

Custom Election Code Template 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.

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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 honoraria, 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 mail-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 one year remained in the life of the council, however, a by election would be held within sixty days.