

I. Election Code Template

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.

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

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.

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 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Sections of the Indian Act no longer in force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.]

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.

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].

Electoral Officers]

Selection of Electoral Officer [and Deputy

Impartiality of Electoral Officer [and Deputy Electoral Officers]

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

Eligibility to Vote

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.

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.]

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

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.

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:

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.

- 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

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

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]:

[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.

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.

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

[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;

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

- 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.

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.

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 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

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.

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;
- (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]

[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 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

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

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.

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.

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:

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

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.

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.

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

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

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.]

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:

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.

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;
- [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:

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.

- 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.