommended constitutional inclusion of "Indian governments" as a distinct order of government rather than the Department's proposal of delegated municipal-style

---

136 For example, the Act creates what has been called an accountability paradox, in which Chief and Council have both too little authority because virtually every decision can be reviewed by the Minister, and too much authority because they are not accountable to their constituent band members as there are few avenues to contest band council decisions (see Christopher Alcantara, Zachary Spicer & Roberto Leone, "Institutional Design and the Accountability Paradox: A Case Study of Three Accountability Regimes in Canada" (2012) 55:1 Can Pub Admin 69; Shin Imai, *The Structure of the Indian Act: Accountability in Governance* (Ottawa, National Centre for First Nations Governance, 2007) at 1.

137 Senate, Standing Senate Committee on Aboriginal Peoples, *First Nations Elections: The Choice is Inherently Theirs*, 40-3 (May 2010) at 25 (Chair: Hon Gerry St Germain), online: <publications.gc.ca> [perma.cc/FM6W-5AY9].

powers, preferring to replace the *Indian Act* entirely.[138] Federal policy since 1985 launched a process of negotiated self-government agreements that remove First Nations from the *Indian Act* in favour of alternative governance structures, while a raft of piecemeal legislative reforms replace specific sections of the *Act* for those who opt out, on matters such as membership, matrimonial property, band council accountability, and land management.[139] Despite the obvious problems with the *Indian Act*, it has proven difficult to garner widespread support—even from Indigenous constituents—for any specific proposal for reform.[140] While sometimes this has to do with inadequacies in the consultative and drafting process, it is frequently because in substance the proposed amendments do not do much to alter the foundational problems with the *Act*: they are simply old wine in new bottles.[141]

For example, in the last twenty-five years, two reform proposals addressing the issue of leadership selection have not moved very far away from the current model. The first proposal was introduced as Bill C-7 (the *First Nations Governance Act*) in 2002 to replace the governance sections of the *Indian Act* and provide bands with "more effective tools of governance pending the negotiation and implementation of the inherent right to self-government."[142] The Bill garnered a great deal of opposition from First

---

138 House of Commons, Special Committee on Indian Self-Government, *Indian Self-Government in Canada: Report of the Special Committee*, (October 1983) at 45–47 (Chair: Keith Penner). See also *Report of the Royal Commission on Aboriginal Peoples: Looking Forward, Looking Back*, vol 1 (Ottawa: Minister of Supply and Services Canada, 1996) at 317; Frances Abele, *Like an Ill-Fitting Boot: Government, Governance and Management Systems in the Contemporary Indian Act* (Ottawa: National Centre for First Nations Governance, 2007); Ken Coates, *The Indian Act and the Future of Aboriginal Governance in Canada* (Ottawa: National Centre for First Nations Governance, 2008); Douglas Sanderson, "Overlapping Consensus, Legislative Reform and the *Indian Act*" (2014) 39:2 Queen's LJ 511.

139 See e.g. Tom Flanagan, Christopher Alcantara & André Le Dressay, *Beyond the Indian Act: Restoring Aboriginal Property Rights* (Montreal: McGill-Queen's University Press, 2011).

140 John Provart discusses these procedural problems in the context of the proposed First Nations Governance Act (Provart, *supra* note 135).

141 John Borrows, "Stewardship and the First Nations Governance Act" (2003) 29:1 Queen's LJ 103 at 118 [Borrows, "Stewardship"].

142 Bill C-61, *An Act Respecting Leadership Selection, Administration and Accountability of Indian Bands, and to Make Related Amendments to Other Acts*, 1st Sess, 37th Parl, 2002, cl 3. In the next parliamentary session, this bill was reinstated (see Bill C-7, *An Act*

Nations representatives[143] and was abandoned by the government in 2003. Two of the main objections relating to leadership selection were the overriding power of the Governor-in-Council and the lack of discretion for First Nations in adopting governance models.[144] The Minister would have had the power to impose a default code if a band did not adopt its own code within the specified three-year period (clause 32(1)). Bands currently subject to s. 74 would have been required to adopt a code fulfilling a list of 10 criteria including secret ballot and a maximum term for council members of 5 years (clause 5(1)). Only bands operating with a custom code at the time the *Act* was to take effect would have been eligible to enact a code based on their existing custom, but they too would have been forced to codify appeals and amendment mechanisms (clause 5(2)). Clause 32(2) required that election appeals be heard by the Minister. Not only was the heavy hand of the Minister retained in this proposal, but it would have forced custom band councils to codify appeal and amendment procedures, arguably terminating a constitutional s. 35 right held by Aboriginal peoples to determine their own selection process.[145]

The second is the *First Nations Election Act*, which came into force on 2 April 2015 as an opt-in alternative to the *Indian Act* election provisions. In light of criticisms of the earlier Bill C-7, the *First Nations Election Act* was made to include several provisions that shift decisions about governance structures from the Minister to the band council—such as whether to move to an election system or reduce the number of councillors. Nevertheless, there remains a residual power of the Minister to forcibly bring a First Nation under the Act if "a protracted leadership dispute has significantly compromised the governance of that First Nation."[146] This

---

Respecting Leadership Selection, Administration and Accountability of Indian Bands, and to Make Related Amendments to Other Acts, 2nd Sess, 37th Parl, 2002, cl 3).

143 See generally Soury Phommachakr, *La Loi sur la gouvernance des premières nations: (dé)colonisation du droit fédéral canadien en matière autochtone?* (LLM Thesis, Université de Montréal, 2004) [unpublished].

144 Stephen Cornell, Miriam Jorgensen & Joseph P Kalt, *The First Nations Governance Act: Implications of Research Findings from the United States and Canada*, A Report to the Office of the British Columbia Regional Vice-Chief Assembly of First Nations (Tucson: Udall Center for Studies in Public Policy, 2002).

145 See Kent McNeil, "The Crown's Fiduciary Obligations in the Era of Self-Government" (2009) 88:1 Can Bar Rev 1.

146 *FNEA*, *supra* note 3, s 3(1)(b).

provision received extensive negative commentary from First Nations representatives during Senate Hearings on the FNEA's predecessor in Bill C-6 in 2012, with the Senate Standing Committee on Aboriginal Peoples (SSCAP) stating that the power continued a colonial and paternalistic approach to First Nations Governance.[147] In the parliamentary debates during the second reading of the Bill, Senator Lillian Eva Dyck observed that the federal government is not neutral in relation to leadership disputes that can be intensified in the context of difficult decisions around resource exploitation and negotiated agreements—as our two case studies have borne out—and Ministers "may feel inclined to order an election in hopes of finding more compatible First Nations leadership when there appear to be delays or disputes in settling resource development disputes."[148] When Senator Dyck's proposed amendment to delete s. 3(1)(b) was defeated,[149] several SSCAP members strongly cautioned that the power in s. 3(1)(b) should be used only rarely and then, only when all other forms of dispute resolution or democratic reform have failed.[150]

Although disagreements between different sections of a community are an expected—and, some might say, healthy—dynamic in any polity, federal policies clearly assume that custom selection codes facilitate intractable disputes when they do not protect the anonymity of the voting process, when they lack an appeals process and when the rules are not public and clear, or are not consistently applied. The received wisdom is that self-government measures require democratic accountability, the rule of law, and procedural fairness standards. These principles, in the abstract, are hard to object to. However, as one former member of the Joint Ministerial Advisory Council on Aboriginal governance (JMAC) put it, reform of the *Indian Act* has been stamped by the effort to make First Nations governments "resemble as much as possible non-Aboriginal visions of governance and democracy, without much of a reciprocal effort

147 "Bill C-9, An Act respecting the election and term of office of chiefs and councillors of certain First Nations and the composition of council of those First Nations", 2nd reading, *Debates of the Senate*, 41:2, 149:39 (27 February 2014) at 1041–43 (Hon Lillian Eva Dyck).

148 *Ibid* at 1043.

149 "Bill S-6, First Nations Elections Act", 3rd reading, *Debates of the Senate*, 41:1, 148:70 (24 April 2012) at 1656.

150 "Bill C-9, First Nations Elections Act", 3rd reading, *Debates of the Senate*, 41:2, 149:50 (8 April 2014) at 1310–18 (Hon Lillian Eva Dyck, Hon Dennis Glen Patterson).

to explore or understand in any depth First Nations' concepts of governance and democracy," and on the stereotyped assumptions that without the imposed regime, there are no suitable governance traditions.[151] According to John Borrows, the rise in discussion of the "accountability" of First Nations governments in recent years has precisely allowed the debate around self-governance to shift from the issue of removing unjust state oversight of Indigenous communities and towards creating further mechanisms for control.[152] And yet, as he takes pains to elaborate, Indigenous traditions have their own contributions to make to the notion of accountability, ones that operate within a broader idea of stewardship.

It remains to be seen, finally, whether the implementation of the *United Nations Declaration on the Rights of Indigenous Peoples* (*UNDRIP*) through the federal *United Nations Declaration on the Rights of Indigenous Peoples Act*[153] will affect either the legislative and policy frameworks for *Indian Act* elections or the ways in which courts interpret custom to further *UNDRIP*'s stated goals of self-determination in light of Article 3, and the right to autonomy in relation to their internal affairs in Article 4. While the Supreme Court of Canada has held that *UNDRIP* has been incorporated as part of Canadian positive law through the *UNDRIP Act*,[154] it is unclear whether this means it is merely to serve as a political framework for negotiating measures that address its objectives as suggested in the British Columbia Supreme Court,[155] or whether it has similar weight to binding international agreements such that s. 35 case law should be brought into conformity with *UNDRIP*.[156] In either case, *UNDRIP* may bolster space for thoughtful approaches which understand that democratic values and accountability may be achieved in many ways and

---

151 See Senate of Canada, Proceedings of the Standing Senate Committee on Aboriginal Peoples, *Evidence*, 40-2, No 10 (2 June 2009) (Wendy Cornet, JMAC member representing the Congress of Aboriginal Peoples).

152 Borrows, "Stewardship", *supra* note 140 at 115.

153 *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14.

154 *Reference re An Act Respecting First Nations, Inuit and Métis Children, Youth and Families*, 2024 SCC 5 at para 15.

155 *Gitxaala v British Columbia (Chief Gold Commissioner)*, 2023 BCSC 1680 at para 466.

156 *R c Montour*, 2023 QCCS 4154 at paras 1175–204.

which then facilitate tailored local solutions rather than pro-forma election models.[157]

While proposals for reform are beyond the scope of this article in its two Parts, it is hoped that our diagnostic approach will have helped to identify what is at stake in the application of conventional standards of judicial review and assumptions about the nature of custom as the "will of the majority" (from Part I) as well as in the federal government's interventionist approach to governance disputes and financial accountability (in Part II). If the broad trends in the Canadian state's Indigenous policy are usually identified as progressing from a civilizing mission in the late 19th and early 20th centuries, a policy of assimilation in the mid-20th century, and then ones of recognition and reconciliation in the last 50 years, there is possibly also a shadow policy to be read in alongside them more recently: that of immunizing the government from political and legal liability. Together with persistent colonial structures and impulses, this may go some way towards explaining the entangled position of "non-involvement" and the paradoxes of recognition.

157 See e.g. Daniel Sherwin & Daniel Hutton Ferris, "Decolonizing Democratic Theory: A Democratic Case for Unelected Indigenous Governments" (2026) Can J Political Science 1 (first view, March).