

of what the federal government recognized or understood to be band custom. One explanation used by the Department of Indian Affairs to explain the reluctance to impose the elective system of the Act in 1951 was the government's doubts about whether the lands at Oka are an Indian reserve within the meaning of the Indian Act (Information Sheet of the Department of Indian Affairs and Northern Development, July 1990 "Mohawk Band Government" and a memo of the Lands, Revenues and Trusts Section of the Department, dated 17 February 1987). If this is the case, then there would also appear to be doubt as to whether there is any authority for recognizing any Indian Act Band Council there, whether by "custom" or by the election provisions of the Indian Act.

The community of Kanesatake has experienced intense internal debate over appropriate forms of Mohawk government for the past thirty years at least, and perhaps longer. Until September 1969, the Indian Act Band Council at Kanesatake while technically operating under band custom, modelled its method on the election process of the Indian Act and its regulations, according to the Department of Indian Affairs. In October 1969, the Department recognized a change in custom following a request for official recognition by the "Kanesatake traditional Chiefs" who backed their request with a petition from what appeared to be a majority of the resident adult population (158 out of 292). As of October 27, 1969, the "traditional chiefs" were recognized as the body with which the department would deal in matters relating to band affairs. An internal Departmental memo in 1970 described the 1969 change in custom as a change from a process of using an election system similar to that of the Indian Act to the Hereditary Chiefs system. This memo described the challenge to the authority of the Hereditary Chiefs by a group known as the Kanesatake Indian Committee or Gaspé group (which had originally supported the change in custom to Hereditary Chiefs). The memo took note of a matter which continues to be an issue today: "The Indian Act makes reference to custom but there is no explicit responsibility placed on the Department in this regard. Whether or not we should adjudicate disputes over interpretation of custom is again debatable."

The 1970 memo also describes how changes can be made to the composition of the Kanesatake Band Council under the system of custom the Department had recognized up to this point: "The [Hereditary] Chiefs explained that under custom this may be by death, resignation or in the case of bad behaviour the clan mother after suitable warnings may ask the individual to resign. Thereupon a Band meeting would choose a replacement." In 1970, the Gaspé group challenged the legitimacy of the existing Band Council on the authority of a petition signed by 121 of the 158 people who signed the 1969 petition. In the end the Department decided it was not knowledgeable enough about custom to adjudicate a dispute over interpretation of custom. If requested by a petition of a majority of electors to recognize a change in custom, the Department decided it would arbitrate only, and this through the process of a majority vote at a meeting or referendum of resident electors clearly setting out the proposed change in custom.

Since 1899, the federal government has tried to govern the Kanesatake community through the aegis of the Indian Act. Since at least 1951, this has involved having to cope with a continuous controversy over: