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# Canada's Chief Electoral Officer: Responsibilities and Independence

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by John C. Courtney

*There are two significant dates in the history of Canadian elections. The first was 1874 when changes ensuring the secret ballot and simultaneous voting were approved. The second was the creation of the Office of the Chief Electoral Officer in 1920. Though the importance of the 1874 changes cannot be minimized, this paper focuses exclusively on the Chief Electoral Officer as an Officer of Parliament. With the announcement in late December 2006 of the resignation of Jean-Pierre Kingsley as Canada's Chief Electoral Officer, this brief summary of the office is designed as a simple "reminder" for the new Chief Electoral Officer of how the office has evolved over the past eight decades and its vital importance to Canada's electoral system.*

Now commonly referred to as Elections Canada, the Office of the Chief Electoral Officer has imparted a legitimacy and a credibility to Canada's electoral process that is unmatched. This is explained largely by the fact that the position got off to a very good start in 1920 and that the statute initially establishing the Office was both well-designed and well-executed. All provinces and territories have fashioned a reasonably close institutional facsimile to that of Elections Canada, and established and emerging democracies alike have repeatedly demonstrated that they value the advice and assistance of our election Officials in establishing their own election machinery or in monitoring their elections.

This article focuses on five aspects of the Office of the Chief Electoral Officer: the Office's origins, independence, responsibilities, responsiveness, and the impact on the Office and the *Canada Elections Act* of the *Canadian Charter of Rights and Freedoms*.

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## Origins

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The creation of the Office of the Chief Electoral Officer can best be understood in the context of the events of 1917 and the immediate postwar years. The Unionist Government brazenly manipulated the electoral process for its own partisan purposes in the midst of the First World War. The *War-time Elections Act* and the *Military Voters Act* of 1917 proved to be the most controversial pieces of electoral legislation in Canadian history. The acts enfranchised for that election only the female relatives of men serving with the Canadian or British armed forces as well as all servicemen. At the same time they disenfranchised conscientious objectors and British subjects naturalized after 1902 who were born in an enemy country or who habitually spoke an enemy language. It was a low point in Canadian electoral history. In 1920, with another election pending, the *status quo* was clearly no longer acceptable.

By 1920 there were other forces as well that were laying the groundwork for substantial changes in the way elections would be run. Various provincial Farmer's parties and the Progressives gave strong support to reforms aimed at making the electoral system fairer and more open. Women's groups successfully pressed for female enfranchisement and they did so openly claiming that if

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women had the vote that would do much to ensure that the political system would be cleaned up. In such a context the establishment of an independent, non-partisan Officer charged with overseeing the administration of elections made a good deal of sense. It was clear that by 1920 public opinion was prepared for substantial changes in the way elections would be managed. Additionally, with the electorate effectively doubling in size because women were about to enter the electorate, the job of organizing elections would suddenly become a much larger and more complicated undertaking than it had ever been in the past.

Thus, to guarantee an electoral organization that would be distinguished by its managerial competence, administrative fairness, and institutional non-partisanship, the Office of the Chief Electoral Officer was established nearly a century ago.

### Independence

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From the outset the General Electoral Officer (the first name given to the Chief Electoral Officer) was to be, in the words of the minister responsible for introducing the legislation, “in every way a permanent and independent officer.”<sup>1</sup> As an Officer of Parliament, the Chief Electoral Officer would be selected by and report directly to the House of Commons through the Speaker. Every Chief Electoral Officer since 1920 (amazingly given that eight-and-a-half decade have passed, only five individuals have held the position) has been appointed with unanimous consent.<sup>2</sup> Significantly no Minister of the Crown would be a party to the reporting transaction. The Officer’s tenure of office would be the same as that of a Superior Court Judge, which effectively meant that he could not be removed by the Government of the day. Instead, removal “for cause” by the Governor in Council could only follow the adoption of an address from both houses of Parliament. To ensure that the Officer would be independent of politics, he and his Deputy have been denied the right to vote in federal elections.

Speaking to the issue of his Office’s independence, our most recent Chief Electoral Officer (Jean-Pierre Kingsley) distinguished that principle from “impartiality”:

“While impartiality goes to the particular decision-maker’s own subjective attitude or mind set towards a particular decision to be made, independence goes to *structural issues* which may impact on the ability of the decision-maker to perform his or her mandate. To be independent ... is to work within an *administrative or legislated structure* which does not intrude upon or otherwise impede the due performance of one’s statutory office according to the law. Independence, in other words, refers to the *administrative structures* which may be necessary to ensure that the performance of one’s statutory mandate is not influenced by factors foreign to legal process itself.”<sup>3</sup>

The structural component in the “independence” of an electoral office is clearly a critical factor in explaining its legitimacy. But equally, one could make a case that “accepted norms” play a vital part in ensuring the Chief Electoral Officer’s independence. Without the support and (dare one say?) deference of the public and elected office-holders, Elections Canada could scarcely expect to enjoy the independence and authority it does. The checked electoral history of many other countries speaks to that point. To be truly independent, an Officer of Parliament such as our Chief Electoral Officer needs the assurance of both a legitimate structural framework within which to carry out his responsibilities and widespread acknowledgement of the legitimacy of his position on the part of the public and political actors.

What is striking about the independence granted the Chief Electoral Officer of Canada by Parliament is its unique stature within the cluster of Parliamentary Officers. Those who have established the framework within which the Chief Electoral Officer fulfills his responsibilities (the *Canada Elections Act*) are at the same time those most obviously and closely identified with having vital interests directly affected by the Officer’s interpretation and application of the Act. In varying degrees, that is less the case with the other Officers of Parliament.

### Responsibilities

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Established in 1920 by the *Dominion Elections Act* (now the *Canada Elections Act*), the Office of the Chief Electoral Officer was from the outset assigned a strictly supervisory and administrative role in electoral management, but with an important twist.<sup>4</sup> In the words of the Minister introducing the Bill to the Commons, the duties of the Chief Electoral Officer would be “to take charge of the election machinery and the conduct of elections in general throughout the Dominion.”<sup>5</sup> That was straightforward enough, but the “twist” in the assignment of responsibilities to the Chief Electoral Officer became obvious from the wording of the Act.

The Chief Electoral Officer was charged.

- (1) with exercising “general direction and supervision over the administrative conduct of elections *with a view to ensuring the fairness and impartiality of all election officers and compliance with the provisions of this Act,*” and
- (2) with reporting “to the House of Commons, through the Speaker, after an election, *any matters arising in the course of the election an account of which ought in his judgment, to be submitted to the House of Commons.*”<sup>6</sup>

The second clause in particular grants considerable scope to the Chief Electoral Officer. Electoral management and administration is one thing; flagging “*any matters arising in the course of [an] election*” for Parliament’s

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attention is quite another. By adding discretionary powers based on his *judgment* to the Chief Electoral Officer's administrative and managerial tasks, Parliament created what amounts to a position with, in effect, two lines of responsibility. First, as an Officer of Parliament the Chief Electoral Officer has an obvious responsibility to those who chose him in the first place. Members of Parliament deserve a full accounting of how the electoral machinery is running and where the *Elections Act's* strengths and deficiencies lie. Second, as someone charged with exercising his judgment on electoral issues the Chief Electoral Officer has a clear responsibility to the electorate. He, in effect, becomes their Ombudsman who makes their case before Parliament on electoral matters. With respect to both lines of responsibility (to Parliamentarians and to the public), transparency of purpose and accountability of action are essential to the success of the Chief Electoral Officer.

### Responsiveness

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The creation of the Office of Chief Electoral Officer introduced a measure of responsiveness to the Canadian electoral system not previously seen. By law, after every election the Chief Electoral Officer must present a report to Parliament in which he can outline obstacles to voting and recommend changes to address these problems. The first Chief Electoral Officer (Oliver Mowat Biggar) made a favourable impression with his initial report following the 1921 election. He noted that some voters (disproportionately newly enfranchised females, as it turned out) had difficulty participating in the election because their names had been left off the voters' list and that others, for a variety of reasons, were unable to vote on the particular day selected for the election. Accordingly, he recommended more revision officers to increase the number of eligible electors included in the voters' list and more advance polls to increase the convenience of voting. By amending the *Elections Act* in line with both recommendations, Parliamentarians indicated an early respect for the advice of "their" Officer.

Countless other examples of improvements in the electoral system have been made as a consequence of recommendations from the Chief Electoral Officers or initiatives undertaken by Elections Canada. These include the provision of wheelchair access to polling stations; the printing of ballots and other election material in Native languages; the use of helicopters to fly in electoral supplies and ballots to small, isolated communities in the northern territories; the provision of assistance in the voting booth for those with a physical disability or impaired vision; and the establishment of polling stations in nursing homes or chronic care facilities. Such moves have been aimed at ensuring that the electoral machinery is responsive to the needs of a growing and increasingly var-

ied electorate. Over the past decade programs aimed at increasing electoral participation rates of such targeted groups as Aboriginal peoples, ethnic minorities, and youth, have been designed to try to reverse the decline in voter turnout.

### The Charter

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In the pre-*Charter* era changes to the *Canada Elections Act* came from two distinct sources: the Chief Electoral Officer and the Government of the day. As we just saw in the previous section Canada's Chief Electoral Officers played an important role in suggesting and anticipating electoral reforms. This has generally taken the form of recommendations included in the statutory reports required after each general election. But other reforms, such as amendments to the *Canada Elections Act* that removed discrimination on the basis of race from the law (1948), or extended the right to vote to registered Indians (1960), or lowered the voting age to 18 (1970), have come directly from the acceptance by Parliament of Government-sponsored amendments to the Act.

The advent of the *Canadian Charter of Rights and Freedoms* in 1982 introduced a new player into the electoral game. Not surprisingly, it is Elections Canada's view that the *Charter* has emerged as "the most significant influence on electoral law in the post-war years."<sup>7</sup>

The courts suddenly joined the Chief Electoral Officer and Parliament as the third protector of voting rights. Let me single out one of many areas of electoral law that has been changed by the courts since the introduction of the *Charter* in 1982: the franchise. The Supreme Court of Canada has handed down three major decisions regarding the franchise: prohibitions on voting by judges (1988), by the mentally handicapped (1988), and by prisoners (2002). In each of those cases section 3 of the *Charter* (the right to vote) has been generously interpreted by the Court; all three prohibitions have all been struck down as violations of the *Charter*-guaranteed right. Many other *Charter* challenges to federal and provincial electoral laws have also been heard by the courts, largely on grounds of violating sections 2 (freedom of expression and association) and 3 (right to vote). These have included several electoral districting cases as well as challenges to laws governing campaign expense reimbursements, prohibiting the publication of public opinion polls, and restricting third party advertising.

The two Chief Electoral Officers who have held office since the *Charter* was introduced have paid considerable attention to *Charter*-related issues and to potential challenges. Both Jean-Marc Hamel (1966-90) and Jean-Pierre Kingsley (1990-2007) crafted a series of reports (on top of those required after an election) specifically designed to outline the problems with and to recommend changes to

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election law and administrative practices. The general intent was to bring electoral laws and regulations in line with the reality of *Charter*-guaranteed protections. Five specific areas have received the greatest attention: the Franchise, Redistribution, Electoral Administration, Voter Registration, and Election Expenses/Party and Candidate Financing. If there has been a theme common to the reports it has been one of increasing transparency and accountability and, in a sense, of redefining electoral democracy into one that is more citizen-focused and rights-protective than it had been in the pre-*Charter* era.

Within a year of the *Charter* coming into effect, the Chief Electoral Officer presented a report to Parliament with an entire section devoted to "The *Canadian Charter of Rights and Freedoms* – Its Effect on the *Canada Elections Act*". It sought to "identify those groups and/or individuals who [were] specifically disfranchised as a result of existing provisions of the *Canada Elections Act*." It singled out sections of the Act dealing with the right to vote and the right to be a candidate that could be subjected to *Charter* challenges. The concerns of the Chief Electoral Officer with the *Elections Act* were evident in his first post-*Charter* report. He sought to forewarn Parliament about legal issues likely to surface in the years ahead. Principal among these were the prohibition on voting based on age; disenfranchisement of specific groups or individuals; administrative disfranchisement of some persons and groups; and qualifications for membership in the House of Commons.

That report set the tone for others in the years ahead. In the 1984 report, for example, a full chapter was devoted to "Potential Conflicts between the *Canadian Charter of Rights and Freedoms* and the *Canada Elections Act*." More recently, Jean-Pierre Kingsley flagged a number of *Charter*-related issues in reports entitled *Canada's Electoral System: Strengthening the Foundation* (1996) and *Modernizing the Electoral Process* (2001).

## Conclusion

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All of this is not to say that the Office has been free of controversy and criticism. Critics invariably find their voice when problems surface with the voter registration process, or in the course of revising voters' lists, or in the election day management of some polling stations. Chief Electoral Officers have themselves been the objects of criticism – not on grounds of partisanship, which in itself is significant, but rather as appearing to at least some Canadians to be overly defensive of controversial parts of the electoral regime (limits on third party advertising come to mind) or overly committed to effect certain changes, such as replacing door-to-door enumerations with a continuously maintained electoral roll.

But how else can public criticisms of the Chief Electoral Officer and of Elections Canada be explained apart from saying that they "go with the turf"? It would be a rare public agency whose administrative and managerial skills were faultless, whose procedures may not always live up to their billing, or whose senior officers' commitments to particular policies were not the subject of occasional debate.

That said, however, the evidence is overwhelmingly on one side of the ledger. In 1920 Parliament set out to fashion an electoral office that would "in every way [be] permanent and independent." It is no exaggeration to say that that goal has been achieved. The fact that since 1920 there have been only five Chief Electoral Officers speaks well of the position as it was originally and subsequently envisaged, of the individuals who have held it, and of their relationship with both the parliamentarians and the public. In the Office of the Chief Electoral Officer, we have an institution that has become an accepted and integral part of our democratic electoral structure. Its legitimacy rests on that fact, as the Office's new incumbent will soon discover.

## Notes

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1. Hugh Guthrie, Minister of Militia and Acting Solicitor General, March 11, 1920. House of Commons, *Debates* p. 339.
2. Upon nomination in 1990, Jean-Pierre Kingsley stipulated that he would accept the appointment only if it received the unanimous consent of the House. The motion supporting his appointment was seconded by members of the two Opposition parties. See also Jean-Pierre Kingsley, "The Administration of Canada's Independent, Non-Partisan Approach." *Election Law Journal*. Vol 3, no 3, 2004, p. 406.
3. See Jean-Pierre Kingsley, "Independence and Accountability Mechanism in Federal Election Legislation." Conference on "Independence and Responsibility: Canada's Officers of Parliament." University of Saskatchewan, November 2-3, 2001, p. 2.
4. The Chief Electoral Officer was assigned the electoral responsibilities previously exercised by the Office of the Clerk of the Crown in Chancery. That office was abolished by the *Dominion Elections Act* in 1920.
5. See, Canada, House of Commons, *Debates*, March 11, 1920, p. 339, [ital. added].
6. Canada, *Dominion Elections Act*. 10-11 Geo V. [1920] s. 19 (1) (b) (c).
7. Elections Canada, *A History of the Vote in Canada*, Minister of Public Works and Government Services, Ottawa, 1997, p. 94.