

# Post-Election Recommendations for Legislative Change

September 14, 2020



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# January 21, 2021

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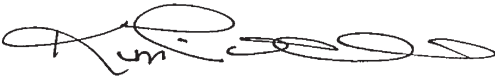
Dear Mr. Speaker,

I respectfully submit to you a special report containing recommendations for legislative change arising out of the September 14, 2020 provincial general election.

I respectfully request that you forward this report to the members of the Legislative Assembly.

I would be pleased to appear before the Procedure, Privileges, and Legislative Officers Committee to discuss my report if the Committee so wishes.

Sincerely,



Kimberly A. Poffenroth  
Chief Electoral Officer

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# Introduction

On September 14, 2020, New Brunswick electors were sent to the polls to vote in the country's first election to be held during the COVID-19 pandemic. This election was also an unscheduled election with a 28-day campaign, the shortest number of days permitted under legislation.

These factors combined to reveal inherent challenges in managing an election under the existing legislation. The *Elections Act* is intentionally prescriptive but, at the same time, this limits Elections New Brunswick's ability to adapt or modify the electoral processes in order to respond to unanticipated challenges. Although our conduct of this historic and precedent-setting election was generally considered a success for Elections New Brunswick, it is important that the lessons learned during the election not be forgotten and that they be acted upon.

Elections New Brunswick will produce a detailed report on the election for release at a future date. However, with additional elections on the near horizon for our organization, I feel it is important to produce this stand-alone report containing recommendations for changes that we believe are critical and should be considered in a timely fashion.

Some recommendations require amendments to the *Elections Act* or the *Political Process Financing Act*, which will require the support of elected members of the Legislative Assembly to make these needed changes. In some instances, the recommendation has been made previously but failed to gain the support needed for it to move forward.

Other needed improvements we have identified are procedural in nature and will not require legislative changes. We will be able to implement these changes by revising Directives of the Chief Electoral Officer, modifying operational plans, or updating instructions in training manuals provided to election workers.

Being the first election management body in Canada to administer a general election during the pandemic, we did not have the benefit of drawing upon the experience of other jurisdictions to design a strategy for running this election. We did, however, benefit from having Public Health and the Department of Justice and Public Safety review the operational plans that we put in place for providing electors with safe voting opportunities. I wish to thank them for their support.

Finally, I want to thank all New Brunswickers for helping us to allow every elector who chose to vote in this election to do so safely. We were extremely pleased with how New Brunswickers observed public health guidelines, helping to ensure the safety of their fellow voters as well as our election workers.

# Recommended Legislative Changes

## Recommendation 1: Appointment of Returning Officers and Election Clerks

The Chief Electoral Officer recommends that her office be given the authority to hire, through a merit-based process, the returning officers and election clerks responsible for administering the elections in their respective electoral regions, both for provincial and local government elections. This is one key recommendation that has been made by this office after previous general elections and by successive Chief Electoral Officers.

It is widely recognized that the independence of the Chief Electoral Officer from government interference and influence is of utmost importance in maintaining and ensuring public confidence in the administration of elections:

One of the hallmark achievements of Canadian government is the independence of election administration from government. Perhaps it is even possible to state that independence has become the first principle of election administration in Canada.<sup>1</sup>

Returning officers and their election clerks are responsible for the administration and conduct of elections in their respective electoral districts or regions. A capable, competent and well-trained returning officer is a significant factor in the success of an election in an electoral district or region. Each returning officer is responsible for hiring, supervising and training returning office and polling station workers; securing appropriate locations for the returning office and polling stations; administering the special voting process; administering the nomination process; dealing with members of the public, the media and candidates or prospective candidates; and managing disputes regarding the electoral process.

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<sup>1</sup> David M. Brock, "The Independence of Election Administration from Government", (2015) Special Issue *Journal of Parliamentary and Political Law, The Informed Citizens' Guide to Elections: Electioneering Based on the Rule of Law* 93 at 93.



While the Chief Electoral Officer is ultimately responsible for the administration of all elections that fall within her mandate, the successful execution of each election rests in large part with the returning officers and other key positions within each of the returning offices. Returning officer appointments expire automatically after each general election.

- In the September 14, 2020 provincial general election, Elections New Brunswick dealt with the resignation of five of the forty-nine returning officers within less than a month before, and after, the commencement of the election. Three returning officers resigned due to health reasons; another was relieved of their duties four days after the start of the election, when it became clear they were overwhelmed by the responsibilities of the position. A fifth returning officer accepted a job less than a month before the election was called.
- During this election, Elections New Brunswick was also put in a position of having to address several media inquiries questioning the non-partisan role of several returning officers.

These recent challenges further underscore the need to have qualified returning officers in place who are willing and able to commit to a term employment with Elections New Brunswick. Such individuals could be kept up-to-date with a comprehensive, ongoing training program over the course of their term and be involved in the development of process improvements. They could also be compensated appropriately for their work between elections. Such a change would have the immediate benefit of providing better quality service to electors and allow for succession planning over the long term to properly plan for future elections.

New Brunswick remains one of the last jurisdictions in Canada in which the appointment of returning officers remains the purview of the government. Canada, the provinces of Newfoundland and Labrador, Nova Scotia, Quebec, Manitoba, Saskatchewan, Alberta, and British Columbia, and the territories of Nunavut, Northwest Territories, and Yukon, all have the Chief Electoral Officer appoint returning officers. To do this, most jurisdictions use a formalized hiring process. In Ontario, the Lieutenant-Governor in Council appoints returning officers for ten years on the recommendation of the Chief Electoral Officer and after consulting with the other political parties. Elections Ontario uses a formalized recruiting, testing, and hiring process to select nominees for recommendation to the Lieutenant-Governor in Council.



## Recommendation 2: Appointment of Special Voting Officers and Poll Officials

The Chief Electoral Officer recommends the removal of the legislative requirement for returning officers to appoint special voting officers and poll officials from lists of nominees submitted by registered political parties.

Experience from the last three provincial general elections, including the September 14, 2020 election, has demonstrated that the registered political parties are struggling to provide names of potential workers in a timely fashion, if at all, to returning officers. This leaves returning officers scrambling during the election period to find an adequate number of poll officials.

As was identified in the discussion document “*Modernizing New Brunswick’s Electoral Legislation*” tabled in June of 2019, the requirement to appoint poll officials and special voting officers nominated by the government party and the party of the official opposition has its roots in a time when elections were not administered by a non-partisan and independent election management body, such as Elections New Brunswick, and checks and balances were necessary to ensure transparency and fairness in the electoral process. In fact, the fairness of the legislated requirement is questionable given it excludes three of five of New Brunswick’s registered political parties.

This recommendation would not prohibit registered political parties from submitting names of nominees for consideration as election workers. It would, however, allow returning officers to ensure that the individuals they appoint have the required qualifications to carry out the duties of the job for which they are being hired. The transparency of the electoral process would continue to be ensured through the ongoing appointment of scrutineers, who are appointed by political parties and candidates to observe the proceedings at the polling stations and to represent their interests at the polls.

## Recommendation 3: Greater Flexibility to Respond to Emergency Situations

The Chief Electoral Officer recommends that the *Elections Act* be amended to provide the Chief Electoral Officer with the authority to adapt the provisions of the Act to the execution of its intent and to protect public safety in the event of a declared state of emergency, including a public health emergency.

The call of an unscheduled general election for September 14, 2020, during a global pandemic, combined with the shortest campaign period allowed by law, created the perfect storm for the administration of a province-wide election.

During an appearance before a legislative committee on August 4, 2020, the Chief Electoral Officer testified that the prescriptive nature of the *Elections Act* did not provide her with the flexibility to make changes to existing rules or to introduce new voting procedures to address unique circumstances that might arise because of the pandemic. As examples, she stated she could not add extra voting days, change Election Day to a Saturday to provide electors more time to vote, or extend voting hours. The Act, as currently written, also did not allow the Chief Electoral Officer to introduce a vote-by-phone option for residents living in long-term care facilities. This option had been approved earlier in the year by the Advisory Committee on the Electoral Process for use in a pilot project during by-elections that were expected in June 2020.

In order to provide the Chief Electoral Officer with the necessary discretionary authority and flexibility to adapt the provisions of the Act to the circumstances of a declared state of emergency, the Chief Electoral Officer recommends providing clear authority in the Act to adapt or modify prescribed voting procedures or processes, as well as supporting provisions related to timelines, forms, and the duties of election officers. It is also recommended that the Chief Electoral Officer be authorized to impose restrictions or take any measures that are considered necessary or advisable to protect the health and safety of the public. Consultation with the Chief Medical Officer of Health and the Minister of Justice and Public Safety should be required as appropriate in the circumstances.

The Chief Electoral Officer should not be permitted to extend the time for filing nominations papers nor to postpone ordinary polling day. It is the opinion of the Chief Electoral Officer that this is not an appropriate discretionary authority to be granted to the Chief Electoral Officer and that this authority should rest with either the Legislative Assembly or the Lieutenant-Governor in Council.

With respect to notice, it is recommended that the Chief Electoral Officer be required to give public notice of any action taken under such authority and the reasons for taking the action. Further, the Chief Electoral Officer should be required to submit to the Speaker of the Legislative Assembly, within four months after ordinary polling day, a report respecting actions taken in accordance with this authority and, if appropriate, any recommendations with respect to amendments to incorporate an adapted procedure into the Act.

In several provinces, legislative provisions have been put in place to provide Chief Electoral Officers with the flexibility to change electoral procedures:

- ① The Government of Saskatchewan made amendments to regulations under The Elections Act providing the Chief Electoral Officer with the authority to adapt any provision of the Act, including the authority to change all or any voting procedures, all or any timelines, deadlines or time requirements and impose any restriction or take any measure that the Chief Electoral Officer considered necessary to protect the health and safety of anyone involved in the election process.<sup>2</sup>
- ② In British Columbia, section 280(1) of the *Election Act* provides that, “The chief electoral officer may, by specific or general order, make exceptions to this Act and the regulations under this Act...if in the opinion of the chief electoral officer, this is necessary because of an emergency, a mistake or extraordinary circumstances in relation to proceedings under this Act.”
- ③ On October 6, 2020, the Chief Electoral Officer of Canada, Stéphane Perrault, submitted a special report to Parliament recommending a number of legislative measures to modify the *Canada Elections Act* in order to administer a federal election during the pandemic. Included in the recommendations were: the authority to replace Monday as polling day and to increase voting hours; authorizing the Chief Electoral Officer to determine how and when voting will occur in long-term care facilities; and providing adjustments to the power to adapt the Act in an emergency situation in order to provide greater flexibility in response to the pandemic.
- ④ In New Brunswick, *An Act Respecting Elections in 2020*, passed March 17, 2020, authorized the Lieutenant-Governor in Council to make a series of changes, including dates for doing anything required under the *Municipal Elections Act*, in order to ensure the proper execution of a municipal general election held on a date set under the authority of that Act. The legislation also allowed for setting alternative dates and times for giving notices of election, the close of nominations, an alternative date for voting and as well authorizing the Municipal Electoral Officer to adapt the provisions of that Act to the execution of its intent.

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<sup>2</sup> Sask. Reg. 55/2020.

In addition to the examples cited above, the same authority being recommended for provincial elections was granted to New Brunswick's Municipal Electoral Officer in December 2020.<sup>3</sup>

## Recommendation 4: Election Period for Unscheduled Elections

The Chief Electoral Officer recommends that the minimum number of days prescribed for the election period of an unscheduled provincial general election be increased.

A number of challenges faced by Elections New Brunswick in the unscheduled September 14, 2020 provincial general election were magnified by the fact the shortest number of days allowed by the *Elections Act* for a campaign, 28, was selected.

- Unlike a scheduled general election, not knowing when to begin to locate and rent returning offices and order the installation of telecommunications and internet services can be a major impediment and risk to the successful operation of an election. Once potential returning offices are identified, a lease should only be signed once the Chief Electoral Officer is relatively certain that they will be needed. Otherwise, New Brunswick taxpayers will incur approximately \$500,000 per month to lease otherwise vacant spaces. Finding new, suitable locations at the last minute was a factor in several electoral districts during this election. Similarly, without a signed lease, telecommunications services cannot be installed in a location.
- It took six days following the issuance of the writs before our IT service provider was able to do the first installation of phone and internet service at any of our 50 returning offices.
- The delay in connectivity at the returning offices, combined with the short election period, impacted the ability to process nomination papers of candidates as well as processing applications for special ballots, including vote-by-mail requests.
- The compressed campaign period reduced the window of opportunity available to allow for vote-by-mail applications to be processed, sent by courier to an elector, and returned by the elector to that returning office in order to meet the legislated cutoff time of 8 p.m. on Election Day.

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<sup>3</sup> *An Act to Amend the Municipal Elections Act*, S.N.B. 2020, c.34, received Royal Assent on December 18, 2020.

The Chief Electoral Officer recommends the minimum number of days established for an unscheduled provincial general election be set at 38, which is the current maximum number of days allowed under legislation for an unscheduled event.

## Recommendation 5: Nomination Contests

The Chief Electoral Officer recommends eliminating the requirement under the Elections Act that a nomination contestant register with the Chief Electoral Officer and the requirements under the *Political Process Financing Act* that a nomination contestant file a financial return.

In 2015, legislation was introduced requiring all leadership and nomination contestants to officially register with the Chief Electoral Officer. These contestants are required to file a financial return with the Supervisor of Political Financing. If the total value of all contributions and financing is \$2,000 or less, the financial return is a simple declaration to this effect and includes no further details. In addition, a registered political party must file with the Chief Electoral Officer a *Certificate of Nomination Convention* after each nominating convention held by the party.

- As of the first week of January 2021, for the 2020 provincial general election, 70 *Certificates of Nomination Convention* had been submitted by registered political parties, listing 86 nomination contestants.<sup>4</sup> Of these 86 nomination contestants, only 76 registered with the Chief Electoral Officer. Of the 86 nomination contestants, only 30 have filed their required financial return, and all 30 of those spent \$2,000 or less on their nomination contest.
- In the 2018 provincial general election, only two of the 169 nomination contestants who filed financial returns indicated they had exceeded the \$2,000 threshold.
- Candidates appointed by their party are not required to register or to file a financial return.
- Elections New Brunswick has no way of knowing if a registered political party has selected candidates by appointment or a nomination contest, and, therefore, must rely on the party to disclose if a nomination contest has taken place, which includes a contest won by acclamation.

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<sup>4</sup> In the 2020 provincial general election, there were 227 nominated candidates, of whom nine were independent candidates.

The Chief Electoral Officer believes the requirement for a nomination contestant to register and to submit a financial return places an unnecessary burden on the contestant. In many cases, the contestants are unopposed, resulting in their acclamation as the candidate at the nominating convention. Even when nominations are contested, the amount of money spent by nomination contestants is minimal, rarely exceeding the \$2,000 threshold for a detailed financial return. In addition, Elections New Brunswick simply does not have the resources required to properly enforce compliance with these rules.

Elections New Brunswick has no direct involvement in the processes used by registered political parties in the selection of its leaders. However, the Chief Electoral Officer sees the value in maintaining the requirement for leadership contestants to register and disclose the finances of their campaigns. Since significant amounts of money may be spent by leadership candidates, this allows for an open and transparent process.

## **Recommendation 6: Special Ballot Application Process - Vote-by-mail**

The Chief Electoral Officer recommends that authority be given to prescribe alternative methods for applying for and processing special ballot applications for vote-by-mail ballots.

The September 14, 2020 provincial general election saw an unprecedented increase in demand from electors wishing to vote by mail during the pandemic. Over 13,000 vote-by-mail packages were prepared by staff at the 50 returning offices province-wide. By comparison, during a typical provincial general election, fewer than 100-200 requests are received, typically from students studying outside of the province or New Brunswickers temporarily working in another province.

The current process utilizes the signature of the elector to verify the elector's identity. The signature of the elector made on the application for a special ballot is compared to the signature on the certificate envelope when the vote-by-mail package is returned to the returning office.

For electors who do not have access to technology needed to download and print off the application nor the tools to scan or fax the application back to the returning office, this presented an obstacle to accessing this option for voting. The time required to have an application mailed to the elector, to have the elector return the signed application to the returning office, to have the vote-by mail package sent by courier to the elector, and then, finally, to have the elector mail their ballot back to the returning office made meeting the cutoff deadline of 8 p.m. on Election Day challenging.

There is a strong possibility that voting by mail will become the preferred voting option of more New Brunswickers, especially while the country continues to deal with the pandemic. Even after the pandemic, voting by mail may become an increasingly attractive option for New Brunswick's aging population and the large number of New Brunswickers who live with mobility challenges.

The Chief Electoral Officer recommends that Elections New Brunswick be given the authority to prescribe alternative secure methods, using modern information technology, to apply for, track, and be confident upon receipt that the elector cast their vote. Many variants of these processes exist in jurisdictions in North America, and a solution appropriate for New Brunswick would need to be developed. Such a process might include: the use of a secure online application portal requiring electors to upload their details along with a photo of their identification; a unique tracking number issued with the vote-by-mail package as it is sent out; and a method to confirm the received ballot was, in fact, returned by the elector in question.

Additional improvements to the current model may include:

- prescribing additional acceptable forms of identification as a “shared secret” for verifying the identity of electors in the special ballot application process; such forms of identification could include a driver’s license or the last three digits of Medicare numbers; such a “shared secret” could replace or supplement the signature requirement;
- developing a centralized system for receiving and processing special ballot requests;
- establishing a deadline for requesting a vote-by-mail package the week prior to Election Day;
- extending the deadline for mail-in ballots to be validly received and counted beyond the current Election Day deadline, provided the ballots are postmarked no later than Election Day; and
- permitting vote-by-mail certificate envelopes to be dropped off at any Service New Brunswick office.



## Recommendation 7: Voting by Write-in Ballot

The Chief Electoral officer recommends that, prior to the availability of the official printed ballots, an elector using a write-in ballot be allowed to either write the name of the candidate they wish to vote for **OR** the name of the registered political party that endorsed, or will endorse, the candidate for whom the elector wishes to vote.

In the September 14, 2020 provincial general election, electors were able to request to vote by special ballot on the date the Writs were issued, Monday August 17, 2020. The official printed ballots were only available on Thursday, September 3, 2020. Anyone voting prior to the ballots being printed voted using a write-in ballot, as permitted under the *Elections Act*. Section 87.62 clearly requires an elector to mark their special ballot paper in favour of **“the candidate”** for whom they vote.

With the close of nominations taking place at 2:00 p.m. on Friday August 28, 2020, the complete list of the candidates running in each of the 49 electoral districts was not available until after that deadline. This meant that people voting early, using a write-in ballot, did not have easy access to the full slate of candidates running in their electoral district.

Elections New Brunswick received numerous complaints by e-mail, phone and its social media channels from electors upset because they wanted to vote early using the special ballot process but did not know the names of all of the candidates for whom they were eligible to vote. Further, when write-in ballots were processed on the Sunday before Election Day, scrutineers and election officers witnessed ballots that could not be counted because an incorrect candidate or a party name had been written by the voter. In some cases, these “rejected ballots” may not have been rejected had the voter been entitled to simply write-in the party name for which they wished to vote.

## Recommendation 8: Election Worker Remuneration

The Chief Electoral Officer recommends that the remuneration for provincial and municipal election workers be increased and that all future increases be tied to the provincial minimum wage rate.

As with the appointment of returning officers, the Chief Electoral Officer and her predecessor have made repeated recommendations for an increase to the rates paid to election workers – both at the returning offices and at the polls. The rates were last adjusted for municipal election workers in March 2008. In July 2010, the rates for provincial election workers were adjusted to the 2008 rates.

Following the September 14, 2020 provincial general election, 17 of the 49 returning officers reported dissatisfaction on the part of poll workers with the flat rate payment of \$150.00 for a 12 to 13-hour workday. For a 12-hour workday, the *Tariff of Fees* barely exceeds the current minimum wage in New Brunswick of \$11.70, putting Elections New Brunswick precariously close to violating the *Employment Standards Act*. In the case of a 13-hour workday, the rate actually falls below the legislated minimum wage.

Another four returning officers reported that individuals refused jobs as poll supervisors because the remuneration, \$225 per day, did not adequately compensate for or reflect the demands of the position.

## Recommendation 9: Voting at Returning Offices

The Chief Electoral Officer recommends that electors waiting in line to vote at a returning office at 8 p.m. on Election Day be entitled to vote. Special ballots returned by mail or by other methods to a returning office would continue to be required to be returned no later than 8:00 p.m. on Election Day, subject to any changes that may be made as a result of the review of the mail-in ballot process.

In the September 14, 2020 provincial general election, a record number of electors opted to vote at one of the 50 returning offices. Under existing legislation, any elector who was in line to vote at the returning office on Election Day at the close of polls at 8:00 p.m. was not permitted to vote. A different rule applies at polling stations, where anybody who is waiting in line to vote at the 8:00 p.m. close of polls on Election Day is entitled to vote. The Chief Electoral Officer believes there is no justification for such a distinction that clearly disenfranchises voters who choose to vote at the returning office for any number of reasons. This should be corrected.

# Conclusion

While, at the end of the day, Elections New Brunswick successfully administered a safe election in September 2020 under clearly challenging circumstances, it is still important to make recommendations to mitigate the challenges that we identified during this election.

We have already begun to address improvements that we can make without legislative change, by updating directives issued by the Chief Electoral Officer and improving training.

The recommendations identified in this document can only be achieved through amendments to our legislation. We urge the elected members of New Brunswick's Legislative Assembly to support the changes that we are recommending and to bring them forward for the debate and discussion they warrant.