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The Proposed Millbrook FN Band Custom Election Code is a danger to democracy that empowers the Band Administration

An analysis by the Micmac Rights Association, Oct 10, 2023

The following is an assessment of the revised August version of Millbrook First Nation Band Custom Election Code which is being proposed to replace the current election system which is determined by sections 74(1)-80 of the *Indian Act* and the government of Canada's Indian Band Election Regulations. As the guiding principles of the proposed Election Code make clear, this is an election code which operates in accordance with the *Indian Act*. It is thus by definition, not a process which is "consistent with our [Mi'kmaq] unique customs, practices and traditions."

It is possible for our people to determine our own collective governance systems outside of the Indian Act system – by for example holding governance meetings where all members are able to speak and to make decisions together – but true sovereignty can never occur by operating through colonial instruments such as the *Indian Act.* After all, the original subtitle of the 1884 version of the *Indian Act* described itself as "An Act to confer certain privileges on the more advanced Bands of the Indians of Canada, with the view of training them for the exercise of municipal powers," and things haven't changed much since then.

Under Canadian Law, leadership selection for an *Indian Act* Chief and Council can take place in the following four different ways:

1. following the steps outlined in the Indian Act and the Indian Band Election Regulations
2. using the new and optional First Nations Elections Act
3. according to a community's constitution as part of a self-government agreement
4. using a community leadership selection process (also called "band custom")

The Millbrook First Nation Band Custom Election Code that is being proposed is the fourth of these, a community leadership selection process. According to Canada's Conversion to Community Election System Policy, in order to be adopted, a majority of electors (50 percent + 1) must vote by secret ballot to approve this code; or the community may approve it in such other manner as the First Nation and the Indigenous Services Canada may agree upon.

Serious concerns with the Draft Election Code

It is not at all clear to us what advantages the Band members of Millbrook First Nation would gain under the proposed custom election code, instead of continuing to use the existing electoral regulations within the *Indian Act* or the *First Nations Elections Act*. (For a comparison of the differences between the *Indian* Act electoral system and the *First Nations Elections Act*, read the government of Canada's Leadership selection in First Nations document.)

The proposed Custom Election Code is a terrible piece of legislation which further reduces the people's already limited control of Chief and Council, and strongly empowers a Band Administration which has been steadily working to undermine our Aboriginal and treaty rights and to bring our people under Provincial jurisdiction. Large sections of this code directly violate our people's Aboriginal and Treaty rights, and the entire proposal should be scrapped.

Ironically, Millbrook's proposed Custom Election Code is less democratic and more colonial than the standard *Indian Act* election system of the *First Nations Elections Act*. Among our most serious concerns are the fact that with this new custom election code:

- The number of elected councillors is reduced from twelve to eight, and the "jurisdiction" of the Band Administration is increased as the roles and responsibilities of council members are reduced, and the time between elections is increased from two to three years.
- Candidates who have any "outstanding criminal charges" and if convicted of such charges must have "completed the sentence at least twenty years prior to the date of the Nomination Meeting."
- Most damaging of all, Elected Chief and Council members can now be removed from office by a petition of only 50 signatures upon the decision of a Complaints and Appeals Board solely appointed by Band Executive Director Claire Marshall. The qualifications required to be on this board make it ideal for those with law enforcement and legal backgrounds, and it is not required that the board members be Millbrook FN members. Once a councillor or Chief is removed from office, an election does not have to be held to replace them.

Specific problems with the Draft MFN Election Code

The following are some of the many ways in which democratic controls are reduced and the power of the Band Administration increased in the proposed Custom election code.

Right off the start, it is worth noting that the document is poorly formatted and riddled with numbering errors and typos. Such lack of attention to detail is symptomatic of the poor quality of work underlying this entire project.

According to **Section 4.1**, the number of elected councillors will be reduced from twelve to eight, with a quorum for decision making of only five members. That means that it only takes a majority vote by three people to pass BCRs and direct the business of Millbrook First Nation. The reduction of elected representation will further reduce the level of community involvement in governance, which is already a serious concern given that a small clique of "in-group members" on the Millbrook Band Council who are also paid Band Employees undemocratically collude with the Band Administration in order to get their way. It will also increase the relative power of the Band Administration to Elected Council, especially because of the other ways the proposed code empowers "the jurisdiction of the Band Administration."

Section 4.2 outlines the role and responsibilities of the Chief, who is required to "consult with" and "to be accountable to the membership," while also "provid[ing] direction and leadership to Council." **Section 4.2(x)** requires that the Chief "respect the jurisdiction of the Band Administration." This is an interesting formulation that appears multiple times throughout the document. What "jurisdiction" the Band Administration exactly has is never defined in the document, but will no doubt be used by Band Administrators to increase their unelected positions of power to the detriment of elected leaders and the people as a whole.

The Mirriam-Webster dictionary defines *Jurisdiction* as "The power, right, or authority to interpret and apply the law; The authority of a sovereign power to govern or legislate; The power or right to exercise authority; the limits or territory within which authority may be exercised." Is this sovereign power something that should really be given to unelected, permanently employed, Band administrators and lawyers who stand to personally benefit when making decisions over the Band's money and politics?

Section 4.3 defines the roles of the now eight Band Councillors, and lists only three "primary duties" of the Councillors. They are to "act in concert" with Council "in the best interests of the First Nation as a whole," to "respect the jurisdiction of the Band Administration," and to "uphold the laws, policies and procedures of the First Nation." Interestingly, unlike in the Chief's role, the councillors are *not* required to consult with the membership, be accountable to the membership, or "to conduct business in an open transparent manner."

This whole section is deeply problematic. Acting "in concert" in this context means to go along with, to sing the same tune as, and to be in "harmony" with the other members of Chief and Council. Critical thinking and consideration of the membership's best interests are not to be taken into account. As noted above, the Councillors are not required to be accountable or transparent to the membership which elected them, but must rather 'go along to get along' with

with their fellow councillors while respecting the jurisdiction of the Band Administration and its policies and laws – no matter how unconstitutional or irrational they may be.

Councillors are also required to "contribute to Council discussions in the best interests of the First Nation as a whole." This is an issue because legally, the term "First Nation" refers to the Millbrook Indian Act Band Council, and not the Mi'kmaq Nation as a whole or even the membership of Millbrook FN. What constitutes "the best interests" of the Band Council is debatable, but presumably in this context it is to be determined by the Band Administration itself.

Councillors are also directed to "uphold the laws, policies and procedures of the First Nation." Given the deeply problematic nature of certain Millbrook First Nation policies, like for example, the unconstitutional construction and development moratorium, the corrupt decision to ban the sale of Mohawk Tobacco, or the impossibly flawed draft Cannabis Control Law which have been passed by a simple majority of Council Members, this section seeks to require Councillors to uphold laws which are unconstitutional, and which go against the fundamental Aboriginal and treaty rights of the people.

Section 4.4 further obliges Chief and Council to "demonstrate credible and consistent leadership" by meeting a series of highly subjective standards which are presumably to be interpreted and assessed by the Band Administration through its policies. What constitutes "credibility," "a clear standard," a "critical decision," a "taint of conflict or self-interest," a "role model" for an Indian Act Band Council, a "best interest of the First Nation," "Mi'kmaq ethics," "declaring and avoiding conflict, whether real or perceived," are all open to interpretation and political judgement. Obligating Chief and Council to "demonstrate credible and consistent leadership" while yet again, "respect[ing] the jurisdiction of the Band Administration" seems to be more about increasing the power of the Band Administration over the elected leadership than anything else.

Surely, the best interpreters of what constitutes "credible and consistent leadership" should be the people themselves, who through elections, may choose the leadership they want to represent them. That seems far preferable to a Band Administration riven by conflict of interest, corruption, and a proven track record of failing to uphold the Aboriginal and treaty rights of its members.

Section 5 of the code determines the eligibility of candidates, and is seriously concerning. Section 5(d)(vi) states that candidates must "Not have any outstanding criminal charges, and, if convicted previously, must have completed the sentence at least twenty (20) years prior to the date of the Nomination Meeting." This means that members who have faced criminal charges as a result of exercising their constitutionally protected Aboriginal and treaty rights are being discriminated against by not being allowed to run for election. This clause would

however, serve the interests of the Band Administration by making it impossible for some current council members to run for election again.

If a person has a criminal charge from the racist and colonial system for upholding their inherent Aboriginal and treaty rights, they should not be barred from running for election. And even if someone does have a criminal record and they have served their sentence, why should they be barred from running for election for 20 years? Let the people decide who they want to represent them! It is of note, that the Indian Act Election Regulations do not have anything to say about anyone's criminal record. Another example of how the Indian Act election regulations are better than what the Millbrook administration dreamed up.

Section 5(b)(v) of the election code introduces another unconstitutional ground to bar participation in elections – being a "tobacco quota holder" or a "contractor of the Band" with contracts in excess of $25,000. This discriminates against Band members who are exercising their inherent Aboriginal and treaty rights to trade in tobacco products, as well as ensuring that people who do business with the Band are not capable of running for a democratically elected office.

Section 6(a) increases the term of office for Chief and Council to three years from the current two years, and thereby further decreases the accountability of Chief and Council to their electorate.

Section 8.6(d) and **8.6(e)** of the code indicate that "if a nominee does not include a valid criminal record check" and if a nominee presents a clear criminal record check, but the nominee "is charged with an offence under a Provincial or Federal Act during the election period, they are disqualified from being a candidate in an election under this Code." This position is again problematic, as it dispenses with the presumption of innocence – which has long been a key part of British common law – and treats anyone charged with an offence as if they were already guilty.

Section 10(c) of the election code states that "MFN electoral candidates agree to campaign ethically, focusing on political issues and candidate platforms, instead of conducting smear campaigns or ones of rumour, innuendo and slander" and that they will use "social media (Facebook, Twitter, Blogs, websites, online forums, etc.), and other mediums in a respectful manner, conducive to constructive debate of issues, treating other candidates with utmost respect in employing such social media." While these rules sound positive on the face of it, the question becomes who will determine what is "respectful", "constructive" or a "smear campaign?" That should be the electorate or a court of law, but in these regulations it will be an Electoral officer appointed by and Accountable to Chief and Council or the Band Administration making the interpretation.

Section 11(c)(xxxix) states that "It is an offence under this Code for any person to attempt to influence voters or tell them to vote or not vote for a candidate or by wearing or display of any object indicting a political statement or message that could be construed as promoting or opposing the election of a candidate." It is probably the case that this section is written in error and is supposed to refer only to such campaigning on election day, but as written it seems to make the work of election campaigning itself illegal.

Section 12.5(b) leaves it up to the Band Administration to decide as to whether or not there shall be any "additional polls at Sheet Harbour I.R.#32, Cole Harbour I.R. #16, Beaver Lake I.R. or any other location" in Millbrook First Nation. Surely, it would be more democratic and accountable to forthrightly indicate where the standard location of all polls shall be, rather than leaving that up to the Band Administration to decide.

Section 16.1 introduces a procedure for the removal of elected representatives from office which represents a serious danger to basic democratic norms. According to the proposed custom code, any Chief or Councillor may be removed from office if the Complaints and Appeals Board (which can be made up of non-Millbrook FN members) and which is solely appointed by Band Executive Director Claire Marshall, decides that they "are guilty of violating this Code, acting contrary to their oath of office or the Millbrook Chief and Council Code of Ethics," or if they fail to "follow or enforce policies adopted by Council or the First Nation members" along with a number of other offences outlined in the section.

The procedure for such removal is that any elector may submit a petition to the Complaints and Appeals Board with 50 signatures of electors with the grounds for removal, along with the information that supports the allegations, plus a non-refundable filing fee of $100. After receiving the petition, the Complaints and Appeal Board will investigate the complaint and may remove the member of Chief or Council. As per **Section 17.1** "If the office of Chief or Councillor becomes vacant, Council may exercise their discretion to continue their term without a by-election to fill the vacant seat." This is a further reduction in the democratic process and leaves the way open for elections to be overturned a three person committee of non-Millbrook Band members appointed by Executive Director Claire Marshall.

As per **Section 18.1**, "The Complaints and Appeal Board (CAB) shall be selected from a list of potential board members who have sought appointment to the Board and have been vetted by the Executive Director of the Millbrook First Nation Band." This gives even more power to the Band Administrator to control the decision making process for any appeals or complaints. The members of this board do not have to be Millbrook FN members, but must "possess a formal legal education," a "capacity for investigation" or "good character, sound judgement, discretion" and are appointed solely by the Executive Director of the Millbrook First Nation Band. Based on the description above, this board appears to be well suited for law enforcement officers, lawyers, and other officers of the Crown to serve on.

According to **Section 16(a)**, Elected Chief and Council members may be removed from office by this incredibly powerful three person board for a number of specific reasons including: accepting bribes, forgery, being convicted of a "serious" offence, violating the Election Code, failing to attend three consecutive duly convened meetings. However, they can also be removed for more subjective reasons, which are clearly up for interpretation. These include if they violate the "Millbrook Chief and Council Code of Ethics," "encourage others to commit any of the above acts or omissions," or if they "fail to follow or enforce policies adopted by Council or the First Nation members."

The Millbrook FN Code of Conduct is written in such a way as to entrench the power and "jurisdiction" of the Band Administration. For example, as per **Section 8.0.3** of the *Millbrook First Nation Code of Conduct*, all Council members are required to "refer all policy related questions and concerns to the Band Administrator," "not interfere with the execution of duties and responsibilities of the Band Administrator," and "not undermine the authority of those responsible for the implementation of policy directives approved by Council."

Under the proposed Custom Election Code, that would mean that serious conflicts between elected representatives of the people and the Band Administrator, may now be resolved by the three person Complaints and Appeals Board – appointed by the Band Administrator (and potentially entirely composed of non-Millbrook FN members) – with the clear power of removing elected representatives from office who "interfere" with the Band Administrator interpretation of facts.

Conclusion – Reject the proposed Custom Election Code!

In conclusion, there is nothing about the proposed Millbrook FN Custom Election Code that is preferable to the existing Indian Band Election Regulations or the First Nations Elections Act. Like many other recent regulations and bylaws passed by Millbrook First Nation at the request of the Band Administration, it is hard to imagine how a policy more damaging of the constitutionally protected Aboriginal and treaty rights of the members could be created.

The Custom Election Code seeks to resolve the critique of current Band policies by ensuring the easy removal of any elected official by a three person committee appointed by the Band Administrator.

The proposed Custom Election Code should be rejected in its entirety. While it could clearly be defeated in a legal challenge, it is far better to oppose its ratification in a referendum, or through popular opposition before it is even put to the vote. Moreover, the mere existence of a proposal of this nature is a strong indication that there is a very serious problem with the Millbrook Band Administration, one which needs to be addressed and resolved before it does more damage to the Micmac people and our Aboriginal and treaty rights.