



Reserve Land Governance

NALMA National Gathering 2023



Governance Practices

- Governance is the process of governing.
- Governance refers to the manner in which power is exercised by governments in managing their community's traditional, environment, social, and economic resources.
- Governance is: **“the means (process and structure) by which *First Nations* exercise their jurisdiction or control.”**
- Land management therefore is essentially about good governance.



- All responsible governments are concerned with the well-being of members and the wise use of lands and resources.
- Successful governance requires leadership, experience, and discipline.
- All governments fulfill certain needs, deliver services, and are accountable to their members.
- However, after Confederation the Parliament of Canada created a dilemma for First Nation people:
 1. Passed legislation designed to alter traditional tribal organization by providing for leadership elections; and
 2. Made the elected Chiefs accountable to the Minister of ISC rather than the members of the First Nation.



- Although the federal government has amended the original legislation several times since 1869, its legacy endures.
- Under the *Indian Act*, the Government of Canada replaced traditional First Nation governments with First Nation governing bodies known as First Nation Councils.
- As First Nation Councils are creatures of statute, they are only authorized to exercise those delegated powers set out in the *Indian Act* and are dependent on Parliament for their existence, powers, and responsibilities.



- The resulting problems for First Nations people include:
 - insufficient power and jurisdiction
 - excessive government controls
 - unclear lines of authority and accountability
 - inadequate funding and training
 - lack of enforcement mechanisms
 - confusion about the impact of provincial laws
 - confusion about leaders' roles and responsibilities; and
 - confusion about governance matters



Powers of Chief and Council

- There are some Councils that have guidelines for the Chief to follow when deciding on exceptional situations; Councillors exercise their powers in a duly convened meeting with a quorum present.
- The *Indian Act* is typical in this regard.
- It confers power on **Council as a collective body**, in other words, to the Chief and Councillors as one.



Important

Individual members of a Council, including the Chief, have no power to act alone when deciding for the First Nation.



- For the most part, Councillors of “custom First Nations” are subject to the *Indian Act*, and hence derive some of their powers from it.
- Whatever the method by which a community chooses its leaders, they become trustees, with delegated powers.
- Therefore, a clearly defined governance standard for all First Nation Councils should be developed.



- The law as decided by the courts, not only for First Nations, but for national and local government, corporations, and non-profit organizations, provides another source of information on powers roles and responsibilities of Councils.
- Much (but not all) of Council's work is "board-like".
- Since virtually all "boards" have a trustee relationship with their members or owners, the principles of good governance are reasonably consistent.



- **In exercising their powers, Councillors collectively have several important governance roles to fill:**

- Representative
- policy-making
- monitoring
- political
- law-making



- **Council's key governance responsibilities include:**
 - overseeing strategic management
 - hiring and directing the First Nation Manager/Director of Operations
 - maintaining good relations with the members
 - protecting community assets
 - fulfilling and legal responsibilities



• Council's functions:

- pass bylaws and BCR's
- negotiate and enter contracts
- hire and supervise managers
- manage assets of the First Nation
- represent the First Nation in negotiating resource and governance agreements and treaties
- manage LUP
- manage commercial development
- manage delivery of programs and services
- spend money on behalf of the First Nation
- deal with developers, legal advisors, and environmental consultants



Council's Internal Relationship

- An important relationship to manage and develop is that of the Councillors' internal relationships with each other, and the Chief.

Note: Council will better manage its internal relationships if it works as a team.

- To be effective, players on sports teams, like lacrosse or hockey, have different, but complementary, skills and play different roles.
- First Nation members expect Chief and Council to work in much the same way.



- A positive approach is for Council to set aside time to determine how each member can best contribute to Council work.
- Naturally, the Chief Councillor is the leader of the Council team and will have a different role than Councillors.
- Understanding and exercising their different roles can make for a very strong working relationship to everyone's benefit.



Fiduciary Obligation of Councils

- A fiduciary relationship exists wherever one person – called the “fiduciary” – has unilateral control over the interests of another – called the “beneficiary” – who is vulnerable to the fiduciary.
- Wherever these conditions are met, the law will hold the fiduciary to a high standard of conduct.
- The fiduciary must act solely in the best interests of the beneficiary and be loyal and careful regarding the beneficiary’s interests or assets.
- Fiduciary law protects those who trust in others from having that trust betrayed or misused.



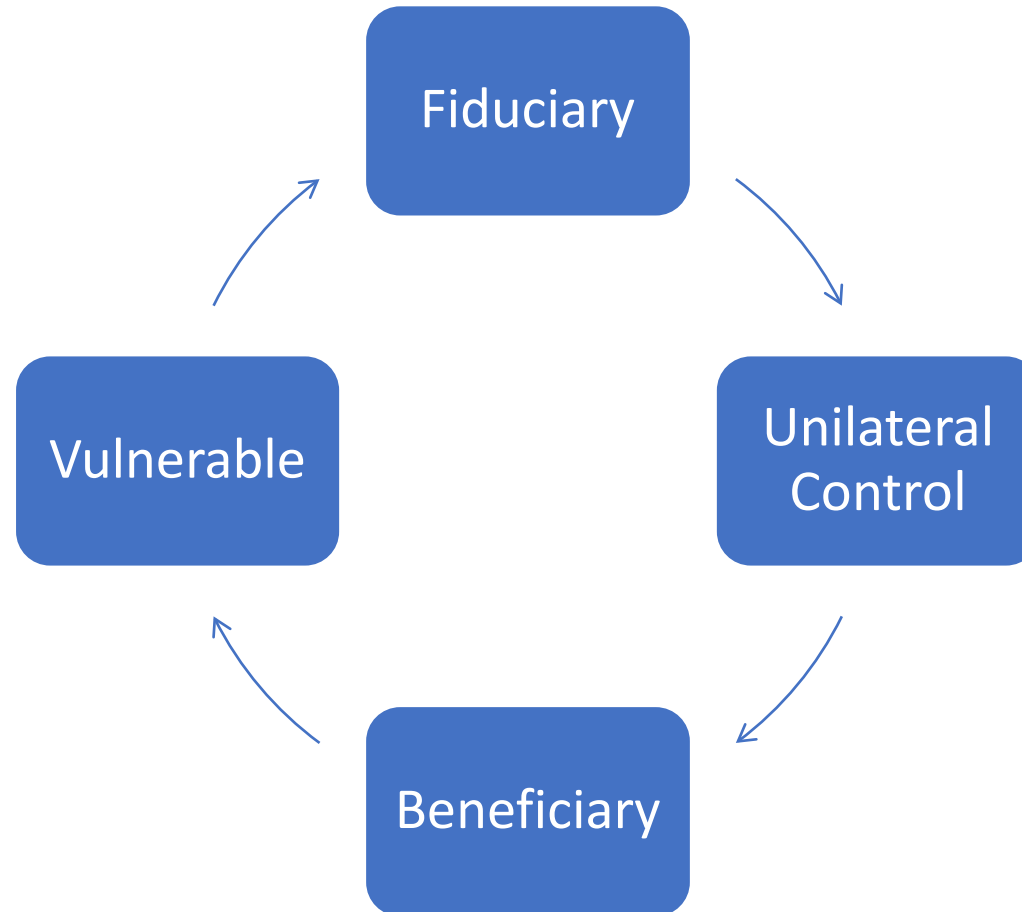
- Fiduciary obligations are not the product of any statute.
- They exist because courts have used their authority to impose legal obligations wherever it is fair and just to do so.
- For this reason, the law of fiduciary obligation evolves constantly, as courts impose fiduciary obligations in new kinds of situations they see as “fair and just” i.e., *Guerin* and *Sparrow*.



- Fiduciary obligation arises between a Council, including the Chief, and the members of a First Nation.
- Councils are in positions of authority and control over monies, land and other assets of the First Nation.
- When Councils make decisions about collecting or spending money, or about dealing with lands, the Council must act in the best interests of the First Nation and must be loyal and careful.



Fiduciary Obligation





To the First Nation

- When we apply the criteria for determining whether a fiduciary obligation exists, we see the Council has unilateral discretion over the assets of the First Nation.
- Members of the First Nation are vulnerable because they cannot make Council decisions but can only provide input.

The British Columbia Supreme Court expressed this duty in *Assu v. Chickite*, [1994] 1 C.N.L.R. 14 (B.C.S.C.):

- *Members of an elected First Nation Council are fiduciaries insofar as the members of the First Nation are concerned. Upon election, a Chief or Council member undertakes to exercise his or her discretion as an elected official in the interest of the First Nation, and the members of the First Nation are vulnerable to abuse by the Chief or Council member of his or her position.*



- Not every decision by a fiduciary – in this case a First Nation – will be under a fiduciary obligation.
- The Council's decisions regarding assets of the First Nation will be held to the strict standard of a fiduciary.
- The following decisions would all create a fiduciary obligation:
 - allot or lease lands to a member
 - grant subsidized housing to a member
 - grant post-secondary funding to a member
 - establish bylaws and policies
 - spend money



- To determine whether a decision breached the fiduciary obligation, the Court stated that one should look for obvious dishonesty or disloyalty.
- Under section 69(1) of the *Indian Act*, a First Nation can request the Governor in Council to permit the First Nation to manage its revenues.
- Where a Council passes a BCR which states that revenues should be disbursed to members, the Council has a fiduciary obligation to distribute the revenues equally among all members.



- A Councillor breaches his/her fiduciary obligation by participating in Council decisions that involve personal interests - interests of the Councillor's family, business or property.
- Thus, a Councillor ought not to vote on a resolution to allot land to a member of his/her family, or a resolution to allow the Councillor's business to lease lands from the First Nation.



Lands and Resources

- Often, when a Council makes a decision regarding lands or resources, the Director of Operations will take that decision to staff for implementation.
- The Council must manage the lands in the best interests of the First Nation by ensuring that benefits of non-members using or living on reserve lands (i.e., rent) flow to the members.
- First Nation assets may include:
 - personal property (office furniture, vehicles, computers, cultural property)
 - lands (reserve lands, off reserve fee simple lands, traditional territories)
 - deposits with trust companies or banks
 - improvements to the lands (such as buildings)
 - corporate interests (in First Nation-owned companies or shares in other companies)



General Principles

- The following general principles will explain how a Council can protect itself from allegations of breached fiduciary obligation:
 - act in the best interests of the members
 - make decisions with care and loyalty to the First Nation
 - avoid conflict of interest situations
 - grant benefits and opportunities equally to all members
 - follow established procedures for making and recording decisions about assets of the First Nation
 - respond to concerns and inquiries by members
 - allow persons affected by a decision to give input
 - take necessary measures to protect Aboriginal title and rights, reserve lands, and other lands associated with traditional activities
 - enforce all contracts and leases



Important Note

Every land manager/officer owes a fiduciary obligation to his/her employer, and the First Nation.

The land manager/officer is a fiduciary because he/she has some decision-making authority over the First Nation's assets and also over assets of minors and persons deemed "mentally incompetent" under the "Indian Act."



- Community members grant power to an elected Chief and Council to govern the land and property of the First Nation for them.
- Councillors, including the Chief, thereby assume responsibility for program and service delivery, financial management, policy development and planning and control systems.
- As the elected representatives of community members, Chief and Council are the authorized First Nation government.
- As such, they have roles and responsibilities beyond those of an ordinary member.



For example:

Councillors have a fiduciary responsibility to always act in the best interests of the First Nation as a whole, and always to use First Nation resources equitably for all the members' benefit.

- Failure to do so can result in personal liability being assets against an individual Councillor or the whole Council.



- Council is responsible for the governance of the community, its own governance and to govern the First Nation administration.
- Council is responsible for providing “good government” over a broad range of purposes that affect community well-being.
- This is “*political accountability*” since Council, in carrying out these purposes, is expected to conduct itself by standards that echo the will of community members.
- Leaders who understand their trustees’ role, and conduct themselves, accordingly, welcome the participation of members and readily make themselves accountable for their actions.



- In short, accountability supports the community in meeting its needs and objectives.
- Also, accountability helps prevent the abuse of power by those who hold positions of trust and authority.
- A clear description of how to structure a government to reach its goals helps Councils know who is accountable to whom.
- Defining the roles, responsibilities and decision-making authority of individuals within the organization is key to management and accountability.



Questions??