

# **Enhancing Integrity in Aboriginal Government: Ethics and Accountability for Good Governance**

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## **1.0 Introduction**

Questions regarding conflicts of interest and ethics in government are a growing public concern for Aboriginal people, especially in this period of discussion on implementing the inherent right of self-government and the repeal and dismantling of the *Indian Act*<sup>1</sup> and Department of Indian Affairs. In the public hearings of the Royal Commission on Aboriginal Peoples, over two hundred submissions addressed concerns relating to ethics and conflicts of interest in Aboriginal governments. Many presenters suggested that explicit codes of conduct for Aboriginal government officials and leaders were required in this era of building institutions and arrangements for implementing the inherent right of self-government. These submissions from Metis, Inuit and First Nations representatives alike should be carefully considered by the Royal Commission on Aboriginal Peoples and Aboriginal communities. As one Mi'kmaq presenter suggested:

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<sup>1</sup> *Indian Act*, R.S.C. 1985, c. 2, as amended.

I believe that above all else in any self-government regime, and again consistent with any changes in the Indian Act or with the introduction of a level of self-government, for example, the Mikmaq Grand Council, there must be in this whole process an accountability...that relates back to the membership. The leadership must be accountable to our people. There must be...methods for removal and replacement of individuals in this new form of self-government. You wouldn't want something in perpetuity that is far worse than the present bureaucracy...which we have to endure. There are good points in the current system and I would suggest that if we're ever going to implement self-government, that there are no life terms, if you will, for leadership. It's got to cover the removal and replacement of individuals in authority in the event of corruption, noncompetence, financial mismanagement, other forms of malfeasance.<sup>2</sup>

It is my view that discussion of the conduct of current and future Aboriginal governments is essential for the healthy restoration and development of Aboriginal governments. The responsibilities of elected and appointed officials in current and future Aboriginal governments is crucial because all government, Aboriginal or non-Aboriginal, is a matter of public trust. It is important to acknowledge that, Aboriginal peoples' concerns about ethics are growing and genuine criticism is being aired as self-government aspirations are translated into policy developments and agreements. Aboriginal leaders are being directly challenged by their citizens in the courts, through internal civil disobedience and most importantly, in the polling booth. These developments are not regressive or unwelcome: they are essential to the re-establishment of public trust of Aboriginal people in aboriginal government. Often this trust was eroded by colonial governments who exerted control over Aboriginal communities and imposed alien system.

Some of these disputes between Aboriginal citizens and their governments are adversarial. Aboriginal governments are being sued by individual community members for alleged breaches of their duties to their membership. This is the consequences of an absence of

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<sup>2</sup>RCAP Public Hearings, Eskasoni, Nova Scotia, 92-05-07 53, Albert Julian, p. 309.

alternative internal political structures to address grievances regarding ethics and accountability in Aboriginal governments. Meanwhile, increased media attention is being paid to these allegations and internal debates. Without appropriate responses or initiatives, public confidence in self-government initiatives on these matters, already tentative in many regions, faces further erosion. What is required by Aboriginal leaders is to squarely address these concerns and the underlying problems from which they stem.

The opportunity for positive change in the direction of effective and accountable Aboriginal government rests with Aboriginal people, but it is also dependent on the willingness of non-Aboriginal politicians to address the root causes of these conflicts with Aboriginal peoples. By examining the root causes of this situation there is opportunity to build mechanisms into the process of implementing self-government and treaty rights to ensure that the checks and balances required for contemporary accountable government are present. Finding the best process to do this, and the correct balance between Aboriginal traditions and contemporary accountability requirements, is a challenge which requires an appreciation of historical context. It is not for non-Aboriginal officials or politicians to dictate to Aboriginal governments on accountability when the imposition of the *Indian Act* system of government is, in large measure, the genesis of contention. Still, Aboriginal leaders cannot simply hide behind the legacy of the *Indian Act* and shield their administrators from criticism or public accountability. A process to examine these matters is required, cognizant of history, but mindful of public trust and duty.

While Anglo-European governments draw upon a large body of literature and political theory on responsible government and public participation, Aboriginal governing traditions have not been recorded in the same manner. Hence, many external observers believe that accountability checks and balances are simply absent from Aboriginal governing traditions. The presentations at the hearings of the Royal Commission on Aboriginal Peoples indicate otherwise. I reviewed the testimony of many Aboriginal presenters who described their governing customs and expressed their preference for these customs as a foundation for responsible government.

While these customs and traditions are intact in many places, they have not been codified or written to date. The oral history on these traditions is still present and influential. Self-government calls for new forms of Aboriginal government consistent with traditions while equipped to tackle the range of social and economic problems Aboriginal peoples confront today in an era of profound change. Formal codes of conduct and ethics may be required to ensure that Aboriginal confidence and trust in government is maintained with self-government. Aboriginal people want to begin examining traditions and customs with respect to responsible government and the various models or examples of codes of ethics and conduct that may be suitable or attractive in this context. This paper may be of some assistance in sparking this process of review.

The focus of this paper is specifically on ethics and accountability in the evolution of First Nations' government. Because of the legacy of the *Indian Act*, elected council style governments in First Nations communities wield extensive authority delegated by the Minister of Indian and Northern Affairs. First Nations' chiefs and councillors acting under the direction of the Minister of Indian Affairs, regulate such vital matters as housing, employment, membership and education. The structure of First Nations' government established by the *Indian Act* entails a primary line of accountability and responsibility to the Minister of Indian Affairs, rather than to the people directly. With the significant fiscal responsibility which has come from new block funding arrangements with bands and tribal councils, the need to create and institute mechanisms which provide checks and balances upon the authority of government and foster accountability to First Nations' citizens is crucial. My focus here on First Nations' governments should not suggest that Inuit and Métis governments do not need to direct their attention to the same kinds of criticisms of Aboriginal government raised during the Commission's public hearings. These criticisms were by no means restricted only to First Nations' governments, nor were they levied only by First Nations' individuals and organizations. All Aboriginal governments are being scrutinized by their members in light of their record on ethics and conflicts of interest. In

addition, along with the First Nations' governments, media attention has in recent years been directed at the conduct of Métis and Inuit leaders, organizations and governments.<sup>3</sup> The study of First Nations' governments speaks broadly to problems of extraordinary relevance because it sets out in clear detail the context for the current environment; in particular, the challenges of making the transition from governments under the *Indian Act* to autonomous governments functioning under an inherent right of self-government, accountable directly to the citizenship of a First Nation along with a duty of accountability to other governments in the Federation of Canada.

One impression drawn from the presentations to the Royal Commission is that grievances over the conduct of *Indian Act* governments have not always been handled in a spirit of openness or responsiveness by either band governments or the Federal government. Increasingly, the actions of band councils have come under attack by band members who have petitioned the courts for redress failing any recognition of the issues at the community level. Chiefs and councillors have been held personally liable for their actions and for decisions made during council meetings that have been determined not to be consistent with the best interests of all members of a given band. The Minister of Indian Affairs has also been challenged for being either overly passive on these issues (responsible by omission) or for failing to disclose to band members information which affects their collective welfare. The current state of affairs is unsatisfactory to all observers. Band members with complaints have no formal process other than the courts; councils must defend even vexatious or politically motivated complaints at great expense in the courts. No one arbitrates these matters and the rumor, conflict and expense only erodes First Nations' confidence in the high duty of public government for the people.

With the spate of recent court challenges and concomitant media attention, there is potential for a widespread lack of trust in the non-Aboriginal community in the ability of First

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<sup>3</sup>See, for example, print media reports on Inuit leader, Senator Charlie Watt, "Quebec Inuit dump Watt as leader in province-wise election" *Gazette*, Montreal, March 27, 1994, p. A5: "Senator Watt lost re-election as leader of Quebec 7000 Inuit on Friday after a week of controversy about possible conflicts-of-interest he faces." See also, S. Cameron, "Boss of the North" *MacLeans*, March 28, 1994, p. 12f.

Nations to effectively govern their people. Many First Nations individuals feel that the courts are ill-equipped to address these concerns because they are too slow, cautious, expensive and unfamiliar with First Nations' customs and traditions. Aboriginal people still do not perceive the courts as institutions reflective of Aboriginal peoples and their governments, but rather as entities serving the needs of the non-Aboriginal population of Canada. This is important because court judgments are often viewed as "outsider interference" in First Nations' affairs and thus ignored internally. This deflects attention from the legitimate issues and means the loss of important opportunities for community debate and discussion on how to bolster ethical standards of conduct and accountability in First Nations' governments. In the absence of any internal First Nations' standards or processes, individuals will have no where to go to get a hearing for their grievances, apart from the court process.<sup>4</sup> This requires immediate attention, and not just solutions at some future point in a self-government agreement.

The use of the mainstream court process in this way brings negative attention to First Nations' communities and erodes both First Nations and non-First Nations' confidence in self-government. Any widely-held perception that First Nations' governments act arbitrarily, unilaterally and capriciously and are not accountable to their people, whether legitimate or otherwise, will have adverse effects upon the opportunities for First Nations to implement self-government and assume greater recognition for First Nations' governments. Indeed, increased negative attention to the activities of the former are particularly susceptible to being seized upon to discredit self-government. Consequently, First Nations' governments need to demonstrate to both First Nations and non-First Nations' peoples that procedures are available to regulate governmental affairs and due consideration has been given to issues of accountability in the decision-making of elected representatives and public officials.

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<sup>4</sup> In Saskatchewan, the Federation of Saskatchewan Indian Nations is currently exploring the possibility of establishing a peacemaker tribunal which would serve as an alternate dispute resolution process utilizing First Nations values and principles but recognized by Canada and First Nations as authoritative by parallel legislation.

The discussion of accountability in First Nations' government is not meant to suggest that it is only First Nations peoples or even Aboriginal peoples more generally who experience difficulties with ethical standards of elected and appointed public officials. The duties of democratically-elected Canadian governments to conduct themselves honourably, and to report to their electorate, is what provides the basis for the public's ability to demand governmental accountability of its actions and expenditures. Canadian political institutions are under constant scrutiny for ethical conduct. They do not always live up to their own standards. This intense scrutiny of politicians and officials is experienced today by all governments in the world.

A great deal of public attention has been directed at building checks and balances into public government in Canada to boost confidence, accountability and trust. For example, the creation of the office of an independent auditor, the Auditor-General of Canada, was designed to ensure that the public treasury's image is consistent with the requirements of public responsibility and trust and that even the appearance of conflict or mismanagement be addressed. The Auditor-General, an independent office from government but with substantial access to government financial statements and budgets, reports annually (or as needed) to the Canadian public on whether or not the government of the day is discharging its financial duties properly. These independent evaluations are the cornerstones of democratic government in Canada. Accountability, transparency in fiscal matters, and an effective process to ensure that apparent or real conflicts of interest are appropriately addressed by an independent entity, are all crucial to public confidence in government.

Checks and balances on government power have developed over many years in the struggle for responsible and accountable government in Canada. Many believe the current guidelines for ethics and accountability in the federal, provincial and territorial governments are still inadequate or too declaratory (rather than enforceable). These standards continue to evolve and a significant effort to strengthen them has been underway in Canada over the past two decades. Specific codes stipulating ethical standards and duties have been developed and

expanded because of specific incidents which have raised new or unique circumstances. While some of these circumstances may be specific to parliamentary democracy, many of the principles and prohibitions are more universal in nature; for example, the prohibition on the acceptance of bribes.

In the quest for Aboriginal self-government, which involves a re-emergence or restoration of customary forms of government, communities are not merely reverting to pre-contact forms of government with idyllic tranquillity between the governed and the governing. No one in the Aboriginal community is advocating this scenario. Many researchers for the Commission have recorded the importance of distinctive First Nations traditions and governing systems in a contemporary context.<sup>5</sup> Aboriginal people are blending traditions and customs with the contemporary modalities of government, such as financial transfer agreements and accountability in the public administration of services. Few people seriously suggest that traditional First Nations' values be jettisoned today and entirely Anglo-European government customs and practices be embraced. What seems to be emerging is this creative blend of both systems; traditional values and forms of representation combined with fiscal accountability, public participation and public trust. For example, in the area of education, First Nations want greater control over curricula, institutions and certification of professionals. This was not a "traditional" government function; it was a family function. Now it is a key component of greater First Nations' government jurisdiction. Discharging this function requires accountability to the community whose members' education is being controlled or managed by a First Nations' government. This kind of accountability is not only fiscal, but extends to school boards and public servants who must reflect the desires of the community in education and thus ensure that schools enjoy the confidence of the people.

The parallel need for Canadian governments to be accountable to the people has resulted in the promulgation of numerous federal and provincial laws and regulations across Canada

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<sup>5</sup> See *Case Studies in Self-Government*, edited by Frank Cassidy for the Royal Commission on Aboriginal People. (1994).



governing matters relating to conflicts of interest and ethical standards of conduct for public officials and representatives. These will be discussed in greater detail below. It is crucial to consider the kinds of ethical standards now in force, their rationale, and their applicability or significance for First Nations. First Nations' citizens would, in my view, find it helpful to consider these codes in order to determine what values or prohibitions they might want to include, along with their traditional values and customs, in responding to the growing concern expressed by First Nations' citizens.

In this regard, the experiences of United States tribal governments are pertinent and are also explored below. In the United States context, tribes responded to similar concerns regarding accountability by developing tribal codes of ethics governing areas of conflict of interests and the general duties and responsibilities of public servants and elected officials. The Navajo Nation, for example, has instituted a code of conduct<sup>6</sup> which stipulates that tribal officials and employees refrain from activities with the potential to place them in any apparent or actual conflict of interest. The Navajo Nation example will be discussed in greater detail because it is the most highly developed tribal system for ethics and accountability. A copy of the Navajo Code, and other supporting documentation from the Navajo Nation is appended to this study for easy reference.

One of the reasons I chose to focus on the Navajo Code is to respond to the concerns raised during the hearings of the Royal Commission. The proposals for codes of conduct raised by several presenters were not restricted to only a local or community level. Many presenters expressed the opinion that regulating the actions of the Aboriginal political leadership must encompass all of Aboriginal governing structures (the "Nation" as a whole), ranging from national organizations to regional organizations, tribal councils and local band councils. Duncan Gould, a member of the Membertou Band, told the Royal Commission that what is needed in his

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<sup>6</sup>*Navajo Nation Ethics in Governmental Law*, 2 NTC, Section 3751-3761, enacted into law on August 9, 1984 by the Navajo Tribal Council by resolution CAU-40-84.

view is “conflict of interest guidelines for all elected native officials from the national level right down to the local level, and that includes chief and councilors, executive directors, board members, whatever have you. Whoever is in a public office. I think you need a strict Code of Conduct and Ethics as far as these elected officials go.”<sup>7</sup> The Navajo Code is relevant here because it governs all reservations and all officials, elected and appointed, within the Navajo Nation.

In the final part of this paper, after considering federal, provincial and territorial examples, as well as the Navajo Code, I have prepared some specific recommendations for addressing ethics and conflicts issues in present First Nations’ governments, as well as recommendations for the longer-term development of codes for accountable governance. Of course, any process in this regard should be community-driven and sensitive to the customs and traditions of the particular nation in question. Hence, my recommendations are general in nature. Nevertheless, I believe, there are positive features to build on with the Canadian and Navajo models which will strike a familiar note with many Aboriginal people. It is not for me to prescribe a specific model code, even though such a document would be helpful in a specific cultural context. Those working in Aboriginal self-government need to carefully consider the governing customs and traditions of their own people (i.e., Nishga, Inuvialuit, Cree, etc.) in developing such models. This is not practical in this kind of preliminary study.

## **2.0. The Indian Act Legacy for First Nations’ Governments**

What is the historical context for the criticisms which are now being levied against *Indian Act* governments? This is the starting point of any discussion because it is only through understanding the restrictions and limits on First Nations’ governments, imposed by the *Indian Act* and the administration of the Act by the Department of Indian Affairs, that we can begin to

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<sup>7</sup>RCAP Public Hearings, Eskasoni, Nova Scotia, 92-05-07 58, Duncan Gould, p. 319.

appreciate how the problems which are now being raised are systemic and not character or personality difficulties in specific communities.

The imposition of the first modern *Indian Act* in 1876,<sup>8</sup> to manage and implement the Dominion government's regulation of First Nations' peoples in Canada was intended to provide for clearer Canadian governmental control over First Nations' peoples and their internal affairs. The *Indian Act* eliminated traditional forms of First Nations' government, at least in an official sense (many went underground), and replaced them with artificial, non-Aboriginal forms of rule which neither reflected First Nations' cultures nor the desires of the peoples for whom they were designed (First Nations were not consulted). In the words of National Chief Ovide Mercredi:

Because of the power the *Indian Act* exerts over our peoples and the injustice it causes, our authority and power as First Nations citizens and governments have been undermined. The Act has imposed a municipal style of government in the form of Band Councils with the result that our traditional government systems and values have been seriously compromised and in some cases lost. For example, in the Iroquois custom of the "Haudenosaunee" or Longhouse, the clan mothers select the chiefs or headmen. They follow an elaborate set of important rules for assigning political responsibility within a spiritual context. though it is contrary to the *Indian Act*, the Longhouse government still thrives in some Iroquois communities. Yet to Canadian governments, the Longhouse garners no recognition or respect; they will deal only with the Band Councils. This results in internal divisions which can be so powerful that they lead to violence and factionalism in our communities.<sup>9</sup>

The *Indian Act* ignored First Nations' understandings of identity and group membership when it created and imposed its own categorization of "Indians."<sup>10</sup> Aboriginal persons who did

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<sup>8</sup>S.C. 1876, c.18.

<sup>9</sup> Ovide Mercredi, Mary Ellen Turpel, *In The Rapids, Navigating the Future of First Nations*, (Penguin Group: Toronto, 1993), at pp. 89-90.

<sup>10</sup>Under section 2(1) of the present Act, the term "Indian" refers only to "a person who pursuant to this Act is registered as an Indian or is entitled to be registered as an Indian."

not fulfill the government's criteria for registration were simply not recognized as First Nations' peoples by the Canadian government. Not only did the artificial label "Indian" apply only to certain nations and individuals, it excluded the Métis entirely and was extended to the Inuit only after a Supreme Court of Canada decision in 1939.<sup>11</sup>

The *Indian Act* also established regulations for group identity and membership through the imposition of the band system. Under the present Act,<sup>12</sup> an Indian band is not defined by notions of group or tribal identity. Rather, a band is defined as a body of Indians:

- (a) for whose use and benefit in common, lands, the legal title to which is vested in Her Majesty, have been set apart before, on or after September 4, 1951,
- (b) for whose use and benefit in common, moneys are held by Her Majesty, or
- (c) declared by the Governor in Council to be a band for the purposes of this Act.<sup>13</sup>

Membership in a band is determined by the band list, which is maintained in accordance with the dictates of the Act under the discretion of the Minister. In addition to determining who was considered to be an Indian and what constituted a band, the *Indian Act* also instituted rules regarding the structure and election of band governments,<sup>14</sup> and the kinds of powers that may be exercised by a band council as delegated from the Minister.<sup>15</sup>

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<sup>11</sup>*Re Eskimo*, [1939] 2 D.L.R. 417 (S.C.C.).

<sup>12</sup>R.S.C. 1985, c.I-5.

<sup>13</sup>Section 2(1).

<sup>14</sup>As contained in sections 74 through 80 of the *Indian Act*.

<sup>15</sup>As contained in sections 81 through 86 of the *Act*.

By determining who was or was not entitled to be recognized as an “Indian,” what constituted a “band,” who was entitled to membership in a particular band, and the powers to be lawfully exercised by a “band council,” the imposition of the *Indian Act* replaced customary First Nations’ governments with municipal-style elected councils operating under terms and conditions provided for by federal legislation and regulations. The unilateral imposition of *Indian Act* governments upon First Nations’ peoples with their own forms of government has resulted in numerous conflicts between *Indian Act* and traditional governments, some of which have been referred to Canadian courts for adjudication.<sup>16</sup> More significantly, it has fostered First Nations’ disdain and cynicism for the imposed system of government even though these governments have been functioning in most communities for more than 60 years. Band council government has also become an established form of government in many First Nations’ communities. Many critics suggest it has become too comfortably embraced by a few First Nations’ stakeholders. As Professor Menno Boldt suggests:

The sociological forces activated by Indian Act designs for an elective system of leadership and the privatization of land, taken in conjunction with the DIAND’s processes of Indian leadership co-optation, are not only giving rise to an Indian ruling class, they are also giving rise to a social-economic elite class. By undermining traditional Indian values of Indian reciprocity and redistribution, which historically inhibited socio-economic class development in Indian communities, these forces (i.e., the elective system, privatization, bureaucratization and co-operation) are generating a two class social-economic order on most reserves: a small, virtually closed elite class comprising influential landowners, politicians, bureaucrats, and a few entrepreneurs, and a large lower class comprising destitute, dependent, and powerless people. (It should be noted that the designation “elite class,” as it is used here, generally implies income and wealth in order of the Canadian middle class, although some Indian elites are considerably wealthier. In reserve communities, where most members are on

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<sup>16</sup>One of the more notable examples may be seen in *Logan v. Styres* (1959), 20 D.L.R. (2d) 416 (Ont. H.C.).

social assistance and destitute, it doesn't take much income or wealth for elite status.)<sup>17</sup>

*Indian Act* governments represent the values of an alien system of government from that of the customs of First Nations, but after over 100 years this system has left a permanent mark on communities. With the line of duty to account to the Minister of Indian Affairs rather than the people, First Nations' people have been critical of this system of government. Ironically, the very chiefs who are elected according to the rules of the *Indian Act* have also been some of the individuals most vocally opposed to the structures of the *Indian Act* and the difficult situations it creates for elected chiefs and councillors. National Chief Ovide Mercredi and I describe this situation as follows:

Issues of trust arise whenever First Nations communities talk about the future because the Indian Act has been such a negative force. Many First Nations peoples have little trust in their own local governments because the Indian Act has allowed a situation to occur where some Band Councils make arbitrary decisions and are not fully accountable to the people. They are accountable instead to the Minister of Indian Affairs. For example, suppose the Chief and Councillors decide to allocate new housing to relatives instead of to those who are most in need: individual First Nations citizens have little recourse to challenge such decisions because the Council's accountability is first to the Department of Indian Affairs and second to the people. This is not to say that Chiefs and all Councils behave irresponsibly but that the Indian Act through this imposed structure of government leaves the door open to unaccountable acts.<sup>18</sup>

During the Royal Commission's public hearings, numerous people, including chiefs, spoke against the imposed system of government of *Indian Act* and it negatively impacts in their communities. Jeanette Castello, Counselor of the Kitselas Drug and Alcohol Program, explained

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<sup>17</sup> *Surviving as Indians, The Challenge of Self-Government* (University of Toronto Press: Toronto, 1993), at p.124.

<sup>18</sup>Note 11 *supra*. p. 84.

how the *Indian Act* system changed traditional forms of First Nations' government and the continuing effects this has had in her community:

Traditional self-government was our clan system. It was a consensus of the clans that dictated the use of the land and its resources. It was the imposition of the Indian Act that created the dichotomy between the electoral system and the traditional house leaders. The roles of the hereditary system have been disempowered by the use of the alien non-traditional system.<sup>19</sup>

Many presenters to the Royal Commission expressed their opinion that much of the corruption that currently exists in band councils may be traced directly to the imposed system of band government in the *Indian Act*. These governments, as mentioned, are directly accountable to the Minister and Department of Indian Affairs for their decisions and actions. Many presenters suggested that the Act thwarts and diminishes band council government accountability to the band members because accountability goes to the Minister first and foremost. While the *Indian Act* provides for the reporting of band council activities to the Department of Indian Affairs,<sup>20</sup> the absence of requirements for band councils to account to band members reinforces the concern over accountable government. As Tom Lindley of the Westbank Indian Band explained to the Commissioners:

We feel the DIA [Department of Indian Affairs] elective system, which was imposed upon us, encourages corruption, favouritism and nepotism. There is an inherent lack of accountability and arbitrary decision-making in relation to spending, political direction and setting goals for the community. These ... concerns

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<sup>19</sup>RCAP Public Hearings, Terrace, British Columbia, 93-05-25 29, Jeanette Castello, pp. 57-58.

<sup>20</sup>For example, under section 82 of the Act, all by-laws must be mailed to the Minister within four days after they are passed and the Minister has the discretion to either disallow the by-law or declare it in force. Even if in force, the Minister can, at any time, revoke a by-law unilaterally.

are dismal reminders of the extent of the failure of this imposed elective system.<sup>21</sup>

In this vein, the sense that the *Indian Act* system fostered nepotism in band administration was raised by representatives of many communities. As Sto:lo Chief Clarence Pennier described to the Commissioners:

Once elected, a similar situation typically arises within Council. Instead of working to build consensus, Chiefs and Councillors frequently divide along family lines and seek to block each other's initiatives while promoting their own. In a standard three-person Band Council, the Chief and at least one Councillor normally owe their support to a single family block. These two can then work independently of the other Councillor whose support is not really required to pass Band Council Resolutions.<sup>22</sup>

The *Indian Act* does nothing to prevent this; indeed, many suggest it fosters family divisions because the form of government supplanted consensus style clan systems where a balance was achieved among various families. Consistent with testimony regarding the corruption and the nepotism spawned by *Indian Act* governments, the Royal Commission was encouraged to support Aboriginal governments anchored in responsibility to the citizenry first and foremost. Garden River First Nation Chief Darrell Boissoneau expressed it as follows:

But what we are saying is that we have the ability to manage our own affairs. We have the ability to take care of our people. We can govern ourselves accordingly. We can elect our leadership accordingly. Our leadership has to be responsible and accountable. If there is a dispute within our community or within a nation, it is

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<sup>21</sup>RCAP Public Hearings, Kelowna, British Columbia, 93-06-17 132, Tom Lindley, p. 298.

<sup>22</sup>RCAP Public Hearings, Kelowna, British Columbia, 93-06-16 32, Chief Clarence Pennier, Sto:lo Tribal Council, p. 62.



not necessary for us to run to the Minister of Indian Affairs for him to resolve this problem.<sup>23</sup>

The rationale underlying Chief Boissoneau's sentiments was summarized by Bernard Gordon of the Gordon's Band in Saskatchewan:

The Indian Affairs Department and the Indian agent worked to destroy our system of government and replace it with their own. They succeeded. We now have Chiefs and council who do not listen to their people but rule them instead through the Indian Act. Under the Indian Act, Chiefs and council are accountable to the Minister of Indian Affairs and his department and not to their own people.<sup>24</sup>

These concerns regarding the *Indian Act* system of Band government are legitimate and suggest that criticism of band governments is not directed at particular individuals or families, but is systemic. It is part and parcel of the *Indian Act* legacy; to be undone with the undoing of the Act. The presenters' observations regarding the lack of checks and balances for the activities of elected chiefs and band councillors are accurate. The *Indian Act* includes a list of powers of what authority may be exercised by band councils [(ss.81-86)] subject to Ministerial supervision, but does not impose any guidelines for the conduct of band leaders or officials in operating within this authority.<sup>25</sup> The *Indian Act* provides guidelines for band council elections (a band may also have a customary election code) and the exercise of band council powers in order to achieve a degree of uniformity and regulation of Indian activities across Canada. It imposes regulations for the election of chiefs and councillors, including the composition of band councils [s.74(2)], the eligibility of persons who may be elected to council [(s.75)] and to vote in

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<sup>23</sup>RCAP Public Hearings, Sault Ste. Marie, Ontario, 92-06-11 200, Chief Darrell Boissoneau, p. 180.

<sup>24</sup>RCAP Public Hearings, Regina, Saskatchewan, 93-05-11 342, Bernard Gordon, p. 240.

<sup>25</sup>Section 76(1) of the *Act* provides only that the Governor in Council may make order and regulations with respect to band elections, including nomination meetings, the appointment and duties of electoral officers, voting procedures, election appeals, and the eligibility of voters based on place of residence.

band council elections [(s.77)], and the length of tenure of chiefs and councillors [(s.78)]. Any regulation of conflicts of interest in band council elections and of band council activities has been previously disregarded.<sup>26</sup> However, recently a set of proposals for amendments to the *Indian Act* has been identified accountability as a power to be given to a band by the Minister.<sup>27</sup>

Many First Nations individuals have given up on voicing their concerns over ethical standards and conflicts of interests to band governments or the federal governments as they have not been taken seriously in many instances. Instead, they are also going to court to challenge the conduct of band governments and raising questions about ethics and public accountability in the Federal Court. In several cases, chiefs and other elected band officials have been found to have compromised their duties to their bands by either placing themselves in situations of conflict of interest or failing to fulfill other ethical duties which the Courts have implied as part of their duties, even within the limited framework of the *Indian Act*.

## **2.1 Emerging Caselaw on the Duties and Responsibilities of Chiefs and Councillors**

In *Joe v. John*,<sup>28</sup> a conflict between competing parties for the position of band chief precipitated an application to the Federal Court seeking an interim order granting control over the management and government of the band to one party. In a second application, that control was removed by the Court due to a conflict of interest. In this case, the respondent obtained an interim order so that the daily activities of band council could continue until the courts could resolve the issue of whether the respondent or the applicant was the properly elected Chief of the Miawpukek Band of Mi'kmaq in Newfoundland. In the meantime, the respondent used her

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<sup>26</sup>Although section 79 of the *Indian Act* allows the Governor in Council to set aside the election of a Chief or Councillor where there is evidence of corrupt election practices or where there was a contravention of the Act that might have affected the election results.

<sup>27</sup> Correspondence from the Honourable Ronald C. Irwin, Minister of Indian and Northern Development to Mr. Ovide Mercredi, National Chief Assembly of First Nations, dated September 1, 1995, outlining proposed amendments to the *Indian Act* including a new subsection to Section 81 to enable Bands to regulate financial administration and accountability (Letter on file with author).

<sup>28</sup>(1990), 34 F.T.R. 280.

court-granted control over the band and its finances to further her claim as the rightful chief through the retention of solicitors to act on her behalf, who were paid out of band funds. The applicant, meanwhile, was unable to access these funds for the same purposes. He applied to the Court to overturn the interim order, alleging that funds used to pay the respondent's solicitors were not being used in the best interests of the band, but simply to maintain the respondent's power as chief.

Upon the presentation of this conflict before the Federal Court, Trial Division, Justice McNair agreed with the applicant's position. He declared that the interim order granted to the respondent be set aside, since her use of the authority contained in the order did not adequately or properly reflect the legitimate interests of the band as a whole, but was entirely self-serving:

In my opinion, the evidence is incontrovertible that these large expenditures from band funds in payment for legal services were not made for the general benefit of the band itself, but rather were directed primarily to supporting the respondents' side of the controversy and maintaining them in their position of authority and control over band affairs.... Can it be said in these circumstances that the legitimate interests of the band are being adequately or properly served by the respondents? I hardly think so.<sup>29</sup>

In *Gilbert v. Abbey*,<sup>30</sup> a more direct conflict of interest arose out of a chief's participation in band council meetings concerned with whether the band ought to reimburse the chief for some of her personal expenses. The chief had an outstanding student loan in the amount of \$2,773.39, as well as tuition and other fees stemming from her two children's private boarding school, which totaled \$85,000.00 for three years of school. In a meeting at which she was in attendance, the band agreed to pay off the chief's student loan and her children's school fees.

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<sup>29</sup>*Ibid.*, at p. 291.

<sup>30</sup>[1992] 4 C.N.L.R. 21 (B.C.S.C.).

In addition to repaying the chief's personal expenses, the band agreed, at a second meeting in which the chief participated, to purchase a mobile home for her personal use. The cost of purchasing, relocating, and renovating the mobile home amounted to \$75,000.00. While no money relating to the mobile home had been expended when the chief and her band council were voted out of office, less than one week later the \$75,000.00 expenditure was approved by the new chief and band council at a meeting. Here, the ex-chief was present and signed the minutes.

Upon discovering the Band Council Resolutions directing payment of the ex-chief's personal expenses and the purchase of the mobile home for her use, one individual band member brought an action against the former chief for breach of fiduciary duty. The individual claimed that the former chief's attendance at meetings at which resolutions pertaining to her financial self-interest were being decided resulted in a conflict between her duty to the band and her own private interest. In deciding in favour of the individual band member, the court held that the ex-chief acted in a conflict of interest and should have disclosed her personal interests to the band and excused herself from deliberating on the issue. As Justice Skipp explained:

There can be no question that a duly-elected Chief as well as the members of a band council are fiduciaries as far as all other members of the band are concerned. The Chief upon being elected, undertakes to act in the interests of the members of the band.<sup>31</sup>

In other words, decisions of chiefs and councillors must adhere to a standard of assessment where band members or Courts can see that the band government, in reaching a decision, duly considers the welfare of all members of the band and not simply one individual, family or elected official. Payment of the chief's personal expenses could not withstand this scrutiny. The Court further determined that because of her personal interest in the matters being decided at the

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<sup>31</sup>*Ibid.*, at p.23.

meetings in question, the chief should not have participated in them.<sup>32</sup> She was ordered to reimburse the band for these expenses.

In another case, *Corbiere v. Canada*,<sup>33</sup> the duties of chief and council, with respect to voting were scrutinized by the Courts. In this case, members of the Batchewana Band who did not reside on any of the band's reserves alleged that certain *Indian Act* provisions relating to band governmental powers unfairly discriminated against them and violated section 15(1) of the *Canadian Charter of Rights and Freedoms*. Specifically, the band members alleged that section 77(1) of the *Indian Act*, which determines the eligibility of voters in band council elections, unfairly discriminated against off-reserve band members by enabling the chief and council to make decisions without having to account to or afford off-reserve members the right to vote.

Section 77(1) of the Act determines the eligibility of voters for chief:

A member of a band who has attained the age of eighteen years and is ordinarily resident on the reserve is qualified to vote for a person nominated to be chief of the band and, where the reserve for voting purposes consists of one section, to vote for persons nominated as councilors.

Section 77(2) uses similar wording in describing voting requirements for the election of band councillors. In the Batchewana Band's situation, the majority of band members resided off-reserve. Consequently, while band council elections were controlled by a distinct minority of band members, the structure of the *Indian Act* band government system -- in particular its provisions relating to the ability of a band to surrender reserve lands, or to spend capital moneys or revenue moneys -- resulted in the numerical minority having ultimate control over actions affecting all band members, whether on-reserve or off-reserve. The conflict here was between

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<sup>32</sup>*Ibid.*, at pp.23-24: "As a fiduciary, she could not have lawfully participated in decisions of the band council which involved her interests."

<sup>33</sup>[1994] 1 C.N.L.R. 71 (F.C.T.D.).

the duty of chief and council to make decisions which assure the rights of all members of the band and the residency requirements which resulted in a substantial number of band members being disqualified from voting. Many did not reside on reserve because of inadequate housing and services.

There was an assumption that reserve lands and band moneys (both capital and revenue moneys) accrued to all band members, not just those residing on-reserve. In accepting the off-reserve members' claim that section 77(1) unfairly discriminated against off-reserve band members and violated section 15(1) of the *Charter*, the Federal Court found that a band's reserve lands and moneys were held for the benefit of the entire band population, resident or not.<sup>34</sup> Section 77(1) was declared invalid with a temporary hiatus in its invalidity to permit the Federal government to re-examine the provision. This case is on appeal because there is some degree of uncertainty regarding the current status of band election procedures and section 77(1) of the *Indian Act*.<sup>35</sup> Clearly, the disenfranchisement of the majority of voters because of residency requirements which do not necessarily correspond to the actual wishes of members to reside on their reserves, is a situation that will either be addressed proactively or by the appeal courts. Given the supremacy of the *Charter* over the *Indian Act* and recent determination regarding band customs relating to the determination of membership, it is unlikely the restrictions on voting will survive further review.<sup>36</sup>

More recently, in *Sparvier v. Cowessess Indian Band #73*,<sup>37</sup> the Federal Court of Canada was petitioned to determine the validity of a disputed band council election. The applicant, Ken Sparvier, was elected Chief of the band at a duly constituted election. The runner-up, Muriel

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<sup>34</sup>*Ibid.*, at p.84.

<sup>35</sup> The Federal Court of Appeal heard oral argument on September 23, 24 and 25, 1996. The Decision has been reserved.

<sup>36</sup> *Twin et. al. v. A.G. Canada* (F.C.T.D.), July 7, 1995 (unreported).

<sup>37</sup>[1994] 1 C.N.L.R. 182 (F.C.T.D.).

Lavallée, argued that two of the five candidates running for chief, including Sparvier, were non-residents of the reserve and were therefore ineligible to run in the election under the *Cowessess Indian Reserve Elections Act* (which codified the band's customs regarding election procedures and practices). Sparvier then appealed the election results to an Election Appeal Tribunal established under the *Cowessess Reserve Elections Act*.

Under section 6(2) of the Act, the Election Appeal Tribunal was empowered to deal with matters relating to election practices which contravened the Act or any illegal, corrupt, or criminal practices by candidates which might discredit the high integrity of the Indian Government of Cowessess Reserve. The tribunal agreed with Lavallée's contention and called for a new election, which Lavallée won. However, after the tribunal overturned the initial election result and prior to the subsequent election, Sparvier commenced proceedings in the Saskatchewan Court of Queen's Bench challenging the Tribunal, its procedures, and its decision to overturn the initial election results. After the court ruled that it was without jurisdiction to determine the issue in dispute, Sparvier launched a second action in the Federal Court, Trial Division.

Sparvier claimed that the Tribunal was improperly constituted under the *Reserve Elections Act*, in that it was not constituted until after the nominations for chief were made. Section 6(4)(a) of the Act held that the Appeal Tribunal was to be constituted prior to the meeting at which nominations for chief was to be held. Justice Rothstein agreed that the Appeal Tribunal was not constituted in accordance with the *Reserve Elections Act*, but nevertheless held that that fact did not invalidate its decision, since section 6(4)(a) was declaratory rather than mandatory.<sup>38</sup>

It was then found, however, that because one Tribunal Member who took an active role in the proceedings but later resigned due to his admitted bias, "fatally affected the proceedings and

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<sup>38</sup>*Ibid.*, at p.190.

the decision of the Appeal Tribunal.”<sup>39</sup> The Court found that this did not change the circumstances that brought the Tribunal’s ruling into disrepute. The admitted bias and derogatory comments were held to have resulted in procedural unfairness to the applicant and therefore called for a new resolution of the dispute. The Tribunal’s ruling was quashed and the applicant’s appeal was sent back to a re-constituted tribunal to decide whether to uphold the results of the first election, those of the second election, or to call a new election.<sup>40</sup>

These four cases demonstrate that conflict of interest especially involving elections, financial decisions, and personal attitudes or biases of those in positions of authority are open to court review. New cases on these kinds of issues are being reported regularly.<sup>41</sup> These cases demonstrate the need for the development of conflict of interest guidelines and regulations so that elected individuals and officials will be personally accountable for their actions and not take advantage of their positions of power or discretion. The creation of such guidelines is required to uphold the integrity of First Nations’ government as well as the manner in which representatives are elected. Without the existence of these checks and balances, the trust and confidence in the integrity of a band council to act in the best interests of all members is significantly lessened due to the inability to require individuals to account for their conduct. If internal guidelines and mechanisms are not developed by the people and for the people, these kinds of court applications will only become more common. Also, First Nations’ governments and organizations will be more aggressively challenged publicly on their shortcomings in this regard. As Marilyn Fontaine, President of the Aboriginal Women’s Unity Coalition, an organization based in Manitoba, explained with reference to the mandate of the Assembly of Manitoba Chiefs:

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<sup>39</sup>*Ibid.*, at p.198.

<sup>40</sup>The quashing order was in fact delayed until after newly-constituted tribunal rendered its decision whether to uphold either of the two elections, or, if it decided to hold a new election, until the day after the new election was to be held.

<sup>41</sup> Concerning conflict of interest in band elections see *James v. Jules* [1995] 3 C.N.L.R. 90 (B.C. Prov. Ct.). For conflict of interest by a Band taxation appeal tribunal, see *Matsqui Indian Band v. Canadian Pacific Ltd.* [1995] 2 C.N.L.R 92 (S.C.C.).



The Assembly of Manitoba Chiefs must address the lack of checks and balances inherent to all democracies within the current political structure. These mechanisms must be developed in a manner that will ensure the full equal participation of constituent groups. These mechanisms must include facilities for appealing decisions flowing from the assembly, conflict of interest guidelines for aboriginal child and family agencies, dispute resolution models for conflicts that arise between agencies that deliver services to different members of the same family, and mechanisms that ensure the accountability of the political leadership to their constituents.<sup>42</sup>

The need for clear standards of accountability and direct statements of ethical responsibilities is even more pressing in the light of self-government implementation. The latter will lead to greater powers being exercised by bands, tribal councils, and regional governments on behalf of their members; possibly building on the *Indian Act*., but ideally moving away from that system into one built on inherent rights. Even in the absence of Aboriginal self-government *per se*, several newer sections of the *Indian Act* provide for the exercise of greater authority by a band over band membership lists, moneys, and reserve lands. For instance, section 10(1) of the *Indian Act* allows a band to assume control over its own membership if it establishes written membership rules and a majority of the band's electors consents to the band assuming such control. Difficulties have arisen as to whether such membership codes must receive the approval of on-reserve voters or total band membership, regardless of residence. Section 60(1) provides a band with the ability to exercise control and management of its reserve lands, subject to the Governor in Council's approval. Finally, section 69(1) contemplates a band's ability to control, manage, or expend its revenue moneys, either in whole or in part, subject, once again, to the Governor in Council's approval. Each of these provisions allow for the ability of bands to exercise greater self-governing powers, albeit to a limited extent and subject to the supervision of the Governor-in-Council.

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<sup>42</sup>RCAP Public Hearings, Winnipeg, Man, 92-04-23 110, Marilyn Fontaine, p. 613.

Where First Nations' governments will be exercising greater degrees of power over their citizenship or membership, the need to compel governmental accountability becomes more pressing. Traditionally, First Nations' governments had built-in systems of accountability which reflected group customs and practices. As Kenneth Deer explained to the Royal Commission on Aboriginal Peoples at Kahnawake, Quebec:

In a true traditional system, it is a real democracy. It is the women who can judge the men who would be best to be leadership by their character, by the way they speak, the way they lived their life, what they know ... They can select the best people for those positions. The men also have the right to reject or accept a nomination by the women ...

Once a Chief is installed, he is responsible to the people. He has to listen to those people. If he doesn't listen to them he will be warned... If he continues to disobey the people he will be warned again. And if he disobeys them a third time he is removed. It is a process using the Clan Mothers and using the people to remove these people and to put somebody else back in that place. It is based on what the people want.<sup>43</sup>

A similar expression of governmental accountability to the people under traditional First Nations' governmental systems was made by Sto:lo Chief Clarence Pennier in a presentation made to the Royal Commission in Kelowna, British Columbia. He stated:

Village politics were very loose. Each family was essentially free to govern itself on matters that were of a local nature. If disputes arose, the family Siy:m [natural born leaders groomed from the age of puberty] would call a family meeting.... [E]ach person was free to express his or her opinion. After each person had their say, the family would work toward a consensus...

It was during this process that the Siy:m's opinion carried great weight.... Ultimately, each person or group of people was free to disagree and "opt out" of the family decision, but typically the

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<sup>43</sup>RCAP Public Hearings, Kahnawake, Quebec, 93-05-06 144 Kenneth Deer, pp. 494-495.

respect people paid their leader led to consensus. The decision reflected the concerns of all involved...

Likewise, a Yewal Siy:m had no way of enforcing his will on the Siy:ms of other families. ... Each Siy:m would have previously ensured that he had the endorsement of his family before he met with the other family leaders. ... [T]he value of co-operation ensured that most issues were resolved through consensus...

If at any time a Siy:m or Yewal Siy:m acted in a manner their family or community found unacceptable, they would be removed. Their power and influence was dependent upon the support of their followers. Without their respect, they had no power base.<sup>44</sup>

Chief Pennier further suggested that adherence to a more traditional systems of First Nations' government could remove the problems associated with the present elected system imposed by the *Indian Act*. In his view:

One obvious way to eliminate the problems associated with the Indian Act election system would be to eliminate it and replace it with an extended family political structure that accommodates the traditional positions of Siy:ms and Yewal Siy:ms. Each extended family could be guaranteed representation in Council, and each family could decide for themselves, and among themselves, who would represent them on Council.

This would eliminate the problem of entire families being excluded from the decision-making process and restore the traditional practices of families being directly involved in all decisions specifically affecting them.<sup>45</sup>

Other presenters to the Royal Commission put forward similar suggestions regarding replacing the *Indian Act* governments with more accountable systems monitored by the First

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<sup>44</sup>RCAP Public Hearings, Kelowna, British Columbia, 93-06-16 32, Chief Clarence Pennier, Sto:lo Tribal Council, pp. 64-65.

<sup>45</sup>RCAP Public Hearings, Kelowna, British Columbia, 93-06-16 32, Chief Clarence Pennier, Sto:lo Tribal Council, p. 68.

Nations' peoples themselves. For example, in Kingsclear, New Brunswick, Linda Ross made the following proposal:

I propose a forum similar to a Human Rights Commission but which would ensure basic treaty rights for all are being met. If we are to put such things as self-government and our own policing and administration, et cetera, in place we must ensure that all our people will have a means to take their complaints forward. We must ensure that all our administration and self-governing is accountable to ensure that the basic rights and freedoms our grandfathers and our mothers suffered starvation for will be assured. We must ensure that all the people are equally benefiting from the loss of our land title. We must ensure that our people are assured a decent standard of living and that they have recourse if it is not met.<sup>46</sup>

The various proposals brought forward during the Commission's hearings are worthy of consideration in the final report on self-government. However, the Canadian context for public accountability of government should also be carefully considered.

### **3.0 Standards for Ethics and Conflicts of Interest in Federal, Provincial and Territorial Governments: A Survey**

Conflict of interest legislation in Canada provides a check upon the activities of elected officials and governmental bodies. In electing public officials to office, the electorate has placed their trust and confidence in the ability of those whom they have elected to perform a certain role or function free from self-interest or private gain. However, the power enjoyed by governmental officials while carrying out official functions often presents opportunities to take advantage of positions and singularly advance self-interest. Governmental codes of conduct prescribe ethical

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<sup>46</sup>RCAP Public Hearings, Kingsclear, New Brunswick, 92-05-19 54, Linda Ross, p. 122.

behavior for public officials by outlining those activities which are deemed to be inconsistent with the public interest and the public trust of the government.

The Canadian federal government, as well as each Canadian province and territory, has at least some rudimentary legislation and/or policy guidelines which seek to ensure that public officials do not let their private or personal interests interfere with the exercise of their public duties.<sup>47</sup> Some of the more serious conflicts of interest by public officials have been included in the *Criminal Code*.<sup>48</sup> There are a number of prohibited activities by elected and appointed governmental officials dealt in this body of legislation and policy guidelines. The following discussion is not intended to be comprehensive, but to give some illustrations of the types of activities that are considered to violate standards of ethical behavior by public officials. Obvious examples include the acceptance of bribes or gifts from others or the offering of bribes or gifts to others. Sections 119 and 120 of the *Criminal Code*, for example, deal with these offences and provide for terms of imprisonment (to a maximum of 14 years) or summary conviction for those persons found guilty of such offences.

There are detailed guidelines governing unacceptable practices by elected officials which have been included in conflict of interest-type legislation and governmental codes of conduct. Selling or purchasing a public office, including any agreement to sell an appointment to or resign from an office, consenting to any such appointment or resignation, or receiving any reward or profit from any such sale is an offense under the *Criminal Code*.<sup>49</sup> Influencing or negotiating appointments, including giving or procuring any reward or benefit as consideration for cooperation, assistance, or the exercise of influence to secure the appointment of a person to

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<sup>47</sup>For a very general review, see *Conflict of Interest in Canada, 1994: A Federal, Provincial and Territorial Perspective* (Minister of Supply and Services Canada, 1994).

<sup>48</sup>R.S.C. 1985, c.C-46.

<sup>49</sup>*Ibid.*, section 124.

office is a criminal offence, as is the “keeping of a place” for transacting or negotiating any business relating to the exercise of influence over appointments, resignations, etc..<sup>50</sup>

Disobeying an Act of Parliament, Order of Assembly, the willful commission of activity forbidden by an Act, or the willful omission of anything required by an Act, such as being convicted of an indictable offence, amounts to a conflict of interest.<sup>51</sup> Obstructing justice, through the willful attempt to obstruct, pervert, or defeat the course of justice in a judicial proceeding by dissuading a person from giving evidence, or influencing a person in his/her conduct as a juror, or accepting or offering bribes in relation to witnesses or jurors, or giving false evidence are all conflicts,<sup>52</sup> as is involvement in public contracts.<sup>53</sup>

A public official who seeks or obtains extraordinary compensation for his or her public duties, in particular obtaining compensation for services rendered in respect of bills, proceedings, contracts, or other public matters, acts in conflict of interest.<sup>54</sup> A public official may also be prevented from holding another office concurrently to avoid conflicts of interest.<sup>55</sup> Where a public official has a direct or indirect pecuniary interest in a matter or its outcome, that person may not participate in debates, discussions, votes, etc. relating to that matter.<sup>56</sup> The failure to disclose pertinent information that may give rise to conflicts of interest, such as the hiding of

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<sup>50</sup>*Ibid.*, section 125.

<sup>51</sup>*Ibid.*, section 126; *Manitoba Legislative Assembly Act*, R.S.M. 1987, c.L-110, s.13.

<sup>52</sup>*Criminal Code*, *supra*, section 139; *Alberta Legislative Assembly Act*, S.A. 1992, c.L-10.1, s.10.

<sup>53</sup>*Parliament of Canada Act*, R.S.C. 1985, c.P-1, ss.14, 34.

<sup>54</sup>*Ibid.*, ss.16, 41.

<sup>55</sup>*Ibid.*, s.32.

<sup>56</sup>*Northwest Territories Legislative Assembly and Executive Council Act*, R.S.N.W.T. 1988, c.L-5, s.15.

assets, concealing private interests, the acceptance of gifts, etc. is also prohibited conduct by a public official.<sup>57</sup>

Another offence which is covered by conflict of interest legislation occurs when a person runs as a candidate for public office while ineligible to hold public office.<sup>58</sup> The inappropriate use of a position of public office to influence others or to give or receive preferential treatment, which is distinguished from bribery in that it does not necessarily involve monetary profit as motivation,<sup>59</sup> is an unacceptable form of conduct for public officials as is the inappropriate use of insider information, that is information obtained from privileged governmental or other sources obtained by way of an individual's position as a public official and used for personal gain.<sup>60</sup>

Engaging in conflicting businesses, professions, or other employment or political activity which might conflict with governmental or official duties or give the appearance of a conflict with governmental or official duties is prohibited.<sup>61</sup> Where a public official assaults, insults, libels, interferes with, or intimidates another public official or individual that conduct is prohibited since it may be considered as misconduct or may serve to disrupt governmental activities.<sup>62</sup> Forging, falsifying, or otherwise tampering with public records or documents for personal gain or other purpose amounts to prohibited conduct for more obvious reasons.<sup>63</sup>

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<sup>57</sup>Yukon *Legislative Assembly Act*, R.S.Y. 1986, c.102, s.7.

<sup>58</sup>Northwest Territories *Legislative Assembly and Executive Council Act*, R.S.N.W.T. 1988, c.L-5, s.6.

<sup>59</sup>Northwest Territories *Public Service Act*, R.S.N.W.T. 1988, c.P-16, s.34(2).

<sup>60</sup>British Columbia *Members' Conflict of Interest Act*, S.B.C. 1990, c.54, s.3.

<sup>61</sup>*Ibid.*, s.8.

<sup>62</sup>Alberta *Legislative Assembly Act*, note 44, *supra*, s.10.

<sup>63</sup>*Ibid.*

Having or acquiring an interest in Crown lands may result in a conflict-type situation, as some jurisdictions impose certain restrictions upon the holding of Crown lands by public officials.<sup>64</sup> Conflict may also be seen to exist where a public official brings frivolous or malicious suits against other governmental or public officials or causes the arrest or detention of those persons for the purpose of harassment, embarrassment, etc.<sup>65</sup> Using public office or a governmental position to gain advantages that are not available to others is also considered to be a conflict of interest,<sup>66</sup> as is the declaration of financial distress, *i.e.* bankruptcy or insolvency, which is not tolerated by the governing statute.<sup>67</sup>

The penalties that exist for the variety of conflict of interest offences that may be committed varies tremendously. They range from imprisonment, such as under sections 119 and 120 of the *Criminal Code*, which impose a maximum of 14 years imprisonment for those who are convicted of bribery, to summary conviction offences for crimes such as obstructing justice, which is provided for under section 139 of the *Criminal Code*.<sup>68</sup> In addition to imprisonment and criminal prosecution, penalties for conflicts of interest vary.

In some instances, fines are used to penalize officials from contravening imposed standards of conduct. Sections 14 and 34 of the *Parliament of Canada Act*<sup>69</sup> impose fines upon persons who are directly or indirectly party to or concerned with a contract under which the

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<sup>64</sup>Alberta *Public Service Act*, S.A. 1992, c. P-31, s.24.

<sup>65</sup>Manitoba *Legislative Assembly Act*, note 43, *supra*, ss.40(j), (k); Quebec *Act Respecting the National Assembly*, S.Q. 1982, c.62, s.55(12).

<sup>66</sup>Prince Edward Island *Conflict of Interest Act*, R.S.P.E.I. 1988, c.C-17, s.3.

<sup>67</sup>Newfoundland *Legislative Disabilities Act*, R.S.N. 1990, c.L-12, s.4.

<sup>68</sup>Although it should be noted that offence of obstructing justice may also be punishable by indictable offence and subject to imprisonment for not more than two years.

<sup>69</sup>Note 45, *supra*.



public money of Canada is made, or who receive consideration for goods or services provided to the Government of Canada. Ineligibility for public office is imposed by the *Parliament of Canada Act* in situations where an individual involved in a certain prohibited activity or who holds a conflicting public office is deemed to be ineligible to hold a particular office by reason of that involvement.<sup>70</sup>

The *Parliament of Canada Act* also provides for the imposed vacation and dismissal, demotion, or disqualification of an individual from public office where persons who hold public office and are found to be involved in certain prohibited activities are deemed to be ineligible to hold that office.<sup>71</sup> Some statutes also allow an individual to launch a civil action against a public official to recover stipulated damages for a wrongdoing on the part of the public office holder.<sup>72</sup> Discretionary penalties, which are decided upon at the discretion of the governing body imposing them, are also used in some instances.<sup>73</sup> For example, reprimands are also imposed for violations of acceptable conduct by public officials.<sup>74</sup>

Temporary suspensions from office are yet another means of punishment for indecorous behaviour by a public official.<sup>75</sup> In some instruments, public officials' obligations or duties are prescribed, but no penalties or sanctions are provided for under circumstances where those

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<sup>70</sup>See, for example, sections 32 and 34 of the *Parliament of Canada Act*, *ibid*.

<sup>71</sup>The office is then held to have been rendered vacant. See, for example, sections 35 and 41 of the *Parliament of Canada Act*, *ibid*.

<sup>72</sup>As in sections 14 and 35 of the *Parliament of Canada Act*, *ibid*.

<sup>73</sup>Such as in the Northwest Territories *Public Service Act*, note 48, *supra*, where “such penalty as the Legislative Assembly deems appropriate in the circumstances” is used to provide a penalty in section 34(10) of the Act..

<sup>74</sup>See the British Columbia *Members' Conflict of Interest Act*, note 52, *supra*, s.17.

<sup>75</sup>*Ibid*.

obligations or duties are disregarded or violated.<sup>76</sup> In these situations, it is open to question what would happen to the official who has violated any of these obligations and/or duties.

Other, more concrete, penalties imposed upon public officials who perform inappropriate acts include the rendering of a contract in which a member of government or a public official is involved as void<sup>77</sup> or forcing the disgorgement of all profits made or gifts/gratuities accepted in contravention of an act.<sup>78</sup> Persons may also be disqualified from participating in a particular matter, but not suspended or having an imposed vacation from office, where the member or public official has a particular private interest which results in a conflict.<sup>79</sup> In some instances, individuals with conflicting employment, associations, etc. may be forced to give up those relationships because of the conflict they create with their public responsibilities.<sup>80</sup> Some conflict of interest legislation also requires that public officials file a disclosure statement regarding their outside activities.<sup>81</sup>

Under section 748(2) of the *Criminal Code*, when a person has been found guilty of an indictable offence and sentenced to more than five years of imprisonment, that person is unable to hold any office under the Crown or other public employment and cannot be elected, sitting, or voting as a member of Parliament or of a legislature, or exercise any right of suffrage. Where a person held such a position prior to being convicted of an indictable offence under the *Criminal*

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<sup>76</sup>Such as in the Yukon *Legislative Assembly Act*, note 49, *supra*, s.7.

<sup>77</sup>See the Saskatchewan *Members of the Legislative Assembly Conflicts of Interest Act*, S.S. 1979, c.M-11.2, s.18.

<sup>78</sup>Such as where profits are made or gifts/gratuities are accepted within the context of a conflicting business arrangement or contract with the government, etc., *ibid.*

<sup>79</sup>See Ontario *Public Officers Act*, R.S.O. 1990, c.P-45, s.16.

<sup>80</sup>New Brunswick *Conflict of Interests Act and Regulations*, S.N.B. 1978, c.C-16.1, s.8.

<sup>81</sup>*Ibid.*, s.10, including potential conflicts relating to association, assets, debts, etc.

*Code*, that office automatically becomes vacant upon conviction.<sup>82</sup> Section 748(3) also prohibits any person who was convicted of an offense of fraud on the government (section 121), selling or purchasing office (section 124), or selling or delivering defective stores to the Crown (section 418) from being able to hold office under the Crown, to enter into a contract with the Crown, or to receive any benefit under a contract between the Crown and any other person.

Even from this survey, it is evident that considerable public effort has been dedicated to prescribing the prohibited forms of conduct for public officials. The range of activities covered is broad and the penalties vary. While little study is dedicated to the issue, an unfortunate aspect of these instruments is the failure to vigorously police the adherence with the duties they prescribe. Ineffective enforcement of ethical standards is a constant complaint. Even the strongest code of ethics is of little value if it cannot be enforced and public confidence cannot be restored when a conflict arises. It is important to look then at other models. The United States experiences, especially in regard to tribal government, is instructive.

#### **4.0 Tribal Governments in the United States: A Longer Experience with Sovereignty**

In many respects, the legal and political context for tribes in the United States differs significantly from the situation for First Nations people in Canada. Although American Indian tribes do not enjoy any constitutional recognition or protection of their rights in a manner similar to the recognition and affirmation of aboriginal and treaty rights in section 35(1) of the *Constitution Act, 1982*, they currently exercise a greater degree of inherent tribal sovereignty than do First Nations, Inuit, or Métis in Canada.

The notion of Indian tribal sovereignty in the United States has been an accepted premise since it was reflected in a number of major aboriginal rights decisions rendered by the United States Supreme Court the early part of the Nineteenth Century. The idea that tribes in the United

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<sup>82</sup>See Section 748(1).

States were “domestic dependent nations” who retained a considerable measure of their pre-contact sovereignty was germinated in the Supreme Court’s 1823 decision in *Johnson v. Mc’Intosh*<sup>83</sup> and became entrenched through the court’s later decisions in *Cherokee Nation v. Georgia*,<sup>84</sup> *Worcester v. State of Georgia*,<sup>85</sup> and *Mitchel v. United States*.<sup>86</sup> As Chief Justice Marshall explained in *Worcester v. State of Georgia*, Britain, and later the United States, considered the tribes as “distinct, independent, political communities.”<sup>87</sup> Earlier, in the *Cherokee Nation* case, he described them as “domestic dependent nations.”<sup>88</sup>

These various descriptions meant that while the sovereignty of tribes in the United States was “necessarily impaired” by Britain’s assertion of sovereignty upon contact, or another view would be it was regulated by the treaties, it was viewed by the courts as having no effect upon their ability to maintain and regulate their internal affairs. The exercise of tribal sovereignty in the United States is subject to the plenary power of Congress. Congressional plenary power emanates from Article I, section 8, clause 3 (the Commerce Clause) and Article II, section 2, clause 2 (the Treaty Clause) of the United States Constitution.<sup>89</sup> Although strongly disputed by tribal leaders and Elders, the plenary power provides Congress with the ability to regulate or

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<sup>83</sup>8 Wheat. 543 (1823 U.S.).

<sup>84</sup>5 Pet. 1 (1831 U.S.).

<sup>85</sup>6 Pet. 515 (1832 U.S.).

<sup>86</sup>9 Pet. 711 (1835 U.S.).

<sup>87</sup>6 Pet. 515 (1832 U.S.), at p.559.

<sup>88</sup>5 Pet. 1 (1831 U.S.), at p.17.

<sup>89</sup>See *Worcester v. State of Georgia*, note 76, *supra*, at pp.558-559. The application of the Commerce and Treaty clause of the United States Constitution does not, however, render the Constitution itself applicable to the exercise of tribal authority: see *Talton v. Mayes*, 163 U.S. 379 (1896).

extinguish tribal sovereignty.<sup>90</sup> However, Congressional power over tribes is subject to a federal trust responsibility.<sup>91</sup> Significantly, though, the federal trust responsibility for tribes is not constitutionally-entrenched in the U.S. as is the Crown's fiduciary obligation to First Nations in Canada.<sup>92</sup>

Essentially, tribal governments in the United States possess complete sovereignty and jurisdiction over all internal matters that have not been regulated, restricted, or eliminated by the exercise of Congressional plenary power. This is what is meant by the phrase "domestic dependent nations," a phrase which retains currency to this day. As explained in Getches, Wilkinson, and Williams, Jr., *Federal Indian Law, Third Edition*, Indian tribes' status as domestic dependent nations "assures them self-government, free of most state law strictures, over their territory and members -- and often over non-Indians as well."<sup>93</sup> In the exercise of this internal sovereignty by American Indian tribes, numerous problems have come to the fore regarding ethics and conflicts of interest. The Bureau of Indian Affairs recognized certain elected tribal governments but would not recognize or fund traditional governments. As a result, significant splits opened in many tribes between the so-called traditional and Bureau governments operating on any given reservation(s). Because of these internal conflicts, many tribal governments have been accused of losing public confidence and trust. Moreover, these situations were germane for the election of individuals who could take private advantage of their positions of responsibility for their own gain. The Navajo Nation encountered a particularly

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<sup>90</sup>See, for example, *United States v. Wheeler*, 435 U.S. 313 (1978), at p.319: "Congress has plenary authority to legislate for the Indian tribes in all matters, including their form of government."

<sup>91</sup>See, for example, *Morton v. Mancari*, 417 U.S. 535 (1974); *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977).

<sup>92</sup>See *R. v. Sparrow* (1990), 70 D.L.R. (4th) (S.C.C.), at p.408.

<sup>93</sup>David H. Getches, Charles F. Wilkinson, and Robert A. Williams, Jr., *Federal Indian Law: Cases and Materials*, Third Edition, (St. Paul: West, 1993).

difficult conflict situation when a tribal chairman arranged a land deal to his own private advantage while discharging his responsibilities to the tribe as a whole. As a result of this situation, and numerous other complaints and problems, the Navajo Nation developed a specific code and tough enforcement mechanisms for ethics and accountability of public officials.

#### **4.1 The Navajo Nation Example**

The Navajo Nation has developed a code of conduct which makes council members responsible for conflicts of interest or ethical misconduct. The Navajo Nation Ethics in Governmental Law<sup>94</sup> was enacted on August 9, 1984. The purpose of this law is to require accountability to the people of the Navajo Nation by their elected, appointed, and assigned public officials and employees in the course of exercising the authority vested in them as a matter of public trust. Furthermore, it seeks to inform the electorate by requiring disclosure from officials and employees of information pertinent to their responsibilities, including disclosure of their private interests and holdings. The law was developed to protect the Navajo Nation and its people from harmful or inappropriate governmental decisions and actions taken with private gain rather than public good in mind.

In early January of 1983, the Navajo Tribal Council established the Ethics and Rules Committee of the Navajo Tribal Council. The Committee is composed of members selected by the Speaker and confirmed by the Navajo Nation Council. The Committee is responsible for implementing investigations and conducting hearings to protect the interests of the Nation and its people by monitoring the activities of Navajo public officials to ensure that they ascribe to acceptable standards of ethical conduct. Following the enactment of the Navajo Nation Ethics in Governmental Law, an Ethics and Rules Office was created. The Ethics and Rules Office provides administrative and clerical support to the Ethics and Rules Committee. It also monitors

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<sup>94</sup> NTC, Section 3751-3761, enacted by resolution CAU-40-84. The Ethics Law is appended to this paper. It appears as Appendix A.

the activities of governmental officials to ensure that they comply with the Navajo Nation Ethics in Governmental Law.

The standard of conduct required by Navajo law is to ensure that all public officials and employees conduct themselves at all times as to reflect credit upon the Navajo people and the Navajo Nation and to comply with all applicable laws of the Navajo Nation with respect to their conduct in their respective offices or employment.<sup>95</sup> More specifically, public officials and employees of the Navajo Nation are to avoid any action which could result in, or create the appearance of:

- using public office for private gain;
- giving preferential treatment to any special interest organization or person;
- impeding governmental efficiency or economy;
- losing or compromising complete independence or impartiality of action;
- making a government decision outside official channels; or
- adversely affecting the confidence of the people in the integrity of the government of the Navajo Nation.<sup>96</sup>

The staff of the Ethics and Rules Office provides training and technical assistance in all areas of ethics law; including providing training on the Navajo Nation Ethics in Governmental Law, complaint and hearing procedures, Economic Disclosure Statement requirements, Request for Advisory Opinion procedures and the Navajo Nation's ethical investigation process. The Ethics and Rules Office provides these services to raise public awareness of the ethics law, its purpose and intent, and the standards that it prescribes.

The Ethics and Rules Office maintains the authority to receive, initiate, examine, investigate and hear complaints of alleged ethics violations. Any person may file a complaint against any elected public official or employee of the Navajo Nation alleging the violation of

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<sup>95</sup>Section 3753(a).

<sup>96</sup>Section 3753(b)(2).

and/or non-compliance with the Navajo Nation Ethics in Government Law. In filing a complaint, the complainant must file an official complaint form provided by the Ethics and Rules Office (see Appendix B). The form must contain the name and address of the complainant and the respondent and shall state the facts constituting the alleged violation or noncompliance, as well as citing the specific sections of the Ethics Law allegedly being violated. The complaint must then be affirmed by the complainant's signature.

The Ethics Law insists that all rules and procedures in the filing of a complaint comply with requirements of due process, including providing the accused with the right to counsel, the right to be informed of all complaints and allegations, the ability to confront and cross-examine all witnesses, the opportunity to be heard, and the ability to produce testimony and evidence. The Ethics Law also prohibits retaliations against complainants. When sitting as a quasi-judicial body, the Ethics and Rules Committee is empowered to administer oaths, issue subpoenas, and compile and maintain a written record of all hearing proceedings.<sup>97</sup> The Committee is not bound by formal rules of evidence and conducts hearings in open session. Upon the completion of a hearing, the Committee prepares a report of its findings and recommendations which is made by resolution for review and recommendation by Government Services of the Navajo Nation Council and subsequently forwarded to the Navajo Nation Council for final determination. In more precise terms, the procedures for the complaint and hearing process may be broken down into seven parts:

- (1) Complaint is filed with Ethics and Rules Office.
- (2) Complaint is reviewed by Ethics and Rules Office.
- (3) Investigation of complaint by Ethics and Rules Office.
- (4) Findings by Ethics and Rules Offices referred to Ethics and Rules Committee.

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<sup>97</sup>The administrative hearing rules and procedures of the Ethics and Rules Committee are appended to this paper. They appear as Appendix "D" See also section 3756(b).



- (5) Hearing of complaint by Ethics and Rules Committee.
- (6) Government Service Committee reviews Ethics and Rules Committee review of complaint and recommendations.
- (7) Navajo Nation Council reviews recommendations.

The Ethics Law also includes restrictions on former elected public officials and employees of the Navajo Nation in assisting or representing other interests following the termination of their positions. The purpose of these restrictions is to prevent potential conflicts of interest which may arise through representation by former elected officials or employees on behalf of a person against the Navajo Nation. The restrictions state that:

No former public official or employee nor partner, employee or other associate thereof, shall, with or without compensation, after the termination of such public office or employment, knowingly act as agent or attorney for or otherwise represent, any other person or entity (except the Navajo Nation, its governmental bodies or political subdivisions), by formal or informal appearance nor by oral or written communication, for the purpose of influencing any governmental body of the Navajo Nation or any officer or employee thereof, in connection with a proceeding, contract, claim, controversy, investigation, charge or accusation, in which such former public official or employee personally and substantially participated, through approval, disapproval, recommendation, rendering of advice, investigation or otherwise, while so acting or employed.<sup>98</sup>

The Ethics Law also provides for financial disclosures to be made by public officials of the Navajo Nation. The Ethics and Rules Office has oversight responsibility for three types of financial reports required by the Navajo Nation.<sup>99</sup> Reports are required from:

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<sup>98</sup>Section 3753(h)(1). Similar restrictions, in section 3753(g) exist for current officials and employees.

<sup>99</sup>As dealt with in section 3754.

- (1) all candidates for election or appointment to any public office of the Navajo Nation;
- (2) each person elected or appointed to any public office of the Navajo Nation, as defined in section 3758, whose term of office or appointment included any part of the previous calendar year; and
- (3) any persons notified by the Ethics and Rules Committee who are employed or assigned to certain positions of public employment with the Navajo Nation, as defined in section 3758, during any part of the previous calendar year and whose duties, as determined by the Committee, involved such participation in activities, advice, decisions, or responsibilities as to have any effect upon the economic interests of the Navajo Nation or upon any Navajo person or persons, or are likely to have any effects thereon, in the current calendar year.

The information to be disclosed is listed in section 3755 of the Ethics Law. The Ethics and Rules Committee also provides and maintains advisory opinions, upon request from an individual whose conduct is governed by the Ethics Laws and is unsure on how to conduct her affairs. The availability of these advisory opinions is to allow those subject to the Ethics Law to ensure that their conduct conforms to ethical requirements prescribed by the Navajo Nation and to be proactive in this regard. The Committee maintains the confidentiality of the requesting party when providing these opinions.

Sanctions and penalties for contravening the Ethics Law are set out in section 3757. Briefly, these include:

- (1) various administrative sanctions--such as removal, discharge, or termination from office or employment; disqualification from elective public offices of the Navajo Nation or appointment to employment or public office for five years; suspension; discipline; issuance of a written public reprimand; issuance of a private reprimand, and; imposition of restitution or other civil penalties;
- (2) other civil damages as described in section 3757(b), and;
- (3) misdemeanor violations and punishments, including fines and/or imprisonment and ineligibility for elected public office for a period of five years.

The Navajo Nation effort in restoring public confidence through the development of an Ethics Law, complaint procedures and an independent Office of Ethics to investigate and determine whether violations of the law have been committed and, if so, the appropriate penalty, is an important example for First Nations governments and communities struggling with issues of conflict of interests and ethical standards. While the size of the Navajo Nation makes these institutions more viable than in most regions of Canada, there is much to learn from their experience and the training materials and workshops conducted by the staff of the Office are open to First Nations citizens in Canada.

## 5.0 Fiduciary and Trust Duties of all Governments

The notion that selection as a political representative result in the creation of a trust-like or fiduciary relationship between elected officials and the people they represent is not a new one for First Nations or Anglo-European societies. In the case of Anglo-European society, John Locke described the trust relationship in his *Second Treatise on Government*, written in the late Seventeenth Century:

...*Political Power* is that Power which every Man, having in the state of Nature, has given up into the hands of the Society, and therein to the Governours, whom the Society hath set over it self, with this express of tacit Trust, That it shall be employed for their good, and the preservation of their Property: ... it can have no other *end* or *measure*, when in the hands of the Magistrate, but to preserve the Members of that Society in their Lives, Liberties, and Possessions; and so cannot be an Absolute, Arbitrary Power over their Lives and Fortunes, which are as much as possible to be preserved.<sup>100</sup>

The fiduciary nature of the relationship between government and its electorate, under its Lockean formulation, stems from the transfer of powers from individual electors to the elected officials of

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<sup>100</sup>John Locke, *Two Treatises of Government*, Peter Laslett, ed., Second Edition, (Cambridge: Cambridge University Press, 1967), at pp.399-400 (para. 171).

government to act in the former's best interests. As a result of the fiduciary responsibilities that emanate from this interest, Locke maintained that elected officials bound by fiduciary duties are susceptible to removal from office for their failure to fulfill those duties:

...[T]he Legislative being only a Fiduciary Power to act for certain ends, there remains still *in the People a Supream Power* to remove or *alter the Legislative*, when they find the *Legislative* act contrary to the trust reposed in them. For all Power given with trust for the attaining an *end*, being limited by that end, whenever that *end* is manifestly neglected, or opposed, the *trust* must necessarily be *forfeited*.<sup>101</sup>

In First Nations' conceptions of their relations with each other and the natural environment, the notion of sharing land with all other living beings and undertaking its stewardship for future generations is, itself, a fiduciary-like undertaking. Leroy Little Bear has described these conceptions of fiduciary duty in the following manner:

Indian ownership of property...is holistic. Land is communally owned; the ownership rests not in any one individual, but rather belongs to the tribe as a whole, as an entity....[T]he land belongs not only to people presently living, but also to past generations and future generations ... not only to human beings, but also to other living things (the plants and animals and sometimes even the rocks); they, too, have an interest.<sup>102</sup>

The holistic duty to the community is the anchor for First Nations' conceptions of the trust responsibility of all elected officials to all citizens of the particular First Nation. One should be responsible, in this formulation, not only for the trust of other humans, but all of Creation.

In the non-First Nations' context, the fiduciary duties of elected public officials to their constituents regarding their public office duties have been judicially sanctioned in a number of

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<sup>101</sup>*Ibid.*, at p.385 (para. 149).

<sup>102</sup>"Aboriginal Rights and the Canadian 'Grundnorm'", in J. Rick Ponting, ed., *Arduous Journey: Canadian Indians and Decolonization*, (Toronto: McClelland and Stewart, 1986).

instances. Some of these cases are interesting because they echo the duties of chiefs and councillors discussed in an earlier section on recent *Indian Act* caselaw. In Canada, the implied fiduciary duties of public officials were found to exist in the early case of *Toronto (City of) v. Bowes*.<sup>103</sup> In this case, the Mayor of Toronto, Bowes, who was also a member of the City's Finance Committee, took an active part in passing a by-law authorizing the city's issue of debentures for the completion of a railroad. An agreement had subsequently been reached to have some of the city's debentures issued to Messrs. M.C. Story and Co., who had been retained for the construction of the railroad. At the time he was Mayor, Bowes was also engaged in a business partnership with a Mr. John Hall, in which Bowes was the primary partner.

Knowing that Story and Co. had been trying to sell the debentures without success and would sell a substantial portion of the issue at a discount, Bowes proposed to the Hon. Francis Hincks, a member of the Legislature, that they should purchase a significant amount of the debentures. The two then purchased a bulk of the debenture issue at a 20% discount and subsequently sold them at a great profit. Later, when rumours spread that Bowes had personally purchased a great number of the city's debentures, he declared in a meeting of the City Council that he had no interest in the debentures or in their negotiation.

Due to Bowes' position as Mayor, a member of the City's Finance Committee, and the manner in which he acted throughout the transaction,<sup>104</sup> he was held to be a trustee of the city and made to account for any profit obtained from the sale of the debentures he had purchased with Hincks. Despite the fact that Bowes had purchased the debentures jointly with Hincks and had been in partnership with Hall, the Privy Council held that the entire profit from the sale of the debentures had to be disgorged.

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<sup>103</sup>(1858), 14 E.R. 770 (P.C.).

<sup>104</sup>At p.792, the Privy Council referred to the "secrecy and disingenuousness with which the Appellant conducted himself."

In *Hawrelak v. City of Edmonton*,<sup>105</sup> the appellant, who was a former mayor of Edmonton, was a principal shareholder in a land development company, Sun-Alta. Sun-Alta. owned certain lands that had been sought by the city for development. Following negotiations between the city and Sun-Alta., an agreement was reached between them in August, 1963. The final contract, however, remained unsigned until March, 1964. In the interim, in October, 1963, Hawrelak was again elected mayor of Edmonton after a four year absence (he had previously been mayor from 1951 until 1959). Just prior to his re-election, Hawrelak had indicated to a city commissioner that Sun-Alta. was eager for a city-planned rezoning of its lands to proceed. He had visited the lands in question and discussed other details of the rezoning issue with the city commissioner.

Meanwhile, in an initially unrelated occurrence, the Chrysler Corporation had sought the purchase of other city-owned lands. Due to the existence of a certain city policy regarding construction start dates, Chrysler decided that its interests would be better served by purchasing other lands that the city desired and arranging for a swap. Chrysler then took an option on lands adjacent to those owned by Sun-Alta. and proposed an exchange for the city-owned lands that it wanted. The city commissioned a report on the Chrysler proposal, which included having to rezone some city-owned lands for Chrysler's needs. When the report was presented to city Council, Hawrelak had just been elected Mayor. He signed the report, but claimed not to know that the land proposed to be exchanged for the city's lands was adjacent to Sun-Alta's lands. He also stated that he did not know that the city's swap of land with Chrysler would result in the inclusion of Sun-Alta's lands in a proposed development of the surrounding area by the city.

There was significant community opposition to the rezoning of the city-owned lands to be transferred to Chrysler. During negotiations over this issue, Mayor Hawrelak stated that he was a

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<sup>105</sup>[1975], 54 D.L.R. (3d) 45 (S.C.C.), rev'g [1973] 1 W.W.R. 179 (Alta. C.A.), aff'g [1972] 2 W.W.R. 561 (Alta S.C.).

director of Sun-Alta. who owned land in the area the city proposed to replot. He did not vote in the matter and the by-law to rezone the lands to be transferred to Chrysler was not enacted.

Hawrelak had personally signed the contract for the sale of the Sun-Alta. lands in March, 1964 to avoid allegations that he was hiding his interest in Sun-Alta. Months later, when the document authorizing the purchase of the Sun-Alta. lands came across Hawrelak's desk as Mayor, he returned the document to the municipal officer so that it would be brought before City Council and his personal interest in the sale could be clearly revealed. Hawrelak then left the city and the acting Mayor executed the document on behalf of the city.

Under existing legislation at that time, a person who was a party to an existing contract with the city was ineligible to be elected mayor. After the matter was brought before the courts, Hawrelak was disqualified from his position as Mayor. At a new trial, in which Hawrelak was accused of breaching his public duties, Hawrelak was found to have breached his fiduciary duty and forced to disgorge the profits made from the sale of the Sun-Alta. lands to the city of Edmonton. The trial decision was affirmed upon appeal, but was reversed by a split (3-2) decision of the Supreme Court of Canada. Nevertheless, a vigorous dissenting judgment by de Grandpré J., Dickson J. concurring, produced the following comments:

Confidence in our institutions is at a low ebb. This statement is not very original but unfortunately is unchallengeable. Many factors have brought about this crisis and unconscionable conduct by public officials is only part of the story. Still, if we are to regain some of the lost ground, we have to start somewhere. To reaffirm the requirements of highest public morality in elected officials is a major step in that direction. To speak of civil liberties is very hollow indeed if these liberties are not founded on the rock of absolutely unimpeachable conduct on the part of those who have been entrusted with the administration of the public domain.<sup>106</sup>

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<sup>106</sup>(1975), 54 D.L.R. (3d) 45 (S.C.C.), at p.68. Note the criticism of the *Hawrelak* decision by the Supreme Court of Canada in E.I. Jacobs, "Comment: *Hawrelak v. City of Edmonton*," (1977), 23 *McGill L.J.* 97.

In *Carlsen v. Gerlach*,<sup>107</sup> Gerlach, who was both a councillor and reeve, participated in a transaction leading to personal profit. He was held to occupy a fiduciary position, but was found not to have profited personally from his public office. In 1950, the municipality had purchased lands to operate as a dump, which was closed in 1976. In 1975, complaints about the dump by citizens and the health inspector led to a search for alternate dump sites. At that time, Gerlach discovered that long-time friends of his would sell land adjacent to a dump which they owned. Gerlach purchased this land personally, purchased some adjoining land from another party, and made an application for subdivision approval of his newly-acquired lands.

Some time later, the municipality sought to register a trail running alongside its dump as a registered road. The trail had formed a boundary for Gerlach's planned subdivision. When the matter came before council for consideration, Gerlach revealed his interests and withdrew from the meeting. Gerlach's subdivision application was first rejected and later approved without involving the municipality. The municipality's dump was then formally closed, at which time Gerlach revealed his interests in the adjacent lands and did not participate in debate on the issue. However, after the dump was closed, Gerlach returned a portion of the land he had purchased to the previous owners because of its increase in value upon the dump's closing.

Suspicious ratepayers brought an action against Gerlach for breach of fiduciary duty. The Alberta District Court found that Gerlach had not used his office for improper purposes inconsistent with his fiduciary obligations to the municipality and its residents. The court held that it could find no evidence to indicate that Gerlach had done anything relating to the closing of the old dump and the purchase of lands for the new dump.<sup>108</sup>

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<sup>107</sup>(1979), 3 E.T.R. 231 (Alta. Dist. Ct.).

<sup>108</sup>*Ibid.*, at pp.235-236.



More recently, in *R. v. Gentile*,<sup>109</sup> a member of the Council of the Municipality of Metropolitan Toronto was charged under section 426(1)(a)(ii) of the *Criminal Code* with nine counts of accepting secret commissions while acting as a metropolitan councillor. At his preliminary inquiry, the accused challenged the application of the section of the *Criminal Code* to the relationship between a member of a municipal council and the municipal corporation. The question placed before the court was whether that relationship constituted one of agent and principal within the meaning of section 426 of the *Criminal Code*. In answering the question in the affirmative, the court drew upon the precedents in *Bowes* and *Hawrelak*.

The idea of governmental fiduciary duties to its electorate is equally applicable to First Nations' and non-First Nations' governing bodies. Indeed, in the case of *Gilbert v. Abbey*,<sup>110</sup> discussed earlier, an ex-chief was held to possess fiduciary obligations to her band in the exercise of her office. Moreover, a logical extrapolation from the decision in *Corbiere v. Canada*,<sup>111</sup> where the Federal Court, Trial Division determined that a band's reserve lands and moneys accrue to the benefit of all band members, not just those residing on-reserve, would suggest that the body responsible for decisions regarding those assets must exercise its authority in a manner which is consistent with the best interests of all band members. This fiduciary-like responsibility would pertain to both the band council and the Department of Indian Affairs, as both have some measure of control over Indian reserve lands and moneys.

It is important to consider the fiduciary-type duties of elected officials and that of those who bear any kind of public trust because these duties exist quite independently of any code or legislation explicitly providing so. These cases remind us that the fiduciary responsibilities and duties do not spring to life with the development of codes of ethics or standards governing

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<sup>109</sup>(1993), 81 C.C.C. (3d) 541 (Ont. Prov. Div.).

<sup>110</sup>Note 24, *supra*.

<sup>111</sup>Note 27, *supra*.

conflicts of interest. They will be implied by the courts if cases are brought forward where a public trust has been used for any kind of private gain.

## 6.0 Conclusions and Recommendations

Due to the increasing responsibilities being undertaken by band council governments and the proposals for the exercise of broad jurisdiction in various areas by emerging Aboriginal governments, there is a need to specifically build checks and balances into the discharge of public office. The development of codes of conduct or, at the very least, guidelines for accountability, may be required before any progress is possible at a negotiation table on self-government. Indeed, a draft of the recently adopted Federal policy on self-government, includes a provision requiring First Nations' governments to be fully accountable to their members. It reads:

47. Aboriginal governments and institutions should be fully accountable to their members for decisions and the exercise of jurisdiction or authority. Mechanisms to ensure political accountability should be developed and ratified by the Aboriginal group concerned, and set out in an internal constitution so that they are transparent to all members, and to others that will have to deal with the Aboriginal government or institution.<sup>112</sup>

The institution of codes of conduct would promote the integrity of Aboriginal government activity and bolster Aboriginal citizens' faith in the ability of government to act in the best interests of the people, in a trust-like and responsible fashion. The creation of governmental codes of conduct is one response to the situation. The development of self-government, specifically driven by the desires of community members for better government, is impetus enough to make a move in the direction of ethics and codes of conduct. If Aboriginal governments do not take the lead in this area, then government may impose requirements. Indeed, government may be persuaded they have a mandate to do so, in the absence of anything

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<sup>112</sup>Federal Policy on Inherent Right of Self-Government, leaked Cabinet document, dated May 9, 1995.

developed at the community level, in order to address the allegations which are now made regarding corruption in band council governments. For example, one presenter to the Royal Commission on Aboriginal Peoples, Frank Bruyere, suggested in his testimony in Kenora, Ontario:

We must acknowledge -- and I can't overemphasize this -- that corruption exists within our own Aboriginal government, as we know it today. We must make our leadership accountable before these negative effects filter in and destroy the very foundations of future self-government initiatives.<sup>113</sup>

Any code of conduct intended to apply to Aboriginal governments, whether band council governments or First Nations' governments established pursuant to the inherent right and treaties, must ensure that checks and balances are in place to uphold the public trust. If governmental codes of conduct exist to ensure that people continue to trust and see the integrity of government, they must ensure that the conduct of governmental officials is beyond reproach. As the preamble to Ontario's Bill 209, entitled *An Act to Revise the Members' Conflict of Interest Act and to make related amendments to the Legislative Assembly Act*,<sup>114</sup> states:

3. Members are expected to perform their duties of office and arrange their private affairs in a manner that promotes public confidence in the integrity of each member, maintains the dignity and justifies the respect in which society holds the Assembly and its members.
4. Members are expected to act with integrity and impartiality that will bear the closest scrutiny.

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<sup>113</sup>RCAP Public Hearings, Kenora, Ontario, 92-10-28 75, Frank Bruyere, United Native Friendship Centre, p. 103.

<sup>114</sup>Which received Royal Assent on December 9, 1994, and was proclaimed in force on October 6, 1995. Now, the legislation replacing the *Members' Conflict of Interest Act* is known as the *Members' Integrity Act, 1994*.

As a precursor to an intended code of conduct, it would be useful to list, in some shape or form, categories and/or examples of prohibited conduct. This could take the form of an appendix to a code of conduct, with cross-references to the text of the code where necessary. The list of prohibited conduct need not be exhaustive, but be sufficiently detailed to provide the communities and the people who will be subject to them an opportunity to determine for themselves what is considered to amount to unacceptable conduct of a public official. The Navajo Code is a good example in this regard. A code may also include a preamble or policy statement that outlines the purpose of the code of conduct and how it attempts to achieve its goals.

Codes of conduct need to ensure that the private activities and the interests of public officials do not interfere with the officials' exercise of their public duties. Therefore, they should attempt to prevent people who sit on band governments from having the opportunity to enter into business contracts with the band, both during the time that they actually serve on band council and for some defined period of time thereafter. Also, those people who have ongoing contracts with band governments should be deemed to be ineligible to run for band government positions until their business dealings with the band council cease.

Instituting a requirement of complete disclosure of candidates' holdings and interests for band council as part of the election nomination process may also aid in reducing the chances of conflicts arising at a later date. If all candidates are required to fill out prescribed forms in which they must divulge their personal business interests, it is possible to prevent a person with conflicting personal interests from running for office. This is preferable rather than having to institute proceedings to remove them from office after they have committed a wrong and potentially hurt the community, not to mention damaging the reputation of the government and hampering its ability to govern with confidence. Ascertaining conflicts of interests of band council candidates prior to commencing an election process also eliminates the need to hold a

second election should one or more candidates be found to be ineligible to run due to conflict of interest violations.

Disclosure of personal interests ought not be limited to pre-election situations. It is equally important to maintain some form of disclosure requirements after a person has been elected to a band council in case some official's personal circumstances or the band council's activities have changed since the last council election. Requiring that band council officials file a disclosure statement annually while in office is consistent with the principles behind the initial, pre-election disclosure requirement and keeps information on officials current.

Disclosure statements should include not only candidates' and officials' personal interests, such as personal assets, liabilities, income, and other financial interests, but should also include the personal interests of spouses and dependent children, as well as the interests of private companies in which the spouses or children maintain either a controlling or significant interest. Disclosure of the interests of immediate family members helps to remove the potential for band council members to act in conflict of interest by conferring benefits upon family members or by using family members as figureheads to conceal activities designed for self-benefit. The Ontario *Members' Conflict of Interest Act*,<sup>115</sup> for example, provides that a members' public disclosure statement must contain all relevant information (assets, liabilities, income, or financial interests), except for:

- (a) assets, liabilities and financial interests having a value of less than \$1,000;
- (b) the source of income where the income paid from the source has a value of less than \$1,000 in any twelve-month period;
- (c) the value of the assets, financial interests and liabilities of the member's spouse and minor children and of private

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<sup>115</sup>R.S.O. 1990, c.M-6, s.12(2).

companies as defined in the Securities Act controlled by the spouse or by a child;

- (d) the amount of the income of the member's spouse or minor children or of a private company controlled by the spouse or a minor child where the income is paid from a source other than directly from a ministry or an agency, board or commission of the government;
- (e) the municipal address or legal description of real property that is primarily for the residential or recreational use of the member or the member's spouse or minor children;
- (f) personal property used for transportation or for household, educational, recreational, social or aesthetic purposes;
- (g) the amount of cash on hand or on deposit with a chartered bank, trust company or other financial institution in Ontario that is lawfully entitled to accept deposits;
- (h) the amount of Canada Savings Bonds, and other investments or securities of fixed value issued or guaranteed by any level of government in Canada or an agency of such government;
- (i) the value of registered retirement savings plans that are not self-administered;
- (j) the amount invested in open-ended mutual funds;
- (k) the value of guaranteed investment certificates or other similar financial instruments;
- (l) the value of annuities and life insurance policies;
- (m) the value of pension rights; and
- (n) the amount of the following liabilities:
  - 1. Mortgages and unpaid realty taxes on property referred to in clause (e).
  - 2. Liabilities related to assets referred to in clauses (f), (h), (i), (j), (k), (l) and (m).
  - 3. Unpaid income taxes.

#### 4. Support payments.

A band may wish to create an independent position of “conflict of interest officer” to remove conflicts of interest situations from the purview of regular business of band governments. This conflicts officer would monitor the activities of all elected band council officers to ensure that their public duties are not compromised by their private interests or those of their families. Where mandatory disclosure forms are a part of a band’s conflict avoidance regime, the conflicts officer would be the person responsible for scrutinizing the forms and ensuring that candidates for band council and council members are not violating conflict of interest guidelines. In particularly small bands, which are dominated by a few families, it might be necessary for a band to go outside of the reserve to hire a conflicts officer who is not a part of any family and has no conflicting allegiances.

In larger bands, or on a tribal council scale, it may be necessary to have more than one conflicts officer. In such cases, a conflicts board or panel may be appointed, as the Navajo Nation have done. In some contexts, tribal councils or regional organizations, encompassing several First Nations, will be better positioned in this regard. To lessen the likelihood of a deadlock in resolving a conflict of interest issue, there should be an odd-number of persons serving on a conflict of interest board or panel and defined dispute resolution mechanisms put into place. A similar suggestion to the creation of a conflicts officer position was made to the Royal Commission by Jeanette Castello, who advocated the creation of an Aboriginal ombudsman to take the place of more traditional means of ensuring adequate representation, fairness and integrity in aboriginal governments.<sup>116</sup>

Council members who recognize that they may have a conflict of interest in a matter before the council should be forced to disclose the existence of the conflict once it is discovered or suspected and withdraw from further participation on the matter, including voting on its

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<sup>116</sup>RCAP Public Hearings, Terrace, British Columbia, 93-05-25 56, Jeanette Castello, p. 84.

disposition. Where a council member does not follow this course of action, he or she may be found in breach of a fiduciary duty to the band as a whole and personally liable as in *Gilbert v. Abbey*.<sup>117</sup>

Another method for ensuring greater degrees of accountability of Aboriginal governments and elected representatives is to have staggered elections so that elections are held more frequently, thereby giving the community greater control over the government's activities. This idea was suggested to the Royal Commission during its hearings in Elizabeth, Alberta by Ken Noskey of the Métis Settlements General Council:

The respective terms of office of the councilors are staggered, with at least two councilors being elected each year. This preserves continuity in the settlement council as a whole, but ensures democratic accountability to the settlement membership by having at least two councilors answerable annually to the electorate for decisions which council has made.<sup>118</sup>

These are just some recommendations for establishing governmental codes of conduct as vehicles for restoring trust and rebuilding relationships in Aboriginal communities. It would be worthwhile for individual communities to look at the particular values they want to espouse and unique challenges that they face in designing codes of conduct for their situations. While there are a number of general conflict of interest situations that apply to virtually every Aboriginal government in Canada, each individual First Nation, Métis and Inuit entity will have unique concerns that require special consideration. Therefore, the first steps in designing codes of conduct should be to carefully examine the kinds of problems that have plagued the community, including those perceived to be a problem by some or all members of the community, and begin developing standards which would have prevented those offensive situations from occurring.

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<sup>117</sup>Note 24, *supra*.

<sup>118</sup>RCAP Public Hearings, Elizabeth, Alberta, 93-06-16 14, Ken Noskey, PG 22.



This kind of initiative may be difficult, because it involves the discussion of controversial and often highly personal issues, however, if directed toward future change and better government, it can only generate a healthy debate in the interests of good government.

Another starting point for First Nations' governments would be the preparation of training seminars by First Nations' educational institutions on duties and responsibilities of elected chiefs and councillors. These training seminars could cover recent caselaw, defining conflicts of interest, and a discussion of appropriate and inappropriate procedures and decisions. With chiefs and councillors potentially liable for bad decisions which a court may determine were contrary to their duties to the band, such instruction might be a good litigation-preventer, in addition to a starting point for developing standards and procedures for maintaining ethics and accountability in First Nations' government. This is just one practical step in a process of restoring of Aboriginal governments and rebuilding of Aboriginal peoples' trust in their leaders and officials.

## **Appendix A:**

### **The Navajo Nation Ethics in Government Law**

## **Appendix B:**

### **Navajo Office of Ethics: Complaint Forms**

**Appendix C:**

**Navajo Office of Ethics: Request for an Advisory Opinion**

**Appendix D:**  
**Navajo Office of Ethics:Administrative Hearing Rules**  
**and Procedures**