

A. 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. 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.