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1. Election Administrators

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Managing Elections in Canada**
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& Thierry Giasson*

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Election Administrators

Andrea Lawlor and Marc Mayrand

Whereas most Canadians tend to focus on parties and candidates during an election campaign, the work performed by an equally important set of actors – election administrators – is often overlooked. Election administrators are responsible for the procedural aspects of an election: implementing election laws, ensuring that campaign advertising and spending comply with the laws set out by Parliament, and most importantly facilitating the voting process for citizens. This chapter covers the work of Canada’s election administrators – Elections Canada and the chief electoral officer.

Alors que la plupart des Canadiens se concentrent d’avantage sur les partis et les candidats pendant une campagne électorale, le travail effectué par un groupe tout aussi important d’acteurs – les administrateurs d’élection – est souvent négligé. Les administrateurs d’élection sont responsables des aspects procéduraux et logistiques d’une élection, c’est-à-dire de mettre en application les lois électorales, veiller à ce que la publicité et les dépenses électorales soient conformes aux lois établies par le Parlement et, surtout, faciliter le processus électoral pour les citoyens. Ce chapitre traite du travail des administrateurs d’élection du Canada, à savoir le Directeur général des élections et Élections Canada.

IN CANADA, THE task of administering federal elections is in the hands of Elections Canada. At the helm is the appointed chief electoral officer (CEO). The CEO is an officer of Parliament – politically independent and at arm’s length from the government of the day. Broadly speaking, the job of Elections Canada and the CEO is to administer elections and referendums, implementing and ensuring compliance with election laws handed down by Parliament.

Elections Canada is an administrative agency entirely staffed by non-partisan bureaucrats. They normally include five hundred full-time members of the civil service: lawyers, policy analysts, auditors, and sundry administrative and technical staff. Their role includes facilitating the registration of parties, candidates, and third parties; conducting by-elections; and holding the rare referendum. They coordinate the monitoring and auditing of party/candidate spending and donations and, broadly speaking, ensure that campaign actors comply with the Canada Elections Act and other relevant election laws. There is also the considerable work of ensuring that the machinery of an election – everything from balloting to deploying the materials required so that millions of Canadians can vote – reaches each of Canada’s 338 ridings without incident. During the campaign, this involves overseeing more than 235,000 temporary election workers, including polling clerks and returning officers.

At the helm is the chief electoral officer, appointed through a resolution of the House of Commons. The CEO advises Parliament, through its committees, to determine fair and enforceable rules for elections. The CEO has some discretion granted by Parliament to deal with emergencies that could affect the running of an election in any given constituency. Ultimately, though, the CEO defers to Parliament in the design of election legislation. Although not reporting directly to a single minister, the CEO is like a deputy minister – the most senior unelected official in the “department” – and as such it is the CEO’s job to submit reports on matters related to elections to the Speaker of the House and to appear before committees that deal with electoral matters.¹ CEOs are typically pulled from the ranks of the civil service and have a history of public

administration and management experience within the government. To preserve their neutrality and independence, they are not permitted to vote in federal elections, and as of 2014 they are limited to serving a ten-year, non-renewable term.²

The authority and limits of Elections Canada and the CEO are set out in the Canada Elections Act. The act was created in 2000, updating and consolidating pre-existing election laws as well as integrating some recommendations from the 1991 Lortie Commission. It is routinely updated by Parliament to address changes to the campaign environment and to reflect the government's preferences for how elections should be run.³ Subsequent electoral legislation – such as the 2006 Federal Accountability Act and the 2014 Fair Elections Act, the 2014 Fair Elections Act, and the 2018 Elections Modernization Act – instituted changes to the election regime, some of which were lasting. These changes included alterations to campaign finance laws, voter identification rules, and responsibilities and permitted activities of the CEO. As a result, Elections Canada has seen its duties expand and contract depending on the legislative preferences of the government. The very act of governments legislating how elections should be run but “outsourcing” some implementation authority to Elections Canada is inherently political and positions the elections administrator as a powerful actor both within and outside the campaign period. Consequently, it could be argued that the emphasis on continually enhancing regulations has built an administrative apparatus that is its own centre of power in elections.

The job of the CEO and Elections Canada could be considered to fall into two distinct periods: the election campaign and the inter-election period. In practice, however, these periods are never truly distinct. Nonetheless, during the inter-election period, Elections Canada and the office of the CEO perform routine electoral administrative duties. They maintain the National Register of Electors; administer the Canada Elections Act and other relevant pieces of electoral legislation; promote the act of voting by ensuring that both polls and information about the vote are accessible;

and provide legal, technical, and administrative support to the commissions responsible for adjusting electoral boundaries. Elections Canada also has some limited duties regarding candidate nominations and leadership contests, such as registering the contests and monitoring compliance with election financial laws. At times, its office orchestrates educational outreach campaigns to improve public knowledge about elections.

Much of the agency's time during the inter-election period is spent monitoring and auditing financial contributions to parties to verify that they are being made in accordance with the Canada Elections Act. Elections Canada dedicates a considerable amount of time to conducting audits to ensure that campaign actors are compliant with election finance laws. Political parties and riding associations submit periodic financial reports, whereas candidates and third parties only submit a report following the election. Although election administrators do not pursue campaign finance violations – the commissioner of elections investigates any violations of the Canada Elections Act, and the RCMP investigate possible violations of the Criminal Code – they do follow up on concerns reported by citizens.

From time to time, Elections Canada might also issue public statements about the application of election laws to matters such as campaign or inter-election spending or advertising. Although such pronouncements might appear to be routine and administrative, at times their effects can be perceived to be controversial since any exercise of rules can have positive or negative implications for specific sets of campaign actors. In 2019, for example, the CEO had to issue a statement assuring environmental groups that they would not find themselves in violation of the Elections Act by publishing calls to fight climate change, despite that message being contrary to the position taken by the leader of the People's Party, Maxime Bernier.⁴ Here it became essential for Elections Canada to clarify that advocacy groups were able to speak freely about issues that have political dimensions without being perceived to be campaigning.

In recent years, Elections Canada and the office of the CEO have shifted to meet the challenges of the new electoral environment. Their mandate has evolved to include enhancing physical accessibility to the polls, providing election data through their online portal, conducting research on voting and campaign innovations (e.g., online voting, digital advertising), and increasing general accessibility to populations such as youth, Indigenous communities, new Canadians, and individuals with disabilities who traditionally have voted in low numbers.⁵ Furthermore, with the turn toward a digital style of electoral outreach, Elections Canada, under the guidance of the CEO, has worked with Parliament to monitor the digital transmission of information as it relates to the procedures for voting by electoral actors and to counter cyberthreats to our electoral system.

Duties in an Election Campaign

The careful stages of planning and laying the groundwork for a free and fair election get pushed into overdrive when the campaign writ is dropped. Although the regularity of election dates has been enshrined in Canadian law since the enactment of Bill C-16, An Act to Amend the Canada Elections Act, in 2007, the parliamentary system still gives the prime minister some ability to set the precise timing of an election. In a minority Parliament, a failed confidence vote can quickly send the country back to the polls. The independence of the CEO from Parliament means that individual does not have any advance knowledge of election timing. Thus, Elections Canada and the CEO have to be agile, responding to an election call at a moment's notice.

During this time, the CEO operates mostly behind the scenes. The constituency-level returning officers carry out most election day duties, and Elections Canada staff deal with legal questions as well as public and media inquiries.⁶ Since a CEO's principal relationship is with Parliament, the role as adviser is engaged only when questions about applying election laws arise during the election.

Arguably, the measure of the agency's success is how little attention is paid to the CEO and team during the campaigns, for it signals few disruptions to the election. Yet challenges arise all the time. They can be minor (e.g., a misprint on a voter card) or major (e.g., misinformation about voting times and locations). Problems can arise from election laws themselves, such as how to implement a law coming into effect for the first time, or from an issue brought up by a member of the public or a political party. For example, just prior to the 2019 election campaign, Chief Electoral Officer Stéphane Perrault had to address requests and a Federal Court directive to review changing the election date because of a conflict with the Jewish holiday of Shemini Atzeret, which began the day before and ended the day after the election. This was a rare occasion of a CEO having to intervene publicly in some capacity during the campaign. No change was made to the original election date.

Part of the role of Elections Canada and the CEO is to lead critical planning exercises to handle any incident or disruption at the polls. This can include poor weather, challenges with infrastructure, security threats, or barriers to access. During the campaign, Elections Canada trains and deploys small teams to handle incidents or inefficiencies in the system. Back in Ottawa, members of these teams monitor risks and create contingency plans to ensure that the election proceeds without disruption. Although the number of incidents arising at the polls has been small historically, threats to personal security, such as concerns following the attacks on Parliament in 2015, are taken seriously; consequently, the CEO is in contact with relevant law enforcement bodies as needed.

Of course, most concerns that arise during the campaign are merely procedural. As election day approaches, Elections Canada must prepare all special ballots that permit individuals to vote remotely. The organization performs a risk assessment of each riding to determine where it might expect a higher than average number of administrative issues. They can include expectations of a high number of voters without identification, voters who are highly mobile (e.g., young people, students, those with no fixed

address), or ineligible voters. To address these issues, the CEO’s staff are in constant communication with the returning officers in the ridings, particularly on election day. At Elections Canada’s headquarters in Gatineau, rapid intervention teams are ready to be deployed to address situations such as staff absences or inadequate training, errors in poll locations, misdirected electors, or disputes between campaigns regarding the counting of ballots and the eligibility of voters.

Recently, Elections Canada has had to keep up with the changing landscape of campaign ads. It used to be the case that money was the metric to evaluate how much access a party has to the electorate. Parliament put laws in place to ensure that limits on spending would create the opportunity for an even playing field when it comes to election advertising.⁷ Historically, the CEO’s appointed broadcasting arbitrator was able to ensure that parties had equal access to purchase ad time. Today televised advertising is only a small part of the campaign backdrop. Partisan advertising has evolved from traditional means (e.g., billboards, radio and print ads) to modern approaches (e.g., social media, targeted online advertising). Modern-day campaign teams are adept at using digital media, automated calling, and other automated and resource-efficient means to tailor messages to specific populations.⁸ Therefore, CEOs have had to work with Parliament to consider whether, how, and to what extent to regulate new technologies, many of which do not always rely on big-ticket spending and therefore cannot be easily evaluated according to the old “money as speech” criterion.

Similarly, CEOs and their office have acknowledged new challenges to their ability to orchestrate democratically fair and open elections. Since the mid-2010s, campaigns have increasingly become targets for actors who seek to disrupt the outcomes of elections either directly or indirectly. Election administrators must be aware of threats coming from anonymous sources insofar as they relate to misdirecting voters about dates, times, and locations of polls. They must cultivate the technical expertise to counter risks, including hacking, tampering with information, or misdirecting the public

on the procedures of elections. However, to maintain its non-partisan nature, Elections Canada has a limited role to play in the mis/disinformation wars waged across Western democracies. The Canadian government and Elections Canada have signalled that they are alert to the possibility of undue campaign influence.⁹ They are therefore putting in place measures to fight off attacks to Elections Canada's internal systems and databases. This preparation includes working with Canada's Communications Security Establishment (CSE), the organization responsible for monitoring the threat of cyberespionage and security and intelligence threats to elections. It incorporates the RCMP, Canadian Security Intelligence Service (CSIS), and Global Affairs Canada.¹⁰

Overcoming Obstacles

Recent challenges faced by Elections Canada have been unprecedented but not entirely unforeseen. The rise in threats to the integrity of democratic elections has been noted worldwide, stemming from the ongoing debate about the extent to which foreign entities meddled in the 2016 US presidential election. It is not part of Elections Canada's mandate to follow up on partisan or policy disinformation. However, the elections administrator can refer any detected threat to the integrity of the campaign to a new Critical Election Incident Public Protocol, composed of five senior-level, non-political government officials. Leading up to the 2019 election campaign, the CEO oversaw an increase in Elections Canada's resources dedicated to countering cyberattacks and commented that the organization was "pretty confident" that it was prepared for the threat of cyberattacks disrupting either the flow of legitimate information or even the election infrastructure itself.¹¹ Greater staffing resources were allocated to monitor social and digital media as well as its own systems to prevent the distribution of inaccurate information about dates and locations of polls and voter eligibility. The threat of attack to the integrity of the system is partly why the

government and Elections Canada have taken such a cautious approach when considering the introduction of online voting.

Efforts to combat poor information were not made solely by the government. In 2018, it had called on large social media companies to take greater care in the dissemination of information. During the campaign, Twitter provided additional checks on the distribution of disinformation and monitoring of potentially volatile political discourse that could lead to misinformation or, worse, violence.¹² Twitter worked with Elections Canada's lists of third parties to verify that ads placed through Twitter conformed to the legislation that governs them.

Electoral finance posed some new but undoubtedly timeless challenges to the election regime. Third-party advertisers were scrutinized carefully by the media as concerns about anonymous funding grew. In the final weeks of the campaign, the media highlighted a possible loophole in third-party spending laws. A conservative think tank became the focus of media inquiry as routine financial disclosure brought to light donations of over \$300,000 to various third-party groups.¹³ Although the law requires that third parties disclose their sources of funding, there is no requirement that donors to third parties do the same. Thus, the think tank was compliant with the letter of the law, but it brought up concerns that legal drafters might not have anticipated. Elections Canada responded that the law does not prevent such activity and therefore did not act on it. These sorts of challenges often come up only once the policy is in place and electoral actors can test its limits. Elections Canada might be called on to advise Parliament on the unintended consequences of election laws as they played out in the 2019 campaign; however, it is not in its purview to initiate changes to the law.

Finally, we could consider the extent of regulation in Canadian elections to provide its own set of challenges. In contrast to some of our international counterparts, Canadian elections might appear to be heavily regulated, particularly in regard to issues of free

speech. In the past, Parliament, civil society, and the Supreme Court of Canada have often been at odds on issues of campaign advertising, the transmission of election results, and third-party spending. These issues routinely engage both advocates and critics of the Charter of Rights and Freedoms, thereby posing challenges for Elections Canada, whose role it is to carry out regulations to remain out of the fray of explicitly political and partisan questions. A grey area exists with respect to advocacy groups' participation in public discourse. As the aforementioned ruling on public discourse about climate change illustrates, the exercise of fundamental freedoms can create friction with the regulatory activities that Elections Canada carries out.

As a further example, at the time of writing, there is considerable debate about changes made to section 91 of the Canada Elections Act, which states that publishing false statements about party leaders, candidates, and other individuals associated with political parties "with the intention of affecting the results of an election" is an offence.¹⁴ Despite a previous amendment to section 91 that removed the notion that misinformation has to be transmitted "knowingly," the commissioner of Canada Elections noted that this section is essentially unenforceable. The combination of widely available digital technologies and platforms on which to express political views further introduces substantial complexity into what constitutes an offence under this section and which offences are to be prosecuted. Although monitoring such activities might not be directly part of the mandate of Elections Canada, inevitably it is alert to legislative changes that might contradict Charter rights or other laws and how that might affect its work in administering election laws. That said, the CEO cannot refuse to apply a provision of the act simply because it *might* be found to be unconstitutional. Until a court rules on the validity of the provision or Parliament changes the act, the CEO must apply the legislation as written. It is unlikely that Elections Canada will take a position on this matter, leaving it instead to the courts and Parliament to react to the issue. However, each decision made by Parliament to restrict or expand the authority of

the elections administrator to limit speech will have inevitable implications for the freedom of parties, candidates, and perhaps even citizens to participate in elections.

The future of elections will inevitably engage serious questions for the public, the government, and the academic community about how the use of technology in campaigning and advertising affects voter deliberations and election outcomes, in addition to core matters of personal freedom. We suggest that these developments have put and will continue to put election administrators in an important but sometimes controversial spot. Election administrators are often placed in the background of conversations about elections. However, considering the changing campaign environment and the likelihood that political actors will use it in order to advocate for or against a stronger regulatory hand, we should continue to consider whether government policies pressure the administrator to take on greater capacity. In the absence of government directives on matters related to campaigns, the administrator might face challenges in upholding the election regime. For now, we can observe that Elections Canada is a long-standing institution with decades spent cultivating administrative expertise. Such institutions tend to be resilient even in the face of a change in government. Thus, despite governments' changing preferences, expect Elections Canada and the chief electoral officer to remain influential in the evolution of our electoral democracy.

Notes

¹ Massicotte, “The Chief Electoral Officer of Canada.”

² Kingsley, “The Administration of Canada’s Independent, Non-Partisan Approach.”

³ Elections Canada, *A History of the Vote in Canada*.

⁴ Zimonjic, “Environmental Groups Can Still Talk Climate Change during Election.”

⁵ Ladner and McCrossan, “The Electoral Participation of Aboriginal People.”

⁶ Massicotte, “The Chief Electoral Officer of Canada.”

- ⁷ See Crandall and Lawlor, “Third Party Election Spending in Canada and the United Kingdom.”
- ⁸ See Pal, “Canadian Election Administration on Trial.”
- ⁹ See Government of Canada, “New Initiatives to Safeguard the 2019 Federal Election.”
- ¹⁰ Centre for International Governance Innovation, “Election Risk Monitor Canada,” 12.
- ¹¹ Bryden, “Chief Electoral Officer Worries Parties Are Weak Link in Cybersecurity Chain.”
- ¹² Paas-Lang, “Twitter Says Canadian Election So Far Free of Major Manipulation Attempts.”
- ¹³ Keller and Cryderman, “Manning Centre Won’t Disclose Source of Donations to Third Parties for Attack Ads on Liberals.”
- ¹⁴ Canada Elections Act, section 91.

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