Canada

Responding to Changing Needs

Recommendations from the Chief Electoral Officer of Canada Following the 40th General Election

EC 94356 (05/10)

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Library and Archives Canada Cataloguing in Publication

Elections Canada

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Text in English and French on inverted pages.

ISBN 978-1-100-51597-7
Cat. No.: SE1-5/2010

1. Voting — Canada.
2. Campaign funds — Canada.
3. Election law — Canada.
4. Canada. Parliament — Elections.
5. Canada. Parliament — Elections, 2008.
I. Title.
II. Title: Faire face à l'évolution des besoins – Recommandations du directeur général des élections du Canada à la suite de la 40e élection générale.

JL193 E43 2010 324.60971 C2010-980161-XE

Printed in Canada

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Foreword

Maintaining a healthy democracy requires an electoral process that is responsive to societal changes, while continuing to foster accessibility, integrity and public trust.

This recommendations report reflects the experience gained during the 39th and 40th general elections of January 2006 and October 2008, respectively. It is based on a number of evaluation activities carried out in the aftermath of these elections and on the feedback received from electors as well as candidates, political parties, parliamentarians and election staff. Most of the issues raised in the *Report on the Evaluations of the 40th General Election of October 14, 2008*, published in June 2009, are echoed in the recommendations contained in the present report.

After each electoral event, Elections Canada reviews and improves its procedures. Since the 40th general election, we have improved the recruitment and training of election officials, increased the number of polling sites (particularly in rural areas, in order to make advance polling more accessible) and begun to update our computer systems. We are planning to add the voter information card to the list of authorized pieces of identification for electors who face challenges in proving their residence at the time of voting so that voting remains accessible to them. We are also planning, with the prior authorization of the appropriate parliamentary committees, to test equipment that would allow electors with disabilities to vote completely independently. These are but a few of the administrative measures designed to promote a more accessible, inclusive and efficient electoral process.

While these improvements will make a difference, more could be achieved if the *Canada Elections Act* provided some flexibility in administering the voting process. This is why we are seeking authority, in Chapter I of this report, to run pilot projects to test different ways of operating. Any such pilot would be subject to the prior approval of parliamentarians and be limited in time. For example, a pilot could involve testing a new approach to the organization of work at polling sites with a view to improving services to electors, enhancing the consistency of administration and specializing tasks in order to alleviate the burden on poll workers.

Increasingly, Canadians expect to be able to carry out their affairs electronically. Chapters I and III provide recommendations that would enable electors to register or update their information electronically. Such a service would, for instance, allow youth who have just turned 18 or who have recently left the family home to use the Internet to register for the first time or to update their address. Similarly, as a result of the recommended changes, political entities would be able to complete the filing of their various reports and returns on-line without having to send a signed paper copy of the same documents. Such services would be more convenient and efficient for electors and political entities as well as for Elections Canada.

Legislators in Canada and around the world have long recognized the need to regulate the role of money in the democratic process. The current federal political financing rules are anchored in the

core values of transparency, integrity, fairness and accountability. As a result of multiple legislative reforms over the years, the regime has become increasingly complex and, in some respects, has lost part of its coherence. With the experience acquired in administering the new rules, we can now suggest specific amendments both to reduce the regulatory burden where it is not really required and to promote greater accountability where the current rules are lacking. Along those lines, Chapter II of this report recommends, for example, changes to the treatment of unpaid claims as well as introducing a requirement for political parties to submit documentation in support of their electoral expenses returns, upon request.

Chapters III and IV of the report provide recommendations that would clarify certain aspects of the legislation as it relates to governance as well as dealing with a number of more technical issues. Some of the changes proposed would, if adopted, confirm or realign certain of the Chief Electoral Officer's authorities and allow for broader collaboration with other Canadian electoral agencies.

It is important to note that there are a number of issues not addressed in this report that, nonetheless, deserve Parliament's consideration. These include the premature transmission of voting results on election night (the "blackout" period), the implications of fixed-date elections on the nature and duration of election campaigns, the role and impact of new media and the persistent decline in voter turnout – an even more fundamental concern. These matters raise important policy questions that should more appropriately be examined and acted upon by Parliament and the government than by the Chief Electoral Officer.

We trust that Parliament will recognize the merit of our recommendations. We will be pleased to support parliamentarians as they review this report and to share our view of how the proposed changes can strengthen the Canadian electoral process, ensuring that it remains a model for many jurisdictions around the world.

Marc Mayrand
Chief Electoral Officer of Canada

I – Issues Relating to the Electoral Process

Introduction

Canadians have been well served by the electoral process. However, Canadian society is quickly evolving; it is becoming more mobile and diversified, it is rapidly aging and an increasing number of citizens are using communication technologies to conduct their daily activities. These significant trends require that the electoral process be updated to better meet electors' expectations in terms of accessibility, service and resource management. Accordingly, this chapter organizes recommendations around three main themes: making the electoral process more flexible and efficient, maintaining electors' trust and increasing accessibility.

There are undoubtedly numerous initiatives that could improve the electoral process and make it more efficient. For example, different administrative structures could be put in place to streamline operations at polling sites. Caution is of the essence, however, as an ill-considered proposal could have adverse effects on our democracy. It would, therefore, be beneficial for Parliament to authorize Elections Canada to test new processes, using a model comparable to that which is already set out in the *Canada Elections Act* for electronic voting. This would enable us to test a number of methods and their implementation and to better assess possible consequences before proposing legislative amendments (recommendation I.1).

Moreover, the current Act provides limited latitude to explore the opportunities afforded by new technologies for improving the electoral process and making it more accessible. An increasing number of electors and political entities want to do business electronically with Elections Canada. While we already make extensive use of computer systems, the Act's requirements with respect to signatures and the production of documents prevent us from providing a more extensive range of electronic services. We therefore recommend that the Act allow the use of authentication and identification methods other than a signature when electors access Elections Canada's services (recommendation I.10). This would allow new electors to register on-line. The third chapter of this report contains a more general recommendation that would allow our stakeholders – in particular, political entities – to deal with us electronically without compromising the integrity of the electoral process (recommendation III.3).

Under the Act, Canadians are required to disclose a certain amount of personal information to us before exercising their right to vote, and they expect this information to be protected. Maintaining the trust of electors is a key element in ensuring that the lists of electors are as complete and as accurate as possible. Accordingly, it is incumbent on Elections Canada to ensure that it uses and communicates such information only when doing so is necessary to achieve the objective of the Act. We therefore recommend that dates of birth be removed from the lists of electors provided to election workers on polling day (recommendation I.8). Since the adoption of

provisions requiring electors to prove their identity and place of residence at the polling site, including dates of birth on the election workers' lists of electors no longer serves a purpose.

This chapter would be incomplete without recommendations for improving the selection and compensation process for the workers who ensure, in every election, the smooth conduct of the vote. During the last general election, some 236,000 election workers were hired in a span of just over two weeks. The current system hampers the ability of returning officers to recruit and train workers and assign them to suitable tasks. The *Report of the Chief Electoral Officer of Canada on the 40th general election of October 14, 2008,* describes some of the challenges we had to face. That is why we recommend shortening the period during which parties with the right to do so can submit the names of potential deputy returning officers, poll clerks and registration officers (recommendation I.2). We also recommend that returning officers be able to assign more election workers to polling sites when circumstances warrant it (recommendation I.3).

Finally, we believe that the application of the *Expenditure Restraint Act* to election staff needs to be reviewed. This law prevents the offering of more attractive compensation to election workers. Amending it would help to meet our recruitment needs for such workers and would allow us to take into consideration the increased duties assigned to some workers as a result of recent legislative changes (recommendation I.4).

Toward a More Adaptable and Effective Electoral Process

I.1 Authority to Conduct Pilot Projects

The Chief Electoral Officer should be authorized to set up and conduct pilot projects during by-elections or general elections, notwithstanding any contrary provision in the Act. Any pilot project would receive the prior consent of the House of Commons committee that considers electoral matters. The authority to conduct pilot projects would make it possible to test various service models for both electors and candidates; the proposal would help improve the effectiveness of the electoral process and the quality of any recommendations that the Chief Electoral Officer may make.

The *Canada Elections Act* sets out in detail the procedures for the conduct of the vote. Although this is useful for ensuring the integrity of the electoral process, there is no mechanism that allows initiatives for improving the process to be tested.

Analysis and discussion

Under section 535 of the Act, as soon as possible after a general election, the Chief Electoral Officer must report to the Speaker of the House of Commons on any amendments that, in his opinion, are desirable for the better administration of the Act. This important process allows the Chief Electoral Officer, as the administrator of the Act, to inform Parliament of any changes that could improve electoral administration and to correct any weakness identified in the current legislation.

However, given the complexity of the Act and of the processes it seeks to regulate, it is sometimes difficult to make concrete recommendations to Parliament about amendments to the Act without having had the opportunity to test the effectiveness of possible solutions to the problem that was identified. In some cases, recommendations are not put forward despite the existence of a clearly identified deficiency because it is difficult to determine whether the potential solution would indeed improve the situation. In other cases, a recommendation may be made that, if adopted, would necessitate subsequent legislative amendments, as the full impact of the recommendation had not been fully identified at the time that it was made. In light of this, it would be desirable to provide the Chief Electoral Officer with the authority to conduct pilot projects for testing possible amendments to the Act, while setting limits on this power.

Many complex recommendations could be improved by completing pilot projects. For example, the arrangements, roles and responsibilities at polling sites are cumbersome and somewhat ineffective, both from an administrative standpoint and from the point of view of electors, who must at times wait in long lines to vote at their assigned polling station. In New Brunswick, workers at central polling places are not assigned to a specific polling division. Electors can go to the polling station that has the shortest lineup, receive their ballot and exercise their right to vote. This is an interesting concept that offers many opportunities for electoral efficiency. However, it deviates from a long-established process and would need to be further evaluated in light of the specific requirements of the federal legislation as well as the diversity of voting circumstances across Canada’s regions. If the Chief Electoral Officer had the opportunity to test such a process in the context of a pilot project, any resulting recommendation would be much more detailed and useful to Parliament.

Another pilot project that could be undertaken by the Chief Electoral Officer to determine the validity of a potential recommendation pertains to the practice, in some countries around the world, of printing the photographs of candidates on the ballot paper or, as some have suggested, of posting these photographs in the polling sites. Since neither of these has ever been the practice in Canada, it is unclear whether the potential benefits to Canadian electors in ensuring that their vote reflects their true intention would justify the operational demands of these initiatives. A pilot project could help assess whether this is a tool that allows more electors to express their true voting intention.

The Ontario legislation gives the province's Chief Electoral Officer the authority, during by-elections, to test voting equipment, vote-counting equipment or alternative voting methods that differ from what is required by the province's electoral legislation.[1] A bill currently before the legislature would extend this authority to most of the voting processes established by the Act.[2]

The concept of pilot projects to test the effectiveness of new ideas, notwithstanding any provision in the Act, already exists in the Act. Indeed, section 18.1 allows the Chief Electoral Officer to test an electronic voting process in the context of by-elections or a general election. It requires the prior approval of the committees of the Senate and of the House of Commons that normally consider electoral matters.[3]

It is recommended that a similar process be adopted for more general testing of models that would help improve the operation of the Act. Pilot projects would be evaluated after being tested in one or more elections.

Pilot projects would be time-limited, in recognition of Parliament's constitutional role as legislator for Canada. They could be implemented only for the period required by the Chief Electoral Officer to evaluate the effectiveness of the measure being tested and to prepare a recommendation that would be supported by the data gathered during the testing.

Therefore, to allow such processes to be tested in the context of a general election, it is recommended that the maximum duration of a pilot project be set at five years. This would ensure that one general election is held during the period of the pilot project and would provide the Chief Electoral Officer with an additional year after the general election to finalize his recommendation. To ensure that the pilot project does not extend past the period required by the Chief Electoral Officer to formulate his recommendation, it is also suggested that within this five-year maximum duration, the pilot project would terminate one year after polling day for a general election during which it was actually implemented.

All pilot projects would require the approval of the committee of the House of Commons that is responsible for electoral matters before being tested.

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[1] *Election Act*, R.S.O. 1990, c. E.6, s. 4.1.

[2] Bill 231, *Election Statute Law Amendment Act, 2010*, s. 4.

[3] The concept of pilot projects also exists in other federal legislation. For example, the *Employment Insurance Act* (S.C. 1996, c. 23, s. 109 and 110) provides that, notwithstanding anything else in that Act, the Canada Employment Insurance Commission may, with the approval of the Governor in Council, test new processes using pilot projects. Whereas in the employment insurance field the pilot project is authorized through a regulation by the Governor in Council, such a process would not be consistent with the nature and structure of the *Canada Elections Act.* That is why, in section 18.1, the authority to approve the project was conferred on the committees of the House and of the Senate.

I.2 Appointment: Deputy Returning Officers, Poll Clerks and Registration Officers

The process for appointing deputy returning officers, poll clerks and registration officers should be amended so that the electoral district associations or, failing that, the registered parties, rather than the candidates, provide the returning officer with the names of suitable persons to be appointed to these positions, no later than the 28th day before polling day. This recommendation would make it possible to appoint these election officers in a timely manner and to train them earlier.

Before hiring certain election officers, returning officers must contact the candidates of the parties that finished first and second in the previous election to request that they provide a list of persons able to fill positions as deputy returning officers (section 34 of the *Canada Elections Act*), poll clerks (section 35) and registration officers (section 39). Furthermore, if the returning officer refuses to appoint a deputy returning officer or poll clerk recommended by a candidate, he or she is required to inform the candidate, who may recommend another person (section 37). Last, under section 36 and subsection 39(3), returning officers must wait until the 17th day before polling day to fill those positions using other sources. This is a cumbersome process that makes it difficult to appoint and train election officers within the tight deadlines of an election period.

The proportion of election officers recommended by candidates fell from 42 percent in the 39th general election to 33 percent in the 40th; that proportion was only 3 percent in British Columbia and 2 percent in Alberta.

The fact that candidates have until the 17th day before polling day to provide the names of persons to fill these positions before the returning officer can make the necessary appointments delays the hiring and training of an adequate number of election officers.

As indicated in the *Report on the Evaluations of the 40th General Election of October 14, 2008,* this represents a major challenge for the administration of the electoral process.

Analysis and discussion

In practice, it is very difficult to request a list of potential election officers from candidates before the 17th day before polling day because the deadline for the confirmation of the candidates is the 19th day before polling day. However, candidates whose nomination has been confirmed at this late date are often not in a position to provide these lists in the two days separating their confirmation and the deadline for the submission of the lists.

Were returning officers not required to solicit the names of potential deputy returning officers, poll clerks and registration officers from candidates, they could begin recruitment earlier and would have more time to adequately train new staff. This is what the Chief Electoral Officer recommended following the 37th general election.

A possible solution would be for the candidates of the parties who finished first and second in the last election to continue to provide the returning officer with the names of suitable persons to be appointed as deputy returning officers, poll clerks and registration officers. The candidates would still have until the 17th day before polling day to provide the lists. The returning officer could, however, start filling these positions as of the issue of the writs.

Another solution would be to ask the electoral district associations or registered parties as necessary, rather than the candidates, to provide the returning officer with the names of suitable persons for the aforementioned positions, no later than the 28th day before polling day.

Given that electoral district associations exist on a continuous basis, they would be in a position to provide these names. The Act could provide that, if there is no registered association, the party would have the right to provide lists of persons suitable for the positions. In our consultations with the political parties, they indicated to us that this was their preferred solution. We recommend this approach.

I.3 Additional Election Officers for Polling Sites

With the authorization of the Chief Electoral Officer, a returning officer should be able to appoint additional election officers, where necessary, to ensure prompt and efficient operations at the advance polls and on polling day. This recommendation would both improve service to electors by reducing congestion at polling sites and help avoid delays in counting the votes.

For several years now, the number of electors voting at the advance polls has been steadily increasing**.** Election officers who work at the advance polling stations must deal with a larger number of electors, unequally spread out over the three days of advance voting. Furthermore, advance polling procedures are administratively cumbersome. Poll clerks must not only cross out the names of electors on the voters list once the electors have received a ballot; they must also record the name and address of each elector who appears at the polling station to vote, the elector's sequence number on the revised list, the polling division number and whether the elector did indeed vote. Each elector must then sign the record opposite his or her name. Nevertheless, the *Canada Elections Act* provides for the appointment of fewer election officers for the advance polls than for polling day.

Some advance polling stations and ordinary polling stations, located primarily in high mobility areas or in new residential developments, are also likely to receive a significant number of electors who are not registered on the revised voters list or the official voters list, as the case may be. Often, these electors want to be registered on the voters list and vote at the same time. These additional electors, in numbers difficult to determine in advance, are likely to create congestion in one or more polling stations.

Analysis and discussion

During the 37th general election in 2000, 6 percent of valid ballots were cast at advance polling stations. This proportion rose to 9.2 percent during the 38th general election in 2004, 10.5 percent during the 39th general election in 2006 and 11 percent during the 40th general election in 2008. Thus, during the last election, 1,520,838 electors chose to exercise their right to vote at the advance polls.

The data from the 40th general election show that ordinary polling stations received an average of 188.2 electors, whereas advance polling stations received an average of 376.4 electors. This works out to an average of 125.5 electors per advance voting day.

However, certain electoral districts experienced a voter turnout rate that was significantly higher than the national average, especially since election day coincided with a Jewish religious holiday.[4] In the 13 electoral districts where a more significant percentage of the population was affected by the election date, the number of electors who voted in advance more than doubled (72,414, compared with 35,386 in 2006).

During the counting of the votes, deputy returning officers and poll clerks working in an advance polling station must also handle an average of twice as many ballots as deputy returning officers and poll clerks working in an ordinary polling station. Since the ballots cast at an advance polling station are counted only once the polls are closed on election day, a large number of ballots can cause delays in releasing the preliminary results.

With regard to the vote on polling day, the increased responsibilities of deputy returning officers and poll clerks over the past few years require adjustments to the number of election workers at polling places to ensure that the election process runs smoothly. For example, appointing central poll supervisors to handle exceptional or more complicated cases, and registration officers to register electors in locations that have only one or two polling stations, would make it possible to lighten the workload of deputy returning officers and poll clerks at those stations.

To date, two solutions have been considered. One of them is aimed exclusively at advance polling stations.

Solution 1: The solution used to facilitate the vote in certain advance polling stations

To take into account an expected increase in the number of voters at the advance polls in some electoral districts, and the need for more staff to inform electors of the new voter identification requirements being applied for the first time during the last general election, the Chief Electoral Officer adapted the Act under the authority provided by section 17. One adaptation allowed the creation of an additional poll clerk position to assist the deputy returning officer and the poll clerk at advance polling stations, while other adaptations allowed the creation, for advance polling purposes, of registration officer, information officer and central poll supervisor positions. A further adaptation allowed the creation of additional deputy returning officer and poll clerk

[4] *Report of the Chief Electoral Officer of Canada on the 40th General Election of October 14, 2008*, pp. 27, 29.

positions to work in pairs, assisting the deputy returning officer and the poll clerk in counting the votes for advance polls in which more than 750 electors voted.

In the electoral districts where it was used, this approach was effective. It made it possible to better inform electors of the new identification measures, reduce the waiting time for electors wishing to exercise their right to vote at an advance poll, and reduce the time it took to count the votes for certain advance polling stations that received a large number of voters. If this solution was adopted, it would be appropriate to amend the Act to integrate the adaptations made during the 40th general election. However, this solution does not resolve the issues relating to polling stations on election day.

Solution 2: A more general option that applies to both polling stations on election day and advance polling stations

Subsection 22(1) of the Act could be amended by the addition of a new category of election officers. These new election officers would be persons, appointed by the returning officer with the approval of the Chief Electoral Officer, whose presence at a polling site is necessary for the conduct of the vote, be it for an advance poll or on election day.

These officials would perform tasks assigned to them by the returning officer in accordance with the instructions of the Chief Electoral Officer. The tasks would be similar to those performed by the central poll supervisors, registration officers and information officers in polling sites with a larger number of polling stations. These election officers are needed in certain polling sites to facilitate advance polling, to handle the larger number of registrations on polling day and to lighten the deputy returning officers' and poll clerks' increasingly heavy workload.

Other provisions of the Act, including sections 135 and 283, would also need to be amended to allow the presence at the polling station or the advance polling station, or during the counting of the votes, of those election officers to whom the returning officer has assigned tasks, in accordance with the Chief Electoral Officer's instructions.

Such amendments would give the Chief Electoral Officer more flexibility to authorize returning officers to appoint additional election officers in certain polling stations or advance polling stations when the circumstances justify it.

This second solution, which is more flexible than the first, is the one that we are recommending.

I.4 Amending Other Federal Laws to Facilitate the Recruitment of Election Staff

In order to facilitate the recruitment of election workers and ensure that they are fairly compensated for their work, Parliament should consider amending the *Expenditure Restraint Act* to provide that it does not apply to election staff whose wages are set in the *Federal Elections Fees Tariff*.

There are increasing difficulties with hiring a sufficient number of election personnel to fill all the positions required to ensure that an election runs smoothly and according to the *Canada Elections Act*.

During the 40th general election, 236,380 positions were filled by election personnel. Filling the positions is becoming increasingly difficult for returning officers and Elections Canada.

One obstacle to recruitment is the fact that for many people – for example, retirees and employment insurance recipients – accepting employment as an election worker will reduce the benefits they are receiving. Moreover, the wages paid are not very high, especially considering the number of hours that some election workers are called on to work.

A number of solutions have been suggested in the past.[5] More recently, members of Parliament have proposed amending legislation in order to increase the incentive for people who are receiving employment insurance benefits or a Guaranteed Income Supplement, or can potentially receive such benefits, to work during an election period.[6] Some members of Parliament have also recommended that election staff be exempted from the public sector wage controls in the *Expenditure Restraint Act*.[7]

Employment insurance

With regard to employment insurance, one possibility would be to exempt claimants who accept employment as an election worker from the deduction applied to benefits in light of earnings received. The amount of the deduction depends upon a number of factors, such as whether the claimant is waiting to receive benefits or is currently in receipt of benefits. Claimants for whom the waiting period has passed can earn only 25 percent of their weekly benefit rate if that rate is $200 or more.[8] Allowing employment insurance claimants to keep all or a greater portion of the income earned as an election worker may increase their incentive to work during an election period.

A second possibility would be to provide that all hours worked by a person in connection with a federal election constitute insurable earnings for the purposes of employment insurance. At present, paragraph 8(1)(*c*) of the *Employment Insurance Regulations*[9] provides that the hours worked by a person who is employed in connection with an election or referendum are not insurable if that person is employed for fewer than 35 hours in any year and is not regularly employed by Elections Canada.

[5] Some possibilities are outlined in the report on the 40th general election.

[6] See discussion, Standing Committee on Procedure and House Affairs, February 24, 2009, and October 8, 2009.

[7] S.C. 2009, c. 2, Part 10. See discussion, Standing Committee on Procedure and House Affairs, October 8, 2009.

[8] *Employment Insurance Act*, S.C. 1996, c. 23, ss. 19(2).

[9] SOR/96-332.

The result is that for many election workers, such as those hired for polling day who work for fewer than 20 hours, the hours they work at the election are not insurable. It is suggested that if potential election workers were aware that their hours would count toward the minimum number of insurable hours required to receive benefits, they may be more attracted to these positions.

During consultations on this recommendation, officials in the Department of Human Resources and Skills Development noted that a pilot project currently underway provides that claimants can keep earnings up to 40 percent of their rate of weekly benefits during their benefit period (rather than 25 percent, as provided by the Act) before their benefits are reduced on account of those earnings.[10] The pilot project will run until December 2010.

With respect to the possibility of making all hours worked insurable hours, the Department's officials noted that while that approach could be advantageous for some workers, it must be understood that employment insurance premiums would then be deducted from the earnings paid to all election staff; this is not currently the case for the vast majority because they work less than 35 hours. Moreover, the regulations could not be amended until all the provincial, territorial and municipal electoral administrations to which they apply were consulted.

Guaranteed Income Supplement

Under the *Old Age Security Act*, the Guaranteed Income Supplement is reduced by one dollar for each two dollars of income received in a calendar year.[11] The Act provides a number of exemptions to this deduction, including a full exemption for the first $3,500 earned in a year, as well as exemptions for various types of income.[12] Consideration could be given to adding compensation paid to election staff to the types of exempted income.

As noted by other officials in the Department of Human Resources and Skills Development, which is also responsible for running that program, few election staff earn the maximum above which the Guaranteed Income Supplement is reduced. Moreover, it may be unfair to create an exemption for a higher amount that would apply to the few election staff who work in the office of the returning officer and receive compensation over $3,500, compared with individuals whose income level would be about the same but who would not be entitled to the Guaranteed Income Supplement or would be entitled only to a small benefit.

Expenditure Restraint Act

The *Expenditure Restraint Act* was put in place to limit public sector wage increases. It applies to election personnel and prohibits wage increases even if the duties of an election worker have changed. The Act also prevents the *Federal Elections Fees Tariff* from being modified to provide for increases in the fees paid at a level higher than that authorized in that Act even if such an increase is considered necessary to meet the demand for election staff, either because of increased duties or the inadequacy of the existing pay. Parliament may, therefore, wish to exempt election personnel from the scope of the *Expenditure Restraint Act*.

[10] *Employment Insurance Regulations*, s. 778, SOR/2008-257, s. 2.

[11] *Old Age Security Act*, R.S.C. 1985, c. O-9, ss. 12(1).

[12] *Old Age Security Act*, R.S.C. 1985, c. O-9, ss. 2(1) "income".

I.5 Candidates' Representatives: Appointment, Administration of Oath and Movement While Ballots Are Counted

A candidate's representatives should be sworn in by the central poll supervisor or by the deputy returning officer of the first polling station visited at a polling site. Once sworn in, representatives should be able to act in all the polling stations for which they have been appointed and which are located in that polling site, without having to take the oath again.

The Act should also be amended to enable the candidate's representatives to move between polling stations that are located in the same room during the counting of the ballots.

These measures would make the current rules more flexible and the electoral process more efficient.

Candidates are experiencing more and more difficulty in recruiting a sufficient number of representatives to act at polling stations. Many candidates now appoint a limited number of representatives for the entire electoral district. These representatives go from one polling site to the next, and within each polling site, observing the polling operations and collecting the statement of electors who have voted on polling day.

The current procedure for appointing representatives and administering the oath is rigid. Representatives appointed to more than one polling station must carry a separate written authorization signed by the candidate or the candidate's official agent for each polling station to which they are appointed. They must present this authorization and take a new oath at every polling station they visit for the first time.

Furthermore, the *Canada Elections Act* does not enable representatives to move from one polling station to another once the counting of the ballots is underway. A passport system valid for all polling stations located in the same room where the counting takes place is proposed to resolve this problem.

The representative could be sworn in by either the central poll supervisor, or by the deputy returning officer of the first polling station visited at a polling site, as the case may be. The election officer administering the oath would then complete the form – in particular, by signing it and by recording his or her name and position.

The duly completed appointment and oath form would be valid for all polling stations to which the representative is appointed and which are located in that polling site.

The Act should also enable representatives appointed to more than one polling station located in the same room to move from one polling station to another within that room during the counting of the ballots. At the closing of the poll, the door to the room where the counting takes place would be closed, and no one would be admitted until the ballots have all been counted.

These amendments would give candidates more flexibility in managing the work of their volunteers. The first amendment would also lighten the work of the deputy returning officers

when a new representative arrives. The second amendment would enable a candidate's representative to witness the counting of the ballots underway at polling stations located in the same room. However, it would not compromise the integrity of the vote, since any representative who leaves the room where the counting takes place may not be readmitted once the counting of the ballots is underway.

I.6 Revision of Preliminary Lists of Electors: By-election Superseded by a General Election

In the case of a by-election superseded by a general election, a mechanism should be provided whereby revisions of the preliminary lists of electors approved for the superseded by-election can be used for the purposes of the general election. This measure would spare election officers from conducting the same revision work twice and would thus improve the efficiency of the electoral process.

Under the *Canada Elections Act*, the preliminary lists of electors must be revised as soon as possible after the writ is issued.

The preliminary lists of electors are produced using the data in the National Register of Electors. The purpose of the revision is to add the names of electors who were not previously registered, to correct information on electors whose names are already on the lists and to delete the names of persons who should not be on the lists.[13] Under subsection 97(2) of the Act, all revisions of the lists must be approved by the returning officer or the assistant returning officer.

Returning officers transmit changes to the lists of electors made during the election period to the Office of the Chief Electoral Officer. As soon as possible after the election, the Chief Electoral Officer prepares the final lists for each electoral district.

The situation becomes more difficult with respect to changes made to the preliminary lists of electors when a by-election in an electoral district is superseded by a general election.

In that situation, the changes to the lists of electors approved during the revision process for the by-election are never incorporated into the National Register of Electors, as they would only have been incorporated after polling day. When the general election is called, the preliminary lists of electors are prepared again using the data in the Register, and, in most cases, the process of approving the changes requested during the by-election has to be done all over again.

[13] Section 99 of the *Canada Elections Act*.

This is because the Act provides no mechanism deeming that revisions approved during a by-election are approved for the purposes of the general election superseding the by-election. It is understood that the returning officer and the assistant returning officer have access to all changes made to the preliminary lists of electors during the by-election, but still, the approval process must be redone.

When the 40th general election was called, the revision was completed in the four electoral districts for which the by-election writs were superseded by the general election writs. The Chief Electoral Officer had to adapt[14] section 96 of the Act by reason of that exceptional circumstance so that all revisions of the preliminary lists of electors approved during the by-election were deemed to be approved as of the starting date of the revision of the preliminary lists of electors for the general election.

Such a procedure does not put an end to the revision but makes it possible to include in the revised lists the changes already made during the revision for the superseded by-election.

Preserving Trust

I.7 Custody of Ballot Boxes Following the Advance Polls

The returning officer should be authorized to recover ballot boxes left in the custody of one or more deputy returning officers when instructed to do so by the Chief Electoral Officer or when the returning officer feels that it would be advisable in order to better protect the integrity of the vote. This recommendation would enable returning officers to adopt an approach suited to the circumstances, with a view to preserving electors' trust in the electoral process and in the care given to their ballots from the time they are placed in the ballot box to the time the votes are counted.

Subsection 175(5) of the *Canada Elections Act* provides that: "In the intervals between voting hours at the advance polling station and until the counting of the ballots on polling day, the deputy returning officer shall keep the sealed ballot box in his or her custody."

Presently, there is no provision in the Act to allow the recovery of ballot boxes in the custody of deputy returning officers when the returning officer or the Chief Electoral Officer has reason to believe that it would be more appropriate to not leave one or more ballot boxes in the custody of one or more deputy returning officers.

During the 40th general election, the Chief Electoral Officer had to adapt section 175 of the Act to authorize the returning officer to recover, with staff assistance, ballot boxes in the custody of deputy returning officers.[15]

[14] Under the power to adapt set out in subsection 17(1) of the Act.

[15] The *Report of the Chief Electoral Officer of Canada on the 40th General Election of October 14, 2008*, contains, on p. 28, a description of the events that led to the recovery of some ballot boxes in the electoral district of Québec.

Analysis and discussion

As the size of electoral districts in Canada varies, the proposed solutions must reconcile the obligation to ensure the integrity of the vote, on the one hand, with the need for flexibility to manage the logistics of storing and transporting the ballot boxes safely and efficiently, on the other. Two solutions are analyzed in light of these factors.

Solution 1: The approach used in Nova Scotia and Quebec

Provincial electoral law in Nova Scotia provides that, on the close of an advance poll, the deputy returning officer shall deliver the ballot box to the returning officer. The ballot box remains in the custody of the returning officer until the counting of the votes on election day. The law also provides that the returning officer may direct the deputy returning officer to retain custody of the ballot box. The general rule, therefore, grants custody of the ballot box to the returning officer, while the exception grants custody to the deputy returning officer.

Somewhat similarly, Quebec's provincial electoral law states that after each day of advance polling, the deputy returning officer returns the ballot box to the returning officer or to the individual designated by the returning officer.

As is the case in Nova Scotia, the returning officer generally maintains custody of the ballot box. The chief electoral officer of Quebec requests that returning officers store the ballot boxes in their offices, but provides exceptions for electoral districts that cover a wide territory. In those electoral districts, the returning officer designates another election officer, such as an assistant returning officer, to maintain custody of the ballot box or boxes in a centralized location.

The returning officer must also manage and document exceptions in cases where the ballot box is kept in the custody of the deputy returning officer.

In this solution, the risk that someone will try to alter the results of the vote is low. However, having all the ballot boxes in one place and transporting a large number of ballot boxes in one vehicle increases the risk of significant loss in the event of theft or natural disaster.

Such a solution is also harder to apply in large electoral districts,[16] where great distances separate the polling stations from the office of the returning officer or the additional assistant returning officer. In these large electoral districts, it would be practically impossible for the returning officer to recover the ballot boxes in the intervals between the various advance polling days.

This solution can be adjusted, for example, by granting custody of the ballot box to the deputy returning officer in the intervals between the advance polling days. However, this adjustment does not change much in the way of risks associated with transporting and storing ballot boxes in a central location. In addition, such a solution would be easily applied only in urban areas.

[16] The electoral districts of the Northwest Territories, Yukon and Nunavut cover an average of 1,307,246 km^2. Certain federal electoral districts in the provinces also cover large areas. For example, the electoral districts of Churchill, Manicouagan and Skeena—Bulkley Valley cover an average area of 345,698 km^2.

Solution 2: The solution used during the 40th general election

A second solution consists of making permanent the temporary procedure implemented through adaptation during the 40th general election. The deputy returning officers would keep the sealed ballot boxes in their custody in the intervals between voting hours at the advance polls and up to the counting of the votes on election day. However, the returning officer would be authorized to recover ballot boxes in the custody of one or more deputy returning officers when the returning officer believes that it is important to do so to better ensure the security of the ballot boxes.

This solution is in line with the historical continuity of federal elections in Canada. The concept of storing election materials at the home of a deputy returning officer was, in fact, introduced into electoral law in the second half of the 1940s.

Presently, deputy returning officers are under oath to ensure the security of the voting materials in their trust and are required to provide the returning officer with contact information so that materials can be recovered whenever necessary.

The risk associated with this solution is shared equally among deputy returning officers who have custody of a ballot box. Should a ballot box be lost, only the votes cast by a limited number of voters would be affected. Measures enabling voters in the affected polling division to exercise their right to vote again could be considered and implemented through adaptations to the provisions of the Act.

This solution also enables returning officers to react quickly to recover a ballot box when they have reason to believe that the integrity of the electoral process could be compromised.

This is the solution we are recommending.

I.8 Protection of Electors' Personal Information

The date of birth of electors should be removed from the revised list of electors and from the official list of electors used by the deputy returning officer to conduct the vote. This would reduce the risk of misuse of this piece of personal information, which is not required for voter identification purposes.

In addition, the definition of "election documents" should be amended to include all forms used at the polling station to collect personal information on an elector. These forms would thus benefit from the increased protection afforded election documents.

These two changes would help protect electors' personal information.

The importance of protecting electors' personal information is the principle that links the two recommendations included in this section. With regard to the first recommendation, it should be noted that in her 2009 report entitled *Privacy Management Frameworks of Selected Federal Institutions*, the Privacy Commissioner of Canada reiterated her concern about the inclusion of the date of birth on the lists of electors used by election officers on polling days.

Analysis and discussion

Date of birth on the list of electors provided to the deputy returning officer

An Act to amend the Canada Elections Act and the Public Service Employment Act, S.C. 2007, c. 21 (Bill C-31) amended section 107 of the *Canada Elections Act* by replacing subsections 2 and 3 of that section. The purpose of that amendment was to add to the revised list of electors and the official list of electors, used by the deputy returning officer, the date of birth of each elector appearing on the lists.

At the same time, the Act was also amended to set out a new procedure for verifying the identity and the address of an elector who comes to vote at a polling station. That procedure contains no provision for verifying the date of birth. At most, if there are reasonable doubts as to whether an individual who intends to vote is, in fact, eligible, the deputy returning officer, the poll clerk, the candidate's representative or the candidate may ask that individual to swear a prescribed oath. The individual will be admitted to vote only if he or she swears the oath.

There is, therefore, no reason for the elector's date of birth to be contained on the lists used by the deputy returning officer to conduct the vote. The date of birth is sensitive personal information, the misuse of which can have adverse consequences, including identity theft. Such incidents are likely to weaken Canadians' trust in the integrity of our system and could make electors hesitant to register on the Register of Electors. To increase the protection of personal information entrusted to the Chief Electoral Officer, it is recommended that section 107 be amended to remove the obligation to indicate each elector's date of birth on those lists.

Definition of "election documents"

Personal information required to be collected at polling stations under the Act may have to be made public by the Chief Electoral Officer.

In some circumstances, deputy returning officers and poll clerks are required to collect personal information regarding electors. That information is entered on forms as required by the Act. The following forms are some examples:

- Record of Electors Voting by Registration Certificate
- Record of Electors Requiring an Oath
- Record of Electors in Whose Names Someone Has Already Voted
- Record of Electors Voting by Transfer Certificate

These forms all contain personal information within the meaning of section 3 of the *Privacy Act*.

To ensure the transparency and integrity of the electoral process, the *Canada Elections Act* establishes two categories of documents. By defining the expression "election documents" in subsection 2(1), the Act ensures that this category of document is treated differently.

Indeed, section 540 sets out strict conditions for the retention of election documents. The objective is to keep in a safe place all documents that validate the integrity of the electoral process and confirm the election results. Only certain persons may have access to election documents, including the Chief Electoral Officer, the Commissioner of Canada Elections and a judge of a superior court. The documents protected under section 540 include the writ, nomination papers, ballots and the list of electors used at a polling station.

The forms that are used at polling stations and that contain personal information on electors, however, are not protected under section 540 as they do not fall under the definition of "election documents." Under section 541, "all other reports or statements, other than election documents" constitute public records. In the law's current state, therefore, a form that is used at the polling station and that contains personal information on an elector may be the subject of a request for release under section 541 of the Act. As a result, there is a risk that the Chief Electoral Officer will be required to disclose personal information that would otherwise be protected.

All personal information collected at polling stations serves to ensure the integrity of the voting process. It should, therefore, receive the full protection accorded to election documents under the Act and be retained with them.

To achieve this objective, the definition of "election documents" could be amended to specify each form used at polling stations that must receive the protection accorded under section 540. That solution is cumbersome, however, and would complicate future updating of the Act or administrative practices.

It is recommended instead that the definition of "election documents" be amended to include, generally, forms used to collect personal information on electors at polling stations. This solution would ensure the longer-term protection of personal information collected at polling stations, while allowing for the evolution of the format and content of the forms.

I.9 Partisan Signs Outside Polling Sites

It should be prohibited to post or display material that could be taken as promoting or opposing a party or the election of a candidate on or within 100 metres of premises in which a polling site or office of the returning officer is located.

Election officers should also be authorized to take down or have taken down any posted or displayed material that contravenes the Act.

These measures would enhance the confidence of electors, who would be afforded an impartial environment near the polling site, devoid of partisan signs.

Paragraph 166(1)(*a*) of the *Canada Elections Act* provides the following:

166. (1) No person shall (*a*) post or display in, or on the exterior surface of, a polling place any campaign literature or other material that could be taken as an indication of support for or opposition to a political party that is listed on the ballot under the name of a candidate or the election of a candidate; […] (Emphasis added)	**166.** (1) Il est interdit : *a*) d'afficher ou d'exhiber à l'intérieur d'une salle de scrutin ou sur les aires extérieures de celle-ci du matériel de propagande qui pourrait être tenu comme favorisant un parti politique mentionné sur le bulletin de vote sous le nom d'un candidat ou l'élection d'un candidat, ou s'opposant à un tel parti ou à l'élection d'un candidat; [...] (Notre soulignement)

This provision of the Act is essential: it enables the creation and maintenance of a neutral zone around polling sites, where electors may exercise their right to vote without undue influence.

Still, during each election, the Chief Electoral Officer receives many questions regarding the interpretation that should be given to the expression "on the exterior surface [of] a polling place."

Some individuals interpret that expression broadly, extending the prohibition to the entire site on which a polling site is located.

Others interpret it quite strictly, limiting the prohibition to the exterior walls of a polling site. From this perspective, posting a banner or sign on a removable medium a few centimetres from the exterior wall would be acceptable.

These different interpretations lead to the inconsistent application of the provision throughout the country.

With regard to partisan signs near the office of the returning officer, the Act does not address this matter at present. The returning officers, who must ensure that they protect their impartiality and neutrality, have to rely on the goodwill of candidates to prevent partisan signs from being posted near their office.

Analysis and discussion

Partisan signs near polling sites

Prohibiting signs from being posted near a polling site is not new.

The proposed amendment is aimed only at clarifying this prohibition, which would now apply to the entire site of the polling place as well as to any area within 100 metres of such a place that may be seen from its entrance (for example, a sign posted on the other side of the street facing the entrance of the polling site or a sign posted on a vehicle chartered to transport electors that would be parked across from the polling site).

Admittedly, this is a restriction of the freedom of expression guaranteed by the *Canadian Charter of Rights and Freedoms*. However, in our view, this restriction is justified in a free and democratic society. The prohibition applies only to the three advance polling days and to polling day. The prohibition is also limited geographically. Last, the proposed extension of the prohibition will ensure a neutral area around polling sites, where electors will be able to make their choice free of any influence.

Partisan signs near the office of the returning officer

Prohibiting signs from being posted near the office of a returning officer would be new. It would enable a neutral area to be created around these offices, protecting returning officers from the appearance of bias that could arise from having a partisan sign posted near their office. In addition, since electors are authorized to vote at these offices throughout the election period under the Special Voting Rules, this is a logical extension of the prohibition already made under paragraph 166(1)(*a*).

This restriction would apply throughout the election period, but in a reduced area at the electoral district level.

Powers of election officers

The Act should also provide that election officers be authorized to take down or have taken down any campaign sign or other such material that is posted or displayed in contravention of the provision.

Increasing Accessibility

I.10 Registration of Electors by Internet

To facilitate the registration of electors over the Internet, the Chief Electoral Officer should be authorized to accept an appropriate mode of authentication and to determine the manner in which electors would establish their identity and residence electronically. In addition, the Chief Electoral Officer's authority should be clarified as it relates to the retention of information he receives from sources authorized under the Act concerning persons 18 years of age or older who do not appear in the Register. Retention of this information would enable consenting, qualified electors to register electronically.

This recommendation would improve the accessibility of the electoral process by offering electors an additional service that is faster and more readily available. It would also improve the quality of the information contained in the lists of electors.

Registering electors for the vote is an important component of the electoral process. In the 1990s, Canada moved from a system that created lists of electors based on door-to-door enumeration after the writ for an election had been issued to the establishment of a permanent register of

electors from which preliminary lists are drawn and then revised and used during an election.[17] Statutory provisions require the Chief Electoral Officer to update the Register of Electors with information from various sources. While the system has generally worked well since its adoption,[18] it does not take full advantage of advances in the area of Internet communications.

Implementing a comprehensive system of on-line registration would enable electors to register and would provide them with the ability to confirm, update or change their registration information. It is particularly useful for young people. As noted by Professor Keith Archer, "In view of the fact that young citizens tend to use the Internet more, on-line voter registration systems are likely to be particularly effective in increasing registration among youth."[19]

Of course, such an initiative must ensure that the integrity of the Register of Electors is maintained, and it must be done within the legislative framework set out in the *Canada Elections Act*. Since the intent is to allow on-line registration and corrections both during and between elections, the system would permit that the information provided on-line by electors be used to update the Register between elections, as well as the lists of electors prepared by returning officers in the electoral districts during elections.[20]

However, the implementation of an on-line registration system requires some adjustments to the Act.

Analysis and discussion

Alberta and British Columbia offer their electors the option to register on-line as well as to verify and update their registration information. Similarly, Quebec has a system that allows electors to verify their information on-line during an election. Moreover, Elections Ontario is currently developing an on-line voter registration system.

Certain provisions of the Act constitute an impediment to the full implementation of a comprehensive electronic registration system. For example, while there is no explicit requirement in section 101 to obtain an elector's signature during revision of the lists of electors in an election period – including the registration of new electors – and thus the Act appears to be flexible enough to allow an electronic registration system, the provisions that deal with registration between elections require that, to register, a person must certify his or her qualification as an elector with a signature (section 49). Similarly, the provision that allows the Chief Electoral Officer to request that an individual confirm or correct the information received

[17] The National Register of Electors was created after the adoption of Bill C-63 (S.C. 1996, c. 35).

[18] The Register currently includes 93 percent of eligible electors, 84 percent of whom are listed at their current address.

[19] "Increasing Youth Voter Registration: Best Practices in Targeting Young Electors," *Electoral Insight*, Vol. 5, No. 2, July 2003, p. 29.

[20] This is, to a certain extent, different from what occurs in the two provinces that allow on-line registration since there is no revision of the list of electors permitted during an election in Alberta, and such revisions are only allowed in the first week of the 28-day election calendar in British Columbia.

from an authorized source, and provide signed certification of the individual's qualification as an elector in order to be added to the Register (section 48), constitutes an impediment to on-line registration.

While a signed certification may be appropriate when a paper process is contemplated, there are other ways of having individuals validate their qualification as electors that are more compatible with an electronic process. Of note, electors in both British Columbia and Alberta can register on-line without signing a certification. Consequently, it is recommended that the requirement in subsection 49(1) for a signed certification in the case of a request regarding the National Register of Electors[21] be reconsidered.

Another statutory obstacle to the implementation of an electronic registration system is the definition of satisfactory proof of identity and residence found in subsection 2(3). Authentication of the elector's identity will unquestionably be a key element in ensuring trust in the integrity of the new system. Sections 101 and 49 both require an elector to provide satisfactory proof of identity. This requirement is defined as follows in the Act:

2. (3) For the purposes of this Act, satisfactory proof of an elector's identity and satisfactory proof of residence are established by the documentary proof of the elector's identity and residence that is prescribed by the Chief Electoral Officer.	**2.** (3) Pour l'application de la présente loi, la preuve suffisante d'identité et la preuve suffisante de résidence sont établies par la production de pièces d'identité déterminées par le directeur général des élections.

While the English version is written in a manner that could allow an elector to prove identity and residence with reference only to one particular document, the French version appears to be more explicit in requiring "la production de pièces d'identité." If the identification document itself must be produced, then it will be impossible to devise an electronic registration system similar to the one used in both British Columbia and Alberta, where electors enter their driver's licence number to establish identity.[22] It is, therefore, recommended that the requirement for "documentary proof" and "la production de pièces d'identité" as prescribed by the Chief Electoral Officer be removed from subsection 2(3) and that satisfactory proof of one's identity and residence instead be established in the manner determined by the Chief Electoral Officer.[23]

Another difficulty in implementing an electronic voter registration system could arise if Elections Canada were unable to retain information it receives on individuals who are not registered electors. Indeed, it would then be impossible for the agency to retain any information that could later be used by these individuals for authentication purposes when they register on-line.

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[21] See also recommendation III.3, Electronic Signatures and Transactions – General Clause.

[22] Alternatively, British Columbia accepts the last six numbers of an elector's social insurance number for authentication, while Alberta accepts the number on the individual's Alberta provincial identification card.

[23] This change would not affect the identification requirements for registering and voting at a polling station. In fact, there are specific provisions describing the acceptable pieces of identification for those purposes. See section 143, as well as sections 161 and 169 that refer to it.

Elections Canada believes that the Act currently provides the authority for the Chief Electoral Officer to retain information about individuals 18 years of age or older who are not registered, when that information comes from one of the authorized sources mentioned in section 46 of the Act. Indeed, section 48 provides that the Chief Electoral Officer may contact such individuals to ask that they confirm the information that the Chief Electoral Officer has about them and to certify their qualification as electors if they wish to become registered.

That said, the wording of paragraph 46(1)(*b*) and section 48 could be interpreted as meaning that the Chief Electoral Officer has the ability to ask electors only whether the information received about them from an authorized source is accurate and to certify their qualification as electors if they wish to register.

If such an interpretation of the current provisions were adopted, and the Chief Electoral Officer were not explicitly authorized to retain information about individuals (as opposed to electors), then it would be difficult to justify the retention of any information received from update sources. Indeed, it would be impossible to determine in advance whether the information related to a person who qualified as an elector.

It should be noted that allowing Elections Canada to retain additional identifier information about unregistered individuals to facilitate their subsequent on-line registration was recommended in *Completing the Cycle of Electoral Reforms – Recommendations from the Chief Electoral Officer of Canada on the 38th General Election*.[24] The Standing Committee on Procedure and House Affairs supported this recommendation in its report *Improving the Integrity of the Electoral Process: Recommendations for Legislative Change*.[25] The recommendation to also authorize the retention of additional identifier information seeks to clarify the existing authority to retain data that is included in the Register upon an elector's registration.

It is therefore recommended that the Act also be amended to clarify the Chief Electoral Officer's authority to retain information about unregistered individuals who are 18 years of age or older if that information has been provided by one of the authorized sources for updates mentioned in section 46 (for instance, provincial registrars of motor vehicles).[26]

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[24] Recommendation 2.8, p. 57: "The ability to refer to such additional identifier information would also likely be of value to electors in any on-line registration and updating process that Elections Canada may develop in the future, as was done in British Columbia leading up to its recent election." The recommendation was to allow the Chief Electoral Officer to retain identifier information in addition to information that subsection 44(2) of the Act provides explicit statutory authority to retain in the Register – namely, an individual's name, sex, date of birth, civic address and mailing address.

[25] The Committee's 13th report, presented to the House of Commons in June 2006. In its response, the Government also supported this recommendation.

[26] This information would not be included in the Register; it would be retained to validate the elector's identity once he or she applies for registration. Section 4 of the *Privacy Act* would continue to apply. This provision prevents a government institution from retaining personal information unless it relates directly to one of its operating programs or activities. In a February 2009 audit report, the Privacy Commissioner commented that, in her view, Elections Canada does not have the authority to retain information about 16- and 17-year-old drivers since these individuals are too young to vote and their information is not directly related to an Elections Canada operating program. Elections Canada no longer plans to collect information on young people under the age of 18. In the case of adults whose citizenship is unknown, Elections Canada retains the information with a view to adding new electors to the Register, in accordance with the Act, once their citizenship has been confirmed.

I.11 Vouching

Electors should be able to vouch for more than one member of their immediate family (for example, a spouse, a parent, a grandparent or an adult child, grandchild or sibling). An elector vouching for more than one family member would be required to take an oath confirming the family relationship that exists with each person for whom he or she vouches. This exception to the prohibition against vouching for more than one person at an election would apply only to family members living at the same address as the voucher. It would make the voting process more accessible to members of the same family and would be of particular benefit to young people and Aboriginal families.

Vouching is the option that the *Canada Elections Act* provides for electors without the required pieces of identification to prove their identity and address before registering to vote at a polling station or before voting. However, restrictions on vouching, which were adopted to protect the integrity of the vote, diminish the usefulness of this option in some circumstances.

For instance, in the case of families who have recently moved, a person with the necessary pieces of identification[27] must choose a single family member for whom to vouch. Finding another voucher outside of the household may be a challenge for new residents of a polling division since the Act states that vouching must be done by an elector who is registered to vote in the same polling division.

Allowing an elector to vouch for more than one family member would be a partial solution to this problem, particularly for families with young adults, who do not have many pieces of identification with which to prove their residence. It could also help address the challenges experienced by Aboriginal electors during the 40th general election. In addition, this measure is secure and efficient.

Analysis and discussion

Vouching consists of having one elector who is registered to vote in the same polling division as another elector – and who has established his or her identity and residence by showing the required pieces of identification – confirm under oath the identity and residence of that other elector, who must also swear an oath.

When the new Act was adopted in 2000, it permitted vouching only in the context of polling day registration. At that time, to address concerns about the risk of voter fraud,[28] a prohibition was also included against vouching for more than one elector at the same election. The vouching process then in existence did not require that the elector vouching for another elector provide documentary proof of his or her identity or residence.

[27] For example, a lease or mortgage agreement to prove residence.

[28] See the review of section 161 of Bill C-2 by the Standing Committee on Procedure and House Affairs on December 1, 1999.

When *An Act to amend the Canada Elections Act and the Public Service Employment Act*[29] (Bill C-31) was adopted in 2007, the vouching process as it then existed in the context of polling day registration was used as a model for new vouching mechanisms, this time applying to registration at an advance poll as well as to voting itself. The vouching process was modified in two ways: first, the person doing the vouching must prove his or her identity and residence by showing the required identification; and second, someone who was vouched for at an election could not thereafter vouch for another person at the same election ("serial vouching"). The prohibition against multiple vouching is maintained for polling day registrations and is also applied to the procedures developed for voting and for registration at an advance poll.

Since electors who vouch for another must now provide documentary proof of their identity and residence before they may act in that capacity, the concerns expressed by parliamentarians in 2000 that multiple vouching could compromise the integrity of the electoral process may no longer be as pressing. There was concern at the time that someone could vouch for another by simply pretending to be an elector whose name was found on the list of electors for the polling division. However, proof of identity and residence is now required since the adoption of the 2007 amendments.

Furthermore, since they must establish their identity and residence before vouching, electors who vouch for another can now be held accountable, in a case of voter fraud, for having taken a false oath as to the person's identity or residence. More specifically, it is possible for the Commissioner of Canada Elections to investigate any allegation of wrongdoing with respect to vouching by contacting the elector who acted as the voucher. This also increases the chances of identifying and charging the person who registered or voted fraudulently with the help of the elector who acted as the voucher.

If Parliament is reluctant to remove the prohibition against multiple vouching altogether, the current requirement to prove identity and residence before vouching for another elector would at the very least support revisiting the scope of the prohibition. Indeed, since the vouching process itself was made more stringent in 2007, multiple vouching could be justified in certain circumstances.

In British Columbia, another province where the person vouching for another must provide documentary proof of his or her identity and residence, multiple vouching is allowed in specific circumstances. In fact, an elector may vouch for more than one person if they are members of his or her immediate family (defined as a spouse, a parent, a grandparent or an adult child, grandchild or sibling). An elector who is authorized by legislation or common law to make decisions about the personal care of one or more other persons may also vouch for them.[30] In Quebec, the legislation also authorizes multiple vouching for members of an elector's family.[31]

[29] S.C. 2007, c. 21.

[30] *Election Act*, RSBC 1996, c. 106, s. 41.1 and 96.

[31] *Election Act*, R.S.Q., c. E-3.3, s. 335.2 *b*).

At the federal level, while the measures ushered in by the 2007 legislative amendments are working fairly well, it may be desirable to improve the system by allowing electors to vouch for more than one person if the latter are members of their immediate family, as is currently done in British Columbia. This would spare a parent with two children of voting age who recently moved into a new polling division from having to choose which of the two the parent will help to register and vote.

An exception could thus be made to allow the person in the family who has the required identification to vouch for all other members of the immediate family. This person could be required to sign a written oath beforehand, confirming his or her relationship with each person being vouched for. In case of allegations of wrongdoing, it would be possible for the Commissioner of Canada Elections to investigate.

This exception to the prohibition against multiple vouching would also be especially useful in addressing the challenges experienced by Aboriginal electors who, in the 40th general election, were less likely to have brought the required pieces of identification with them to the polls.[32]

As a means of maintaining public confidence in the integrity of the process, this exception to the prohibition against vouching for more than one person could be limited to vouching for members of the immediate family who live at the same address as the elector doing the vouching.[33]

The option of further restricting multiple vouching for one's immediate family members by authorizing only vouchers already registered on the voters list to vouch for more than one member of their immediate family was considered, but rejected. Given that an unregistered voucher must provide proof of identity and address to register on polling day and act as voucher, the same safeguards for the integrity of the vote would be in place regardless of whether the vouching elector was already registered. Furthermore, it would make the exception unavailable to families who had recently moved into a new polling division. Such families constitute one of the target groups for which the exception is likely to offer the greatest benefit, as noted earlier.

[32] According to the *Report on the Evaluations of the 40th General Election of October 14, 2008*, 11 percent of Aboriginal electors did not bring the required identification with them. See pp. 9–10 of that report.

[33] The Act currently allows vouching for another elector living in the same polling division.

II – Issues Relating to Political Financing

Introduction

The purpose of the federal political financing regime is to ensure the integrity, fairness and transparency of the electoral process in such a way as to build public trust while promoting participation. This regime has become increasingly complex, however, as a result of numerous reforms, the latest of which were effected in 2003 and 2006. The different aims of the reforms have at times affected the consistency of the regime and created challenges in the areas of clarity and compliance with the *Canada Elections Act*.

The recommendations in this chapter reflect an approach that seeks to balance two key objectives: to improve the integrity and consistency of the regime and to reduce the administrative burden on the entities governed by the Act.

On the one hand, we see a need in some respects to improve control measures and to put forward administrative compliance mechanisms that would complement the penal measures already set out in the Act. In particular, we are recommending changes to the review process for political parties' electoral campaign returns that would require parties, upon the request of the Chief Electoral Officer, to provide explanations and documentary evidence in support of their electoral expenses returns (recommendation II.1). The purpose of this recommendation is to strengthen the integrity of the regime and accountability in the management of public funds. We are also recommending, in the case of candidates and parties that exceed their spending limit, a reduction of the amount of their election expenses reimbursement equal to the amount by which the spending limit was exceeded (recommendation II.2). This administrative measure, which is already in use in some provinces, would allow for more effective penalties to enhance the fairness of the process.

On the other hand, it is evident that the regime has become increasingly onerous with each new set of reforms. It generates costs and inefficiencies for both the political entities and Elections Canada without really ensuring that the objectives of the Act are achieved. This suggests a need to reduce the regulatory burden while preserving the underlying values of integrity and transparency. It is in this spirit that we have addressed reform of the unpaid claims regime (recommendation II.8). We are also recommending a review of the requirements under the Act with regard to the opening of bank accounts and the filing of auditors' reports for campaign returns and their subsequent updates (recommendations II.10, II.12 and II.13).

On the whole, these recommendations are intended to enhance the regime's accessibility while maintaining the integrity of the political financing rules and helping to more effectively achieve fairness and transparency.

Maintaining the Integrity of the System

II.1 Documents Supporting the Parties' Financial Returns

To ensure transparency and improve financial reporting related to the public funding of political parties, the Chief Electoral Officer should be able to request that registered political parties provide any documents and information that may, in the Chief Electoral Officer's opinion, be necessary to verify that the party and its chief agent have complied with the requirements of the Act with respect to the election expenses return.

The *Canada Elections Act* provides a set of rules to ensure the financial transparency of the various regulated political entities: political parties, candidates, electoral district associations, nomination contestants and leadership contestants. Registered political parties are required to submit a financial transactions return every year (section 424), a quarterly return on contributions[34] (section 424.1) and an election expenses return after each general election (section 429). The Chief Electoral Officer has the mandate of ensuring that those returns comply with the requirements of the Act. However, despite these legislative requirements and the substantial public subsidies attached to them, the Chief Electoral Officer does not have any real means to ensure that parties' returns meet the requirements of the Act. This situation is particularly problematic when it comes to the election expenses return as parties may obtain a reimbursement for these expenses. Indeed, unlike candidates and other regulated entities, political parties are not required to provide any documentary evidence to support their returns. This inconsistency in the Act undermines considerably the transparency of political parties and the accountability of the Chief Electoral Officer, in terms of his audit capacity.

Analysis and discussion

Registered parties are eligible to sizeable public subsidies, partly in the form of a 50-percent reimbursement of their election expenses.[35] For that reimbursement to be paid to a party, the Chief Electoral Officer must provide a certificate to the Receiver General attesting that he is satisfied that the party has complied with the reporting requirements of the Act (section 435). Following the 40th general election, $29,182,448.51 was paid to the five parties that qualified for this reimbursement.[36]

Despite the considerable funding given to registered parties, the Chief Electoral Officer does not receive any documentary evidence of the expenses reported in the election expenses return. Nor does the Act provide the Chief Electoral Officer with the authority to request that a party provide

[34] For those parties eligible to receive the quarterly allowance.

[35] The reimbursement is only available to parties that obtained 2 percent of the valid votes cast in the election or 5 percent of the votes in the electoral districts in which they ran candidates.

[36] Eligible parties are also entitled to a quarterly allowance based on the number of votes received in the preceding general election. This allowance can be issued only if the party has submitted its annual returns, its quarterly returns and, if applicable, its election expenses return (section 435.02). In 2009, $27,174,226 was paid to the five eligible parties.

such evidence. Therefore, he has no means to verify the accuracy of the reported expenses on which the reimbursement is based. In comparison, the election laws of five provinces stipulate that documentary evidence must accompany either the party's financial return or its election expenses return, or both.[37] Furthermore, the chief electoral officers of all the provinces have the authority to request financial information or documentary evidence from the parties and to inspect their books in the party's own offices.[38] In most cases, the latter authority is carried out directly by the chief electoral officer or his staff; in a few cases, a warrant from a court is required in advance.[39]

The expenditure of public funds without supporting documentation is also out of step with procedures that exist with respect to other federal spending. For example, with respect to Government of Canada payments to individuals or entities that do not result in the acquisition of goods, services or assets (known as transfer payments), there are government policies in place requiring departments and agencies to exercise financial oversight and conduct periodic reviews to ensure accountability for the funds paid.[40] Without the capacity to have access to documents for verifying the parties' reported election expenses, Elections Canada cannot exercise similar oversight to ensure accountability and transparency.

The inability to verify a party's return also has serious repercussions for Elections Canada's ability to administer other aspects of the Act as intended by Parliament. For example, section 432 of the Act allows the Chief Electoral Officer to make or request corrections to a party's return provided to him under section 424 or 429. The intent of this power is plainly to allow Elections Canada to ensure that the return correctly reflects a party's financial transactions so that accurate information is available to the public, thereby furthering the Act's underlying goal of transparency. However, the inability of the Chief Electoral Officer to request that documentary evidence be provided greatly inhibits his ability to conduct such a review and to make or request the necessary corrections.

This lack of ability to verify parties' financial transactions with respect to an election contrasts with the law applicable to other entities governed by the Act. Candidates, leadership contestants and nomination contestants all must provide, with their returns, documentary evidence of the expenses set out in those returns.[41] If the Chief Electoral Officer judges that the documents

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[37] These provinces are Quebec, Saskatchewan, New Brunswick, Nova Scotia and Prince Edward Island. See *Election Act 1996*, S.S. 1996, c. E-6.01, s. 251; *Election Act*, R.S.Q., ch. E-3.3, sec. 434; *Political Process Financing Act*, S.N.B. 1978, ch. P-9.3, sec. 82; *Elections Act*, R.S.N.S., c. 140, s. 184; *Election Expenses Act*, R.S.P.E.I. 1988, c. E-2.01, s. 20.

[38] *Election Act*, R.S.B.C., 1996, c. 106, s. 276; *Election Finances and Contribution Disclosure Act*, R.S.A. 2000, c. E-2, s. 4 and 5; *Election Act, 1996*, S.S. 1996, c. E-6.01, s. 266; *Elections Finances Act* C.C.S.M., c. E32, s. 57; *Election Finances Act*, R.S.O. 1990, c. E.7, s. 6 and 7; *Election Act*, R.S.Q., c. E-3.3, s. 118; *Election Expenses Act*, R.S.P.E.I. 1988, c. E-2.01, s. 5 and 6; *Elections Act, 1991*, S.N.L. 1992, c. E-3.1, s. 274 and 275.

[39] *Elections Finances Act* C.C.S.M., c. E32, s. 70.1; *Political Process Financing Act*, S.N.B. 1978, ch. P-9.3, sec. 18; *Elections Act*, R.S.N.S., c. 140, s. 193.

[40] See the Treasury Board's *Policy on Transfer Payments.*

[41] See subsections 435.3(3), 451(2.1) and 478.23(3).

provided are not sufficient, he may request that the candidate or contestant file additional documents.[42] The lack of a similar ability in respect of parties constitutes an inconsistency in the Act.[43]

Party returns, as those of other entities, including candidates, are reviewed by an external auditor hired by the entity. The auditor must provide an audit report on the return and, if the return does not fairly reflect the information in the financial records on which it is based, must make a statement to that effect.[44]

However, while the external auditor's report is important, it is not a compliance audit. The role of the auditor hired by the party is to ensure that the election expenses return fairly reflects the information contained in the financial records on which it is based. This is strictly an accounting exercise in respect of the financial transactions reported. The external auditor does not examine whether the party's financial return complies with the requirements of the Act – for example, whether an amount claimed as an election expense eligible for reimbursement is, in fact, an election expense as defined in the law. By its nature, the report by the party's external auditor is an accounting exercise that does not have the objective of ensuring compliance with the Act.

Given the considerable public funds that are paid to parties based on the election expenses reported in their returns, and given the importance of the returns accurately reflecting the financial transactions to ensure transparency, it is recommended that the Act be amended to make it possible to verify that the party and its chief agent have complied with the requirements of the Act when the party's returns are submitted to the Chief Electoral Officer. To that end, two solutions may be considered.

Solution 1: Authorize the Chief Electoral Officer to request any necessary documentary evidence supporting the parties' election expenses returns

The Chief Electoral Officer should be authorized to ask a party to produce the documents and provide the information that he deems necessary to verify that the party and its chief agent are compliant with the Act's requirements with regard to election expenses returns.

Under this approach, the parties would be subject to a less cumbersome regime than that which applies to candidates, nomination contestants and leadership contestants, since a party would not be required to systematically submit all documentary evidence supporting its expenses. In terms of accountability, Elections Canada would be able to ensure transparency and compliance through audits focusing on key or randomly chosen transactions.

The recommendations report prepared following the 38th general election, *Completing the Cycle of Electoral Reforms*, contained a recommendation asking Parliament to provide the Chief Electoral Officer with examination and inquiry powers necessary to verify the accuracy and

[42] See subsections 435.3(4), 451(2.2) and 478.23(4).

[43] It is noteworthy that the requirement to file documentary evidence, and the ability of the Chief Electoral Officer to request additional documents, also applies to leadership and nomination contestants, despite the fact that, unlike registered parties, they are not eligible for public subsidies.

[44] See sections 426, 430 (parties) and 453 (candidates).

compliance of financial returns from all entities governed by the Act.[45] This recommendation was rejected by the Standing Committee on Procedure and House Affairs. The recommendation presented here is simpler and less intrusive. Furthermore, the increased importance given to accountability for public expenditures since the enactment of the *Federal Accountability Act*[46] supports such a measure.

It should be underlined that the measure recommended here would not grant Elections Canada access to a party's offices. Elections Canada would instead contact the party, which could then provide the agency with the documents in question or with access to them. What is more, the recommendation covers only the election expenses return produced under section 429 and not the other returns provided by the parties. This approach is based on the fact that the election expenses returns require a more thorough review, given that it involves a reimbursement.

This solution would provide the Chief Electoral Officer with the minimum tools he needs to meet the obligation conferred on him by the Act – that is, to ensure that political parties comply with the political financing rules and reporting requirements. It would also provide him with a better overview of the financial activities of the various entities of a political family, namely, the party, its electoral district associations and its candidates. This approach would substantially enhance transparency and accountability, thus complementing the reforms adopted in 2003 and 2006.

Solution 2: Expand the responsibilities of parties' external auditors

In consultations with the political parties, some opposed the solution set out above, raising concerns, in particular, about the potential for increased costs for Elections Canada. As an alternative, they proposed that the party's external auditor be given increased responsibility to perform a compliance audit function. The external auditors would thus be responsible not only for reviewing the parties' returns with regard to accuracy and transparency, but also for assessing compliance with the political financing rules set out in the Act.

For Elections Canada, the previously outlined solution is preferable to this last one. This solution would notably entail increased auditing costs for the parties and would require Elections Canada to issue guidelines for the accounting auditors.

However, if Parliament chooses not to pursue the proposed recommendation, it would be necessary to open discussions with professional bodies governing auditors and with the external auditors themselves to see, from their perspective, whether the proposed alternative is workable. The expanded accounting audit responsibilities, though perhaps not the ideal solution, would at least provide an additional basis for allowing the Chief Electoral Officer to determine whether the party has complied with the requirements of the Act before he authorizes the reimbursement of election expenses.

[45] See p. 89 and following.

[46] S.C. 2006, c. 9.

II.2 Reimbursement of Election Expenses When Limit Exceeded

Candidates or political parties having exceeded the authorized election expenses limit during an election should see a dollar-for-dollar reduction in their election expenses reimbursement, as is the case in Ontario and Manitoba.

This proposal is aimed at increasing public confidence in the integrity and fairness of the electoral process.

The *Canada Elections Act* does not provide timely consequences for the campaign of a candidate or a registered party that exceeds its election expenses limit during an election. While campaign officials may be prosecuted for an offence, the campaign itself is unaffected. Indeed, the campaign may receive a reimbursement of up to 60 percent of its election expenses even if the limit was not respected. This situation could affect public trust in the fairness of our political system.

Analysis and discussion

To ensure a certain level of electoral fairness, Parliament has adopted rules to govern political financing – including rules on contributions, election expenses limits, various financial benefits for parties and candidates – as well as the disclosure requirements that make enforcement of all these rules possible.

The provisions on the reimbursement of election expenses[47] and on election expenses limits[48] contribute substantially to ensuring electoral fairness. The balance struck by Parliament between the limits, and the level of state resources provided to political parties and candidates that allows them to compete within these limits, promotes equal participation in the electoral process by the various contenders. The parties and candidates that have obtained an appreciable measure of support from electors are assured of a certain amount of state funding.[49]

When parties or candidates exceed their statutory election expenses limit, however, they have effectively stepped outside the regime adopted by Parliament to maintain electoral fairness. The measures currently provided for in the Act are purely penal in nature and are not sufficiently effective in addressing non-compliance with these limits.

For instance, despite the fact that the chief agent of a political party or an officer from a candidate's campaign may be prosecuted and convicted for having incurred election expenses in excess of the limit, there are currently no measures to address the unfair advantage from which

[47] See section 435 for the reimbursement to political parties and sections 464 and 465 for the reimbursement to candidates.

[48] See sections 422 and 423 for political parties and sections 440 to 443 for candidates.

[49] A candidate must have obtained 10 percent of the valid votes cast in the electoral district to be eligible for the reimbursement, whereas a registered party must have received at least 2 percent of the valid votes cast nationally in an election or 5 percent of the valid votes cast in the electoral districts where they endorsed candidates.

the party or candidate benefited in the election by overspending.[50] Such a party or candidate receives the full amount of the reimbursement calculated using the statutory formula in the Act. Indeed, a candidate or party that reported election expenses below its limit and that is subsequently convicted of omitting to report a substantial portion of its election expenses may even receive an additional reimbursement following the conviction – namely, the difference between the amount reported and its actual expenses, up to 60 percent of the limit. In such a case, the amount of the additional reimbursement could turn out to be substantially higher than the amount of the fine imposed.

To address this situation and to give effect to Parliament's intent of establishing, to some extent, a level playing field among candidates in an election through the partial reimbursement of election expenses and the election expenses limit, a formula should be developed to reduce the amount of reimbursement offered to candidates or political parties that exceed their limit. Such a reduction would be achieved by administrative means, independently of the potential recourse to penal sanctions.

Such a regime exists in two provinces. In Ontario, subsection 38(4) of the *Election Finances Act* provides that the subsidy paid to a campaign is "reduced by an amount equal to such excess" over the limit of campaign expenses. In Manitoba, subsection 73(1) of the *Elections Finances Act* provides that the reimbursement provided to the party or candidate is "reduced by $1 for every dollar" by which the election expenses or the advertising expenses exceed the election expenses limit or the advertising expenses limit (whichever excess is greater).

Using the Ontario and Manitoba model (a dollar-for-dollar reduction to account for any overspending), the proposed measure would have the following effects in a scenario of two candidates competing within a $100,000 election expenses limit:[51] the candidate who spent the maximum authorized amount would receive a reimbursement of $60,000 for his or her election and personal expenses paid, while a candidate who exceeded the $100,000 limit by $5,000 would be eligible for a reimbursement of only $55,000 for his or her election and personal expenses paid.

Public confidence in the fairness of the electoral process could be significantly enhanced if the reimbursement were reduced to account for overspending as this would constitute a real and concrete consequence affecting the campaign itself in a timely manner.

[50] With the possible exception of a contested election under Part 20 of the Act, where someone can prove that this constituted an irregularity, fraud or illegal practice (in the case of a candidate who knowingly overspends during the campaign) that affected the result of the election. The difficulty in proving this makes a contestation for this reason unlikely.

[51] The example involves two candidates, both of whom expect to receive 10 percent or more of the votes cast in their electoral district. This is a requirement for all reimbursements pursuant to sections 464 and 465 of the Act.

II.3 Failure of Deregistered Electoral District Associations to File Outstanding Financial Returns

The Chief Electoral Officer should be required to refuse an application for registration from an electoral district association when a deregistered association of the same party and the same electoral district has not complied with the requirement to submit its final financial return (as well as any outstanding return) within six months after deregistration. This ban on registering a new association should be maintained for four years. However, if the missing returns are provided during that period, the Chief Electoral Officer should be authorized to proceed with the new registration.

These changes would provide added effectiveness to the rules governing financial reporting by electoral district associations that aim to ensure the transparency of the political financing regime.

Registered electoral district associations must report annually on their financial transactions and may be deregistered if they fail to do so. Within the six months following its deregistration, an electoral district association must submit a final financial return. This requirement aims to ensure the overall transparency of the political financing system, since the registered association can transfer funds and provide goods and services to the party, other associations and candidates. However, Elections Canada has difficulty obtaining these final financial returns from deregistered electoral district associations, as the *Canada Elections Act* requires. At present, a new association may register in place of the deregistered association that has not met this requirement.

Analysis and discussion

Electoral district associations are an important component of political parties and of our democratic system. They help to air local issues, select candidates, recruit volunteers and raise funds to finance electoral activities. Until 2004, however, electoral district associations were considered to be the “black hole” of our political financing system. To remedy that situation, the reforms adopted in June 2003, which came into effect on January 1, 2004, put in place a voluntary registration and reporting regime for electoral district associations. There are currently 1,268 registered electoral associations, of which 977 are affiliated with the four parties represented in the House of Commons.

Once registered, electoral district associations may collect contributions, transfer funds, provide goods and services to specified entities of the same registered party, accept the transfer of surplus electoral funds from candidates or surplus campaign funds from leadership contestants or nomination contestants and, with the consent of the party, issue receipts for tax purposes to contributors (section 403.01).

Under the Act, registered associations must also meet a number of obligations relative to their financing and administration. In the six months following its registration, an association must provide an initial statement of assets and liabilities as of the day before the date of registration (section 403.05). Registered associations must also provide an annual financial transactions return, including, among other things, the name and address of each person who has contributed a total amount of more than $200 in the calendar year (section 403.35). Registered associations must also keep the information in the Registry of Electoral District Associations up to date and report to the Chief Electoral Officer when information in the Registry changes.

Failure to comply with one of the above obligations constitutes an offence either by the association itself or by the financial agent, as the case may be. An association may also be deregistered for failing to comply with these obligations. Section 403.21 creates a process that requires the Chief Electoral Officer to give an association the opportunity to meet its obligations before deregistering it. The electoral district association will be deregistered only if it does not rectify the omission.[52] A deregistered association is still obliged to file all required financial returns that it has not yet submitted, including a financial return covering the period up to its deregistration (section 403.26). A financial agent who fails to file these returns within six months after deregistration commits an offence.

Since 2004, 76 electoral district associations have been deregistered. Elections Canada often has difficulty obtaining the final financial return from deregistered associations. In 8 cases, the returns have been filed after the six-month deadline; in 19 other cases, no return has been filed at all.[53]

It is not surprising that there has been little enforcement action despite the difficulties Elections Canada has experienced in obtaining the final financial returns. Enforcement for an offence under Part 19 of the Act is generally appropriate only in the clearest and most serious cases. Often, the failure to comply with section 403.26 is neither clearly the fault of any one person nor, at first glance, particularly serious. In most cases, deregistration occurs after the association's dissolution, the key members having simply withdrawn for one reason or another. In some cases, the electoral district association fails to file its return because it cannot find someone to act as financial agent. In such circumstances, it is impossible to take enforcement action. Moreover, the offences in question apply only to the financial agent of the deregistered association. Furthermore, given the small amounts of money involved in some of these cases, it is not often in the public interest to expend available resources for the purposes of enforcing the Act.

Although not always appearing serious enough to warrant enforcement action, non-compliance with section 403.26 remains a significant administrative concern. In addition to being a problem in itself, this non-compliance could affect the integrity of the political financing system or the perception of its integrity. This is especially true when coupled with the fact that there is nothing

[52] Electoral district associations can also be deregistered in other circumstances: the association can voluntarily choose to deregister or can be deregistered at the request of the party.

[53] Figures as at March 31, 2010.

to prevent an electoral district association of the same party from registering again in the same electoral district, even if the deregistered association has not complied with its financial reporting obligations following deregistration.

Once the association is deregistered, another association of the same party may apply to register the very next day for the same electoral district. If the new association provides the documents required under section 403.02, the Chief Electoral Officer has no choice but to register it, even if its predecessor has not filed its outstanding financial returns.

This situation is incompatible with the Act's goal of transparency and may lead to legitimate questions as to whether the integrity of the political financing system is being maintained.

To overcome this difficulty, steps should be taken to limit the ability of electoral district associations to register again, or of parties to register a new association in an electoral district when the previous association in that electoral district has been deregistered and has not, within the six months following its deregistration, provided an audited financial return for the portion of the fiscal period ending on the day of its deregistration or for any earlier fiscal period for which the documents have not yet been provided. The Chief Electoral Officer should be required to refuse an application for registration in such a case.

The requirement to file the financial returns before a new association may be registered will be an additional incentive for members of the electoral district association to take responsibility for filing the deregistered association's outstanding returns. Furthermore, the party's knowledge that its future activities in an electoral district may be compromised because of irregularities in the association's file will encourage the party to provide the necessary assistance to a deregistered association to comply with the requirements of the Act. The goal of this procedure would be directly aimed at achieving timely compliance with the terms of the Act.

However, it would not be justifiable to permanently prohibit the registration of an association in a particular electoral district because of the non-compliance of a former association or its financial agent.

The Chief Electoral Officer should therefore be required to refuse to register an association if a deregistered association of the same party in the same electoral district has failed to comply with its financial reporting obligations under section 403.26 within four years of its deregistration (that is, a "normal" electoral cycle). However, if during that period the missing returns are filed – that is, those set out in section 403.26 as well as the annual returns covering the period since deregistration – the Chief Electoral Officer should be authorized to proceed with the new registration. After a period of four years, a new association could be registered without having to produce the missing returns.

II.4 Disposal of a Candidate's Surplus Electoral Funds

A candidate's campaign that has not transferred its campaign property to the registered association or to the registered party should be required to dispose of such property at fair market value in anticipation of its disposal of surplus electoral campaign funds. Moreover, the resale value of such property should be included as electoral campaign revenue in calculating the surplus.

These changes would help maintain Canadians' trust in the process by ensuring that no person can profit financially from an election campaign.

After all financial obligations of a candidate's campaign have been met in accordance with the *Canada Elections Act*, any surplus funds must be remitted to the registered party or the registered association, in the case of a candidate endorsed by a registered party, or to the Receiver General in any other case.

It would undermine the integrity of the political financing rules if individuals could profit by keeping excess funds accumulated with the support of public subsidies. The same applies to any property that was purchased with the aid of public funds. It would also discredit the political financing rules if individuals linked to the campaign could simply keep the property, which may have significant value, for their personal use after the election.

There is currently no explicit requirement in the Act for a candidate's campaign to dispose of campaign property after the election and to include that value in the calculation of surplus campaign funds. Nevertheless, Elections Canada has been requiring that campaigns dispose of property of significant value before disposing of their surplus. This policy is consistent with Parliament's intent to prevent campaign officials and others from benefiting personally by the use of property financed, in part, by state funding.

Generally, this approach by Elections Canada has worked well. Nevertheless, to prevent difficulties and to remedy a possible enforcement gap currently found in the Act, it is recommended that the Act be amended by adding explicit property disposal rules. The Act would thus require campaigns to transfer property to the registered party or association in accordance with the requirements of the Act, or else sell such property at fair market value before disposing of surplus campaign funds. It is further recommended that the resale value of the property, at fair market value, be included as campaign revenue for the purposes of calculating surplus electoral campaign funds under subsection 471(2).

II.5 Offences for Filing a Campaign Return with False or Misleading Statements or Filing an Incomplete Campaign Return

Offences that apply to official agents for filing an incomplete campaign return or a return with false or misleading statements should also apply to candidates and nomination contestants.

This recommendation would make the Act more consistent.

In its current form, the *Canada Elections Act* is inconsistent in its treatment of non-compliance with similar obligations applicable to candidates, leadership contestants and nomination contestants.

In the three cases, the Act prohibits a candidate or contestant, and an official agent or financial agent, as the case may be, from providing to the Chief Electoral Officer a return that the candidate, contestant or agent knows or ought reasonably to know contains a material statement that is false or misleading (paragraphs 435.43(*a*), 463(1)(*a*) and 478.38(*a*)). It also prohibits a candidate or contestant, and an official agent or financial agent, as the case may be, from providing an incomplete return that does not substantially set out the required information (paragraphs 435.43(*b*), 463(1)(*b*) and 478.38(*b*)). These provisions enhance transparency for candidates, leadership contestants and nomination contestants alike.

However, the measures to enforce these important provisions of the political financing regime are drafted inconsistently.

The provisions applicable to leadership contestants and their financial agents include equivalent offences that apply to both.

- Paragraph 497(1)(*q*.16) establishes a strict liability offence for the leadership contestant or his or her financial agent who, contrary to paragraph 435.43(*b*), provided an incomplete return.
- Paragraph 497(3)(*m*.16) establishes a dual-procedure offence for the leadership contestant or his or her financial agent who knowingly provided a return containing a material statement that is false or misleading (contrary to paragraph 435.43(*a*)) or an incomplete return (contrary to paragraph 435.43(*b*)).

The same symmetry is not found in the measures to enforce the provisions applicable to candidates and their official agents. The Act includes the following related offences:

- under paragraph 497(1)(*y*), a strict liability offence for the official agent who, contrary to paragraph 463(1)(*b*), provided an incomplete return
- under paragraph 497(3)(*v*), a dual-procedure offence for the official agent who knowingly provided a return containing a material statement that is false or misleading (contrary to paragraph 463(1)(*a*)) or an incomplete return (contrary to paragraph 463(1)(*b*))

In order to give effect to Parliament's intent of also prohibiting candidates from knowingly providing returns containing false or misleading statements, or from providing incomplete returns, it is recommended that the offences mentioned above for official agents also apply to candidates.

With respect to nomination contestants, a drafting error seems to have been made, for while paragraph 497(3)(*z*.12) applies to both the nomination contestant and his or her financial agent, paragraph 497(1)(*z*.35), setting out the strict liability offence for having filed an incomplete return, does not mention the contestant. It is, therefore, further recommended that the offence under paragraph 497(1)(*z*.35), which currently applies only to the financial agent of a nomination contestant, also be made applicable to the contestant.

II.6 Election Advertising Expenses of a Registered Party's Electoral District Associations and of Third Parties

The rules for election advertising by third parties should be reworded to apply to those expenses related to election advertising that are incurred before the beginning of the election period if the advertising is transmitted during the election period.

Similarly, electoral district associations should be prohibited from transmitting election advertising during an election period, even when the associated expenses are incurred before the beginning of the election period.

These changes to the wording of the relevant provisions are aimed at better reflecting Parliament's intent.

Section 350 sets limits on the election advertising expenses that a third party may incur.

For its part, section 403.04 prohibits the electoral district association of a registered party from incurring election advertising expenses during an election period.

Sections 350 and 403.04 are similarly worded. Parliament is restricting election advertising expenses incurred during the election period. That time reference is unnecessary, as the definition of election advertising in section 319 already restricts it to advertising transmitted during an election period. Adding the phrase "during the election period" to sections 350 and 403.04 is problematic as it has the effect of restricting the scope of the prohibition solely to expenses incurred during the election period. The affected entities would therefore be free to incur election advertising expenses before the election period – that is, expenses related to the production of messages and the acquisition of their means of distribution – and then using the products of those expenditures during the election period.

Since the adoption of sections 56.1 and 56.2 of the *Canada Elections Act*, which fix the date of general elections, this omission is likely to have more of an impact on electoral fairness.

Analysis and discussion

Section 350 and the third parties regime

Given the definition of election advertising in section 319, the Act should simply prohibit a third party from incurring election advertising expenses that exceed the limits set out in section 350, without specifying when those expenses are incurred.

Such an amendment would consequently include, for the purposes of the limits set out in section 350, the value of advertising products and services acquired before the beginning of the election period, but used during the election period.

The Act should also provide that, in the case of a general election that is not held on the date set out in subsection 56.1(2) or section 56.2, or in the case of a by-election, the third party will have proved that those costs do not constitute an election advertising expense if the third party can demonstrate that, on the issue of the writs, it was no longer able to cancel the transmission of that advertising.

Section 403.04 and electoral district associations of a registered party

Section 403.04 was incorporated into the electoral legislation in 2003 with the passage of *An Act to amend the Canada Elections Act and the Income Tax Act (political financing)*.[54]

That provision prevents an electoral district association of a registered party, whether the association is registered or not, from incurring election advertising expenses during an election period.

As is the case for section 350, the proposed solution consists of removing the time reference in section 403.04. Consequently, associations would be prohibited from incurring election advertising expenses. Because advertising distributed outside the election period does not constitute election advertising, such advertising would not be covered by the prohibition. Moreover, all election advertising within the meaning of section 319 would be covered by the prohibition, regardless of whether the associated expenses were incurred before or during the election period.

These amendments would reflect Parliament's intent at the time that the provisions were adopted.

[54] S.C. 2003, c. 19, s. 23 (Bill C-24).

II.7 Candidates' Debates

The Act should define under what circumstances expenses incurred to organize a candidates' debate constitute a non-monetary contribution received by the participating candidates and an election expense of those candidates. Similarly, it should specify under what circumstances expenses incurred to organize a party leaders' debate constitute a non-monetary contribution made to the participating registered parties and an election expense of those parties. These clarifications would add certainty to the corresponding rules and make it easier for candidates to interpret them.

In recent years, there has often been confusion about the political financing rules set out in the *Canada Elections Act* and how they apply to candidates' debates that are organized by community associations or by other interested individuals or groups during an election. During the 40th general election, Elections Canada was again asked whether a candidate's participation in a debate constitutes, with respect to the costs of organizing the event, a non-monetary contribution to the candidate and an election expense of the candidate.

In light of the importance of such debates to our democratic system, the Chief Electoral Officer's interpretation of the political financing rules has long been that expenses incurred to organize a forum for debate that allows the public to hear and question candidates do not constitute a contribution to any candidate, provided that the following conditions are met:

- The forum must be open to the public, and the invitation must be extended to all of the candidates. (Where this is not the case, there must be a reasonable basis for the exclusion.)
- The forum must be conducted in a politically impartial fashion.

While the Chief Electoral Officer believes that this interpretation is consistent with the intent of Parliament, this matter continues to generate complaints that are difficult to address during an election period.

Analysis and discussion

While the definition of "election advertising" under section 319 of the Act excludes the transmission of debates, the definition of a candidate's election expenses under section 407 is broader than merely what constitutes election advertising; it includes non-monetary contributions received by a candidate to the extent that the property or service that constitutes a contribution is used to directly promote or oppose a candidate during an election period.

For example, if a landlord offers a candidate free use of one of the landlord's premises to set up an electoral campaign office during an election period, this non-monetary contribution constitutes an election expense of the candidate since it promotes that candidate's election.

Section 407 could, therefore, be read as including in election expenses the costs of a debate organized to promote the election of a candidate or to place another candidate who is not participating at a disadvantage. The individual who incurs these costs would thereby make a non-monetary contribution that would be subject to the Act's rules on contributions, including the limits and the restrictions on who can contribute.

That having been said, elections present a prime opportunity in our democratic system for the public to engage in a policy debate on the issues of the day. The holding of an all-candidates' debate is, and has consistently been, an important means through which electors receive information about the positions of the various candidates running in their electoral district. This information can be crucial in helping electors decide for whom to vote. This was recognized in a 1993 decision of the Ontario Court (General Division), *R. v. CBC*.[55]

Furthermore, many such all-candidates' debates are organized by community associations for the benefit of the residents of a neighbourhood or by local television stations as a community service. Here, too, if section 407 is applied to the letter with respect to candidates' debates, the costs of organizing the debates would constitute an election expense because they are a non-monetary contribution to the campaigns. In light of the rules on political contributions in the Act, the community associations and local television stations organizing the debates would therefore be committing an offence under the Act since only individuals can make contributions to a candidate. This would be the case even if all candidates were participating in the debate since each candidate would be participating as a means of promoting or enhancing his or her respective campaign for election.

Elections Canada is of the opinion that this was not Parliament's intent when it adopted the rules on political financing in the Act since candidates' debates have a long and established history and play a very important role in Canadian democracy. In fact, it is clear that Parliament intended for such debates to receive special treatment under the Act since section 319 of the Act explicitly provides, under paragraph (*a*) of the definition of "election advertising", that "the transmission to the public of … a debate" is not considered election advertising.

The result is uncertain: some may argue that Parliament did not want debates to be considered as election advertising, but nevertheless wanted the associated organizational expenses to constitute an election expense of the candidates or parties that benefit from the forum, which enables them to communicate their views to electors. As mentioned above, if this had been the intent of Parliament, only individuals would be able to organize such debates, in strict compliance with contribution limits.

Over the years, Elections Canada developed criteria for determining in what circumstances expenses incurred to organize a debate are, in fact, a non-monetary contribution to the participating candidates and an election expense of those candidates.

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[55] *R. v. CBC* (1993) 72 CCC (3d) 545, 42 CPR (3d) 250 (Ont. C. (Gen. Div.)); see also *Gauthier v. Milliken et al.*, T-571-06 (Fed. C.) and *National Party v. CBC*, 13 Alta KL.R. (3d) 20, 19 CPC (3d) 191, 106 DLR (4th) 568. It is noteworthy that if a leaders' debate does not meet the criteria for excluding it as an election expense under section 407, the debate would constitute a non-monetary contribution made to a participating registered party and an election expense of that party because the debate promotes the registered party.

First, in light of the definition of "election expense" under section 407, the criteria established by Elections Canada recognize that providing a forum for debate to candidates, if done with the intent of promoting particular candidates, can constitute a contribution to those candidates and must be subject to the contribution rules of the Act, including the rules respecting eligibility and limits.

However, as noted above, the expense incurred to organize a forum for debate that allows the public to hear and question candidates will not represent a contribution made to a candidate provided that:

- The forum is open to the public, and no candidate is excluded. (Where this is not the case, there must be a reasonable basis for the exclusion.)
- The forum is conducted in a politically impartial fashion.

Elections Canada has consistently applied these criteria and believes them to be consistent with Parliament's intent in adopting the rules on political financing. However, since these criteria are not explicitly set out in the Act, they are more subject to challenge.

Parliament should adopt clear provisions in the Act that define under what circumstances expenses incurred to organize a candidates' debate constitute a non-monetary contribution received by participating candidates and an election expense of those candidates, and under what circumstances expenses incurred to organize a debate among party leaders constitute a non-monetary contribution to participating registered parties and an election expense of those parties.

Reducing the Regulatory Burden

II.8 Treatment of Candidates' Outstanding Claims (Including Loans)

The rules governing the unpaid claims of candidates[56] should be amended to simplify them and to improve their effectiveness.

The proposed system would eliminate many elements of the current regime that are ineffective or that undermine transparency, including the requirement to obtain authorization for late payment of claims and the rules for deeming unpaid claims to be contributions. The new system would provide for a standard 18-month period for payment of debts, accompanied by stepped-up reporting requirements, and offences for non-payment of claims after 18 months.

At the beginning of the campaign, the vast majority of candidates lack the funds needed to pay the expenses that will be incurred for the election. These are generally funded through loans or instalment payments to creditors, whose invoices are often not received until the campaign is over. Payment of these claims can extend over months, if not years in some cases. When that

[56] In this recommendation, the term "candidate" also refers to leadership contestants and nomination contestants.

happens, there is a risk that the transparency and integrity of the political financing regime will be undermined.

The *Canada Elections Act* includes provisions aimed at providing an end date to the financial administration of a candidate's campaign and at ensuring the transparency and integrity of the political financing regime. But the current regime is burdensome, complex and very ineffective. The provisions on which it is based were adopted well before the political financing reforms of 2003 and 2006, and were transposed to newly regulated entities (including nomination and leadership contestants) without being brought up to date.

Although elements of the regime apply to registered parties and electoral district associations, the recommendations made here apply only to candidates, leadership contestants and nomination contestants. As registered parties and associations are ongoing entities with annual reporting obligations, many of the concerns raised about the regime do not apply to them. In the following paragraphs, the term "candidate" will refer to candidates, nomination contestants and leadership contestants.

Analysis and discussion

The existing regime for the payment of claims

The current regime for candidates' payment of claims was built over the years. Some aspects go all the way back to the 19th century, but most of the provisions date from 1974. The current regime includes the following elements:

- The invoice for the claim must be sent within three months after the event (candidate selection, election or leadership race).
- The claim must be paid within four months after the candidate's selection or election, or 18 months following the end of the leadership race.
- An application must be made to the Chief Electoral Officer or to a judge to pay a claim when either of the above deadlines is not met.
- When claims are paid following the authorization of the Chief Electoral Officer or a judge (or in other limited circumstances), candidates must file an updated campaign return.
- If a claim is not paid within 18 months of the deadline, the amount of the claim is "deemed to be a contribution," except in defined circumstances, including when the claim is the subject of a "binding agreement to pay" or if the claim has been written off in accordance with the creditor's "normal accounting practices."
- The list of claims deemed to be contributions is to be published.
- In some circumstances, subject to specified exceptions, failure to pay an unpaid claim in a timely manner may constitute a strict liability offence.[57]

[57] A strict liability offence is an offence for which the prosecutor has only to prove that the wrongful act was committed by the accused, without any proof being required as to intent; however, the accused will not be found guilty if the accused can prove that he or she exercised due diligence in attempting to meet the statutory requirements.

None of the elements of this regime were reviewed during the major reforms of political financing carried out in 2003. The regime applicable to candidates was simply tacked onto the regime governing nomination contests and leadership races, irrespective of the new rules on contributions. Neither was the regime reviewed in 2006, when the rules regarding contributions were tightened again. Consequently, it is ill adapted to the new realities facing candidates: it is cumbersome, complex and ineffective. It also fails to achieve its key objectives – that is, to provide an end date for the financial administration of candidates' campaigns and to ensure the transparency and integrity of the political financing regime.

Lack of an end date

Two aspects of the regime seek to provide an end date for the financial administration of candidates. For the first, the Act sets a deadline for the submission of invoices and the payment of claims, which cannot be exceeded without the authorization of the Chief Electoral Officer or a judge. In addition, the Act stipulates that claims remaining unpaid after 18 months be deemed contributions, subject to exceptions. Both of these elements are problematic.

i) Deadlines for submission of invoices and payment of claims

In practice, failure to make payment is almost always a result of a lack of funds. For many election candidates, this may be because they have not received their election expenses reimbursement within four months after polling day. In the aftermath of the 38th general election, 348 candidates had unpaid claims four months after the election, which is the deadline set by the Act for payment of such claims. The figure was 310 candidates for the 39th general election.[58] Ability to pay all of the claims within the prescribed time frame constitutes a widespread problem for all candidates and is not an isolated phenomenon.

Candidates who have not paid their claims by the four-month deadline must request authorization from the Chief Electoral Officer or a judge before they can pay them. This requirement is needlessly cumbersome. First, many candidates do not even know about it, so they inadvertently commit an offence by paying a debt without obtaining authorization to do so.[59] Second, those unable to pay their debts within the new deadline set by the Chief Electoral Officer must then obtain the authorization of a judge. In so doing, they incur additional expenses that increase the burden of the outstanding claims. Neither the Chief Electoral Officer nor the judge is likely to withhold this payment authorization since paying an election debt is desirable in and of itself, and the authorization – since it is the primary mechanism for requiring a candidate to produce a modified return – ensures transparency.[60]

It should also be pointed out that the creditors' requirement to submit their invoice within three months following the event does not take into account the fact that certain expenses are incurred

[58] Data is as of May 5, 2010, and subject to change.

[59] During the 39th general election, 101 candidates' returns were referred to the Commissioner of Canada Elections.

[60] The requirement to produce an updated return applies only in certain circumstances, generally when the candidate asks the Chief Electoral Officer or a judge for authorization to pay a claim after the deadline prescribed by the Act has expired. An updated return must also be submitted when a payment is made following an order issued by a court in connection with an action to recover a debt or when a creditor dies.

beyond this date. This is the case, for example, with expenses relating to fundraising activities aimed at paying these debts or with legal fees associated with requests for judicial authorization for late payment of claims. When an expense is incurred after the three-month deadline, the creditor and the candidate are violating the provisions of the Act that set out deadlines for invoice submission and payment since these deadlines have already expired.[61]

Thus, the provisions relating to submission of invoices and payment of claims within a set deadline are ineffective, if not counterproductive.

ii) Deemed contributions

There is a presumption under the Act that a claim that remains outstanding after 18 months constitutes a contribution. This presumption was originally introduced to bring a close to the financial administration of candidates after 18 months, at which time outstanding claims are deemed to be contributions and are published by the Chief Electoral Officer. However, the presumption does not apply when the unpaid amount:

- is the subject of a binding agreement to pay
- is the subject of a legal proceeding to secure its payment
- is the subject of a dispute
- has been written off by the creditor as an uncollectible debt in accordance with the creditor's normal accounting practices

Nevertheless, these provisions do not achieve their intended results.

First, the scope of the exceptions provided for in the Act is such that the presumption does not apply to the vast majority of outstanding claims. It should be noted that it is not possible for the Chief Electoral Officer to categorically evaluate whether a claim actually meets the criteria for an exception to the rules because there is no obligation to file documentary evidence to support the notification provided by the candidate or the candidate's agent as to the application of one of these exceptions.

Second, the deemed contributions regime does not take account of the contributions limits and restrictions on their source that were added to the Act. Before 2003, restrictions on the source and amount of contributions were few in number. The only consequence of declaring an unpaid claim as a contribution was identifying the amount in question. But since the new rules were adopted in 2003 and 2006, the presumption that claims constitute contributions took on a new meaning. If a candidate fails to provide the notification regarding the four exceptions above as required by the Act, the creditor could be deemed to have made a contribution in excess of the

[61] Authorization can be requested of the Chief Electoral Officer or a judge to "regularize" a late claim of this nature.

authorized limit. However, since the offence provided for when a person makes a contribution in excess of the limit requires proof that the limit was wilfully exceeded, application of enforcement measures requires going beyond the legal presumption.[62] In this context, we can no longer set an arbitrary date beyond which candidates' outstanding transactions are no longer reviewed and simply published as contributions.

Thus, the publication of claims deemed to be contributions no longer constitutes a close to the financial administration of candidates and to Elections Canada's requirement to examine the manner in which the candidates settle their claims.

Lack of transparency

Despite its complexity, the current regime does not in all cases achieve its primary goal of making candidates' financial transactions fully transparent. The most significant problem with the current regime is that it does not require an updated return every time claims are paid and contributions are raised after candidates file their initial return but before the requirement for payment authorization takes effect.

As indicated earlier, the requirement to file an updated return arises only in certain circumstances – generally, when the candidate applies for authorization from the Chief Electoral Officer or a judge to pay a claim outside the statutory period. Because of the way various sections of the Act interact, candidates may reimburse expenses or make loan payments without having to update their returns.

The statutory period for paying claims runs for four months from the event, in the case of candidates and nomination contestants, and 18 months, in the case of leadership contestants. The requirement to seek the authorization of the Chief Electoral Officer or a judge to pay a claim is imposed only after the end of this period. Candidates have no obligation to submit a return when they pay a claim during the period between the filing of the return in which they report that unpaid claim and the beginning of the period when they must seek authorization to pay a claim. In effect, claims paid during this period are not subject to any disclosure requirements under the Act because no updated return need be filed in such a case.[63]

The reporting gap is clearest with respect to party leadership contestants. Leadership contestants must file their campaign return within six months of the end of the leadership contest. However, they have 18 months to pay their unpaid claims. Any claims that are paid between the date of filing the campaign return and the end of the 18-month period, as well as the contributions raised

[62] See paragraph 497(3)(*f*.13). Parliament's silence regarding its desire to subject deemed contributions to the new rules for contributions at the time of their adoption suggests that it neither anticipated nor wanted this consequence. That being the case, the presumptions apply only to the extent that this is necessary to meet the objectives that were set when the rules were adopted, namely, transparency and the desire to end the reporting requirement.

[63] That said, when calculating the surplus funds to be disposed of in accordance with the requirements of the Act, it is the candidate's responsibility to justify any calculation of surplus funds not based on amounts reported in the return. To satisfy the Chief Electoral Officer that the surplus amount is accurate, the candidate should normally report all new payments and contributions.

to make those payments, are not subject to reporting requirements. If the contestant's claims are all paid within the 18-month period, the contestant has no legal obligation to ever report those financial transactions.[64]

In addition, candidates and contestants are required to report on contributions and other funds received since the original return was filed only when the Chief Electoral Officer exercises his discretionary power to impose such an obligation on one who seeks authorization to pay a claim after the specified deadline.[65]

These issues further confirm that the payments regime is not functioning effectively with respect to its initial objectives.

Proposed new regime

What is needed is a simpler and more effective regime that, above all, makes financial transactions transparent.

It is therefore recommended that the following elements of the payment regime, applicable to candidates and contestants, be repealed:

- the provisions setting out a period in which claims must be invoiced and paid, along with the associated offences
- the provisions requiring that a written application for authorization to pay be made to the Chief Electoral Officer or a judge to excuse the candidate or creditor from the deadlines for submission and payment of claims
- the existing obligation to update a return following each authorized payment

Furthermore, instead of deeming claims to be contributions – an approach that causes complications and confusion context of contribution limits – transparency should be sought through publication of outstanding claims, with appropriate documentation to support all requested exceptions.

The Act should simply be amended to require that all candidates who have unpaid claims on the date that they submit their financial return, or who carry out transactions after the return has been filed, must report on the payment of those claims and declare the sources of funds used for the payment of those claims. Payments and transactions made during the first 18 months following polling day, as well as contributions received, could be reported at the time of the candidate's choosing within that 18-month period.

[64] After 18 months, any outstanding claims that a leadership contestant wishes to pay can be paid only with the authorization of the Chief Electoral Officer or a judge, in accordance with sections 435.26 and 435.27. Under section 435.35, an authorization triggers the requirement for an updated return.

[65] For example, see subsection 447(2) with respect to payments made by candidates.

If any claims remain unpaid, or if the candidate has transactions that were not reported over the 18-month period following the election or the end of the contest, the candidate will need to file a return updated to the end of that period.

At that time, in order to allow the Chief Electoral Officer to determine whether the rules on contributions (including the anti-avoidance provisions) were complied with, the candidate should be required to indicate whether any of the following circumstances apply to each unpaid claim:

- Any part of the claim is subject to a dispute, and steps have been taken by the parties to resolve the dispute.
- The claim is the subject of a court proceeding to recover payment.
- The parties have agreed on a reasonable repayment schedule, which is being followed (i.e. the agreed payments are not in default).
- The debt was written off as uncollectible in accordance with the creditor's usual business practices. (In this case, the creditor would be required to provide documentation, as requested by the Chief Electoral Officer, to verify the creditor's usual business practices, including whether it normally affords credit in such an amount, whether it followed normal debt recovery processes and whether the debt was written off in accordance with the creditor's usual practices.)
- Any other relevant fact concerning the unpaid claim that may explain why it remains unpaid and was not, in reality, a contribution.

In addition to stating which of the above conditions (if any) applies to an unpaid claim, the candidate should be required to provide documentary evidence of the condition. In the case of a written agreement to pay, the repayment schedule should be provided.

As recommended elsewhere,[66] there is no need for an audit report on an updated return. However, it should be clear that the candidate must provide documents to support any expenses reported in an updated return and that the Chief Electoral Officer may request additional documentation, as is the case with the initial campaign return.

It should also be an offence to fail to file an updated return where required or, as is the case for all returns, to file one that is incomplete, false or misleading. The Chief Electoral Officer would publish all updated returns, including the information regarding the status of claims that remain unpaid.

The recommended changes would simplify financial transactions occurring after the initial campaign return is filed, thus lessening the regulatory burden associated with payment authorizations and regularization of late invoices. Furthermore, a legal presumption would no longer occur at an arbitrary moment to suggest that a creditor was really an ineligible contributor, in the absence of any consideration of the facts surrounding the transaction.

[66] See recommendation II.10 concerning audits on updated returns.

In addition, the recommended measures would enhance transparency by eliminating the existing reporting gap. They would also make it possible for the Chief Electoral Officer to have a better understanding of the facts surrounding the candidate's transactions and thus determine whether any of them need to be brought to the attention of the Commissioner of Canada Elections so that an investigation can be carried out to verify compliance with the rules on contributions.

The regime described above does not, however, resolve the problems associated with the lack of closure when claims remain unpaid after the proposed 18-month period after the election or contest period. Ideally, all claims would be paid within that time. However, experience shows that this is not always the case, and the four circumstances outlined above are examples of situations in which claims may remain unpaid long after a campaign or contest has ended.

To deal with any claims that remain unpaid after the 18-month period, parts of the current regime should continue. That is, a candidate who wishes to make a payment after that time should be required to seek the authorization of the Chief Electoral Officer before the end of the statutory period, unless the payment is being made as a result of court proceedings to recover the unpaid amount. The Chief Electoral Officer could then require the documents and set the conditions that he deems necessary to ensure the integrity of the rules on political financing. After a claim is repaid (whether authorized by the Chief Electoral Officer or as a result of a court proceeding to recover payment), the candidate should be required to file an updated return setting out all financial transactions that have occurred since the previous update, including the source of contributions or transfers used to pay the amount.

Additionally, the Act should provide for a strict liability offence for any claim that remains outstanding after the 18-month period. Unlike the offence currently set out in the Act, it would apply regardless of whether the Chief Elector Officer has issued an authorization to pay after the 18-month period. The candidate would then have to convince the judge that he or she has exercised due diligence to pay his or her campaign debts.

Parliament may also wish to consider additional provisions to motivate candidates to pay their claims before the 18-month deadline. One option that could be considered is a ban on being a candidate, a leadership contestant or a nomination contestant for a specific period or for a shorter period if the unpaid claim is paid in the meantime. This ban, similar to that now found in paragraph 65(*i*) for candidates who fail to file their election expenses return, could apply to candidates who have unpaid claims more than 18 months after the campaign, and it could remain in place until the claims are settled, unless those claims are the subject of litigation. This option, however, involves serious considerations about electoral participation and should be reviewed carefully by Parliament to assess whether it is legitimate in our democratic system. For this reason, it does not form part of the present recommendation.

II.9 Extensions of Time for Filing Financial Returns[67]

Political entities should be able to apply to the Chief Electoral Officer for an extension of time up to the date that the return is due and in the two weeks after that date.

Political entities should be able to apply to a superior court for an extension in the following three scenarios: once the above period has expired, on the expiry of the Chief Electoral Officer's extension or on the Chief Electoral Officer's refusal of an extension.

Any such extension of time should be authorized unless the Chief Electoral Officer or the judge, as the case may be, has reason to believe that the political entity has shown gross negligence.

In addition, candidates who fail to file an electoral campaign return by the statutory due date should forfeit up to one-half of their nomination deposit, regardless of whether they receive an extension.

These changes would allow extension requests to be processed more efficiently and would reduce recourse to the courts. What is more, they would encourage greater compliance with the statutory deadlines.

The existing regime for seeking an extension to the filing deadline for a financial return is costly, cumbersome for regulated political entities and does not promote timely reporting.

Under the *Canada Elections Act*, entities that are seeking extensions to file a return or a modified return must apply to the Chief Electoral Officer by the date that the return is due or to a court in the two weeks after that date. Although the Act does not explicitly provide for extension requests to be made after that two-week period, it is not unusual for courts to grant such extensions all the same.[68]

Failure to file by the prescribed deadline is an offence for which the agent of the relevant entity may be prosecuted. Elected candidates who do not meet this requirement may not continue to sit or vote as members of Parliament until they are in compliance. Furthermore, candidates who do not file their returns cannot be reimbursed for a portion of their election expenses, even if they are otherwise eligible, and lose their nomination deposit (section 468). Electoral district associations and registered parties that fail to file returns may be subject to deregistration.

[67] For the most part, this recommendation applies to the five political entities governed by the Act. For the purposes of this recommendation, the terms "financial return" or "return" – unless the context is not applicable – refer equally to the campaign returns produced by the various types of candidates (candidates, leadership contestants and nomination contestants) or by the parties after a general election. Also, the term "agent" refers to a candidate's official agent; the financial agent of an association, nomination contestant or leadership contestant; and a party's chief agent.

[68] See, for example, *Green Party of Canada v. Canada (Chief Electoral Officer)* 2002 O.J. No. 188 (Sup. Ct.) (QL).

Despite the above provisions, there are several weaknesses in the existing regime.

- The grounds for allowing extensions are too narrow.
- The existing regime puts the procedures in the hands of the courts too early in the process.
- The existing regime is not effective in promoting the timely filing of returns.

These three issues will be reviewed in turn.

Analysis and discussion

1. Grounds for allowing extensions are too narrow

The Chief Electoral Officer or a judge may authorize an application for an extension to the filing deadline only if it can be shown that one of the following four criteria caused the late filing:

- the illness of the applicant
- the absence, death, illness or misconduct of the agent or a predecessor
- the absence, death, illness or misconduct of a clerk or an officer of the agent, or a predecessor of one of them
- inadvertence or an honest mistake of fact[69]

One of the primary goals of the Act is to ensure transparency in political financing through complete disclosure of the financial transactions of regulated political entities. There are any number of circumstances that may cause a regulated political entity to seek an extension for filing its return. If a circumstance does not fit within the scope of those enumerated in the Act, however, the Chief Electoral Officer or court cannot, by law, allow an extension to the deadline or a modification of the return.

Yet the result of refusing an extension to a political entity is to prevent the publication of the financial return. Although the entity may be subject to prosecution in these circumstances, the goal of transparency is defeated. These prosecutions may have a deterrent effect, but they do not ensure transparency. Furthermore, prosecution is unlikely in circumstances in which a reasonable attempt to obtain an extension was made but denied under the terms of the law.

As a result, the Chief Electoral Officer, applicants and the courts must often stretch elements of a situation to match one of the four grounds in order to ensure transparency while avoiding enforcement action.

2. Dependence upon the courts early in the process

Under the present regime, only a superior court has the power to grant an additional extension of time if an entity fails to apply for an extension by the deadline or fails to meet an extended deadline provided by the Chief Electoral Officer. Given the importance placed upon the

[69] Only (*b*) to (*d*) apply to parties and associations. See subsections 433(3) and 403.41(3).

objective of transparency and the fact that there is no known instance of a court refusing an application for an extension, the requirement to seek a judicial extension at such an early stage appears to be an unnecessary financial and administrative burden, both for the applicant and for the courts.

3. Ineffectiveness of the current regime in promoting timely disclosure

Notwithstanding the penalties clearly stated in the Act, and the fact that the entities must go through the burdensome and costly process of seeking a court order as prescribed by the Act, many entities still do not file their financial returns on time.

With respect to candidates, the following statistics show the extensions granted by the Chief Electoral Officer following the three most recent general elections:

- 2004 general election: 343 extensions out of 1,686 candidates = 20.3 percent
- 2006 general election: 430 extensions out of 1,636 candidates = 26.3 percent
- 2008 general election: 471 extensions out of 1,602 candidates = 29.4 percent

This data shows that the timely filing of returns is becoming less and less common, at least with respect to candidates.

At present, the primary penalty associated with late filing is prosecution. However, this measure is generally seen as being appropriate only in the clearest and most serious cases.

Generally, enforcement action is taken if the return is not filed as required by the Act. Because of the overriding goal of transparency, it is in the public interest to ensure that entities file a return. Although Elections Canada wishes to encourage timely reporting, the agency is very hesitant to refuse an extension request or to oppose an extension request made to a court. In most cases, timeliness must, therefore, be sacrificed in favour of transparency.

In conclusion, the current process is cumbersome for political entities, costly and ineffective, and does not encourage more timely reporting.

In light of the above issues, it would be appropriate to modify the existing provisions relating to extensions of time for all political entities to better ensure that the goals of the Act are achieved.

In *Completing the Cycle of Electoral Reforms*, the previous recommendations report of the Chief Electoral Officer, it was recommended that the Chief Electoral Officer be entirely responsible for granting extensions to candidates, both before and after the statutory deadline. The House of Commons Standing Committee on Procedure and House Affairs voiced its support for this recommendation in its 13th report, *Improving the Integrity of the Electoral Process*, [70] published in June 2006, but the Government did not act on it.

[70] Standing Committee on Procedure and House Affairs, *Improving the Integrity of the Electoral* Process, p. 24.

The present recommendation seeks to build on that earlier recommendation by extending its application to all entities. Furthermore, it reinstates a role for the court (removed in the earlier recommendation). Finally, to deal with the rising problem of non-compliance with the statutory deadline by candidates, it proposes that the refund of a portion of the candidate's nomination deposit be dependent upon filing within the deadlines prescribed by the Act.

For all entities, the following is proposed:

- The current provisions regarding the granting of extensions should be replaced with a provision authorizing all such extensions unless the Chief Electoral Officer or judge, as the case may be, has reason to believe that the political entity has shown gross negligence. Such a provision would better reflect the fact that, with rare exceptions, the public interest is better served by disclosure of the information.
- The period in which an application may be made to the Chief Electoral Officer for an extension should be extended to include the two weeks after the return is due. In many cases, last-minute complications cause a return to be filed somewhat late. These complications should not require an entity to seek an extension from the courts. This would greatly reduce the burden on the courts and on entities that, in good faith, are unable to file their returns by the prescribed deadline.
- An application for an extension should be made to a superior court: (1) when an application has not been made to the Chief Electoral Officer within the prescribed time frame; (2) on the expiry of an extension granted by the Chief Electoral Officer; or (3) on the refusal of the Chief Electoral Officer to grant an extension.

The above changes will reduce the administrative burden on entities seeking an extension. However, other changes are needed to reverse the trend toward more frequent late filing by candidates. It is, therefore, recommended that candidates who file after the statutory deadline, even in accordance with an extension provided by the Chief Electoral Officer or a court, forfeit a portion of their nomination deposit.[71]

At present, candidates who do not file their return within the deadline authorized by the Act forfeit their entire nomination deposit, as do candidates who fail to return all of their unused tax credit receipts within a month of polling day.

Therefore, if the above recommendation is accepted, candidates who file within four months of polling day (that is, by the statutory deadline) shall have their entire nomination deposit refunded. In contrast, candidates who fail to comply with all of the terms of the Act, or who fail to return all unused tax credit receipts, would lose their entire deposit. Finally, candidates who file after the four-month deadline, but within an extension period, would forfeit a portion of their nomination deposit.

[71] In the last recommendations report by the Chief Electoral Officer, *Completing the Cycle of Electoral Reforms*, it was recommended that the application to the Chief Electoral Officer for an extension be accompanied by a $1,000 cheque payable to the Receiver General for Canada. Although the Standing Committee on Procedure and House Affairs endorsed that recommendation, we are proposing a less severe approach, one that is more in line with the current regime and that provides for a deposit to guarantee compliance with the candidate's obligations.

There are two possible options for implementing this recommendation. The first would be that candidates who file after the four-month deadline forfeit one half of their nomination deposit. The second option would be that candidates who file within the first week after the four-month deadline forfeit $100; within the second week, $200; and so on, up to a maximum of $500.

II.10 Removing the Requirement for Audit Reports on Updated Returns

The requirement that an updated return filed by a candidate[72] be accompanied by an updated auditor's report should be eliminated. This requirement is of little practical use and constitutes a burden for the candidates.

In some circumstances under the *Canada Elections Act*, a candidate must file an updated audit report along with an updated financial return. The requirement for an updated audit report is an unnecessary administrative and financial burden on candidates for the following reasons.

First of all, in many cases, the amounts are minimal, and there are very few transactions.

Second, an updated return must be filed within 30 days of the transaction – an especially tight timeline. Given the past difficulties experienced in obtaining returns on time, this additional requirement could further slow a process that is intended to achieve timely reporting.

Finally, Elections Canada receives from the candidates all of the documentation pertaining to the expenses in the updated return and has the authority to request additional documents as necessary.

II.11 Contributions to Leadership Contestants

It is recommended that the "per contest" limit imposed on contributions to leadership contestants be replaced with an annual limit.

It is further recommended to repeal the existing presumption that a contribution made within 18 months following a leadership race is deemed to be a contribution for this race.

These changes would make the Act more consistent by harmonizing the leadership contestants' regime with the regime for candidates and nomination contestants.

The limit imposed on contributions to leadership contestants is not established on an annual basis (as is the case for other regulated entities), but rather is established on a "per contest" basis.

[72] This recommendation applies to all three types of candidates: election candidates, party leadership contestants and nomination contestants.

Furthermore, subsection 405(5) of the *Canada Elections Act* states that contributions made to leadership contestants within 18 months after a leadership contest are deemed to be contributions to that contest. This provision is of questionable utility and leads to uncertainty in cases where a person is a contestant in two leadership contests that closely follow each other.

Analysis and discussion

There are no deeming provisions similar to subsection 405(5) for the other entities in the Act. This is likely because other entities, with the exception of candidates not affiliated with a party, have contribution limits calculated on an annual basis. As contributions to leadership contestants are instead calculated on a per-event basis, the Standing Committee on Procedure and House Affairs raised concerns about the contribution rules for leadership contestants when it considered Bill C-24 in 2003. Specifically, the Committee wished to clarify that contributions could be received for a period of 18 months after a contest and applied to debts from that contest. The Committee added subsection 405(5) in an effort to clarify the situation.

In practice, the presumption established by subsection 405(5) raises more questions than it provides solutions.

To begin with, it is unclear whether a person who has a debt from a previous leadership contest, but wishes to begin collecting contributions as a contestant for a future contest, is barred from accepting contributions for the second contest for 18 months after the selection date of the first contest.

It is also uncertain whether a leadership contestant who still carries a debt 18 months after the contest can continue to accept contributions after that period to pay off the debt.

If a provision proves necessary, it should be worded as a presumption that can be rebutted, as opposed to being deemed to be one thing or another. However, even a rebuttable presumption appears to be unnecessary. It should be noted that in the absence of subsection 405(5) or of a similar provision with a presumption, there would be no prohibition on a contestant raising funds after selection day if that contestant still has debts to pay. The simplest way to deal with the uncertainty raised by subsection 405(5) would therefore be to repeal it.

In addition to repealing the provision, Parliament should deal with the root of the problem that caused the Committee concern and replace the “per contest” contribution limits with annual limits for leadership contestants. Creating annual contribution limits would remove any question as to which limit applies to a given contribution. It would also make the contribution limit regime for leadership contestants consistent with that of most other entities. Finally, an annual limit would be better adapted to the reality of leadership contestants taking part in a larger-scale contest, financed over several years, because of the substantial costs associated with the contest and the significant reduction of contribution limits since 2006.

II.12 Adjustments to Leadership Contestants' Reporting Requirements

Adjustments should be made to the return accompanying the contestant's application for registration. It should include information on loans obtained before the contest begins, and the period covered by the return should be adjusted. This adjustment would eliminate the overlap between the information provided in this return and in the first "weekly return," which is a source of confusion.

It is further recommended that only contestants who accepted contributions and incurred expenses valued at over $10,000 should be required to file the weekly returns (a final campaign return would still be required of the other contestants). Also, the number of these weekly returns should be reduced from four to two.

These recommendations seek to simplify the requirements of the current regime while maintaining the underlying principle of transparency.

A set of new rules governing the financing of leadership contests of political parties came into effect in January 2004.[73] Since then, experience has shown that some aspects of these rules are not well adapted to the reality of leadership contestants, which may in fact be quite variable. Some contests are low-key, with limited spending and contributions, while other contests are substantial in scope and involve large sums of money. In both cases, adjustments to the rules would appear to be called for.

Analysis and discussion

Party leadership contestants are required to file a number of returns, including five during the leadership race. In establishing these requirements, Parliament wanted information to be made public on the financing of the leadership contestants' campaigns, with a view to making the party leader selection process more transparent.

In addition to the campaign return that must be submitted within the six months after a contest, leadership contestants are required to submit various financial returns before the conclusion of the contest. The first of these returns must accompany the application for registration. The next return is due three weeks before the end of the leadership contest. Three additional returns are due in the following three weeks (two weeks before the end of the contest, one week before the end of the contest and the last day of the contest). The four returns presented at weekly intervals are referred to as the "weekly returns."

[73] Following the passage of the *Act to amend the Canada Elections Act and the Income Tax Act*, S.C. 2003, c. 19 (Bill C-24).

The following table shows the required returns and their deadlines, the periods covered and the content required.

Deadline	Period Covered	Content
Return 1[74]		
When contestant registers	Start: Date when 1st contribution received or 1st expense incurred End: Day preceding registration request	Contributions and number of donors Donors' names and addresses
Return 2[75] (1st weekly return)		
No later than three weeks before end of race	Start: First day of race End: Four weeks before end of race	Information requested in registration return Details of loans obtained Directed contributions (donors' names and addresses, amount of contribution and amount transferred by party) Donors' names and addresses Transfers to the party or an association Contributions received and reimbursed to their donor
Return 3[76] (2nd weekly return)		
No later than two weeks before end of race	Start: Four weeks before end of race End: Three weeks before end of race	Same as for 1st weekly return
Return 4[77] (3rd weekly return)		
No later than one week before end of race	Start: Three weeks before end of race End: Two weeks before end of race	Same as for 1st weekly return

[74] See sections 435.05 and 435.06.

[75] See section 435.31.

[76] *Ibid.*

[77] *Ibid.*

Deadline	Period Covered	Content
Return 5[78] (4th weekly return)		
No later than last day of race	Start: Two weeks before end of race End: One week before end of race	Same as for 1st weekly return
Return 6[79]		
No later than six months after end of race	Start: Date when 1st contribution received or 1st expense incurred	Information requested in weekly returns Status of campaign expenses Status of disputed claims

As indicated in the recommendation, some of these returns require a few changes.

Return accompanying the application for registration

The return accompanying the application for registration has a number of shortcomings. First, although it includes contributions received before the application for registration was submitted, it does not include loans, even though they are an important element of the leadership contestant's financial picture. Elections Canada currently asks leadership contestants to voluntarily report loans, but it would be preferable to have this requirement in the *Canada Elections Act*.

Second, the interplay of certain provisions of the Act requires that contributions received by a leadership contestant be reported twice, both in the return filed by the contestant upon registration and in the first weekly return. Aside from adding to the administrative burden on the contestants, this double reporting can be confusing for the public. For example, journalists reporting on contributions may not be aware of this overlap and may, therefore, over-report the contributions received by a contestant.

It is recommended that the overlap be eliminated by specifying that the return accompanying the application for registration relate only to contributions received up to the beginning of the leadership contest.

Under this approach, contributions received directly by the contestant between the beginning of the leadership contest and the date of application for registration would not be reported before the filing of the first weekly return. In practice, however, this would involve relatively few contributions, as the majority of those made to leadership contestants are directed contributions transferred through the party to take advantage of the tax credit available for contributions to political parties.

[78] *Ibid*.

[79] See section 435.3.

The only effect of this change will be the deferral of the reporting of a number of contributions, which will no longer be reported in the initial return but rather in the first weekly return. The information will, therefore, still be available well before the selection date. In addition, as most contributions to leadership contestants are made through the party, it is unlikely that much substantive information will be delayed.

The wording of paragraph 435.06(2)(*d*) of the Act could, therefore, be amended as follows to eliminate the overlap while ensuring that loans obtained before registration are declared. (Underlined sections indicate proposed amendments.)

> 435.06 (2) The [leadership contestant's] application must be accompanied by the following:
> […]
> (*d*) a statement containing the information referred to in paragraphs 435.3(2)(*d*) to (*e*) with respect to contributions received and loans obtained before the beginning of the leadership contest.

Weekly returns

The Act requires that the financial agent of leadership contestants submit four weekly returns in the last weeks of the contest to provide information about the contestants' sources of funding before a new leader is selected. This requirement for four interim returns imposes a heavy administrative burden on leadership campaigns, with little added value in terms of transparency. The number of returns to be filed could be reduced without affecting transparency since the information should still be submitted in the last weekly return filed before the end of the contest.

Furthermore, the requirement to provide four weekly returns was developed based on leadership campaigns that receive substantial financing in the form of contributions or loans. For campaigns that receive a much lower level of financing, it is more difficult to justify the requirement to submit four weekly returns before the end of the contest.

The rationale behind the section 435.31 requirements is to ensure the timely availability of information about the financing of leadership campaigns before a new leader is selected. In the wording of the provision adopted by Parliament, efforts were made to balance the objective of transparency with the operational requirements related to compiling and sending the relevant information to the Chief Electoral Officer. As such, there is no requirement to provide, before the end of the contest, information about loans obtained or contributions accepted during the last week of the leadership contest.[80]

In accordance with paragraph 412(2)(*b*), the Chief Electoral Officer must publish the returns filed pursuant to section 435.31 as soon as practicable after he receives them, in the manner that he considers appropriate. In practice, the Chief Electoral Officer has chosen to publish these returns on the Elections Canada Web site.

[80] This information must nevertheless be disclosed after the contest as part of the leadership campaign return required to be filed within six months of the end of the contest by virtue of section 435.3.

Since the adoption of rules on the financial administration of parties' leadership contests in 2003,[81] seven leadership contests have been held.[82] Of these seven contests, three had at least one contestant whose campaign received total contributions (including loans) of an amount greater than $10,000 (Green Party contest, 2006; Liberal Party contest, 2006; Liberal Party contest, 2008). Most of the other contests were very small affairs; in one case, the whole contest was a one-day event.

Section 435.31 seems to have been developed based on a model of leadership contests in which contestants receive substantial loans or contributions. It is particularly important for the public to know who contributed funds to such campaigns, in light of the higher risk of undue influence. Conversely, where a campaign receives low levels of contributions or loans, the potential for contributors or lenders to exert undue influence is considerably reduced. In such cases, the justification for the burden of producing four weekly returns – which are often "nil" returns – does not seem as compelling. In fact, the information obtained may not be of any use, most evidently in the case of campaigns that did not receive contributions or loans.

Therefore, section 435.31 should be amended to require "weekly returns" only from campaigns that, up to the time of the return, accepted contributions and loans of a total amount greater than $10,000. Should a leadership contestant only meet the $10,000 threshold subsequent to the period covered by the first return to be filed under section 435.31, but before the end of the period covered by the last return to be filed under that section, the period of the next return due to be submitted under section 435.31 would cover the full period from the beginning of the contest to the end of the period covered by that return.

A leadership campaign that would not be required to provide weekly returns under section 435.31 would clearly continue to be subject to the requirement to submit a final campaign return within six months of the end of the leadership contest, pursuant to section 435.3.

In addition, another amendment to section 435.31 is desirable. The need to produce four distinct weekly returns in the weeks preceding the day of the leadership contest seems excessive. The same information could be obtained from fewer returns, while still ensuring that the necessary information is available before the new leader is selected. Indeed, since the last of the returns (covering contributions and loans received during the second-to-last week of the contest) is due no later than one week after the period it covers, it is possible, under the current rules, that the information may not be posted on-line before the new leader is selected.[83]

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[81] *An Act to amend the Canada Elections Act and the Income Tax Act (political financing)*, S.C. 2003, c. 19.

[82] Green Party (June 29 to August 28, 2004); Green Party (April 21 to August 26, 2006); Liberal Party (April 7 to December 3, 2006); Newfoundland and Labrador First Party (one-day contest on September 15, 2008); Canadian Action Party (May 6 to November 6, 2008); Christian Heritage Party (February 7 to November 7, 2008); and Liberal Party (November 14, 2008, to May 2, 2009).

[83] For instance, whereas the leader may be chosen on the morning of the last day of the contest, the return itself may be submitted at the end of that day. Furthermore, even where a return was submitted before the new leader was selected, if only a paper copy was received at Elections Canada, the time needed to process the data to allow for the information to be posted on-line currently means that the return is likely to be publicly available only after the leader is selected.

For these reasons, the number of weekly returns required before the end of a contest should be reduced from four to two. The first return would continue to cover the period from the first day of the contest to the day that is four weeks before the end of the contest and would have to be submitted no later than one week after the end of the period that it covers. The second end-of-contest return would cover the period from the end of that covered by the first return to the day that is one week before the end of the contest. To ensure that the legislative intent behind section 435.31 is met and that the information contained in such a return is publicly available before the new leader is selected, the second return should be submitted no later than two days before the end of the leadership contest.

II.13 Bank Account and Audit of a Candidate's Campaign Return

Candidates[84] who conduct no financial transactions should not be required to open a separate bank account.

Candidates[85] who are not eligible for the reimbursement of election expenses and who did not receive contributions or incur expenses of more than $10,000 should not be required to produce an auditor's report with their campaign return.

The financial aspects of campaigns place a heavy administrative burden on candidates and their agents.[86] Detailed rules on political financing have been adopted over time to ensure transparency and electoral fairness, as well as to protect the integrity of the political financing regime. Although valid policy reasons existed for adopting each of these rules, it remains that in certain circumstances, the underlying rationale is not as compelling.

One example is the requirement for the candidate's agent to open a separate bank account for the campaign, even when no financial transactions occurred. Another is the requirement to audit a candidate's campaign return, even when no significant financial transactions occurred during the campaign and the candidate did not qualify for public funding.

Analysis and discussion

Bank account

Under the *Canada Elections Act*, the agent of a candidate must open a separate bank account for the purposes of the campaign, through which all of its financial transactions must be processed.

[84] The use of the term "candidate" in the recommendation regarding the requirement to open a separate bank account also refers to leadership contestants and nomination contestants.

[85] In this recommendation, the term "candidate" also includes leadership contestants, the latter being ineligible for reimbursement of their campaign expenses.

[86] The term "agent" refers to a candidate's official agent and the financial agent of a nomination contestant or leadership contestant.

Currently, this requirement applies to all candidates, whether or not a financial transaction other than the required payment of the candidate's deposit actually occurs.[87]

In some cases, financial institutions require a deposit when a bank account is opened. Agents must then make a contribution or a loan to the campaign to satisfy the legal requirement to open a bank account. In fact, an agent who fails to satisfy this requirement commits an offence, with a maximum penalty upon conviction of a $1,000 fine and three months' imprisonment.

It is recommended that the requirement for agents to open a bank account for the purposes of the campaign be removed if no financial transaction other than payment of the candidate's deposit occurred.

Audit requirement

Candidates and leadership contestants are required to appoint an auditor at the same time that they appoint an agent; this must be done before a contribution is received or a campaign expense incurred. It should be noted that nomination contestants are exempted from the requirement to appoint an auditor and produce an audited campaign return if they accepted contributions or incurred expenses valued under $10,000.[88]

The auditor's role is to conduct the necessary examinations to determine whether the campaign return accurately presents the information contained in the financial records on which it is based, in accordance with generally accepted auditing standards.

While it is desirable, at the start of the campaign, to require all candidates to designate a qualified auditor willing to report on their return, the need to require that the return of every candidate or contestant is, in fact, audited is not as clear cut.

If the campaign incurred significant expenses or received many contributions, there is value in calling upon an independent and professional auditor to examine the campaign return and determine whether it accurately reflects the financial records on which it is based before the return is submitted to the Chief Electoral Officer.

Similarly, an audit is an important control mechanism when the candidate receives 10 percent or more of the valid votes cast in the electoral district since the campaign will receive direct public funding. Indeed, the Act provides for reimbursement of up to 60 percent of the candidate's election and personal expenses. It is, therefore, important for an audit to verify that the reported expenses are supported by the financial records.

On the other hand, the need for and usefulness of a campaign return audit are not as evident when significant financial transactions have not occurred and when the candidate did not qualify for the reimbursement of election expenses. Although section 466 of the Act does provide for a subsidy to assist in paying the fee charged by the candidate's auditor (and, in practice, the cost to

[87] The candidate's deposit may be paid with funds other than campaign funds and, in such cases, would not be processed through the campaign account.

[88] See section 478.25.

very small campaigns is covered by the state through the minimum amount of this subsidy), an audit may in some cases add very little value and may in fact delay reporting on the financial transactions of a campaign. In cases where the auditor is not in a position to finish the work within the tight deadlines set by the Act, the candidate may have to obtain an extension of the filing deadline from a judge, with the fees inherent in such a process being added to the cost of the campaign.

The significant administrative burden imposed on some candidates as a result of applying this requirement is particularly evident when the return reflects no transactions, indicating that the campaign did not incur any expense nor accept any contribution, loan or transfer. A total of 142 of the 1,636 candidates in the 39th general election submitted a return showing no transactions. Nevertheless, they were required under the Act to have it audited before it could be sent to the Chief Electoral Officer. In accordance with section 466, the auditor would have received the minimum public subsidy of $250 provided under the Act to examine a return that did not contain a single financial transaction.

Moreover, it can be argued that little value is added by requiring an audit of the returns of other small campaigns that were far from reaching the applicable spending limit, and that only accepted a small amount in contributions, if those campaigns are not eligible for the reimbursement of election expenses. Although the establishment of the cut-off point for requiring an audit may be somewhat arbitrary, data from the 39th general election provide some idea of the consequences of adopting such a threshold.

Candidates in the 39th General Election – Effect of $5,000 and $10,000 Thresholds on Number of Audits Required

	No Threshold (Current Law)	$5,000 Threshold	$10,000 Threshold
Qualified for Reimbursement	884	884	884
Did Not Qualify for Reimbursement but Required Audit	752	146	75
Total Audits Required	**1,636**	**1,030**	**959**
Total Audits No Longer Required		**606**	**677**

Notes:
1. Data as of April 14, 2010; subject to change.
2. Audit required if contributions or electoral campaign expenses exceed the applicable threshold.

As shown above, in the 39th general election, a total of 884 candidates would have required an audit, regardless of their financial transactions, because they were eligible for reimbursement of their election expenses. Since public funds would be provided to help finance the campaigns, the

state would have an obvious interest in ensuring that the amount of reimbursement, calculated on the expenses reported in the return, is supported by the financial records.

If a threshold of $5,000 had been in effect for that election,[89] an additional 146 candidates would have been required to have their returns audited, as well as the 884 candidates who would automatically have had to do so because they were eligible for public funding. Therefore, in total, 1,030 audits would have been required instead of 1,636 under the existing rules.

If a threshold of $10,000 had been in effect for that election,[90] in addition to the 884 candidates who would automatically have had their returns audited because they were eligible for public funding, 75 other candidates would have been required to do so. Therefore, in total, 959 audits would have been required.

A threshold of $10,000, as opposed to $5,000, results in a substantial drop in the number of audits required from candidates endorsed by parties not represented in Parliament, independent candidates and candidates with no affiliation. (Only half of those who would have needed their returns audited with the $5,000 threshold would be required to do so with a $10,000 threshold.) Since, in the past, some of these candidates may have had the least opportunity for support from a party to assist them in navigating the maze of rules and procedures involved, adoption of a $10,000 threshold may be desirable. On the other hand, whichever threshold is chosen, the usefulness of an audit is called into question for these campaigns: in both cases, the candidates are far from the statutory spending limit, they have received relatively low levels of contributions and in no case would they be eligible for direct public funding.

Such a comprehensive study has not been carried out with regard to party leadership contestants. There is no reason, however, not to extend this recommendation to them.

Consequently, it is recommended that the Act be amended to exempt candidates from the requirement to have their returns audited if they are not eligible for reimbursement of their election expenses, did not accept total contributions of more than $10,000 during the campaign and did not incur expenses of more than $10,000. The same recommendation is made for leadership contestants if they did not accept total contributions of more than $10,000 during the campaign and did not incur campaign expenses of more than $10,000.

The requirement that a candidate's nomination papers or a leadership contestant's registration application include the name and consent to act of an agent and an auditor should, however, be maintained.

[89] That is, no audit would be necessary if total electoral expenses (including non-monetary contributions) and total contributions received were each under $5,000.

[90] That is, no audit would have been necessary if total electoral expenses (including non-monetary contributions) and total contributions received were each under $10,000.

II.14 Pre-Confirmation Transfers to Candidates

Registered parties and registered electoral district associations should have the right to transfer funds, goods and services to candidates at any time. From the moment that they accept a transfer, those who intend to be a candidate must begin meeting the financial requirements of the Act.

This recommendation would simplify the current rule and would benefit the parties, associations and candidates.

Transfers of funds, goods and services from registered parties and associations to candidates are permitted only once their candidacy is confirmed by the returning officer. Meanwhile, registered parties and associations frequently wish to transfer goods, services and funds to candidates to help them start up their campaigns before their candidacies are confirmed by the returning officers.

The significant number of pre-confirmation transfers to candidates demonstrates the extent of the problem. In the 2004 general election, 535 candidates received transfers (from the party, the associations or both) before their nomination was confirmed. In the 2006 election, 333 such transfers occurred. Since these transactions are not authorized by section 404.2, they constitute illegal contributions. Only individuals are authorized to make contributions to political entities governed by the *Canada Elections Act*.

Analysis and discussion

To deal with the problem created by the existing prohibition against the transfer of funds, goods and services by registered parties and associations to candidates before their official confirmation by the returning officer during the election period, the Act could permit transfers to candidates before they are officially confirmed. More specifically:

- Parties and associations could be given the right to transfer funds to candidates at any time after the issue of the writ.
- Parties and associations could be given the right to transfer funds to candidates at any time, including before the issue of the writ.

The advantages and disadvantages of these potential amendments will be discussed in turn.

It should be specified, however, that the following proposals apply solely to transfers of funds *to* candidates. In the case of transfers *from* candidates (see paragraphs 404.2(2)(*c*) and (2.1)(*c*)), it is desirable to maintain the restrictions set in these provisions to ensure transparency and preserve contribution limits by preventing persons who do not subsequently file a return from injecting funds *into* the political system.

It should also be noted that the Chief Electoral Officer treats the time when the candidate's nomination is confirmed by the returning officer as the time when he or she receives a party's endorsement. Elections Canada believes, therefore, that transfers between the party or electoral

district association and a candidate are possible only after confirmation of the candidate's nomination. This position is based on the fact that once the nomination has been confirmed, the candidate must meet the reporting requirements and abide by the contribution limits, retroactive to when the candidate received his or her first contribution or incurred his or her first campaign expense. While the timing of confirmation establishes a clear line beyond which legal consequences come into play, the party's endorsement has no bearing on the candidate's legal obligations. For example, different rules apply to candidates who receive a party's endorsement but subsequently lose it and become independent candidates because their nominations are confirmed as independent candidates and not as candidates of a party.[91]

Pre-confirmation transfers

The first solution would be to eliminate the words "endorsed by the party" from the relevant provisions referring to transfers *to* candidates. Such a change would have little negative impact on the other goals of the Act.

In terms of reporting, if a person who receives funds (or goods or services) from the party or registered association subsequently becomes a candidate, the transfer would have to be reported by the candidate pursuant to section 365.[92] If funds (or goods or services) are made available to a person who subsequently does not become a candidate, the transfer would still have to be reported, but only in the return of the party or association.[93] This is not unusual, however. Parties and associations are not restricted in their disbursement of funds or goods.

Similarly, if the recipient does not become a candidate, there is the possibility that some of the transferred funds will be lost to the political system.[94] However, as noted above, this is no different from any other situation where a registered party or association makes a transfer or payment to a person who is not a candidate. The Act generally does not prohibit such payments.[95]

That said, a party or association is unlikely to transfer something of value unless it is certain that the candidate will represent it in the next election.

If Parliament chooses to amend the provisions of the Act to allow pre-confirmation transfers, sections 82 and 365 should be amended to take transfers into account. These sections provide that, for financial purposes (including disclosure), a person who becomes a candidate is deemed to have been a candidate from the moment he or she accepted a contribution or incurred a

[91] Contribution limits and the rules governing transfers differ for independent candidates and for those without party affiliation.

[92] Pursuant to this provision, a person is deemed to have been a candidate from the time he or she accepted a contribution or incurred an expense.

[93] The amount will then be reported as a disbursement, not as a transfer.

[94] There is the possibility of funds being returned as contributions, but they would then be subject to the relevant contribution limits.

[95] However, subsection 405.2(4) and section 405.21 prohibit contributions in some circumstances, depending on the uses to which the party will put the funds.

campaign expense. These provisions should be amended so that they are also triggered by the acceptance of a transfer.

Transfers after the issue of the writ or at any time

There remains the question as to whether the allowable period for transfers to candidates should be extended to authorize transfers from the issue of the writ or at any time. As already noted, the goals of the Act are unlikely to be severely affected by allowing pre-confirmation transfers. The impact on the regime would not be any greater if pre-confirmation transfers were allowed at any time than if such transfers were limited to the writ period.

Finally, given that parties and associations would likely wish to have the flexibility to make transfers to candidates outside the writ period, especially in the weeks leading up to an election call, it would be preferable to choose the broader approach, allowing more scope for transfers.

It should be noted that, should Parliament wish to maintain the status quo, it is further recommended that the words "and whose candidacy is confirmed by the returning officer" be added after the words "endorsed by the party" in section 404.2 so that there is no doubt as to when transfers can be made.

II.15 Election Superseded by a General Election – Effects on Political Financing and Reimbursement of Candidates' Expenses

The system for reimbursing a candidate's expenses in the event of a superseded election should be reviewed to increase its fairness and to enable candidates in the first cancelled election to transfer their assets to their campaign for the second election. Consequently, the following is recommended:

- All confirmed candidates at a superseded election should be reimbursed for eligible election and personal expenses incurred.
- Reimbursement of a candidate's election expenses and personal expenses should be the same for a cancelled election as for a completed election – that is, a reimbursement of 60 percent of the election and personal expenses paid to a maximum of 60 percent of the authorized limit.
- Only the expenses paid for by a candidate should be reimbursed.
- The campaign assets of a candidate in the first cancelled election should be transferable to the campaign of the same candidate in the second election. The transfer would be presumed to have occurred when the writ for the second election was issued. The candidate would be presumed to have accepted the transfer.

Section 470 of the *Canada Elections Act* governs the political financing of candidates when an election is superseded by a general election. It also applies when the writ of election is withdrawn because of flood, fire or other disaster. In both situations, the election in progress is cancelled and replaced by another.

The purpose of section 470 appears to be to compensate the candidate for any campaign deficit resulting from a cancelled election.[96]

However, section 470 has the following impacts on participating political entities; we will further elaborate on these below.

- Section 470 creates an unfair situation for candidates in an electoral district where the election was cancelled before the closing day for nominations because in this case they are not entitled to any reimbursement.
- Section 470 allows a higher reimbursement for candidates who rely on transfers (rather than on contributions) to finance their campaign.
- Section 470 allows candidates to be reimbursed for expenses that were not actually incurred or paid.

Furthermore, section 470 has the following gaps:

- It does not provide for the candidate of a registered party in a by-election that is superseded by a general election to receive more funding from an individual who might have already reached the annual contribution limit that he or she is subject to.
- The Act does not provide any means for the campaign assets of a candidate in a by-election to be transferred to the campaign of the same candidate running in the general election that replaces it.

Analysis and discussion

According to section 470, the rules in Part 18 of the Act respecting electoral campaign expenses apply somewhat differently to the campaign expenses of a candidate in a superseded election.

Candidates in a cancelled election must prepare a return on their campaign's financial transactions in accordance with section 451 of the Act, and they will have to report and dispose of any surplus as required by the Act.

However, a candidate's election expenses and personal expenses are not reimbursed in the same way following a superseded election as they are following an election that is completed.

[96] It should be noted that these rules apply only to persons who were candidates in the cancelled election – that is, their nomination papers had been accepted by a returning officer prior to the cancellation of the election. Persons whose nominations were not confirmed prior to the cancellation of the election never were official candidates for the purposes of the *Canada Election Act.* These persons are not required to report and are not eligible for any reimbursement of election or personal expenses.

A candidate in a superseded election is eligible for reimbursement of election or personal expenses only when the following circumstances unite:

- The election is cancelled on or after the closing day for nominations (that is, 21 days or less before polling day) – no candidate is eligible for reimbursement if the election is cancelled before the closing day for nominations.
- The candidate's election expenses, as disclosed in his or her electoral campaign return, are greater than the value of the contributions received.
- The candidate's electoral campaign return and related documents are submitted as required under section 451 of the Act.

If the aforementioned conditions are satisfied, the candidate qualifies for a reimbursement amount that is the lesser of:

- the election expenses limit established for the electoral district
- the amount by which the total of the candidate's election and personal expenses, as disclosed in his or her electoral campaign return, exceeds the total value of contributions that the candidate received

The following text discusses the impacts of the rules set out in this provision and the gaps identified.

a) *The effect of cancelling an election before the closing day for nominations on the reimbursement of candidates' election and personal expenses*

Paragraph 470(2)(*a*) provides that candidates are not entitled to reimbursement for election expenses if a by-election is cancelled before the closing day for nominations, even if their nomination has been confirmed.

This rule has been in the Act since 1977. It has been amended a few times, but the minimal reimbursement structure has always been retained. When it was introduced, the right to reimbursement was linked to completion of the enumeration of electors rather than the closing day for nominations. Thereafter, the election expenses limit set for the electoral district was added to determine a limit for reimbursement. Finally, the closing day for nominations replaced the completion of enumeration so as to put a time limit on possible reimbursements.

Parliament wanted to restrict eligibility for reimbursement based on a specific day in the election calendar. The reason for this restriction is unclear. However, it appears to create an injustice.

This injustice is clear when two by-elections being conducted at the same time, but with different closing days for nominations, are superseded by the call of a general election. In the electoral district where the by-election is cancelled after the closing day for nominations, the candidates running in that by-election are entitled to reimbursement. In the other electoral district where the

by-election is cancelled before the closing day for nominations, the running candidates are not entitled to reimbursement.[97]

In addition, some candidates may have incurred a substantial portion of their election expenses before the closing day for nominations, when the election is cancelled, and will not be entitled to any reimbursement. Others may have incurred far fewer expenses by that time and, as a result, will not be as seriously affected by the lack of reimbursement.

This aspect of section 470 appears to contradict the objective of the provision, which is to eliminate any campaign deficit incurred by the candidates.

Section 470 of the Act should be amended to allow reimbursement to all confirmed candidates who incurred eligible election expenses and personal expenses.

b) The effect of campaigns financed by transfers on the reimbursement of candidates' expenses and on the formula for calculating reimbursement

The calculation for the reimbursement of expenses set out in section 470 takes into account any "contributions" received by the candidate. Only expenses that exceed the contributions may be reimbursed. This rule does not take into consideration transfers received from the party or registered electoral district association.

Therefore, a candidate whose campaign is financed by contributions made to the electoral district association is entitled to a higher reimbursement than a candidate who receives the contributions directly.

In 2004,[98] several amendments to Part 18 of the Act came into effect. Some of them were adopted to provide for the transfer of funds between the various entities of a political party.

Subsections 404.2(2) and (2.2) permit this type of transfer. Although transfers must be reported, they do not constitute a contribution. Without this specific exclusion, the ordinary meaning of the term "contribution" would include transfers. Transfers were, in fact, considered to be contributions before 2004.

The amendments that came into force in 2004, stipulating that transfers do not constitute contributions, redefined the term "contribution" for the purposes of the Act.

The new definition of the term "contribution," applied in section 470, would favour some candidates by increasing the amount of their reimbursement. To resolve this problem, section 470 must be amended to include transfers in the calculation of reimbursement. This amendment would give effect to what appears to have been the intention of section 470 – that is, to allow reimbursements only for expenses that have resulted in debt.

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[97] This problem could have occurred in 2008, as by-elections called on different dates were superseded by the calling of the general election. Fortunately, in all cases, the writ for the general election was issued after the closing day for nominations, thus leaving the candidates in the four electoral districts on an equal footing.

[98] Following the passage of *An Act to amend the Canada Elections Act and the Income Tax Act (political financing)*, S.C. 2003, c. 19.

c) Lack of resources for the second campaign

Furthermore, there is a question of whether the purpose of section 470, to eliminate any campaign deficit of a candidate, is fair to candidates in a superseded election. In fact, section 470 provides that the amount reimbursed is the amount by which the candidate's election expenses and personal expenses (up to the expense limit) exceeds the total value of contributions received.

Candidates in a superseded election may be left without financial resources to mount a new campaign, although some assets acquired during the first election may be used during the second. In theory, they may have spent all the money they had and cannot seek additional contributions from those who have already contributed up to their annual limit. Even if they finance their campaign through transfers and obtain a 100 percent reimbursement of their expenses, the money they had at the start of the campaign is gone.

The candidates in the second election campaign are not necessarily all the same. New candidates would therefore have resources that were not exhausted by the cancelled campaign. In theory, this gives them an advantage. To resolve this issue, it should be possible for the election expenses and personal expenses of candidates in a cancelled election to be reimbursed in the same way as for a completed election – that is, reimbursement of 60 percent of the actual election expenses and personal expenses paid, to a maximum of 60 percent of the authorized limit.

d) Reimbursement of a candidate's unpaid expenses

Under section 470, if a by-election is superseded by another election on or after the closing day for nominations, all candidates in the cancelled election qualify for a reimbursement amount that is the lesser of the election expenses limit for the electoral district or the amount by which the total of the candidate's election expenses and personal expenses, as disclosed in his or her electoral campaign return, exceeds the total value of contributions that the candidate received.

For a candidate to be entitled to this reimbursement, the candidate's election expenses, as disclosed in his or her electoral campaign return, must exceed the value of contributions that the candidate received, and the candidate's electoral campaign return and any associated documents must be provided in accordance with section 451 of the Act.

Section 470 provides for the reimbursement of all reported expenses, and not only those that have actually been paid. To resolve this problem, section 470 should specify that the reimbursement is only for expenses that have actually been paid, as is the case in the ordinary conduct of an election that is not cancelled.

e) Transferring assets from one campaign to another when an election is superseded by another

When one election is superseded by another, the Act does not provide any means for the campaign assets of a candidate in the first election to be transferred to the campaign of the same candidate in the second election. This type of transfer is not permitted by the Act, and this poses some practical problems: the candidate continues to occupy the premises and to benefit from signs posted on the streets, as from all of the accumulated resources that are at the candidate's

disposal for the campaign in the second election. That reality cannot be ignored and requires legal mechanisms to regularize the situation for the second campaign.

Candidates of a registered party could transfer all the assets from their campaign for the cancelled election to the registered electoral district association. The electoral district association could then transfer them to the candidate's campaign for the second election. However, this transaction would be an artificial one.

Candidates who do not represent a registered party have no way to transfer the assets of their campaign for the first election to their campaign for the second election. They could sell them, but that could create a double reimbursement, since both campaigns would have incurred and paid the same costs.

In order for the assets of the campaign of a candidate in the first election to be transferred to the candidate's campaign in the second election, the Act must include provisions to that effect. Such provisions should be able to resolve several of the problems that arise when one election supersedes another and both campaigns of the same candidate follow one another.

Some elements of the first campaign could continue during the second campaign. For example, commercial messages transmitted during the first campaign could continue during the second campaign.

To resolve this type of issue, the candidate would be presumed to have accepted the transfer that would be presumed to have occurred upon issue of the writ. It would be an exception to the rule prohibiting candidates from receiving transfers before their nomination is confirmed by the returning officer.[99]

The value of the assets acquired during the first campaign and transferred to the second campaign would constitute an election expense for the purposes of the expenses limit of the second election. These expenses would not, however, be considered for a second reimbursement.

II.16 Adjustment for Inflation (Payments to Auditors)

The reimbursement amount for the fees to audit candidates' electoral campaign returns and registered electoral district associations' financial transactions returns should be subject to an inflation adjustment.

This recommendation would maintain the value of the payment made to auditors.

[99] See recommendation II.14, which proposes that this prohibition be removed.

Section 403.39 provides that a registered association will be reimbursed for a portion of the audit fees for its financial transactions return. The maximum amount that can be reimbursed has not been adjusted for inflation since the passage of *An Act to Amend the Canada Elections Act and the Income Tax Act (political financing)*[100] in 2003.

For its part, section 466 provides that a candidate will be reimbursed for a portion of the audit fees for his or her electoral campaign return. The maximum amount that can be reimbursed has not been adjusted for inflation since the passage of *An Act to Amend the Canada Elections Act and the Income Tax Act (political financing)*[101] in 2003, although the calculation method was modified slightly in 2006.[102]

The reimbursement limits set out in those sections should be adjusted to take into account the gradual increase in audit fees due to inflation. The inflation adjustment factor set out in subsection 405.1(1), which calculates inflation based on the year 2002, should be used.

Calculated using the proposed formula, the amount of $1,500 set out in those sections would be adjusted to $1,717 for 2010, and the amount of $250 set out in paragraph 466(*b*) would be adjusted to $286 for that year.

[100] S.C. 2003, c. 19, s. 23 (Bill C-24).

[101] *Ibid*., s. 50.

[102] *An Act to Amend the Canada Elections Act and the Public Service Employment Act*, S.C. 2007, c. 21, s. 35 (Bill C-31).

III – Governance

Introduction

The *Canada Elections Act* is the legal framework that establishes the position of Chief Electoral Officer and invests the incumbent with the majority of his or her responsibilities. This chapter addresses a number of matters relating to the governance of the agency that supports the Chief Electoral Officer in his duties. Three main themes are covered: collaboration with other electoral agencies at the national and international levels, modernization of the communications and exchanges provided for in the Act and the management of human resources.

Elections Canada has long collaborated with electoral agencies in other Canadian jurisdictions. This has encouraged all the agencies involved to draw on one another's experience and to jointly identify and adopt best practices in electoral management. We now wish to extend this collaboration and develop joint initiatives to better serve electors and to increase efficiency – in particular, by entering into service agreements with each other and common supply arrangements (recommendation III.1).

Similarly, Elections Canada has acquired an international reputation for providing technical assistance to electoral agencies in emerging democracies. Conducted at the request of the Government of Canada and funded by the government through ad hoc transfer payments, these electoral assistance projects contribute to Canada's broader international policy objectives. The Act should formally grant the Chief Electoral Officer the authority to commit the funds that the government transfers to Elections Canada for that purpose (recommendation III.2).

As mentioned earlier in this report, allowing electors and political entities governed by the Act to conduct transactions with Elections Canada using electronic means of communication would help to improve efficiency and accessibility. Therefore, we propose allowing for authentication methods other than traditional signatures for the transmission of information and the filing of returns (recommendation III.3).

Finally, this third chapter addresses a number of issues relating to the management of human resources. The proper and efficient conduct of an election relies on the availability and commitment of qualified staff to carry out work leading to an election and election period activities. The Public Service Labour Relations Board rendered a decision on this subject several months ago, ruling that such work does not constitute services necessary for the safety or security of the public that could be subject to an essential services agreement with the unions. We therefore recommend that, while remaining unionized, Elections Canada employees not have the right to participate in work stoppages initiated by their respective unions. This measure would enable Elections Canada to fulfill its mandate of being ready to conduct an election at all times (recommendation III.6). For the same reason, the Act should be amended to authorize the temporary suspension of a returning officer if that person is unable to satisfactorily carry out

pre-event assignments or election period activities (recommendation III.8). We also suggest that the position of field liaison officer, which was tested in the past three elections, be recognized in the Act (recommendation III.7).

These recommendations and the others contained in this chapter – media presence at polling sites (recommendation III.5) and the right to vote of prisoners serving a sentence of two years or more (recommendation III.4) – aim at facilitating the administration of the Act and enhancing the governance of the electoral process.

III.1 Contracting Authority of the Chief Electoral Officer

- For greater certainty, the authority of the Chief Electoral Officer to enter into contracts with respect to the procurement needs of his Office should be confirmed.
- The authority of the Chief Electoral Officer to enter into agreements to offer services to, or receive services from, other electoral agencies in Canada, as well as to enter into joint procurement contracts with such agencies in order to achieve common objectives, should be explicitly recognized in the Act.
- The Chief Electoral Officer should be provided with the authority to enter into leases for all premises used by election officers for the purposes of an election. When he deems it necessary for the proper conduct of the election, the Chief Electoral Officer may enter into certain leases before the election is called. The legislation should also provide that the authority to enter into a lease may be delegated to a returning officer on the conditions that the Chief Electoral Officer may impose.

These changes would allow a more efficient use of resources.

The Chief Electoral Officer currently has an implied contracting authority that supports the delivery of his legislative mandate. The ability of the Chief Electoral Officer to contract is essential to the independence of his Office as well as to the discharge of duties related to the conduct of an election. Amendments to the *Canada Elections Act* are desirable for clarifying this authority as well as for allowing the Chief Electoral Officer to contract jointly with other electoral agencies and to provide the authority to returning officers to sign leases in his name.

Analysis and discussion

Procurement needs of the Chief Electoral Officer

The House of Commons Standing Committee on Access to Information, Privacy and Ethics noted the special nature of the Office of the Chief Electoral Officer and the need to shield it from political interference in the Committee's May 2005 report, *A New Process for Funding Officers of Parliament*:

> Unlike most other Officers of Parliament, the Chief Electoral Officer is not an ombudsman. He is responsible for the delivery of two fundamental democratic rights: the right to vote, and the right to be a candidate in an election. In accordance with this unique role, the independence of his Office from political influence is safeguarded in a number of ways, including the funding mechanism, but more importantly, the appointment and removal processes.

Given the need to protect the independence of the Office of the Chief Electoral Officer, the Act[103] has consistently been applied as conferring contracting authority on the Chief Electoral Officer for the procurement of goods and services related to the mandate of his Office.[104] The imperative of removing any perception of political interference in election administration favours granting contracting authority to the independent officer of Parliament appointed to administer the process, as opposed to a minister from the governing party.

Since the creation of the Office in 1920, the Chief Electoral Officer has consistently used the independent contracting authority to carry out his own procurement activities. Even after Parliament adopted provisions in the *Government Organization Act, 1969* (Bill C-173) that confer on the Minister of Public Works contracting authority for the procurement of all government materiel,[105] the Office of the Chief Electoral Officer has continued to enter into contracts independently to meet Elections Canada's needs for both goods and services. However, whenever it is possible and does not lead to a loss of confidence in the integrity of the electoral process, the Office of the Chief Electoral Officer entrusts this task to the Department of Public Works in order to benefit from that department's capabilities.[106]

Parliament recently adopted provisions to grant to the Minister of Public Works and Government Services the exclusive authority to acquire services (in addition to materiel) for the whole of government, through an amendment to section 9 of the *Department of Public Works and Government Services Act* contained in the *Budget Implementation Act, 2005*.[107] The government has yet to fix a date for the coming into force of this amendment. That said, there is no indication in the parliamentary debates that Parliament intended to confer on the Minister exclusive contracting authority over the procurement of services for the Office of the Chief Electoral Officer. As the 1969 changes did not have this effect with respect to the procurement of materiel,

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[103] As well as the *Dominion Elections Act* before it.

[104] Section 16 of the Act reads as follows:
The Chief Electoral Officer shall
(*a*) exercise general direction and supervision over the conduct of elections;
(*b*) ensure that all election officers act with fairness and impartiality and in compliance with this Act;
(*c*) issue to election officers the instructions that the Chief Electoral Officer considers necessary for the administration of this Act; and
(*d*) exercise the powers and perform the duties and functions that are necessary for the administration of this Act.

[105] The current equivalent provisions are found in section 9 of the *Department of Public Works and Government Services Act*.

[106] For example, last summer, in anticipation of an epidemic due to the A-H1N1 virus, the Office of the Chief Electoral Officer asked the Department to provide its services to obtain a large quantity of antiseptic hand liquid for each polling station that would be open during the by-elections that had been scheduled for the fall. The Department turned down that request, however, as it was unable to conduct that supply activity for the Office within the deadlines we had to meet.

[107] Bill C-43 received royal assent on June 29, 2005. See sections 120 to 125, S.C. 2005, c. 30.

and without an explicit indication of the intent to change the situation with respect to services, no such conclusion can be drawn. Such a change would constitute a profound policy shift that legislators would have been quick to underline.

Nevertheless, it is recommended that the *Canada Elections Act* be amended to confirm the contracting authority of the Chief Electoral Officer, reflecting long-standing practices that have served Canadian democracy well. By removing any possible confusion about the existence of an independent contracting authority for the Chief Electoral Officer with respect to the procurement needs of his Office, an amendment to the Act that explicitly overrides section 9 of the *Department of Public Works and Government Services Act* would further strengthen the independence of his Office and help maintain confidence in the integrity of the electoral process. A number of agencies already receive this exemption, including the Canadian Food Inspection Agency,[108] the Canada Revenue Agency,[109] the Canadian Institutes of Health Research[110] and Parks Canada.[111]

Ability to enter into agreements with other electoral agencies in Canada to offer or receive services

In her November 2005 report,[112] the Auditor General of Canada recommended that "Elections Canada, in collaboration with other public sector organizations, should pursue its efforts and explore additional ways to rationalize and improve the overall efficiency of data collection and management of information on Canadians and Canadian geography." While Elections Canada has a long history of leveraging initiatives carried out by other electoral agencies to achieve significant savings – indeed, Elections Canada's response to the Auditor General's report noted that there were 36 existing agreements with various federal, provincial, territorial and municipal agencies to support voter registration – much more could be done.

As election administration becomes increasingly complex and technology evolves to allow for improved systems and added opportunities, Elections Canada could effectively carry out common initiatives with other electoral agencies in Canada. For example, electoral agencies could collaborate on the development of public education and outreach tools and programs; this would allow Elections Canada and these agencies to improve their services and use public funds more efficiently. In the same way, electoral agencies that are studying similar initiatives, such as electronic voter registration, could pool their resources in order to share some of the costs of development, integrate their systems and eventually facilitate the registration of electors from one jurisdiction to another.

[108] S.C. 1997, c. 6, s. 16.

[109] S.C. 1999, c. 17, s. 66.

[110] S.C. 2000, c. 6, s. 28.

[111] S.C. 1998, c. 31, s. 9.

[112] *Report of the Auditor General of Canada*, November 2005, Chapter 6 – Elections Canada – Administering the Federal Electoral Process, recommendation 6.41.

The *Canada Elections Act* should, therefore, be amended to provide an explicit authority for the Chief Electoral Officer to enter into an agreement:

- To do any thing for or on behalf of another electoral administration in Canada if the Chief Electoral Officer is authorized to do that thing under the *Canada Elections Act* or any other Act of Parliament. The Chief Electoral Officer should be authorized to charge for such services and, on receipt of payment, should be required to forward it without delay to the Receiver General.[113]
- To have another electoral administration in Canada do any thing for or on behalf of the Chief Electoral Officer that allows him to deliver on his mandate under the *Canada Elections Act* or any other Act that the Chief Electoral Officer is responsible for administering. Claims for such services rendered to the Office of the Chief Electoral Officer should be paid by separate cheques issued from the Receiver General.
- With one or more electoral administrations in Canada for contracting with suppliers in order to realize common objectives, in the context of the Chief Electoral Officer's mandate under the *Canada Elections Act* or any other Act that the Chief Electoral Officer is responsible for administering.

Leases for returning offices and polling sites

Under section 98 of the Act, an explicit authority is provided to the returning officer "to rent one or more offices for the revision of the preliminary lists of electors." Aside from this explicit authority, the Act contains no provision about the entering into of leases during an election period. However, several provisions imply that an authority to enter into other leases rests with the returning officer in each electoral district. The following are examples of such implied authorities:

- opening a returning office (subsection 60(1)) and an office for each additional assistant returning officer (subsection 30(2))
- establishing a polling station for each polling division (subsection 120(1) and section 122)
- establishing a central polling place (subsection 123(1))

The responsibility for renting office space was undoubtedly conferred on returning officers because of the large number of leases required during an election and the fact that the returning officers have local knowledge of their respective electoral districts. Indeed, it would be very difficult for the Office of the Chief Electoral Officer to enter into the tens of thousands of leases required in an election period.

Despite these operational considerations, it may be advisable to confer on the Chief Electoral Officer the authority to enter into the leases, accompanied by an explicit power to delegate this authority to the returning officer in each electoral district. This change would more accurately reflect current realities.

[113] This is similar to the authority provided to the Minister of Public Works under sections 16 and 17 of the *Department of Public Works and Government Services Act*.

Even though the Chief Electoral Officer is not a party to the lease between the returning officer and the landlord, there is a public perception of the Office of the Chief Electoral Officer as the signatory. This perception undoubtedly flows from the fact that the rent is paid by the Chief Electoral Officer; however, it complicates matters in the case of any litigation arising from the rented premises, such as where an elector was injured on site during a fall. It is common in such instances for the Office of the Chief Electoral Officer to be named as a party in any ensuing litigation, despite the fact that it was not a party to the lease. In recent years, the Office of the Chief Electoral Officer has not objected to this.

A more transparent solution would be to have the Act provide that the Chief Electoral Officer is the signatory of the lease. As the Office of the Chief Electoral Officer pays for the rented space, defends against any allegations of liability arising from the leased premises, settles such claims, pays damages and is seen by the public as the lessee, a statutory recognition that the Chief Electoral Officer is the contracting authority would be consistent with modern realities.

Moreover, providing authority to the Chief Electoral Officer to enter into these leases could resolve an existing problem created by the wording of subsection 60(1) of the Act:

60. (1) Every returning officer shall, without delay after receiving the writ or notice by the Chief Electoral Officer of the issue of the writ, open an office in premises with level access in a convenient place in the electoral district and shall maintain the office throughout the election period.	**60**. (1) Dès la réception du bref ou dès que le directeur général des élections lui en a notifié l'existence, le directeur du scrutin ouvre en un lieu approprié de la circonscription un bureau avec accès de plain-pied, pour toute la période électorale.

There has been uncertainty as to whether this provision allows a returning officer to rent an office before the issue of the writ when this is necessary to ensure that an office will be available at the drop of the writ. For several years, it has proved quite difficult to secure space in some regions of the country that are experiencing an economic boom. Given that subsection 60(1) may be interpreted as authorizing the returning officer to lease space for his or her office only after receiving notice of the issuance of the writ, a delay in finding adequate space may lessen the returning officer's ability to deliver on his or her statutory mandate.

To provide a legal foundation for renting space before the issue of the writ, the Chief Electoral Officer must issue instructions to returning officers in such regions under paragraph 16(*c*) of the Act. Once again, it would be preferable to provide the Chief Electoral Officer with the authority to enter into the leases that are required in an electoral district for the conduct of an election. When he deems it necessary to ensure the proper conduct of the election, the Chief Electoral Officer could rent such a space in advance in order to ensure that it is available to the returning officer for the opening of his or her office, as required by subsection 60(1).

The authority to enter into these leases should be accompanied by the power to delegate this authority to a returning officer. As mentioned above, it is impossible for the Office of the Chief Electoral Officer in Ottawa to sign each of the tens of thousands of leases that are required during an election. Furthermore, within the federal electoral administration, the returning officers are those with the local knowledge that is essential to finding suitable space.

In sum, it is recommended that the Act be amended to provide the Chief Electoral Officer with statutory authority to enter into all leases required in an electoral district for the purposes of an election (including for returning offices, revising offices and polling sites). This should include the power to delegate the authority to sign leases in the Chief Electoral Officer's name to a returning officer during an election period, or at any other time when the returning officers are carrying out pre-writ assignments, on the conditions that the Chief Electoral Officer may choose to impose. Since the passage in 2007 of provisions for fixed election dates, and particularly in the context of majority governments, the Office of the Chief Electoral Officer and returning officers would be better able to plan the most suitable time for entering into these leases and ensure that all spaces required for the election period are available.

Section 98 of the Act should also be amended so that the responsibility of renting offices for the revision of the lists of electors no longer falls to the returning officer. The amended provision would specify that the returning officer must open such an office in the space rented by the Chief Electoral Officer. Similarly, subsection 60(1) of the Act, which provides for the returning officer opening his or her office, should be amended to clarify that the returning officer must open this office in the space rented by the Chief Electoral Officer for that purpose.

III.2 International Assistance and Co-operation

The authority of the Chief Electoral Officer to provide assistance to electoral agencies of other countries for the development of their electoral processes at the request of the Government of Canada should be confirmed.

In addition, there should be explicit authority for the Chief Electoral Officer to co-operate on electoral matters with international organizations, and with other electoral agencies, in order to exchange information and develop best practices.

These recommendations would provide a better legal framework for Elections Canada's international activities while recognizing current practices in this field.

Since the creation of the Office of the Chief Electoral Officer in 1920, the federal electoral agency has acquired significant expertise in the administration of elections and referendums. It has gained considerable expertise while conducting 27 general elections, 2 national referendums[114] and countless by-elections.

It is not surprising, then, that new and emerging democracies often contact the Government of Canada, or the Chief Electoral Officer directly, to request assistance and advice as they set out to conduct their own electoral events. The House of Commons Standing Committee on Foreign

[114] In 1942 and 1992.

Affairs and International Development has recognized Elections Canada's highly regarded international role.[115]

Despite the fact that the international assistance and co-operation activities of the Chief Electoral Officer are well known and are, for many, a source of national pride, the *Canada Elections Act* does not mention any mandate in that regard. In fact, Elections Canada's international role has evolved over the years, most often as a result of requests from the Government of Canada made through the Department of Foreign Affairs or the Canadian International Development Agency (CIDA).[116] Elections Canada's expertise has thus been called upon to respond to assistance and co-operation requests received from other countries. Under this approach, Parliament is kept informed of Elections Canada's international involvement through the agency's departmental performance reports.[117]

The silence of the Act on this subject is in contrast to the situation in Quebec, where section 485 of the *Election Act* provides as follows:

485. […] The chief electoral officer may, with the authorization of the Government, provide assistance and cooperation to other countries or to international organizations in election matters, in particular at the material, professional or technical level.	**485.** […] Il peut, avec l'autorisation du gouvernement, fournir à d'autres pays ou à des organisations internationales, son aide et sa collaboration en matière électorale, notamment au niveau matériel, professionnel et technique.

Some electoral management bodies of other established democracies have an explicit mandate in their enabling statute that authorizes them to conduct international assistance and co-operation activities. For example:

- The Australian Electoral Commission is mandated "to provide, in cases approved by the Minister for Foreign Affairs and Trade, assistance in matters relating to elections and referendums (including the secondment of personnel and the supply or loan of materiel) to authorities of foreign countries or to foreign organisations."[118]

[115] Standing Committee on Foreign Affairs and International Development, *Advancing Canada's Role in International Support for Democratic Development*, July 2007, p. 80.

[116] CIDA is often called upon to finance the electoral assistance projects in which Elections Canada participates.

[117] See, for instance, *Office of the Chief Electoral Officer: Performance Report for the period ending March 31, 2008*, in which the agency reports on activities carried out in support of its International Research and Co-operation program, which involves researching and monitoring international best practices and innovations in election administration, as well as providing training and coordinating information exchanges with similar agencies in other countries. See also *Office of the Chief Electoral Officer: Performance Report for the period ending March 31, 2007*, in which the agency reports on its international assistance work in Haiti.

[118] *Commonwealth Electoral Act, 1918*, par. 7(1)(fa).

- The newly created Electoral Commission of South Africa, a national commission that is very active on the international scene, has the mandate to "promote co-operation with and between persons, institutions, governments and administrations for the achievement of its objects," which include "to strengthen constitutional democracy and promote democratic electoral processes."[119]
- The United Kingdom's Electoral Commission may, among other things, at the request of a national or regional parliament or government in a country other than the UK, "provide the body with advice and assistance as respects any matter in which the Commission have skill and experience."[120]
- Mexico's Instituto Federal Electoral (IFE) has an international mandate to "coordinate the exchange of information, cooperation and technical and material assistance projects" [translation].[121] The IFE is a major international assistance and co-operation body in Latin America and elsewhere that has maintained close relations with Elections Canada since it was founded in 1990.

These explicit mandates provide assurance to the agencies that their international activities are expressly authorized by their parliament. In the same way for Canada, such a mandate within the Act would provide formal parliamentary authority for the Chief Electoral Officer to make payments, as required, for this type of activity. It is understood, however, that with respect to assistance provided to electoral agencies of other countries at the request of the government, the funds for those projects would be provided by the agency or the federal department that asks Elections Canada to provide that international assistance.

III.3 Electronic Signatures and Transactions – General Clause

The Chief Electoral Officer should be able to authorize, for electronic transaction purposes, a non-signature authentication means that would be secure and would ensure the integrity of the electoral system and the protection of personal information transmitted electronically. This measure would enable participants in the electoral process – electors, political entities or agents – to conduct business with Elections Canada through more modern and rapid communication channels.

The rapid evolution of information technologies enables governments and businesses to provide citizens with expeditious, customized services. A number of federal departments and agencies offer on-line services, which are now a part of daily life. For example, Service Canada administers an on-line employment insurance benefit claim system. The Canada Revenue Agency allows some categories of taxpayers to file their tax returns on-line and manage their personal files. Citizenship and Immigration Canada also authorizes some applications to be made on-line, particularly those related to studying in Canada.

[119] *Electoral Commission Act of 1996*, c. 2, s. 5.

[120] *Political Parties, Elections and Referendums Act 2000*, Part 1, ss. 10(1).

[121] See www.ife.org.mx.

The current wording of the *Canada Elections Act* considerably limits the possibility of improving services to electors, candidates and political parties through the use of information technologies.

Indeed, the provision of on-line services requires some modifications to traditional means of authentication. Authentication is the verification of the declared identity of an individual or entity. It is generally used to ensure the legitimacy of transactions and to protect systems against potential irregularities.

Physically signing a document is one means of authentication. However, other means are now commonly used, such as a secure electronic signature, a personal identification number (PIN), the combination of a user name and a password, and third-party identity verification.

While different technologies make it possible to verify the identity of individuals and entities, the characteristics of available technologies vary depending on the level of security required for the transaction in question.

The Act currently requires a physical signature on a document in some 50 circumstances. Other expressions used in the Act have traditionally been interpreted as requiring a signature – for example, when a declaration is required. Finally, the Act allows the Chief Electoral Officer to prescribe the format of a large number of forms and oaths that it requires. Some prescribed forms require a signature.

In some of the circumstances in which a signature is required, an electronic signature is not a good solution. This is the case for most signatures required at polling stations and advance polling stations, for instance.

However, other circumstances in which the Act requires a signature or a declaration could allow for the use of an electronic signature or another means of authentication for the delivery of electronic services.

For example, when a person wants to be included in the National Register of Electors, section 49 of the Act requires a signed certification that he or she is qualified as an elector. As part of the electronic voter registration project, the Chief Electoral Officer should be able to prescribe another acceptable means of authentication. Once an individual's identity is verified, the individual could certify electronically that he or she is qualified as an elector.[122]

Nomination of candidates is another example. When nomination papers are filed by a person whose candidacy is endorsed by a political party, the witness must provide, in addition to the nomination papers, a written statement signed by the party leader or the leader's delegate confirming that the person seeking nomination is in fact endorsed by the party. Here again, to ease the restrictions on the transmission of such statements to candidates, it would be desirable for the Chief Electoral Officer to be able to prescribe another means for transmitting and authenticating such statements.

[122] A separate recommendation has been made in connection with electronic voter registration. See recommendation I.10.

A last example is the electronic transmission of a number of financial returns required by the Act. Currently, the Chief Electoral Officer allows political entities to produce and file a portion of their return through the Electronic Financial Return (EFR) software. However, because of the various statements required by the Act, the Chief Electoral Officer requires entities that submit their returns electronically to provide a paper copy of those returns, duly signed. To consolidate its offer of electronic services, the Chief Electoral Officer wishes to develop user authentication systems that would allow for the electronic provision of declarations.

By allowing the Chief Electoral Officer to determine the acceptable means of authentication for each electronic service he plans to offer, evidently taking into account the intended users and inherent information exchange risks, Parliament will pave the way for more effective delivery of services that are better adapted to user needs, without compromising security.

The latitude accorded to the Chief Electoral Officer will help to streamline and improve a number of services already offered, including transactions for the filing of financial returns by political entities, and also allow for the development and delivery of new services, such as electronic voter registration.

The Chief Electoral Officer will, of course, authorize only recognized, secure means of authentication that ensure the integrity of the electoral system and the protection of personal information.

III.4 Right to Vote of Prisoners Serving a Sentence of Two Years or More

The *Canada Elections Act* should provide a voting process for electors who are incarcerated in federal institutions, similar to what is already in place for provincial correctional institutions.

This measure would give official effect to these electors' constitutional rights, as recognized by the Supreme Court of Canada, and allow them to vote not only in an election but also in a federal referendum, which is not currently the case. The measure would also prevent the Chief Electoral Officer's power of adaptation from serving as a substitute for the legislative function.

Sections 246 and 247 of the Act set out the process whereby persons incarcerated in provincial correctional institutions can exercise their right to vote by means of a special ballot. The Act provides no similar process for persons serving a sentence of two years or more, who are generally incarcerated in a federal penitentiary. However, since paragraph 4(*c*) was struck down in 2002 by the Supreme Court of Canada in *Sauvé v. Canada (Chief Electoral Officer)*,[123] anyone who meets the other eligibility conditions has the right to vote in a federal election, regardless of the length of the sentence being served.

In every by-election and general election since the decision of the Supreme Court of Canada in *Sauvé*, the Chief Electoral Officer has used his authority under section 17 of the Act, and more recently section 179, to adapt sections 246 and 247 to provide a process for voting by individuals

[123] [2002] 3 S.C.R. 519.

incarcerated in federal penitentiaries. This process has mirrored the existing processes for provincial correctional institutions. The adaptations were minor and usually involved only the inclusion of references to federal ministers wherever the section in question referred to a provincial minister.

The ongoing use over a long period of the extraordinary power conferred on the Chief Electoral Officer to adapt the Act is undesirable and difficult to justify. That is why it was recommended in 2005[124] – and that recommendation is reiterated today – to amend sections 246 and 247 so as to set out a voting process for federal institutions similar to the one that exists for provincial correctional institutions.

The majority of the members of the Standing Committee on Procedure and House Affairs endorsed that recommendation.[125] However, in its response to the Committee's report, the Government noted that the Chief Electoral Officer exercised his power to adapt to remedy that situation, and it indicated that it did not plan to act on that recommendation.[126] We believe, however, that it is important for Parliament to remedy the situation so that the Act reflects the constitutional requirements. For this reason, we reiterate this recommendation.

Moreover, amending the Act to recognize the right to vote of prisoners serving a sentence of two years or more would remedy an inconsistency with respect to their participation in the election and referendum process. As things stand now, prisoners are able to participate in the electoral process by means of the Chief Electoral Officer's power to adapt. But that same power cannot be used to enable them to participate in a referendum.[127]

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[124] *Completing the Cycle of Electoral Reforms*, recommendation 1.15, p. 35.

[125] *Improving the Integrity of the Electoral Process: Recommendations for Legislative Change*, June 2006, p. 10.

[126] See *Government Response to the Thirteenth Report of the Standing Committee on Procedure and House Affairs, "Improving the Integrity of the Electoral Process."*

[127] The *Referendum Act* makes reference to the *Canada Elections Act* with respect to participation rights. Although the latter statute excludes the participation of prisoners serving a sentence of two years or more, that exclusion is inoperative in an electoral context, as it was ruled in *Sauvé* that prisoners' participation in a federal election is a protected constitutional right. However, in another case, the Supreme Court ruled that participation in a referendum is not a protected constitutional right (*Haig v. Canada (Chief Electoral Officer)*, [1993] 2 S.C.R. 995). When applied in a referendum context, the provision of the *Canada Elections Act* excluding the participation of prisoners in federal institutions therefore continues to be in effect, and the Chief Electoral Officer cannot use his adaptation power to override it.

III.5 Presence of the Media at Polling Stations

The Chief Electoral Officer should be able to authorize media representatives, upon request, to be present and to film or photograph registered party leaders and the candidates running against them as they cast their ballot. This measure would make the electoral process more transparent by providing better access to the media, while maintaining the predictability, efficiency and fairness of the electoral process.

In addition, to maintain the secrecy of the vote and the privacy of those inside the polling site, the use of cameras should be restricted to media representatives whose presence has been pre-authorized by the Chief Electoral Officer.

The *Canada Elections Act* does not provide media with an explicit right of access to polling stations. Indeed, section 135 stipulates exactly who is authorized to be present at a polling station, and allowing free media access would be contrary to the restrictive nature of that section. Moreover, unfettered media access to polling stations would present some challenges with respect to provisions of the Act, which prohibit impeding electors at or near a polling station (section 142) and which edict that the vote is secret (section 163). Consequently, Elections Canada has a long-standing policy that journalists can film from the doorway of a polling station provided that they do not inconvenience or disturb electors in or near the polling station. However, this approach has been criticized by the media, which would like increased access to polling stations.

Analysis and discussion

For the electoral process to proceed in a manner that enables voters to solemnly consider their vote and make their choice in private, without distraction or delay, subsection 135(1) of the Act contains a list of persons who are entitled to be present at a polling station. The list includes election officers, candidates and their representatives, electors and, where needed, a person who is assisting an elector, as well as any observer authorized by the Chief Electoral Officer. As this list shows, the Act does not expressly allow media representatives to be present at the polling stations, contrary to what may be the case in other Canadian jurisdictions or other countries.

Such being the case, Elections Canada traditionally issues a media advisory during each election period to remind everyone that media representatives are not permitted to enter polling stations to film or broadcast voting by electors, including party leaders. The advisory also notes that media representatives may film proceedings from the doorway of these locations provided this can be done without interfering with or disturbing electors in or near the location. In the past, this long-standing policy has given rise to criticism by the media, as well as by registered parties wanting media coverage of their candidates as they vote.

During the 40th general election, in response to the media advisory issued by Elections Canada, a consortium of national broadcasters requested that the Chief Electoral Officer delegate to the returning officers his authority under paragraph 135(1)(*e*) of the Act to authorize the presence of observers at the polls so as to allow filming of party leaders as they cast their ballot. The

consortium maintained that such access would be consistent with their right to freedom of the press under the *Canadian Charter of Rights and Freedoms*.

Under the Act, the discretion to authorize others to be present as observers at a polling station is given to the Chief Electoral Officer in Ottawa, who cannot delegate his decision-making power to local returning officers. Because of the number of media representatives potentially wanting to be present at the thousands of polling stations across Canada, it is not possible for the Chief Electoral Officer to receive and consider all these individual requests during an election period.

Nevertheless, on a trial basis during the 40th general election, the Chief Electoral Officer authorized the presence of representatives of this consortium at polling stations while the leaders of registered parties were casting their ballot. As was reported in the *Report of the Chief Electoral Officer of Canada on the 40th General Election of October 14, 2008* (at p. 30), "This process should be re-examined because the strict conditions on media presence were not always respected, and because other media outlets and candidates issued complaints about preferential treatment."

In establishing a process to allow media presence at the polls, the following considerations must be balanced:

- maintaining the efficiency and integrity of electoral operations (including protection of the right of voters not to be impeded or disturbed at or near a polling station)
- respecting the principle of electoral fairness (that is, avoiding preferential treatment for any candidate)
- providing equal access to the different forms of media

From this perspective, the process used on a trial basis during the 40th general election could be improved by allowing media to film party leaders and the candidates running against them and by ensuring that all media are treated impartially.

Given the pressing demands from the media to have access to the polling stations, and the need to manage this access so as to preserve the efficiency of voting operations, it is recommended that clear authority be given in the Act to enable a balancing of the considerations mentioned above.

It is thus recommended that the Chief Electoral Officer be able to authorize media representatives, upon request, to be present and to film or photograph registered party leaders and the candidates running against them as they cast their ballot. The Act should provide expressly that the authority may be delegated to officers on his staff or to returning officers, in accordance with instructions issued by the Chief Electoral Officer.

This solution would be similar to what is found in Nova Scotia and British Columbia.

It should also be specified in the Act that the use of cameras in polling sites is restricted to media representatives whose presence has been pre-authorized and that those who violate this provision are committing an offence. This restriction would apply to electors and candidates'

representatives alike, with the objective of preserving the secrecy of the vote and the privacy of persons in these polling sites.

III.6 Right to Strike of Elections Canada Staff

The *Public Service Labour Relations Act* or the *Canada Elections Act* should be amended to provide that employees of the Office of the Chief Electoral Officer, while unionized, cannot participate in a strike. This recommendation seeks to prevent the electoral process from becoming destabilized by delays in the preparations for an election and thus maintain the trust of electors and other participants in the political process.

The primary mandate of the Chief Electoral Officer and his staff is to be prepared at all times to conduct a general election, by-election or referendum.[128] That level of readiness, however, cannot be achieved or maintained, as the case may be, if employees in some bargaining units are on strike.

The successful conduct of an electoral event depends not solely on what is done during an election period, but also on the various elements that are put in place and tested during the period preceding an election. Without those preparations, it would be impossible to conduct an electoral event without major difficulties.

That is why we have proposed, in a number of recommendations reports, to withdraw the right to strike of unionized Elections Canada staff and why we reiterate that same recommendation in this report.[129] That decision is based largely on the recent ruling of the Public Service Labour Relations Board, in which the Board concluded that the activities performed by the Computer Systems (CS) Group at Elections Canada, during or prior to the election period, do not constitute an essential service for the health and safety of the public within the meaning of the *Public Service Labour Relations Act*.[130]

Analysis and discussion

Substantial preparations are required in anticipation of an election, including procurement of materials, their bundling for transport to the 308 electoral districts, updating of computer systems (including databases for updating maps, lists of electors and polling sites), preparation of maps, training of returning officers and their assistants, preparation of communications plans and development of advertising campaigns, as well as recruitment of staff to support election

[128] See Office of the Chief Electoral Officer, *2009–2010 Estimates*, Part III – *Report on Plans and Priorities*, p. 7.

[129] See *Strengthening the Foundation: Annex to the Report of the Chief Electoral Officer of Canada on the 35th General Election*, p. 67; *Modernizing the Electoral Process: Recommendations from the Chief Electoral Officer of Canada following the 37th General Election*, p. 120; *Completing the Cycle of Electoral Reforms: Recommendations from the Chief Electoral Officer of Canada on the 38th General Election*, p. 25.

[130] *Treasury Board v. Professional Institute of the Public Service of Canada*, 2009 PSLRB 120.

operations in Ottawa and core field staff to serve a multicultural and geographically dispersed population.[131]

These preparations take up a substantial portion of Elections Canada's resources. It generally takes two to three months, after stocks of materials have been replenished following a general election, to be up and running for the next election. In a minority government context, that next election can be called at any time.

As the Public Service Labour Relations Board indicated in a decision rendered in 2009:

> When an election is called at a time other than those fixed in the *Canada Elections Act*, S.C. 2000, c. 9 (CEA), the government does not consult EC on when to hold the election and does not give EC advance notice of the election date. EC is informed of the election date at the same time as the public, that is, when the Governor in Council issues the election proclamation. Parliament's expectation is that, when an election is called, EC is prepared to conduct it.[132]

Elections Canada would thus face major challenges if it had to conduct an election in accordance with the rules established by Parliament if all or some of its employees were on strike or had been during the period immediately preceding the election call.

Subsection 197(1) of the *Public Service Labour Relations Act* reads as follows:

> 197. (1) If a strike occurs or may occur during the period beginning on the date of a dissolution of Parliament and ending on the date fixed for the return of the writs at the next following general election and, in the opinion of the Governor in Council, the strike adversely affects or would adversely affect the national interest, the Governor in Council may during that period make an order deferring the strike during the period beginning on the day on which the order is made and ending on the twenty-first day following the date fixed for the return of the writs.

The power given to the Governor in Council under this provision would make it possible to defer or suspend a strike during the election period. Such an order, however, cannot be made until Parliament has been dissolved. It is therefore of no avail in ensuring that the preparations needed to conduct an election will be carried out in time for the election.

Parliament may also choose to legislate striking employees back to work. This method is ill-suited, however, to remedy the situation if the only employees affected by the legislation are Elections Canada employees. Moreover, to be effective, the legislation would have to be passed several months before an election was called to enable Elections Canada to carry out the necessary preparations.

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[131] *Ibid*., par. 17 and following; see also *Completing the Cycle of Electoral Reforms, op. cit*., p. 26.

[132] *Ibid*., par. 9.

Another solution considered in the 2005 recommendations report[133] would be for Elections Canada to conclude an essential services agreement with all of its unions.[134] Such a solution, while imperfect, would require unionized employees whose activities are deemed to be "essential for the health and safety of the public" under an agreement between the employer and the union to report to work in spite of a strike.

In the past two years, Elections Canada has tried to negotiate such an agreement with the union representing the employees in the CS Group. According to the union, an election and the preparations leading up to it do not constitute activities that are "essential for the health and safety of the public" within the meaning of the *Public Service Labour Relations Act*. The union, therefore, declined to conclude such an agreement, and the matter was referred to an adjudicator – a member of the Public Service Labour Relations Board – who found in favour of the union.[135]

While agreeing that extensive preparations are required for the conduct of an election and that elections are important and central to our democracy, the adjudicator was not prepared to conclude that the safety and security of the public would be threatened if Elections Canada were unable to prepare for an election or to conduct it properly. Therefore, Elections Canada cannot conclude any essential services agreement with the unions that represent its employees. Following the decision of the Public Service Labour Relations Board, the other unions representing Elections Canada employees indicated that they intended to decline to conclude an essential services agreement with respect to activities relating to the preparation and conduct of an election.

In the adjudicator's opinion, the Governor in Council has a tool to provide Elections Canada with the time needed to prepare if an election happens to be called when all or some of its employees are on strike. The adjudicator found that the Governor in Council could defer calling an election, even if the Government were defeated in the House of Commons, to allow Elections Canada to prepare properly:

> If Elections Canada is not ready to conduct an election because of a strike, the Governor in Council can simply decide to wait until the strike is over before proclaiming the election. As Professor Russell explained, even when the Government is defeated in the House of Commons on a confidence vote, the Governor in Council does not have to call an election immediately.[136]

In our opinion, the timing of an election should not depend on the resolution of a labour dispute. Deferring an election, even if the Government were defeated in the House of Commons, is not a desirable solution.

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[133] *Completing the Cycle of Electoral Reforms, op. cit.*, p. 25.

[134] PSLRA, s. 4, 119 and following.

[135] *Treasury Board v. Professional Institute of the Public Service of Canada, op. cit.*

[136] *Ibid*., par. 209.

The adjudicator was also of the view that the *Public Service Labour Relations Act* provides the Government with another tool in such a situation:

> Although there is a minimum 36-day period for conducting an election (paragraph 57(1.2)(*c*) of the CEA), there is no maximum period. If the Governor in Council believes that EC needs two months to prepare for an election and another month-and-a-half to conduct it, he or she may establish a three-and-a-half-month election period and use section 197 [of the PSLRA] to defer the strike until after election day. Of course, that is the worst-case scenario. It supposes that EC is not at all ready when the election writ is dropped. In most cases, EC will be prepared to some extent.[137]

Quite apart from the impact that a three-and-a-half-month election period would have on the election campaign of candidates and political parties, the tool identified by the adjudicator would not resolve Elections Canada's difficulties. Indeed, the *Canada Elections Act* requires that certain activities be accomplished within a fixed number of days after the issue of the writs. Among them are the opening of the offices of returning officers without delay after receiving the writs (section 60), the right of every elector to vote under the Special Voting Rules as of the issue of the writs (section 232), the obligation of the returning officer to sign and issue a notice of election within four days after the issue of the writs (section 62), the registration of third parties as of the issue of the writs (section 353), in addition to the desire of many candidates that their nomination be confirmed as soon as possible after the beginning of the election period. Many of these activities require significant preparations prior to the election by a large number of Elections Canada employees, and it would be difficult, if not impossible, to meet all these deadlines in the context of a strike affecting a large part of the agency's personnel.

Possible solutions

To mitigate the risks and difficulties described above, the only solution seems to be a legislative amendment that would prevent unionized employees from taking part in a strike so that Elections Canada can rely on its employees to fulfill its principal mandate of being prepared at all times to conduct an election.[138] Various mechanisms could be used to achieve that goal:

- It could be provided that, despite the definition of "essential services" contained in the *Public Service Labour Relations Act*, the preparation and conduct of elections constitute services essential for the health and safety of the public. Such an exception might, however, undermine the jurisprudence established by the Public Service Labour Relations Board. The effect of such an amendment might be more controlled if it were included in the *Canada Elections Act* rather than in the *Public Service Labour Relations Act.*

[137] *Ibid*., par. 213.

[138] The *Public Service Labour Relations Act* prohibits public servants that belong to a bargaining unit whose process for resolution of a dispute is arbitration from participating in a strike (see paragraph 196(*e*)). For that rule to apply to all Elections Canada employees, each group represented within Elections Canada would probably have to decide to withdraw from its current bargaining unit and form one or more new bargaining units comprising only Elections Canada employees. That approach does not seem feasible.

- Section 59 of the *Public Service Labour Relations Act* provides for the exclusion of positions from a bargaining unit. Employees in excluded positions are not part of the bargaining unit. Their working conditions are nevertheless the same as those of employees with the same classification who are governed by a collective agreement. The positions occupied by the employees of the Office of the Chief Electoral Officer could be added to the list set out in section 59.
- Section 196 of the *Public Service Labour Relations Act* sets out circumstances in which public servants cannot participate in a strike. A paragraph could be added, referring to public servants employed by the Office of the Chief Electoral Officer. In such a case, the employees would remain members of the bargaining unit, with the associated privileges and obligations, but could not participate in a work stoppage. This solution is perhaps most in keeping with the intent of the *Public Service Labour Relations Act*.
- These exceptions could be added to the *Canada Elections Act* rather than to the *Public Service Labour Relations Act*.

Finally, it is worth noting that, in all provincial and territorial jurisdictions in Canada, the employees of electoral administrations are excluded either from the public service or from bargaining units, thus preventing them from participating in a strike.

The most advantageous solution for Elections Canada and its unionized employees would undoubtedly be to prohibit only their right to strike. They would nevertheless remain members of bargaining units, with all other associated advantages and obligations.

III.7 Field Liaison Officers

The position of field liaison officer, whose incumbent would be appointed on merit by the Chief Electoral Officer, should be defined as an election officer. The Chief Electoral Officer would have the authority to revoke a field liaison officer's appointment if he has valid grounds to do so. This recommendation would enshrine in the Act a trial program carried out over the past three general elections with very successful results. Elections Canada, and by extension all participants in the electoral process, would be better served.

The field liaison officer position has existed since 2003, and all incumbents of that position play an important role in the conduct of elections. However, the position is not included in the list of election officers in section 22 of the *Canada Elections Act*, and so field liaison officers are hired under personal service contracts. This arrangement, however, imposes limitations on their relations with Elections Canada that should be remedied.

Analysis and discussion

In the *Report of the Chief Electoral Officer of Canada on the 38th General Election Held on June 28, 2004*, it was reported that a new element had been added to the management framework for that election. Elections Canada had retained the services of field liaison officers to:

- keep the Office of the Chief Electoral Officer informed of the conduct of the election at the local level and provide a qualitative assessment to complement the statistical feedback transmitted daily by returning officers
- provide returning officers with functional leadership
- enhance the quality and timeliness of the performance of key duties within each electoral district of their region
- identify problems at the local level and help returning officers resolve them
- act as a media representative when required[139]

The 24 initial field liaison officers were retained as consultants and were recruited through a competitive process from within the returning officer and assistant returning officer community. They were experienced election specialists who had worked in at least two general electoral events at the federal or provincial level, in a management position.

The program was found to be very successful and, after the 2004 general election, was expanded over time. It now includes 31 field liaison officers, 27 of whom are responsible for providing support to a given geographic area, each of which includes no more than 14 electoral districts. The other four field liaison officers (one for each region of the country, consisting of the West, Ontario, Quebec and the Atlantic) provide backup support to their colleagues and are able to step in to act as a replacement in their respective regions. As noted in the *Report of the Chief Electoral Officer of Canada on the 40th General Election of October 14, 2008*, "As in past elections, the field liaison officers proved to be an important asset."[140]

To this day, field liaison officers are consultants retained on contract with Elections Canada. There has been relatively little turnover in their membership over time, and the program has remained quite stable. Nonetheless, the fact that these individuals are retained on contract presents some challenges that need to be addressed.

Since they may provide Elections Canada with services over long periods of time, the agency must always be vigilant to ensure in practice that no employer-employee relationship is inadvertently created. These individuals are not employed under the *Public Service Employment Act*, nor should they be, considering the unpredictability of the work schedule and the fact that

[139] *Report of the Chief Electoral Officer on the 38th General Election Held on June 28, 2004*, p. 33.

[140] *Report of the Chief Electoral Officer of Canada on the 40th General Election of October 14, 2008*, p. 16.

they are largely autonomous with respect to their day-to-day activities. Nevertheless, if an employer-employee relationship were inadvertently created, it would be a violation of that Act.[141]

It is recommended that Part 3 of the *Canada Elections Act* (which deals with election officers) be amended to create the position of field liaison officer, appointed on merit by the Chief Electoral Officer. Field liaison officers would provide local support to the returning officers and their staff in their assigned geographic areas. In addition, they would act as an intermediary between these individuals and the Office of the Chief Electoral Officer in order to improve the effectiveness of the electoral process. Finally, at the request of the Chief Electoral Officer, they would take part in the appointment process for returning officers set out in subsections 24(1) and (1.1).

It is recommended that field liaison officers be included as election officers under subsection 22(1) of the Act and that the *Federal Elections Fees Tariff* provide for their remuneration and reimbursable expenses, as it does for those of other election officers. The Chief Electoral Officer should be able to remove a field liaison officer for cause, using a fair and appropriate process.[142]

III.8 Temporary Suspension of a Returning Officer

The Chief Electoral Officer should be authorized to temporarily suspend a returning officer if he finds that, for whatever reason, he or she cannot competently perform the required tasks in preparation for an election or during the election period itself.

This recommendation would provide a mechanism for ensuring improved management of election staff.

Since December 2006, the Chief Electoral Officer is responsible for the appointment and removal of returning officers. In recent years, we have seen that the current system is not well adapted to deal with a situation in which a returning officer cannot carry out his or her duties, before an election is called or during the election period itself, for reasons other than absence or incapacity. The procedural fairness required to remove a returning officer necessitates a process that cannot take place in the context of an election.[143] To protect the integrity of the electoral process while maintaining the procedural fairness required for a removal, it is necessary to provide a mechanism for temporary suspension.

[141] It should be noted that the Public Service Commission has been approached to see whether it would consider exercising its power under the *Public Service Employment Act* to exclude field liaison officers from the operation of any or all of that Act's provisions. The Commission has indicated that it is not prepared to do so.

[142] The process for removal would be adapted to the particular circumstances of this type of election officer.

[143] Subsection 24(7) of the Act sets out the reasons for which a returning officer may be removed by the Chief Electoral Officer, and subsection 24(1.1) requires that a fair removal procedure be established.

Analysis and discussion

The *Canada Elections Act* provides that an assistant returning officer takes over from the returning officer on an acting basis when the latter is absent or unable to act or when the position is vacant.[144]

The measure does not, however, appear to present a clear basis upon which to temporarily and immediately remove a returning officer, on the grounds of partisanship or poor performance, even when the returning officer's actions are threatening the integrity of the electoral process.

Procedural fairness requires that returning officers at risk of removal be given an opportunity to respond to allegations and make their case. However, given the central role the returning officer plays in delivering an election, if a serious situation arises, the continuation of inappropriate behaviour while the removal process is unfolding could threaten the integrity of the election.

What is required, therefore, is the capacity to suspend returning officers when their behaviour may threaten the integrity of the election process.[145]

The suspension should only be temporary. It should cover the election period (and, if applicable, the period during which tasks to prepare for an election must be performed) as well as the 120 days following the end of the election period, during which time the returning officer continues to have responsibilities in relation to the election. The Chief Electoral Officer could end the suspension at an earlier date if he considers it appropriate to do so. If, at the end of the 120 days following the end of the election period, a process that could lead to the removal of the returning officer has commenced under subsection 24(1.1) of the Act, the suspension will remain in force until the end of that process.

A suspended returning officer would be replaced on an interim basis by the assistant returning officer unless the Chief Electoral Officer believes that the assistant returning officer is also unable, for any reason, to perform the duties of the returning officer (for example, if both are displaying political partisanship). In such circumstances, the Chief Electoral Officer should have the power to designate a temporary replacement along the lines of the existing subsection 28(3.1), which provides for the possibility that both the returning officer and the assistant returning officer are absent or unable to act.

[144] Subsection 28(3). In addition, if both the returning officer and the assistant returning officer are absent or unable to act during an election period, the Chief Electoral Officer appoints a replacement for that election (ss. 28(3.1)).

[145] Note that several provinces and territories have similar provisions. See Alberta's *Election Act*, R.S.A. 2000, c. E-1; Nova Scotia's *Elections Act*, R.S.N.S. 1989, c. 140; Saskatchewan's *Election Act, 1996*, S.S. 1996, c. E-6.01; and Yukon's *Elections Act*, R.S.Y. 2002, c. 63.

IV – Technical or Minor Amendments

IV.1 Use of Nicknames by Candidates

The wording of paragraph 66(2)(*b)* and subsection 66(3) should be reviewed to ensure better consistency between the English and French provisions. In both cases, the English version should be amended to correspond to the French.

There is a discrepancy between the English and French versions of paragraph 66(2)(*b*) of the *Canada Elections Act* as to whether a prospective candidate's nickname replaces only one or all of that person's given names. As well, the English version of subsection 66(3) of the Act is more limited in scope than the French version. The discrepancies between the English and French wording of these provisions cause difficulties in interpretation and sometimes lead to different applications of the rules, depending on which version is used by the returning officer. As subsection 117(1) of the Act stipulates that the name of a candidate that appears on the ballot shall be the same name as that written on the candidate's nomination paper, it is important that the rules governing the name that candidates can use on their nomination papers be clear and consistent.

*Discrepancy between the English and the French versions of paragraph 66(2)(*b*)*

Under paragraph 66(2)(*b*) of the Act, prospective candidates may use a nickname on their nomination papers. The wording of that provision reads as follows:

66.(2) For the purpose of subparagraph (1)(*a*)(i), […] (*b*) one or more of the given names may be replaced by a nickname by which the prospective candidate is publicly known, other than a nickname that could be confused with the name of a political party, and the nickname may be accompanied by the initial or initials of their given name;	**66**.(2) Les règles suivantes s'appliquent dans le cadre du sous-alinéa (1)*a*)(i) : […] *b*) le ou les prénoms peuvent être remplacés par un surnom — sauf un surnom susceptible d'être confondu avec le nom d'un parti politique — sous lequel la personne qui désire se porter candidat est publiquement connue et, dans ce cas, le surnom peut être accompagné des initiales du ou des prénoms;

The English version of paragraph 66(2)(*b*) states that a prospective candidate's nickname may replace one or more given names, so that the name appearing on the nomination paper and ballot could include one given name as well as one nickname in place of another given name.

Accordingly, if John Paul Doe wants to use the nickname “Buddy” instead of one of his given names, the name on his nomination paper and the ballot could be “John Buddy Doe” or “Buddy Paul Doe.” Mr. Doe could also replace both his given names by the nickname, resulting in “Buddy Doe.” When using a nickname, he could also include the initials of his given name.

The French version, however, reads: “le ou les prénoms peuvent être remplacés par un surnom.” According to this wording, the nickname taken from the nomination paper replaces all of the prospective candidate’s given names.

As a result, if John Paul Doe wants to use the nickname “Buddy” on his nomination paper, that nickname will replace both given names, so that the name “Buddy Doe” will appear on the nomination paper and the ballot, perhaps with initials as well.

Discrepancy between the English and the French versions of subsection 66(3)

Subsection 66(3) of the Act requires that a prospective candidate submit documents, upon request of the returning officer, as evidence of the common public knowledge and acceptance of the nickname used. The provision reads as follows:

66. […] (3) A prospective candidate who uses a nickname described in paragraph (2)(*b*) in his or her nomination paper shall, if the returning officer requests, provide the returning officer with documents that are determined by the Chief Electoral Officer to be evidence of the common public knowledge and acceptance of the nickname.	**66**. […] (3) Dans le cas où elle a remplacé son prénom par un surnom dans l’acte de candidature, la personne qui désire se porter candidat doit aussi fournir au directeur du scrutin, sur demande, les documents requis par le directeur général des élections à titre de preuve qu’elle est publiquement connue sous ce surnom.

The English version specifies that a prospective candidate who uses a nickname in the place of his or her given name must, if the returning officer requests, provide the returning officer with documents as evidence of the common public knowledge and acceptance of the nickname. It is difficult to see how one could provide evidence of the acceptance of a nickname.

The French version of subsection 66(3), however, only requires evidence to be provided of the common public knowledge of the nickname. The French version thus makes no mention of the common public acceptance of a prospective candidate’s nickname. This appears to be a better approach.

IV.2 Cancellation of a Nomination – French Version of Section 73

The French version of section 73 should be amended by replacing the word “rejetée” with the word “annulée” in order to better reflect the procedure used under that section as compared to the procedure under section 71.

Most nomination papers are filed in person at the office of the returning officer. A returning officer must accept or refuse to accept the nomination within 48 hours of receiving it (see section 71).

Section 73 of the *Canada Elections Act* provides that individuals can also file their nomination papers electronically (for example, by fax or by e-mail, with the nomination paper attached in PDF format). The electronic version of the nomination paper and the deposit must be received by the close of nominations, and the original documents must be received no later than 48 hours after the close of nominations. If the original documents are not received by the returning officer within this time, the returning officer must “cancel” the nomination, unless the prospective candidate can satisfy the returning officer that all reasonable efforts were made to ensure that the documents were received on time. This decision may be made several days or even weeks after the electronic submission of the documents.

The concept of “cancelling” the nomination reflects the intention of Parliament to allow a candidate who files electronically to be accepted as a nominated candidate upon review of his or her electronically submitted documents. The logic behind this measure is to allow candidates who live in remote regions of the electoral district to begin campaigning once they have submitted their documents electronically; this is one of the main purposes of this provision. If the candidate fails to comply with the conditions relating to the subsequent filing of the original documents, the candidate may have his or her nomination cancelled.

This procedure is different from the filing of nomination papers in person under section 71, which requires only one decision by the returning officer – that is, to accept or refuse to accept the nomination paper within 48 hours of its submission.

The difference between the two procedures is reflected in the use of the word “cancelled” in the English version of section 73, as distinguished from “refusal to accept” in section 71. The French versions of the two provisions both use the word “rejetée”.

IV.3 Information Provided on the Application for Registration to Vote by Special Ballot

The Act should no longer require electors to provide the name of their electoral district on the application for registration to vote by special ballot. This provision no longer has a purpose, and it sometimes causes errors.

Under subsection 233(3) of the *Canada Elections Act*, electors who submit an application for registration and special ballot must indicate whether their name is already on a list of electors and, if it is, in which electoral district.

This information must be provided in addition to the other information to be disclosed under subsection 233(1), which includes the elector's name and his or her place of ordinary residence (indicating in which electoral district the elector's vote will be counted).

The collection of the information provided under subsection 233(3) of the Act is designed to prevent repetitions in the lists of electors. The revising agent or the special ballot officer will verify whether the elector's place of ordinary residence is in the same electoral district as the one indicated on the list of electors on which the elector is already registered. This is to ensure that the elector's name will not appear on the lists of electors of two different electoral districts.

Since the creation of the different national databases (in 2000 for the REVISE system and in 1993 for the national system for the Special Voting Rules), revising agents and special ballot officers can verify for themselves in which electoral district the elector is already registered.

Consequently, the information provided by electors under subsection 233(3) has been less useful since those databases were created. This information, which is based on the elector's memory, is more likely to contain inaccuracies.

In recent general elections, it was noted that this information created some confusion for revising agents. Revising agents relied on the information provided by electors rather than verifying the information in the national REVISE database. This resulted in some mistakes being made because electors provided inaccurate information.

IV.4 Registration Certificate – Outgoing Member of Parliament

The words "au bureau de scrutin établi dans la section de vote où il réside habituellement" should be deleted from the French version of subsection 161(4) to ensure consistency between the French and English versions and to account for the situation of a candidate who was an outgoing Member of Parliament.

While section 6 of the *Canada Elections Act* stipulates that every person who is qualified as an elector is entitled to have his or her name included on the list of electors for the polling division in which he or she is ordinarily resident, section 10 provides an exception for a candidate at a general election who, on the day before the dissolution of Parliament, was a member.

This candidate and electors living with the candidate are entitled to have their names entered on the list of electors for, and to vote at the polling station that is established for, the polling division in which is located:

- the place of ordinary residence of the former member

- the place of temporary residence of the former member in the electoral district in which the former member is a candidate
- the office of the returning officer for the electoral district in which the former member is a candidate; or
- the place in Ottawa or in the area surrounding Ottawa where the former member resides for the purpose of carrying out parliamentary duties

An affected elector wishing to have his or her name entered on the list of electors on polling day could be prevented by the restrictive wording of the French version of subsection 161(4). Indeed, the French version of that subsection provides that the registration certificate authorizes the elector to vote only in the polling division in which he or she is ordinarily resident, thus preventing the elector referred to in section 10 from making the choice provided for under that section.

In order to resolve that apparent contradiction and ensure consistency between the French and the English versions, the words “au bureau de scrutin établi dans la section de vote où il réside habituellement” should be deleted from the French version of subsection 161(4).

IV.5 Returning Officers Prohibited from Participating in Activities of Electoral District Associations

The expression “a registered association” should be replaced by “an electoral district association” in subsection 24(6) to better define the legislative framework to which the prohibition on politically partisan conduct applies.

Subsection 24(6) of the *Canada Elections Act* prohibits returning officers from engaging in politically partisan conduct while in office. It reads as follows:

24. (6) No returning officer shall, while in office, knowingly engage in politically partisan conduct and in particular shall not make a contribution to a candidate, a leadership contestant or a nomination contestant or belong to or make a contribution to, be an employee of or hold a position in, a registered party, an eligible party or a registered association.	**24.** (6) Il est interdit au directeur du scrutin, pendant son mandat, de faire sciemment preuve de partialité politique, notamment d’appartenir ou de faire une contribution à un parti enregistré ou admissible ou à une association enregistrée, d’y exercer une fonction ou d’occuper un emploi à son service ou de faire une contribution à un candidat, à un candidat à la direction ou à un candidat à l’investiture.

The prohibition on politically partisan conduct (making a contribution to, being an employee of or holding a position in a political entity) applies to registered associations, among others.

This subsection does not apply to unregistered electoral district associations. However, those associations are defined in the Act as an association of members of a political party:

2. (1) The definitions in this subsection apply in this Act. […] "electoral district association" means an association of members of a political party in an electoral district.	**2.** (1) Les définitions qui suivent s'appliquent à la présente loi. […] « association de circonscription » Regroupement des membres d'un parti politique dans une circonscription.

Those associations are also partially governed by the Act, including in sections 403.01 (various prohibitions applying to unregistered associations) and 403.04 (prohibition on incurring expenses for election advertising during an election period). The prohibition set out in subsection 24(6) of the Act should include all electoral district associations, whether they are registered or not.

IV.6 Updating the Rules Respecting the Tariff of Fees

The provisions authorizing a tariff of fees for election workers require a few technical amendments to clarify their scope and respond to certain concerns of the Standing Joint Committee for the Scrutiny of Regulations. This recommendation would not change the current application of the tariff's provisions but would strengthen their legal foundation.

The provisions of the *Canada Elections Act* governing the *Federal Elections Fees Tariff* (the tariff), under which election officers and other election workers are paid, must be updated to allow for greater flexibility and a more efficient approach to making certain payments.

The tariff regulates payments to election officers and the reimbursement of costs they incur in the context of an election. The tariff is made under the authority of the following provisions of the Act:

542. (1) On the recommendation of the Chief Electoral Officer, the Governor in Council may make a tariff fixing or providing for the determination of fees, costs, allowances and expenses to be paid and allowed to returning officers and other persons employed at or in relation to elections under this Act.	**542.** (1) Sur l'avis du directeur général des élections, le gouverneur en conseil peut établir un tarif fixant les honoraires, frais et indemnités à verser aux directeurs du scrutin et autres personnes employées pour les élections en vertu de la présente loi, ou prévoyant leur mode de calcul.

545. (1) If it appears to the Governor in Council that the fees and allowances provided for by a tariff made under subsection 542(1) are not sufficient remuneration for the services required to be performed at an election, or that a claim for any necessary service performed or for materials supplied for or at an election is not covered by the tariff, the Governor in Council may authorize the payment of any sum or additional sum for the services or materials supplied that the Governor in Council considers just and reasonable.	**545.** (1) Lorsqu'il constate que les honoraires et indemnités prévus par un tarif établi en conformité avec le paragraphe 542(1) ne constituent pas une rémunération suffisante pour les services à rendre à une élection, ou qu'une réclamation présentée par une personne qui a rendu un service indispensable ou fourni du matériel pour une élection n'est pas prévue par le tarif, le gouverneur en conseil peut autoriser le paiement de toute somme ou somme supplémentaire qu'il croit juste et raisonnable en l'occurrence.
545. (2) The Chief Electoral Officer may, in accordance with regulations made by the Governor in Council, in any case in which the fees and allowances provided for by a tariff made under subsection 542(1) are not sufficient remuneration for the services required to be performed at an election, or for any necessary service performed, authorize the payment of such additional sum for the services as he or she considers just and reasonable.	**545.** (2) Le directeur général des élections peut, en conformité avec les règlements pris par le gouverneur en conseil, dans tous les cas où les honoraires et indemnités prévus par le tarif des honoraires établi en conformité avec le paragraphe 542(1) ne constituent pas une rémunération suffisante des services à rendre à une élection, ou relativement à tout service nécessaire rendu, autoriser le paiement de la somme supplémentaire qu'il croit juste et raisonnable pour ces services.

Proposal 1: Allow for efficient payment of additional sums when necessary

Not all expenses that arise in the course of an election can be foreseen. The nature of an election, with the opening of tens of thousands of polling stations, as well as the hiring of hundreds of thousands of workers in the short time frame prescribed by the Act, makes unexpected costs almost inevitable. Furthermore, the varied conditions in a country as vast and diverse as Canada make a "one size fits all" approach nearly impossible to implement.

To account for the possibility of unforeseen circumstances, the Act contains provisions that anticipate the adjustment of amounts in the tariff in certain circumstances. Section 545 creates two such powers.

Subsection 545(1) authorizes additional payments when the fees or sums covered by the tariff do not constitute sufficient compensation for the services to be provided or when a claim is made for essential services or goods not covered by the tariff. However, the ways in which this power can be exercised are not clear. This power rests with the Governor in Council, and subsection 545(1) does not contain an authority to delegate that power. Subsection 545(2) *does* allow the Governor in Council to make a regulation permitting the Chief Electoral Officer to increase payments in specific circumstances, but only with respect to fees for services already provided for in the tariff. It does not cover unforeseen expenses for goods.

There are two difficulties with subsection 545(1). First, by leaving to the Governor in Council the ultimate decision of what sums to pay in certain circumstances, subsection 545(1) is out of step with the rest of the Act. In general, the costs of elections are paid directly from the Consolidated Revenue Fund (see section 553). This approach to funding elections works to insulate the conduct of the election from political interference. In 1934, the law was changed to provide that payments made under the tariff would come directly from the Consolidated Revenue Fund, rather than by warrant of the Governor in Council.[146] However, amounts additional to those set out in the tariff continued to be the responsibility of the Governor in Council. This historic exception to the general rule continues today as subsection 545(1).

Second, because the power cannot be delegated, it is not clear how it can be exercised in an efficient manner. Many of the additional payments required as a result of unforeseen situations are quite small. There may be the need for a few hundred dollars to be paid here and there in excess of the amounts provided for in the tariff or for matters not expressly contemplated by the tariff. Given the small amounts at issue, the involvement of the Governor in Council in each such decision appears unnecessary.

Past tariffs have, from time to time, sought to alleviate this difficulty by providing that the Chief Electoral Officer can authorize the payment of certain amounts not covered by the tariff. The Standing Joint Committee for the Scrutiny of Regulations has objected to this practice, asserting that it represents an improper delegation of the Governor in Council's power under subsection 545(1).

The Committee nevertheless acknowledged the difficulty for the Governor in Council to specify or prescribe a method of calculation for every fee, cost, allowance or expense related to the conduct of an election. The Committee, therefore, recommended that the Act be amended to authorize the Governor in Council to designate a person, such as the Chief Electoral Officer, to determine the additional amounts to be paid.[147]

It is, therefore, recommended that section 545 be repealed and a new subsection added to section 542, authorizing the Chief Electoral Officer to set the amount that may be paid for any good or service not covered by the tariff and required for the election, and to authorize payment of any additional sums he deems to be fair and reasonable when he notes that the fees and allowances provided for in the tariff, established in accordance with subsection 542(1), do not constitute sufficient remuneration for the services to be rendered during an election.

As a corollary, paragraph 553(*d*) should also be amended to include a reference to the subsection added to section 542.

Proposal 2: Incorporate the Travel Directive *directly rather than by reference*

Many people employed for elections receive a reimbursement for their travel expenses. For example, special ballot coordinators may need to travel to different communities to assist persons

[146] *Dominion Elections Act*, S.C. 1934, c. 50, ss. 60(3).

[147] Correspondence of the Standing Joint Committee for the Scrutiny of Regulations to the Chief Electoral Officer of Canada dated February 11, 1994, and July 6, 1995.

with functional limitations to vote at home (section 243.1). Furthermore, election officers are required to attend training sessions during the election period, and this frequently requires their travelling to another region. Similarly, returning officers and assistant returning officers must sometimes travel to Ottawa or a regional centre for information sessions outside the election period. In such cases, all travel costs are reimbursed.

Rather than creating a separate regime to determine in what amount travel costs will be reimbursed, the tariff has incorporated, by reference, the Treasury Board's *Travel Directive*. As a result, the eligible costs paid to election workers are the same as those for all federal government employees.

In the past, the Standing Joint Committee for the Scrutiny of Regulations has objected to incorporating by reference into the tariff an outside document that is amended from time to time.[148] The Committee has argued that doing so can be seen as an unauthorized delegation of the power of the regulation maker (the Governor in Council) to another body (the Treasury Board). The Committee, therefore, recommended that, to remove any doubt as to the authority of the Governor in Council, the wording of section 542 be amended to allow the direct incorporation of the *Travel Directive* into the tariff.

It is, therefore, recommended that section 542 be amended to permit the incorporation into the tariff of the Treasury Board's *Travel Directive*, as amended from time to time.[149]

IV.7 Payment of Claims

Payment by electronic means or by cheque of claims that relate to the conduct of an election should be authorized to reflect current practices.

Under section 543 of the *Canada Elections Act*, "All claims that relate to the conduct of an election shall be paid by separate cheques issued from the office of the Receiver General at Ottawa and sent directly to each person who is entitled to payment."

For many years, however, the majority of election workers (76 percent in the last general election) have been paid by electronic means, in accordance with the terms of the *Electronic Payments Regulations*, rather than by cheque.

Election workers who prefer to be paid by cheque, as well as suppliers with whom returning officers have done business, receive a cheque directly from the Receiver General for Canada. These cheques are generally issued by the office of the Receiver General nearest to the electoral district for which the payment is claimed.

[148] Letter of February 11, 1994, from the Committee to Jean-Pierre Kingsley.

[149] A similar recommendation was made in *Modernizing the Electoral Process* (2001), rec. 7.12.

Accordingly, section 543 of the Act should be updated as follows:

543. All claims that relate to the conduct of an election shall be paid by electronic payment credited to the account of the person who is entitled to payment or by cheque issued from the office of the Receiver General, and sent directly to that person.	**543.** Les réclamations relatives à la conduite d'une élection sont acquittées par paiements électroniques portés au crédit de la personne qui a droit à un paiement ou par chèques émis par le bureau du receveur général, et expédiés directement à cette personne.

IV.8 Use of the Preliminary Lists of Electors by a Registered or Eligible Party

The Act should regulate the uses that may be made by a registered party or eligible party of a preliminary list of electors received in electronic form, as is the case for all other lists distributed to the parties.

Section 93 of the *Canada Elections Act* was amended in 2007[150] by the addition of a subsection (1.1). Under that subsection, the Chief Electoral Officer distributes, to each registered party or eligible party that requests it, one copy in electronic form of the preliminary lists of electors for an electoral district in respect of which a writ has been issued.

However, no consequential amendment was made to section 110, which sets out, among other things, how registered parties may use the lists of electors.

Subsection 110(1) should, therefore, be amended by the addition, after the listing of sections, of the words "or subsection 93(1.1)."

A new subsection should also be added, which would become subsection 110(1.1), to restrict, in the same manner as is already done for registered parties, how these lists may be used by eligible parties. That subsection would stipulate that "an eligible party that, under subsection 93(1.1), receives a copy of preliminary lists of electors may use the lists for communicating with electors, including using them for recruiting party members."

In subparagraph 111(*f*)(i), the words "or eligible parties" should also be added after the words "registered parties."

[150] S.C. 2007, c. 21, s. 13 (Bill C-31).

IV.9 Registry of Parties

In section 374 of the Act, the reference to the repealed subsection 390(3) should be removed.

Section 374 of the *Canada Elections Act* refers to provisions that set out the information that must be contained in the registry of parties. Subsection 390(3) of the Act, which is one of those provisions, was repealed in 2003.

IV.10 Judicial Recount – Notice to the Returning Officer

Electors who wish to apply for a judicial recount should be required to provide written notice of the application to the returning officer before submitting it to the judge. This recommendation would facilitate the returning officer's work and would enable the returning officer to ensure better support for the judge and the candidates involved in a judicial recount.

In the 40th general election, judicial recounts were held in six electoral districts. Four of them were ordered following an application by an elector, as provided by section 301 of the *Canada Elections Act*.

That section should be amended to require the applicant to provide written notice of the application for a judicial recount to the returning officer before submitting it to the judge.

Currently, the applicant and the judge are not required to notify the returning officer that an application for a recount is about to be or has been submitted. In some cases, returning officers are notified of the application only once a summons required under subsection 301(4) is served on them – that is, after the judge has accepted the application and fixed the date for the recount.

In most cases, applicants already take the initiative of informing the returning officer before applying for a recount. However, in the 40th general election, at least one application was heard without the returning officer being notified. The returning officer received only the summons to appear, issued by the court in accordance with subsection 301(4).

It is essential that the returning officer be notified as soon as possible that a judicial recount may be held. Such an exercise requires substantial organization on the part of the returning officer in a short period of time. Additional materials and the ballots collected in accordance with the Special Voting Rules must be shipped to the electoral district by the Office of the Chief Electoral Officer in Ottawa. Staff must also be recruited to assist the judge with the recount.

Providing notice at the time that the application is submitted gives the returning officer the opportunity to be represented during the hearing of the application. The returning officer or his or her representative may, on that occasion, notify the judge of the number of ballots and ballot boxes to be counted, of the technical assistance that may be provided to the judge, as well as of requirements with regard to security, furnishings, equipment and so on. The returning officer

may also suggest that the judge hold a preparatory meeting with the candidates or their representatives, before the recount begins, to discuss the logistical aspects of the recount and to reach an agreement on the procedure to be followed.

This new requirement would constitute only a minor additional responsibility for the elector submitting the application. Returning officers can be readily reached over the period during which an application for a judicial recount may be made. The notice of application can easily be served in person or by fax.

IV.11 Removal from the National Register of Electors by an Authorized Representative

The duly authorized representative of a person under guardianship or curatorship should be able to request that that person's name be deleted from the National Register of Electors.

This recommendation would make the registration system more efficient while preserving electors' confidence in its integrity.

Under paragraph 52(1)(*c*) of the *Canada Elections Act*, the Chief Electoral Officer may delete from the National Register of Electors the name of any person who requests in writing to have his or her name deleted.

Elections Canada's current practice is to take into consideration the authority established by a curatorship or guardianship and to allow, where a curator or guardian makes such a request, the deletion of the name of a person under protective supervision.[151]

Two conditions must be met: first, the person in question must be under a court-ordered curatorship or guardianship;[152] second, the curator or guardian must provide the Chief Electoral Officer with a copy of the court decision establishing the curatorship or guardianship and a piece of identification establishing the curator's or guardian's identity.

The Act should be clarified to remove any doubt regarding this practice, and the term used to designate the representative should be broad enough to cover the different provincial protective supervision regimes.

[151] "Tutorship to the person" and "curatorship to the person" are civil law concepts. According to the provisions of the *Civil Code of Québec*, the court appoints a tutor for the person whose incapacity is partial or temporary and who requires to be represented in the exercise of his or her civil rights (article 285), whereas a curator is appointed for the person whose incapacity is total and permanent (article 281). In Ontario, the court appoints a "guardian of the person" for a person who is incapable of personal care and, as a result, needs decisions to be made on his or her behalf by a person who is authorized to do so (section 55 of the *Substitute Decisions Act, 1992*).

[152] Currently, this does not cover powers of attorney for personal care authorized by a court. Only court-ordered protective supervision regimes are covered.

It should be noted that deleting the person's name from the National Register of Electors in no way removes that person's right to vote. The individual will still be able to vote provided that he or she registers again on the list of electors.

Under paragraph 101(1)(*c*) of the Act, the guardian or curator may register the person under protective supervision on the preliminary list of electors during an election period.

Furthermore, this practice takes into account the fact that, under the applicable provincial law, the curator or guardian has the obligation to act in the represented person's interest and that the court has determined the appointed representative to be in the best position to fulfill the obligation.

This recommendation deals only with the case of a curatorship or guardianship established by a court. Parliament will perhaps wish to take into account other situations where a representative might want to act for a person who is unfit to do so.

In Quebec, the power of attorney for personal care is a contract that itself sets out the roles and responsibilities of the mandatary, who is also appointed therein. The power of attorney comes into effect once it is sanctioned by the court. The mandatary can use the conferred powers only once the judgment has been rendered. It would also be appropriate to take into consideration this court-sanctioned power of attorney for personal care.

In the other Canadian provinces that provide for a power of attorney for personal care, the mandatary is not required to have the power of attorney sanctioned by a court in order for it to come into effect. As a general rule, the power of attorney itself sets out the conditions for its coming into effect. Otherwise, a procedure is put in place for the court to set out the terms and conditions for protective supervision. In revisiting section 52, Parliament may also wish to consider the situation in which the power of attorney for personal care comes into effect without the court's involvement.

IV.12 Commercial Value Deemed to Be Nil

The circumstances under which a non-monetary transaction is deemed to have a nil commercial value should be amended to better ensure the consistency of the current system. Consequently, the following is recommended:

- The provision should apply only in cases where the property or service was provided by a Canadian citizen or a permanent resident of Canada since only a citizen or a permanent resident is entitled to make a contribution under the Act.
- It should apply only in cases where the commercial value of goods or services provided was $200 or less.
- The total value of all goods and services that are provided to a distinct political entity during the relevant period set out in subsection 405(1), and treated as having a nil commercial value, should not exceed $200.

Subsection 2(2) of the *Canada Elections Act* deals with situations where a monetary transaction of little value is deemed as having no value for the purposes of the Act. Although this provision is useful, its current wording is problematic.

Subsection 2(2) reads as follows:

2. (2) For the purposes of this Act, other than section 92.2, the commercial value of property or a service is deemed to be nil if	**2.** (2) Pour l'application de la présente loi, à l'exclusion de l'article 92.2, la valeur commerciale d'un bien ou service est réputée nulle si, à la fois :
(*a*) it is provided by a person who is not in the business of providing that property or those services; and	*a*) la personne qui le fournit n'exploite pas une entreprise qui les fournit;
(*b*) the amount charged for it is $200 or less.	*b*) le prix exigé est de 200 $ ou moins.

The rationale for this provision is to exclude from the obligation to report as a contribution and an election expense any service or good of minimal value that a person provides to a political entity in certain circumstances that do not warrant such reporting. For instance, were it not for subsection 2(2), a door-to-door canvasser using his or her vehicle while campaigning for a candidate in a rural electoral district would be considered as making a non-monetary contribution to the campaign consisting of the value of the use of the vehicle and of the gasoline consumption. Similarly, a campaign volunteer who brought a plate of homemade cookies to the campaign office for fellow volunteers would be considered as having made a contribution to the campaign, were the exemption not provided. Since accounting for such minor transactions would impose a heavy burden on campaigns, Parliament decided to deem them to be of no commercial value.

It would be unmanageable for campaigns to account for every such transaction as a non-monetary contribution and an election expense; to this extent, the provision in question is logical in its intent. However, the wording of subsection 2(2) does not accomplish the intended goal. Indeed, as currently drafted, the provision would allow an individual to offer a good or a service of substantial value, but to have it deemed to be of no value under this provision, simply because the amount charged by the individual was $200 or less. For example, an individual who is not in the business of selling furniture could provide the campaign with all of its required furniture, but the transaction would be deemed as having no commercial value because the price asked was $200 or less even if the real value was well in excess of that individual's contribution limit. Clearly, a literal application of the provision would be problematic and not in keeping with the intent of Parliament as it could allow the circumvention of the rules on disclosure and on contribution limits, as well as spending limits.

Furthermore, the text does not take into account changes in the political financing rules since this provision of the Act was adopted. Taken literally, the provision could be interpreted as permitting corporations (in their capacity as legal persons) to make contributions that would be deemed to be of no commercial value. Nevertheless, such a transaction would clearly be contrary to the spirit of the political financing rules recently adopted in the Act.

Finally, subsection 2(2) is written in a manner that suggests that it applies on a transaction-by-transaction basis and is non-cumulative. However, in the context of the new contribution limits, deeming certain transactions to have no commercial value opens the door for contributions that, together, amount to a value that exceeds the contribution limits. Take, for example, an individual who makes 10 non-monetary contributions, each valued at $200 or less, to a candidate's campaign and has each transaction deemed to be of no commercial value. The real commercial value of such a contribution of goods and services would total $2,000. The $1,000 limit on contributions that individuals can make in total to all local entities of a registered party in a given year loses much of its meaning in such a context.

It is, therefore, recommended that subsection 2(2) of the Act be amended to replace the word "person" with the expression "Canadian citizen or permanent resident of Canada," as only citizens and permanent residents are entitled to make contributions under the Act.

Further, it is recommended that paragraph 2(2)(*b*) of the Act be amended to replace the words "the amount charged for it" with "its commercial value." Thus, the provision deeming the commercial value to be nil would apply only in cases where the actual commercial value is $200 or less. This would prevent the literal interpretation of the provision, which appears to allow any transaction to be deemed to have no commercial value, regardless of its true value, as long as the price charged by the person providing the good or service is $200 or less.

Finally, it is recommended that the exception attributing a nil commercial value to the provision of certain goods and services be applied on a cumulative basis with respect to each individual making the non-monetary contributions. The rule would apply, therefore, only when the total commercial value of all transactions for which the exception is being claimed is $200 or less.

The period for computing these transactions should correspond to the periods set out in subsection 405(1) of the Act (that is, a calendar year, for qualifying non-monetary contributions made by an individual to a local entity of a registered party and to the registered party itself; the election period, for contributions to an independent candidate; and the duration of a leadership contest, for contributions made to leadership contestants). Although the contribution limits in subsection 405(1) apply to the total amount of contributions made by an individual to all local entities of a particular registered party (paragraph 405(1)(*a.1*)) and to all leadership contestants in a particular contest (paragraph 405(1)(*c*)), in practice, it would be impossible for distinct campaigns or registered associations to apply the provision if the $200 limit applied to contributions made also to other campaigns or registered associations. For this reason, a separate calculation on a cumulative basis should apply to transactions made by an individual to each distinct political entity recognized under the Act.

IV.13 Connection of Third Parties to Canada

The criteria for registering third parties should be amended to ensure the consistency of the Act regarding participation in the electoral debate of persons or groups without a connection to Canada.

Parliament has already limited participation in the issues being debated during an election by persons or groups with no connection to Canada. For example, section 358 of the *Canada Elections Act* prohibits third parties from using contributions from non-Canadian sources for election advertising purposes, specifically contributions from a "person who is not a Canadian citizen or a permanent resident" and those from a "corporation or an association that does not carry on business in Canada." As well, paragraph 354(2)(*d*) provides that third parties that are required to register must appoint a financial agent who is a Canadian citizen or a permanent resident.

Moreover, under section 331, "No person who does not reside in Canada shall, during an election period, in any way induce electors to vote or refrain from voting or vote or refrain from voting for a particular candidate unless the person is (*a*) a Canadian citizen; or (*b*) a permanent resident [...]"

It is reasonable to believe that third-party election advertising may constitute such an inducement. However, under the third-party registration requirements set out in subsections 353(1) to (3) and (5), it is not necessary for third parties themselves to have a connection to Canada.

The Chief Electoral Officer is required to register a third party under subsection 353(6) if the third party meets the registration requirements. However, the legality of election advertising done by a third party with no connection to Canada could be challenged, even if the third party has registered in accordance with the Act.

Therefore, to ensure consistency in the Act regarding participation in the issues being debated during an election by persons with no connection to Canada, the third-party registration requirements should include the following:

- When an application for registration is filed by an individual, that individual should attest that he or she is a Canadian citizen, is a permanent resident or resides in Canada.
- When an application is filed by a corporation or an association, an official authorized to sign on its behalf should attest that it carries on business in Canada.
- When an application is filed by an association or other group, the person who is responsible for the association or group should attest that he or she is a Canadian citizen, is a permanent resident or resides in Canada.

IV.14 Amendment to Section 435.27 – Late Payments

The words “four-month” should be deleted from paragraph 435.27(*a*) to correct an inconsistency in the *Canada Elections Act*.

Subsection 435.24(1) prescribes the period for the payment of certain claims relative to leadership campaign expenses. That period is 18 months. However, when it refers to that subsection, paragraph 435.27(*a*) erroneously specifies a four-month period.

The proposed change would correct an apparent contradiction and would maintain consistency between those provisions.

IV.15 Repeal of Paragraph 501(3)(j) – Additional Penalties

Paragraph 501(3)(*j*) should be repealed to correct an internal inconsistency.

If a registered party, its chief agent, one of its registered agents or one of its officers has been convicted of an offence referred to in subsection 501(3), subsection 501(2) allows the judge, under certain circumstances, to direct deregistration of the party as well as liquidation of the party’s assets and those of its registered associations.

The offence referred to in paragraph 501(3)(*j*) pertains to the candidate or the candidate’s official agent. It cannot be committed by the registered party, its chief agent, one of its registered agents or one of its officers. That paragraph should, therefore, be repealed.