

CUSTOM CODE CONVERSION COMMENTS FROM ISC-HQ

Bonaparte First Nation Bonaparte First Nation Custom Election Code (#686, BC)

[Indian Act Election Term Expires 2025-05-03]

Section 11 Membership

4 Year Term- Council: 1 Chief (4 Years) and 4 Councillors (2 Highest votes 4 years, 2 lowest votes 2 years)

1st Draft: May 1, 2023

2nd Draft: March 22, 2024

3rd Draft: September 16, 2024

INTERPRETATION

Under the “Priority” column in the following pages there are 5 classifications:

- **Required** – This section of the act is at a very high risk of being in conflict with the *Constitution Act, 1982*, the *Canadian Charter of Rights and Freedoms*, or other legislation and legal decisions of the court. The Minister cannot approve a regulatory Ministerial Order removing the First Nation from the *Indian Act* election provisions until this wording is amended.
- **Strongly Recommended** – The section is potentially in conflict with the *Constitution Act*, other legislation or legal decisions. Or, the section creates a logical inconsistency that will seriously impair the First Nation’s ability to implement the Custom Code. Revisions or clarifications should be made. If no changes are to be made the First Nation should understand that there is a risk the Code could be successfully challenged in Court.
- **Recommended** – The section creates a logical inconsistency, or there is a gap, that could impair the First Nation’s ability to implement the Custom Code. If no revisions or clarifications are made, the First Nation should understand that there may be difficulties in the consistent implementation of the Code. These inconsistencies could create risks.
- **Suggestion** – A change is suggested to improve the Code’s clarity, or to help the electoral procedure function more efficiently. It is not necessary for the Code to be approved, but would strengthen it overall.
- **Editing** – Changes to the ordering of paragraphs and subparagraphs, references to other portions of the Code (or other documents), or corrections to spelling and grammar that are necessary to ensure that the Code is easily understood.

REFERENCES: RELEVANT COURT CASES

- **Gull Bay** – On August 20, 2007, the Federal Court of Canada issued a judgement in the matter of *Eugene Esquega et. al v. The Attorney General of Canada* commonly referred to as the Gull Bay litigation. This litigation involved a challenge to **subsection 75(1) of the *Indian Act*, which requires candidates for the position of councillor in band council elections to reside on-reserve.** The Court ruled that subsection 75(1) of the *Indian Act* violates section 15 of the ***Charter of Rights and Freedoms***. As a result, candidates for councillor positions do not need to reside on the reserve.
- **Goodswimmer** – In 1995, the Federal Court of Canada ruled that a candidate for chief as well as those nominating or seconding candidates for chief need not be a band member, nor be ordinarily resident on the reserve.
- **Corbiere** – On May 20, 1999, the Supreme Court of Canada ruled that seven words contained in section 77(1) of the *Indian Act* were against the *Charter of Rights and Freedoms*. Those seven words are: As a result of this ruling, all band members, whether they reside on or off the reserve, became eligible to vote for chief and councillors at band elections held under the *Indian Act*. In addition, the electoral officer must undertake certain activities in order to facilitate the participation of off reserve electors in the election process.
- **Dickson (2024)** - In 2019, Ms. Cindy Dickson sought to Judicially Review the validity of a provision of the Vuntut Gwitchin First Nation (VGFN) Constitution, a self-governing First Nation in the Yukon. Ms. Dickson argued that the VGFN “Residency Requirement” to be a candidate in VGFN elections violated her right to equality guaranteed by s.15 of the Charter on the analogous ground of Aboriginality-residence previously recognized by the Supreme Court in Corbiere. As we are aware from many Custom Code leadership disputes before the Courts, there is often disagreement between members of First Nations as to what traditions or customs are applicable to a particular Custom Leadership selection process. Therefore, it should be presumed that asserted leadership selection processes constitute a traditional collective right described in Dickson, while recognizing that there is a possibility that a Court could reach the opposite based on sworn testimony, oral evidence and other evidence presented parties before the Court which would not be available to the Minister when considering the content of a Custom Code. As you can see from the four step process below, an assertion by a First Nation submitting a Custom Code for consideration would likely be presumed to be the exercise of a right protected under section 25. Whether this would be an irreconcilable with an individual Charter right would depend on the particular fact situation.

The majority set out a four-step interpretive framework for s 25 to resolve challenges posed by competing collective Indigenous rights and individual *Charter* rights:

- First, the *Charter* claimant must show that the impugned conduct *prima facie* breaches an individual *Charter* right. If no *prima facie* case is made out, then the *Charter* claim fails and there is no need to proceed to s 25.
- Second, the party invoking s 25 – typically the party relying on a collective minority interest – must satisfy the court that the impugned conduct is a right, or an exercise of a right, protected under s 25. That party bears the burden of demonstrating that the right is an Aboriginal, treaty or other right.
- Third, the party invoking s 25 must show irreconcilable conflict between the *Charter* right and the Aboriginal, treaty or other right or its exercise. If the rights are irreconcilably in conflict, s 25 will act as a shield to protect Indigenous difference.
- Fourth, courts must consider whether there are any applicable limits to the collective interest relied on.

GENERAL

- In submitting a draft Election Code, please ensure that the cover page includes a draft number along with the date to allow better record keeping and progression of the file.
- The numbering of the sections or subsections may need to be adjusted, where applicable.
- After making changes, please review carefully to ensure that all references to other parts of the Election Code have been updated. The Election Code will not be functional until all of the references to other sections are corrected/clarified.
- Please revise the document for spelling and grammatical errors
- **Please revise the document for formatting errors (including spacing between words and paragraphs)**

SECTION	COMMENTS	PRIORITY
PART 3 – INTERPRETATION		
Executive Director	Please revise the document to change “ED” to “Executive Director” for clarity, or include a note in the definition that ‘Executive Director’ may be referred to as ‘ED’.	Edit COMPLETED
PART 8 – ELECTION PREPARATION PROCEDURES		
81. a)	Please adjust the content below for continuity between the ballot requirements for Chief and Councillors: <i>a) The name of the candidates nominated for election as Chief, in alphabetical order by surname <u>and identified by nicknames if applicable</u>; and</i>	Edit COMPLETED
PART 9 – CAMPAIGN CODE OF ETHICS		
88.	Please revise for formatting.	Edit COMPLETED
PART 10 – PRE-ELECTION PROCEDURE		
92.	Please revise for formatting.	Edit COMPLETED
PART 12 – ELECTION DAY PROCEDURES		
110.	Please include language to state that the Electoral Officer must confirm whether or not an individual has voted by ‘Electronic Voting’ or by ‘Mail-In Ballot’ prior to providing the Voter with the ballot. Note that at the time that Voters arrive at the polling station Mail in Ballots have not yet been processed, they are processed after	Required COMPLETED

	<p>the polls have closed.</p> <p>This is required as section 122. sets out that mail-in ballots will be verified before the commencement of the polls. By doing this, it means that any individual who sent in a mail-in ballot cannot change their mind and choose to vote in person and have their mail-in ballot cancelled. By conducting this verification, the Electoral Officer will avoid any double voting. This section has been revised to change the word “poll “ to “count”.</p>	
PART 13 – COUNTING OF THE VOTES		
144. (f)	<p>Please do not circulate a breakdown of how each individual elector will cast their ballot as this may inadvertently provide information as to whom that individual has voted. Instead, please consider providing a breakdown of the total number of individuals who voted using each method. The specific voting method used by an individual voter can be recorded in the Master Voters List which is solely used by the Electoral Officer and Deputy Electoral Officers.</p> <p>Please consider amending this to state:</p> <p><i>f) a breakdown of the number of Voters who voted via in-person voting, mail-in ballot, and electronic voting.</i></p>	<p>Highly Recommended</p> <p>COMPLETED</p>
PART 15 – ELECTION APPEALS		
168.	Please revise for formatting.	<p>Edit</p> <p>COMPLETED</p>