



HOUSE OF COMMONS
CHAMBRE DES COMMUNES
CANADA

42nd Parliament, First Session

REPORT OF THE COMMITTEE

The Standing Committee on Procedure and House Affairs

has the honour to present its

THIRTY-FIFTH REPORT

A Third Interim Report in Response to the Chief Electoral Officer's Recommendations for Legislative Reforms Following the 42nd General Election

Pursuant to its mandate under Standing Order 108(3)(a)(vi), the Standing Committee on Procedure and House Affairs has studied the Report of the Chief Electoral Officer of Canada entitled "An Electoral Framework for the 21st Century – Recommendations from the Chief Electoral Officer of Canada Following the 42nd General Election" and has agreed to report the following:

The *Canada Elections Act*¹ (CEA) requires the Chief Electoral Officer (CEO) to provide a report to the Speaker of the House of Commons following each federal general election that sets out any amendments that are, in the CEO's opinion, desirable for the better administration of the Act. Accordingly, the CEO's report under section 535 of the CEA was tabled in the House of Commons on September 27, 2016. Pursuant to Standing Order 32(5), the CEO's report was referred to the Committee that same day.

During the course of the 42nd Parliament, 1st Session, the Committee has dedicated 19 meetings to the consideration of the CEO's report and has adopted two interim reports

1 Section 535, *Canada Elections Act*, S.C. 2000, c. 9.

based on this study: one presented to the House on March 6, 2017,² and the other on March 20, 2017.³

On May 17, 2017, the Committee received a letter from the Minister of Democratic Institutions requesting that the Committee prioritize its work on the review of the CEO's report in order to provide feedback to the government on specific recommendations that will be "critical for [the government's] decision-making this summer."⁴ The letter followed the Minister's appearance before the Committee on March 9, 2017, where she made a similar request to the Committee. The recommendations from the CEO's report that the Minister highlighted in her letter as important were: A21, A22, A25, A33, A34, A39, B9, B12, B15, B18, B27 and B44.

In the CEO's report, the recommendations found in Table A concern modernizing Canada's electoral process and improving the political finance regulatory regime. The recommendations found in Table B deal with "other substantive recommendations."

This interim report provides a summary of the Committee's views on the recommendations the Minister highlighted in her letter as requiring a timely response on the part of the Committee. The Committee continues to hold the completion of its study of all of the CEO's recommendations found in his report to count as among its top priorities. The Committee is of the view that the government must ensure that the final report of the Committee, presented to the House in a timely manner, will inform future legislation brought forward by the government stemming from the CEO's report. The Committee expects there to be further legislation introduced by the government based on its later interim and/or final reports presented to the House by the Committee in a timely manner.

As with its past two interim reports, the Committee again wishes to acknowledge and express its gratitude to Elections Canada, along with the Office of the Commissioner of Canada Elections, for the generous assistance and collaborative support provided to the Committee during this study. In particular, the Committee wishes to thank Mr. Marc Chénier, General Counsel and Senior Director, Mr. Yves Côté, Commissioner of Canada Elections, Mr. Trevor Knight, Senior Counsel, Ms. Anne Lawson, General Counsel and Senior Director, Ms. Karine Richer, Legal Counsel, and Ms. Nicole Sloan, Analyst, Policy and Parliamentary Affairs.

2 House of Commons, Standing Committee on Procedure and House Affairs, [*An Interim Report in Response to the Chief Electoral Officer's Recommendations for Legislative Reforms Following the 42nd General Election*](#), Report 23, 42nd Parliament, 1st Session, March 2017.

3 House of Commons, Standing Committee on Procedure and House Affairs, [*A Second Interim Report in Response to the Chief Electoral Officer's Recommendations for Legislative Reforms Following the 42nd General Election*](#), Report 27, 42nd Parliament, 1st Session, March 2017.

4 Minister of Democratic Institutions, Letter to the Chair of the House of Commons Standing Committee on Procedure and House Affairs (Re: Chief Electoral Officers Report following the 42nd general election), May 17, 2017.

A21. Fixed election date

Provisions in the CEA: 57

This recommendation suggests that Parliament consider amending the CEA to provide for a maximum length for an election period

Currently, the CEA does not provide for a maximum length for an election period, only a minimum length of 36 days after the issue of the writs of election, as provided for by section 57 of the CEA. The CEO's report states that having no maximum length for an election period increases uncertainty for all electoral participants except the governing party, and diminishes the benefit afforded by the fixed date in terms of Elections Canada's election preparedness.

Also, campaign periods that exceed 37 days are prorated to increase the spending limits provided for under the CEA for parties and candidates. The CEO's report notes that this can compromise the level playing field by favouring campaigns that have access to more resources.

The Committee agrees with the reasoning behind the CEO's recommendation. As such, it proposes that the maximum length for an election period be 43 days, or up to one week longer than the minimum period. The Committee recommends this proposed maximum length for an election period apply to by-elections as well.

The Committee also noted that the experience of employing a fixed date for an election has created other implications related to Canada's election financing regime. The Committee considers it important to give further study to the impact of fixed date elections on, for example, election advertising and the financial administration of third parties.

A22. Polling day

Provisions in the CEA: 56.1, 57(3), 57(4) and 128

This recommendation proposes that Parliament consider moving election day from being held usually on a Monday, to instead a Saturday or Sunday. The report notes that elections are held on weekends in Australia, New Zealand and a number of European countries.

Elections Canada officials explained to the Committee that holding an election on a Monday results in several challenges for the organization and issues for voters. First, holding an election on a regular workday means that Elections Canada experiences difficulty in recruiting qualified election workers; about 285,000 election workers need to be hired for election day. It also creates problems finding suitable polling places; Elections Canada officials told the Committee that increasingly schools are resistant to having voting take place at schools when students are present. Also, voting on a weekday often results in long line-ups before and after regular working hours.

The Committee engaged in a wide-ranging discussion on this recommendation. Concerns were raised that in many ridings, especially in rural areas, places of worship or halls attached to places of worship frequently are used by Elections Canada as polling places. As such, moving election day to a day on the weekend could interrupt the religious practices of a certain number of Canadians, and potentially impose an undue imposition on their religious beliefs. Other members of the Committee wondered if other solutions for the challenges experienced by Elections Canada in, for example, hiring qualified election workers, could not be better remedied by increasing remuneration of workers, as opposed to moving election day. It was noted by a member that for the next scheduled general election, two out of four days of advanced polling are held on weekends, while the Monday of advanced polling is to be held on Thanksgiving, a statutory holiday. As such, moving election day to a day on the weekend created an imbalance between voting opportunities on weekends and weekdays, in favour of weekends. Still, another Committee member suggested that consideration be given to making election day a statutory holiday. Meanwhile, other Committee members considered the various points of view expressed by colleagues and Elections Canada officials and, on balance, agreed with the CEO's recommendation.

Overall, a general consensus existed among members of the Committee to reject the CEO's recommendation, although the Committee notes that some members did support it.

A25. Partisan nominees for election officer positions

Provision in the CEA: 32 to 39

This recommendation proposes to remove the prohibition on recruitment of election officer positions pending the receipt of names of partisan nominees. The recommendation does, however, make clear that candidates and parties should remain free to recommend qualified persons for election officer positions.

Currently, the CEA provides that Returning Officers (ROs) must solicit the registered parties whose candidates finished first and second in the last election in the electoral district for names of suitable persons to fill certain election officer positions.

ROs are required to consider partisan nominees for the positions of Deputy Returning Officer (DRO), poll clerk and registration officer until the 24th day before polling day, and for revising agents until three days after the parties receive the request for names from the RO. This means that ROs cannot staff the key DRO and poll clerk positions until late in the election period.

The CEO's report states that these hiring requirements pose a significant limit on the staffing flexibility of ROs and can create delays in training. In most cases, parties and candidates provide no names or an insufficient number of names to ROs.

Elections Canada officials told the Committee the organization's preference was to repeal the provisions that require election positions to be first staffed by partisan nominees. Nevertheless, they noted that shortening the timelines following the start of an election

period for parties to provide names of nominees for election officer positions to Elections Canada would be of assistance.

The Committee deferred discussion about the merits of retaining partisan nominees in the context of the modern administration of elections. It recommends that the timeline for political parties to provide names of suitable persons to fill certain election officer positions be shortened to seven days from the start of the election period.

A33. Power of Commissioner to compel testimony

Provisions in the CEA: 510

This recommendation proposes to give the Commissioner of Canada Elections the power to seek a court order to compel witnesses to provide evidence, with all necessary safeguards for ensuring compliance with the *Canadian Charter of Rights and Freedoms*.

Both the Commissioner and the CEO recommended, in 2013, that the Commissioner be given the power to seek judicial authorization to compel testimony, which would greatly aid in investigating and successfully prosecuting offences under the CEA.

The majority of the Committee supports this recommendation. The decision was not unanimous as the Official Opposition stated that it did not support this recommendation.

A34. Authority of Commissioner to lay charges

Provision in the CEA: 511 and 512(1)

With this recommendation, the CEO proposes to amend section 511 of the CEA to authorize the Commissioner to lay a charge (or “initiate a prosecution”) under the CEA without prior authorization from the Director of Public Prosecutions (DPP). Similarly, the recommendation proposes that the Commissioner ought to be expressly exempted from the prohibition in section 512(1) of the CEA against anyone but the DPP laying a charge without the latter’s prior written consent.

The Commissioner has requested that he be granted the power to lay a charge on his own initiative, as is the case for the police and almost all federal regulatory investigators, instead of having to first obtain authorization from the DPP to do so.

The CEO’s report states that for the vast majority of federal offences, the investigator is the one to lay the charge and the DPP is the one to prosecute. Further, granting the Commissioner this power would reduce delays in processing cases and be more operationally efficient.

The Commissioner has recommended the same process be followed for election offences, and the DPP has no objection to the adoption of this model under the CEA.

The majority of the Committee supports this recommendation. The decision was not unanimous as the Official Opposition stated that it did not support this recommendation.

A39. Broadcasting regime

Provisions in the CEA: 332 to 348

The CEO's report states that the provisions of the CEA dealing with broadcasting need to be updated to make them fairer and more coherent. The report raises several issues about the current state of the broadcasting regime: the regime is complex; it no longer covers an adequate range of players, since the free time rules are limited to "networks" only; and it continues to unduly favour larger parties over smaller ones, which is a chronic irritant for smaller parties.

Further, the Broadcasting Arbitrator is required to allocate paid time among registered parties, even though many of them do not have the resources to buy broadcast advertising. However, the free time allocation is linked to the paid time allocation, requiring all parties to buy broadcast advertising. In addition, the statutory formula for the paid time allocation relies heavily on past electoral performance. The Broadcasting Arbitrator is permitted to modify this allocation if, in his view, it would otherwise be "unfair to a registered party or contrary to the public interest." He has used this authority consistently since his appointment in 1992.

Under this single recommendation, the CEO and the Broadcasting Arbitrator make five lengthy and complex recommendations. These are:

First, uncouple the paid and free time allocation processes.

Second, modify the allocation regime for paid broadcasting time. Instead of 390 minutes of paid time being allocated among political parties in accordance with a complex statutory formula, each party should be given the same entitlement of 100 minutes of paid time. A cap of 300 minutes should be set on the total amount of paid broadcasting time that any station must sell to political parties. Where the requests from all parties to one station amount to more than 300 minutes, the time should be pro-rated, with any disputes to be resolved by the Broadcasting Arbitrator. Parties should also have the right to purchase additional time, subject to availability, as is currently the case.

Third, provide paid time at the "lowest unit charge," which should be defined to mean the lowest rate charged to non-political advertisers who receive volume discounts for advertising purchased months in advance. The Canadian Association of Broadcasters suggests that paid time be provided "at the same unit rate" to all parties, without any comparison to other potential purchasers. Neither the CEO nor the Broadcasting Arbitrator supports this suggestion.

Fourth, the obligation to provide free broadcasting time should no longer apply only to "networks." Instead, it should apply, through conditions of licence under the *Broadcasting Act*,⁵ to all conventional television stations that broadcast news or public affairs programs, all news/talk radio stations, and all specialty television stations that focus on news or

⁵ *Broadcasting Act* (S.C. 1991, c. 11)

public affairs. Each station should be required to provide a total of 60 minutes of free time, to be allocated among the parties. The Canadian Association of Broadcasters objects to this proposal, suggesting that it would be financially onerous for broadcasters. The CEO and the Broadcasting Arbitrator maintain this recommendation, however, as greater access to free broadcasting time for all political parties is in the public interest.

Fifth, on the issue of free broadcasting time, although the Broadcasting Arbitrator believes that it should be allocated according to his 50/50 modified approach (currently used for the paid time allocation), the CEO recommends an equal allocation of free time among all registered parties.

CBC/Radio-Canada has also recommended that the free time allocation be published by the Broadcasting Arbitrator within two days of the issue of the writs; that parties be given a 10-day deadline to express their intention to use their free time allocation; that a station, if it is part of a network or broadcaster group, be able to schedule free time similarly on all stations of the network or group; that it not be necessary to schedule the free time evenly over the election period, as long as parties are treated in an equitable manner; and that no reallocation be permitted less than 21 days before polling day. The CEO and the Broadcasting Arbitrator agree with these recommendations, which essentially mirror the current allocation regime for paid time.

The Committee is of the view that to give adequate study to a recommendation of such breadth and complexity necessitates a greater time period for information gathering and deliberation than the Committee currently has at its disposal. As such, the Committee has decided to revisit this recommendation at a later date.

B9. References to electors' gender in the CEA

Provisions in the CEA: 44(2), 46(1)(b), 49(1), 56(b), 107(2), 107(3), 194(1)(a), 195(1)(a), 195(2)(a), 199(2)(a), 204(93) and 222(1)

This recommendation seeks for the Committee to endorse the update of the terminology related to gender in the CEA. The collection and use of gender information is currently being reviewed on a federal government-wide basis, with input from all departments and agencies.

Provisions in the CEA require information about the gender of electors be collected. As such, many Elections Canada forms require an elector to indicate whether they are male or female; there is no other option. However, there are gender identities other than male and female.

This issue is not restricted to Elections Canada; it is a government-wide matter. The CEO's report notes that the Canadian Human Rights Commission and the Treasury Board Secretariat are currently conducting research into the collection and use of gender information by government institutions.

The CEO's report also notes that absence of gender information on lists of electors at polling stations would not impact the integrity of the voting process. Poll workers are currently instructed to disregard gender information on the lists of electors. However, the collection of gender information is important in many cases for identifying electors and matching information in the National Register of Electors (NROE), and is also useful to provide statistical information about candidates.

Some form of gender information (regardless of the number or description of categories) is required to be collected in the NROE for operational reasons and is useful for statistical reasons with respect to candidates. It is not necessary for any operation at the polls. All requirements to indicate an elector's gender on lists of electors or other related documents should be deleted (sections 107, 194, 195, 199, 204 and 222).

The Committee agrees with this recommendation.

B12. Publishing false statements to affect election results

Provisions in the CEA: 91

This recommendation concerns the making of false statements about the personal character or conduct of a candidate with the intention of affecting the results of an election, which is currently prohibited by section 91 of the CEA.

At issue, the intended scope of this provision is unclear in terms of the behaviour it seeks to capture (that is, what constitutes a false statement about personal character or conduct?). It is also unclear how the provision applies when the intent is to affect the results of the election in general, rather than the election of a candidate in a particular electoral district. The Commissioner has noted that the provision's lack of clarity causes enforcement difficulties. It also raises expectations of what can be prosecuted.

As such, the Commissioner has suggested to the CEO that Parliament may wish to clarify or repeal this provision. Meanwhile, the CEO is of the view that section 91 ought to be repealed, as serious cases of defamation or libel can be dealt with through alternative civil or criminal legal mechanisms.

In response to a request by the Committee, the Office of the Commissioner of Canada Elections provided it with amendments to the CEA that would broaden the application of section 91 and provide for the behaviour that would constitute a false statement of fact (see Appendix A). The Committee agrees with the amendments proposed by the Commissioner and recommends that these amendments be made to the CEA.

The majority of the Committee supports this recommendation. The decision was not unanimous as the Official Opposition stated that it did not support this recommendation.

B15. Oath of assistance

Provisions in the CEA: 155(3)

This recommendation seeks to repeal the requirement for a family member or friend to take an oath of assistance.

Currently under the CEA, a family member or friend assisting an elector with a disability in voting must take an oath. The oath requires the assistor to make the following declaration: that the assistor will mark the ballot paper as directed by the elector; will keep the elector's choice of candidate secret; will not try to influence the elector in making that choice; and, if assisting as a friend, has not so assisted another person during the current election.

According to the CEO's report, the use of an oath is unnecessary in this circumstance, adds complexity to the voting process and creates an air of formality and intimidation that is not consistent with the goal of the provision, which is to help electors vote. Rather, the CEO is of the view that it is sufficient to have the election officer, acting on the CEO's instructions, inform assistors that they must not influence the elector's choice, must mark the ballot as directed and must keep the elector's choice of candidate secret.

The Committee raised concerns about this recommendation, regarding if it struck the appropriate balance between safeguarding the integrity of the vote and facilitating the right of electors with disabilities to exercise their franchise without undue disturbances. The Committee has requested that Elections Canada re-engage with its Advisory Group for Disability Issues and others with disabilities about this specific recommendation and to provide the views of the group back to the Committee. The Committee has, for the time being, deferred its decision on this recommendation.

B18. Counting of votes from advance polls

Provisions in the CEA: 172(a)(iv) and 289(1)

This recommendation proposes that the CEA be amended to specify that ballots cast at advance polls may be counted on election day before the polls close, if ROs obtain the CEO's prior approval. The counting would occur in the presence of candidates' representatives. The proposed provision would also provide for all appropriate safeguards for keeping the results secret until the polls close, such as sequestering counters until polls close.

Currently under the CEA, the counting of ballots from advance polls can only begin after the polls close on election day. The CEO's report states that this can make it difficult to count ballots from advance polls in a timely manner, especially when there has been high voter turnout at advance polls. Elections Canada officials reminded the Committee that the number of electors casting their ballots at advanced polls has increased in recent elections; that long counts following the close of polls makes for unfavourable working conditions for election officials; and that the CEO has previously used his power to adapt the CEA to permit such counting and the process worked well.

Elections Canada officials told the Committee that for the 2015 general election, the CEO used his adaptation power under section 17 of the CEA to authorize the counting of ballots from advance polls to begin no more than two hours before the polls closed in about one-third of the approximate 4,000 advance poll districts.

The majority of the Committee supports this recommendation. The decision was not unanimous as the Official Opposition stated that it did not support this recommendation.

The Committee is cognizant that the need for this recommendation may be reduced by improved planning and the implementation of greater administrative flexibility at polling places, as requested by the CEO in his report and endorsed by the Committee. Nonetheless, where necessary, the majority of the Committee recommends that ballot counting of advance polls be permitted prior to the close of polls, provided it does not begin earlier than two hours before the polls close and any person present during the counting of ballots be sequestered until the polls close. Further, it was also recommended that any person who divulges results of advance polls be subject to a penalty equivalent to a contravention of a similar nature.

B27. Foreigners inducing electors to vote or refrain from voting

Provisions in the CEA: 331

Currently the CEA provides for a prohibition on anyone who does not reside in Canada, or who is not a Canadian citizen or permanent resident of the country, inducing electors to vote or refrain from voting or vote or refrain from voting for a particular candidate. The CEO's report states that this prohibition is overly broad and needs to be modernized or repealed.

The prohibition's breadth has caused difficulties for Elections Canada and the Commissioner in recent elections. The CEO's report notes that Elections Canada receives frequent complaints that media statements (such as tweets or interview comments) made by non-Canadians violate this provision. It also receives questions about whether goods and services supplied by a foreign provider violate the CEA. It has led to criticism of both Elections Canada and the Commissioner for not properly enforcing a law that was likely never intended to limit all speech and actions by foreigners.

The Commissioner has suggested to the CEO that Parliament may wish to modernize this provision or repeal it. The CEO recommends that section 331 be repealed.

In response to a request by the Committee, the Office of the Commissioner of Canada Elections provided it with amendments to the CEA that would tighten and refine the breadth of the application of section 331 (see Appendix B). The Committee agrees with the amendments proposed by the Commissioner and recommends that these amendments be made to the CEA.

The Official Opposition raised some concerns about this recommendation and will expand on these concerns in its dissenting or supplementary opinion that will be appended to this report after the signature of the Chair.

B44. By-election called specifically to overlap with fixed election date

Provisions in the *Parliament of Canada Act*: 31

This recommendation proposes that section 31 of the *Parliament of Canada Act*⁶ be amended so as not to require the issuance of a warrant where a vacancy in the House of Commons occurs within one year (or some other period) before the fixed election date in subsection 56.1(2) of the *Canada Elections Act*.

Currently the *Parliament of Canada Act* requires that a by-election be called no later than 180 days after the CEO receives notice of a vacancy in the House. The CEO's report states that the obligation to call a by-election shortly before a fixed election date can be problematic.

In 2015, for example, three by-elections were called with the same polling day as the fixed general election date. The by-election periods were six months long and raised several operational and political financing questions. Some of the problems cited in the CEO's report about these by-elections were that parties and third parties were in the difficult situation of having to distinguish between by-election expenses and pre-writ expenses for the impending general election.

The Committee agrees with the CEO's recommendation but proposes instead that the time period proposed in the CEO's recommendation be reduced from one year to nine months. Further, the Committee is of the view that the 180 day time period for calling a by-election found in section 31 of the *Parliament of Canada Act* ought to be examined.

C30. Contribution to third parties

This recommendation proposes to remove the timing restriction in section 359(4)(a) of the CEA so that all relevant contributions must be reported, regardless of when they are received. The Commissioner agrees with this recommendation.

The contributions received for election advertising purposes by third parties must only be reported for the period beginning six months before the issue of the writ and ending on election day. The CEO's report states that restricting the period in which such contributions must be reported is not warranted and is not well suited to fixed-date elections.

The Committee agrees with this recommendation

6 *Parliament of Canada Act*, R.S.C., 1985, c. P-1

C45. Search and seizure

Provisions of the CEA: 511(3)

This recommendation proposes that the CEA be amended to provide investigators on contract with the Commissioner with the same powers as public officers under section 487 of the *Criminal Code*, which is the basic search warrant provision.

Currently, important search and seizure tools found under section 487 of the *Criminal Code* are only available to permanent employees of the Commissioner, who by virtue of their employment are public officers for the purposes of the *Criminal Code*; they are not available to investigators on contract with the Commissioner.

The CEO's report notes that the Commissioner recommended to the CEO that section 511(3) of the CEA should be updated to ensure that all the Commissioner's investigators, including contractors, are able to apply for judicial authorizations as provided for in the following sections of the *Criminal Code*: 487 (search warrants); 487.012 (preservation demands); 487.013 (preservation orders for computer data); 487.014 (general production orders); 487.015 (production orders to trace specified communications); 487.016 (production orders for transmission data); 487.017 (production orders for tracking data); 487.018 (production orders for financial data); 487.019(3) (revocations or variations of a production order); 487.0191 (orders prohibiting disclosure of information related to or the existence of a preservation demand, preservation order or production order); and 487.0192 (particulars of production orders).

The Committee agrees with this recommendation.

Revamping the rules governing third parties to better address foreign influence

The Committee recommends other amendments should be made to expand the third party regime in the CEA in order to ensure that third parties, especially ones that receive foreign funds, do not undermine the transparency and level playing field in Canadian elections.

In particular the scope of regulated activities of third parties should be expanded beyond "election advertising" to cover a broader range of promotional activities such as direct voter contact and polling research in support of campaign activities.

Furthermore, to better address the influence of foreign funds in the Canadian electoral process, the Committee recommends that the use of a third party's general revenues for regulated activities be restricted.

Pursuant to Standing Order 109, the Committee requests that the government table a comprehensive response to this Report.

A copy of the relevant *Minutes of Proceedings* ([Meetings Nos. 32, 33, 34, 35, 36, 37, 38, 41, 42, 44, 48, 49, 50, 51, 52, 54, 55, 62, 63, 64, 66](#)) is tabled.

Respectfully submitted,

Hon. Larry Bagnell
Chair

APPENDIX A

91 (1) No person shall, with the intention of affecting the results of an election, knowingly make or publish any false statement of fact in relation to the personal character or conduct of a candidate, prospective candidate, leader of a registered party, or of a person closely associated with the campaign of a candidate, prospective candidate, registered party or the leader of a registered party.

(2) For the purposes of subsection (1), a false statement of fact in relation to the personal character or conduct of a person is one that is likely to have a significant prejudicial effect on the impression electors have of the person by reason that it falsely ascribes serious defects and failings to the person, including

(a) the commission of a criminal act;

(b) views or behaviour fundamentally inconsistent with what is generally expected of an elected official; or

(c) feelings of hatred, contempt for or deep-rooted prejudice against an identifiable group.

APPENDIX B

331 (1) No person or entity shall, inside or outside Canada, during an election period, unduly attempt to influence electors to vote or refrain from voting or vote or refrain from voting for a particular candidate or registered party unless the person is

- (a) an individual who legally resides in Canada;
- (b) a Canadian citizen; or
- (c) a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*.

(2) For the purposes of subsection (1), an attempt to influence electors is undue where

- (a) the person or entity incurs any expense to directly promote or oppose a candidate, a registered party or its leader, except where the incurring of the expense is expressly permitted under this Act;
- (b) manifestly false information is produced or transmitted with the intent of causing serious confusion and to influence the exercise of an elector's vote; or
- (c) the manner used to attempt to influence electors includes an act or omission that contravenes a provision of this Act or of any other Act of Parliament.

(3) Except as provided in subsection (2), subsection (1) does not apply

- (a) to the expression of an individual's personal opinion about the outcome of an election, including by directly inviting electors to vote or refrain from voting, or to vote or refrain from voting for a particular candidate or registered party; or
- (b) subject to section 330, to the production and transmission to the public of editorial content or news, regardless of any expense incurred.

(4) No person or entity, in or outside Canada, shall act in collusion with another person or entity for the purpose of contravening subsection (1).

SUPPLEMENTARY OPINIONS OF THE OFFICIAL OPPOSITION

The Official Opposition would like to thank all witnesses who appeared before the committee and those who submitted briefs as part of the study on the Report of the Chief Electoral Officer of Canada entitled “An Electoral Framework for the 21st Century – Recommendation from the Chief Electoral Officer of Canada Following the 42nd General Election.

While we endorse most of the contents of the Committee’s third interim report, the following sets out the supplemental and dissenting conclusions of the Official Opposition.

Recommendation A22. Polling day

Provisions in the CEA: 56.1, 57(3), 57(4) and 128

It is the opinion of the Official Opposition that the CEO’s recommendation for Parliament to consider moving election day from being held on a Monday, to instead a Saturday or Sunday, be rejected.

The Committee did note in the report that “in many ridings, especially in rural areas, places of worship or halls attached to places of worship frequently are used by Elections Canada as polling places. As such, moving election day to a day on the weekend could interrupt the religious practices of a certain number of Canadians, and potentially create an undue imposition on their religious beliefs.” However, the Official Opposition also wishes to note its opposition, as it feels that this recommendation does not fully take into account the significant impact it would have on cultural and religious practices of Canadians.

As well, the current voting arrangement under the *Canada Elections Act* (CEA) strikes a balance between weekday and weekend voting opportunities for electors. Under the CEA, election day takes place on a Monday, and advance polls take place on the 10th, 9th, 8th and 7th days before election day (a Friday, Saturday, Sunday, and Monday). This gives electors the opportunity to vote on election day either before or after work or during their lunch hour, as by law, electors must have three consecutive hours off of work to cast their vote on election day. Additionally, electors have the opportunity to cast their ballots on four advance polling dates, two of which take place on weekends.

Changing this voting arrangement to have election day on a Saturday or Sunday may lead to decreased voter turnout, as many Canadians have weekend activities or cultural or religious commitments that take place on the weekend. As such, the Official Opposition is opposed to this recommendation.

Recommendation A33. Power of Commissioner to compel testimony

Provisions in the CEA: 510

Through amendments to the *Canada Elections Act* proposed by and adopted under the previous government (section 482.1), it is now an offence to knowingly provide false or

misleading information to an investigator or to obstruct an investigation being conducted by the Commissioner.

Both the Commissioner of Canada Elections and the police currently have similar powers in their investigative capacity, including but not limited to the ability to seek from the Court a search warrant, a production order, and other orders relating to potential evidence.

Only courts have the power to subpoena witnesses and to compel testimony, once charges have been laid, as part of a trial. While the *Canada Elections Act* is regulatory in nature, at present, all offences under the Act are treated as criminal offences under the law. In a criminal investigation, police do not have the power to compel testimony. The only exception is that testimony can be compelled by police, by way of a court order, in the course of anti-terrorism investigations. Clearly, anti-terrorism investigations cannot be reasonably equated with investigations pertaining to election law.

Furthermore, the Official Opposition has concerns that the processes requested by the Chief Electoral Officer and the Commissioner of Canada Elections would, despite their assurances, run afoul of protections under sections 11(c) and 13 of the *Canadian Charter of Rights and Freedoms*, which protect against self-incrimination and against the use of testimony given in the course of one proceeding to initiate the prosecution of the person who is being compelled to testify. Given Elections Canada's established ability and willingness to spend millions of dollars on litigation, it could prove financially impossible for individuals to fight for their constitutional rights in a proceeding initiated by the Commissioner of Canada Elections.

The Official Opposition believes the law, as presently written, strikes an appropriate balance between the rights of those involved in electoral law investigations, and the powers of officials conducting those investigations.

Recommendation A34. Authority of Commissioner to lay charges

Provision in the CEA: 511 and 512(1)

The Official Opposition took note that the Chief Electoral Officer, in his report, indicated that "for the vast majority of federal offences, the investigator is the one to lay the charge and the DPP is the one to prosecute." He added in his Appendix that "normally, charges are laid in advance of the Crown review and are later stayed if the Crown concludes that it is not in the public interest to proceed with a prosecution or that there is no reasonable prospect of conviction."

The *Canada Elections Act* is administered in an environment characterized by significant and publicly-scrutinized partisan competition amongst the actors that the Act seeks to regulate. In this context, it is essential that the political actors have full confidence in the impartiality and fairness of the administration and enforcement of the Act. A decision to lay charges against a political actor is one that carries a high likelihood of inflicting significant and irreparable political and personal damage on that actor, and on that actor's partisan associates.

Laying a charge on a political actor can furthermore have a significant impact on public opinion, especially when done during, or in close proximity to, an election period. A subsequent decision, after an indeterminate period of time, to stay charges, for whatever reason, is likely to have little countervailing impact on the damage the initial charge has had on the political actor in the public's eye; the most severe damage in the public's eye—indeed, damage tantamount to a conviction—is done to a political actor upon the laying of the charge, and is unlikely to be undone by a stay of those charges.

In light of the impact that laying charges has on political actors, the Official Opposition believes it is important, for electoral fairness and integrity, that the decision to lay charges under the Act be taken with caution, and with an awareness of the electoral stakes of such a decision. The Official Opposition believes that those tasked with laying charges under the Act therefore should have an independent view of an investigation after it has been completed. Maintaining this independence between investigators and prosecutors is the long-standing practice under the current provisions of the Act, as was indicated to this Committee on April 1, 2014 by former Commissioner of Canada Elections William Corbett. Mr. Corbett offered his opinion, informed by his experience, that

“the less [prosecutors] have to do with the investigators beforehand, the better. If they have been involved with the investigators because they had to make a court application, someone else in the office will make that decision to prosecute.”

The Official Opposition therefore believes it is appropriate that the Act continue to require an independent officer, the Director of Public Prosecutions, to make an independent review of the evidence presented and to be responsible for the determination whether to lay charges under the Act against a political actor.

Recommendation B12. Publishing false statements to affect election results

Provisions in the CEA: 91

The Committee was presented with two divergent recommendations respecting section 91 of the *Canada Elections Act*: first, from the Chief Electoral Officer, that section 91 ought to be repealed, and second, from the Commissioner of Canada Elections, that section 91 ought to be either clarified or repealed.

The Official Opposition strenuously disagrees with the suggested amendments to section 91 offered, in response to the request of the Committee, by the Office of the Commissioner of Canada Elections. As the Chief Electoral Officer noted in his report, “serious cases of defamation or libel can be dealt with through alternative civil or criminal legal mechanisms”, and we note that section 92 of the Act continues to prohibit any person from “knowingly publish[ing] a false statement of the withdrawal of a candidate”. The Official Opposition supports the retention of section 92 as it presently stands.

The Official Opposition does not support any expansion of the power to police political speech during an election period, or retrospectively, and especially does not support this power being wielded outside of a court of law. The Official Opposition does not

believe it is the place of government or executive branch agents to stand in judgement over the veracity of political speech outside or during an election period, nor for those agents to have the power to lay charges against or punish political speech, apart from speech that is already unlawful under other sections of the Act or under other Canadian statutes.

The Official Opposition agrees with the recommendation of the Chief Electoral Officer that section 91 of the Act should be repealed in its entirety. Furthermore, the Official Opposition would strongly object to section 91 being replaced by any provisions that aim to police political speech that is not already unlawful under other sections of the Act or under other Canadian statutes.

Related to legal proceedings arising from the Act, the Official Opposition believes it is profoundly unjust, and possibly unconstitutional that, under the current provisions of the Act, political entities must fund legal expenses from controlled contributions, whereas the Crown has a practically unlimited ability to fund legal proceedings against political entities. Presently, as the Chief Electoral Officer noted in his report, “legal fees that are incurred as a result of a dispute or a judicial application under the Act... constitute electoral campaign expenses”, and must be paid out of campaign funds using regulated and limited contributions. He continued on to say that this “interaction with contribution limits creates problematic results”, and that this restraint on their ability to “access their right to legal counsel to protect their rights under the Act... in some cases... may not be appropriate”. The Acting Chief Electoral Officer, in his appearance before the Committee on May 16, 2017, confirmed this state of affairs with respect to funding legal fees of political parties.

The Chief Electoral Officer’s report, under recommendation “A37---Greater flexibility for certain categories of candidate expenses”, recommends a change with respect to litigation expenses for candidates that would provide for legal fees that are incurred as a result of a dispute or a judicial application under the Act to “be specifically exempted from the mandatory application of the electoral campaign expenses regime” and that “[c]andidates and contestants should be free to incur legal fees subject to the regulatory regime, or outside of it”.

This Committee, in its twenty-third report, that being its first interim report in response to the Chief Electoral Officer’s recommendations, unanimously agreed with recommendation A37 with respect to litigation expenses for candidates. The Official Opposition believes that a similar provision should be considered for litigation expenses incurred by parties.

Recommendation B15. Oath of assistance

Provisions in the CEA: 155(3)

The Official Opposition opposes the idea of repealing the requirement for a family member or friend to take an oath of assistance while assisting an elector with a disability.

The oath sets out the following: that the assistor will mark the ballot paper as directed by the elector; will keep the elector's choice of candidate secret; will not try to influence the elector in making that choice; and, if assisting as a friend, has not so assisted another person in the current election.

The Official Opposition feels that this oath is of utmost importance to uphold the integrity of the Canadian voting system, and as such, should be kept in place.

The Official Opposition agrees with the concerns raised by the Committee regarding this recommendation and further believes that the sanctity of every elector's vote, including those of disabled Canadians who require assistance to cast their ballot, must be paramount. As such, there must be every possible safeguard in place, including this oath, to ensure this sanctity is upheld.

Recommendation B18. Counting of votes from advance polls

Provisions in the CEA: 172(a)(iv) and 289(1)

The CEO recommended that "the *Canada Elections Act* be amended to specify that ballots cast at advance polls may be counted on election day before the polls close, if Returning Officers obtain the CEO's prior approval."

The Committee built on this recommendation by adding stipulations that "ballot counting of advance polls be permitted prior to the close of polls, provided it does not begin earlier than two hours before the polls close and any person present during the counting of ballots be sequestered until the polls close. Further, it was also recommended that election officials who divulge results of advance polls be subject to a penalty equivalent to a contravention of a similar nature."

The Official Opposition agrees with the Committee's recommendation, however, also believes that a further stipulation, which was discussed in Committee, should be added. The Official Opposition further recommends that the Returning Officer seek the unanimous consent of all candidates prior to allowing ballot counting of advance polls prior to the close of polls.

Recommendation B27. Foreigners inducing electors to vote or refrain from voting

Provisions in the CEA: 331

In response to a request of the Committee, both the Office of the Chief Electoral Officer and the Office of the Commissioner of Canada Elections provided suggested amendments to section 331 of the *Canada Elections Act*. The Official Opposition will comment on these submissions separately.

In the suggested amendments to Section 331 of the Act, the Office of the Commissioner of Canada Elections proposed a new subsection 331(2)(b). The Official Opposition sees this particular suggested subsection as of a similar kind to the suggested amendments to section 91 provided by the Office of the Commissioner of Canada Elections under recommendation B12. Therefore the Official Opposition strongly opposes the inclusion of the suggested amendment in the Act.

Respecting the remainder of the suggested amendments to Section 331 of the Act provided by the Office of the Commissioner of Canada Elections, the Official Opposition observes that the suggested provisions would increase transparency with respect to the spending of third parties on election activities, and would reduce the ability of foreign money to play a role in Canadian elections, thereby increasing public trust in our election laws and enforcement abilities. The Official Opposition is supportive of these outcomes.

The Official Opposition welcomes the recommendations of the Chief Electoral Officer, entitled *Revamping the Rules governing Third Parties to better address Foreign Influence*, that the use of a third party's general revenues for regulated activities be restricted. It further welcomes the support of the Chief Electoral Officer for the recommendations of the June 8, 2017 report, entitled *Controlling Foreign Influence in Canadian Elections*, from the Senate Standing Committee on Legal and Constitutional Affairs that recommend that “the scope of regulated activities of third parties should be expanded beyond “election advertising” to cover a broader range of promotional activities such as direct voter contact and polling research in support of campaign activities”.

The Official Opposition observes that, on its face, the present circumstance under which “election advertising” is the only category of third party election activity that is regulated is problematic and out of step with the rest of the political activity regulatory regime. The Official Opposition would welcome further study of these recommendations to ensure fair, effective, and transparent regulation and enforcement of third party electoral activities and finances.

Conclusion

We strongly encourage the Government to take into account the thoughts, concerns, and recommendations expressed by the Official Opposition herein.

Respectfully submitted.

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