



# 2017

## Recommendations for Legislative Change



**ELECTIONS  
NOVA SCOTIA**

40<sup>th</sup> Provincial General Election  
May 30, 2017

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# Summary

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On April 30<sup>th</sup>, 2017, at the request of Premier Stephen McNeil, the Lieutenant Governor, the Honourable J.J. Grant CMM, ONS, CD (Ret'd), dissolved the Legislative Assembly. An Order in Council directed the Chief Electoral Officer to issue the writs of election to all 51 electoral districts, ordering that the 40th Provincial General Election be held on Tuesday, May 30<sup>th</sup>, 2017.

At the time of dissolution in the House of Assembly, there were:

- 34 members of the Nova Scotia Liberal Party,
- 10 members of the Progressive Conservative Association of Nova Scotia,
- 5 members of the Nova Scotia New Democratic Party,
- one independent member and
- one vacancy (Dartmouth South MLA Marian Mancini resigned April 23, 2017, a week before the writ was issued.).

In the May 30<sup>th</sup>, 2017 Provincial General Election, 203 candidates stood for election: 51 from each of the Nova Scotia Liberal Party (NSLP), the Nova Scotia New Democratic Party (NSNDP), the Progressive Conservative Association of Nova Scotia (PC), 32 representing the Green Party of Nova Scotia (GPNS), 15 from the Atlantica Party (Atlantica) and 3 independent candidates.

Elected to the House of Assembly were 27 members of the NSLP, 17 of the PC and 7 of the NSNDP. No GPNS, Atlantica or independent candidate was elected.

The NSLP received 158,383 votes (39.5%) of the valid votes cast, while the PC received 143,354 (35.7%), the NSNDP received 86,299 (21.5%), the GPNS received 11,127 (2.8%), Atlantica received 1,632 (0.4%), and independent candidates 447 (.1%) of the valid votes cast.

By close of the polls on election day, there were 756,113 electors registered to vote. In total, 403,365 of those electors voted using one of the early voting opportunities or visiting a poll on election day. In total, 53.4% of eligible electors voted compared to 58.2% in 2013, 57.9% in 2009, and 59.9% in 2006.

A total of 2,112 polling stations were set up in 889 different locations across the province; 51 returning offices accepted early voters from three days of the writ was issued; 58 write-in ballot polls including 6 hospital polls; 74 advance polls; 19 community polls; 87 mobile polls serving electors in residential centres and 1,833 election day polling stations. More than 6,700 Nova Scotians were employed during the election period.

To enhance access to early voting, electors could vote at any returning office, advance poll or community poll offered throughout the province. The 40<sup>th</sup> Provincial General Election was the first election to have advance polls run for seven days instead of the two offered in the past; the first where electors could vote at any advance poll or community poll offered in the province as opposed to being assigned a single advance poll and the first where voters received a printed ballot that included their candidates' name and party affiliation once nominations closed. Community polls were used as an early voting opportunity in districts with a large geographic area to cut down travel time for electors. Other early voting opportunities included write-in-ballot polls, and write-in ballot teams who visited homes, hospitals and long-term care facilities by appointment so those who could not visit a polling location had the opportunity to vote.



# Introduction

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The Recommendations of the Chief Electoral Officer for Legislative Change are documented briefly in the following pages. Additional details about the 40th Provincial General Election and subsequent analysis is provided in *Volume I, Statement of Votes & Statistics*, and in *Volume II, Report on the Conduct of the May 30, 2017 Provincial General Election and Recommendations for Legislative Change*.

## Consultations with the Election Commission

The recommendations in this booklet are the result of input and analysis of election procedures and experience. All of the recommendations herein have been reviewed with the Election Commission, and each recommendation was discussed in detail with the members of the Commission and others before being brought forward for legislators' consideration. While the advice we receive from the Election Commission is valued, it should be clearly understood that deliberations with the members are intended to provide guidance to the Chief Electoral Officer. The recommendations contained in this or any report should not be taken as having the endorsement of all members of the Commission unless specifically mentioned that consensus has been reached.

## Consultations with the Caucuses of the Registered Parties

It is the responsibility of members of the Election Commission to brief their respective caucuses on their discussions of electoral process reform held in meetings with ENS. Elections Nova Scotia has not directly interacted with the members of registered parties' caucuses in recent years. Because this report contains a large number of administrative changes that would have a significant impact on how provincial elections are administered

in Nova Scotia, the Chief Electoral Officer is prepared to have ENS senior staff meet with and respond to questions raised by caucus members at the request of an accompanied by an Election Commission member.

## Abbreviations

ARO – assistant returning officer

Atlantica – Atlantica Party

CEO – Chief Electoral Officer

DPO – deputy presiding officer

DRO – deputy returning officers

EC – Election Commission

ENS – Elections Nova Scotia

ENS HQ – ENS Headquarters, 7037 Mumford Rd., Halifax

GPNS – Green Party of Nova Scotia

NSLP – Nova Scotia Liberal Party

NSNDP – Nova Scotia New Democratic Party

OOD – out-of-district

PC – Progressive Conservative Association of Nova Scotia

PGE – Provincial General Election

PO – Presiding Officer

RO – returning officer

VIC – Voter Information Card



# Recommendations for Legislative Change

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## Voting by Members of the Canadian Armed Forces

**Recommendation 1:** *The Chief Electoral Officer recommends the use of internet voting (or e-voting) for members of the Canadian Armed Forces stationed out of province.*

The members of the Election Commission are unanimous in their support of this recommendation.

When an election is called, the designates of the Canadian Armed Forces are contacted to start the process of providing applications and ballot kits. Too often the members of the Canadian Armed Forces posted overseas are challenged in exercising their democratic right to vote. The following are the more obvious challenges they face:

- Often members of the military are deployed overseas in places that are geographically difficult to get to (Navy on patrol, remote foreign postings and sensitive or secret military locations)
- While the processing of applications for Vote by Mail Kits by members of the Armed Forces are expedited by ENS staff, we have no control over the speed of the delivery of the ballot kits to the eligible electors nor the return delivery of the marked ballots to ENS before close of polls on election night (by mail, courier or by the Military Liaison Officer).

The Chief Electoral Officer firmly believes use of internet (or e-voting) expressly for members of the Canadian Military posted out of province should be considered for the following reasons:

- The current vote by mail process presents an indefensible barrier to their ability to exercise their right to vote because of circumstances beyond their personal control



- The opportunity for fraudulent voting is miniscule.
  - The number of applicants would be controlled and limited.
  - The actual voting process available to the eligible electors would be under the scrutiny of the Armed Forces and therefore the usual concern with unsupervised voting (not knowing who is marking the ballot) is overcome.
  - Any cyber-attack attempt for the limited number of participants would be immediately detected.
- e-voting by the military posted out of province is the only viable solution currently available to overcome the barriers their circumstances present.
- e-voting by the military posted out of province can be defended as a one-off solution without changing current policy positions on e-voting for the public at large (concerns about e-voting security and unsupervised voting).

## Ballot Count / Verification of Write-in Ballots

**Recommendation 2:** *The Chief Electoral Officer recommends removing the redundant step of verifying the elector's signature on their write-in ballot application by comparing it to that on their declaration envelope a second time just prior to the count of write-in ballots on election day.*

The members of the Election Commission are unanimous in their support of this recommendation.

When a write-in ballot coordinator receives a returned completed write-in ballot kit from an elector there are numerous steps taken to process the completed kit. One of these steps is to verify the elector's signature on their write-in ballot application to their signature their declaration envelope (the envelope the voter returns their marked ballot in). This verification process is part of the steps necessary to ensure that the contents of the declaration envelope belong to elector who applied for the ballot kit, and thus approves that their ballot may be counted at the close of polls on election day.

At the close of polls on election day the team counting the write-in ballot poll must begin the counting procedures by again verifying the elector's signature on the application matches that on the declaration envelope. This second round of verification is to be witnessed by either candidate, their assigned scrutineers, or at least two electors (see recommendation Witnesses to the Count).

This redundant requirement in the legislation delays the counting of votes, thus delaying the reporting of votes for these particular polls.

## Witnesses to the Count

**Recommendation 3:** *The Chief Electoral Officer recommends removing the requirement to have two witnesses present before starting the count of ballots for any poll.*

The members of the Election Commission are unanimous in their support of this recommendation.

ENS is mandated to ensure that the counting process remain as open and transparent as possible, while ensuring secrecy of the individual vote. In addition to having two election officers assigned for each ballot box there is a legislated requirement to have a minimum of two observers during the count. In instances where an observer leaves a count for whatever reason, the count must stop until they have been replaced.

Out-of-district ballots are cast by an elector in an early voting opportunity in a district in which they did not reside. During the count of out-of-district ballots at head office, several observers left forcing staff to reduce the number of teams counting to be used as observers. This slowed the counting of results with the last of the 51 out-of-district ballot boxes being reported at 1:50am of May 31<sup>st</sup>. A few other polls in the field encountered similar problems with the last in-district box (and final poll) being reported at 2:30am.

All in-district early and election day voting was counted at the locations where the polls took place or at the returning office. All five parties were invited to send scrutineers to observe the process and witness of the count at every location ballot counting occurred, including ENS headquarters for the counting of OOD ballots.

## Newspaper Advertising

**Recommendation 4:** *The Chief Electoral Officer recommends that the requirement to publish the notice of election and the grant of poll in a newspaper be rescinded.*

The members of the Election Commission are unanimous in their support of this recommendation.

There was a time when announcing an election through newspaper advertising was the most effective way to reach Nova Scotians. Elections Nova Scotia believes, as the trend of declining newspaper readership continues, there are more effective alternatives to informing electors once an election has been called. As an example, in Nova Scotia, the largest daily newspaper circulation is reported to currently be less than 100,000, far less than the 756,113 eligible electors. Electors can be informed of an election call through all forms of news media (online, TV, radio, newspaper) and social media. Direct mail to all households in the province and therefore all eligible electors currently at home during the writ period, has been proven to be a more effective way to inform Nova Scotians of an election than the legislatively required newspaper publication of the notice of election and grant of poll.

## Campaign Signs

**Recommendation 5:** *The Chief Electoral Officer recommends the removal of the prohibition on advertising within sixty metres of a voting location.*

The members of the Election Commission were unanimous in their support of this recommendation.

A significant number of the complaints filed with this office were about the location of election advertising signs, in particular, the proximity of the signs to a voting location. Election advertising is prohibited within 60 metres of the entrance to a building that houses a voting location. The intention of this legislation is presumably to keep electors arriving to vote from being exposed to last minute influences as they enter the voting location. Yet electors are constantly exposed to signs and information about candidates from many locations, media and other sources up to and including election day. The CEO believes that removing the 60 metre ban would have very little influence on electors' decisions and would simplify the administration of the election.

## Campaign Offices

**Recommendation 6:** *The Chief Electoral Officer recommends the removal of the prohibition on the location of the headquarters of a registered party, candidate or candidate's official agent within sixty metres of the returning office and retaining the requirement for the agreement of the Chief Electoral Officer for these headquarters co-habiting with a returning office within the same building.*

The members of the Election Commission are unanimous in their support of this recommendation.

During the writ period, there were three complaints filed about campaign headquarters being within 60 metres of the location of a returning office (Guysborough-Eastern Shore-Tracadie, Halifax Citadel-Sable Island, and Yarmouth). These reports were filed 8 to 14 days after the writ was issued and well after campaign headquarters and returning offices leases had been signed. In Halifax Citadel-Sable Island, the campaign headquarters was 59 metres from the returning office.

The *Elections Act* prohibits the headquarters of a registered party, candidate or candidate's official agent within 60 metres of the returning office without an agreement of the Chief Electoral Officer. The intention of this legislation is presumably to not unduly influence electors arriving to vote at the returning office and to maintain the appearance that the returning office is non-partisan and not influenced by a specific candidate or party.

This rule has always been a challenge to enforce for three reasons. Firstly, in many urban and rural communities, available office space of sufficient size is limited and therefore both returning officers and local candidates must compete to secure a suitable leased space. Secondly, for financial reasons, returning officers are not permitted to sign leases for space on speculation that a writ of election will be issued. Candidates are likewise constrained because they cannot claim lease costs for the time before the writ is issued as election expenses eligible for reimbursement. Thirdly, returning officers must have the office setup and open to the public within 72 hours of the issuance of the writ. The restriction outlined in federal *Elections Act* which prohibits advertising within or posted on the exterior surface of a voting location would be a more appropriate model to follow.

## Election Advertising by Elected Members of Other Jurisdictions

**Recommendation 7:** *The Chief Electoral Officer recommends that elected members of federal, provincial and territorial legislatures be prohibited from transferring money, services or property to a registered party, electoral district association or candidate during a provincial election.*

This recommendation does not have the unanimous support of the members of the Election Commission.

During the election, a federal member of parliament assisted a provincial candidate through his constituency office in the creation of a video endorsing the candidate. While the *Act* currently contemplates, and restricts the involvement of federal and provincial political parties, their candidates and their electoral district associations, it is silent on the involvement of both federal and other provinces elected members. Specifically, S. 214(5) of the *Act* states:

214(5) Those entities from whom a registered party, electoral district association or candidate shall not accept, as a transfer, services, money or property include

- (a) a federal political party;
- (b) a federal electoral district association;
- (c) a federal candidate;
- (d) a political party in another province of Canada;
- (e) an electoral district association in another province of Canada; and
- (f) a candidate in another province of Canada.

The Chief Electoral Officer believes the intent of the *Act* is to prevent undue influence in an election by outside agencies and political entities and to hold elected members of other jurisdictions to the same standard.

As a point of clarification, this change if enacted, would not impinge in any way, a provincial or federal member of parliament from endorsing or canvassing for a provincial candidate during a writ period.

## Candidate Withdrawals and Party Endorsements

**Recommendation 8:** *The Chief Electoral Officer recommends updating the legislation to add a process for candidates who withdraw and for parties to revoke their endorsement of a candidate after the close of nominations, specifically:*

- *Support a process for a registered party to withdraw its endorsement of a candidate through to the end of the Saturday immediately before election day (Day 4).*
- *If a party withdraws their endorsement, remove the per vote subsidy to be provided semi-annually to that party based on the votes cast for that candidate.*
- *Where possible, Elections Nova Scotia update the ballot to reflect that a party has withdrawn its endorsement of a candidate who is now running as an independent.*
  - *At most early voting opportunities (at the returning office, advance poll and community poll) ENS uses the "ballot on demand" process which can be adjusted before voting starts the next day.*
  - *If the change is before the end of the second Saturday before election day (Day 10), the election day ballots will be adjusted.*
- *Inform each voter in the electoral district of the change through a method prescribed by the CEO, for example, by posting at each location any updates to party endorsement or candidate withdrawals.*

The members of the Election Commission are unanimous in their support of this recommendation.

The current wording in the *Elections Act* can lead to confusion among the voting public when either a candidate withdraws from the election or a registered party rescinds its endorsement for a candidate. There were three such examples during the 40<sup>th</sup> PGE.

The *Act* envisions a candidate withdrawing or changing their nomination before close of nominations but not after.

There are also no provisions in the *Act* for ENS to withhold funding due to a candidate based on votes received and therefore the provincial funding tied to votes remain earmarked for the party.

There are no provisions in the *Act* to facilitate a candidate changing their status from being a candidate for a registered party to an independent candidate after the close of nominations. The funding based on votes received remain earmarked for the party.

To reduce voter confusion, Elections Nova Scotia issued a media release stating that the *Elections Act* does not permit changes after the close of nominations, and that all valid votes would be counted as cast.

Despite this, in two of three cases during the 40<sup>th</sup> PGE, significant voter confusion appeared to remain. In one case, most of the 957 votes for the candidate were cast in the 15 days remaining in the election after he withdrew. If his name and party affiliation was removed from the ballot, some of these voters may have chosen another candidate. Likewise, in another case, if the party affiliation of the candidate had been removed some of the voters may have voted for another candidate.

## Candidate Deposits

**Recommendation 9:** *The Chief Electoral Officer recommends that the candidate's nomination deposit requirement be removed from the legislation.*

The members of the Election Commission are unanimous in their support of this recommendation.

On October 25, 2017, the Court of Queen's Bench of Alberta rendered its decision in *Szuchewycz v. Canada (Attorney General)*, stating that the \$1,000 deposit requirement for prospective candidates in federal elections infringes on section 3 of the *Canadian Charter of Rights and Freedoms*, which provides that: "Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein."

The CEO believes that this decision applies to Nova Scotia and invalidates Section 65 of the *Elections Act* and, as a result, prospective candidates will no longer be required to deposit \$200 as part of their nomination requirements.

## List of Persons to be Selected as Election Officers

**Recommendation 10:** *The Chief Electoral Officer recommends that the requirement for the CEO to request lists of election officers from the parties that came first and second in the previous election be removed from the legislation.*

The members of the Election Commission are unanimous in their support of this recommendation.

Section 81 of the *Elections Act* requires the returning officer to reach out to registered parties (whose candidates finished first and second in the previous election) and request lists of individuals who may be selected to work in the polls during the election. The list is to be sent to the returning officer by the end of day 25, five days after the writ is issued.

This section of the *Act* poses challenges for returning officers in that:

- Many campaigns, ignore the returning officers request often citing difficulty in filling their own campaign team rosters.
- When lists are provided, they are often incomplete and include outdated contact information making it difficult for the returning office staff to contact people named.
- Most often, lists are received after the deadline. Numerous returning officers reported campaign teams provided their lists exceedingly late, several with less than seven days before election day. At this time, the returning officer may have filled some or all of the election officer positions and are under no obligation to use any of the names provided. The late provision of names may cause unrealized expectations for the individuals and may create conflict with campaigns.
- Lastly, the individuals on lists have often been promised a specific position at a specific location by a candidate's campaign staff, causing conflicts among the returning office staff, the campaign and the individual. These conflicts are most difficult to manage in the more rural districts where polling stations tend to be located further apart and those listed are reluctant to travel outside their immediate locale.



## Applications for a Recount

**Recommendation 11:** *The Chief Electoral Officer recommends that an applicant applying for a recount be required to provide justification, to the Justice that:*

- *a deputy returning officer has improperly counted any ballot or improperly rejected any ballot or made an incorrect statement of the number of ballots cast for any candidate; or*
- *the returning officer has improperly tabulated the votes; or*
- *where the Court has determined there may be other grounds to justify a recount.*

The members of the Election Commission are unanimous in their support of this recommendation.

Currently under the *Act*, after official addition, if the number of votes separating the first two candidates is fewer than 10 votes, the CEO must apply for a judicial recount. Given that a recount with a difference of more than 10 votes rarely succeeds, the CEO believes that any difference of 10 or more votes should require some justification to be presented to a Justice for a recount and that the Justice would have discretionary powers to accept or reject the application. The federal *Elections Act*, and the Ontario *Elections Act* provides two possible justifications for a recount:

- that a deputy returning officer has improperly counted any ballot or improperly rejected any ballot or made an incorrect statement of the number of ballots cast for any candidate, or
- that the returning officer has improperly tabulated the votes.

## Recount Costs

**Recommendation 12:** *The Chief Electoral Officer recommends that any applicant applying for a recount, where the vote difference is 25 votes or more between the candidate who received the most votes, and any other candidate, be required to pay a portion of the operational costs for the recount if the results of the recount does not result in a difference of less than 25 votes.*

This recommendation does not have the unanimous support of the members of the Election Commission.

The CEO believes that the awarding of costs should remain at the discretion of the Justice for recounts where the difference remains between 10 and 25 votes. The CEO also believes that the applicant should be required to pay a portion of the costs if the difference in votes that remains after a recount is greater than 25. The portion to be paid to be determined by the presiding Justice based on the arguments presented by the applicant, the other candidates and parties involved and the CEO.

## Modernizing the Voting Process

With the greater use of the “vote anywhere” process used at returning offices, advance polls and community polls, and the observed challenges in counting and reporting the vote on election night, greater use of technology within the voting process could provide efficiencies and streamline the process.

### Combining the role of DPO with PO

**Recommendation 13:** *The Chief Electoral Officer recommends combining the role of DPO with PO with one role that performs all required steps. This change will increase customer service to electors, and leverage the successes of the “bank-teller model”, by allowing electors to go to any available poll official to cast their vote.*

The members of the Election Commission are unanimous in their support of this recommendation.

Currently at early voting opportunities, the Deputy Presiding Officers (DPO) scans the elector’s Voter Information Card (VIC) and their elector record is retrieved, whereas traditionally the poll official would manually locate them on a paper copy of the list. Using an electronic List of Electors decreases the time required to locate an elector on the list and improves the integrity of the voter check-in and registration process.

In the current roles, the DPO’s role is to check-in electors and revise them if required, and the PO’s roll is to hand electors their ballot, mark them as voted and ensure that the ballots are placed in the secrecy envelope before being placed in the ballot box.

Based on the feedback and the review of the process, the CEO sees the opportunity to combine the two roles and provide better service to electors.

## Greater use of Technology in Early Voting

**Recommendation 14:** *The Chief Electoral Officer recommends using technology to support the voting process at early voting opportunities, i.e., for an elector to mark and print their ballot. On election night, using technology, the results may be reported immediately after the close of polls. The printed ballots are available for use in random audits to be conducted by ENS and reported publicly in Volume I Statement of Votes and Statistics and for any manner of recount.*

The members of the Election Commission are unanimous in their support of this recommendation.

Under this recommendation, electors who choose to vote at a returning office or an advance poll after the close of nominations would be processed by the presiding officer in the same manner as in the 2017 general election. Once verified as eligible, the vote would be directed by the presiding officer to a privacy screen where they would be instructed to choose the candidate of their choice from the list of their local candidates on the touch screen of a voting tablet. Once they verified their choice, a ballot would be printed on demand with their choice marked. The voter would verify their choice on the printed ballot, fold it and return it to the presiding officer who would insert it into an envelope and hand it back to the voter to insert into the ballot box. This slight change in the current voting methodology would have several positive impacts for all stakeholders including:

- The use of technology introduces a minimal change to the process the voter is accustomed to (their choice is marked for them on their printed paper ballot). The remainder of the process is unchanged from that experienced during the 2017 general election.
- A reduction in the error rate in marking of ballots. The voter's choice is marked for them unambiguously on their printed ballot. As well, the voter gets to verify their choice twice in the voting process (on screen before complete casting their vote and visually on the printed marked ballot) before they personally deposit it in the ballot box.
- On election night, the unofficial results would be tabulated based on the voters' choice registered in the voting tablet. In

this manner, the results of the 51 returning office continuous polls and all of the out-of-district votes province wide (about 30% of the total votes cast) would be posted within a half hour of the close of polls at 8:00pm on election night.

- The tabulation of these results would be 100 percent accurate and balanced against the number of voters and ballots used (not prone to the human error factor often encountered in manual counts).
- The paper ballots would be used in all manner of recounts (CEO recounts and judicial recounts).
- For accountability and transparency purposes, the paper ballots would be used in audits (random audits during a general election and automatic audits during by-elections) conducted by ENS and reported publicly in *Volume I Statement of Votes and Statistics*.
- The provision to registered parties of printed 'bingo sheets' would be replaced with the availability of a record of elector ID numbers for electors who have voted using this technology.

## Number of Electors per Polling Division

**Recommendation 15:** *The Chief Electoral Officer recommends that increases to the maximum number of electors assigned to each polling division be at the discretion of the Chief Electoral Officer with consideration given to travel time standards.*

The members of the Election Commission are unanimous in their support of this recommendation.

The maximum number of electors per polling division (450) was originally determined based on the number of electors that could be processed effectively by a Deputy Returning Officer and a Poll Clerk on election day. At that time, all processes used in the poll were manual and time consuming. The poll clerk had to find the voter's name on a paper list and once confirmed, strike their name off the list as voted using a pen and ruler. The DRO then had to write their name and address in a paper poll record before they were given a ballot.

Processing a voter today is much less manual with significantly less writing required by the poll officials. The time it takes for the average person to vote today has dropped appreciably (85% of all voters bring their VIC to the poll and can be processed in less than a minute).

In addition, there has been a significant decline in voter turnout from 75.9% in 1988 to 53.4% in 2017, and a steady growth in those choosing to vote early (from less than 5% in 1988 to 30% in 2017). It is anticipated that the trend to choose the convenience of voting before election day will continue, the number of electors who vote on election day has declined in every election over the past 20 years. In 2017, only 36.7% of registered electors chose to vote on election day.

The CEO expects these trends to continue. Additionally, the development of technologies used to process voters on election day coupled with the move to the bank teller model in locations with multiple polls, the number of voters that can be processed by election officials in a day has and will continue to grow. Many polling divisions, particularly in urban areas where travel times to the polling location are well within the accepted standard for travel time, could process significantly more electors on any given day with fewer staff. This change would lead to cost and operational efficiencies.

In less urban, rural and remote areas the province, the number of electors per poll would continue to be guided by current travel time standard restrictions and therefore are not expected to change appreciably.

## Final List of Electors

**Recommendation 16:** *The Chief Electoral Officer recommends that the legislation be amended to provide authority to the CEO to complete the Final List of Electors and for the list to include only electors who "are on" the list (as opposed to "have been on the list"). Drop the Final List of Electors returned by the returning officer with the return of material.*

The members of the Election Commission are unanimous in their support of this recommendation.

The *Act* states that the final list of electors is the revised list of electors prepared by the CEO and includes information whose names have been on or added to the official list of electors (the list used on election day).

In practice, this does not make sense in that electors' names may appear on more than one list. If an elector moves to a new poll division or to another electoral district, the elector's name will be added and according to the legislation, may not be removed from the list of their previous district.

In practice, the most accurate list of electors should only contain valid names of electors. If the CEO follows the *Act* as currently written, collectively the final lists of electors overstate the number of electors in the province by 24,868 (the total number of moves performed during the 2017 general election). The CEO believes that he should have the authority to remove or update elector's information in all circumstances to create the final list of electors with all duplicates removed.

One concern may be that the number of names on the Final List may decrease and the expense limits of the candidates are based on this number. These limits are protected as the legislation also states the expense limit is based on the higher of the number of electors on the preliminary list of electors or on the final list of electors.

Conversely, if the *Act* is not changed to correct this obvious overstatement, it could be argued that candidate expense limits are inflated by the number of known duplicates on the final list used to make that calculation and therefore, the reimbursement provided by ENS to candidates for their eligible expenses may also be inflated.

Lastly, increasing the number of names on the final list has the effect of decreasing the reported turn out. In 2017, adding nearly 25,000 names would have had the effect of decreasing turnout from 53.4% to 51.6%.



## Registration Requirement – Provision of Sex

**Recommendation 17:** *The Chief Electoral Officer recommends that the requirement that electors provide their “sex” when making applications for the Register or List of Electors be changed from mandatory to optional.*

This recommendation does not have the unanimous support of the members of the Election Commission.

The *Act* states that each application of an elector to be added, corrected or deleted from the register must include: legal name, residential address, mailing address, date of birth, proof of identity and residence, and sex.

Sex is interpreted as gender identity. When the applications were processed, it was found that about 12% did not include sex. In addition, about 5% of the names currently in the register do not have their sex indicated.

This information is maintained in the Register of Electors and has been used at times to match elector information from other sources when available. The information is not shown or used on any List of Electors or shared with the registered parties or candidates. It is shared with Elections Canada.

The governments of Nova Scotia and Canada have made changes in how gender identity is recorded and communicated in government documents such as driver’s licenses and passports.

## Declining to Vote

**Recommendation 18:** *The Chief Electoral Officer recommends that declined ballots be reported within official results. Further, the Chief Electoral Officer recommends that a voter’s intent to decline their ballot not be made public.*

The members of the Election Commission are unanimous in their support of this recommendation.

While the *Elections Act* currently allows voters to decline their vote in protest, it does not afford them the same secrecy as those who choose to register their protest by intentionally spoiling their

ballot during the voting process. The *Act* requires voters who wish to decline their ballot to return it to the poll official, and make their intentions known to the poll official. The poll official further compromises the elector's identity by crossing their name off the official list of electors and writing in beside their name the phrase "declined to vote".

In addition, a declined vote is not deemed to be a vote within the *Act* as it is treated as a cancelled ballot, and not considered a "valid vote" within official results. Conversely, a ballot that has been intentionally spoiled by a voter (e.g. marks all candidates, defaces their ballot) is counted as a rejected ballot, is considered as a valid vote cast and is reported in the official results.

Presently there are five jurisdictions within Canada who publicly report declined votes within their official tabulation: Alberta, Manitoba, Ontario, Yukon, and Northwest Territories.

## Voting Before the Close of Nominations

Based on the NL court decision, the Chief Electoral Officer makes two recommendations:

**Recommendations 19:** *The Chief Electoral Officer recommends that:*

- *voting commence at 4:00pm, two hours after nominations close at on Day 20 so that voters may be made fully aware of the all nominated candidates contesting the election in their home electoral district; and further,*
- *any elector who cannot attend a poll after nominations close on Day 20, apply and be pre-approved to be sent a write-in ballot kit on Day 19 along with a list of the candidates contesting the election in their district.*

This recommendation does not have the unanimous support of the members of the Election Commission.

In September 2017, the Newfoundland and Labrador Supreme Court released its decision on a challenge to the special ballot



provisions of the Newfoundland and Labrador *Elections Act*. Of particular relevance is s. 86(4) which states:

*86 (4) An application to vote by special ballot may be made to the office of the Chief Electoral Officer **beginning not more than 4 weeks before the issue of the writ of election** and ending at 6:00 p.m. on a day to be determined by the Chief Electoral Officer. [Emphasis added]*

Ultimately, the Court determined that the legislative scheme created by the special ballot provisions interfered with the right of special ballot voters to play a meaningful role in the electoral process and their related rights to be well informed of all their choices when casting their vote. It was additionally determined that the sections inappropriately interfered with the right of some candidates to meaningful participation in the election process. Elaborating on this, the following three points were noted:

1. Because of the time limitations, special ballot voters could be required to vote prior to knowing the full slate of candidates. The Court considered that special ballot voters who happened to be unable to cast their vote after nominations close when the list of candidates were known could be forced to guess who the official candidates were.
2. The provisions impacted differently on the right of persons affiliated with a registered party and those running unaffiliated to be qualified for membership in the House of Assembly. It was noted that the legislation permitted voters to vote by indicating either: the name of the candidate, the name of the candidate along with the political party, or the name of the political party alone. Therefore, unaffiliated candidates without a political party were disadvantaged.
3. The advantages provided by incumbency that are in place during the period in which special ballot voting may be taking place (such as the ability to be active in their district and utilize public funds for meals and travel allowances in their district), create an unfair disadvantage for citizens challenging the incumbent and restrict the right to meaningful participation in an election.

Despite this, Justice Baker wrote for the court that the practice of voting before nominations close can be reasonably defended and balanced with the charter right to vote after the writ of election is issued and before nominations close as is practiced in Nova Scotia, eight other provinces and in federal elections.

Nova Scotia has one of the earliest dates in the writ period for the close of nominations, currently 20 days before election day. Between the issuance of the writ and the close of nominations in the 40<sup>th</sup> general election, 3,378 people voted, averaging 66 voters per district or 0.8% of the total votes cast province-wide. Only 195 of these votes were cast using a write-in ballot poll meaning 94% of these people voted in person at a returning office.

The CEO believes that by far the majority if not all these early voters could reasonably exercise their right to vote after nominations close on Day 20. Any elector who could not be accommodated after this date, could still apply for and be approved to vote by write-in ballot in advance of the close of nominations. ENS would expedite the delivery of their ballot kit once nominations close.

## Piloting Technology in Election Day Polls

**Recommendation 20:** *The Chief Electoral Officer recommends that pilot projects be permitted in by-elections after presenting the details of said pilot project to the Election Commission, considering their feedback and receiving unanimous support of the Commission.*

The members of the Election Commission are unanimous in their support of this recommendation.

**Recommendation 21:** *The Chief Electoral Officer recommends that the e-poll book solution be piloted in a by-election before use in a general election.*

The members of the Election Commission are unanimous in their support of this recommendation.

Based on the directive of the Chief Electoral Officer developed in 2015-2016, a pilot project to use technology to register and

strike off electors at election-day polls during the 40<sup>th</sup> PGE was planned to be implemented as early as fall 2017. As the 40<sup>th</sup> PGE was called before this date, this pilot project could not be delivered. Elections Ontario plans to introduce the use of the same technology in election day polls for the first time in Ontario's 42<sup>nd</sup> PGE scheduled for June 9th, 2018. The CEO expects that the use of "e-poll" books for registration of electors will improve the integrity of the registration process by reducing the human error and improve efficiency at the polls.

The best opportunity to prove that these changes improve the election processes, improve the integrity of the election and define the costs of this or any pilot project is by testing these in a by-election. The lessons learned from the Ontario experience should benefit Elections Nova Scotia's plans for this pilot project. The *Act* (see Section 357) states that in order to use an alternative procedure, equipment or technology in a by-election or in up to one third of the electoral districts in a general election, a directive (or resolution) supported by majority vote in the House of Assembly is required. The directive may be initiated on the advice of the Election Commission or on the CEO's own initiative and must be passed at least 60 days before the election to which it applies.

The directive process can be challenging in getting the item on the agenda at the appropriate time and limits the opportunities of piloting new procedures and technology. With the advent of similar changes across the nation and new technologies coming available, the CEO recommends more flexibility in his ability to pilot procedures, equipment or technology. The CEO recommends that 30 days after presenting to the members of the Election Commission and receiving unanimous support of the Commission, that projects piloting an alternative procedure, equipment or technology be permitted.

## Interpretation Clarification: Clear Days

**Recommendation 22:** *The Chief Electoral Officer recommends that the definition of "day" in the Elections Act and the Controverted Elections Act be defined as calendar days and not clear days.*

The members of the Election Commission are unanimous in their support of this recommendation.

Under the *Controverted Elections Act*, a petitioner has 21 days from the return of the writ in which to file. If no petition has been filed after that time, the prothonotary of the Supreme Court certifies that no petition has been filed or that the petition has been presented and finally disposed of.

To enact this legislation, the CEO sends each prothonotary a letter and a form to facilitate their response. On review of the *Controverted Elections Act*, a conflict in the definition of “day” was found in the legislation. In the *Elections Act*, the term “day” has been traditionally interpreted to mean any day of the calendar. This interpretation has important ramifications to the 30-day election writ period and the key dates with respect to the writ period and the declaration of the official results publicly.

Based on feedback from the courts and the prothonotaries, days has a different interpretation under the *Controverted Elections Act*. Days has been interpreted to mean “clear days”, that is, non-business days, or days that the court may sit.

If the interpretation were that the term means “clear days” and the election calendar stops on non-business days, there would be a substantial impact on election planning and the execution of many sections of both the *Act* and the *Controverted Elections Act*.

## Notice of Non-compliance and FOIPOP

**Recommendation 23:** *The Chief Electoral Officer recommends that section 299 of the Elections Act be made exempt by Regulation from Freedom of Information requests. Alternatively, that section 299 be amended to remove the current restriction on publishing.*

This recommendation does not have the unanimous support of the members of the Election Commission.

The Chief Electoral Officer has a range of options to respond to breaches of the *Elections Act* in order to take into account the nature and seriousness of the breach and to ensure fairness of the electoral process and the public interest. In recognition of the powers of the Chief Electoral Officer, the *Act* gives the CEO powers, privileges and immunities of a commissioner under the *Public Inquires Act*.

Once an investigation is complete, the CEO may refer the matter to the Director of Public Prosecutions, may enter into a compliance agreement, may issue a notice of non-compliance, or may dismiss the matter. The most serious matters are sent to the Director of Public Prosecutions who chooses whether to prosecute.

Less serious matters may lead to a compliance agreement where the contracting party accepts responsibility for the breach, and may agree to terms and conditions the CEO considers necessary. Once the compliance agreement has been signed, the CEO publishes a notice of the compliance agreement summarizing the breach of the *Act*.

For less serious breaches of the *Act*, where the CEO believes a person has committed an act or omission that would constitute an offence under the *Act*, a notice of non-compliance of the *Act* may be issued. In practice, these have been offences that are not likely to reoccur and where the person may not have been aware of the details in the *Act*. An example has been where a candidate's official agent has accepted contributions to a campaign before the candidate was officially nominated.

While general information regarding compliance agreements are subject to Freedom of Information requests, section 299 of the *Act* explicitly restricts publishing by any means that the CEO has issued a notice of non-compliance. Currently, the *Elections Act* is not specifically named by regulation associated with the *Freedom of Information and the Protection of Privacy Act* to be exempt. This oversight needs to be addressed.

