

Understanding Governance and Fiduciary Responsibilities of First Nation Councils

1. What is Governance?

Governance refers to the systems, processes, and structures through which a government exercises authority and manages resources—traditional, environmental, social, and economic—for the benefit of the community. For First Nations, governance means the exercise of inherent jurisdiction, reflecting traditional values while adapting to modern realities.

Effective land management is rooted in good governance. Responsible governments are entrusted with the well-being of their people and the wise stewardship of lands and resources. Strong governance requires leadership, experience, transparency, and discipline.

All governments are expected to:

- Provide services and programs
- Maintain accountability
- Support community well-being

However, historical policies disrupted traditional governance structures. After Confederation, Canada's Parliament enacted laws that:

1. Replaced traditional leadership systems with imposed electoral processes
2. Made elected Chiefs accountable to the federal Minister of Indigenous Services Canada, not to their people

Despite multiple amendments since 1869, the legacy of these colonial laws remains. Under the Indian Act, First Nation Councils were created as statutory entities. They hold only those powers delegated by the Act and remain dependent on Parliament for their continued authority.

This imposed system has created ongoing challenges for First Nations:

- Limited powers and jurisdiction
- Excessive government controls
- Unclear lines of authority and accountability
- Inadequate funding and training
- Lack of enforcement mechanisms
- Confusion regarding provincial law
- Confusion about roles and governance structures

2. Powers and Roles of Chief and Council

The Indian Act grants decision-making authority to Council **as a collective body**. This means decisions must be made in a duly convened meeting with quorum present. Individual councillors—including the Grand Chief—cannot act unilaterally.

Even under “Custom” governance systems, councils may still rely on certain powers derived from the Indian Act. However, all leaders—whether elected traditionally or otherwise—serve as **trustees** with delegated authority from the people.

Key Responsibilities of Council:

- Providing strategic leadership
- Hiring and supervising the First Nation Manager or Director of Operations
- Maintaining strong member relations
- Protecting community assets
- Fulfilling fiduciary and legal obligations

3. Council Functions

A First Nation Council’s key functions include:

- Passing bylaws and Band Council Resolutions (BCRs)
- Entering into contracts
- Hiring and supervising administration
- Managing assets and land
- Representing the Nation in land/resource negotiations
- Overseeing land use and commercial development
- Managing budgets and finances
- Working with developers, legal advisors, and environmental consultants

4. Council’s Internal Relationships

Strong internal relationships between councillors and the Grand Chief are vital for effective governance. Just like players on a hockey or lacrosse team, each Council member contributes unique strengths toward a shared goal.

Time should be set aside to:

- Define each member's role
- Acknowledge the Grand Chief’s leadership responsibilities

- Clarify individual contributions to collective success

Council functions best as a team that respects its diverse roles, communicates effectively, and remains focused on serving the community.

5. Fiduciary Obligations of Council

A fiduciary duty exists when one party (the fiduciary) holds discretionary authority over the assets or interests of another (the beneficiary), who is in a vulnerable position. In the case of First Nations, Council is the fiduciary, and community members are the beneficiaries.

Fiduciary duties require:

- Loyalty and care
- Decisions made in the best interests of the Nation
- Avoidance of conflicts of interest
- Equitable treatment of all members
- Transparent and documented decision-making

These obligations are not created by statute but by common law. Courts impose fiduciary duties when it is fair and just, such as in *Guerin v. The Queen* and *R. v. Sparrow*.

Examples of Fiduciary Responsibilities:

- Allocating or leasing land
- Granting housing or education funds
- Spending community funds
- Creating bylaws and policies
- Making decisions on land and resource use

Councillors must not vote on matters where they or their families stand to benefit. Doing so can lead to **personal liability** or legal consequences.

6. Lands and Resources

When Council makes a decision involving lands or resources, the Director of Operations may assign it to staff for implementation. Still, Council bears full responsibility for ensuring those decisions serve the best interests of the Nation.

First Nation Assets May Include:

- Office equipment, vehicles, cultural property
- Reserve lands (e.g., Oka-lettered, interim land base, traditional lands)
- Buildings and infrastructure
- Bank deposits and trust funds
- Equity in businesses owned by the Nation

Key Principles for Avoiding Fiduciary Breaches:

- Always act in the best interest of all members
- Avoid conflicts of interest
- Provide equal opportunity for benefits
- Follow documented procedures
- Allow input from those affected
- Uphold Aboriginal title, rights, and traditional practices
- Enforce all bylaws and contracts

Council is entrusted with governance over land and property and must manage programs, services, budgets, and operations accordingly. Leadership that respects its role as trustee welcomes participation and accountability.

7. Accountability and Community Trust

Accountability is essential to good governance. It builds trust, prevents abuse of power, and ensures that leaders act in alignment with community priorities.

Political Accountability Means:

- Being transparent in decision-making
- Accepting input and feedback from members
- Demonstrating integrity in leadership roles
- Clarifying who is responsible for what

Clear governance structures help define who is accountable to whom, and how decision-making authority is distributed within the organization.

8. Structuring for Good Governance

Governance must be supported by structure—this includes clear roles, lines of communication, and community involvement. Good governance depends on:

- Defined responsibilities for Chief, Council, and administration
 - Clear decision-making authority
 - Open records and public access to information
 - Inclusive processes for consultation and law-making
 - Transparent financial reporting and audits
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9. Understanding Land Governance in Canada

All 634 First Nations in Canada manage their lands under one of **three primary land governance regimes**. Each regime determines the extent of authority, responsibility, and autonomy over land and resource decisions.

1. Indian Act Land Management (IALM)

- Default regime for most First Nations
- Lands are managed by Indigenous Services Canada (ISC) under the Indian Act
- Council has limited authority; most decisions require ministerial approval
- Fiduciary duty is shared with the federal government

2. Reserve Land and Environment Management Program (RLEMP)

- Transitional regime where certain land authorities are delegated to First Nations
- Still subject to the Indian Act
- ISC maintains oversight; land tenure and legal mechanisms remain federal

3. First Nations Land Management Act (FNLMA)

- First Nations ratify a Land Code to replace Indian Act land provisions
 - Full land governance authority is transferred to the First Nation
 - No more ministerial approvals
 - Increased fiduciary and legal responsibility for Council
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10. Kanehsatà:ke – A Unique Legal Framework

Kanehsatà:ke is **not recognized as a “reserve” under the Indian Act**. Because of this, Kanehsatà:ke was **not eligible to participate in FNLMA** like other First Nations.

Instead, following the 1990 Oka Crisis and subsequent negotiations with Canada, Kanehsatà:ke established its own governance path by negotiating:

- The **Kanehsatake Interim Land Base Governance Agreement (KILGA)**

- The **Kanehsatake Land Governance Act**, passed by Parliament in 2001
- The **Kanehsatà:ke Land Governance Code**, ratified by the community

This unique legal framework grants Kanehsatà:ke **exclusive jurisdiction** over its land base, without falling under the Indian Act or the FNLMA.

What Makes Kanehsatà:ke Different?

- Kanehsatà:ke is not a “reserve” under federal law
- Federal land provisions do not apply
- Council holds **full authority** over land management under its own Code
- KILGA is a **sectoral self-government agreement**, not a delegated program
- The Land Governance Code governs conflict of interest, transparency, law-making, and community consultation
- **Fiduciary and political accountability lies entirely with Council and the people**, not with Canada

Kanehsatà:ke’s model stands as a **distinct sectoral self-government agreement** and provides a powerful precedent for communities operating outside the standard federal frameworks.