



# Custom leadership selection codes for First Nations

## Contents

I. <a href="#">Introduction</a> .....	3
A. <a href="#">Objectives</a> .....	3
B. <a href="#">Approach and Scope</a> .....	3
II. <a href="#">Key Findings</a> .....	5
A. <a href="#">Leadership Selection and First Nations</a> .....	5
B. <a href="#">Current Approaches to Leadership Selection</a> .....	6
C. <a href="#">First Nations guidelines or rules for leadership selection</a> .....	7
D. <a href="#">Issues affecting First Nation leadership selection</a> .....	8
E. <a href="#">Guides and Resources on Leadership Selection</a> .....	12
III. <a href="#">Leadership Selection</a> .....	13
A. <a href="#">Generic Model</a> .....	13
B. <a href="#">Elements of a custom election code</a> .....	25
<a href="#">Glossary</a> .....	30
<a href="#">Resources</a> .....	31
<a href="#">Appendix A. Custom code, self-government and Indian Act provisions</a> .....	34
<a href="#">Appendix B. Custom Election Code Fact Sheets</a> .....	35
<a href="#">Appendix C. Custom election codes</a> .....	52
<a href="#">Appendix D. Sample training material</a> .....	53

## I. Introduction

### A. Objectives

The main objective of this report is to help communities to develop or amend custom election codes. To that end, it provides:

- Background on leadership selection;
- A discussion of the legal and other issues in drafting a custom code;
- Generic and actual samples of codes and the elements within them;
- Approaches to training;

While it describes a range of options, it does not recommend one particular path over another. There is too much difference between one community and another to allow for wholesale adoption of a code used elsewhere. Each community will develop its own approach, one that best reflects its past experiences and its aspirations for the future. The goal is to support that work.

One theme that came through repeatedly in talking to communities was that the voice of the people must be heard. For that reason, another objective is to explain some of the approaches that communities have taken to gather and reflect the thoughts of their citizens in developing and revising custom election codes.

### B. Approach and Scope

This report describes various approaches to custom election codes that have been used or are in development. In some cases comments are also included about how well a particular option has worked for a community.

The report was prepared by Coutts & King Inc. under the direction of the Governance Advisory Section of the National Centre for First Nations Governance. It draws on interviews with First Nations across Canada, analysis of custom codes and election procedures in self-government agreements and a number of relevant court cases.

First Nations that were interviewed had adopted a custom code already, were considering or in the process of developing their first code, or were revising an existing custom code. All were assured of confidentiality in sharing information. Anywhere that a specific community or nation is identified in these materials, it is from a publicly available source, not from the interviews.

People in the First Nations contacted generously shared their thoughts and experiences. Most provided their custom election codes, either in draft or final form.

It is clear from the interviews that what is put down on paper is often the result of a long and sometimes difficult process of discussion within the community, and the need to balance many differing considerations. A huge thanks to the people in First Nations communities, who helped immeasurably on this project by providing insights into that process.

## II. Key Findings

### A. Leadership Selection and First Nations

Leadership selection is at the heart of good governance: citizens need to feel that their leaders have been selected through a valid and fair process. Traditionally, First Nations used a variety of selection processes. In the modern era, however, leadership selection in most communities has been dominated by the Indian Act and its associated regulations. As commentators note, under federal government control:

The Minister responsible for Indian Affairs and his deputies were given wide powers over selection and deposition of Band leaders...<sup>1</sup>

... efforts [were made] to suppress traditional native structures of self-government, and to teach the elements of English-style “good government”, through imposition of elected “band councils”...<sup>2</sup>

However, the Royal Commission on Aboriginal People confirmed in its 1996 report the inherent right of all aboriginal peoples in Canada to govern themselves, and to do so under structures of their own choosing:

The right of self-determination is vested in all the Aboriginal peoples of Canada, including First Nations, Inuit and Métis peoples.... By virtue of this right, Aboriginal peoples are entitled to negotiate freely the terms of their relationship with Canada and **to establish governmental structures that they consider appropriate for their needs.**<sup>3</sup>  
(Emphasis added)

The report notes that “there will be many ways for Aboriginal nations to conduct their internal affairs. In some instances these will draw upon a

---

<sup>1</sup> “Historical Review: Our Way (The Saskatchewan Indian Position),” Saskatchewan Indian, June 1975, <http://www.sicc.sk.ca/saskindian/a75our06.htm>. Accessed March 13, 2008

<sup>2</sup> “Prospects for Aboriginal Justice in Canada,” Palys, Ted S., School of Criminology, Simon Fraser University, undated, <http://www.sfu.ca/~palys/prospect.htm>. Accessed February 15, 2008.

<sup>3</sup> Report of the Royal Commission on Aboriginal Peoples, October 1996, [http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm\\_e.html](http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html). Accessed February 27, 2008.

nation's traditions. In others they may synthesize traditional, non-traditional and non-Aboriginal government procedures."

Along those lines, communities are increasingly turning to custom leadership selection codes. Their goals typically include allowing their leaders to operate more effectively and reclaiming or reaffirming aspects of their traditional leadership selection. A custom election code sets out in writing what the process is, how its integrity is ensured, and how, if and when necessary, the community can change it. Often, the custom election code is a step along the path that will lead ultimately to self-government.

## B. Current Approaches to Leadership Selection

A First Nations community may conduct leadership selection under one of three possible approaches:

- Election procedures under a **self-government agreement**. Self-government agreements are federal acts passed into law by Parliament. An agreement typically sets out the requirement for a self-governing nation to create a constitution (including a leadership selection process) that is in accordance with the agreement. An example of this approach is the Westbank First Nation agreement, finalized in 2003.<sup>4</sup> Alternatively, the agreement may include those specific elements itself, as was the case in the Cree Naskapi (of Quebec) Act, passed in 1991.<sup>5</sup>
- A **custom election code**. A community that does not have a self-government agreement may use a custom election code. The courts have defined custom as having to "include practices generally acceptable to members of the band and upon which there is a broad consensus." To adopt a custom election code, a community must seek to be exempted from the election provisions of the Indian Act. To quote from the INAC website: "...removal from the Indian Act election provisions requires the issuing of a ministerial order in accordance with subsection 74(1) of the Act which must then be registered in accordance with the Statutory Instruments Act."<sup>6</sup>

<sup>4</sup> Westbank First Nation Self-Government Agreement, Section 43 (b), [http://www.ainc-inac.gc.ca/nr/prs/s-d2003/wst\\_e.pdf](http://www.ainc-inac.gc.ca/nr/prs/s-d2003/wst_e.pdf). Accessed February 15, 2008.

<sup>5</sup> See Part II of the Act. <http://laws.justice.gc.ca/en/C-45.7/index.html>. Accessed February 2, 2008.

<sup>6</sup> [http://www.ainc-inac.gc.ca/ps/lts/nelts/ele/index\\_e.html](http://www.ainc-inac.gc.ca/ps/lts/nelts/ele/index_e.html). Accessed January 28, 2008.

- **Indian Act** and related regulations. Sections 74 through 79 inclusive, and the associated regulations, set out processes for elections.<sup>7</sup>

Of these approaches, self-government provides the greatest flexibility and autonomy in developing the provisions of a code, followed closely by a custom code, while the Indian Act provides the least. **Appendix A** compares the kinds of provisions that are or might be possible under each approach.

The words “might be possible” are important to note. The provisions of a self-government agreement are set through negotiation with the federal government and considered by Parliament as a whole, while those of a custom code are subject to approval by the Minister of Indian Affairs only. All statutes and codes, including the Indian Act, however, can be challenged in court under the Canadian Charter of Rights and Freedoms.

This table summarizes available information on the use of custom codes and self-government agreements by region:

Region:	Number of nations	With custom	Self-governing	Total*
Atlantic	33	7		21%
Quebec	39	21	9	77%
Ontario	139	55		40%
The Prairies	179	97		54%
British Columbia	198	96	6	52%

\* Percentage of all First Nations in the region using custom or self-government election codes  
**Source:** First Nation Profiles at <http://sdiprod2.inac.gc.ca/FNProfiles/>, other publicly available information and interviews.

**Note:** May understate number of communities using custom codes, as this information is not reported for some communities on the Profiles website.

### C. First Nations guidelines or rules for leadership selection

Traditional leadership approaches can be dealt with in a number of ways:

- The preamble to the custom election code can discuss traditional approaches, such as a code of honour that leaders are expected to

<sup>7</sup> [http://laws.justice.gc.ca/en/showdoc/cs/I-5/bo-ga:s\\_74/en#anchorbo-ga:s\\_74](http://laws.justice.gc.ca/en/showdoc/cs/I-5/bo-ga:s_74/en#anchorbo-ga:s_74). Accessed January 28, 2008.

follow. Provisions of the code itself can make reference to this code and to the consequences of candidates failing to meet its standards.<sup>8</sup>

- The community can create a parallel governance system in addition to the one described in the custom code. This can consist, for example, of a hereditary or elders' advisory council that provides guidance to the elected chief and council.
- The nation with which the community is affiliated can set out, in its constitution, a description of hereditary or other traditional practices, or can actually incorporate these into its own governance system.
- A self-government agreement might include or make reference to hereditary or other traditional systems of governance.

While the most powerful means of asserting traditional approaches is to work to negotiate these as part of a self-government agreement, it is possible to include traditional approaches in a custom election code as long as they enjoy broad community support. The next section discusses in more detail ways of ensuring community input into the custom election code. The courts have also recognized that customs can change, so provisions of a code based on tradition can still evolve over time.

#### D. Issues affecting First Nation leadership selection

##### *Case law*

There have been numerous court cases involving election processes, whether under the Indian Act or a custom election code. The Corbiere case, establishing that the Indian Act was in violation of the Canadian Charter of Rights and Freedoms by limiting voting to citizens living on reserve, is probably the best known. The courts have since extended this logic to other issues that have had or could have an impact on custom codes. The Resources section of this report summarizes several cases of this kind.

##### *Other community activities*

The election code needs to be seen as part of the entire range of legislation a community relies on. In the past, a custom election code might have been a "stand-alone" document. Now, more and more communities are drafting constitutions, custom citizenship codes, and other pieces of legislation. Each piece of legislation can have an impact on the others.

---

<sup>8</sup> See, for example, the ruling of the Federal Court involving the Piikani Nation, discussed in Appendix A.



In considering a custom code, then, it is valuable to think about it in the context of all the other legislation that a community is working on or planning for. Similarly, as other types of legislation are being drafted, consideration has to be given to whether anything in them will trigger the need to change an existing election code. The pieces of legislation most likely to involve interaction with election processes include:

**Constitution:** Very often the constitution itself sets out general election processes. More specific and operational aspects of how to run nominations and elections may need to be set out in another piece of legislation, regulations and/or a procedural handbook.

**Citizenship code:** This code is important because it determines who may be included on the electors' list.

**Appeals tribunal:** The creation of an appeals tribunal will trigger a change in the election code if the tribunal is able to hear election appeals.

**Code of conduct for chief and council:** The responsibilities of chief and council relate mainly to their activities in governing the community and its citizens, although they have certain responsibilities around ensuring that elections are fair and transparent. Because elections are mainly the responsibility of the electoral officer, however, your community may prefer to define election processes in legislation that is separate from a description of chief and council responsibilities.

#### *Electoral officer's handbook*

It is not practical or necessary to include all the duties and responsibilities of the electoral officer and others involved in elections in the custom election code or constitution. These can be outlined in a handbook or procedural manual.

#### *Work at the nation level*

Another consideration is any drafting work at a higher level than that of the individual community. Some nations, including for example the Anishinabek (comprising the Algonquin, Chippewa, Delaware, Mississauga, Odawa, Ojibway and Pottawatomi), are developing or have developed overarching constitutions that individual communities may support. The resources section provides a link to information on the Anishinabek process and its connection with self-government. Once an individual community has agreed to support a nation constitution, it will want to make sure that its own legislation dovetails with that constitution.

*Custom election codes and self-government*

Another critical consideration, of course, and related to the previous section, is the view of a community on self-government. Some First Nations do not wish to pursue a self-government agreement, seeing it as merely a delegation of authority from the federal government. Many others, however, are actively pursuing this route. For communities in the second group, all legislation should be written with an eye to how (or whether) it would work in the context of self-government.

Generally, in the area of custom election codes, changes that would be needed to move to self-government would not be major. This is particularly the case if a community and/or its nation is also adopting or has already adopted legislation covering its own appeal tribunal, a custom citizenship code and constitution. Because of the minor differences in election codes under self-government, many First Nations look to the election provisions of self-governing First Nations as they develop or revise their own custom election codes.

*Gaining community acceptance*

Like any other document that has an impact on the community, the success of the custom election code will reflect the extent to which people in the community accept it. Experience shows that community input and discussion are key to building acceptance.

In the words of a staff member closely involved in community discussions on several pieces of legislation:

Our legislators are the people. [Legislation] is not from the top down, it has to be from the grassroots and the elders.... We just can't take mainstream society's values – it has to come from our customs, values and traditions.

Some examples of how this might be done:

- For the community above, the main means of getting input has been meetings with its citizens – not just in the community, but in two nearby cities where significant numbers live. As well, an elders council and a family representatives council were created to advise on various pieces of legislation and other community matters.
- Many communities have used their websites to distribute draft codes and proposed amendments and report back on the results of

community discussions, a method that is useful in reaching those who live off-reserve.

- Communities have also used questionnaires to get feedback. Focus groups involving a small number of people are another technique.
- One community used a wide range of approaches to get people involved in drafting its new constitution, which also covers election procedures:
  - They formed a constitution committee that includes a youth, an elder, their legal council and others.
  - Because of the difficulties of getting people to speak out at larger meetings, the committee first gave an overview presentation, then individual committee members sat with smaller groups at individual tables. They discussed the issues and posted their ideas on a flipchart, with all tables sharing their thoughts at the end of the process.
  - Committee members were also available to sit down and discuss the constitution one-on-one if a citizen wished.
  - Students in grades 7 and up were invited to “pizza and pop” lunches, divided up into tables and asked to answer three questions: What is a constitution? Why do we need one? What would contribute to developing it? Each table of students had a spokesperson to present their ideas and, in the words of the administrator, “I was blown away by their knowledge and determination.” In this community, a male and female youth sit on the constitution committee and the membership committee. The community’s proposed appeals tribunal would also have a youth representative.

#### *INAC requirements*

INAC states that a proposed custom code must clearly describe the process and rules with respect to:

- the appointment of an electoral officer;
- voter and candidate eligibility;
- time frames;
- the nomination of candidates;

- the conduct of the poll;
- the participation of citizens who do not live on the reserve;
- the length of term of office;
- the appeal mechanism; and
- the mechanism by which the code can be amended.

These are minimum requirements. A custom code typically contains these and other provisions.

INAC has developed what it calls a “custom election dispute resolution policy” in case of community-level disputes. This policy allows the Minister to re-impose the provisions of the Indian Act around elections when disputes cannot otherwise be resolved.

#### E. Guides and Resources on Leadership Selection

The National Centre for First Nations Governance can provide advice and training, as can some tribal councils or other nation-level organizations. The starting point for drafting might be a code used successfully in another community, such as one of those provided as **Appendix C**.

As mentioned, the election provisions of self-governing First Nations can be useful. **Appendix C** provides links to some of these. Election procedures included in constitutions tend to be fairly general, however, and a custom election code will likely call for more detailed procedures. And of course, each community is unique and will want to tailor various provisions accordingly.

Since the custom code is a legal document, the input of a lawyer or legal technician is useful through the drafting process. Some communities have done most of the drafting themselves and then taken their work to a lawyer for final checking. This route may be less costly initially, but might involve a lot of revisions at the last minute.

### III. Leadership Selection

#### A. Generic Model

This sample code provided here is intended to outline possible directions only and does not constitute legal advice. Communities must ascertain for themselves what legal resources and opinions they will need.

The possible directions outlined here relate mainly to governance-related issues, such as term length, who can vote or run for office, how appeals are handled, and so on. This report does not provide detailed guidance on such procedural matters as the handling of ballots, voting methods and ensuring voting secrecy, the role of candidates' agents, and so on. The First Nations Electoral Officers Association provides a handbook outlining the duties of an electoral officer in running an election at [www.fneoa.ca/resources/get/10](http://www.fneoa.ca/resources/get/10).

Examples of options chosen by actual communities appear as **Appendix B**. Considerations around various elements follow this generic sample code.

#### **The Custom of the [Name of community/nation] as to the Election of Chief and Council**

##### Preamble

WHEREAS the [Name of community] [is a constituent community of the ✪ Nation and] has the inherent authority to adopt, by way of Custom, a method for choosing its Chief and Council, [as recognized by subsection 2(1) of the Indian Act, R.S.C. 1985, c. I-5, and as was recognized by the same subsection of the Indian Act, R.S.C. 1970, c. I-6];

AND WHEREAS this Custom Code for the Election of the Chief and Council was

*The preamble is optional. It may refer to or discuss the customs and traditions of the nation in selecting leaders and/or take a more administrative tone, as has been done in this example.*

discussed by our citizens and approved by their vote on [date] [and amended through the approved process on date];

WE THEREFORE set forth here the custom of the [Name of community/nation] as to the Election of Chief and Council, constituting the Custom Election Code of the [Name of community/nation].

##### **Effective Date**

This Custom Election Code came into full force and effect on [original date] [and was amended on date].

## Sections of the Indian Act no longer in force

Provisions found in the Indian Act, R.S.C. 1985, c. I-5, and its predecessor, the Indian Act, R.S.C. 1970, c. I-6, respecting the Band Elections of Chiefs and Band Councils, being sections 74, 75, 76, 77, 78, and 79 inclusive, do not and shall not apply to the [Name of community/nation].

## Definitions

In this code,

“Amendment Vote” means a vote held in accordance with this Custom Election Code to add, amend or repeal any of its provisions.

“Business day” is any day except a Saturday, Sunday or statutory holiday.

“Community” means the geographical area which the Chief and Council govern, including but not necessarily limited to the Reserve of the [Name of community/nation], and its citizens.

“By-Election” means an election held for the purpose of filling a vacant Council position other than through a General Council Election.

“Candidate” means an eligible person who was nominated according to the requirements set out in this code [and fulfilled all other requirements for candidacy set out here].

“Clear days” means a series of days exclusive of the first and exclusive of the last day.

“Election” means either a General Council Election or a By-election.

“Election Day” is the last day on which a Poll may be taken in connection with any election.

“Election Period” is the time between the calling of the Election and Election Day.

“Election Poll” means the Poll held on Election Day.

“Electoral Officer” means the person appointed [or selected] in accordance with the procedures set out in this Custom Election Code to carry out and oversee election processes.

A “General Council Election” takes place at the end of the regular term of Chief and Council to determine the succeeding Chief and Council, unless all positions are filled by acclamation.

“[Name of community/nation] Web Page” means the internet web page maintained by the Council on behalf of the [Name of community/nation].

“Ordinarily resident” means that a person’s usual, permanent place of residence is on the community’s territory [or on the Reserve of the Name of community/nation].

“Poll” means the casting and recording of votes in accordance with this Custom Election Code.

“Reserve” means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of the [Name of community / nation].

*The Council and its make-up may be defined elsewhere, for example in the constitution. In that case, any wording in the custom election code should be consistent with other documents.*

*For considerations around the number of councilors and the length of term, please consult the Fact Sheets (Appendix C).*

*In most communities, councilors are elected “at large” – that is, they represent all citizens. It is possible to create geographical divisions, with a councilor for each division. In this case, however, voting by non-resident electors for councilors becomes complicated.*

“Territory” means the traditional territory of the [Name of community / nation].

### **The Council**

3.1 The Council shall consist of one Chief and [◆] Councillors [or one Chief, elected at large, and one Councilor for each division]. [Note: “◆” refers to the specific number of councilors in the community]

3.2 The term of office of the Council is [X] years.

### **Election Date**

4.1 For a General Council Election, Election Day is normally the [first or second or third or fourth] [day of week] in [month].

4.2. Council is normally required to call a General Council Election no later than [X] days before its term of office expires.

4.3. Council shall call a General Council Election through a Resolution of Council that sets the Election Day and the procedures for selecting the Electoral Officer.

[4.4. Notwithstanding 4.1, 4.2 and 4.3, another authority may be legally empowered, under the legislation of the [Name of community / nation], to order a General Council Election in accordance with this or other legislation, in which case that authority calls the election and provides an order containing substantially the same information as the Council Resolution.]

4.5 The Resolution or Order shall be posted at least [X] days before Election Day in one or more conspicuous places in the community [and on the Web Page].

*The provisions around the setting aside of an election might give an Appeals Tribunal, for example, the power to call an election in some circumstances*

## Selection of Electoral Officer [and Deputy Electoral Officers]

### Impartiality of Electoral Officer [and Deputy Electoral Officers]

#### Eligibility to Vote

*The Fact Sheets set out a range of options that communities have developed to help ensure the impartiality of electoral officers and the credibility of the election process.*

5. To be eligible to vote, an Elector:

(a) must have reached the age of [X] years on or before Election Day;

(b) must be a citizen [or member] of the [Name of community/nation] as recorded in the citizenship [or membership] list maintained by the community;

(c) and the Elector's name must appear on the Electors' List.

*The Fact Sheets discuss in more detail the questions of residency and age of eligible Electors.*

#### Electors' List

6.1 The Electors' list shall be prepared on the basis of the community's citizenship [or membership] list, taking into account the criteria for Electors set out in this Code [and:

a) For voters who are residents, shall include the names of all eligible Electors;

b) For voters who are not normally resident, shall include [the names of all eligible Electors or the names of all eligible Electors who have indicated their wish to be included on the Electors' list.]

6.2 The Electoral Officer shall prepare the Electors' List containing: the names of Electors in alphabetical order; the name of the Electoral Officer; and the telephone and fax numbers, [e-mail address] and mailing/courier address of the Electoral Officer.

6.3 At least [X] days before the date of an Election, the Electoral Officer shall post one or more copies of the List in a conspicuous place in the community and in any other location he or she deems appropriate.

*Some communities limit non-resident voting to those who have confirmed that they wish to vote. This helps reduce the cost of an election. See the Fact Sheets for more details.*

6.4 Any citizen [or member] of the community may apply to the Electoral Officer in person or by telephone, courier, regular mail, [e-mail] or fax, for a revision or revisions to the Electors' list on the grounds that it incorrectly sets out the name of an Elector or otherwise fails to accurately list and record the names of all eligible Electors.



6.5 If satisfied that the Electors' list should be corrected, the Electoral Officer shall make the needed corrections and the list as corrected shall be the Electors' List on Election Day.

### **Notice of Nomination Meeting**

7.1 When an Election is to be held, the Electoral Officer shall post a Notice of Nomination Meeting in the form prescribed by Council.

7.2 The Notice of Nomination Meeting shall contain, at a minimum:

- a) the date, time and location of the Nomination Meeting;
- b) the Electors' list or instructions as to how to receive or view a copy of it;
- c) the name of and contact information for the Electoral Officer;
- [d) the Internet address of the Web Page;]
- [e) the statement that any voter may vote by mail-in ballot;]
- [f) a description of the manner in which an Elector can nominate a candidate, or second the nomination of a candidate; and]
- [g) the statement that, if the elector wants to receive information from candidates, the elector can agree to have his or her address released to the candidates.]

7.3 At least [X] clear days before the date of the Nomination Meeting, the Notice of Nomination Meeting shall be posted:

- a) in one or more conspicuous places in the community; and
- [b) on the Web Page; and]
- c) in any other location that the Electoral Officer considers appropriate.

[7.4 The community may also wish to specify newspapers or other media outlets through which the Notice of Nomination Meeting must be advertised, *or* specify that the Notice be mailed to the last known address of each Elector *or* both, and the timing of these communications]

### **Eligibility to be Nominated**

8.1 All nominees for Chief or Council must meet the requirements of an Eligible Elector [and must also meet the following criteria]:

*Codes typically set out several criteria for nominees, covering such matters as whether they are employees of the community, where they live (or must live if elected), criminal record, age and so on. Please read the related Fact Sheets for further details.*

*As well, some codes specify that a person may run for only one office in any election. This avoids the possibility of an immediate vacancy following an election result.*

*If a community wishes to allow self-nominations, then the provision about requiring an Elector to second a nomination would have to change*

[additional criteria]

[8.2 A person may be nominated for only one position in any one Election.]

### **Criteria for making a nomination**

9.1 Only eligible Electors may make a nomination.

9.2 Every nomination must be moved by an Elector and seconded by another Elector.

### **[Nominations before the Nomination Meeting**

10.1 Nominations, which must include the signatures of the eligible Electors who moved and seconded the nomination, may be made in writing before the date of the Nomination Meeting.

10.2 Nominations made before the Nomination Meeting may be delivered by hand or mail to the Electoral Officer. Nominations not received by the Electoral Officer before the time set for the Nomination Meeting are void.]

## **Nomination Meeting**

11.1 At the time and place specified in the Notice of Nomination Meeting, the Electoral Officer shall open the meeting to nominations.

[11.2 Immediately after opening the meeting, the Electoral Officer shall read out the nominations of eligible nominees received in writing before the meeting.]

11.3 The Nomination Meeting shall remain open for [a minimum of one hour and] a maximum of three hours.

*Some codes also set out the duties and powers of the Electoral Officer around maintaining order and security at the Nomination Meeting.*

11.4 The Electoral Officer shall close the Nomination Meeting after it has dealt with all business that, in the view of the Electoral Officer, was properly brought before it.

### **Acclamation**

12.1 If, at the time the Electoral Officer closes the Nomination Meeting, only one Eligible Nominee has been nominated for the position of Chief, the Electoral Officer shall declare the nominated person to be duly elected.

12.2 If, at the time the Electoral Officer closes the Nomination Meeting, the number of Eligible Nominees who have been nominated for Council does not exceed the number of positions to be contested for Council, the Electoral Officer shall declare those nominated to be duly elected.

12.4 If positions are not all filled by acclamation, the Electoral Officer shall declare that the Polls will proceed.

### **Notice of Election**

13.1 As soon as possible after the Nomination Meeting, the Electoral Officer shall post a Notice of Election in the form prescribed by Council:

- a) in one or more conspicuous places in the community; and
- [b) on the Web Page; and]
- c) any other location that the Electoral Officer deems appropriate

and all postings shall be made at least X clear days before Election Day.

[13.2 The community may also wish to specify newspapers or other media outlets through which the Notice of Election must be advertised, *or* specify that the Notice of Election be mailed to the last known address of each Elector *or* both, and the timing of these communications]

13.3 The Notice of Election shall contain, at a minimum:

- a) the date, time and location the [Advance Poll(s) and] Election Poll;
- b) the Electors' list or instructions as to how to get or view a copy of it;
- c) the name of the Electoral Officer and the telephone and fax numbers, [e-mail address] and mailing address of the Electoral Officer;
- d) the Internet address of the Web Page;
- e) the names of the candidates and the position which each is contesting; and
- f) the names of those acclaimed, if any.

### **[Date of Advance Poll(s)]**

14. The Electoral Officer shall set the date(s) of the Advance Poll(s) at least X clear days after the date on which the Notice of Election is posted and at least Y clear days before Election Day.]

### **[Nomination Papers**

15.1 Eligible Nominees shall file Nomination Papers with the Electoral Officer by 5 p.m. on the second business day following the Nomination Meeting. The Nomination Papers shall be in the form prescribed by the Council and may be filed in person, by mail, by courier or by fax. They must contain the valid signature of the Eligible Nominee.

15.2 At the request of any Elector, an oath or affirmation in a form prescribed by the Council as to an Elector's eligibility to be nominated for a particular Council position shall be administered to any Elector wishing to file Nomination Papers.

*Candidates are sometimes required to pay a fee that may be refundable, based on the share of votes the candidate achieves.*

15.3 No person who has refused to take the oath or affirmation referred to in section 15.2 when requested so to do shall be permitted to be a Candidate in a Band Election and shall be disqualified from the Band Election.

15.4 Once an Eligible Nominee files Nomination Papers and, if requested, takes an oath or affirmation in relation to their eligibility, the Nominee becomes a candidate.

15.5 Nomination Papers received after the period prescribed here are void and the Nominee may not stand as a candidate.

15.6 After the time for filing Nomination Papers expires, the Electoral Officer shall include the list of Candidates for each Council position in the Notice of Election.

OR

### **Refusal of Nomination**

15. A Nominee can refuse a nomination by filing with the Electoral Officer a written

*There are two basic approaches to ensuring a nominee wants to run: filing nomination papers or formal withdrawing after nomination. The Fact Sheets discuss both options.*

withdrawal, signed by the Nominee in the presence of the Electoral Officer, a justice of the peace, a notary public or a commissioner of oaths, no more than [X] days after the Nomination Meeting.]

#### **Withdrawal of candidacy**

16.7 A Candidate may withdraw at any time before the opening of the Poll on Election Day by filing with the Electoral Officer a written withdrawal of his or her nomination, signed by the Candidate in the presence of the Electoral Officer, a justice of the peace, a notary public or a commissioner of oaths.

16.8 The death of a Candidate any time before the opening of the Poll on Election Day constitutes the Candidate's withdrawal.

16.9 If there is enough time between the withdrawal and the printing of ballots, the Candidate's name will not appear on the ballot. If the ballots have been printed, the Electoral Officer will, time permitting, black out or obliterate the Candidate's name to the extent possible. In any event, any votes cast for the Candidate are null and void.

### Mail-in Ballots

17.1 A Mail-in Voting Package consists of the following:

- (a) Voting Instructions;
- (b) Declaration of identity;
- (c) Return envelope with postage prepaid;

*Handling of mailed-in ballots and ballots from advance polls has sometimes been contentious. If these options are used, the electoral officers' handbook should set out careful procedures for ensuring the integrity of the process.*

(d) Ballot initialed by the Chief Electoral Officer or a Deputy Electoral Officer;

(e) A ballot envelope.

17.2 The Electoral Officer will ensure that, at least [X] clear days before Election Day, a Mail-in Voting Package is mailed to [every non-resident Elector on the Electors' List *or* every person on the Electors' List who requests one].

### Determination of Outcome

18.1 In any election in which the position of Chief is contested, the Chief shall be elected by the highest number of votes cast for that position.

18.2 In any General Council Election, the [◆] Candidates receiving the highest number of votes shall be elected as Councillors. [“◆” stands for the number of councilors in your community]

*Normally, the Electoral Officer breaks a tie by casting a vote or making a random choice. One code contemplates favouring non-incumbents over incumbents in breaking a tie, or choosing the candidate who would bring the council's gender balance closer to 50:50.*

[18.2 (a) The person receiving the highest number of votes for Councillor in a General Council Election will hold the title Vice Chief [*or* Deputy Chief]. The duties of this person, other than as described here with respect to filling a vacancy for the position of Chief in certain circumstances, are set out in the Code of Conduct for Chief and Council.]

18.3 In any By-election in which the position of

*The duties of the authority who receives election appeals are normally: to advise all candidates that the result has been appealed, deliberate on any responses received from candidates, and investigate further if necessary. Suitable time frames and procedures for notifying all the parties involved must be spelled out. This sample code describes one set of processes, but this is an area where the community and, as appropriate, its legal advisers, must make the final determinations.*

*The authority must then make a ruling on the matter, which may require the result of the election to be set aside.*

Councillor is contested, the Candidate(s) receiving the largest number of votes, to a maximum of the number of positions contested in the By-Election, shall be elected as Councillor(s).

18.4 Where it appears that two or more Candidates has received an equal number of votes in an Election, and the tie must be broken to determine who has been elected, the procedure for tie-breaking shall be:

18.5 As soon as the votes have been counted and the outcome of any tie-breaking, where needed, has taken place, the Electoral Officer shall publicly declare the names of those Candidates who have been elected and their positions and shall also post in some conspicuous place a statement signed by him or her showing the number of votes cast for each Candidate.

### **Election Appeals**

19.1 Within 30 days after an Election, any Candidate or other Elector who voted in the Election and who has

reasonable grounds for believing that:

*There are many options in use for election appeals. The Fact Sheets provide more details.*

a) there was corrupt practice in connection with the Election; or

b) there was a violation of this Custom Election Code that might have affected the result of the Election; or

c) a Candidate was ineligible to be nominated

may lodge an appeal by forwarding the particulars, [duly signed *or* verified by affidavit,] to [the Electoral Officer *or* the Appeals Tribunal of the community *or* another authority specified in the Code] by registered mail.

*Some codes require a fee and security deposit against costs (returnable if the appeal is successful).*

19.2 If the [designated authority] receives an appeal, [he, she *or* they] shall, within [X] days, forward a copy, together with all supporting documents, by registered

mail to each Candidate.

19.3 Any Candidate may, within [Y] days of receiving these materials, forward to the authority by registered mail a written answer, together with all supporting documents duly verified by affidavit.

19.4 The authority may conduct such further investigation into the matter as the authority deems necessary, either personally or by designating another person to do so and to provide a written report to the authority.

19.5 The authority may set aside the Election of a Candidate if the authority is satisfied that:

- a) there was corrupt practice in connection with the Election; or
- b) there was a violation of this Custom Election Code that might have affected the result of the Election; or
- c) a Candidate was ineligible to be nominated.

19.6 Where the election of a Candidate is set aside, the Candidate receiving the next highest number of votes shall be declared as elected.

### **Vacancies**

20.7 The office of the Chief or Councillor becomes vacant when the person who holds office:

- a) is convicted of an indictable offense under the Criminal Code of Canada; or
- b) dies or resigns from office; [or
- c) fails to become ordinarily resident in the community within [X] days after the Election Day.]

*Because of the expense of by-elections, communities have developed a number of other ways to fill vacancies, especially if a general council election is scheduled within the next year. The Fact Sheets discuss these options.*

20.8 Any Candidate elected in a By-Election shall be entitled to complete only the remaining term of office for the position in question.

### **Penalty**

21. Every person who violates any of the provisions of this Code is subject to such penalty as may be set out in

a Council by-law.

### **Postponement of Meeting, Election or Amendment Vote**

22. At the discretion of the Electoral Officer during the Election Period, or Council for an Amendment Vote outside an Election Period, any meeting, poll or vote may be postponed:

- a) in the event a death in the community, to the day after the funeral or memorial service, or to another appropriate day, if the meeting, poll or vote would have conflicted with the funeral or memorial service; or

b) in the event of weather conditions that might pose a risk to Electors, to the next day on which conditions are no longer considered to create an undue risk

and in either case the relevant authority (normally the Electoral Officer, but in the case of an Amendment Vote outside an Election Period, the Council) shall make every reasonable effort to ensure that Electors are advised of the change and the new date.

## Amendments

23.1 Council must notify Electors of any proposal to add to, repealed or amend any or all provisions of this Code through a Notice of Amendment Vote which shall, at a minimum, contain the following information:

a) the date, time and location of the Vote;

b) the Electors' list or instructions as to how to receive or view a copy of it;

*Votes to amend a code normally follow procedures similar to those used in an election. In at least one community, however, citizens vote at an open meeting.*

[c) the Internet address of the Web Page;]

[d) the statement that any voter may vote by mail-in ballot;]

e) either a copy of the proposed amendment(s) or a summary of the proposed amendment(s) along with instructions as to how a complete copy of the proposed

amendment(s) can be obtained or viewed

23.2 At least [X] clear days before the date of the Vote, the Notice of Amendment Vote shall be posted as follows:

a) in one or more conspicuous places in the community; and

[b) on the Web Page; and]

c) in any other location that the Electoral Officer considers appropriate.

[23.3 The community may also wish to specify newspapers or other media outlets through which the Notice of Nomination Meeting must be advertised, *or* specify that the Notice be mailed to the last known address of each Elector *or* both, and the timing of these communications]

23.4 The Vote shall be determined the majority of the votes cast by Electors.



## B. Elements of a custom election code

This section describes various elements of a custom code and, in some cases, considerations around adopting them. The Fact Sheets that make up **Appendix B** show options that different communities have adopted for various elements. **Appendix C** provides the complete codes, either actual or draft, of several communities.

### Term of office

The most frequent reason cited by communities for creating their own custom election code is the two-year term prescribed by the Indian Act. Two years is felt to be simply not enough time for the chief and councilors to learn their job and deal with the issues facing them before they are forced back into election mode again. As one First Nation explained it: "First Nation Chiefs and Councillors are dealing with very complex and important issues today. If a community has short terms of office and a high turn-over rate it may suffer the consequences of never having leaders who have the time to gain the experience and understanding necessary for positive decision-making."

Another consideration is the increasingly expense of holding elections, particularly since the Corbiere decision and subsequent regulations to the Indian Act have extended voting to all electors in the community, no matter where they live.

Most of those First Nations adopting custom codes have opted for three-year terms, with a smaller number electing their chief and council to four-year terms or staying with the two-year term. A very few communities have gone to a five-year term, while a few have staggered systems in which the chief or some portion of council serves a different length of term.

The table below shows a breakdown in term length using publicly available information on all First Nations in Canada:

Term in years:	Two	Three	Four	Five	Total
Number of communities:	58	84	54	10	206
Percentage of total:	28%	41%	26%	5%	100%

**Note:** Results are based on information publicly available from the communities database at [http://sdiprod2.inac.gc.ca/FNProfiles/FNProfiles\\_home.htm](http://sdiprod2.inac.gc.ca/FNProfiles/FNProfiles_home.htm). It is impossible to verify the accuracy and timeliness of this information. As well, some communities do not provide the relevant information. These results should therefore be considered as indications only.

### Staggered terms

Related to a longer term of office is the question of whether terms might then be staggered. This approach is mentioned most often in connection with longer terms: for example, if all councilors served four years, half the council would face election

every two years. The thought seems to be a safeguard against the relatively long time that voters would have to wait to change the make-up of council if they were dissatisfied. Voters would have a chance every two years to provide feedback through the ballot box on council (or at least half of it). Individual councillors, on the other hand, would have a full four years to learn the complexities of the job and achieve progress.

One possible disadvantage of a staggered term system is that the community would still hold an election every two years, with all the related disruption. On the other hand, the longer the term, the more likely by-elections may be needed between regular elections.

Looking at the information from publicly available sources tends to confirm that staggered terms are more likely as term length increases. Among communities with four-year terms, 17% have staggered elections, as opposed to 10% and 7% for communities with two-year and three-year terms, respectively. (Only one of the 10 communities with a five-year term has staggered elections, on the other hand. It may be that some of these communities are very small and have chosen a longer term to reduce election costs.)

Regionally, staggered terms appear to be more common in B.C. than other parts of the country; of 24 communities identified through the database as having staggered terms, 15 were in B.C.

### **Filling vacancies**

Under the INAC election regulations, if a vacancy occurs more than three months before the date when another election would normally be held, a special election may be held to fill the vacancy. The regulations require that an “accelerated election” must be held if council would not otherwise have a quorum. INAC pays the costs of accelerated elections but not other special elections. Many communities have found this approach to be disruptive, time-consuming and expensive, with one respondent estimating the price of a special election at \$25,000.

### **Voter eligibility**

Belonging to the First Nation was a requirement for voter eligibility in every code analyzed. (While the Indian Act discusses “membership” in a First Nation, this report uses the term “citizenship” instead, in line with the growing preference of communities themselves. However, many custom codes still use the term “member”.) Records of citizenship are kept through a community’s membership or citizenship roll and criteria for citizenship set out in its constitution, if the community has adopted one.

Apart from citizenship, the most important element of voter eligibility is place of residence. The Indian Act limits voters to those “normally resident” on the reserve. After the Corbiere decision – which found that by limiting voting to those living on a

reserve, the Indian Act violated Section 15 of the Canadian Charter of Rights and Freedoms – regulations to the Act were introduced to allow voters to live anywhere.

At the time of the decision, several First Nations commentators noted that the Corbiere decision would likely apply to similar provisions in custom election codes. And in 2005, a Federal Court judge did indeed use logic similar to that in the Corbiere decision to find that a custom election code could not limit voting for chief and council to those living on reserve lands. The case related to the community of Hartley Bay Village, B.C. The judge decided in favour of those who felt all citizens should be able to vote, despite the arguments of the opposing side that those living off reserve were adequately represented by a hereditary council under the community's "two-tier" system of government. This decision has implications for other First Nations that may wish to use place of residence as an eligibility criterion in a custom election code.

Most communities interviewed, however, were more concerned about how to include all potential voters than considering residency as a limitation. (Several, in fact, even before the Corbiere decision had created custom codes allowing those living elsewhere to vote.)

The Indian Act regulations assume that everyone who is eligible to vote will want to do so. The regulations provide detailed procedures for mail-in ballot packages that include a ballot, stamped self-addressed envelope and the other documents to be sent to all potential voters living off-reserve.

Communities, in their custom codes, have developed several approaches that supplement or replace the Indian Act processes. They reflect both the particular circumstances of a community's non-resident voters and, in some cases, their experiences to date with mail-in voting.

Mail-in voting and advance polls have been a matter of concern in some communities because of questions around the integrity of the process. As a result, at least one community plans to move to the use of metal ballot boxes that are both locked and sealed. Ballot boxes must normally be opened by the electoral officer in the presence of representatives of all candidates.

### **Criteria for candidates**

Although the two-year term length under the Indian Act was most often cited as a reason to develop a custom election code, the failure of the Act to specify that a candidate for Chief must be a citizen of the community was another concern.

All custom election codes analyzed for this report require that those running for Chief or councilor must be citizens. Beyond that, however, and again reflecting local conditions, different First Nations place additional requirements on potential candidates. Generally, to be nominated, a candidate must be eligible to be a voter.

### **Nomination procedures**

All the nomination practices examined shared one fundamental point: To be nominated, a potential candidate had to be proposed by one voter and seconded by another. The person moving the nomination and the seconder must be voters (and by extension, citizens of the First Nation). One First Nation's electoral code did limit this right somewhat by stating that neither an electoral officer nor a member of the appeal committee can nominate or second candidates.

When an election code requires the support of two people (nominator and seconder), it is technically impossible for a candidate to self-nominate. One community is considering a self-nomination process that would not require a seconder.

### **Withdrawing or confirming candidacy**

Under the Indian Act and its regulations, potential candidates do not need to approve their nomination or even be present at the nomination meeting. In fact, those nominated who do not want to run must go through a relatively complex process within five days of the nomination meeting, involving a signed declaration to the electoral officer. Only one custom code examined followed this model. The rest provided different approaches that required potential candidates to affirm that they wanted to seek office.

### **Vice chief or deputy chief**

Because of the heavy time and travel commitment generally involved in the Chief's role, some custom codes stipulate that the councilor who gets the highest number of votes has the title Vice Chief, Deputy Chief, or similar. In addition to sitting in when the Chief is unable to attend meetings, this person can also step into the job for the balance of the term if the Chief's position becomes vacant between elections, depending on how soon the next election is and whether there is still a quorum. When this happens, the vacancy for Chief becomes a vacancy on council.

### **Electoral officer impartiality**

As the person charged with overseeing the election process, the electoral officer carries a heavy responsibility. Because of this, a number of communities have looked at ways of helping to ensure the impartiality of this position. While the majority of codes give council the role of selecting the electoral officer, at least one code requires electoral officers to be selected by a show of hands at a meeting of voters.

### **Tie votes**

Electoral officers typically cannot vote, except in the case of a tie. Generally, codes specify simply that the electoral officer (and assistants, where available) must vote to break ties. In practice, it seems, many choose to flip a coin or use another random method to make the decision.

A proposed provision to a custom code would set out the following guidelines for tie-breaking: first, if the tie is between an incumbent and a non-incumbent, the non-incumbent should be declared elected; if that option is not available, then the candidate who would bring the gender balance of council closer to 50:50 should be declared elected; and if neither option is available, the winning candidate should be selected at random.

### **Appeals**

Common reasons for appeals include concerns that a corrupt practice took place, that the rules governing elections were not followed, that an ineligible person was nominated or that a candidate was not nominated according to the rules of the custom code. This is often a controversial area, which may be why communities have developed a number of different approaches to launching and deciding appeals.

### **Adopting or changing a custom code**

How the code is approved at the community level, and how subsequent changes would be made, is an area where councils may need to strike the right balance between getting things done and ensuring community consensus.

## Glossary

The sample code provides definitions of terms that are specific to a legally drafted code.

As used in this report and related materials (except for minor variations in the sample code), the following terms have the following meanings:

“Community” means the geographical area which the Chief and Council govern, including but not necessarily limited to the reserve, and its citizens.

“By-Election” or “special election” means an election held for the purpose of filling a vacant council position other than through a general council election.

“Candidate” means an eligible person nominated according to the requirements set out in an election code and meeting all other criteria of the code.

“Citizen” means a person meeting the citizenship (or membership) criteria of a community.

“Election” means either a general council election or a by-election. (A “general council election” is an election that takes place at the end of the regular term of Chief and Council.)

“Electoral Officer” means the person chosen in accordance with the procedures set out in a custom election code to carry out and oversee election processes.

“First Nation” generally refers to an individual community. See also “Nation”.

“Nation” means either a First Nation or a higher-level organization representing several First Nation communities, depending on the context.

“Resident” means that a person’s usual, permanent place of residence is on the community’s territory or reserve, depending on how the community chooses to define its area of authority.

“Poll” means the casting and recording of votes in accordance with this Custom Election Code.

“Reserve” means a tract of land, the legal title to which is vested in Her Majesty, that has been set apart by Her Majesty for the use and benefit of community.

“Territory” means the traditional territory of the community.

## Resources

### *Self-government approaches*

#### Nisga'a Lisims Nation:

The link does not provide the constitution or election code, but does describe the form of government, which involves four village governments as well as a national one:

[http://www.nisgaalisims.ca/about\\_nisgaa\\_lisims\\_government](http://www.nisgaalisims.ca/about_nisgaa_lisims_government)

Accessed February 22, 2008

#### Anishinabek Nation:

A discussion of how a nation constitution relates to governance in its constituent communities:

[http://www.anishinabek.ca/index.php?option=com\\_content&task=view&id=69&Itemid=9](http://www.anishinabek.ca/index.php?option=com_content&task=view&id=69&Itemid=9)

Accessed February 22, 2008

### *Relevant court decisions and other resolutions*

#### Gull Bay (2007)

The Court ruled that provisions of the Indian Act limiting requiring candidates for councilor to live on reserve violated the Canadian Charter of Rights and Freedoms.

Website of the Federal Court of Canada

<http://decisions.fct-cf.gc.ca/en/2007/2007fc878/2007fc878.html>

Accessed February 15, 2008

#### Hartley Bay (2005)

The Court ruled that provisions of a custom election code limiting voting to residents of the reserve violated the Canadian Charter of Rights and Freedoms.

Website of the Office of the Commissioner of Federal Judicial Affairs

<http://reports.fja.gc.ca/en/2005/2005fc1030/2005fc1030.html>

Accessed February 15, 2008

#### Leq'á:mel (2007)

The Court ruled that provisions of a custom election code limiting voting to residents of the traditional territory violated the Canadian Charter of Rights and Freedoms.

Website of the Federal Court of Canada

<http://decisions.fct-cf.gc.ca/en/2007/2007fc707/2007fc707.html>

Accessed February 15, 2008

M'Chigeeng First Nation (2004)

Discussion of a compromise reached after several years of INAC refusal to accept the community's draft custom code. INAC's concern was that the draft code ran counter to the Corbiere decision by allowing non-residents to vote only if they did so in the community.

Ontario Birchbark newspaper, March 2004

<http://www.ammsa.com/birchbark/topnews-Mar-2004.html>

Accessed February 22, 2008

Piikani Nation (2008)

This case involved the eligibility of candidates whom some elders believed had violated the traditions known as PIIKANISSINI, set out in the preamble to the code, and their conduct had dishonoured and brought shame on the Piikani Nation. Provisions of the code permit removal from office for violating these traditional principles, but did not specifically state that a violation would prevent an individual from being a candidate. The Court asked the community, as part of the ruling in this case, to extend the need to live up to traditional values to the section of the code setting criteria for candidates.

Website of the Federal Court of Canada

<http://decisions.fct-cf.gc.ca/en/2008/2008fc130/2008fc130.html>

Accessed February 15, 2008

*General material on First Nations governance and election practices*

"Understanding governance in strong Aboriginal communities"

Phase one: Principles and best practices from the literature

October 1999

Institute on Governance in collaboration with York University, CESO Aboriginal Services and the Saskatchewan Federated Indian College

Pages 54-57 inclusive

Discusses of the impact of election processes under the Indian Act and sets out other potential models

[http://www.iog.ca/publications/strong\\_ab\\_gov.pdf](http://www.iog.ca/publications/strong_ab_gov.pdf)

Accessed February 15, 2008

"Prospects for Aboriginal Justice in Canada"



Palys, Ted S., School of Criminology, Simon Fraser University

Undated

Paper surveying historical approaches to justice, including a discussion of the negative impact of federal legislation on traditional governance structures

<http://www.sfu.ca/~palys/prospect.htm>

Accessed February 15, 2008

“Rethinking the Reserve: Problems of governance”

Libin, Kevin

The National Post, February 20, 2008

Highly critical article pointing out problems and concerns about current election practices and governance; does, however, conclude by recognizing the need for First Nations people to be given real control “over their leadership and the fate of their own lives”

<http://www.nationalpost.com/news/canada/rethinkingthereserve/story.html?id=280526>

Accessed February 22, 2008

“Historical Review: Our Way (The Saskatchewan Indian Position)”

Saskatchewan Indian, June 1975

<http://www.sicc.sk.ca/saskindian/a75our06.htm>

Accessed March 13, 2008

Report of the Royal Commission on Aboriginal Peoples

October 1996

[http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm\\_e.html](http://www.ainc-inac.gc.ca/ch/rcap/sg/sgmm_e.html)

Accessed February 27, 2008

## Appendix A. Custom code, self-government and Indian Act provisions

Provisions may specify:	Custom election code	Self-government	Indian Act (incl. regulations)
Terms > 2 years	Yes	Yes	No
Staggered terms	Yes	Yes	No
Voters must be resident	No <sup>9</sup>	Uncertain	No (by regulation)
Flexibility in non-resident voting	Yes	Yes	No
Min. elector age other than 18	Uncertain, but probably no <sup>10</sup>	Yes <sup>11</sup>	No
Chief must be a citizen	Yes	Yes	No
Candidates must be residents	No <sup>12</sup>	Uncertain	Uncertain <sup>13</sup>
Min. candidate age > 18	Uncertain	Uncertain	No
Rules for employees who run	Yes	Yes	No
Record check for candidates	Yes	Yes	No
Nomination papers/deposit	Yes	Yes	No
Community-based appeal process	Yes	Yes	No
Flexibility in filling vacancies	Yes	Yes	Limited

<sup>9</sup> The 2007 Hartley Bay decision found that a custom code that limited voting to community residents violated the Canadian Charter of Rights and Freedoms. This extended the logic of the Corbiere decision to a custom code. Similarly, a decision the same year involving the Leq'á:mel First Nation found that provisions of a custom election code limiting voting to residents of the traditional territory violated the Canadian Charter of Rights and Freedoms.

<sup>10</sup> It appears that Indian Affairs discourages custom codes proposing a minimum voting age other than 18

<sup>11</sup> See, for example, the Haida self-government agreement, which sets the minimum voting age at 16

<sup>12</sup> In the Leq'á:mel decision referred to in Footnote 1, the Court ruled that requiring candidates to live in the traditional territory also violated the Canadian Charter of Rights and Freedoms.

<sup>13</sup> The 2007 Gull Bay decision found that the provision of the Indian Act limiting candidacy for council to community residents violated the Canadian Charter of Rights and Freedoms.

Traditional approaches	Yes <sup>14</sup>	Yes	No
------------------------	-------------------	-----	----

## Appendix B. Custom Election Code Fact Sheets

Note: Some of the approaches below reflect drafting by communities in the process of developing or revising custom codes, are not final and have not necessarily been accepted by their communities. As well, any provision of an existing code may be subject to legal challenge. The approaches are therefore provided for information only.

<a href="#">Fact Sheet – Term length</a> .....	36
<a href="#">Fact Sheet – Council size</a> .....	37
<a href="#">Fact Sheet – Candidate residency</a> .....	38
<a href="#">Fact Sheet – Candidate criminal record check</a> .....	39
<a href="#">Fact Sheet – Candidates who are First Nations’ employees</a> .....	40
<a href="#">Fact Sheet—Candidates’ knowledge of traditional language and culture</a> .....	41
<a href="#">Fact Sheet – Candidates’ financial status</a> .....	42
<a href="#">Fact Sheet – Candidate age</a> .....	43
<a href="#">Fact Sheet – Electoral Officer impartiality</a> .....	44
<a href="#">Fact Sheet – Residency requirements for electors</a> .....	45
<a href="#">Fact Sheet – Non-resident voting procedures</a> .....	46
<a href="#">Fact Sheet – Nomination procedures</a> .....	47
<a href="#">Fact Sheet – Accepting or rejecting a nomination</a> .....	48
<a href="#">Fact Sheet – Process for launching an appeal</a> .....	49
<a href="#">Fact Sheet – Who hears and decides appeals</a> .....	50
<a href="#">Fact Sheet – Vacancies</a> .....	51

---

<sup>14</sup> A number of custom codes now in existence allow certain traditional practices in selecting leaders. The courts have said that a custom “must include practices generally acceptable to members of the band and upon which there is a broad consensus.” In a recent decision involving the Piikani Nation, the Federal Court not only confirmed that an elected official could be removed from office for violating a traditional code of behavior, it asked the community to extend that criterion to candidates for election. Given the introduction of the Canadian Charter of Rights and Freedoms and court decisions based on it, however, it is not clear whether such practices as selecting leaders by means other than a vote of all electors would withstand a Charter challenge.

## Fact Sheet – Term length

**Definition:** This criterion specifies the number of years for which chief and council are elected to office in a regularly scheduled election.

**Purpose and Relevance:** The single most common reason typically cited for First Nations creating their own custom election codes is the two-year term prescribed by the Indian Act. First Nations' elected officials today deal with complex problems, ones that can take many years to solve. Short terms and a constant turnover in elected officials means leaders never gain the experience or have enough time to deal with these issues properly. As well, frequent elections are costly and disruptive.

### Options:

- Most First Nations that have created custom election codes have opted for three-year terms for their chief and council, with a smaller number opting for four years or staying with the two-year term historically favored by INAC, and a very few choosing five-year terms.
- A possibility is to stagger elections – for example, with a four-year term, half the council would be elected every two years. This gives the continuity of longer terms, while letting with electors give their feedback at the ballot box more frequently. Where staggered terms are in use, they are most often applied to a four-year term. Communities with other term lengths also use them, however.

## Fact Sheet – Council size

**Definition:** The provisions setting the overall size of the council (defined as councillors plus chief).

**Purpose and Relevance:** The size of a First Nation's council needs to strike a balance between adequate representation and the ability to manage. Too few councillors limits the diversity of voices; too many may seriously affect the council's ability to get anything done. The Indian Act sets out the number of councilors at one for each 100 citizens, with a minimum council size of two and maximum of 12 (both including the chief).

### Options:

The numbers mentioned in custom codes are widely divergent. Generally, however, many custom codes seem to provide for fewer councilors than the Indian Act sets out.

## Fact Sheet – Candidate residency

**Definition:** Residency requirements for candidates set out where a candidate must live (1) to be eligible to run for office and (2) to serve if elected. They relate specifically to whether the candidate lives on the territory of the First Nation.

**Purpose and Relevance:** Where elected officials live is a matter of importance to First Nations, especially as more citizens live away from the nation's territory and, under the Charter of Rights and Freedoms, have the right to vote in elections no matter where they live.

**Under the Indian Act, candidates for councilor must live on the reserve. This was successfully challenged, however, in August 2007 in the case of the Gull Bay First Nation. The Federal Court of Canada ruled that this requirement violated Section 15 of the Canadian Charter of Rights and Freedoms. In another 2007 decision, involving Leq'á:mel First Nation, the court applied the same thinking to a custom code requiring a candidate to be a resident – in this case, of the traditional territory – to determine that the restriction violated the Charter.**

**Although** the Indian Act requires candidates for council to live on the reserve, it does not set the same requirement for a candidate for Chief. Indeed, under the Indian Act the candidate does not even need to be a citizen of the nation. This was confirmed in a 1995 ruling of the Federal Court of Canada. There is a very strong sense among First Nations that candidates for chief must meet the same citizenship and residency requirements as those for councilor. This fact sheet therefore applies to both types of candidate.

### Options:

- Any citizen of the First Nation may run for office, regardless of place of residence. This is the most common approach. There are various options for ensuring the candidate, if successful, moves to the community:
  - Once elected, a successful candidate must move to the community within a specified period of time; failing to do so results in the seat being declared vacant
  - Candidates must provide a signed undertaking that they will move to the community if elected
- Only citizens living in the community (with a minimum residency period of a year, for example) may run for office. Note, however, that this approach might not meet a court challenge.
- One council position is designated to represent non-residents specifically, and the candidate must live outside the community and remain a non-resident for the term of office. Other positions are open only to residents, who must remain resident for the term of office. All citizens vote for all positions. This approach does not appear to be common.

## Fact Sheet – Candidate criminal record check

**Definition:** Requirements concerning candidates' criminal records set out (1) whether any individual with a criminal record is eligible to run for office and, (2) if so, under what conditions.

**Purpose and Relevance:** A key part of good governance is quality candidates, those who put the interest of their community and the voters before their own. By restricting the eligibility of those with criminal records in their custom election codes, First Nations hope to ensure that candidates for elected office are of good character. On the other hand, limiting the period over which a candidate must be conviction-free is a way of allowing those who have corrected earlier behavior to run for office.

### Options:

The approaches that different First Nations have taken on this issue vary widely:

- One proposed code requires that any potential candidate submit an up-to-date Canadian Police Information Centre report (CPIC) showing them to be clear of any serious offenses.
- Another code specifies that any potential candidate have a "clear criminal record," meaning in this case no convictions in the five years before election day.
- A third barred candidates who had been convicted of an offence in the preceding ten years, except for convictions arising from "the assertion of native rights or title."
- Another approach is to allow a candidate with a criminal conviction to run for office if the offence has been pardoned (including pardons received through a traditional justice process).
- In various codes, the clear criminal records check covers Canada; Canada and the U.S.; or every jurisdiction in which the candidate has lived (in this case, the code allows for additional time to carry out the required check). The seriousness of the crimes that prevent a candidate from running also varies widely, from "any serious conviction" to a named list.

## Fact Sheet – Candidates who are First Nations' employees

**Definition:** Eligibility rules regarding employees of the First Nation set out whether such individuals are allowed to seek elected office and in what circumstances.

**Purpose and Relevance:** Rules preventing employees from running or holding office are by no means universal in custom election codes. Indeed, anecdotal evidence suggests that some communities actively encourage their employees to run for office because of their knowledge and expertise. Perhaps feeling that individuals who were both employees and elected officials of a First Nation would fast find themselves enmeshed in conflicts of interest, other First Nations set out provisions in their custom codes to deal with this situation.

An important consideration when looking at whether employees must resign or take an unpaid leave if elected is how well chief and councilors are compensated compared to staff members. If elected positions receive only honaria, and employees must give up a salary if elected, this will act as a disincentive for them to run.

### Options:

- Some codes state that any employee must apply for and be granted an unpaid leave of absence before running.
- Another code requires that they must take a leave of absence only once elected.
- Another approach states that any employee elected to the office of chief or councilor is deemed to have resigned from their job upon election.



## Fact Sheet—Candidates' knowledge of traditional language and culture

**Definition:** This criterion says that candidates must have knowledge of or proficiency in their Nation's language and knowledge of their cultural and history.

**Purpose and Relevance:** This is a matter of importance to many communities, because they want to ensure the survival of their language to the extent possible and regard cultural and historical knowledge as necessary for their leaders.

From a practical perspective, however, this may be a difficult criterion to enforce. As important as language is, in some communities there are very few fluent speakers remaining. Setting complete fluency as a criterion would seriously limit the pool of potential candidates. Even if only partial fluency is required, it might prevent an otherwise good candidate from running. Another concern might be how to decide whether a candidate has enough knowledge or fluency. Who would decide, and on what basis? This might become contentious.

Communities are starting to develop ways of spreading knowledge of their language and history. One possible approach to applying a criterion of this type might be whether potential candidates have been involved in those efforts, have taken courses offered by the community on language and history, and so on. This would provide an objective way of determining a candidate's interest in the language and culture.

### Options:

- Most codes are silent on the question of candidates' language and cultural knowledge.
- Another option is to set out a requirement and provide a straightforward way for candidates to show whether they meet the requirement.

## Fact Sheet – Candidates’ financial status

**Definition:** Some First Nations’ custom election codes prohibit those owing money to the First Nation or in serious financial trouble from seeking elected office.

**Purpose and Relevance:** A candidate indebted to the First Nation that they are elected to govern may find themselves embroiled in serious conflict of interest. They may be unable to put the interests of the Nation before their own. Likewise, a candidate enmeshed in bankruptcy proceedings may find themselves distracted from their duties or pressured by their creditors to behave inappropriately.

### Options:

Few of the custom codes surveyed made mention of a candidates’ financial position. Those that did, focused on very different situations:

- One stated that no potential candidate was eligible for office who owed money to the First Nation.
- Another stated only that no potential candidate was eligible of office if they are an “undischarged bankruptcy.”

## Fact Sheet – Candidate age

**Definition:** This criterion sets a minimum age for a candidate – either any candidate, or candidate for chief only.

**Purpose and Relevance:** By requiring a candidate to be older than the minimum age for an elector, a community may be signaling that the chief or chief and councilors need to have a certain amount of experience, as reflected by their age.

Although a higher age criterion has been proposed for candidates in some draft codes, there is not enough experience to date to know whether this approach would be acceptable.

### Options:

- Most codes set the minimum age for candidates at the same minimum age for electors (generally, 18 years of age on or before election day).
- Another option is to require candidates for chief or for any position to be older than the minimum age for an elector.

## Fact Sheet – Electoral Officer impartiality

**Definition:** These provisions set out rules to ensure that the electoral officer conducts the nomination and electoral processes in a fair and impartial fashion.

**Purpose and Relevance:** In making sure that the nomination process and election set out in the custom election code are followed properly, the electoral officer helps guarantee that the results will be broadly accepted as legitimate.

### Options:

All codes prohibit the electoral officer from voting in the election, except to break a tie, or from being a candidate. Others put forth additional regulations to further ensure impartiality:

- One proposed code would specify that the electoral officer may not be a member of the community.
- One custom code prohibits the electoral officer from nominating or seconding the nomination of a candidate.
- Another approach is that, once selected, the electoral officer provides council with an undertaking to discharge the duties and responsibilities in a fair and neutral manner.

Another issue is who selects the electoral officer. While this is generally the duty of council, in at least one community the process is done through a public meeting, with electors making the selection.

## Fact Sheet – Residency requirements for electors

**Definition:** A non-resident elector is, as the name suggests, any elector who is not normally resident on the territory of the First Nation but is a citizen of that First Nation.

**Purpose and Relevance:** Historically, under the Indian Act, citizens of a First Nation not resident on the reserve were not allowed to vote in that nation's election. This changed with the Corbiere decision that found that barring off reserve members from voting violated Section 15 of the Canadian Charter of Rights and Freedoms.

Subsequent decisions have extended that view to custom codes. In 2005, a federal judge ruled that the off reserve members of the community of Hartley Bay Village should be able to vote, despite arguments that they were adequately represented by a hereditary council under the community's two-tier system of government. In 2007, the Federal Court ruled in the case of the **Leq'á:mel First Nation that a similar restriction requiring electors to live in the traditional territory was also in violation of the Charter.**

### Options:

- All citizens of the First Nation may vote, regardless of place of residence. This is the most common approach.
- Right to vote is limited by where citizen lives. Note, however, that such a provision might be open to a court challenge similar to those discussed above.

## Fact Sheet – Non-resident voting procedures

**Definition:** These regulations determine how non-resident electors can cast their ballots in a First Nation’s election.

**Purpose and Relevance:** Creating a system that allows non-resident voters to cast ballots in First Nation elections is an important part of the democratic process. Their voices count, too. Elections held under the Indian Act provide for the participation of non-resident voters in elections, and assume that all potential non-resident electors will want to vote and will do so by mail. To this end, every non-resident elector is sent a package containing a ballot, a stamped envelope and other documents. Reflecting their experiences with this system and the often very different circumstances of their non-resident electors, several First Nations’ election codes have outlined new ways to include non-residents in the electoral process.

### Options:

- One First Nation with a large number of its non-resident members living in two nearby cities hold advance polls in those cities. It also sends mail-in ballots as requested.
- Another first nation whose non-resident members are very widely dispersed plans a modified mail-in system. Rather than send every potential non-resident voter a package, the electoral officer will contact all non resident voters well in advance of the election, asking them if they are interested in voting. Only those responding yes will receive a package.
- Another variant on the email-in system set out in one First Nation’s custom election code uses what might be termed a “negative option.” Non-resident voters are sent a notification of upcoming elections at least 40 days in advance. Those not interested in voting are asked to identify themselves. Everyone else is sent an election package.

## Fact Sheet – Nomination procedures

**Definition:** Nomination procedures set out how the names of those who will run for chief and council positions are put forward.

**Purpose and Relevance:** To make sure that interested electors have an opportunity to nominate potential candidates, that the nomination and seconding are done by eligible electors, and that the place and time of the nomination meeting are known to all interested electors well beforehand. Carrying out these steps in an open and transparent manner is a key part in creating a sense of trust in a First Nation's chief and councillors.

### Options:

The details for nomination procedures vary from custom code to custom code. Generally, however, all share the following qualities:

- A nomination meeting is held well in advance of the election, with the time and place of that meeting made public beforehand.
- Nominations must be made and seconded by individuals who are eligible to vote in the upcoming election, which commonly means citizens of the First Nation over the age of 18.

Some First Nations, in addition to holding a nomination meeting, also allow for nominations made and seconded by electors to be submitted in writing in advance of the meeting.

## Fact Sheet – Accepting or rejecting a nomination

**Definition:** These provisions detail how any nominated candidate accepts – or rejects – their nomination.

**Purpose and Relevance:** Under the Indian Act, potential candidates do not need to approve their nomination or even be present at the nomination meeting. In fact, those nominated who do not choose to run face a complicated process that involves making a signed declaration to the electoral officer no later than five days after their nomination. Rather than follow this “negative option,” some custom codes instead require that nominees actively affirm that they want to seek office

### Options:

- One code requires that the candidate and two other electors sign a nomination form, either at the nomination meeting or beforehand.
- Nominations forms bearing the valid signature of the nominee must be submitted in person by mail or by fax no later than 48 hours after the start time of the nomination meeting.
- A nominee must accept a nomination in person, either at a nomination meeting or by signed written notice delivered to the electoral officer, within seven days of the nomination meeting.
- Some codes keep the requirement that a candidate must submit a formal withdrawal, but with provisions slightly different from those in the Indian Act.



## Fact Sheet – Process for launching an appeal

**Definition:** These provisions set out the steps for electors and/or candidates to follow where they wish to appeal the result of election.

**Purpose and Relevance:** The ability to appeal is an important part of a fair and open election process. Common reason for appeals can include corrupt practices, violations of the rules governing the conduct of elections, or violations of the rules governing nominations. Violations like these, if substantiated, can affect the outcome of an election and in the long run undermine popular faith in the electoral process. On the other hand, investigating an appeal can take time and cost money, so there may be concerns around the possibility of appeals being lodged that are unlikely to be substantiated.

### Options:

- One code requires that an appeal must be launched within thirty days of an election, together with a non-refundable fee of \$75. The notice of appeal must be sworn before a notary public or commissioner of public oaths the reasons for wanting an election declare invalid, along with any supporting documents.
- Another approach requires any candidate or voter who feels the election was conducted improperly must notify the relevant authority within thirty days of the election. The authority can conduct an investigation to determine if they appeal was valid and, if necessary, set the election aside.

## Fact Sheet – Who hears and decides appeals

**Definition:** These criteria establish who hears any appeal relating to an election.

**Purpose and Relevance:** The appeals process is important, a key element of fair and transparent government. But the process will only work if measures are also in place that ensure the appeal is heard fairly and dispassionately.

**Options:**

- Some communities refer any challenges to their electoral officer.
- One custom code refers challenges to an arbitrator chosen by the band council.
- Another First Nation puts a specific appeals committee in place before the election. Consisting of three people (two from the community), each member provides the council with an undertaking to discharge their duties in a fair and neutral manner.
- Some First Nations have appeals tribunals in place that deal with a wide range of matters, including election appeals.

## Fact Sheet – Vacancies

**Definition:** There may be occasions when, for whatever reason, the office of chief or councilor becomes vacant during a council's term. These regulations set out the rules for dealing with such vacancies.

**Purpose and Relevance:** A key job of any electoral system is to guarantee representation and provide continuity in governing. Vacancies threaten this ability.

Under the election regulations to the Indian Act, if a vacancy opens up more than three months before the next scheduled election, a special, or by election, can be held to fill the position. The regulations also state that if council would not otherwise have a quorum, an "accelerated election" must be held. It seems that INAC pays the cost of accelerated elections but not other special elections. Special elections can be time-consuming and expensive; many custom election codes outline different practices for dealing with vacancies without requiring a by-election.

### Options:

- One custom codes states that if the post of chief or councilor becomes vacant with fewer than six months remaining in the term of council, the seat remains empty, unless the number of councilors falls below that needed for a quorum. In that case, a by-election is held within 90 days.
- Under one proposed system, if a vacancy occurred with less than one year remaining until the next election, the unsuccessful candidate who had the largest number of votes in the pervious election would join the council. If more than on year remained in the life of the council, however, a by election would be held within sixty days.

## Appendix C. Custom election codes

Election provisions in or associated with self-government agreements, available on-line:

Naskapi Cree:

[http://laws.justice.gc.ca/en/showdoc/cs/C-45.7/bo-ga:l\\_II//en#anchorbo-ga:l\\_II](http://laws.justice.gc.ca/en/showdoc/cs/C-45.7/bo-ga:l_II//en#anchorbo-ga:l_II)

Westbank First Nation:

[http://wfn.ca/pdf/070719wfn\\_constitution\\_revision\\_final.pdf](http://wfn.ca/pdf/070719wfn_constitution_revision_final.pdf)

Carcross Tagish First Nation:

<http://www.ctfn.ca/tiki-page.php?pageName=SelfGovernment>

The page above includes links to Constitution and Voting Information documents. The latter deals with the vote on self-government, but provides an example of a very clear, user-friendly guide to voting procedures in general

Haida Nation:

<http://www.haidanation.ca/Pages/CHN/Constitution.html>

Anishinabek nation constitution rolling draft:

<http://www.anishinabek.ca/images/ROIpdfs/anishinabeknationconstitutionrollingdraft.pdf>

Custom election codes available on-line:

Communities post their codes on their website from time to time or on a permanent basis. Because the purpose of posting the code is often to discuss potential revisions with the community's citizens, we have not listed any individual codes available on-line at the time this report was prepared. However, material of this type can be found through an internet search using a description such as: First Nation "custom election code".

## **Appendix D. Sample training material**

Sample provisions given to Group A:

Term length: Two years for council and Chief

Who can vote and how: Any citizen over the age of 18, including non-residents; voting in person only, in the community.

Who can run for office: Any citizen over the age of 18 who has been living in the community (including traditional territory) for at least two years.

Sample provisions given to Group B:

Term length: Two year years for council and three years for Chief

Who can vote and how: Any citizen over the age of 18, including non-residents; all non-resident electors receive a mail-in voting package, but are not allowed to vote in person.

Who can run for office: Any citizen over the age of 18 who has a working knowledge of the traditional language and who has a clear criminal record (no criminal convictions in Canada or the U.S.).