



**Strengthening Governance
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Fiduciary Duties and Conflict of Interest

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Outline

- Fiduciary Duties
 - When exist
 - Meaning
 - Examples

Introduction

- Meaning of Fiduciary
- Is Chief and Council fiduciaries?
- Duties of a Fiduciary
- Example / case studies

Common Law Duties

Often referred to as “judge made” or “case law”

Several features

- Not created by the government or a statute
- Arises from court decisions
- Binding on other judges
- May change over time

Fiduciary Duties

Fiduciary Duties is one area of the **common law** that applies to Chief and Council

Fiduciary Duties

May arise from:

- Application of legal test
- **Nature of the relationship**
 - E.g. Board members, lawyers and other professionals
 - Members of Chief and Council

Nature of the Duty

If one person **undertakes to act** in relation to a particular matter **in the interests of another**, and has been **entrusted with a power or discretion to affect the other's interests**, in a legal or practical sense, so that the **other is in a position of vulnerability**, then a fiduciary duty exists

Nature of the Duty

- Owed by each member of Chief and Council
- Individual member is the fiduciary
- Members of the First Nation collectively are the beneficiaries
 - Not individual members

Nature of the Duty

- If breach of fiduciary duty, may be **personally liable**
 - For gain or benefit received
 - For loss to First Nation (even if no personal gain or benefit)

Nature of the Duty

- Utmost good faith
- At all times act in the best interests of the First Nation
- Act honestly and faithfully

Nature of the Duty

- **Not take any profit**, benefit for gain from First Nation assets or opportunities
- **Not act when in a conflict of interest**
- Cannot contract out of duties

Conflict of Interest

- Can arise as a result of being a fiduciary but also from one or more **governing documents** (e.g. policy, by-law, custom)
- **Family relationships** (e.g. a decision involving a family member)
 - May be relaxed in small communities

Conflict of Interest

Also arise from a **business relationships**

- Selling goods or services to the First Nation
- sale of community materials or property
- Employment

Court Decisions

Chief and Council as a Fiduciary – Personal Benefit

Williams Lake Indian Band v. Abbey, [1992] 4 C.N.L.R.
21 (B.C.S.C.)

- Chief caused First Nation:
 - Repay student on her behalf
 - Pay tuition for her children
 - Payment of a home

Williams Lake Indian Band v. Abbey, [1992] 4 C.N.L.R.
21 (B.C.S.C.)

“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. The members of the band are vulnerable to abuse by the fiduciary of his or her position, and a fiduciary undertakes not to allow his or her interest to **conflict** with the duty that he or she has undertaken”

Williams Lake Indian Band v. Abbey, [1992] 4 C.N.L.R.
21 (B.C.S.C.)

“A fiduciary shall not enter into a transaction in which she has a **personal interest**, which transaction would be in conflict with the interests of her principal, (the members of the [First Nation]), and **it does not matter whether or not the fiduciary [the Chief] acted in good faith**. If the fiduciary did in fact enter into such a transaction, **any gain or advantage must be considered as accruing to the principal** (the members of the [First Nation])”

Williams Lake Indian Band v. Abbey, [1992] 4 C.N.L.R.
21 (B.C.S.C.)

“while she was Chief are subject to strict scrutiny, and there must have been no question of her allowing her interests to conflict with her duty to the Band. As a fiduciary **she could not have lawfully participated in decisions of the Band Council which involved her interests**”

“insofar as her participation in decisions by the Band Council to pay accounts which were for her new home was in a conflict of interest situation. I find that **her duty as a fiduciary was to not participate in such votes**”

Williams Lake Indian Band v. Abbey, [1992] 4 C.N.L.R.
21 (B.C.S.C.)

- Obligated to make full disclosure of that interest to the Band Council
- Obligated to not participate in the Band Council's discussions
- Chief is **liable even if not aware of her fiduciary duties**

Williams Lake Indian Band v. Abbey, [1992] 4 C.N.L.R.
21 (B.C.S.C.)

Chief was required to refund

- Amount Band paid for her student loan
- The difference paid for children's tuition and amount Band normally would fund
- Damages for use of home (Chief had returned home to Band!)

Williams Lake Indian Band v. Abbey, [1992] 4 C.N.L.R.
21 (B.C.S.C.)

- Former Chief stated that Council had authorized payment of tuition
- Court states not a defence
 - Former Chief did not make **full disclosure** to Council members
 - **Did not absent herself** from the discussion and vote

Williams Lake Indian Band v. Abbey, [1992] 4 C.N.L.R.
21 (B.C.S.C.)

- Several Band members started a court action against the former Chief
- The money to be repaid by the former Chief was payable to the Band

Williams Lake Indian Band v. Abbey, [1992] 4 C.N.L.R.
21 (B.C.S.C.)

- There was considerable hostility between outgoing and incoming Chief and Council
- Outgoing Chief and Council (including Chief Abbey) had terminated all staff, cut off hydro, telephone and heat

Williams Lake Indian Band v. Abbey, [1992] 4 C.N.L.R.
21 (B.C.S.C.)

- Court stated this was “petty and unworthy” and “Decisions taken by the Band Council surely are to be taken with one purpose in mind, the **best interests of the members of the [First Nation]**”
- This was likely a breach of fiduciary duty to act in the bests interest of members
 - But no liability sought in the court action

***Sumas Indian Band v. Ned*, [2002] 4 C.N.L.R. 280
(B.C.S.C)**

- Chief and Council member obtained licence to sell tobacco on reserve in their own names
- Revenues accrued to First Nation while in office
- When out of office, former Chief and Council member kept revenues personally

***Sumas Indian Band v. Ned*, [2002] 4 C.N.L.R. 280**

- Questions to be decided
 - Did Chief or Councillor owe a fiduciary duty regarding the license? [**yes**]
 - Did they breach the fiduciary duty? [**yes**]
 - Did Council consent to them acquiring licence? [**no**]

***Sumas Indian Band v. Ned*, [2002] 4 C.N.L.R. 280**

- **No doubt** former Chief and council member **were fiduciaries** and breached duty

***Sumas Indian Band v. Ned*, [2002] 4 C.N.L.R. 280**

- In order to obtain consent of First Nation to acquiring licence
 - Prove full disclosure
 - First Nation made **informed consent**

***Sumas Indian Band v. Ned*, [2002] 4 C.N.L.R. 280**

- Former Chief and former member of Council shall pay **damages equal to the net profits** earned under the licence

Chief and Council as a Fiduciary – Employment Contracts

Annapolis Valley First Nations Band v. Toney,
2004 FC 1728

- Chief and Council consisted of Chief and 2 Council members
- Prior to end of term, each member was awarded a 5 year contract of employment as Gaming Commissioner
- Each member was absent when vote on their individual contract

Annapolis Valley First Nations Band v. Toney,
2004 FC 1728

- Did each member of Chief and Council breach their fiduciary duty?
 - Yes

Annapolis Valley First Nations Band v. Toney, 2004 FC 1728

“The respondent Chief and the two Councillors awarded themselves five-year, lucrative employment contracts near the end of their two year term in office. They were fiduciaries and they had a duty to avoid placing themselves in a position of conflict. **While conflict of interest rules must be relaxed in small Bands** where relatives of the Chief and Councillors will necessarily be involved in Band business, this does not permit the Chief and Council members to award themselves substantial benefits to the detriment of the Band.”

Annapolis Valley First Nations Band v. Toney, 2004 FC 1728

- Removing themselves from the meeting did not avoid a breach of fiduciary duty
- Although each member did not have a direct interest in the other's contract, it was in their best interest to award a favourable contract so that he would reciprocate on the same terms.

Annapolis Valley First Nations Band v. Toney, 2004 FC 1728

“it made no difference whether the respondent left the room when his contract was being discussed, since all of the Council members were tainted by self-interest”

“While procedural safeguards reduce the incidents of conflict, **the mere fact that a procedure has been instituted and followed does not mean that a breach of fiduciary duty has not occurred.**

Procedural safeguards are simply tools that help a fiduciary avoid breaching his obligations and their effectiveness will depend on the particular circumstances of the case. In the case at bar, **the respondent and his two Councillors ridiculed the procedural safeguard.**”

Chief and Council as a Fiduciary – Payment to a Third Party

Ermineskin Cree Nation v. Minde, [2010] 2
C.N.L.R. 147 (Alta.Q.B.)

- Former Chief caused payment of \$149,000 to a third party
- Payment to former Chief from social services department

***Ermineskin Cree Nation v. Minde*, [2010] 2
C.N.L.R. 147 (Alta.Q.B.)**

**By-law, Rules of Conduct of Council and written agreement
signed when elected:**

“No individual or councillor shall authorize or commit funds on behalf of the Band or Council except by decision of a quorum of Council at Regular Council meeting ”

Chief had authority to commit funds not exceeding \$500 in certain circumstances

***Ermineskin Cree Nation v. Minde*, [2010] 2
C.N.L.R. 147 (Alta.Q.B.)**

Former Chief “had a fiduciary obligation to his constituents and to the other members of the Tribal Council to **fulfill his duties honestly, faithfully and in the best interests of the Band**”

***Ermineskin Cree Nation v. Minde*, [2010] 2
C.N.L.R. 147 (Alta.Q.B.)**

- A duty not to exceed authority as Chief
- **Make decisions according to constating documents**
- Make decisions in best interests of the Band

***Ermineskin Cree Nation v. Minde*, [2010] 2
C.N.L.R. 147 (Alta.Q.B.)**

- **Not relevant that Chief did not benefit** – liable for money paid to 3rd party (\$149,000)
- Must re-pay money received from social services department (\$13,917) as not entitled to receive

Honouraria / Salary

- Fees/rates may be based on custom, by-laws, contract, quantum meruit or employment law (if elected representatives are employees)
- Section 6 of the *First Nations Financial Transparency Act* requires every First Nation to prepare and publish a “Schedule of Remuneration and Expenses” setting out the remuneration and expenses paid to Chief and Council
- Distinguish between regular honouraria and special payments

Louie v. Louie, 2015 CarswellBC 1483, 2015 BCCA 247, [2015] 3 C.N.L.R. 144 (B.C.C.A.)

- Band received one time payment of \$125,000 settlement funds
- Chief and Council authorized payment of \$5,000 to each as retroactive **honorarium**
- Informal and custom based governance
 - But no practice of one-time payment for past work
 - Out of proportion to regular honourara (\$360 per month)

Louie v. Louie, 2015 CarswellBC 1483, 2015 BCCA 247, [2015] 3 C.N.L.R. 144 (B.C.C.A.)

“the two most fundamental and long standing obligations of fiduciaries — the **"no conflict"** rule and the **"no profit"** rule”

“inescapable that this was **a breach of fiduciary duty, even in the context of a relatively informal and custom-based governance structure.**”

***Louie v. Louie*, 2015 CarswellBC 1483, 2015
BCCA 247, [2015] 3 C.N.L.R. 144 (B.C.C.A.)**

- Onus on person alleging breach of fiduciary duty
- Once a *prima facie* case of conflict of interest has been shown, the onus generally shifts to the defendant to show that he or she was acting in the best interests of the plaintiff

Louie v. Louie, 2015 CarswellBC 1483, 2015 BCCA 247, [2015] 3 C.N.L.R. 144 (B.C.C.A.)

- Objectives of the rules:
 - So fiduciary is not swayed by personal interest
 - Fiduciary must account for any benefit or gain
- Money must be re-paid to First Nation

Conflict of Interest – When family member benefits

- It is common that a family member could benefit, directly or indirectly, by a decision that is voted upon by Chief and Council
- The smaller the community – the greater the likelihood

Assu v. Chickite, 1998 CanLII 3974 (B.C.S.C.)

- A dispute by Chief and 3 council members (the “minority”) and 5 other council members (the “majority”)
- Majority called various meetings – determined to be duly constituted Band Council meetings pursuant to section 2(3) of the *Indian Act*

Assu v. Chickite, 1998 CanLII 3974 (B.C.S.C.)

- Section 2(3)(b) of the *Indian Act*:

“(b) a power conferred on the council of a band shall be deemed not to be exercised unless it is exercised pursuant to the consent of **a majority of the councillors** of the band **present at a meeting** of the council **duly convened**.”

Assu v. Chickite, 1998 CanLII 3974 (B.C.S.C.)

- An interim Band Manager was hired and her salary was decided
- One member who was spouse did not vote and left room
- Two other members of Council were **siblings** to the council member who was a spouse

Assu v. Chickite, 1998 CanLII 3974 (B.C.S.C.)

- In support of an alleged breach of fiduciary duty, bias was alleged
- The **test of bias cannot be strictly applied to a small community** (e.g. 204 or 408 electors)
- No direct benefit to the remaining council members
 - No bias

Assu v. Chickite, 1998 CanLII 3974 (B.C.S.C.)

“Given its small size, it would be practically impossible for the Band or its Council to operate if Councillors had to withdraw from all matters involving relatives. ”

Assu v. Chickite, 1998 CanLII 3974 (B.C.S.C.)

- **Note:** Chief obtained support of a majority of electors at a general membership meeting
- Motion denying the Majority payment of their legal fees from Band funds
- Not a factor in the Court's decision

Summary

- Chief and Council are fiduciaries and shall:
 - fulfil duties honestly, faithfully and in the best interests of the Band
 - not to allow their interest to conflict with the duty they have undertaken

Summary

- In a position of trust relative to the Band generally, Band assets and members of the Band
- Manage Band assets in the best interests of the membership
- May have duty to conduct meaningful consultation with membership

Summary

- Custom may inform the scope of fiduciary duties e.g.
 - conflict of interest policies or by-law
 - Reasonable honouraria
 - Spending authority

Summary

- This means in practice:
 - **Not entitled to take any profit**, benefit, or gain from band assets, and is not allowed to be in a position where **their interest and duty conflict**
 - Not participate in discussion or vote where have an interest
 - Make full disclosure
 - Not entitled to payment as a fiduciary without express authority

Summary

- Conflicts in small community
 - Test for bias may be relaxed in a small community
 - Line between no conflict of interest and a conflict depends on the circumstances
 - But cannot receive a direct personal benefit

Summary

- Fiduciary may be liable regardless of:
 - Intentions, including presence of good faith
 - Lack of harm or loss to the beneficiary
 - Lack of profit by the fiduciary

Questions?

Please contact me at basmith@wmnlaw.com or (807) 625-8891 if you want a copy of the cases





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