

**IMPROVING
THE SYSTEM FOR FIRST
NATIONS
ELECTIONS**

Discussion Paper

October 1, 2010

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INTRODUCTION AND BACKGROUND

At the current time, 247 First Nations (approximately 40%) hold Band Council elections under the election provisions of the *Indian Act*. The vast majority of First Nations agree that these election provisions are out-dated and problematic. Specific issues centre around the following:

- The term of office for elected Band Councils under the *Indian Act* is two years. This short length of term places First Nations communities in an almost continual state of electioneering, and it undermines the Band Council's stability as well as their efforts to develop long-term projects.
- A weak process for the nomination of candidates that can result in the nomination of many candidates (sometimes over 100) for one election.
- A mail-in ballot system that can lead to abuse.
- An appeal process to the Minister of Indian Affairs and Northern Development that is "paternalistic", complicated and often takes too long to produce findings and a final ruling.
- The absence of defined election offences and associated penalties under the *Indian Act* allows alleged cheating and other related activities such as the selling and buying of votes to go unpunished.

The Atlantic Policy Congress of First Nations Chiefs (APC) and the Assembly of Manitoba Chiefs (AMC) have taken a keen interest in looking at ways to stabilize and improve upon First Nations governance through a stronger and more modern election system. Over the last two years, with the support of Indian and Northern Affairs Canada, the AMC and the APC have been researching the issue of Band Council elections. After having heard from First Nation leaders, governance technicians and community members in their respective regions, both organizations produced recommendations which called for an improved system for Band Council elections.

This discussion paper was written for the purposes of outlining these recommendations, to further the discussion and to invite feedback on developing a stronger election system for First Nations.

RECOMMENDATIONS FOR AN IMPROVED ELECTION SYSTEM AND MORE STABLE FIRST NATIONS GOVERNMENTS

At the onset, and before outlining the recommendations, it is important to point out that replacing the existing *Indian Act* election system is not what is being proposed. The *Indian Act* election system will remain unchanged for those First Nations who feel that it suits their needs. The AMC and the APC have recommended the development of a brand new “opt-in” law and system for Band Council elections. First Nations who hold elections under their own community-election codes approved by their membership will not be affected by the proposed reforms. For the purposes of this discussion only, the proposed election law will be referred to as a “First Nations Elections Act”. It would contain some of the same rules as the *Indian Act* election system along with some important differences as outlined below:

- the term (length) of office for Band Council members should be 4 years instead of the 2-year term that exists under the *Indian Act* system;
- the mail-in ballot system should be improved;
- the Minister of Indian Affairs and Northern Development and his Department - who currently receive, investigate and decided upon election appeals - should be removed from any involvement; and
- the Act should define and set out election offences and attach penalties to discourage cheating and other dishonest activities from taking place in elections.

While the above are the major recommendations for improving the election system as put forward by the APC and the AMC, there were other recommendations that dealt with matters such as a common (or same) day for elections in Manitoba, and the ability for First Nations voters to “recall” elected officials and have them removed during their term of office.

The key elements of a proposed First Nations Elections Act are described in the following pages.

1. New “Opt-in” Legislation for Band Council Elections

The APC and AMC have recommended that the Government of Canada introduce new legislation as an alternative to the *Indian Act* system for Band Council elections. With this new legislation, individual First Nations could choose to “opt in” and have it applied to their elections. In keeping with this, a First Nation Council would pass a resolution, indicating that it wishes to “opt-in” to the new legislation, and then send that resolution to the Minister of Indian Affairs and Northern Development for action.

If the new legislation for Band Council elections were to be introduced, individual First Nations currently operating under the *Indian Act* system would have three basic options:

- “opt-in” to the new legislation so that the provisions of that legislation would then govern the elections for the “opting in” First Nations;
- continue to hold Band Council elections under the *Indian Act* election system; or
- develop and ratify a community-designed (custom) election code.

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| <p>1. It is proposed that the Government of Canada introduce a new First Nations Elections Act – with key provisions as proposed below in sections 2 to 11 of this discussion paper – and provide individual First Nations with the choice of “opting in” or, at a later date “opting out” if they so wish, in favour of a community-designed or custom election system.</p> |
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2. Band Council Size and Membership

Under the *Indian Act*, a Band Council consists of one Chief and one Councillor for every 100 members of the Band, but the number of Councillors is not less than 2 and no more than 12. Also, under the *Indian Act*, no Band shall have more than one Chief. It is proposed that these provisions of the *Indian Act* for Band Council size and membership be the same in a new First Nations Elections Act.

Until recently, all candidates for Councillor positions had to live on-reserve. However, in August 2007, the Federal Court struck down this residency requirement in what is called the “Gull Bay decision”. As a result of this court decision, it is now possible for some First Nations Councils to be made up entirely of Band members not living on the reserve. Many First Nations are troubled by this prospect as they believe that a Band Council made up largely or

entirely of off-reserve members would have less knowledge of on-reserve issues. They believe that this would result in the concerns of on-reserve members not being properly heard and their priorities being ignored. This prospect highlights the need for the new First Nations Elections Act to provide a structure that establishes a balance between, (i) the rights of off-reserve members to hold Band Council positions and, (ii) the need to address the specific interests of on-reserve members, such as in respect of the direction, management and delivery of on-reserve services.

2. It is **proposed** that, under a new “opt-in” First Nations Elections Act, that:
- (a) a Band Council consist of one Chief and one Councillor for every 100 members of the Band, but the number of Councillors not be less than 2 nor more than 12; and
 - (b) up to one-half of the Councillor positions on a Band Council may be designated to be held by only Band members who live on the reserve if, during a vote held on this question, 50% or more of the votes cast support it.

3. *Term of Office for Band Council Members*

First Nations Band Council members, who are elected under the *Indian Act* election system, hold office for a 2-year term. The APC and the AMC have recommended that the new elections legislation provide that, for First Nations “opting into” the legislation, the Band Council members be elected for a 4-year term.

The *Indian Act*, in requiring elections every two years, has created conditions of instability and has fostered divisions in First Nations communities. Most often the two-year term of office is too short to provide political stability for First Nations governments to plan for and implement long-term initiatives, and to build a proper foundation for community development before they face re-election. The 2-year term is especially difficult and challenging for those elected to a Band Council for a first time. New Councillors need time to learn their responsibilities and the various projects that require their attention. Projects are often put at risk by the 2-year election cycle and by the related high turnover of elected officials.

For these reasons, the APC and the AMC recommend a 4-year term for Band Councils. Federal, provincial and most municipal governments across the country have 4-year terms, so this recommendation would make terms of office of Band Councils comparable with most other governments in Canada.

3. It is **proposed** that, under the new “opt-in” First Nations Elections Act, the term of elected office for Chiefs and Band Councillors be 4 years.

4. Same or Common Day for Elections

Under the *Indian Act* provisions, elections of Band Councils must be held every two years. However, the *Indian Act* provisions do not require that elections be held on a common or same day. Consequently, under the *Indian Act* elections system, if there are 20 First Nations in a province, there could be 20 different election dates spread over a 2-year period on which the individual elections would be held. Manitoba First Nations have voiced their disagreement with regards to this formula and want Band Council elections in their province to be held on the same day, or within the same period.

With this approach, First Nations Band Councils in Manitoba that choose to “opt in” would all hold office starting and ending on the same day. The AMC believes that this would foster stability, consistency and better coordination of joint and cooperative projects among First Nations in Manitoba, and possibly bring enormous benefit to economic development for First Nations across the province. The AMC noted that, under the *Indian Act* elections system, joint or cooperative projects requiring the participation and support of several Band Councils in Manitoba often cannot get started because, in any given month, leadership in one or more of the Band Councils changes due to an election. As new Band Councils are elected, members often have their own personal perspectives and interests.

Beyond Manitoba, if all or most of the First Nations in the same region or province so wished, a common or same day for elections within that region or province could be selected. However, this part of the legislation would not be mandatory and each region would decide whether they want to adopt a common election day or not.

4. It is **proposed** that the new First Nations Elections Act and regulations provide First Nations with the possibility of adopting a common day for all Band Council elections in that region or province.

5. Electoral Officers

Before an election is to be held under the *Indian Act* election system, an electoral officer is appointed by the Band Council and approved by the Minister. The electoral officer is responsible for preparing the voters list, sending and receiving mail-in ballots, conducting the nomination meeting, overseeing the voting, verifying the mail-in ballots and counting the votes. It is believed that these provisions for Electoral Officers have worked well and should be incorporated in a new First Nations Elections Act. However, it has been recommended that under the new legislation, and in accordance with the proposal to remove the involvement of the Minister of Indian Affairs and Northern Development in Band Council elections, that the appointment of an electoral officer by a Band Council would not need to be approved by the Minister.

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| <p>5. It is proposed that the new First Nations Elections Act and its regulations provide for the appointment of electoral officers by Band Councils without requiring the Minister's approval.</p> |
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6. Nominations and Elections

Under the *Indian Act* election system, any one who is registered on the Band list and is 18 years of age or older can vote. To be a candidate, to nominate or to second a nomination of a candidate for a Councillor position, a person must be a qualified elector (voter). These features of the *Indian Act* election system have proven to be effective.

Under the *Indian Act* election system, a nomination meeting is held at least 42 days before the election. The purpose of this meeting is to nominate candidates for the positions of Chief and Councillors for the upcoming election. Notice of this meeting, along with the voters list, must be posted by the Electoral Officer at least 30 days in advance. The Electoral Officer will, at the same time, mail out to each eligible off-reserve voter for whom there is an address, the notice of the nomination meeting along with a voter declaration form. Voters can nominate candidates for the position of Chief and Councillors through the mail-in process. If the number of nominees does not exceed the number of positions to be filled, the nominees will be declared elected.

While these provisions of the *Indian Act* for nominations and voting do not require changes, there are others that have created problems. For example, under the *Indian Act* provisions, one person can be nominated for both the Chief and a Councillor position. Furthermore, there is no limit on the number of candidates that one person can nominate. Frivolous candidates - individuals without the serious intent of running - can also be a problem. Nobody is discouraged from letting their names stand for election once they are nominated.

In addition, people who have no interest in running for election are often nominated by others. Once people are nominated, their name will automatically appear on the ballot unless they withdraw in writing, so names may appear on the ballots without the person even knowing they were nominated. If the ballots are already printed, a name stays on the ballot even if the candidate has withdrawn.

In other election systems, including many First Nations community-designed (or custom) systems, there are many ways to control the nomination process so that it is not abused. For example, a candidacy fee must be paid which can ensure that candidates letting their names stand for election are serious. At the very least, persons who are nominated must sign a declaration accepting the nomination for their name to appear on the ballot.

6. It is **proposed** that, in the new First Nations Elections Act and its regulations, the process to nominate candidates generally mirror or copy the process under the *Indian Act* system with the following improvements:
 - (a) only First Nations Band members (aged 18 or older) may nominate and be nominated for a Chief or Councillor position; no person may be nominated for more than one position; and no person can nominate more candidates than there are positions available for election;
 - (b) persons who are nominated will be required to accept their nomination in writing or their name will not appear on the ballot.
 - (c) individual First Nations be provided with the option of charging a candidate fee of up to \$250.

7. Mail-In Ballots and Advance Voting

Under the *Indian Act* election system, voters both on and off reserve may vote by mail-in ballot. The Electoral Officer receives a list of addresses from a Band administrator and, using this list, mails the ballots and voting instructions to off-reserve voters. On-reserve voters can contact the Electoral Officer directly to obtain a mail-in ballot. These voters then fill out the ballot, sign a voter declaration form in the presence of a witness and mail the completed ballot package to the Electoral Officer so that it can be received before the polls close on voting day.

As the APC and the AMC have noted, there have been abuses with the mail-in ballot system. Since no one sees the voter cast his or her vote on the mail-in ballot, it is often difficult to ensure that the person filling and mailing the

ballot is indeed the proper voter. A number of off-reserve voters, who have little interest in their First Nations election process but have received a mail-in ballot because their name and address are kept by the First Nation, are alleged to have sometimes “sold” their ballots to others. In various parts of the country, the alleged buying and selling of mail-in ballots has been quite widespread. Given that the First Nation provides the Electoral Officer with a list of addresses for mail-in ballots that may or may not be accurate or up-to-date, this activity can easily take place. Voters who receive these mail-in ballots may or may not have an interest in casting a legitimate vote. This type of abuse could be reduced if the new legislation allowed for greater control of the distribution and return of mail-in ballots. The rules could also place the responsibility on the interested voters to contact the Electoral Officer to have a mail-in ballot sent to them. This would ensure that ballots are only sent to interested voters.

7. (a) It is **proposed** that the new First Nations Elections Act or its regulations provide that mail-in ballots be sent to voters only upon their written request and that those written requests must be accompanied by photocopies of reliable identification of the voters.

(b) It is also proposed that the regulations permit the holding of advance polls to reduce the number of electors who would need to vote by mail-in ballot.

8. Appeals of Band Council Elections

The *Indian Act* sets out provisions for First Nations voters to launch an appeal of an election with the Minister and the Department of Indian Affairs and Northern Development. To do so, a First Nations voter must submit an affidavit setting out the grounds for the appeal within 45 days of an election. When the Department receives an appeal, a copy of it is sent by registered mail to all the candidates in the election and the electoral officer, who may provide a response and comments within 14 days. After receipt of the responses and any other information, the Department may conduct an investigation. If there is enough evidence to show that the election was invalid, the Minister can ask the Governor in Council to overturn the election of one or more candidates.

The experience to date has been that about 30% of all Band Council elections under the *Indian Act* have been appealed; which amounts to 40 elections per year. Many of the election appeals are rejected outright by the Department because the reasons put forward for the appeal are not acceptable, do not demonstrate violations of the election rules or are considered to be so minor as to have had no impact on the election. Each year, usually no more than 5 election appeals result in the overturn of an election.

Identified problems with the *Indian Act* appeals process are:

- It lacks rigor, transparency and procedural fairness.
- It is easy to launch an appeal based on frivolous allegations, which throws a “dark cloud” of uncertainty over the Band Council for often a very long period of time.
- An appeal can take anywhere from 6 to 18 months to be resolved, which is a significant part of a Band Council’s mandate.
- The role of the Minister in investigating and deciding upon election appeals is paternalistic and an inappropriate intervention in the internal affairs of a First Nation.

The AMC noted that approximately 50% of all *Indian Act* elections in Manitoba are appealed and in some cases, appeals can take over a year to get resolved. The AMC said that this “creates uncertainty and instability both in the community and among other First Nation leaders and business stakeholders” and that “the challenge is to design a legitimate, independent and impartial appeal mechanism”.

The APC and the AMC recommended that, under a new First Nations Elections Act, the role of the Minister and his Department in election appeals be eliminated in favour of the establishment of new independent tribunals that would have powers set out in the legislation to investigate and decide upon appeals. The APC also recommended that timeframes for conducting investigations and issuing decisions on appeals be established and that persons wishing to launch an appeal be required to pay a fee up to a maximum of \$250.

There are also some other options to consider to change the appeals process by improving the current role of the Minister in election appeals as outlined in Option #1, or relying on the courts to hear and decide election appeals as per Option #3.

Option #1: Improve the current election appeal process in the new legislation. The current role of the Minister of Indian Affairs and Northern Development in the appeals of Band Council elections could be maintained but significantly improved in the new legislation. Considering that many First Nations elections appeals under the *Indian Act* system are superficial and not justified, the new legislation could set out measures to reduce these types of appeals, such as providing guidelines, requiring fees, and setting strict timelines for investigation and resolution. While such added provisions could improve and speed up the Department’s elections appeal process, this option would not satisfy the recommendation of many First Nations that the Minister and the Department not play a role in election appeals.

Option #2: Set up a new independent and impartial elections appeals tribunal. This approach calls for the establishment of an elections appeals tribunal to take over the related roles and responsibilities of the Minister of Indian Affairs and Northern Development. This option satisfies the recommendations for the Minister and the Department to withdraw completely from election appeals.

Option #3: Rely on the courts to handle the appeals of Band Council elections. For federal, provincial/territorial and municipal elections, the power to impose penalties on corrupt practices and to overturn elections resides only with the courts. In this regard, the Superior Courts have demonstrated that they can act impartially and judiciously. Through a new First Nations Elections Act, the Superior Courts could be asked to take on this appeals function for “opting in” First Nations. That arrangement would draw on the demonstrated capacity of the Superior Courts and put the “opting in” First Nations on a comparable basis with other governments across Canada in terms of ruling upon the validity of elections.

8. It is **proposed** that options for improving the appeals process for Band Council elections be given further consideration and that one option be chosen and recommended for inclusion in the new First Nations Elections Act, based on feasibility and the best use of limited financial resources.

9. Election Offences and Penalties

As noted by the APC, the *Indian Act* election system does not set out election offences or attach any related penalties. This is a major weakness because people who engage in dishonest and corrupt election practices are not called to account. The APC recommended that the new election legislation define offences – such as buying and selling mail-in ballots and offering gifts or favours for individual votes – and attach penalties to the defined offences. This arrangement exists in federal, provincial and municipal elections laws and even allows prosecutions to be launched outside of the election appeal process.

In the new First Nation election legislation, the introduction of defined elections offences and penalties would allow the investigation, prosecution and imposition of penalties relating to corrupt or dishonest practices by the Crown prosecutors, courts and police, which is consistent with federal, provincial and municipal elections in Canada.

9. It is **proposed** that the new First Nations Elections Act and its regulations provide for offence and penalty provisions similar to those found in the *Canada Elections Act* for vote buying, intimidation and interference (see Annex A to this discussion paper). A person who has been convicted of a serious election related offence could also be declared ineligible to be a candidate at a First Nation election for up to 6 years.

10. Recall of Elected Band Council Members

Under the *Indian Act* and its regulations, there is no provision for First Nations voters who have lost confidence in their leaders to take action to “recall” elected Band Council members and have them removed from office. However, in British Columbia and in many community (or custom) election systems, voters are able to recall their elected officials.

The APC and the AMC recommended that the new First Nations Elections Act allow for the majority of a First Nation’s voters to recall one or more elected Band Council members during the 4-year term of office for reasons such as: excessive absences from Band Council meetings, poor performance, conflict of interest or disreputable behaviour.

Under a new system of recall, it is further proposed that petitions for the recall and removal of an elected official from office be allowed only at the 2-year point of the 4-year mandate and only within 30 days of that 2-year point. This will ensure that the stability that a four year term would achieve is not ruined by the leaders constantly being recalled. If an elected official is recalled and removed from office, there would need to be a by-election to fill the vacancy on the Band Council.

Although this kind of recall mechanism does not exist in most municipal, provincial or federal election systems, it was thought to be a good way to address the concerns of some individuals who feel that four years is a long term for a leadership that is not doing a good job.

10. It is **proposed** that the new First Nations Elections Act provide for the recall and removal from office of one or more elected officials when there is a related petition having the support of at least 60% of the voters of that First Nation. The petition for a recall would only be allowed to take place at the 2-year point of a 4-year mandate and only within 30 days of the 2-year point.

11. Removal of Elected Band Council Members from Office

The *Indian Act* provides that the office of a Chief or Band Councillor becomes vacant when the person who holds that office is convicted of a crime, dies or resigns his office. It is suggested that these conditions for removal from office, along with the “recall” provision (as discussed and proposed above), be incorporated in the new First Nations Elections Act.

The *Indian Act* also gives powers to the Minister to remove an elected person from a Band Council if he or she had been absent from three consecutive Band Council meetings without authorization. It is proposed that no such powers be given to the Minister under a new First Nations Elections Act.

11. It is **proposed** that the new First Nations Elections Act and its regulations provide that a Chief or Band Councillor would cease to hold office if he or she: (i) is convicted of an indictable offence and sentenced to imprisonment for more than 30 consecutive days; (ii) dies or resigns from office; (iii) is convicted of offences under the new Act; or (iv) is removed from the elected position pursuant to the legislation’s “recall” provision.

CONCLUSION

This discussion paper is based on the analysis and recommendations put forward by both the APC and AMC who engaged their First Nations members on the issue of First Nations elections. Both the APC and the AMC have called for the design and implementation of a new “opt-in” First Nations Election Act and resulting regulations that would provide an effective and modern system for governing Band Council elections for the “opting-in” First Nations. As evidenced by the recommendations, First Nations are interested in having free and fair Band Council elections that support stable, effective and accountable First Nations governments as well as supporting the individual rights of their members.

OFFENCES AND PENALTIES IN THE *CANADA ELECTIONS ACT*

480. (1) Every person is guilty of an offence who, with the intention of delaying or obstructing the electoral process, contravenes this Act, otherwise than by committing an offence under subsection (2) or section 481 or 482 or contravening a provision referred to in any of sections 483 to 499.

Public meetings

(2) Every person is guilty of an offence who, at any time between the issue of a writ and the day after polling day at the election, acts, incites others to act or conspires to act in a disorderly manner with the intention of preventing the transaction of the business of a public meeting called for the purposes of the election.

Offering bribe

481. (1) Every person is guilty of an offence who, during an election period, directly or indirectly offers a bribe to influence an elector to vote or refrain from voting or to vote or refrain from voting for a particular candidate.

Accepting bribe

(2) Every elector is guilty of an offence who, during an election period, accepts or agrees to accept a bribe that is offered in the circumstances described in subsection (1).

Intimidation, etc.

482. Every person is guilty of an offence who
(a) by intimidation or duress, compels a person to vote or refrain from voting or to vote or refrain from voting for a particular candidate at an election; or
(b) by any pretence or contrivance, including by representing that the ballot or the manner of voting at an election is not secret, induces a person to vote or refrain from voting or to vote or refrain from voting for a particular candidate at an election.

Offences under Part 1 (Electoral Rights)

Offences requiring intent — dual procedure

483. Every person is guilty of an offence who contravenes

(a) paragraph 5(a) (voting when not qualified or entitled) or 5(b) (inducing a person not qualified or entitled to vote, to vote); or
(b) section 7 (voting more than once).

Punishment

500. (5) Every person who is guilty of an offence under any of subsections 480(1) and (2), sections 481 to 483, subsections 484(3), 485(2), 486(3), 487(2), 488(2) and 489(3), section 490, subsections 491(3) and 492(2), section 494, subsections 495(5), 496(2) and 497(3), section 498 and subsection 499(2) is liable:

(a) on summary conviction, to a fine of not more than \$2,000 or to imprisonment for a term of not more than one year, or to both; or
(b) on conviction on indictment, to a fine of not more than \$5,000 or to imprisonment for a term of not more than five years, or to both.