



Angelina Amaral - Introduction

- + Conne River First Nation band member
- + New lawyer – called to the Bar in June of 2015
- + Work History
 - Healing Our Nations – 3years
 - Mi'kmaw Legal Support Network – 6 years
- + BA (UCB), MEd (MSVU) and JD (Dal)



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Clarifying the purpose of this session

This session is NOT

- + a commitment from chief and council to undertake any of the options

This session WILL NOT

- + affect how the current election your community will be undertaken this fall

This session IS

- + For educational purposes only
- + An opportunity to discuss the options that are available to us as First Nations

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Overview and Purpose

- + The 4 options for holding First Nations elections
- + What a Band must do to adopt an election process
- + Key differences among the elections laws
- + Identify some pros and cons of each election process



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First Nation Elections Options

There are 4 options in Canada:

1. Self-Government Agreement
2. *Indian Act*
3. *First Nations Elections Act*
4. Custom Election Code



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First Nations Elections across Canada

- + 6% of Bands hold election under a **Self-Government** agreement - 36 FNs
- + 40% of Bands follow the **Indian Act** - 240 FNs
- + 54% of Bands follow a **Custom Election Code** - 341 FNs
- + 10 - 15 Bands select their leaders following the **hereditary** or clan system
- + 5 First Nations have "opt-in" to the **First Nations Elections Act**
 - + Madawaska and Gesgapegiag – elections held in August 2015
 - + Pabineau – election scheduled for March 2016

In Nova Scotia

- + 2 Bands hold elections under a **Custom Election Code**



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Self-Government Elections

- + Need a comprehensive self-government agreement
- + Need a **constitution** for the Nation that authorizes the Band to make laws
- + Once a constitution is in place the Band can establish their own laws and policies in a matters that are:
 - internal to their community; and
 - integral to their cultures and traditions
- + AANDC is never involved in the election processes

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Differences – Benefits – Cons

Indian Act

First Nations Elections Act

Custom Election Code

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Indian Act

First introduced in **1876**

The focus of the *Indian Act*

- + Land management
- + First Nations membership
- + Local government
- + Assimilation

Despite legislative changes in 1951 and 1985 the **framework** of the 1876 *Indian Act* has been preserved and remains fundamentally intact.

Basically the same policy that has existed for the past 138 years



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The *Indian Act* election process

- + A Band has to be added to the schedule
- + The Minister can require a First Nation to hold elections under the *Indian Act*. This can be done:

Whenever the Minister "*deems it advisable for the good government of the band...*" (s 74(1))
- + The *Indian Act* election system became the default for those First Nations that did not have a custom elections process established

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Elections under the *Indian Act*

A typical election under the *Indian Act* includes:

- + the appointment of an electoral officer (EO) who must be approved by the Minister
- + holding a nomination meeting
- + voting in person on reserve and by mail-in ballot
- + counting of the votes and declaration of elected candidates



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Elections under the *Indian Act*

Council Terms of 2 years

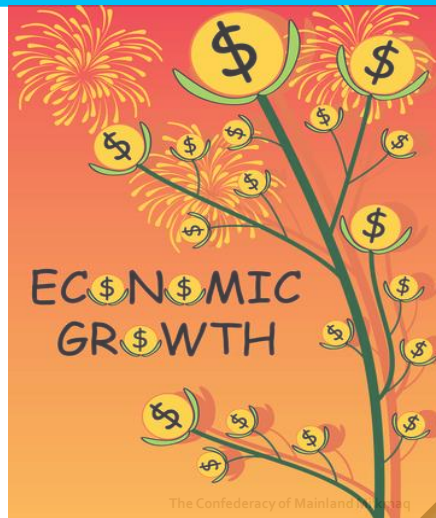
- + Very little time to learn their responsibilities before the next election
- + Could prevent Council from moving forward on important projects
- + Does not make First Nations very attractive for long-term and economic development

Section 74 – anyone can be nominated for the position of Chief

- + Non-band member

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The Role of AANDC under the *Indian Act*

- + To provide training and support for EOs
- + AANDC must approve the Council's choice of EO or appoint an EO when there is no Council in place
- + Determine if there was a violation of the *Indian Act* or if there was corrupt practice in relation to the election
- + Review, investigate and decide all election appeals

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Election Appeals under the *Indian Act*

- + ONLY candidates and eligible voters can file an Appeal
- + Appeal has to be received by AANDC within **45 days** after the election
- + Appeal has to be based on one or more of the following grounds:
 - 1) corrupt practices in connection with the election
 - 2) a violation of the *Indian Act* or the *Indian Band Election Regulations* that might have affected the results of the election
 - 3) a person running who was not eligible to be a candidate



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Criticisms of the *Indian Act* system

- + Loose nomination processes that allows the nomination of candidates who are not serious or dedicated
- + No way to prevent one person from running and being elected for both Chief and Councillor.
 - + If the person chooses to hold only one position the other has to be filled through another lengthy and costly by-election
- + A mail-in ballot system that is open to abuse
- + Election appeals take a long time for the Minister to review, investigate and decide
- + No system of recall

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First Nations Elections Act (FNEA)

- + In 2009, the **Atlantic Policy Congress of First Nation Chiefs** and the **Assembly of Manitoba Chiefs** lead discussions for the purpose of creating a better election process
- + The **First Nations Elections Act** was developed with input from First Nations organizations
- + FNEA is an alternative **"opt-in"** election system



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The "opt-in" process for FNEA

A Band can adopt the FNEA in 2 ways:

1. **Band Council Resolution (BCR)**
 - The BCR must request the community be added to the schedule and provide an election date (s 3(1)(a))
 - Upon receipt of a BCR, AANDC will start the process of issuing the ministerial order
 - Can be completed in a Few Weeks
- OR
2. **The Minister can place a First Nation under FNEA, where:**
 - The Minister finds "*that a ... leadership dispute has significantly compromised governance*" of a FN (s 3(1)(b)); or
 - The Governor in Council has ... set aside an election ... on the basis of the Minister's finding of "*corrupt practices in connection with that election*" (s 3(1)(c))

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Key changes ...

- + The extension of the terms of office for Chief and Council
 - + 4 years, instead of, 2 year terms
- + A candidate can run for only one Council position in each election
- + Requiring candidates for Chief be a band member, who is at least 18 years of age
- + A **recall provision** that allows Band members to initiate a process to remove elected officials (**Regulations currently silent – can not be use**)
- + Candidates must accept their nominations in writing; and pay a fee (**optional**)
- + By-elections for Council members who cease to hold office must be done at least 3 months before the end of their term

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- + Designating an off-reserve councillor positions (**optional**)
- + Councillors may appoint EO without ministerial approval
- + Automatic recount if 5 votes or less between winner and runner up
- + Sending mail-in ballots to voters only upon their written request
- + elections have to be held 30-days before a term of office ends
- + The possibility of common election days among several First Nations
- + No role for the Minister in election appeals and possible creation of an independent appeals tribunal

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The Recall Provisions

s. 28(2) A Chief or Councillor will be removed from office if:

- a) convicted of an **indictable offence** and sentence to **30 consecutive** days or more;
- b) convicted of an offence under FNEA;
- c) they **die or resign** from office;
- d) a court sets aside their election; or
- e) they are removed from office by **means of a petition** in accordance with the regulations. **(Cannot use until Attorney General makes regulations)**



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Rules at the Polling Stations



- s. 20 A person must not, in connection with an election,
- (a) **post or display** anything that promotes or opposes a candidate;
 - (b) within hearing distance of a polling station, **orally promote** or oppose a candidate;
 - (c) in a polling station, **attempt to influence** someone to vote or not vote for a candidate.

s. 21(1) Gives the EO or deputy EO the power to remove someone from a polling station, IF:

- the person is committing an offence under this Act that threatens the maintenance of order at the polling station, or
- the officer believes on **reasonable grounds** that a person has done so.

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Offences and Penalties in FNEA

Nomination

- + agree to be a candidate knowing you are not eligible (s 10)
- + intimidate or try to influence a person when nominating or deciding to accept a nomination
- + try to get someone to disrupt the nomination meeting, publish a false statement that a candidate is withdrawing or has withdrawn their candidacy (s. 12)

Ballots

- + provide a false name in order to obtain a ballot;
- + purchase a mail-in ballot that was issued to another person; or
- + print or reproduce a ballot with the intention that the ballot will be used as a genuine ballot (s. 14)

Polling Station

- + to intentionally try to disrupt the conduct of the vote or try to get someone else to do so (s. 20)



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Voting

- + knowingly use a forged ballot;
- + Intimidate or try to influence a person's vote; or
- + offer money, goods, employment or other valuable consideration in an attempt to influence a person vote (s. 16)

Penalty

- + **I** - a fine of not more than **\$5,000** or to imprisonment for a term of not more than **five years**, or to both
- + **S** - a fine of not more than **\$2,000** or to imprisonment for a term of not more than **six months**, or to both

AND

- + Will not eligible to be elected as Chief or Councillor during the five years after the date of conviction

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Offences and Penalties



Voting

- + vote or try to vote knowing they are not entitled to vote (s. 16)
- + attempt to influence another person to vote knowing they are not entitled to vote (s. 16)
- + intentionally vote more than once (s. 17)

Penalty

- + **I** - a fine of not more than **\$5,000** or to imprisonment for a term of not more than **five years**, or to both
- + **S** - a fine of not more than **\$2,000** or to imprisonment for a term of not more than **six months**, or to both

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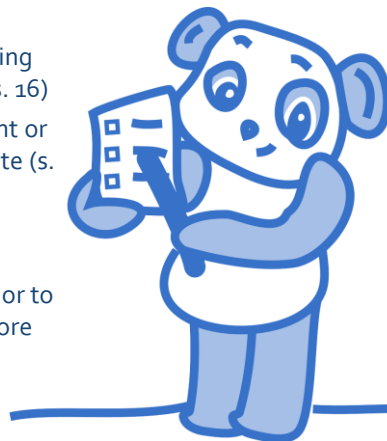
Offences and Penalties

Elector

- + put a ballot into a ballot box knowing they are not authorized to do so (s. 16)
- + Accept money, goods, employment or other valuable consideration to vote (s. 17)

Penalty

- + **S** - a fine of not more than **\$1,000** or to imprisonment for a term of not more than **three months**, or to both



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How are the Offences enforced?

- + Who can lay the charge?
 - + The local police in the area where the offence took place
- + Once a charge is laid the matter goes to the **Provincial Courts** – with the **Federal Crown** prosecuting the offence
- + Money collected from any fines goes to the Provincial Court

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Election Appeals under FNEA

- + You have **30 days** after an election to file an Appeal application (s. 32)
- + The Appeal has to be filed with the:
 - + Federal Court; or
 - + Supreme Court of Nova Scotia (s. 33)
- + A copy of the application **MUST** be served to the **electoral officer** and all the **candidates** who participated in the contested election (s. 34)
- + You can only appeal on the grounds that there was:
 - + a contravention of a provision of this Act or the regulations THAT is likely to have affected the result (s. 31)
- + After a hearing, the Court can decide to set aside election and results
 - + If set aside– Court sends a copy of the decision to Minister (s. 35)



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Cost of filing an Appeal

- Supreme Court of Nova Scotia can get a waiver of court fees
- NO fee waivers for Federal Court fees

NS Supreme Courts

- + Halifax
- + Amherst
- + Antigonish
- + Annapolis Royal
- + Bridgewater
- + Digby
- + Kentville
- + Pictou
- + Truro
- + Yarmouth

Federal Court

- + Halifax



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Custom Election Codes

- + Under the **Indian Act** a Band can hold elections according to the customs and traditions of the Band, as long as it is:
 - + Written (i.e. as a Custom Election Code)
- + Allows for the blending of traditional forms of governance (Elder councils) with contemporary governance structures (elected Chief and Council)
- + Custom Election Codes are unique to each to community
- + Prepared by consultation with the community

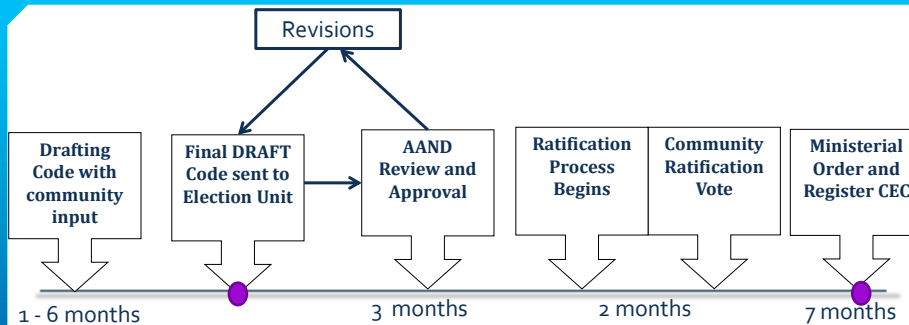


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"Opt-in" process for a CEC



Once a Draft CEC developed, ideally with community input
12 months earliest a CEC can be passed

- With immediate AANDC approval
- No requirement for revisions and resubmission

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1996 – Minimum requirements policy

- + The *Indian Act* does not set out rules for CECs
- + Federal government established the *Conversion to Community Election System Policy*
- + To be removed from the *Indian Act* a Band must:
 - + Develop a written election code
 - + Code must be compliant with the *Charter of Rights and Freedoms*, the principles of natural justice and procedural fairness
 - + Have provisions for the settlement of election appeals
 - + Include participation of off-reserve Band members

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Charter principles

Overbreadth (*Suresh, Canadian Foundation*)

- Is the law **broader than is necessary** to accomplish that objective (*R v Heywood*)

Vague

- Fails to give people fair notice of the consequences of their conduct; or
- Fails to adequately limit law enforcement discretion

Arbitrariness (*Chaoulli, Big Mac & Major jj*)

- The law bears **no relation** to, or **inconsistent with**, the objective that lies behind it

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Protected Grounds of Discrimination

Charter

- 1) Race
- 2) National or ethnic origin
- 3) Colour
- 4) Religion
- 5) Sex
- 6) Age
- 7) Mental or physical disability

Canada Human Rights Act

- 1) Race
- 2) National or ethnic origin
- 3) Colour
- 4) Religion
- 5) Sex
- 6) Age
- 7) Sexual orientation
- 8) Marital status
- 9) Family status
- 10) Disability
- 11) Conviction for an offence for which a pardon has been granted

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Principles of NJ and PF

Natural Justice (NJ)

- + Requires that a person must be given an **adequate opportunity** to present their case

Procedural Fairness (PF)

- + Right to a fair hearing with independent and impartial decision-maker
- + Right to know the case
- + Right to make full answer and defence



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AANDC involvement in CECs

All CECs must be submitted to AANDC for approval.

AANDC will:

- + Review the Code to ensure the leadership selection process is clear and transparent
- + Review the Code for compliance with the *Policy*

Once removed the Department no longer oversees the evolution of the community's Election Code

AANDC is limited to recording the election results provided by the First Nation

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Custom Election Code



- + Allows for community-level development of the codes
- + Community development of localized dispute resolution procedures
- + Can develop a Chief and Council codes of ethical behaviour and remuneration rules
- + Can implement criteria for electoral officers

Your community creates the Code – as long as it is compliant with the **Policy** anything goes

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CEC Appeals Process



- + Community has to set up and maintain an Appeals Board
 - + Cost
 - + Time
 - + Knowledge and skill set
- + Appeal process can take time and become costly
- + AANDC is never involved in election appeals

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What else ...

- + What resources are in your community
- + There is NO going back to the *Indian Act*
- + The Minister's fiduciary duty
- + Cost of establishing and maintaining each system
 - + Financial
 - + Time
 - + Capacity



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Thank You

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