VOL. 5 • NO. 1 • MARCH 2003

Elections Canada
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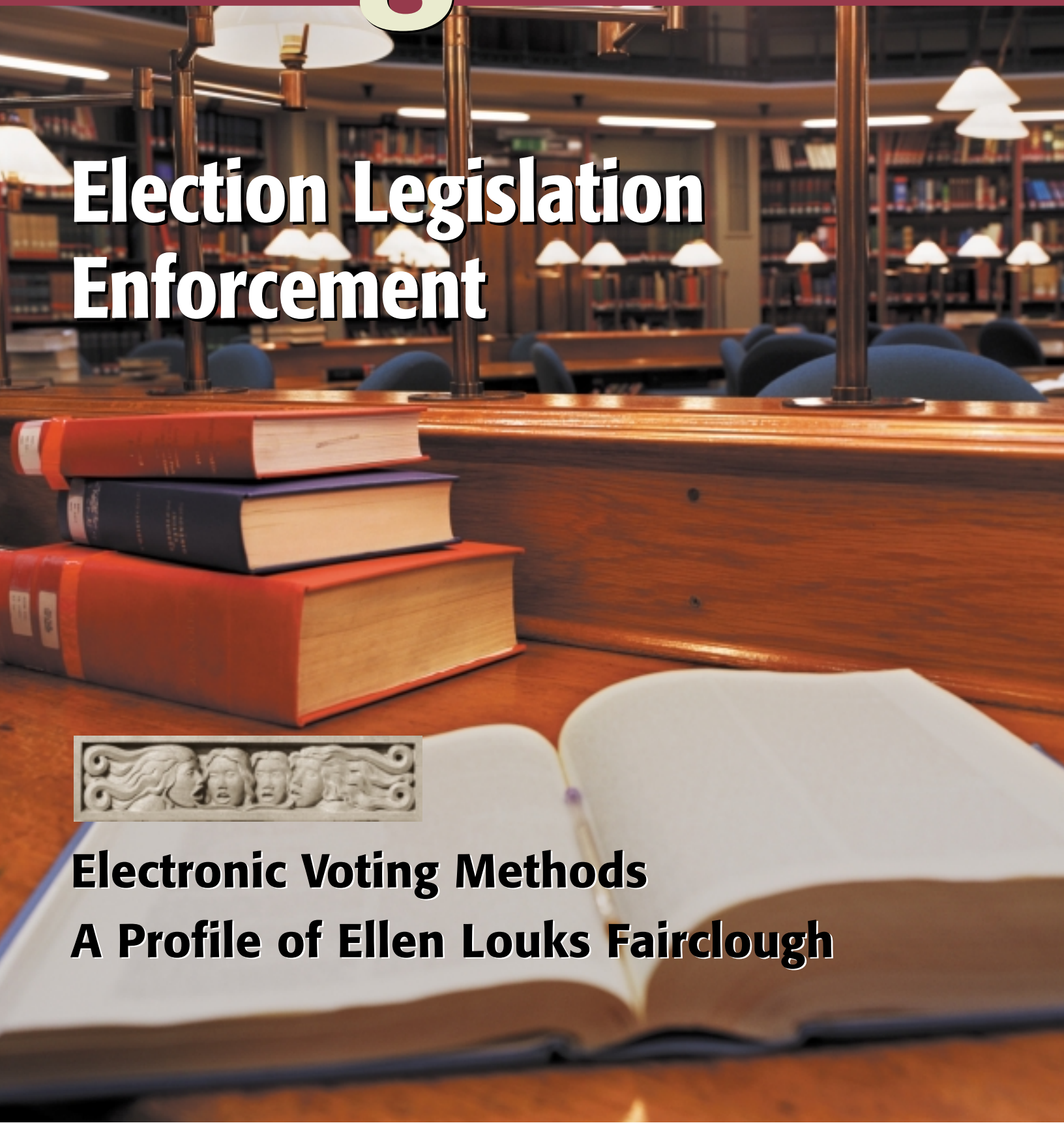
ELECTORAL Insight



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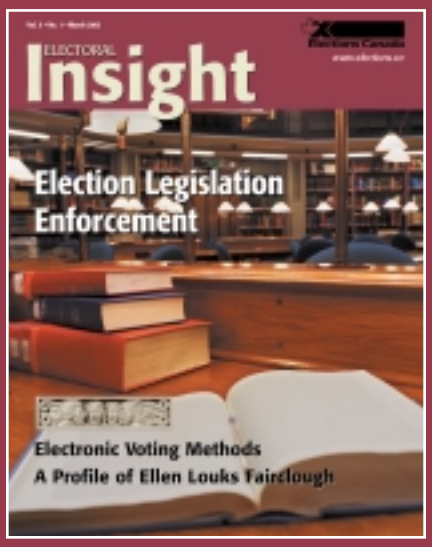

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ISSN 1488-3538
EC 91826

Eleanor Milne, Chris Fairbrother and Marcel Joanisse
The Vote (1979–1980)
Indiana limestone, 121.9 x 182.8 cm, House of Commons, Ottawa

The base stone of *The Vote*, a sculpture on the east wall of the House of Commons chamber, shows four heads with flowing hair whose mouths shape, in song, the first syllables of Canada's national anthem, "O-Ca-na-da".

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Elections Canada is the non-partisan agency responsible for the conduct of federal elections and referendums

Electoral Insight is published by Elections Canada three times a year. *Electoral Insight* is intended for those interested in electoral and related matters, including parliamentarians, officials of international and domestic electoral management bodies, election officers and academics. The opinions expressed are those of the authors; they do not necessarily reflect those of the Chief Electoral Officer of Canada.

Submissions of articles and photos that might be of interest to *Electoral Insight* readers are welcome, although publication cannot be guaranteed. If used, submissions will be edited for length and clarity as necessary.

Please address all contributions and letters to Wayne Brown, Managing Editor, *Electoral Insight*, Elections Canada, 257 Slater St., Ottawa, Canada K1A 0M6 (wayne.brown@elections.ca).

Jean-Pierre Kingsley
Chief Electoral Officer of Canada

Chief Electoral Officer's Message

Election Legislation Enforcement

The method of enforcing election legislation is one of many elements that serve to strengthen democratic processes. Different systems have been developed based on particular values and cultures, and the circumstances existing at the time of their adoption. Their common and essential goal is to maintain public trust in the integrity of the process.

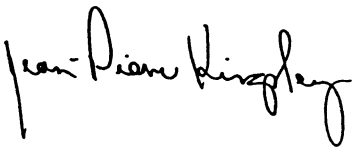
In Canada, while I am responsible for the administration of federal elections, the Commissioner of Canada Elections is responsible for the enforcement and prosecution of all offences under the *Canada Elections Act*. The Commissioner is selected and appointed by the Chief Electoral Officer under section 509 of the Act. More information about his role and the multi-faceted approach used to ensure enforcement of the Act is contained in Raymond Landry's article in this issue.

The new *Canada Elections Act* adopted in 2000 contained some changes that reflected the views of many, including myself, who had recommended decriminalizing certain offences under the *Canada Elections Act*. Nevertheless, it is important to ensure that the consequences for non-conformity remain relevant to ensure deterrence and serve to educate the public, and that the processes of enforcement remain shielded from political manipulation.

This issue of *Electoral Insight* surveys enforcement schemes adopted to effect compliance with electoral law in various jurisdictions. Criminal prosecution of offenders, imposition of civil fines and less stringent measures such as the conclusion of compliance agreements are among the provisions used. As will be seen from the various articles in this issue, a range of administrative and judicial bodies are responsible for applying these rules.

Every democracy is a social laboratory where processes are tested in real-life situations, and every nation must continue to strive to determine what works best to ensure the effective enforcement of its election law. In so doing, the experience of others can be instructive and contribute to the process of adaptation to changing circumstances.

As always, comments about this issue are welcome, along with suggestions for future articles.



Jean-Pierre Kingsley

Enforcement of the *Canada Elections Act*

Raymond Landry
Commissioner of Canada Elections

The contemporary electoral process in Canada is characterized by a number of checks and balances that dramatically reduce the likelihood of widespread abuses, and by means for enforcement that act as a deterrent. At the federal level, the Commissioner of Canada Elections, an impartial and independent official appointed by the Chief Electoral Officer, has the duty to ensure that the Act is complied with and enforced.

This article presents an overview of the role and responsibilities of the Commissioner of Canada Elections in the federal election law enforcement scheme, and describes the multi-faceted approach used to enforce the Act.

Role and responsibilities of the Office of the Commissioner of Canada Elections

The adoption of the *Election Expenses Act* in 1974 led to the creation of the Office of the Commissioner of Election Expenses, with statutory powers over the application of the extensive new financial provisions of the *Canada Elections Act*.[1] In 1977, the Commissioner was assigned responsibility for enforcement of all provisions of the Act, and the holder of the office was renamed the Commissioner of Canada Elections.[2]

The Commissioner of Canada Elections is an impartial official selected and appointed by the Chief Electoral Officer (who is appointed by a resolution of the House of Commons and reports directly to Parliament). In deciding on the proper course of action to deal with a complaint of an alleged infraction, the Commissioner is thus independent from politicians, political parties and the government.

Section 509 of the *Canada Elections Act* provides that the duty of the Commissioner of Canada Elections is to ensure that the Act is complied with and enforced.[3] In carrying out his responsibilities, the Commissioner investigates possible breaches of the provisions of the Act and decides on the appropriate course of action to remedy the infraction.

Prior to the adoption of a new *Canada Elections Act* in 2000, the only enforcement tool, aside from automatic administrative consequences for some acts or omissions, was prosecution before a court of justice. The Commissioner of Canada Elections had and still has exclusive responsibility for all prosecutions under the *Canada Elections Act* and prosecutions for electoral offences under s. 126 of the *Criminal Code*. However, the *Canada Elections Act* adopted in 2000 enhanced the compliance role of the Commissioner by providing him with two new tools: compliance agreements and injunctions, about which further details are provided below.

Until 1993, the Royal Canadian Mounted Police, at the Commissioner's request, carried out investigations of alleged offences under the Act. A major change occurred in 1993 when a national network of special investigators was set up by the Commissioner to carry out investigations in the field, on his behalf and at his request. Currently, 26 special investigators are retained across the country. They carry out their investigations in accordance with the procedures and policies in the *Special Investigator's Manual*. This manual is published on-line to make public the rules under which investigations are performed, bringing fairness and consistency to the process.[4]

In addition, the Commissioner is assisted in the performance of his duties by legal counsel and chief investigators. When

a decision to initiate a prosecution has been reached by the Commissioner based on his review of the evidence uncovered during an investigation, a lawyer in private practice, whose independence from political activities has been determined, is retained in the applicable region of the country to carry out the prosecution.

The setting up of a network of special investigators as a substitute to requesting investigations by the RCMP, and the use of lawyers in private practice to carry out the prosecution instead of relying on Crown attorneys, are two elements that have enhanced the independence of the Office of the Commissioner of Canada Elections. These measures further remove any possible political interference in the discharge of his duties.

Finally, it is worth mentioning that the Commissioner of Canada Elections normally defends the constitutionality of the offence provisions of the *Canada Elections Act* where a prosecution on his behalf is filed in court, and defence counsel initiates a constitutional challenge of those provisions. Notice of constitutional questions must still be served, however, on the Attorney General of Canada and the attorney general of each province.

Enforcement of the *Canada Elections Act*: A multi-faceted approach

The enforcement scheme under the Act is multi-pronged, ranging from the application of administrative incentives, to the initiation of criminal prosecution. Although prosecution remains the ultimate enforcement tool, the *Canada Elections Act* adopted in 2000 gave the Commissioner two new tools to effect compliance: first, the power to enter into compliance agreements; and, second, the ability to seek an injunction during an election period. These new tools can act as much to prevent breaches of the Act as to stop those breaches after the fact.

The mere act of intervening in an election period, whether to seek an injunction or to enter into a compliance agreement in the hopes of avoiding a breach of the Act or the commission of an offence, has itself the potential of causing political controversy. Resources may be diverted from a campaign and reputations called into question. In the consideration of the exercise of his powers, the Commissioner must therefore be careful not to allow the complaint process to become a political tactic.

A closer look at each of the elements of the enforcement scheme is provided below.

Administrative incentives

The Act contains a number of provisions that provide for automatic statutory consequences to some acts or omissions. These incentives (or disincentives) exist to encourage political parties and candidates to act in conformity with their legal responsibilities. It is important to note that the Chief Electoral Officer is responsible for the administration of these measures, which include:

- the statutory loss of a candidate's nomination deposit where the reporting requirements are not met after the election (s. 468)
- the loss of the second instalment of a candidate's reimbursement of election expenses where the reporting requirements are not met (s. 465)
- the suspension of a registered political party that failed to provide its annual fiscal report (ss. 386 and 387)

The existence of these statutory measures may have an impact on the course of action chosen by the Commissioner to deal with a complaint. In essence, the Commissioner's responsibility is to choose the most appropriate tool at his disposal to deal effectively with a case of non-compliance.

The power to seek an injunction

Section 516 provides the Commissioner with the authority to apply to a court for an injunction ordering any person named in the application to refrain from committing any act that is prohibited, or to do any act that is required by the legislation. These new measures have been specially tailored to the electoral process.

The Commissioner cannot himself issue an injunction. He is authorized only to apply to a court for such an order. Further, he can do so only during the election period, which can be as short as 36 days from the issue of the writ to election day.

Before the Commissioner can apply for an injunction, and before a court can grant that request, there must be reasonable grounds to believe that a person has committed, is about to commit or is likely to commit an act or omission that is contrary to the Act. Accordingly, while neither the Commissioner nor the court need be satisfied beyond a reasonable doubt of the breach or potential breach, neither can act on mere speculation or whim. There must be sufficient objective evidence to indicate that a breach has been or will likely be committed.

Before an injunction can be issued, it must be justifiable in light of three basic considerations:

- the nature and seriousness of the breach

- the need to ensure the fairness of the electoral process
- the public interest

These factors must all be considered and balanced in light of the particular circumstances.

The short period during which an injunction can be sought, namely the election period, imposes some very real limitations on the practical exercise of the power. Complainants are therefore encouraged to provide all relevant and verifiable information available, as soon as possible. Any delay in providing such information can adversely affect the likelihood or ability of the Commissioner to seek an injunction within the statutory deadlines.

Since the adoption of this new measure, the required elements to justify the seeking of an injunction have not been found to exist in any occurrence.

The power to enter into compliance agreements

Another tool provided to the Commissioner in the 2000 legislation is the authority to enter into a compliance agreement, found in section 517 of the Act.

A compliance agreement is a formal agreement between the Commissioner of Canada Elections and another person known as a contracting party. It is completely voluntary and contains terms and conditions that are mutually acceptable to ensure compliance with the Act. The Commissioner may enter into such an agreement with any person who he has reasonable grounds to believe has committed, is about to commit or is likely to commit an offence.

As long as the contracting party acts in conformity with the terms and conditions of the agreement, no prosecution can be instituted or continued against that person for the act or omission constituting the offence. An acknowledgement of responsibility in a compliance agreement, unlike a guilty plea in a court of justice, does not result in a criminal record.

Photo: Philipe Landreville

Supreme Court of Canada

To further the public interest, compliance agreements can be used to prevent the probable commission of offences, thereby avoiding harm before it happens. Moreover, it also provides an alternative mechanism for resolving a complaint where there is no overriding public interest to be served by a prosecution, or where prosecution may have been possible but not justifiable in the public interest. Finally, a compliance agreement, as an alternative to judicial intervention, serves to lighten the court system's caseload.

In order to maintain transparency, notice of all compliance agreements entered into must be published. For this reason, a person who enters into a compliance agreement with the Commissioner must consent to its publication. Since the adoption of this new power, the Commissioner has signed compliance agreements with more than 50 individuals and groups to resolve cases of offences under the *Canada Elections Act*. A public notice for each of these agreements appears in the *Canada Gazette* and can be viewed on the Elections Canada Web site at www.elections.ca.

The ultimate enforcement tool: the initiation of a prosecution

Although compliance agreements and the authority to apply for an injunction provide the Commissioner with greater flexibility to enforce the Act, there remain instances where prosecution is warranted. By virtue of section 511, this avenue of redress is still open to the Commissioner where he believes on reasonable grounds that an offence under the Act has been committed and is justified by the public interest.

Considerations that may come into play during an assessment of the public interest include the necessity of maintaining public confidence in the fairness and effectiveness of the electoral system, the need for general deterrence, and the need for decisive action where the offence is of considerable public concern. Other factors may include the suitability of alternative modes of enforcement and the presence of significant mitigating or aggravating circumstances.

The Commissioner's written consent is required before a prosecution for an offence under the *Canada Elections Act*

can be initiated, pursuant to section 512. In determining that reasonable grounds exist to believe that an offence has been committed, the Commissioner satisfies himself that there is reliable, admissible and sufficient evidence to prove that an offence was committed by a person or group and that there is a reasonable prospect of conviction; as with all other prosecutions under a penal statute, proof means proof beyond a reasonable doubt.

The Act provides for specific ranges of penalties for every offence that include fines and prison terms.

Under section 510 of the Act, the Chief Electoral Officer can direct the Commissioner, in specific circumstances, to make any inquiry that appears to be required. This can occur when he believes on reasonable grounds that an election officer may have committed an offence against the Act or that any person has committed an offence under the provisions listed in that section. However, the power to initiate the prosecution remains with the Commissioner.

Offences

Since the electoral reform of 2000, there is normally no longer a need to rely on section 126 of the *Criminal Code* to prosecute for an act or omission contrary to the *Canada Elections Act*. The Act includes a complete code for the conduct of federal elections: there are some 175 distinct offences in Part 19 covering acts or omissions committed by candidates, electors, voters, registered parties, third parties, employers, official agents and election officers.

The Act also sets out the level of intent that a person must have in order to be found guilty of a particular offence. Some offences are strict liability offences where the fact of the occurrence is sufficient for conviction, unless a person acted with due diligence. Other offences require a *mens rea* of having "knowingly" committed the prohibited act. This essentially means that the person was aware of what he or she was doing but did not necessarily desire the prohibited result of those actions. Finally, some offences require a level of intent whereby the person commits the offence "wilfully," which essentially means that the person acted intentionally to achieve the prohibited result.

Sentencing

The Act provides for specific ranges of penalties for every offence that include fines and prison terms. Penalties are proportional to the gravity of the offence, and to the degree of intent required for the offence to occur. The courts have also been given greater flexibility in imposing alternative punishments in section 501, including:

- a fine of up to five times the amount by which a third party exceeded the limit on election advertising expenses
- community service
- compensation for damages
- specific performance of the obligation which gave rise to the offence (e.g. submit return)
- any other reasonable measure (e.g. charitable donation)

Finally, in section 502, a number of offences are listed as being either illegal or corrupt practices. These include serious wrongdoings that affect the integrity of the election process. Upon conviction for these listed offences, automatic consequences that apply for the next five years for an illegal practice, and for seven years for a corrupt practice, are:

- loss of entitlement to be a candidate, or to sit in the House of Commons
- loss of entitlement to hold office in the nomination of the Crown or of the Governor in Council

Loss of right to vote is no longer a punishment for having being convicted of an illegal or corrupt practice, as was the case before 2000.

A sentencing digest listing all individuals found guilty of an offence under the *Canada Elections Act* is maintained on Elections Canada's Web site.

Conclusion

I have been Commissioner of Canada Elections for a period of more than 10 years. Since 1992, I have acted in that capacity for one national referendum, three general elections, and 37 by-elections.

Some movement towards decriminalization during my time as Commissioner is consistent with my general observation during the course of my work that Canadians by and large want to act in accordance with their statutory responsibilities. Once informed that they are in violation of these obligations, most immediately react to correct their behaviour to ensure their conformity with the law.

Criminal prosecution and sanctions must necessarily continue to be applied to serious wrongdoings that put the integrity of the electoral process in jeopardy. However, where there is no overriding public interest to be served

by a prosecution, every effort must be made to promote alternative means of achieving compliance with the *Canada Elections Act*.

It is important to recall that the most effective element that ensures the smooth and harmonious unfolding of an electoral event and of related political processes remains the commitment of all stakeholders to abide, in good faith, by the rules prescribed in legislation. Indeed, the integrity of the electoral process can only be maintained where parties, candidates, third parties and electors have trust in the system and where they act in accordance with their obligations under the law.

NOTES

1. Reporting of election expenses by candidates had been required since 1874 (*Dominion Elections Act*, S.C. 1874, c. 9), but the law did not include any means for enforcement.
2. Previous holders of the Office have been John P. Dewis (1974-1976), Joseph Gorman (1976-1987), and George M. Allen (1988-1991). The use of the masculine gender in this article is intentional as all commissioners to date have been male.
3. Although section 38 of the *Referendum Act* provides the Commissioner with a similar role with respect to that Act, the present article will deal solely with the Commissioner's responsibilities pursuant to the *Canada Elections Act*, S.C. 2000, c. 9.
4. An on-line copy of the manual can be found on the Elections Canada Web site, in the *Electoral Law and Policy* pages, together with all other public notices and information relating to the Office of the Commissioner of Canada Elections.

Comparative Review of Penalties for Electoral Offences in Canada

Marc Chénier
Legal Counsel to the Commissioner of Canada Elections

Alain Pelletier
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Broad similarities can be detected in processes adopted in each Canadian jurisdiction to ensure the fair, transparent and accessible election of members to their respective legislative assemblies.[1] These similarities in the provisions adopted by the federal Parliament and the provincial/territorial legislatures have led to specific acts or omissions being identified in most jurisdictions as constituting offences under their specific electoral laws.[2] Despite these similarities in processes and in the offences created to ensure their lawful enforcement, Cécile Boucher stated in 1991, as part of her work for the Royal Commission on Electoral Reform and Party Financing, that "there are no real similarities in penalties for election offences in various jurisdictions."[3]

As this article demonstrates, more than a decade later, this lack of uniformity in the penalty schemes in federal, provincial and territorial electoral legislation is still evident. Specifically, we will review the availability of fines and imprisonment as punishments used by the courts in sentencing individuals convicted of offences under the various electoral laws. We will also discuss the availability of additional penalties, some of them being automatic consequences upon conviction – namely of an offence identified in the particular legislation as being either an illegal or a corrupt practice; others being imposed at the discretion of the court upon sentencing. Finally, in our conclusion, we will note the trend evidenced over the past decade towards the decriminalization of statutory offences and its effect on the range of remedial measures available to rectify a contravention of electoral law.

To begin, a few observations may be helpful. First, it is important to note that electoral law covers a broad range of processes that include the actual voting process itself, but also: election financing; the registration of political parties; the nomination of candidates; the regulation of activities of partisan groups during election campaigns; and political broadcasting and advertising. Offences have evolved to cover each of these different areas of electoral law, and as a general rule, the ranges provided for the various punishments available depend on the level of intent required for the commission of the offence (implying various levels of "blameworthiness"), and on the severity of the consequences of the act or omission on the integrity of the electoral process.

Second, under the Constitution, the federal Parliament has sole authority to legislate to define criminal acts.[4] Prosecutions for such offences are necessarily by way of indictment. Although the provinces cannot create criminal acts, they are entitled to create offences that are required for the effective enforcement of a statute that they have adopted in the exercise of their constitutional powers according to their fields of competency. Where such a statutory offence is created either by a province or by the federal government, it is not considered a criminal act, and the proceedings are by way of summary conviction. This entails a less demanding procedure than by indictment.[5]

As a general rule of thumb, ranges of penalties made available during sentencing are generally higher for offences that are categorized as criminal acts than for those that are merely statutory offences.

Fines

All jurisdictions in Canada provide for the imposition of fines as an option for punishment upon conviction for an offence under their election legislation.

The requirement to impose at least a minimal fine upon conviction is provided for only in New Brunswick and Quebec. In these jurisdictions, when sentencing individuals convicted of some particular offence, judges are required to impose at least a certain specified amount in fines. As an example, anyone in New Brunswick who is found guilty of having disclosed at a polling station the name of the candidate for whom they voted is automatically liable to a fine of at least $70.[6] These minimal fines limit to a certain extent judiciary discretion with respect to sentencing.

With respect to maximum amounts, in the federal scheme, the harsher range of fines is reserved for convictions on indictment for offences requiring intent. In these cases, fines of not more than $5 000 can be imposed. While the option of proceeding by indictment is available at the federal level only for criminal acts, some provinces have nevertheless provided for harsher fines for similar statutory offences that are necessarily prosecuted on summary conviction.

Accordingly, while the $5 000 maximum upon conviction on an indictment is applicable in cases of intimidation of voters at the federal level, the maximum fine is twice that, at $10 000, for the corresponding offence committed during a Manitoba provincial election, where the prosecution must necessarily proceed by summary conviction.[7] Conversely, where the Commissioner of Canada Elections – the federal prosecutor of electoral offences – chooses to proceed by summary conviction on a charge of intimidation, the maximum fine applicable is $2 000.[8] This represents one fifth of the maximum penalty provided for in Manitoba for the equivalent offence also prosecuted by way of summary proceedings. This is one example of higher maximum fines being consistently applied to all offences in the Manitoba statute.[9]

In some jurisdictions, where the option of imprisonment is not available for a specific offence, the maximum range of the fine that can be imposed by a court is significantly more than the usual fines provided for in that statute. In the *Canada Elections Act*, for example, where only a fine is made available to the sentencing judge, the maximum fine that can be imposed jumps to $25 000.[10] Offences where this particular maximum fine applies include: wilfully failing to provide election survey information; wilfully transmitting survey results during the blackout period; and, being a broadcaster, wilfully failing to make broadcasting time available pursuant to the Act's requirements.[11]

The same occurrence is observable in the Northwest Territories and in Nunavut, where broadcasting offences are punishable only by a fine. This fine is increased five times, to $5 000, from the usual maximum fine of $1 000 provided by law for all other offences where imprisonment is also available as an option. In Quebec, where no prison terms are available as a sentencing option, maximum fines tend to be generally higher than in other Canadian jurisdictions.

Imprisonment

It is arguable that imprisonment is the ultimate punishment available to the courts under Canadian electoral law, since it entails serious consequences that deprive an individual of his or her rights to liberty and freedom. However, it is not a sentencing option available to Quebec judges for any offence committed under that province's election law,[12] and in New Brunswick, a prison term can be imposed only as a punishment for offences under the election financing provisions.[13] Minimum terms of imprisonment are no longer used in Canadian electoral law, although as recently as 1991, Saskatchewan still imposed a minimum term of seven days in prison for some offences committed under its *Elections Act*.[14]

All jurisdictions in Canada provide for the imposition of fines as an option for punishment upon conviction for an offence under their election legislation.

Despite the availability of this form of punishment for most offences identified in the *Canada Elections Act*, since the office of the Commissioner of Canada Elections was created in 1974 the courts have not imposed a term of imprisonment on anyone convicted of an offence under that Act.

As the only Canadian jurisdiction with the constitutional power to create offences representing criminal acts, offences in the federal legislation can, where so indicated, be prosecuted either by way of summary conviction or by indictment. Accordingly, the maximum period of imprisonment that can be imposed for an offence prosecuted by way of indictment under that Act is, at five years, the longest period of imprisonment provided for in all of the jurisdictions.

Nova Scotia and Prince Edward Island have the highest provincial/territorial maximums for their prison terms, at two years for all offences where a prison term is available as a sentencing option. Conversely, Newfoundland and Labrador and Ontario are the only provinces that exclusively provide for maximum prison terms that are less than one year, when a term of imprisonment is included as a sentencing option for an offence committed under their electoral legislation. Maximums in Newfoundland and Labrador range from periods of imprisonment of no more than three months, to a maximum of no more than six months for offences related to the voting process or election signs. In Ontario, imprisonment is used as a sentencing option very sparingly, with a maximum term of six months for some offences related to the ballot and some related to election officers.

Yukon's approach is to impose the identical maximums in terms of fines and imprisonment for every offence under its electoral legislation. All offences are therefore punishable by a fine of no more than $5 000, and/or imprisonment for no more than one year.[15]

Additional penalties for corrupt or illegal practice

Jurisdiction	INELIGIBILITIES: To be nominated as candidate	To be elected as member	To sit as a member	To be nominated or appointed to office	To vote	To be appointed to civil service
Canada		✔	✔	✔		
Newfoundland and Labrador						
Prince Edward Island		✔	✔	✔		✔
Nova Scotia		✔	✔	✔		
New Brunswick		✔	✔	✔	✔	
Quebec	✔			✔	✔	
Ontario	✔		✔	✔		
Manitoba						
Saskatchewan		✔	✔		✔	
Alberta	✔	✔		✔	✔	
British Columbia						
Northwest Territories		✔	✔	✔	✔	
Yukon						
Nunavut		✔	✔	✔	✔	

(Adapted from: *Compendium of Election Administration in Canada: A Comparative Overview*, 2002 Edition; Table H.2 General Offences and Penalties)

Special consequences upon conviction for illegal or corrupt practices

Aside from British Columbia, Yukon, Manitoba and Newfoundland and Labrador, all other Canadian jurisdictions have identified specific offences under their electoral legislation that they consider to be either illegal or corrupt practices. In addition to the other punishments provided for these offences (i.e. fines and prison terms), the legislator has added special automatic consequences in terms of ineligibilities that apply for a specified period of time.

In the federal context, all illegal practices involve offences committed by either a candidate for election or an official agent, and the automatic ineligibilities that result from the conviction are in effect for a period of five years following the conviction. Offences identified as constituting corrupt practices mostly involve actions or omissions by candidates or their official agents, except for three distinct situations: where anyone is convicted of signing a nomination paper when ineligible; performs a forbidden act with a list of electors; or applies for a ballot under a false name. In the case of a corrupt practice at the federal level, the ineligibilities that automatically apply are in effect for a period of seven years from the day of the conviction.[16]

The longest periods of ineligibility are found in Ontario and Alberta, where

they are in effect in the case of Ontario until the eighth anniversary of the date of the official return,[17] and in Alberta, for the eight years following the date on which the Chief Electoral Officer receives the report of the court stating that the candidate was found guilty of a corrupt practice.[18] The period of ineligibility following a conviction for an offence listed as an illegal practice in the Northwest Territories and Nunavut is for five years, and for a corrupt practice, seven years from the date of the conviction. All other jurisdictions that have identified offences as being either illegal or corrupt practices have special automatic consequences that apply for a period of five years.

In addition to the additional consequences noted in the above table, New Brunswick, Saskatchewan and Alberta prohibit anyone convicted of a corrupt or illegal practice of being entered on a list of electors or of being registered as an elector for the period of the ineligibility. Further, Quebec prohibits such a person from engaging in partisan work during the five years following the date of the judgment.[19]

Additional penalties

Further to the automatic consequences upon conviction that apply to offences identified as illegal or corrupt practices, a few jurisdictions have adopted additional penalties that may be imposed at the court's discretion.

Among these, two jurisdictions allow the sentencing judge to impose a type of "surcharge" in addition to any other fine or term of imprisonment, in specific circumstances. The *Canada Elections Act* provides that, in addition to any other punishments that may be imposed under the Act, a third party that spent in excess of the limit on advertising expenses to which it was subject is liable to a fine of up to five times the amount by which it exceeded the limit.[20] A third party is an individual or group, other than a candidate, a registered party or a local association of a registered party, that spends money on election advertising during an election period. A type of "surcharge" is also available in Manitoba as a sentencing option, where any person convicted of an offence related to bribery or inducement is liable to a further fine equal to double the amount or value of the benefit involved.[21] The adoption of this sentencing option may be recognition that money spent (or overspent) in a manner contrary to the provisions of election legislation can have especially negative consequences on the integrity of the electoral process.

Further to the automatic consequences upon conviction that apply to offences identified as illegal or corrupt practices, a few jurisdictions have adopted additional penalties that may be imposed at the court's discretion.

Moreover, other forms of additional punishments are provided for at the federal level in section 501 of the *Canada Elections Act*. They include the performance of community service, compensation to persons who may have suffered damages as a result of the commission of the offence, specific performance of any obligation, or the imposition of any other measure the court considers appropriate to ensure compliance with the Act. No other jurisdiction provides for comparable punishments or remedial measures.

Conclusion

This article has reviewed the possible punishments that can be imposed by the criminal courts upon conviction of an individual for an offence under electoral law.

Some move towards decriminalization of regulatory offences in Canada has also been evidenced, to a certain degree, in election law. This has tended to increase the diversity of remedial and punitive measures available for enforcement. At the federal level, for example, a review of the notices of agreements published by the Commissioner of Canada Elections in cases where compliance agreements were entered into for cases of nonconformity, indicates that, on a voluntary basis, some offenders have made a charitable donation or performed community service.[22]

Another example of alternative means of dealing with nonconformity can be found in New Brunswick, where payment of a sum equal to $50 for each day an individual is late in filing a financial return can remedy what would otherwise be an offence.[23] This represents a rare case in Canadian electoral law where civil fines exist as an enforcement tool, and other jurisdictions may one day decide to contemplate such a regime in the interest of further decriminalization.

It is apparent that the various jurisdictions in Canada continue to have diverging penalty schemes for

punishment of individuals who commit offences under their respective election acts. In a federal system, this is not necessarily surprising. Indeed, a certain degree of diversity can be instructive as jurisdictions learn from each other about what works best to ensure compliance with electoral law.

NOTES

1. At the federal level, only members of the House of Commons are elected. The Prime Minister appoints senators to the second chamber of Parliament, the Senate.
2. This is not to say that the rules are identical. For instance, while the sale of alcohol continues to be prohibited on election day in Prince Edward Island, Saskatchewan and all three territories, there is no longer such a prohibition at the national level or in the other provinces.
3. C. Boucher, "Administration and Enforcement of Electoral Legislation in Canada" in M. Cassidy, ed., *Democratic Rights and Electoral Reform in Canada*, Volume 10 of the Research Studies, Royal Commission on Electoral Reform and Party Financing, Dundurn Press, Toronto, 1991, p. 479.
4. *Constitution Act, 1867*, s. 91.
5. Where a dual procedure is provided for (i.e. the statute provides that the prosecution can be by way of summary conviction or by indictment), the prosecutor has the discretion to choose to proceed by either way. The offence is considered to have been a criminal act only where the decision is made to proceed by indictment.
6. *Elections Act*, R.S.N.B. 1973, c. E-3, s. 109; and *Provincial Offences Procedure Act*, S.N.B. 1987, c. P-22.1, s. 56(3).
7. *The Elections Act*, R.S.M. 1987, c. E30, s. 164.
8. *Canada Elections Act*, S.C. 2000, c. 9, s. 500(5).
9. *Compendium of Election Administration in Canada: A Comparative Overview*, 2002 Edition, available at www.elections.ca.
10. *Canada Elections Act*, S.C. 2000, c. 9, s. 500(4).
11. For a complete list of offences where the maximum fine of $25 000 can be imposed upon conviction, please see s. 495(4) of the *Canada Elections Act*.
12. *Election Act*, R.S.Q., c. E-3.3.
13. *Political Process Financing Act*, S.N.B. 1978, c. P-9.3.
14. *The Election Act, 1996*, S.S. 1996, c. E-6.01, s. 191.
15. *Compendium of Election Administration in Canada*.
16. A complete list of offences constituting illegal or corrupt practices in the federal regime can be found in section 502 of the *Canada Elections Act*, S.C. 2000, c. 9.
17. *Election Act*, R.S.O. 1990, c. E.6, s. 98(1).
18. *Election Act*, R.S.A. 2000, c. E-1, s. 173(2).
19. *Compendium of Election Administration in Canada: A Comparative Overview*, 2002 Edition.
20. *Canada Elections Act*, S.C. 2000, c. 9, s. 500(6).
21. *The Elections Act*, R.S.M. 1987, c. E30, s. 145(4).
22. Notices of compliance agreements can be viewed by clicking "Compliance Agreements" on the *Electoral Law and Policy* menu of the Elections Canada Web site (www.elections.ca).
23. *Political Process Financing Act*, S.N.B. 1978, c. P-9.3, s. 88(2).

Election Law Enforcement International Comparisons

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Enforcement of election laws and regulations is an essential element of free, fair and reliable elections, no matter where they are held. Good enforcement not only ensures that the legal and regulatory framework for elections is applied and respected, but also reassures voters of the legitimacy of the electoral process. It also encourages accountability, acts as a deterrent, increases transparency and builds confidence in the election results.

Most enforcement systems for democratic elections have evolved over time and are a reflection of the political and social context within each country. Their institutional frameworks, jurisdictions and procedures differ, as does the quality of enforcement. However, despite differing characteristics and mechanisms, most democratic electoral systems have a similar basic enforcement regime: monitoring the process, identifying and investigating offences, prosecuting those believed to be responsible, determining guilt and sentencing those responsible.

Part of the enforcement regime is usually a system of checks and balances to ensure the integrity and effectiveness of election law enforcement. Different institutions, or offices within an institution, are used as a means to limit the power of other institutions and to serve as a check that the laws are being appropriately enforced. One of the most prevalent mechanisms used in election law enforcement is the separation of powers among the agencies that investigate, prosecute and adjudicate offences. Another widely used safeguard is the availability of an appeal process as a check on enforcement decisions.

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The examples in this overview, taken from a range of countries, illustrate the different types of enforcement systems and methods used. Some systems are based on an independent election commission, while others use the state administrative system. In others, independent commissions enforce certain aspects of the election laws, such as campaign financing or anti-corruption rules.

Enforcement responsibility

In many electoral systems, an electoral management body (EMB) administers elections. In these systems, the EMB often acts as the primary enforcement agency, taking complaints and initiating investigations. For example, in the Philippines, the Commission on Elections (COMELEC) is constitutionally responsible for the preliminary investigation and prosecution of cases involving election offences. It was first established in 1941 as an independent national elections commission to administer elections, and its role in enforcement has expanded over the years. In 1963, it was strengthened by legislation to "carry out its constitutional duty to ensure free, clean and orderly elections and administer and enforce all laws relative to the conduct of elections."[1] Its enforcement powers were further expanded by the 1973 Constitution that added judicial power, making COMELEC a judicial tribunal as well as an election administration body.

The approach of expanding the role of an independent election commission to include electoral law enforcement has been adopted by other countries, especially those with a troubled electoral past or history of election fraud. This is seen as a way to improve accountability and break an entrenched party's hold on the process, as demonstrated in Mexico.

In the early 1990s, Mexico completely reformed its electoral system and adopted an extensive system of checks and balances. The 1990 Federal Code of Electoral Institutions and Procedures (COFIPE) gave the electoral management body (the Federal Electoral Institute or IFE) and the Federal Electoral Tribunal shared responsibility for election law enforcement. The IFE has authority to enforce administrative rulings and sentence electoral authorities, political parties, citizens and other public and private entities that violate the election law. However, decisions by IFE can be appealed to the Tribunal, which handles the majority of offences. The focus of the Tribunal is on juridical aspects such as violations of political-electoral rights and actions of federal electoral authorities that violate constitutional or other legislation.

Mexico has a federal political system, and each state has its own election laws that cover the organization of elections and the prosecution of related offences. As IFE is a federal institution, it enforces federal law. However, its agreements with the states to provide electoral instruments, such as voter lists and voter cards, make many locally committed election offences eligible for federal prosecution.

Thailand also recently reformed its electoral system and gave enforcement powers to its EMB. The 1997 Constitution established an Election Commission of Thailand (ECT) to organize elections and investigate and adjudicate cases of electoral fraud. Some of the powers given to the ECT include the right to enter premises and to search and seize documents, assets, and evidence without a court warrant, provided there is compelling evidence of a violation of election law.[2]

In some other electoral systems, a government agency or ministry administers elections. Their election law enforcement regimes usually follow the same rules that apply to offences not related to elections. In Moldova, for example, a state Central Elections Commission organizes and conducts elections. Its permanent staff is supplemented by seconded government workers during elections and preparations for elections. The Commission has the power to investigate abuses of the electoral system, including allegations of fraud. Administrative offences, which include voter fraud, are documented by local officials (mayors, chairpersons of the relevant electoral body or police supervising electoral operations) and are submitted to a court for processing. If criminal action is involved, the state prosecution bodies are informed and the case is then pursued by the prosecutors.[3]

Adjudicating election disputes

Election law enforcement requires a mechanism for voters, candidates and others to challenge suspect parts of the process and to have their complaints investigated and resolved. Many electoral disputes are based on allegations of fraud or election law violations. Each system has developed its own way of handling election disputes and processing any illegal action found during the resolution of those disputes.

The agency responsible for formal electoral dispute resolution varies from one jurisdiction to another. As

Enforcement Agencies in Selected Countries[4]

Country	Agency
Argentina	Federal judges with electoral jurisdiction
Bulgaria	Electoral management body and Council of Ministers
Canada	Commissioner of Canada Elections[5]
Mexico	Federal Electoral Institute (electoral management body) and Federal Electoral Tribunal
El Salvador	General Controller's Office
Philippines	Electoral management body
Thailand	Electoral management body
United Kingdom	Electoral management body
United States	Electoral management body

Agencies Responsible for Formal Electoral Disputes in Selected Countries[6]

EMB	Judiciary	Electoral Tribunal	Other
Albania	Australia	Barbados	Belgium
Canada (Commissioner of Canada Elections)	Botswana	Italy	Denmark
South Africa	India	South Africa	Norway
United States[7]	United Kingdom	Turkey	Switzerland

indicated in the previous table, this can be the responsibility of the EMB, the judiciary, the electoral tribunal or other mechanisms.

In the Bahamas, a temporary electoral court is created to handle election petitions. This civil court issues a Certificate of Judgement that either upholds or voids an election. At the same time, the court will issue a report to the Attorney General if corrupt or illegal practices were involved, including the nature of the offence and the identity of the persons involved. The Attorney General then decides whether to start a criminal prosecution.[8]

A similar system is used in Western Samoa, where the Supreme Court hears all election petitions. At the end of the trial, the court issues a Certificate of Court on the result of the election, as well as a Report of the Court on corrupt or illegal practices. The report includes the names of those involved and is given to the Attorney General for prosecution.[9]

Investigations

Essential to the enforcement process are the investigation of complaints and the determination of whether an illegal action has taken place. Agencies responsible for investigations can vary widely among the different enforcement regimes. In some countries, such as New Zealand, the police investigate election offences. In other countries, the EMB has this responsibility.

In the Philippines, COMELEC has the exclusive power to conduct the preliminary investigation of all election offences punishable under the election act. The Law Department within COMELEC often starts the preliminary investigation based on a complaint or a COMELEC initiative. It may delegate investigations to regional election directors or provincial election supervisors. The investigating officers have subpoena powers and can hold hearings to clarify issues. Once an investigation is concluded, the investigating officer determines whether there are sufficient grounds to hold a respondent for trial. If so, the case is then turned over to government prosecutors.

In Bangladesh, an Electoral Enquiry Committee is established by the Election Commission. The Committee includes judicial officers and its mandate is to investigate problems and prevent pre-poll irregularities. It investigates complaints made directly to the Committee or through the Election Commission. The Committee can also use its own initiative to investigate any act or omission that it believes obstructs the preparation and conduct of a free and fair election. Bangladesh also has election tribunals that are constituted by the Election Commission and headed by judicial officers at the divisional levels, but the sole function of the tribunals is to try election petitions arising out of election disputes.[10]

In Hong Kong, a separate Independent Commission against Corruption (ICAC) was established with law enforcement powers that include enforcing the *Elections (Corrupt and Illegal Conduct) Ordinance*. Its enforcement strategy includes investigation and prevention. As it found that it could not win the battle against corruption unless it was able to change the people's attitudes towards corruption, it also carries out public education activities. For election offences, the ICAC receives, considers and investigates complaints of election corruption. It has the power to arrest, search and seize property and detain a suspect. Cases that reveal misconduct or malpractice by a civil servant are referred to government departments for disciplinary or administrative action. Cases of criminal violations are given to the Secretary for Justice for prosecution.[11]

Types of offence

Most election laws include detailed sections on election offences and penalties. Despite variations in content and the wording used to describe the offence, the basic list of offences is similar. The differences are found more in the penalties than in what constitutes an electoral offence.

Several countries, such as the Bahamas and Western Samoa, differentiate between "illegal practices" and "corrupt practices." Illegal practices in the Bahamas are tried before a magistrate and carry smaller penalties than corrupt practices. Corrupt practices are tried before the Supreme Court and carry stiffer penalties. Prosecution for a corrupt practice also requires the consent of the Attorney General.

In New Zealand, a corrupt practice is a serious offence against the electoral process, resulting in a fine and/or imprisonment. Anyone who wilfully contravenes the provisions of the election and related laws, is considered to have committed an illegal act. The names of persons who commit a corrupt practice are put on a Corrupt Practice List for three years. Persons on the list, compiled by each registrar of electors, are not permitted to register to vote.[12]

In Mexico, offences against the election law are characterized as

"administrative faults" and are enforced by IFE. However, criminal acts fall under the federal penal code in a section entitled "Electoral Laws and the National Registry of Citizens." This was done to ensure that criminal offences are prosecuted by federal judicial authorities. Only about 5 percent of electoral offences are administrative faults handled by IFE.[13]

What constitutes a campaign finance law violation and its penalty varies widely. The Brazilian Electoral Court has the power to verify the financial reports provided by political parties, but only as an administrative review to see if their statements meet general accounting practices. There are no legal sanctions for non-compliance.[14] However, in other countries, there are penalties for non-compliance. In Thailand, for example, the Election Commission can seize cash and property of those who violate campaign finance laws. In New Zealand, the Electoral Commission reports offences to the police.

In the United States, enforcement differentiates between deliberate or large financial violations and mistakes made out of ignorance. Mistakes are handled administratively by the Federal Election Commission, while purposeful violations are prosecuted as crimes by the Justice Department (see "Campaign Finance Enforcement in the United States" in this issue). In the United Kingdom, an independent Election Commission was created in 2000 as part of campaign finance reforms. Until that time, the United Kingdom did not have an agency for campaign finance regulation enforcement at the national level.[15]

Agency Responsible for Campaign Finance Law Enforcement in Selected Countries

Country	Agency
Canada	Commissioner of Canada Elections
France	National Commission[16]
Mexico	IFE General Council
Nepal	Election Commission
New Zealand	Electoral Commission
Thailand	Election Commission
United Kingdom	Election Commission[17]
United States	Federal Election Commission[18]

Prosecution

Many systems use the government prosecution system to prosecute criminal acts related to elections. Some of these countries include Armenia, the Bahamas, Burkina Faso, Mali, New Zealand and South Korea.

In Thailand, it was found that the criminal prosecution system was too slow and ineffectual to deter vote-buying and election fraud. The 1997 electoral reforms gave the ECT the power to adjudicate cases of electoral fraud. If evidence of fraud is found, the ECT can declare an election null and void and order a by-election. It can also revoke the election rights of a candidate. Once someone's election rights are revoked, that person is subject to prosecution under the criminal procedure code.

In Mexico, a Special Prosecutor for Electoral Offences was created in 1994 by presidential decree. The Special Prosecutor is a member of the Attorney General's office, but has technical autonomy to address electoral offences. In the Philippines, a state, provincial or city prosecutor decides whether to prosecute a case. However, COMELEC has the power to review and reverse the resolution of a prosecutor. Criminal cases are tried in trial courts and appeals are processed through the criminal justice system. Private prosecutors are allowed in cases involving the recovery of civil liability.

There is a different system in Bulgaria, where the Central Election Committee and constituency election committees investigate violations and draw up a statement of findings. Penalty statements are then issued by the regional governments where the violation occurred. If a penalty instrument is issued against a regional governor, the penalty statement is done by the Minister of Public Administration.[19]

Penalties

Penalties for election law violations and for election-related crimes vary widely from country to country. Much of the variation depends on the particular context in each country and the perception of what constitutes a serious threat to its electoral process.

In Mexico, penalties for administrative faults are established according to who committed the fault. The different fault categories are voters, electoral officials, party officials, public servants

and religious ministers. For example, sanctions for a citizen found guilty of a vote violation range from a 10 to a 100 wage-day[20] fine and/or six months to three years in prison. Religious ministers who try to influence voters receive up to a 500 wage-day fine. Electoral officials who alter electoral instruments or documents or who refuse to perform their electoral duties receive a 20 to 100 wage-day fine or from three months up to five years in prison.

In other countries, penalties are divided according to whether the offence was a corrupt act or an illegal practice. In the Bahamas, illegal practices receive a fine up to $1 000 and/or up to three months in jail. Corrupt acts receive a fine of up to $2 000 and/or up to two years in jail.

Other countries add additional penalties for crimes committed under special circumstances. For example, in Mali, the election law adds forced labour to the punishment for crimes that are violent or violate the secrecy of the vote. In Western Samoa, those convicted must also pay all of the court costs. And many systems will revoke voter and candidate rights, depending on the violation.

Conclusion

Despite the various enforcement systems, the similarities among election enforcement regimes in democratic systems are striking. They have the same fundamental objectives and, in large measure, identify the same basic acts as offences. They also face the same problems of providing neutral, timely and effective enforcement within an often highly charged and politicized environment. The differences reflect the different political institutions and history of each country and what they perceive as the most direct threats to the holding of free and fair elections. This focus on historical and potential threats is reflected in the choice of institutions, the amount of power given to each institution and the severity of the sanctions.

Enforcement systems form part of each jurisdiction's legal and regulatory framework. However, unless an enforcement system is respected and appropriately used, its value is questionable. Widespread impunity for lawbreakers or the use of enforcement for partisan purposes erodes public trust and can cloud the legitimacy of the election outcome.

Enforcement regimes also reflect the norms and values of their citizens, and the international trend since the early 1990s has been towards free and fair elections. As citizens and political participants demand greater accountability and reliable elections, enforcement regimes are updated, reformed or strengthened. Ensuring there are functioning checks and balances is a significant part of that process. Another is building public trust and confidence in the enforcement system, so that it can fulfill its objective of protecting the integrity of the electoral process.

Sanctions for Election-Related Violations in Selected Countries[21]

Country	Vote Buying	Voter Fraud	Disrupting Polling	Armed Entry into Polling Station	Taking Ballot Boxes	Altering Ballots
Algeria	Handled under the Penal Code	3 months to 3 years + 500 to 5 000 dinars	6 months to 2 years; if armed: 6 months to 3 years	6 months to 3 years (excludes law officers)	5 to 10 years; if violence: 10 to 20 years	5 to 10 years
Armenia		Up to 1 year or up to 500 times minimum wage	200 to 400 times minimum wage; if violence or threat: up to 5 years	up to 500 times minimum wage		2 to 5 years
Burkina Faso	up to 2 years +/or 2 000 francs	1 month to 1 year +/or 10 000 to 100 000 Fr	1 to 5 years +/or 300 000 to 600 000 Fr; if armed: 5 to 10 years	8 000 to 20 000 Fr; if hidden: 20 000 to 50 000 Fr	1 to 5 years + 600 000 Fr; if by group: 5 to 10 years	6 months to 2 years
Mali	1 to 5 years, 100 000 to 1 million francs	6 months to 2 years + 25 000 to 250 000 Fr	1 to 5 years + 120 000 to 600 000 Fr; if armed or vote violated: 5 to 10 years forced labour	20 000 to 120 000 Fr; if concealed: 15 days to 3 months + 60 000 to 360 000 Fr	1 to 5 years + 120 000 to 600 000 Fr; if violence: 5 to 10 years forced labour	1 to 5 years + 60 000 to 600 000 Fr
Mexico	200 to 400 wage-day fine + 1 to 9 years jail (public servants)	10 to 100 wage-day fine + 6 months to 3 years jail	10 to 100 wage-day fine + 6 months to 3 years jail		10 to 100 wage-day fine + 6 months to 3 years jail	10 to 100 wage-day fine or 6 months to 3 years jail (citizens)
Thailand	1 to 10 years + 20 000 to 200 000 baht	1 to 10 years + 20 000 to 200 000 B	1 to 5 years +/or 20 000 to 100 000 B	Up to 5 years +/or up to 10 000 B	1 to 10 years + 20 000 to 200 000 B	1 to 5 years +/or 20 000 to 100 000 B (1 to 10 years + 20 000 to 200 000 B for public official)

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21. Penalty data taken from the respective election laws.

Campaign Finance Enforcement in the United States

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Introduction

There are more than 50 campaign finance enforcement schemes in the United States, or roughly the same as the number of campaign finance laws. U.S. federal law generally governs only the financing of campaigns for election to the offices of President and Vice President of the United States, United States Senator, and United States Representative.[1] Each U.S. state has its own system of campaign finance law, with a corresponding enforcement scheme. And some of the larger U.S. cities, such as New York and Los Angeles, have enacted their own ordinances regulating the financing of municipal election campaigns and have created local agencies to administer and enforce those ordinances.

At the federal level, responsibility for campaign finance enforcement is again divided. Violations of the campaign finance laws that are aggravated both in intent and amount may be prosecuted as crimes by the U.S. Department of Justice (DOJ). Offenders found guilty of campaign finance crimes may be imprisoned, fined or both. All violations of the campaign finance laws, whether of aggravated or lesser intent and regardless of the amount of money involved, may be settled or prosecuted in civil court by the Federal Election Commission (FEC or "the Commission").

The FEC is the independent agency of the United States Government vested with the exclusive authority to "administer, seek to obtain compliance with, and formulate policy with respect to" the three laws at the centre of the federal scheme of campaign finance regulation. Those laws are:

- The *Federal Election Campaign Act* of 1971, as amended (FECA or "the Act").[2] FECA sets forth the basic limits and prohibitions regarding who may contribute to whom and how much. It also requires periodic disclosure of receipts and disbursements by candidates, political party committees, and other participants.
- The *Presidential Primary Matching Payment Act*.[3] This law provides partial public funding to the campaigns of candidates in the presidential primaries who agree to limit their spending.
- The *Presidential Election Campaign Fund Act*.[4] This law provides public funding to the general election campaigns of candidates for President and Vice President who agree not to accept private contributions and to spend no more than the federally provided amount. It also provides public funds for the national party nominating conventions.

This article addresses U.S. campaign finance enforcement solely at the federal level. Its main focus is on the civil enforcement process administered by the FEC. That process is the only process applicable to the vast majority of campaign finance cases; it also has some features that are unique or very unusual in American administrative law. Before turning to civil enforcement, however, we look briefly at criminal enforcement.

Criminal enforcement

The Department of Justice has had authority to prosecute criminal violations of the federal campaign finance statutes since the first such statute was enacted in 1907. But before the creation of the Commission in 1974, very few prosecutions were brought. This was largely due to substantive deficiencies that made FECA's predecessor, the *Federal Corrupt Practices Act* of 1925, extremely easy to evade. However, it was also due to an unwillingness to expend limited prosecutorial resources on what some considered "minor" or "technical" violations. While the violations may have been "minor" compared to other types of crime, failure to prosecute them contributed to widespread flouting of the *Federal Corrupt Practices Act*.

Thus, in 1974 Congress created the FEC as an agency with power to enforce compliance with the *Federal Election Campaign Act* and the Presidential public financing statutes in the civil courts.

Violations of U.S. federal campaign finance laws can be crimes only if they are committed with "knowing and wilful" intent. This is a very high standard; it means, in essence, that defendants can be found guilty only if they knew their conduct was unlawful and engaged in it anyway. Moreover, even "knowing and wilful" violations may be prosecuted as crimes only if the amount of money involved exceeds a certain threshold, which in most cases is US$2 000. Additionally, as in any criminal case, the prosecution must prove "knowing and wilful" intent, as well as the acts constituting the crime, beyond a reasonable doubt.

Until recently, criminal violations of the FECA could be directly prosecuted only as misdemeanours.[5] However, the most aggravated FECA violations – generally those where the amount in violation aggregates more than US$25 000 in a calendar year, or US$10 000 for cases involving

Photo: U.S. Federal Election Commission

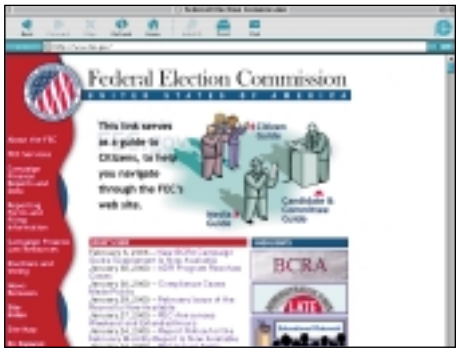
Ellen L. Weintraub, Chair, U.S. Federal Election Commission

reimbursed contributions through "straw donors" – are now felonies under amendments to FECA contained in the *Bipartisan Campaign Reform Act* of 2002 (BCRA, popularly known as "McCain-Feingold" or "Shays-Meehan").[6] Moreover, the statute of limitations for criminal prosecution of FECA violations has been extended to five years, from the previous three.[7]

The FEC and its enforcement process

The Federal Election Commission has six members. They are appointed by the President to serve staggered, six-year terms. No more than three of the commissioners may be of the same political party. Among the Commission's core functions are encouraging voluntary compliance with the federal campaign finance laws, investigating potential violations of those laws, attempting to settle or "conciliate" violations where they are found, and, where cases cannot be settled, prosecuting violations by filing civil lawsuits in U.S. District Court.

The Commission takes its mission of encouraging voluntary compliance very seriously. Its Public Information Division conducts an aggressive program of educational outreach to the regulated community through a monthly newsletter, the publication of "Campaign Guides" and other resources about the law, periodic training conferences, and the Commission's Web site (www.fec.gov). Moreover, the Commission's Reports Analysis Division (RAD) examines the reports of receipts and disbursements that political committees file with the Commission; the most minor technical reporting violations are usually disposed of by a letter from RAD to the reporting committee noting the problem, and the committee's subsequent filing of an amended report. However, voluntary



compliance does not always work. Where it does not, the Commission's investigative and law enforcement missions begin.

Matters under review (MURs)

The Commission's enforcement functions are carried out primarily through enforcement cases, called Matters Under Review (MURs). The Act and regulations contain detailed enforcement procedures that require approval by the votes of four of the six commissioners at each stage (to initiate

an investigation, approve a subpoena, find probable cause to believe a violation has been committed, settle a matter, or authorize suit). This means that, on occasion, the Commission will take no action in an enforcement matter because it lacks four votes for any particular position. However, the four-vote requirement and the partisan balance of the Commission combine to ensure that every action taken by the Commission has at least some bipartisan support. Congress deliberately designed the system in this manner so that no majority party could use the Commission to persecute its political adversaries in the minority. If the Commission finds itself unable to act due to a lack of four votes for a particular position, it will usually then vote unanimously to dismiss the case on those grounds.

Initiation of a compliance action

MURs may be initiated in two ways. Most are initiated by complaints, which may be filed by any person who believes a violation has occurred. Complaints must be signed and sworn to by the person making the complaint; the Act prohibits the Commission from acting on anonymous complaints. They must also allege violations within the Commission's relatively limited jurisdiction; for example, the Commission has no power to act on an alleged violation of the *Voting Rights Act*, which is wholly within DOJ's jurisdiction.

MURs can also be initiated by the Commission itself based upon information ascertained in the normal course of carrying out its responsibilities, such as through RAD's regular review of reports or through an audit of a political committee; the receipt of a referral from another government agency; or through the receipt of a *sua sponte* submission from a respondent (i.e. one in which a respondent reports its own violation).

Rights of respondents

Respondents receive notification of the Commission's actions at various stages in the enforcement process. They also have opportunities at various stages to respond in writing to the allegations raised and to the Commission's actions during its investigation. However, respondents have no opportunity for an oral hearing before the Commission.

Respondents have a right to be represented by counsel, if they choose, at all stages of a matter. Moreover, until the termination of the MUR, the Act requires that the entire investigation remain confidential, unless the respondent files an express waiver.[8]

Case intake and enforcement priority system

If a proper complaint within the Commission's jurisdiction is filed, a file is opened and assigned a MUR number. Copies of the complaint are sent to the respondents and, once responses are received, an initial determination is made as to whether the case appears to be significant enough to warrant use of Commission resources. The Commission calls this triage process the Enforcement Priority System, or EPS. EPS can be viewed as a funnel. If purely voluntary compliance and (in the reporting context) prompt and complete responses to RAD inquiries are at the top of the funnel, EPS further winnows the enforcement agenda so that staff focus only on the most serious and significant cases. Among the factors examined in EPS are the presence of knowing and wilful intent, the impact of alleged violations on elections, the amount of money involved, and whether certain areas of the law require special attention. Cases that appear to warrant use of Commission resources are assigned to staff, as staff becomes available to work on them. Cases that do not warrant use of Commission resources may be closed without investigation, pursuant to the Commission's prosecutorial discretion. Although staff is responsible for the evaluation of a case under the EPS, the evaluation is subject to review by the Commission, and all decisions to close cases must be approved by the Commission.

The "reason to believe" stage

In matters that are activated, the complaint, the respondent's response, and the staff analysis and recommendations are submitted to the Commission for an initial determination as to whether there is reason to believe or no reason to believe a violation has occurred. In internally generated matters, the Commission considers its internal records and the staff analysis and recommendations when making this determination. "Reason to believe" is a relatively low threshold, and the statutory term has been criticized as misleading; at this stage, the Commission is simply deciding whether there is reason to investigate.

If the Commission finds reason to believe, an investigation is initiated. If the Commission does not find reason to believe, the matter is closed. The Commission may also find reason to believe, but exercise prosecutorial discretion to take no further action and close the file.

If the Commission finds reason to believe, the respondent will receive a legal and factual analysis showing the basis for the Commission's finding. At this point, unless the Commission has determined to take no further action and close the file, all respondents – including respondents in internally generated matters, who have received no notification of the matter prior to this point – have an opportunity to respond.

Investigation and pre-probable-cause conciliation

The Act provides a full range of investigative powers to enable the Commission to secure sufficient information and evidence to resolve the case. The investigation may be conducted through informal contacts or through formal issuance of subpoenas and orders for production of documents, depositions or answers to interrogatories.

The Commission's regulations provide a means to settle matters early if the respondent states in writing a willingness to conciliate a violation prior to a finding of probable cause. Upon receipt of this request, staff will prepare a conciliation agreement for Commission approval if the General Counsel's investigation is complete. In an effort to streamline the process, in certain types of cases, the Commission may send a proposed pre-probable-cause conciliation agreement to a respondent along with the reason-to-believe notice.

Probable cause to believe

If a matter is not resolved in pre-probable-cause conciliation, the General Counsel prepares a brief stating his position on whether the facts of the case and the applicable law indicate probable cause to believe a violation has been committed. Although the Commission has not formally articulated a definition of "probable cause to believe," for most Commissioners, in most cases, it seems to mean "more likely than not" – the same standard the Commission would have to meet in court if it ultimately sued a respondent. The General Counsel simultaneously provides the respondent and the Commission with a copy of the brief. The respondent has 15 days after receipt of the brief in which to submit a response brief. The Commission then considers both briefs before voting on probable cause.

Photo: Getty Images

Capitol Building, Washington

In the event the Commission finds probable cause and decides to pursue the matter, it must attempt to conciliate the violation for at least 30 days, but not more than 90 days. If it has unsuccessfully attempted pre-probable-cause conciliation, it must nevertheless try again after a finding of probable cause.

A conciliation agreement usually provides for payment of a civil penalty by the respondent. The Commission may consider various factors in determining the amount of the civil penalty.

The agreement also contains a statement of facts, and, in virtually all cases, an admission of violation and an agreement to cease and desist from further violations of the provision of law at issue. It may also require corrective action, such as the refund or giving up of illegally received contributions; the amendment of a committee's disclosure reports; or the attendance of the committee's treasurer at an FEC training conference.

If the Commission finds that a violation was knowing and wilful, it may seek a civil penalty of up to twice the amount it otherwise could.[9] The Commission may, of course, settle or civilly prosecute knowing and wilful violations itself. It may also refer such violations to DOJ for criminal prosecution, but not until it has found probable cause to believe. If the Commission refers a matter to DOJ, the Commission may retain jurisdiction over that matter until DOJ has completed its process with regard to the case.

Post-probable-cause action

If the Commission is unable to correct a violation through a conciliation agreement, it may authorize the filing of a civil action for relief in U.S. District Court by an affirmative vote of at least four members. The District Court reviews the facts of the matter *de novo*.

Two aspects of this procedure are highly unusual compared to most other U.S. administrative law enforcement schemes. First, most other U.S. administrative agencies have the power to directly fine persons who violate the law or to order them to cease and

desist from further violations. In the usual scheme, after an investigation, an alleged lawbreaker is administratively prosecuted by agency staff before an independent administrative law judge, who takes testimony and renders an initial decision; the presidential appointees at the head of an agency serve an appellate function. The burden of contesting the agency's final findings and orders is on the respondent, who must usually appeal the final agency action to a U.S. Circuit Court of Appeals. Those courts, in turn, review the agency actions under the more deferential standards applied by appellate courts.

Congress provided for the Commission to conduct most of its own litigation in order to ensure that civil enforcement actions under the Act would be brought independently of political considerations.

In contrast, there are no administrative law judges at the Commission. With the limited exception of a pilot program for handling routine reporting violations, the Commission has no power to do anything to a respondent, other than to sue. Rather than serving an appellate function, the Commission performs a function somewhat akin to a civil grand jury's. The burden of going forward in court is on the Commission, not the respondent.

The second unusual aspect of this procedure is that the General Counsel's Office, not the Department of Justice, represents the Commission in enforcement litigation (and in defensive litigation, as well). Congress provided for the Commission to conduct most of its own litigation in order to ensure that civil enforcement actions under the Act would be brought independently of political considerations.

In contrast to criminal FECA prosecutions, where the government must prove beyond a reasonable doubt that the defendants knowingly and wilfully violated the law, FEC enforcement suits are subject to the same "preponderance of the evidence" burden of proof as any civil suit in the United States. This burden is considerably lower than "beyond a reasonable doubt." Moreover, the FEC may bring a civil enforcement suit even if the defendant did not have knowing and wilful intent. Violations of FECA's limitations and prohibitions on the sources and amounts of contributions are subject to civil sanction if committed with knowing intent. This means that the defendants intended to do the act that violated the law, whether or not they knew it was illegal. Violators of FECA's requirements for disclosure of political committees' receipts and disbursements are subject to civil sanction under a "strict liability" standard. This means that the FEC need prove only that the violation occurred, and need not prove intent.

Termination of enforcement matters

Compliance matters are terminated in one of three ways. First, they may be terminated if the Commission closes the file after finding no violation or taking no further action. A Commission determination in the context of an enforcement matter involves the exercise of prosecutorial discretion. Therefore, the Commission can decide not to pursue a particular violation due to mitigating circumstances. Factors the Commission may consider in deciding to take no further action include the amount of money involved, the timing of the violation, actions taken to correct the violation, the timing of those actions, and whether the matter involves an ambiguous area of the law or a provision that has not been previously interpreted by the Commission.

Second, a compliance matter is terminated (at least with respect to a particular respondent) when the Commission enters into a conciliation agreement with the respondent. Finally, a compliance matter is terminated after a failure to get four votes for any action necessary to continue the matter.

Between 1996 and mid-2002, about 56 percent of matters activated and assigned to staff were resolved through conciliation agreements; some of these matters settled relatively rapidly, but others settled only after extensive investigations. Roughly 39 percent were closed either after a substantive finding of no violation, an exercise of prosecutorial discretion to take no further action, or a failure to obtain 4 votes. Only about 5 percent of matters activated and assigned to staff were subjected to the entire enforcement process through the authorization of a civil law enforcement suit.

Complainant's challenges to agency handling of complaints

If the Commission does not take final action on a complaint within 120 days after it was filed, the complainant may seek judicial review in the U.S. District Court for the District of Columbia. The complainant will have to show that the Commission's failure to complete action was contrary to law or arbitrary and capricious. In deciding such claims, the court takes into consideration the nature

and complexity of the enforcement matter and the action the Commission has taken, as well as other factors such as the Commission's workload and its human and budgetary resources. If the court agrees that the manner in which the Commission is proceeding is not arbitrary and capricious, it may dismiss the suit, or it may require periodic reports from the Commission about any action the Commission is taking.

In defending these cases, the Commission frequently provides the court and complainant/plaintiffs with confidential chronologies of the actions taken in the enforcement matter up to that point. These cases frequently settle with an agreement to provide the court and complainant with periodic updates.

Moreover, in a provision that may be unique in American administrative law, complainants may seek judicial review of a Commission decision *not* to pursue a matter. If the Commission dismisses a complaint, the complainant may file a petition to review that dismissal. However, the petition must be filed in the U.S. District Court for the District of Columbia, no matter where the complainant is located. The petition must be filed within 60 days after the Commission dismisses the complaint. As with suits for delay, the complainant/plaintiff bears the burden of proving that the Commission's failure to act was arbitrary and capricious or contrary to law.

If the court rules that the Commission acted in an arbitrary and capricious manner, it may order the Commission to take some other action within 30 days. If the Commission does not conform to the court's directive, the court may authorize the complainant to file his or her own suit against the respondent to remedy the alleged violation of the law.

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Senate of the United States

Alternative enforcement processes

Administrative fines program

A larger number of political committees than one might expect either fail altogether to file the required reports disclosing their receipts and disbursements, or fail to file them on time. Many of these violations do not result from malfeasance, but are instead committed by smaller committees staffed by less experienced personnel. The only factual issue in the cases is usually whether the report was or was not filed on time. Nevertheless, prior to 2000 the FEC had no way to deal with these cases other than the procedure-laden process just described.

Amendments to the FECA, first enacted by Congress in 1999 and since renewed, permit the FEC to directly impose civil money penalties, based on published schedules of penalties, for late filing and non-filing of disclosure reports, if the violation occurs between January 1, 2000, and December 31, 2003. Beginning with the July 15, 2000, quarterly reports, the Commission began a new program to assess these penalties.

Under the new program, if the Commission finds reason to believe that a committee failed to file a report at all or on time, it notifies the committee in writing of the factual and legal basis of its finding and the amount of the proposed civil money penalty. The committee has 40 days from the date of the reason-to-believe finding either to pay the civil money penalty or submit to the Commission a written response, with supporting documentation outlining the reasons why it believes the Commission's finding and/or penalty is in error.

If the committee submits a response, the response is forwarded to an impartial reviewing officer – someone employed by the FEC who was not involved in the original reason-to-believe finding. After reviewing the Commission's finding and the committee's written response, the reviewing officer forwards a recommendation to the Commission. Respondents have an opportunity to submit a written response to the reviewing officer's recommendation. The Commission then makes a final determination as to whether the committee violated

the Act. If the Commission finds a violation occurred, it assesses the civil money penalty.

After a final determination by the Commission, the committee has 30 days to pay the penalty or seek judicial review in a U.S. district court in the area where the committee resided or conducted business. If a respondent fails to pay the civil penalty, the Commission may either sue the respondent directly to collect the penalty or transfer the case to the U.S. Department of the Treasury for collection.

In 2000, the Commission initiated an Alternative Dispute Resolution (ADR) pilot project to resolve certain enforcement matters. It recently made the project permanent.

Alternative dispute resolution

In 2000, the Commission initiated an Alternative Dispute Resolution (ADR) pilot project to resolve certain enforcement matters. It recently made the project permanent.

The objectives and goals of the ADR program are to promote compliance, expand the tools available to the Commission for resolving selected complaints, resolve matters more quickly without using the full Commission enforcement mechanism, and reduce costs to both the FEC and respondents.

If the Commission determines that a matter is appropriate for handling as an ADR matter, the respondent or respondent's representative will be contacted by a representative of the ADR office. If the respondent is not willing to participate in ADR, the matter is returned to the General Counsel's Office for handling through the normal enforcement process. If the respondent is willing to engage in the ADR process and agrees to toll any applicable statute of limitations for the time the matter is pending in ADR, the matter proceeds to bilateral negotiations between the respondent or representative and a representative of the ADR office.

If a settlement is reached in negotiation, it will be submitted to the Commission for approval. If not, the ADR process proceeds to mediation.

If an ADR matter proceeds to mediation, the ADR office will forward to the respondent a list of three proposed mediators, all of whom are senior, experienced, neutral professionals from the private sector. The respondent has the opportunity to choose one or reject all three. If the respondent rejects all three, the ADR office will forward a second and final list of three proposed mediators.

The respondent and the ADR representative choose a location for the mediation session, which will generally last one day. During the session, the mediator will meet both jointly and separately with the respondent or respondent's representative, and the ADR representative, as necessary. The mediator treats as confidential all respondent-mediator communications, i.e. the mediator does not reveal anything about the communications to the ADR representative without the respondent's permission. Moreover, no information that respondents provide in a mediation can be used in a later enforcement proceeding.

Any proposed settlement, whether reached through negotiation or mediation, is submitted to the Commission for its approval. All approved settlements become a matter of public record; all are accompanied by a statement that the settlement was negotiated through ADR and that the settlement cannot be used as a precedent for the settlement of other cases. If the Commission fails to approve a settlement arrived at between a respondent and the ADR office, the matter is dismissed.

If the negotiation and mediation processes fail to produce a settlement, the case is returned to the General Counsel's Office for handling through the normal enforcement process. At this point, any applicable statute of limitations begins to run again.

The *Bipartisan Campaign Reform Act* and the future

The *Bipartisan Campaign Reform Act* became effective on November 6, 2002, the day after the 2002 national general election. The coming months and years promise great change in the substance of federal campaign finance law enforcement in the United States, as the Commission and the regulated community adjust to the many substantive changes BCRA made to the law. However, other than making it easier for DOJ to prosecute the most aggravated violations as felonies, BCRA left the process by which FECA is enforced virtually untouched. The procedures described in this article will continue in place as the Federal Election Commission pursues its missions of encouraging voluntary compliance and enforcing the law.

NOTES

1. There are some exceptions. Most notably, U.S. federal law prohibits foreign nationals – essentially meaning individuals who are neither U.S. citizens nor green card holders, and corporations or other non-natural persons that are organized under non-U.S. law or otherwise under foreign control – from making contributions or expenditures in connection with elections for federal, state or local office. A number of specific requirements that are beyond the scope of this article apply to the establishment of a political action committee by a U.S. subsidiary of a foreign corporation, or to direct or indirect contributions from the subsidiary's corporate treasury to state and local candidates.

2. 2 U.S.C. ss. 431–455.

3. 26 U.S.C. ss. 9031–9042.

4. 26 U.S.C. ss. 9001–9013.

5. However, DOJ has had some success using more general statutes to bring felony prosecutions in cases where reimbursed contributions have been made through "straw donors" in attempts to disguise the identity of the true contributor and/or evade FECA's limitations and prohibitions.

6. Pub. L. 107-155, 116 Stat. 81 (2002). BCRA introduced a number of important substantive amendments to FECA, including a ban on the receipt or spending of non-federal funds (or so-called "soft money") by national political parties, 2 U.S.C. s. 441i(a); new restrictions on the receipt and spending of such funds by state and local political party committees (which typically conduct activities that affect both federal and non-federal elections), 2 U.S.C. s. 441i(b); and new restrictions on the sources of funding for what BCRA calls "electioneering communications," or broadcast advertisements aired in close proximity to elections that refer to candidates for federal office without using words of express advocacy and are targeted to the constituency from which the candidate is seeking election. 2 U.S.C. ss. 434(f)(3) (definition), 441b(c) (restriction on source of funds). More on BCRA's substantive provisions, the reasons Congress passed them, and the constitutional issues they raise can be found in Richard Briffault, "Soft Money, Issue Advocacy and the U.S. Campaign Finance Law," *Electoral Insight*, May 2002, pp. 9–14.

7. BCRA's enhanced criminal penalties are codified at 2 U.S.C. ss. 437g(d)(1)(A) and (D). The longer statute of limitations for criminal prosecutions is codified at 2 U.S.C. s. 455(a).

8. A judge of the U.S. District Court for the District of Columbia held in 2001 that the Act's confidentiality provision extends beyond closure of the matter and prevents the Commission from making public all but a very limited range of materials relating to a MUR after the MUR is closed, *AFL-CIO* v. *FEC*, 177 F. Supp. 2d. 48 (D.D.C. 2001). Prior to the decision, the Commission had always made public most of the investigative files in enforcement matters once they were complete. Pending review of this decision by a U.S. Court of Appeals, the Commission is complying with it with respect to all newly closed enforcement matters.

9. Under BCRA, civil penalties for knowing and wilful violations of the prohibition on reimbursed contributions will now be a minimum of three times the amount of the violation and a maximum of 10 times the amount of the violation, 2 U.S.C. s. 437g(a)(6)(C). This represents the first time Congress has provided for mandatory minimum civil penalties for violations of FECA.

Electronic Voting Methods
Experiments and Lessons

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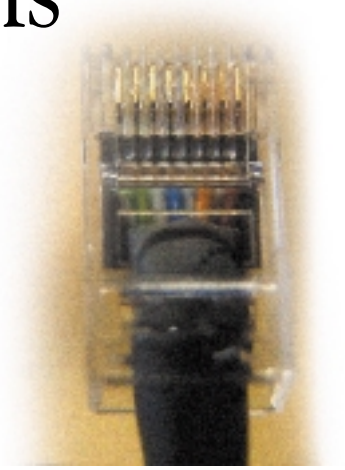

Digital information and communication technologies tend to have an extensive, transnational reach, may be accessed from almost any location at any time of the day, and have the capacity to be used for various kinds of transactions, commercial and otherwise. In this climate of technological development, many governments have begun exploring and undertaking so-called *e-*(electronic) *democracy* initiatives.

Developments in the electronic or digitized administration of elections and electoral processes, particularly the use of on-line technologies in voting and voter registration, should be seen within the broader context of debate about public participation in the democratic process.[1] It is suggested, for example, that measures to enhance the accessibility of the electoral process could help encourage more people, including youth, to exercise their right to vote.

Voting in a secure environment by methods that protect the privacy of voter information, ensure ballot secrecy and are accessible to all eligible electors is the cornerstone of democratic elections, as articulated in the International Covenant on Civil and Political Rights and other international legal instruments.[2]

In the context of the use of on-line/Internet and other electronic technologies for electoral events, the Internet as a *global* or transnational information and communications medium raises a unique set of concerns about security, privacy, ballot secrecy, accessibility for different socio-economic groups and other matters. Many countries and sub-national governments are currently addressing these concerns and how barriers could be surmounted so that Internet/on-line voting may be implemented as an effective alternative voting method.

This article examines recent global trends in voting and voter registration through electronic means, with a focus on developments in the use of on-line/Internet voting and voter registration to elect government representatives. The examination is based on an environmental scan of recent developments (from September 2001 to September 2002) in e-voting and e-voter registration in various countries. Our purpose is to highlight and discuss the major themes and issues emerging from these developments.

The term e-voting, according to a recent report, may encompass a range of methods, from electronic counting of paper ballots, to voting by direct recording electronic machines (DREs), to wide-scale remote voting by electronic means. DREs may include touch screen systems or PC-based technologies that use screens and keypads to register votes. The machines may be in the form of static or mobile kiosks located at, or transported to, various public sites to facilitate voting in, for example, the workplace, hospitals and seniors' homes.[3] Remote voting by electronic means (RVEM), that is, e-voting from places other than supervised polling stations, may include voting by Touch-Tone telephone (either land lines or mobile phones), SMS (short message service) text messaging, interactive digital TV (iDTV) and voting over the Internet.

Elections Canada examines on-line voter registration

Before reporting on developments elsewhere, it should be noted that the feasibility of an on-line voter registration system is being examined by Elections Canada. A study provided in November 2002 by CGI Information Systems and Management Consultants Inc. found that implementing on-line voter registration is feasible for Elections Canada, assuming legal and user authentication issues can be resolved. The feasibility study reflects Elections Canada's commitment to exploring new mechanisms to facilitate the processes by which electors add, update or confirm their elector information between and during electoral events.

The study was based on consultations with internal and external stakeholders and an environmental scan of similar initiatives in Canada and around the world. It sought to identify the operational, legal, technical and privacy considerations associated with the development of an on-line voter registration system and to recommend a strategy for implementing such a system.

United Kingdom

At the national level, many countries are now considering the possibility of implementing full-scale *electronic-enabled* general elections. A number of countries are first trying e-voting at the local level, in order to identify problems and potential barriers that may have to be overcome before applying e-voting on a wider electoral scale.

Two significant initiatives to examine the feasibility of electronic voting (including electronic voter registration) recently took place in the United Kingdom. The first, launched in October 2001, was a seven-month study conducted by a range of central and local governments as well as private agencies to examine the possibilities of implementing electronic voting. This study looked at the potential for, as well as the implications of, implementing various forms of electronic voting and vote counting, including via the Internet. The research findings in the report

The Implementation of Electronic Voting in the UK, published by the Local Government Association of the U.K., were meant to pave the way for Britain's first "e-enabled" general election by 2008. The report concludes that the implementation of e-voting may introduce greater flexibility as well as convenience into the electoral process, and would also help modernize the electoral system. Implementing e-voting is a complex endeavour, it emphasizes, but one that ought not to compromise democratic principles of freedom and fairness in electoral processes.[4]

The second and related initiative involved the piloting of alternative methods of voting, including all-postal and multi-channel/electronic voting, across 30 local councils during the May 2002 local elections. An evaluation, including recommendations for future pilots, prepared by the Electoral Commission was part of this pilot program and is contained in the report *Modernising Elections: A Strategic Evaluation of the 2002 Electoral Pilot Schemes*.[5] The evaluation aims to draw various implementation lessons from the pilot projects and is meant to serve as a stepping stone in the testing of on-line and other electronic and alternative voting methods.

According to the Electoral Commission, the e-voting pilots generated a great deal of positive feedback from voters, candidates, agents and polling station staff about the convenience and ease of use of new voting methods. In terms of security, in e-voting as well as other (all-postal) pilot areas, much effort was made to prevent fraud and other breaches of security.[6] In areas where electronic vote counting was adopted, ballot papers were printed in special ink, and counting machines rejected papers not printed with this ink.

The Commission states that, compared with conventional methods of voting, there was no evidence to suggest that any of the e-voting procedures led to increased rates of impersonation or other electoral offences. But the Commission *does* warn that, if public concerns about fraud were to grow, this could lessen public confidence in the use of e-voting mechanisms. To provide reassurance to voters, it suggests that in the future a set of technical criteria be established against which pilots may be judged for security.

The U.K. Electoral Commission asserts that *remote voting* is more convenient than traditional polling stations for many voters, and that, over time, remote voting is likely to become the norm for most elections.[7] "In the medium term, remote voting may be through postal voting, but over the

longer term – as Internet access and digital television ownership grow – technology-based schemes are likely to increase," it observes. Nevertheless, the Commission regards it as important to retain, for the foreseeable future, the option of voting in polling stations along with "remote" and other electronic voting methods.

While the May 2002 experience appeared to be satisfactory, the Electoral Commission indicates that further pilots are definitely necessary "to tease out a number of issues and further establish the security measures necessary to protect these systems from attack and ensure public confidence."[8] In light of the success of the 2002 pilot projects, the U.K. Government has announced its intention to continue on-line voting trials by inviting local councils to submit bids to run innovative voting pilots in this year's local elections. These will include voting by the Internet, by mobile and touch phone, interactive digital television or by post.[9]

The question of electronic voting was also examined by the Independent Commission on Alternative Voting Methods established by the Electoral Reform Society. Its February 2002 report, *Elections in the 21st Century: From Paper Ballot to E-Voting*, was based on a study that examined new methods of voting, including on-line voting. It makes recommendations on the importance of ensuring security and secrecy of the ballot as well as continued public confidence in the electoral process.[10]

Recent developments in other countries

The Netherlands, the United States, Australia, New Zealand, Brazil and other governments have also begun piloting the use of on-line mechanisms to conduct referendums and legislative elections. Such experiments are being undertaken at traditional polling stations and other public sites such as libraries and shopping centres, from home and the workplace, as well as from other more remote locations overseas.

At the international and multinational levels there also have been developments in this area, involving the consideration and implementation of on-line voting for electoral events. One major initiative is the CyberVote project sponsored by the European Union (EU). It seeks to develop a universally applicable on-line/Internet voting system to facilitate e-voting within the EU. The E-Poll project is another multinational on-line and e-voting initiative in the process of being piloted in at least three European countries: Italy, France and Poland.

Australia's On-line Council is another example of a national forum that has been actively discussing major issues related to the implementation of electronic, especially on-line, voting. It is addressing such considerations as equal access to Internet technology and the so-called "digital divide."

Several studies from the United States have examined major issues and concerns about on-line and other electronic means of voting. Three of these are: the National Science Foundation report, the California Task Force on Internet Voting, and the report of the General Accounting Office. These studies concur that Internet voting at polling sites may be feasible in the near term, but that many technological and voter security concerns, such as ballot secrecy and privacy, the prevention of intrusions and accidents and the provision of equal access to user-friendly technology, must first be resolved.[11]

In the Australian context, two noteworthy reports are: *Electronic Voting and Electronic Counting of Votes: A Status Report*,[12] a joint endeavour of the Victoria Electoral Commission and the Australian Electoral Commission (March 2001); and *Electronic Voting: Benefits and Risks* (April 2002),[13] published by the Australian Institute of Criminology. The former examines the status of e-voting in the U.S. and then discusses the feasibility of, and possible context-specific factors to be considered in, implementing various forms of electronic voting in Australia.

The latter report aims to test the effectiveness of electronic voting in satisfying the requirements of free and fair elections and concludes that new e-voting technologies have the potential to both facilitate and hinder electoral fraud.

Possible lessons from recent initiatives

In the quest to test and/or implement on-line and other electronic methods of voting in public elections, many countries have recognized the importance of identifying context-specific barriers to various forms of e-voting. Nevertheless, certain shared concerns and considerations seem to have emerged across countries that are experimenting with electronic voting technologies. The experiences of various countries provide useful lessons and ways of overcoming hurdles to the implementation of various e-voting systems.

One major recommendation has been that implementation ought to follow an incremental or phased-in approach that allows careful examination of particular problems and issues associated with different forms of e-voting. In other words, there should not be large-scale implementation of e-voting, especially RVEM, until issues of security, secrecy, technological penetration and voter capacity have been adequately addressed.

Most recommendations from various countries with regard to the implementation of e-voting have focused (with minor variations) on issues such as security, secrecy and privacy, accessibility, and public awareness and public confidence, in a bid to maintain the integrity of free and fair democratic elections. But the issues of the cost-effectiveness per ballot, the need to ensure the timeliness, accuracy, authentication and verifiability of e-ballots, as well as the need to review and possibly revise electoral laws, have also emerged as important concerns.

The main concerns about security have generally been that eligible voters should be allowed to cast their ballots in an unhindered, safe manner; and that, once votes are cast, they be recorded and counted accurately. To prevent major security risks posed by computerized voting, such as third-party interference through computer hacking, studies in Australia have recommended the installation of "firewalls" and other internal controls in government computer systems. Maintaining an accurate electoral roll has also been recognized as essential to an efficient voting system and a means of discouraging electoral fraud.

Effective means of voter identification, and of ensuring security and verifiability of votes, are also major concerns. The United Kingdom, the United States, Australia and other countries have begun experimenting with various technological approaches to the proper identification of voters at the time of voting, through the use of such methods as smart cards, PIN numbers, biometric (signatures, fingerprints) authentication, and/or public key cryptography and digital signatures.

The impact of e-voting methods on ballot secrecy is also a major concern. Ballot secrecy may be compromised in a number of ways in the private sphere of the home. In the U.K. it has been noted that voting by Internet or digital TV, unlike by paper ballots, means that voting is more susceptible to the "gaze of others."[14] There may also be intentional or unintentional influence or sometimes outright coercion of voters by other family members, which can compromise voter autonomy.

Another concern is the cost-effectiveness of such schemes. Countries have tended to measure the cost-effectiveness in terms of cost per vote, that is, by comparing the amount of money and other resources spent on a particular initiative with the number of voters who turned out to vote using a particular e-voting method. In the May 2002 local elections in the U.K., turnout in the pilot areas was 38.7 percent, compared to 32.8 percent in all local authority areas. The Electoral Commission's report concluded: "In general terms, the pilots appeared to provide good value for money in terms of the cost per voter as compared with previous years." As for the pilot Voting Over the Internet (VOI), a project of the U.S. Department of Defence's Federal Voting Assistance Program held during the November 2000 presidential elections, the Pentagon received severe criticism in light of the cost of US$6.2 million and the fact that only 84 voters participated.

Another important issue for countries considering e-voting, including on-line voting, is the need to make appropriate legislative changes to

permit not only further testing but also the wider application of such voting methods.

In general, researchers and public bodies that have examined these issues are recommending a gradual phased-in implementation approach. The implementation of wide-scale e-voting, including remote electronic voting in general elections, is increasingly being viewed as feasible in the medium term and may even become the norm in the longer term, but not prior to rigorous and continuous pilot testing and research. It is not yet foreseeable that electronic means will completely replace conventional methods of voting. E-voting, particularly Internet voting, is considered as a complementary alternative to traditional paper ballot voting in a multi-channel system of voting that is being fairly widely advocated in the U.K., U.S., Australia and elsewhere.

Ensuring security of systems, the ability to maintain the secrecy of ballots and voter information, organizational and technological capacity, availability as well as accessibility of technology to citizens, and voter capacity to use such systems are major considerations that must be kept in mind by those responsible for the implementation of on-line/Internet voting. In the meantime, useful lessons can be learned from pilot projects and experiments such as those highlighted in this article.

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Ellen Louks Fairclough
Canada's First Female Federal Cabinet Minister

Wayne Brown
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Photo: Special Collections, Hamilton Public Library

Ellen Fairclough was elected to the House of Commons five times and as Minister of Citizenship and Immigration introduced historic legislation giving Status Indians the right to vote in federal elections.

The Rt. Hon. Ellen Louks Fairclough. The addition of the title "Rt. Hon." to her name may appear strange given that, in Canada, that title has normally been reserved for prime ministers, governors general and justices of the Supreme Court of Canada. And most of them have been men. However, on Canada Day in 1992, Queen Elizabeth II bestowed that title on Ellen Fairclough, almost 30 years after she left Parliament. It recognized her life of many achievements, the most notable being that she was the first woman to enter the federal Cabinet, on June 21, 1957. She was also elected to the House of Commons five times, a record unmatched by any other woman during the 1950s and 1960s. In addition, Fairclough was responsible for Indian Affairs when, in 1960, many Aboriginal Canadians were given the right to vote. In January 2003, she celebrated her 98th birthday.

The early years

She was born Ellen Louks Cook, in Hamilton, Ontario, on Saturday, January 28, 1905, the third of five children in a fifth-generation Canadian family. On her mother Nellie's side, she was descended from Huguenots and United Empire Loyalists who moved to Norfolk County from Vermont in 1790. Her paternal ancestors emigrated to Ancaster, Upper Canada, in 1802, from Lancaster, Pennsylvania. Her father, Norman Ellsworth Cook, had farmed in Norfolk County, but the light soil did not produce sufficient crops and, in 1904, he moved his family to a house on the western edge of Hamilton. In her memoirs, Fairclough states, "Although we never went hungry, we were not an affluent family. Money was often hard to come by, especially when 'hard times' descended on Hamilton, which they seemed to do periodically." When Ellen was nine, the family could not even afford each child's school fees of 10 cents per month.

A life of long hours of work began early. When Ellen was 13, a flu epidemic swept the country. When most of her family fell ill, she was spared and, while caring for four very ill people, also had to prepare three meals a day for her father and two boarders, make beds, and give medication and other general nursing aid. She usually obtained high marks at school, but by today's standards did not receive a lot of formal education. Her family could not afford

"collegiate," so instead she enrolled in a commercial studies program. Since taking a streetcar would cost five cents, she walked to school. She would learn secretarial work, which would pave the way for a series of bookkeeping jobs. Sundays consisted of morning attendance at Zion Methodist Church, bible study, Sunday school in the afternoon, playing the piano and singing – but only religious music. In 1921, at the age of 16, at a church-related social function, she met Gordon Fairclough. Ten years later they would elope to marry in Buffalo, New York. Their only child, Howard, was born 10 months later.

In those years, Fairclough does not appear ever to have thought of someday trying to be elected to Parliament, but she did serve in the trenches of the Conservative Party. She and Gordon joined the Junior Conservative Club and she would become the president of the local Young Conservatives organization and vice-president of the Young Conservatives of Ontario.

During a 10-year period, Fairclough held many clerical and bookkeeping jobs. In *Saturday's Child: Memoirs of Canada's First Female Cabinet Minister,* Margaret Conrad has written that "Ellen was an ambitious and enthusiastic recruit to the new bureaucratic processes, increasingly making her mark by her ability to 'fix' people's muddled financial records." She took several correspondence courses and earned accreditation as a general accountant, making her part of a very male-dominated profession. Her accounting practice grew and she became the Secretary for the Canadian Wholesale Grocers' Association. Those duties included visits to Ottawa to meet departmental officials and members of Parliament.

Fairclough serves Hamilton

Fairclough's first attempt to win election was at the municipal level when, in 1945, Tony Evans, the local Tory boss, demanded she run for a seat on Hamilton's council. She firmly refused. Evans telephoned Fairclough's husband and announced to him that she was going to seek election. In her memoirs, Ellen says Gordon "thought this is a great idea, and that was that. Of course, I could have stubbornly resisted the 'call,' but I was actually quite intrigued by the possibility of a political career." Actually, she lost by a mere three votes and stated, "No one can ever tell me that a single vote does not count!" A few weeks later, when an alderman resigned, the council appointed Fairclough to the seat, which paid a salary of $400 per year. She was also active in a number of voluntary organizations as Dominion Secretary of the United Empire Loyalists' Association, Provincial Secretary and Vice-President of the Imperial Order Daughters of the Empire (IODE) and a regional chair of the Zonta International women's group, which included members from American states and Canadian provinces.

Photo: Special Collections, Hamilton Public Library

Ellen Fairclough at the 1959 opening of a model home in Hamilton.

A 1943 edition of the *Fort William Daily News* quotes a typical passage from one of the many speeches she made to groups across the province. "Why in these days of co-operation, are there no women in the legislature? Are women so insignificant that they have no desire to be heard? If women were in the legislature a lot of things that are dirty would be cleaned up, they wouldn't stand for them. Above all we must lend our courage and trust in a mass confidence in our ability to achieve."

Fairclough was re-elected three times to Hamilton's council and, in 1949, became the city's deputy mayor.

She loses and wins

A federal election was held in 1949 and Fairclough attempted her next step up the political ladder. She was unanimously nominated to be the Progressive Conservative candidate in the riding of Hamilton West. But she was running against a Liberal Cabinet minister, Colonel Colin Gibson, who had held the seat for almost a decade. Fairclough suspected party officials had encouraged her to run as a way of appealing to women voters and that, in fact, they saw no chance of a Conservative winning there. She lost

by more than 3 000 votes and the Liberal party won the national election.

The following year, Colonel Gibson was appointed to the bench and a by-election was called. Fairclough soon discovered that someone was telephoning all the delegates to the nominating meeting to persuade them to vote for someone else to carry the party's banner. Fairclough believed the president of the local Progressive Conservative Women's Association was responsible, and that some local party officials did not want a female candidate. Regardless, most of the other women in the Association did support her and she defeated her male competitor by a count of more than three to one. In the by-election campaign itself, she claimed the Opposition in Ottawa needed to be strengthened and accused the Liberals of failing to implement universal old-age pensions and to reform unemployment insurance. On the election eve, Fairclough's campaign signs were covered by those of a competitor. Overnight, her supporters worked diligently to counter that effort, but by morning very few signs for either candidate were left standing. The May 15, 1950 ballot count seesawed all evening but, in the end, Fairclough, by a margin of just over 400 votes, became only the sixth woman in Canadian history to be elected to the House of Commons. She told Austin F. Cross of *Canadian Business* that her husband, Gordon, had given her great support. "He made more than half my (campaign) plans; had wonderful ideas about publicity."

Fairclough would be an Opposition member in the Commons and the only woman with a seat there in that session of Parliament. Her small pie-shaped fifth floor office was jammed in beside an elevator, but she was thankful that, unlike most of her male colleagues, she did not have to share space with another member. "In my early days in Ottawa I had more support from the men in my party than I did from the women. Many of the women, I think, questioned my ability to do the job, in part because they could not imagine themselves functioning in such a position." She was asked to serve as the Opposition spokesperson on labour, a good fit with her other duties as a member for a large, industrial city. Fairclough spoke frequently in the Commons and called for old-age pensions at the age of 65, rather than 70. However, some media commentators were more interested in her clothing and personal life than in what she said about policy. Undaunted, she introduced a private member's bill to require equal pay for equal work in areas under federal jurisdiction. During her second term in Parliament, after the 1953 general election, the Government enacted similar legislation. The media gave Fairclough much of the credit.

Fairclough enters Cabinet

In 1957, following a general election, Ellen Fairclough became the first woman in Canada's history to be sworn into the federal Cabinet, but it almost didn't happen. John Diefenbaker took power as the Prime Minister of a minority Progressive Conservative government. He had pledged to appoint a woman to the Cabinet. He had only two in his caucus to choose from and Fairclough had the longer service and committee experience. In *Saturday's Child,* Fairclough recalls her belief that Diefenbaker did not like her. "He also had not forgiven me for refusing to support him in his bids for party leadership in 1942, 1948 and 1956."

A few days after the June election, one of those Diefenbaker was likely to include in his Cabinet, Dr. William Blair, died. "At the cemetery, Diefenbaker motioned with his head for me to come over to his side," she has stated. "He asked me if I could see him later in the day. I said, 'Yes, when?' We finally decided upon 6:00 p.m., in his office. I was there on time but he kept me waiting while various people, mostly members of his staff, ran in and out of his private office." A half-hour later, Diefenbaker told her, "I have to form a Cabinet, and it looks as if I shall have to form it largely of my enemies." Fairclough has said she then denied his accusation she had supported one of his rivals at their party's leadership convention. She promised the complete loyalty Diefenbaker requested and he told Fairclough she could be the Secretary of State in his Cabinet.

Fairclough was surprised because she had expected a weightier portfolio. Her first inclination was to turn him down but, instead, left Diefenbaker with only a commitment to let him know her answer. George Drew, a former Ontario premier and Diefenbaker's predecessor as leader of the federal Progressive Conservatives, then counselled her not to reject the chance to become the first woman minister in the federal Cabinet. The next day, she accepted Diefenbaker's offer. However, as Mary Lowrey Ross wrote several months later in *Saturday Night* magazine, "There have been a few to point out that the Secretary of State position is a minor Cabinet appointment and hardly adequate to Mrs. Fairclough's talents."

On June 21, 1957, Fairclough was sworn into Cabinet. Canada's 90th birthday was just a few days away and

she was surprised to discover no celebration was planned for Parliament Hill on July 1. She was told any festivities would be poorly attended because local residents would be at their cottages or vacationing elsewhere. Fairclough would not accept that explanation and ordered planning to begin for the first Dominion Day celebrations in front of the Parliament Buildings the next year.

She recalls that pressure for a distinctive Canadian flag was also on the rise, with thousands of suggestions coming in from across the country. "The designs came in all sizes and colours and ran the gamut from childish scribbles on scrap paper to a beautifully embroidered white satin effort. I recall taking some of them with me on speaking engagements." However, the Diefenbaker government would fall from power before a new flag was chosen.

As official Ottawa got used to having a female Cabinet minister, her husband Gordon became accustomed to often being the only male among the spouses of ministers at social events. He enthusiastically took part, providing more examples of the full support he always gave her.

At Citizenship and Immigration

In the 1958 general election, the Progressive Conservatives won the largest majority in Canadian history (208 of 265 seats). Fairclough was very easily re-elected and appointed to the much tougher post of Minister of Citizenship and Immigration. In those days the position included responsibility for the Royal Canadian Mint, the National Film Board, the National Gallery and the Public Archives/ National Library.

Indian Affairs was also under Fairclough's jurisdiction and, in 1960, she introduced the historic legislation giving Status Indians the right to vote in federal elections. In a 1973 interview with Peter Stursberg, she said "I think that was long overdue and

Photo: Special Collections, Hamilton Public Library

Ellen Fairclough was sworn into Cabinet as the Secretary of State, on June 21, 1957. She is pictured here with the Great Seal of Canada used on all state documents for authority and authenticity.

I was very happy that it happened in my time." She went on to state, "Although some Native leaders feared that enfranchisement was a device to undermine their treaty rights, I made it very clear that this was not the case. No Indian, or any Canadian, is forced to vote, but it is a privilege that every Canadian citizen has a right to exercise." She has estimated that, as Minister, she visited as many as 100 Native reserves in Canada. Fairclough would later receive many honours from Aboriginal groups, including the Six Nations Indian Band. The Blackfoot made her an honorary chief.

Fairclough has written that, while in politics, her colleagues usually treated her as just "one of the boys," but on one occasion she was excluded from Cabinet. Ministers were reviewing the case of Stephen Truscott, who had been convicted of the rape and murder of a young girl. Fairclough obeyed Diefenbaker's request that she leave the room, rather than see graphic photos of the deceased.

Fairclough brought in reforms in immigration policy to try to eliminate race and ethnic origin as grounds for discrimination. But the intense controversy that accompanied post-war immigration policy and pressure from the Opposition, media and the public often left her close to resigning. "However, I had my personal staff to consider, all of whom would have been out of a job if I quit. Moreover, I knew that if I threw in the towel, the criticism would have been levelled at all women – 'She couldn't take it.'" Instead, she "stuck it out to the bitter end."

The end was very difficult. The Government devalued the Canadian dollar to 92 cents American, which was not well received by many voters. In the 1962 election, Fairclough was re-elected, but the Progressive Conservatives won only enough seats for a weak minority government. Fairclough was moved to the Postmaster General's portfolio. The Cuban missile crisis erupted and the Cabinet was divided on how to respond to American calls for support and on whether Canada's new weapons system would include nulear warheads. Some ministers were thought to be plotting to oust Diefenbaker, and his government

was defeated in a vote in the House of Commons.

Fairclough asked Diefenbaker for an appointment to the Senate. "Despite being the first female Cabinet minister, I was not to be one of the chosen few," she has written. On April 8, 1963, another general election brought the Liberals to power and Fairclough was personally defeated by 2 800 votes.

Life after Ottawa

"At the age of 58, most people begin to think of retirement, but not Ellen Fairclough," wrote Margaret Conrad. As Corporate Secretary, "she helped make Hamilton Trust and Savings Corporation into a force to be reckoned with in Ontario financial circles and continued her active involvement in a wide range of boards, foundations and voluntary organizations." She also chaired Hamilton Hydro and served as treasurer of Zonta International.

On February 20, 1978, the House of Commons unanimously passed a resolution congratulating Fairclough for "the significant contribution she made to Canadian political life, for being, 20 years ago today, the only woman in Canadian political history to serve as Acting Prime Minister." The latter refers to a very brief period Diefenbaker left her in charge of the Government while he was travelling.

In the introduction to Fairclough's memoirs, Margaret Conrad recalls, in 1993, she was watching the Progressive Conservative Party's leadership convention and saw the 88-year-old Fairclough move the nomination of Kim Campbell, who would become the country's first female prime minister. She regarded Fairclough's life as an untold story and the next day asked Fairclough if she could write her biography. "She replied immediately. Not only was she prepared, without having met me, to let me be her biographer; she had a 75 000-word memoir that would speed my progress." In 1995, those memoirs were published and Fairclough was installed as a Companion of the Order of Canada.

Ellen Louks Fairclough never saw herself as an ardent feminist but always believed that women could contribute more to business and political life. She proved it with her own career. "Although I never started out to be the 'first' anything, it turned out that I was the first woman in many areas of public life," she has stated. "There were not many others to follow, so I just followed my own instincts. These served me pretty well over the years, as did my willingness 'to work hard for a living.' And when all is said and done, it has been a pretty satisfying life."

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Electoral News in Brief

Government Proposes Major Changes to Political Financing

The federal government has introduced legislation to make major reforms to the rules governing the financing of political parties and candidates and to extend them to certain other political participants. Bill C-24, *An Act to amend the Canada Elections Act and the Income Tax Act (political financing)*, was introduced in the House of Commons on January 29, 2003, by the Honourable Don Boudria, Minister of State and Leader of the Government in the House of Commons. If passed, it is to come into force six months after receiving Royal Assent or on January 1, 2004, whichever is later.

Canada's Parliament Buildings, Ottawa

This bill addresses a number of issues covered in *Modernizing the Electoral Process*, the Chief Electoral Officer's 2001 report to Parliament. In it, he made a number of recommendations to improve transparency in election financing by extending disclosure obligations to electoral district associations, and party nomination and leadership contests. He also recommended limits on all political contributions, other than to leadership contestants, and on spending in party nomination contests. The Chief Electoral Officer underlined the right of Canadians to know who is financing the political process in Canada, which he said is essential "for maintaining the trust of Canadians in the integrity of the process and their continued participation in it."

Overview of proposed changes

The government's bill contains provisions that, with minor exceptions, will allow only individuals to contribute to candidates, political parties, their local associations, and nomination and leadership contestants. The proposed amendments would also require greater disclosure of sources and amounts of financing, and increase public funding to the participants in election campaigns. As well, for the first time, the legislation would provide for electoral district associations and party nomination and leadership contestants to register with and report the contributions they have received and their expenses to the Chief Electoral Officer.

The government says these changes would enhance the fairness and transparency of the electoral system. "Canadians want access to full information about how much political parties and candidates collect, and whom they collect it from," stated Mr. Boudria, in a January 29, 2003, press release. "We are determined to eliminate even the perception that individual Canadians have less influence than corporations and unions in our electoral system."

Contributions

Corporations, unions and associations would be barred from making contributions to any registered party or leadership contestant. However, they would be allowed to contribute up to $1 000 in total per year to a party's candidates and nomination contestants, as well as its registered electoral district associations. Under the proposals in Bill C-24, an individual's contributions to a registered party and its registered electoral district associations, candidates and nomination contestants would be limited to $10 000 per year. Individuals would also be restricted to a maximum of $10 000 in donations to the leadership contestants of a party, during a leadership race. Currently, political contributions can be made by individuals, corporations, unions and other organizations, and there are no limits on the amounts.

Greater disclosure of sources and amounts

Transparency would be further enhanced by extending disclosure requirements to registered electoral district associations and leadership and nomination contestants. Currently, only candidates and registered political parties are required to disclose sources and amounts of contributions. All contributions of more than $200 and the name and address of the person or organization making the donations would have to be reported to the Chief Electoral Officer.

Nomination contestants would be required to disclose that information and the expenses they incurred within four months of the nomination contest. Leadership contestants would need to register with the Chief Electoral Officer. In each of the four weeks leading up to their leadership convention, they would be required to submit reports disclosing the amounts and sources of contributions they had already received. Finally, six months following the leadership convention, they would have to submit information about additional contributions received and expenses incurred.

Spending limits for nomination contests

Bill C-24 would introduce spending limits for nomination contestants. Their spending would be limited to half the amount a candidate in that district was allowed during the previous election period. At present, only candidates and registered political parties are subject to spending limits, which apply during elections.

Public financing

The provisions of the new bill would also increase the public funding available to registered political parties and make it easier for candidates to qualify for reimbursements of election expenses. A candidate would need 10 percent of the votes in the electoral district in order to qualify for reimbursement, instead of the current 15 percent. The reimbursement rate on election expenses for registered parties would rise from the current 22.5 percent to 50 percent, to make it equal to the rate for candidates. In addition, a registered party would receive an annual allowance of $1.50 per vote obtained by that party in the previous general election, provided it received either 2 percent of the valid votes cast nationally or 5 percent in the districts where it ran candidates. The allowance would be paid in quarterly instalments.

Meanwhile, to encourage contributions by individuals, Bill C-24 would also amend the *Income Tax Act* to double the amount of an individual's donation that is eligible for a 75 percent tax credit, from $200 to $400. The maximum tax credit for a political donation of $1 275 would rise to $650.

Federal Government Appeals Ruling on Third Parties

The federal government has asked Canada's highest court for permission to appeal a ruling that struck down limits on how much third parties can spend on advertising during a federal election. On February 14, the government requested the Supreme Court of Canada for leave to appeal a December 16, 2002, decision by the Alberta Court of Appeal. Third parties are individuals and groups other than candidates, registered political parties or their electoral district associations.

The limits were part of the new *Canada Elections Act* that came into effect shortly before the 2000 federal general election. Under that legislation, a third party could spend a maximum of $150 000 nationally on election advertising. Of this amount, it could spend no more than $3 000 to promote or oppose the election of any one candidate in any single electoral district. For by-elections, the maximum was $3 000 for each electoral district.

The Alberta court, in a two-to-one decision, ruled there was insufficient evidence to justify the legislation's restrictions in a free and democratic society. "The government has failed to establish that the sections address a pressing and substantial concern," wrote Madame Justice Marina Paperny. The court also overturned sections of the law requiring anyone who incurred more than $500 in election advertising expenses to register with Elections Canada.

The legislation was in effect for the 2000 general election, but not for the nine federal by-elections held in May and December 2002. On June 29, 2001, Mr. Justice Cairns of the Alberta Court of Queen's Bench ruled that sections 350 and 351 of the *Canada Elections Act,* respecting third parties' election advertising expenses, were no longer in force. In October 2000, the Chief Electoral Officer of Canada, Jean-Pierre Kingsley, had appeared as an intervenor before that court. After the lower court ruling, he announced that in order to achieve fair application of the Act across the country, the Alberta court decision would be applied nationally.

The constitutional challenge to third party limits was launched in June 2000 by the president of the National Citizens Coalition, Stephen Harper, before he became leader of the Canadian Alliance party.

Federal Prison Inmates Win Right to Vote

A Supreme Court of Canada decision allowing inmates of federal penitentiaries to vote in federal elections was quickly implemented by Elections Canada. The court decision was rendered on October 31, 2002, a day before the writs were issued for two federal by-elections. The Chief Electoral Officer of Canada, Jean-Pierre Kingsley, applied the Special Voting Rules for incarcerated electors to inmates in federal penitentiaries.

Canadians serving a term of less than two years in a correctional institution in Canada already had the right to vote. The Supreme Court, in a five-to-four ruling, struck down a section of the *Canada Elections Act* adopted in 1993 that barred prisoners serving terms of two years or more from voting. A series of lower court rulings had effectively allowed all inmates to vote in the 1993 and 1997 federal elections. The right for those serving two years or more, however, was revoked following a 1999 decision by the Federal Court of Appeal upholding the validity of the prohibition.

In the latest court decision, Chief Justice Beverly McLachlin wrote on behalf of the majority that "the right to vote is fundamental in our democracy and the rule of law and cannot be lightly set aside." The majority found that paragraph 4(*c*) of the *Canada Elections Act* violated the *Canadian Charter of Rights and Freedoms* and that this violation could not be justified under section 1 of the Charter. The federal government had argued that the voting ban was a legitimate punishment in addition to a prison term and that allowing inmates to vote would demean the electoral system. The challenge to the ban was first launched 18 years ago by paroled inmate Richard Sauvé, while he was serving a life term for murder.

An estimated 12 000 inmates are affected by the latest court ruling. The first opportunity for inmates to vote following the ruling was in the December 9, 2002, by-elections in Lac-Saint-Jean–Saguenay and Berthier–Montcalm, in Quebec.

To vote in a federal electoral event, incarcerated electors must register

by filling out an Application for Registration and Special Ballot, which is made available through each correctional institution. A staff member in the institution serves as a liaison officer and helps the electors register. For electoral purposes, an inmate's address of ordinary residence is not the institution in which he or she is serving, but rather the first possible option from the following list: the inmate's residence before being incarcerated, the residence of a spouse or a relative, the place where the elector was arrested or the last court where he or she was convicted and sentenced. Votes are counted and applied in the electoral district of the address an inmate has identified, rather than the electoral district that includes the institution.

Federal Representation 2004 Update

The results of more than one year of work by 10 independent federal electoral boundaries commissions are expected to be proclaimed in July 2003 or shortly thereafter. The process of readjusting electoral district boundaries, which is tied to the decennial census, has been ongoing since March 12, 2002, when the Chief Electoral Officer of Canada received the latest census return from the Chief Statistician of Canada.

Articles published in the May and October 2002 editions of *Electoral Insight* described the initial steps of the process. First, the Chief Electoral Officer used the census figures to calculate the number of seats allocated to each province, applying the formula and rules set out in sections 51 and 51A of the *Constitution Act, 1867*. Based on this formula, the House of Commons will increase by seven additional seats: three for Ontario, and two each for Alberta and British Columbia. In all other provinces, the number of seats remains the same. On April 16, 2002, under s. 13 of the *Electoral Boundaries Readjustment Act* (EBRA), 10 independent commissions were

assigned the task of readjusting the federal electoral boundaries of their respective provinces. This date marked the beginning of a one-year period during which the commissions must produce a final report [s. 20(1), EBRA].

The Chief Electoral Officer may, on request by a commission, extend the time for the completion of its report for up to six months [s. 20(2)]. None of the commissions requested an extension.

Between June and August 2002, the proposals of each commission were published in the *Canada Gazette* and at www.elections.ca, Federal Representation 2004. Across Canada, 115 public hearings were scheduled and approximately 2 090 representations were received by the commissions from individuals or groups who wished to comment on the proposals. This figure is more than triple the number of representations received in 1994 and more than double the number in 1987.

Photo: Will Fripp, Commission Secretary

At one of their public hearings, held in London, are the members of the Federal Electoral Boundaries Commission for Ontario, Dr. Janet Hiebert, the Honourable Mr. Justice D.H. Lissaman (Chairperson) and Dr. Andrew Sancton.

Although not all representations are heard at public hearings (approximately 950 were heard), each commission seriously considered all representations when completing its report. Some individuals preferred to forward a written representation to the commission and some requested that their representations be read at a public hearing.

When the Chief Electoral Officer receives a commission's report, he transmits it to the Speaker of the House of Commons, who then tables and refers the report to the Standing Committee on Procedure and House Affairs (a copy of the report is then posted on the Elections Canada Web site). While each report is in Committee, members of the House of Commons have another opportunity (in addition to the public hearings) to give their feedback about the proposed changes.

Ultimately, the final decision rests with the commission in each province.

As of March 28, 2003, the reports from the commissions for all provinces had been transmitted to the Speaker of the House of Commons for tabling before the Standing Committee on Procedure and House Affairs.

The House Committee began its work on redistribution in January 2003. As each report becomes available, members of the House of Commons have 30 calendar days to examine it and to file objections with the Committee. An objection must be signed by not less than 10 members of the House of Commons. The Committee then has 30 sitting days to consider the objections and return a report to the Speaker, together with a copy of the objections and of the minutes of its proceedings. This report may include background information on redistribution, general comments by the House Committee regarding the process and reports of the commissions, legislative provisions, a summary of the main concerns of members, objections filed and suggestions offered by members, and recommendations by the Committee.

The Speaker refers the report (as well as a copy of the objections and of the minutes of proceedings and evidence of the Committee) to the Chief Electoral Officer, who sends it to the commission for consideration. The commission then has 30 calendar days to consider and dispose of the objections and to provide a certified copy of a report in which it responds to the objections filed by members of the House of Commons. In considering these objections, the commission bears in mind the representations of the public hearings that preceded the report. This final report is returned to the Chief Electoral Officer for transmittal to the Speaker.

It is expected that the proclamation and publication of the representation order in the *Canada Gazette* will occur between July 21 and 30, 2003 (s. 26, EBRA). Provided the representation order is proclaimed during that period, it will be in force upon the first dissolution of Parliament that occurs no earlier than July 21, 2004 (s. 25, EBRA). The one-year intervening period gives members of the House of Commons, political parties and Elections Canada time to adjust to the new electoral map.

On-line Voter Registration Feasibility Study

Elections Canada is examining the feasibility of developing and implementing an on-line voter registration system. A study provided in November 2002 by CGI Information Systems and Management Consultants Inc. sought to identify the operational, legal, technical and privacy considerations associated with the development of an on-line voter registration system and to recommend a strategy for implementing such a system. It was based on consultations with internal and external stakeholders and an environmental scan of similar initiatives in Canada and around the world.

The feasibility study reflected Elections Canada's commitment to exploring new mechanisms that would facilitate the processes by which electors add, update or confirm their elector information between and during electoral events. It also followed up on a commitment made in the *Report of the Chief Electoral Officer of Canada on the 37th General Election Held on November 27, 2000* to study "the feasibility of secure on-line registration and verification" as a method of improving the National Register of Electors.

The Register is a database of Canadians who are qualified to vote. It contains basic information about each person – name, address, gender and date of birth. Canadians may choose whether or not to have their names listed in the Register. The information in the Register is used to produce the preliminary lists of electors for federal elections, by-elections and referendums. It may also be used to produce the preliminary lists of electors for provinces, territories, municipalities and school boards that have signed agreements with Elections Canada, as permitted by the *Canada Elections Act* and provincial and territorial statutes.

The study's chief finding was that implementing on-line voter registration is feasible for Elections Canada, assuming legal and user authentication issues can be resolved. For the short term, it recommended that Elections Canada provide downloadable registration forms on-line and enable electors to confirm on-line whether they are on the list of electors. For the longer term, it recommended that other registration transactions – being added to or removed from the list of electors or the Register and having information changed – be implemented incrementally. The report also recommended that partnerships be established with key agencies and initiatives such as Government On-Line to resolve common security, privacy and authentication issues and that Elections Canada align its service delivery channels to offer the same services to electors irrespective of the communication medium used (i.e. telephone, on-line, mail or in person).

Elections Canada surveys conducted after the November 2000 general election found support for on-line registration has been growing, with 70 percent of electors stating that they would like to register to vote on-line, if technology allows. Support increased when respondents were reassured about security concerns. In addition, stakeholders such as Aboriginal electors, special needs electors and the academic community indicated strong support for on-line voter registration.

Elections Canada is presently studying the report's recommendations. The availability of an on-line voter registration system complementing existing paper-based registration methods has the potential of providing improved service to electors, reducing the number of elector calls and transactions that occur during an electoral event, and improving the quality of data contained in the Register.

Additional information about Elections Canada's on-line voter registration strategy will be provided in future editions of *Electoral Insight*.

Elections Canada Assists Afghanistan in Preparing for Elections

Elections Canada is providing support and technical expertise to the United Nations Assistance Mission to Afghanistan (UNAMA) to help Afghanistan (Transitional Islamic State of Afghanistan) prepare for general elections that have been tentatively scheduled for June 2004. The assistance was announced on January 13 by the Chief Electoral Officer of Canada, Jean-Pierre Kingsley.

Under the general leadership of UNAMA, Elections Canada is providing strategic oversight for the Elections and Registration in Afghanistan (ERA) Project in co-operation with the International Foundation for Election Systems (IFES). IFES provides professional advice and technical assistance in promoting democracy, and serves as an information source on democratic development.

The Chief Electoral Officer appointed Mr. Jean-Jacques Blais as the Head of Mission for the ERA project. Mr. Blais is responsible for the overall conduct of the ERA project. Mr. Blais is a former federal minister and has been a member of seven election observation teams organized by the Commonwealth, the Organization of American States and the United Nations. He led the Commonwealth observation team in Cameroon. Mr. Blais was Deputy Chairman of the Provisional Election Commission for Bosnia Herzegovina and was invited by Yemen to review proposals on electoral reform.

Under the Bonn Agreement, UNAMA will support Afghanistan in conducting elections. The Canadian government, through the Canadian International Development Agency, has allocated $1.5 million in assistance for the ERA project. The project will focus on five components of an electoral system: institutions and systems of representation as established in the constitution and electoral law; election administration; voter registration and identity documents; political parties and campaigning; and media and monitoring.

Global Bill of Electoral Rights for People with Disabilities

Senior election administration officials, disability rights experts and activists, and parliamentarians from more than two dozen countries have drafted a global Bill of Electoral Rights for People with Disabilities. The joint declaration was officially launched at a September 2002 meeting in Sigtuna, Sweden. While not a legally binding document, it outlines the responsibility of countries to ensure that people with disabilities have the same rights as other citizens in participating in the electoral process. Among the participants from Elections Canada were the Chief Electoral Officer, Jean-Pierre Kingsley, Deputy Chief Electoral Officer and Chief Legal Counsel, Diane Davidson, and Director of Operations, Luc Dumont.

The bill resulted from the work of the International Institute for Democracy and Electoral Assistance (International IDEA) and the International Foundation for Election Systems to bring together concerned parties as equal partners to develop such an initiative.

"International agreements place a real, positive obligation on nation states to secure electoral rights for all citizens," stated Karen Fogg, Secretary-General of International IDEA.

An International IDEA press release states: "In many new democracies, election observers cite problems with infrastructure, in particular inadequate physical access to polling stations, as a key factor limiting disabled people's ability to participate in elections." It adds that

Canada and Sweden "are leading the way in ensuring that polling stations are made fully accessible to people with disabilities."

The Bill of Electoral Rights for People with Disabilities will serve as a practical advocacy tool for disability organizations and others working at the national and international levels to improve access to the electoral process for people with disabilities. The declaration includes the right to secret voting, full physical accessibility of polling stations and full and equal electoral rights for people with mental disabilities. It also guarantees that citizens with a physical, sensory, intellectual or psychiatric disability have the right and opportunity:

- to have access on general terms of equality to the conduct of public affairs, directly or through freely chosen representatives
- to participate on general terms of equality in the conduct of elections
- to register for, and to vote in genuine and periodic elections, referendums and plebiscites determined by universal and equal suffrage
- to vote by secret ballot
- to stand for election, to be elected and to exercise a mandate once elected

The September conference also approved Standards of Electoral Access for Citizens with Disabilities that provide further explanation of the bill (see www.electionaccess.org/rs/Discussion_Paper.htm).

Over the years, Canada's electoral process has undergone many changes to make it as accessible as possible to all electors. A very important improvement is the special ballot, which allows Canadians to vote by mail or in person at the office of their returning officer. Elections Canada has also modified buildings and offices used during federal elections to ensure that all revisal offices, polling stations and other premises have level access.

Additional services include mobile polling stations, and information in alternative formats, such as large print, Braille, audio-cassette and diskette.

British Columbia has new Chief Electoral Officer

Harry Neufeld was sworn in as British Columbia's new Chief Electoral Officer on November 7, 2002. A special committee established by the province's Legislative Assembly unanimously recommended his appointment.

Mr. Neufeld has 20 years of experience in electoral management, including positions with Elections BC, Elections Canada and the United Nations. He has also written articles on electoral management published by the International Institute for Democracy and Electoral Assistance (IDEA), the International Foundation for Election Systems and the United Nations Electoral Assistance Division. He is responsible for the administration of the province's *Election Act*, *Referendum Act* and *Recall and Initiative Act*.

Robert Patterson left the provincial Chief Electoral Officer's position on June 6, 2002, when his term expired. He had been involved for 30 years with administering the democratic process in British Columbia and had held the position of Chief Electoral Officer since 1990.

Photo: Elections BC

Harry Neufeld, Chief Electoral Officer of British Columbia

Consultations on Electoral System Reform

Law Commission of Canada conducts consultation

The Law Commission of Canada has been conducting public consultations about possible reform of Canada's electoral system, and intends to table its recommendations in Parliament. The Law Commission is an independent federal law reform agency that advises Parliament on how to improve and modernize Canada's laws.

To stimulate public discussion and debate, the Commission released a discussion paper, *Renewing Democracy: Debating Electoral Reform in Canada*. Nathalie Des Rosiers, President of the Commission, stated that there is a growing perception in Canada that our democratic institutions may no longer reflect the way in which Canadians engage and participate in political life. "Our current voting system seems unable to reflect the diversity of Canadian society and the variety of perspectives that characterize our country," added Des Rosiers when the discussion paper was released. "It is also problematic because a party can win a majority of the seats in Parliament or legislatures with only a minority of the vote."

Since the release of *Renewing Democracy* in October 2002, the Law Commission has held public consultations on the current voting system and its alternatives in Toronto, Ottawa, Montréal, Vancouver, Charlottetown and London, Ontario. Other consultations are being planned for other parts of the country. The Commission's electoral reform project is part of its strategic work on "governance relationships," which reflects the view that there is more to addressing concerns about democratic processes and institutions than seeking a way to change how Canadians vote.

More information about the Law Commission's electoral reform initiative and the discussion paper are available at www.lcc.gc.ca.

Prince Edward Island

The government of Prince Edward Island has initiated an independent examination of Prince Edward Island's electoral system. Its November 14, 2002, Speech from the Throne pledged to appoint a commission on electoral reform. On January 21, 2003, Premier Pat Binns announced that the Honourable Norman H. Carruthers, retired Chief Justice of the Supreme Court of Prince Edward Island, had accepted an appointment to head the Commission. "I have asked the Commissioner to engage Islanders on the important issue of electoral reform so that the *Election Act*, associated legislation and the manner in which our Legislative Assembly is selected continues to be relevant and effective," stated the Premier. An interim report is expected to be submitted in fall 2003, and a final report is to be completed in 2004.

Last April, Merrill H. Wigginton, the province's Chief Electoral Officer, submitted a report on proportional representation to the Speaker of the Legislative Assembly (see the October 2002 issue of *Electoral Insight)*. He recommended that "any binding decision for one system over another system should be left to a provincial referendum, preceded by an impartial campaign of public education about the issues involved in the choice."

British Columbia

The British Columbia government announced in the Speech from the Throne on February 11, 2003, that a motion would be introduced in the legislature to initiate the process of establishing a citizens' assembly on electoral reform. As a preparatory step, on September 20, 2002, the government appointed Gordon Gibson, a former leader of the B.C. Liberal Party, to develop recommendations on how the assembly should function and be structured. The citizens' assembly will assess various models for electing the MLAs, including preferential ballots, proportional representation and the province's current electoral system.

Mr. Gibson has submitted a paper titled *Designing the Citizen's Assembly*, which states: "In British Columbia we employ the traditional 'first past the post' (FPTP) system, which from time to time has yielded quite unusual results. We have seen situations where the party with the largest percentage of votes did not form government, or where government holds a disproportionate number of seats compared to the vote it received." He also notes that the need for any reforms is not yet clear because "many feel that the current system has served us reasonably well since the founding of British Columbia and there is no need for change." Mr. Gibson's paper is available at www.ag.gov.bc.ca/legislation/citizensassembly.

If the citizens' assembly recommends a change to the electoral system, that option will be presented in a referendum question at the next provincial election scheduled for May 17, 2005.

Quebec

On June 20, 2002, the Premier of Quebec, Mr. Bernard Landry, and the Minister responsible for the Reform of Democratic Institutions, Mr. Jean-Pierre Charbonneau, published a discussion paper titled *Citizen Empowerment*. The paper was designed to provide a basis for reflection by addressing 10 themes related to democratic institutions, ranging from modifying the current electoral system to the possible adoption of elements of a presidential system.

On September 5, 2002, Mr. Claude Béland was appointed to chair the Steering Committee of the Estates General on the Reform of Democratic Institutions. The Committee held consultations from October 15 to November 27, 2002. Almost 225 briefs were presented.

The Estates General was held on February 22 and 23, 2003, with almost 1 000 people participating. The participants discussed 10 issues relating to the themes in the discussion paper.

Some of the notable results of the Estates General were:

- 66 percent were in favour of the current first-past-the-post system incorporating elements of proportionality to reduce any distortions
- 53 percent supported changes to the current political system inspired by the rules of the traditional parliamentary system, while 47 percent favour changes inspired by the rules of the traditional presidential system
- 82 percent wanted elections to be held on set dates
- 58 percent were against lowering the voting age to 16
- 80 percent were in favour of a popular initiative process that would allow referendums on certain major issues
- 74 percent were in favour of incentives to assist the access of women to political institutions
- 65 percent were in favour of incentives to promote ethnocultural community members' access to political institutions
- 74 percent were against having a second legislative chamber with an equal number of representatives from each region

The Steering Committee submitted its report to the government in early March 2003. It can be viewed at www.pouvoircitoyen.com/en/estates/welcome.html.

Before the April 14 provincial election was called, another initiative was being conducted by the National Assembly's Committee on Institutions. Its objectives were to assess the current voting method and propose improvements to it. The Committee published a discussion paper in October 2002 titled *The Reform of the Voting System in Quebec*, which explores the various existing electoral systems and proposes avenues for reform of the voting method in the province.