

# A Pandemic Federal Election: Democracy Under Conditions of Emergency

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## Résumé de l'article

Le défi posé par la tenue d'élections libres et équitables au beau milieu d'une pandémie où tout événement d'envergure présente des risques évidents de transmission du virus suscite une vive controverse à travers le monde. Les différents pouvoirs ont adopté diverses stratégies pour tenter de trouver un équilibre entre la nécessité de tenir des élections et le maintien de la santé publique et de la sécurité publique. Cet article évalue les questions juridiques principales soulevées par la perspective de tenir une élection fédérale au Canada pendant la pandémie. En résumé, je plaide en faveur de l'adoption de nouvelles mesures dans les bureaux de vote pour garantir la santé publique, l'élargissement du vote par anticipation et, lorsque les bulletins sont envoyés par la poste, l'acceptation de tous ceux qui portent le cachet de la poste du jour du scrutin. La mise en application de certaines de ces réformes nécessiterait des amendements législatifs. L'adoption d'amendements en temps opportun pourrait s'avérer difficile, cependant, pour un gouvernement minoritaire occupé, avec raison, par des questions urgentes liées à la pandémie et dont les heures de séance sont limitées par l'expérimentation de la tenue de procédures virtuelles. Le Parlement devrait toutefois se pencher de toute urgence sur la probabilité d'une élection en cas de pandémie et sur les réformes nécessaires.

La section II examine le cadre juridique de la tenue d'élections en situation d'urgence. En résumé, les règles habituelles de la *Loi électorale du Canada* continuent de s'appliquer dans une large mesure et ne sont pas remplacées par une loi d'urgence ou par des dispositions spéciales de la Loi elle-même. La section III résume et analyse les options de vote actuelles pour les élections fédérales, à la lumière des contraintes et des risques possibles de la pandémie. La section IV examine en profondeur le vote en personne pendant une pandémie. Elle traite en particulier des changements apportés aux bureaux de vote pour s'adapter à la pandémie et de l'expansion des possibilités de vote par anticipation. La section V analyse le sujet pressant du vote par correspondance. Je soutiens que le système actuel de vote par correspondance risque d'être inadéquat s'il est utilisé à une échelle beaucoup plus large que lors des élections précédentes, où peu de votes ont été exprimés de cette manière. L'éducation des électeurs et des électrices devrait être une priorité en réponse à certaines des caractéristiques du vote par correspondance. Toutefois, des réformes législatives sont également nécessaires afin de garantir que tous les votes exprimés avant le jour du scrutin et reçus dans un délai raisonnable soient correctement pris en compte.

# A Pandemic Federal Election: Democracy Under Conditions of Emergency

*Michael Pal*

THE CHALLENGE OF administering free and fair elections in the midst of a pandemic where any mass event raises obvious risks of transmission of the virus has generated considerable controversy around the globe. Jurisdictions have adopted diverse strategies in their attempt to balance the need for elections and public health and safety. This article assesses the main legal issues raised by the prospect of conducting a federal election in Canada during the pandemic. In sum, I argue for new measures at polling stations to ensure public health, expanded advance voting, and, where ballots are mailed-in, accepting all that are postmarked by election day. Implementing some of these reforms would require legislative amendment. Passing amendments in a timely fashion may be a challenge, however, in a minority Parliament that is justifiably occupied with urgent matters related to the pandemic and with limited sitting hours in the midst of an experiment with virtual proceedings. Parliament should urgently turn its mind, however, to the likelihood of a pandemic election and what reforms are needed.

Section II discusses the legal framework for conducting elections during an emergency. In sum, the regular rules in the *Canada Elections Act* largely continue to apply and are not displaced by either emergency legislation or special provisions in the Act itself. Section III summarizes and analyzes the current options for casting a ballot in federal

LE DÉFI POSÉ par la tenue d'élections libres et équitables au beau milieu d'une pandémie où tout événement d'envergure présente des risques évidents de transmission du virus suscite une vive controverse à travers le monde. Les différents pouvoirs ont adopté diverses stratégies pour tenter de trouver un équilibre entre la nécessité de tenir des élections et le maintien de la santé publique et de la sécurité publique. Cet article évalue les questions juridiques principales soulevées par la perspective de tenir une élection fédérale au Canada pendant la pandémie. En résumé, je plaide en faveur de l'adoption de nouvelles mesures dans les bureaux de vote pour garantir la santé publique, l'élargissement du vote par anticipation et, lorsque les bulletins sont envoyés par la poste, l'acceptation de tous ceux qui portent le cachet de la poste du jour du scrutin. La mise en application de certaines de ces réformes nécessiterait des amendements législatifs. L'adoption d'amendements en temps opportun pourrait s'avérer difficile, cependant, pour un gouvernement minoritaire occupé, avec raison, par des questions urgentes liées à la pandémie et dont les heures de séance sont limitées par l'expérimentation de la tenue de procédures virtuelles. Le Parlement devrait toutefois se pencher de toute urgence sur la probabilité d'une élection en cas de pandémie et sur les réformes nécessaires.

La section II examine le cadre juridique de la tenue d'élections en situation

elections, in light of the likely constraints and threats posed by the pandemic. Section IV takes a deep dive into in person voting during a pandemic. It discusses in particular changes within polling stations to adapt to the pandemic and the expansion of early voting opportunities. Section V analyzes the pressing topic of mail-in voting. I argue that the existing system for voting by mail appears likely to be inadequate if used on a much wider scale than in previous elections, when few votes were cast in that fashion. Voter education should be a priority in response to some of the features of voting by mail. Legislative reforms are also needed, however, to ensure that all votes cast by election day and received within a reasonable timeframe are properly counted.

d'urgence. En résumé, les règles habituelles de la *Loi électorale du Canada* continuent de s'appliquer dans une large mesure et ne sont pas remplacées par une loi d'urgence ou par des dispositions spéciales de la Loi elle-même. La section III résume et analyse les options de vote actuelles pour les élections fédérales, à la lumière des contraintes et des risques possibles de la pandémie. La section IV examine en profondeur le vote en personne pendant une pandémie. Elle traite en particulier des changements apportés aux bureaux de vote pour s'adapter à la pandémie et de l'expansion des possibilités de vote par anticipation. La section V analyse le sujet pressant du vote par correspondance. Je soutiens que le système actuel de vote par correspondance risque d'être inadéquat s'il est utilisé à une échelle beaucoup plus large que lors des élections précédentes, où peu de votes ont été exprimés de cette manière. L'éducation des électeurs et des électrices devrait être une priorité en réponse à certaines des caractéristiques du vote par correspondance. Toutefois, des réformes législatives sont également nécessaires afin de garantir que tous les votes exprimés avant le jour du scrutin et reçus dans un délai raisonnable soient correctement pris en compte.

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# A Pandemic Federal Election: Democracy Under Conditions of Emergency

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## I. INTRODUCTION

While Canada's next fixed date federal election is scheduled by the *Canada Elections Act*<sup>1</sup> (the Act) for October 2023,<sup>2</sup> one of the consequences of the current minority Parliament elected in 2019 is that a new election could be called at any moment.<sup>3</sup> In April 2020, Elections Canada issued a remarkable statement in anticipation of a federal election in the midst of the COVID-19 pandemic.<sup>4</sup> Canada's non-partisan, independent electoral management body communicated to the public that if an election occurs during the pandemic, it might *not* be able to administer elections in all ridings due to the ongoing public health emergency. In such circumstances, Elections Canada would certify to the Governor in Council that the writ(s) of election, the legal mechanism for instituting a vote in each of the 338

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1 SC 2000, c 9 [CEA].

2 *Ibid*, s 56.1(2).

3 See *Conacher v Canada (Prime Minister)*, 2010 FCA 131 at para 12.

4 See Elections Canada, "Impact of COVID-19" (last modified 8 July 2021), online: <[www.elections.ca/content.aspx?section=med&dir=cor&document=index&lang=e](http://www.elections.ca/content.aspx?section=med&dir=cor&document=index&lang=e)> [Elections Canada, "Impact of COVID-19"]. The note was updated on August 27, 2020, to include some new material, particularly with regard to Elections Canada's preferred legislative amendments in response to COVID-19.

federal ridings, should be withdrawn.<sup>5</sup> Elections Canada emphasized that it has never taken such action in its history.

This statement highlighted the difficult decisions facing democracies with upcoming elections in the face of a pandemic caused by a highly transmissible virus. The most direct, negative potential consequence of a pandemic election would be the transmission of COVID-19 among voters or poll workers at a rate that would augment the public health emergency. The policy decisions taken by Parliament and the government are always of great importance, but the choice of elected representatives is especially precipitous during a pandemic given the urgent decisions that must be taken regarding public health and the economy among other issues. The failure to return Members of Parliament for specific ridings, in the scenario outlined by Elections Canada, would also be troubling, particularly if the areas most ravaged by COVID-19 would be the ones unable to elect a representative to the House of Commons. Low turnout, if voters are deterred by health risks from casting ballots,<sup>6</sup> could harm the perceived legitimacy of Parliament and the government emerging from a pandemic election. Legitimacy would also be harmed if the election was carried out, but seen as administered below the expected standard due to the challenges of the pandemic.<sup>7</sup>

Canada already has some experience of conducting elections with such issues hanging in the air. During the pandemic, New Brunswick, British Columbia, Saskatchewan, Newfoundland and Labrador, and Nova Scotia held provincial elections, Yukon held a territorial election, and there were

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5 *Ibid*: “In an extreme and unexpected case, the [Chief Electoral Officer] could certify that it has become impracticable for Elections Canada to administer the election in one or several electoral districts and recommend to the Governor in Council that the election writ be withdrawn. This has never been done in Elections Canada’s history.” On postponements of elections in the United States, see Michael T Morley, “Postponing Federal Elections Due to Election Emergencies” (2020) 77:1 Washington & Lee L Rev Online 179.

6 See Toby S James & Sead Alihodzic, “When Is It Democratic to Postpone an Election? Elections During Natural Disasters, COVID-19, and Emergency Situations” (2020) 19:3 Election LJ 344 at 353–54. There is some evidence in Canada that natural disasters have deterred turnout. See e.g. Marc André Bodet, Melanee Thomas & Charles Tessier, “Come Hell or High Water: An Investigation of the Effects of a Natural Disaster on a Local Election” (2016) 43 Electoral Studies 85.

7 Canada attains a score of 75 in the Perceptions of Electoral Integrity Index, putting it in the “very high” electoral integrity category. See Pippa Norris & Max Grömping, “Electoral Integrity Worldwide” (May 2019) at 6, online (pdf): *Electoral Integrity Project* <[www.dropbox.com/s/csp1o48mkwbrpsu/Electoral%20Integrity%20Worldwide.pdf?dl=0](http://www.dropbox.com/s/csp1o48mkwbrpsu/Electoral%20Integrity%20Worldwide.pdf?dl=0)>.

two federal by-elections in Toronto to fill vacant seats.<sup>8</sup> These experiences shone a spotlight on matters of election law that had long lain dormant, including most notably the scope of the legal authority of Chief Electoral Officers to adapt procedures set by statute in the midst of an election and when the power to delay or suspend an ongoing election should be exercised. The first three provincial votes ran relatively smoothly. The election in Newfoundland and Labrador, however, was interrupted by a COVID-19 outbreak and illustrated the importance of resolving these previously obscure matters.

Jurisdictions around the globe have adopted diverse strategies in their attempt to balance the necessity of elections for democracy with public health and safety. South Korea opted to modify in person voting procedures to facilitate physical distancing and sanitary transfer of materials such as ballots.<sup>9</sup> France,<sup>10</sup> Poland,<sup>11</sup> and Mali<sup>12</sup> all notably conducted elections early on in the pandemic, with varying degrees of success. Many other jurisdictions have postponed scheduled elections. Where they have gone ahead, voter turnout has generally been moderately down.<sup>13</sup>

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- 8 The newly elected Leader of the Green Party of Canada, Annamie Paul, also a candidate in the by-election in Toronto Centre, called for the by-elections to be postponed due to COVID-19. See Alex Ballingall, "Justin Trudeau Says Democracy Must Continue During Pandemic, as Green Leader Calls for Toronto Byelections to be Suspended Amid Rising COVID-19 Cases", *The Toronto Star* (9 October 2020), online: <[www.thestar.com/politics/federal/2020/10/09/fearing-second-wave-in-toronto-green-leader-annamie-paul-calls-on-justin-trudeau-to-suspend-scheduled-byelections-in-the-city.html](http://www.thestar.com/politics/federal/2020/10/09/fearing-second-wave-in-toronto-green-leader-annamie-paul-calls-on-justin-trudeau-to-suspend-scheduled-byelections-in-the-city.html)>.
  - 9 See Antonio Spinelli, "Managing Elections Under the COVID-19 Pandemic: The Republic of Korea's Crucial Test" (21 April 2020) at 3, online (pdf): *International Institute for Democracy and Electoral Assistance* <[www.idea.int/sites/default/files/publications/managing-elections-during-pandemic-republic-korea-crucial-test.pdf](http://www.idea.int/sites/default/files/publications/managing-elections-during-pandemic-republic-korea-crucial-test.pdf)>.
  - 10 See Romain Rambaud, "Holding or Postponing Elections During a COVID-19 Outbreak: Constitutional, Legal and Political Challenges in France" (15 June 2020), online (pdf): *International Institute for Democracy and Electoral Assistance* <[www.idea.int/sites/default/files/publications/holding-or-postponing-elections-during-a-covid-19-outbreak-v2.pdf](http://www.idea.int/sites/default/files/publications/holding-or-postponing-elections-during-a-covid-19-outbreak-v2.pdf)>.
  - 11 See Vasil Vashchanka, "Political Manoeuvres and Legal Conundrums Amid the COVID-19 Pandemic: The 2020 Presidential Election in Poland" (3 July 2020), online (pdf): *International Institute for Democracy and Electoral Assistance* <[www.idea.int/sites/default/files/political-manoeuvres-and-legal-conundrums-2020-presidential-election-poland.pdf](http://www.idea.int/sites/default/files/political-manoeuvres-and-legal-conundrums-2020-presidential-election-poland.pdf)>. Whether Poland remains a constitutional democracy with free and fair elections is doubtful, for reasons unrelated to the pandemic. See Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford, UK: Oxford University Press, 2019).
  - 12 See Robert Gerenge, "Managing Elections Under COVID-19 Pandemic Conditions: The Case of Mali" (23 September 2020), online (pdf): *International Institute for Democracy and Electoral Assistance* <[www.idea.int/sites/default/files/managing-elections-under-covid-19-pandemic-conditions-the-case-of-mali\\_en.pdf](http://www.idea.int/sites/default/files/managing-elections-under-covid-19-pandemic-conditions-the-case-of-mali_en.pdf)>.
  - 13 James & Alihodzic, *supra* note 6 at 352–55.



In the United States, COVID-19 hit during the frenzy of state primaries. Some states delayed elections or reorganized their administration. The state of New York cancelled its Democratic Presidential Primary in order to focus on congressional and state races scheduled for June 2020.<sup>14</sup> After litigation around access to mail-in ballots reached the United States Supreme Court, Wisconsin proceeded with largely in person voting for elections to congressional offices and the state courts.<sup>15</sup> Local public health authorities have since concluded that a number of voters and poll workers contracted coronavirus by virtue of participating in election day.<sup>16</sup>

For the Presidential election culminating in election day on November 3, 2020, voting by mail proved popular. Extensive litigation accompanied the efforts of states seeking to expand access to the ballot box despite the pandemic or, in some instances, to hinder access.<sup>17</sup> Prior to his ban from the social media platform, President Trump repeatedly tweeted baseless allegations that voting by mail would lead to electoral fraud against him.<sup>18</sup> His tweets highlighted one partisan interpretation of attempts to ensure access to the ballot box in the face of the pandemic.

This article assesses the main legal issues raised by the prospect of conducting a federal election in Canada during the pandemic.<sup>19</sup> Building

14 See Stephanie Saul & Nick Corasaniti “New York Board of Elections Cancels Democratic Presidential Primary”, *The New York Times* (27 April 2020), online: <[www.nytimes.com/2020/04/27/us/politics/democratic-primary-canceled-coronavirus.html](http://www.nytimes.com/2020/04/27/us/politics/democratic-primary-canceled-coronavirus.html)>.

15 See *Republican National Committee v Democratic National Committee*, 140 S Ct 1205 (2020).

16 See Rebecca Klar, “Officials Say at Least 40 People Who Voted or Worked in Wisconsin Elections Have Coronavirus” *The Hill* (28 April 2020), online: <[thehill.com/homenews/campaign/494984-health-officials-say-36-coronavirus-cases-possibly-exposed-through](http://thehill.com/homenews/campaign/494984-health-officials-say-36-coronavirus-cases-possibly-exposed-through)>.

17 For a good overview of the 2020 election, see Nathaniel Persily & Charles Stewart III, “The Miracle and Tragedy of the 2020 US Election” (2021) 32:2 *J Democracy* 159.

18 On May 26, 2020, then President Donald Trump stated on twitter: “There is NO WAY (ZERO!) that Mail-In Ballots will be anything less than substantially fraudulent. Mail boxes will be robbed, ballots will be forged & even illegally printed out & fraudulently signed. The Governor of California is sending Ballots to millions of people, anyone... living in the state, no matter who they are or how they got there, will get one. That will be followed up with professionals telling all of these people, many of whom have never even thought of voting before, how, and for whom, to vote. This will be a Rigged Election. No way!” All emphasis and spelling are from the original tweets. For copies of President Trump’s tweets, see Elizabeth Dwoskin, “Twitter Labels Trump’s Tweets with a Fact Check for the First Time”, *The Washington Post* (27 May 2020), online: <[www.washingtonpost.com/technology/2020/05/26/trump-twitter-label-fact-check](http://www.washingtonpost.com/technology/2020/05/26/trump-twitter-label-fact-check)>.

19 There are two additional constitutional matters not directly addressed by this article: (1) the constitutionality of restrictions imposed for public health reasons on freedom of political expression and association and the right to vote; and (2) federalism issues where provincial or municipal public health measures conflict with the federal CEA or

on the experiences in other countries and in the Canadian jurisdictions that have held pandemic elections, I argue for new measures to ensure access to the fundamental right to vote in the face of the pandemic. These reforms include measures at polling stations to ensure public health, the expansion of advance voting, and for mail-in voting rules that maximize access. Implementing some of these reforms would require legislative amendment. Passing amendments in a timely fashion may be a challenge, however, in a minority Parliament that is justifiably occupied with urgent matters related to the pandemic and with limited sitting hours in the midst of an experiment with virtual proceedings.<sup>20</sup> As of the time of writing, a bill to enact some amendments remains before the House of Commons.<sup>21</sup> Parliament should urgently turn its mind to the likelihood of a pandemic election and what reforms are needed.

Section II discusses the legal framework for conducting elections during an emergency. In sum, the regular rules in the *Canada Elections Act* largely continue to apply and are not displaced by either emergency legislation or special provisions in the Act itself. The main uncertainty stems from the scope of the Chief Electoral Officer's power to adapt provisions of the legislation and the roles of the various institutional actors if an ongoing election was to be interrupted by an emergency.

Section III summarizes and analyzes the current options for casting a ballot in federal elections. Canadians have a variety of methods, including voting in person or by mail. The section argues that reforms are necessary in light of the pandemic. Section IV addresses in person voting during a pandemic. It discusses, in particular, changes within polling stations to adapt to the pandemic and the expansion of early voting opportunities.

Section V analyzes the pressing topic of mail-in voting. It summarizes what we know about public attitudes to mail-in voting during the pandemic, canvasses models for voting by mail in other jurisdictions, and assesses the deficiencies in the current framework in the *Canada Elections Act*. I argue that the existing system for voting by mail appears likely to be inadequate if used on a much wider scale than in previous elections, when few votes were cast in that fashion. Voter education should be a priority to maximize

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discretionary actions of the Chief Electoral Officer. These topics are worthy of further study on their own.

- 20 The move to hybrid in-person and virtual proceedings until December 11, 2020 was implemented by unanimous consent after negotiations by the parties. See *House of Commons Journals*, 43-2, No 1 (23 September 2020) at 1.
- 21 See Bill C-19, *An Act to amend the Canada Elections Act (COVID-19 response)*, 2nd Sess, 43rd Parl, 2020 (first reading 10 December 2020) [Bill C-19].

the chances that Canadians who intend to cast their ballots by mail will follow the proper procedures and, therefore, have their votes counted. Legislative reforms are also needed, however, to ensure that all votes cast and received within a reasonable timeframe are counted. The bill before the House that would amend the *Canada Elections Act* in response to the pandemic does not, in my view, go far enough in updating the legal framework for voting by mail.

## II. EMERGENCIES AND ELECTIONS

Federal emergencies legislation is surprisingly silent with regard to elections.<sup>22</sup> The relevant legislation is therefore the *Canada Elections Act*. None of the legislation passed by Parliament in direct response to the pandemic to date has addressed elections.<sup>23</sup> Bill C-19, *An Act to amend the Canada Elections Act (COVID-19 Response)*, received first reading on December 10, 2020, but did not become law before the general election was called on August 15, 2021.<sup>24</sup>

### A. Adaptions and Postponements

The Chief Electoral Officer (CEO) has wide authority under section 16 of the *Canada Elections Act* to “exercise general direction and supervision over the conduct of elections” including by issuing to election workers the “instructions that the [CEO] considers necessary for the administration of [the Act].”<sup>25</sup> Section 17 permits the CEO to adapt the provisions in the Act as necessary in order to run an election, but “solely for the purposes of enabling electors to vote and counting the vote.”<sup>26</sup> Many features of election administration are therefore outside of the special authority provided

22 See *Emergencies Act*, RSC 1985, c 22 (4th Supp); *Emergencies Management Act*, SC 2007, c 15.

23 See *COVID-19 Emergency Response Act*, SC 2020, c 5; *An Act to amend the Financial Administration Act (special warrant)*, SC 2020, c 4.

24 Bill C-19, *supra* note 21.

25 CEA, *supra* note 1, s 16.

26 *Ibid*, ss 17(2)–(3), set specific constraints on the exercise of the CEO’s s 17 authority with regard to the hours at polling stations. See also Elections Canada, “Administering an Election During the Pandemic – Special Report of the Chief Electoral Officer: Administering an Election During the COVID-19 Pandemic”, online: <[www.elections.ca/content.aspx?section=res&dir=rep/oth/sprep&document=p3&lang=e](http://www.elections.ca/content.aspx?section=res&dir=rep/oth/sprep&document=p3&lang=e)> [Elections Canada, “Pandemic Election”].

by section 17, including registration, candidate nominations, protection of health at the polls, and so on.<sup>27</sup>

The existing legal framework therefore largely applies rather than any special set of emergency provisions, with the possible exception of an expanded use of the authority granted under section 17 and the particular scenario of a natural disaster occurring after the election has commenced. The lack of specific treatment of electoral emergencies in either electoral or emergency statutes is also prevalent in the United States,<sup>28</sup> though with exceptions,<sup>29</sup> such as statutory authority in some states to postpone elections.<sup>30</sup>

Elections Canada has proposed an expansion of its powers under section 17. It favours a legislative amendment such “that section 17 be superseded by a provision that authorizes necessary adaptations with all areas of the [CEO’s] mandate while maintaining some prohibitions.”<sup>31</sup> This proposed revision would therefore keep section 17 largely intact, but increase its scope. Bill C-19 would seem to largely reflect this proposal. The Bill would alter section 17 to refine the acceptable purposes for the CEO to adapt the legislation, so as to enable “electors to exercise their right to vote, enabling the counting of votes or ensuring the *health* or *safety* of electors or election officers.”<sup>32</sup> The permitted adaptations include, without being limited to, extending the time for doing an act or increasing the number of election workers or polling stations. A new subsection 17(3) would limit the CEO’s discretion to make adaptations in relation to polling station hours in an emergency.<sup>33</sup>

A contrasting approach to the existing section 17 of the *Canada Elections Act* that instead sets out specific authority in case of an emergency can be seen in Saskatchewan, where emergencies are now explicitly contemplated

<sup>27</sup> *Ibid.*

<sup>28</sup> See Michael T Morley, “Election Emergencies: Voting in the Wake of Natural Disasters and Terrorist Attacks” (2018) 67:3 *Emory LJ* 545 at 609–10.

<sup>29</sup> *Ibid* at 613, where Morley discusses the exceptions and then concludes that “[t]he majority of states...has not yet enacted election emergency statutes.”

<sup>30</sup> See Jacob D Shelly, “Postponing Federal Elections and the COVID-19 Pandemic: Legal Considerations” (20 March 2020), online (pdf): *Congressional Research Service* <crsreports.congress.gov/product/pdf/LSB/LSB10425>.

<sup>31</sup> Elections Canada, “Pandemic Election”, *supra* note 26.

<sup>32</sup> Bill C-19, *supra* note 21, s 558, amending CEA, *supra* note 1, s 17(1) [emphasis added].

<sup>33</sup> The polling stations would have to close at the latest by midnight and could not in any event be open more than 28 hours during the polling period: Bill C-19, *supra* note 21, s 563, amending CEA, *supra* note 1, s 17(3).

by the provincial electoral law.<sup>34</sup> Saskatchewan amended its provincial election legislation in response to COVID-19 so that, in an emergency, it's CEO can change "all or any voting procedures or methods or any manner of voting" and adjust "any timelines, deadlines or time requirements."<sup>35</sup> This language is open-ended. It would hypothetically allow the CEO of Elections Saskatchewan to change the deadlines for the acceptance of mailed-in ballots, for example, so that those received after the usual deadline, due to a postal delay, could still be counted. The proposed amendments by Elections Canada would operate in a similar fashion.

The most extensive use of the power to adapt electoral legislation held by a CEO came in the recent and controversial provincial election in Newfoundland and Labrador. In response to a COVID-19 outbreak in St. John's during the election, the provincial CEO first delayed the vote in some ridings,<sup>36</sup> then cancelled the regular polling day and switched to a mail-in ballot election for all those who had not already cast ballots in the early voting period.<sup>37</sup> Absent clear statutory authority to make these specific changes, the CEO relied upon the general power to adapt the legislation.<sup>38</sup> Switching the method of casting a ballot for the vast majority of voters in the jurisdiction was a broad interpretation of the power to adapt the legislation, which is generally exercised cautiously by the CEOs across the country with similar authority. The particular decisions on how to conduct the postal election may have compromised access. Eligible electors were required to request a mail-in ballot (technically called a "special ballot") by a deadline, rather than Elections Newfoundland and

34 Other options are set out by New Brunswick's Chief Electoral Officer in her post-election report. See Elections New Brunswick, *Post-Election Recommendations for Legislative Change*, by Kimberly A Poffenroth (Fredericton, New Brunswick: Elections New Brunswick, 14 September 2020) at 6. The report raises the possibility of voting by phone.

35 *The Election Act Amendment Regulations, 2020 (No 2)*, OC218/2020, s 2, amending *The Election Act Regulations*, RRS c E-6.01, Reg 1, s 2. The amendments are also more flexible about what constitutes an emergency than the *Canadian Charter of Rights and Freedoms* (the *Charter*) provisions related to elections.

36 See Office of the Chief Electoral Officer of Newfoundland and Labrador, "Statement of the Chief Electoral Officer" (11 February 2021), online: <[www.gov.nl.ca/releases/2021/elections/0211n02/](http://www.gov.nl.ca/releases/2021/elections/0211n02/)>.

37 See Office of the Chief Electoral Officer of Newfoundland and Labrador, "Statement of the Chief Electoral Officer" (12 February 2021), online: <[www.gov.nl.ca/releases/2021/elections/0212n10/](http://www.gov.nl.ca/releases/2021/elections/0212n10/)>.

38 See Newfoundland and Labrador, Chief Electoral Officer, *Report of the Chief Electoral Officer on Part 1 Adaptions for the 51st General Election* (St John's: Elections Newfoundland and Labrador, 21 April 2021) at 2.

Labrador automatically distributing them to those who had not already cast ballots.<sup>39</sup>

While some allowances may have been appropriate given the emergency, the scenario was less than ideal. Had the outcome of the election been closer, we would likely have seen extensive litigation contesting the results in particular ridings. Such litigation would potentially include claims that the CEO exceeded his statutory authority or that the right to vote was harmed by the decisions of the CEO around voter registration, distribution of ballots, and the deadline for receiving them, even considering the extraordinary circumstances.

## B. Withdrawing the Writs

Elections Canada stated in a worst case scenario it would certify to the Governor in Council that it could not administer a pandemic election in certain ridings.<sup>40</sup> This scenario adds another layer to the relatively involved process by which an election comes to be called. Elections occur following the dissolution of Parliament. The dissolution of Parliament remains a Crown prerogative exercised by the Governor General on the advice of the Prime Minister.<sup>41</sup> Subsequent to dissolution, the Governor in Council (in this case the Cabinet) issues an Order in Council to the CEO requesting the issuance of “writs of election” in each riding.<sup>42</sup> “Writs of election” are the technical legal mechanism by which elections are initiated; each writ is a “formal written order”<sup>43</sup> directing the returning officer in each riding to conduct an election. The Governor General then also directs the issuance of writs. The CEO then issues writs to each returning officer, who is tasked with administering the election in the riding. Pursuant to the

39 The deadline was extended many times, before a final requirement that it be postmarked by March 12, 2021. See Office of the Chief Electoral Officer of Newfoundland and Labrador, “Statement of the Chief Electoral Officer” (19 February 2021), online: <[www.gov.nl.ca/releases/2021/elections/o219no7](http://www.gov.nl.ca/releases/2021/elections/o219no7)>.

40 Elections Canada, “Impact of COVID-19”, *supra* note 4.

41 See Philippe Lagassé, “The Crown and Prime Ministerial Power” (2016) 39:2 *Can Parliamentary Rev* 17 at 19.

42 CEA, *supra* note 1, s 57(1): “The Governor in Council shall issue a proclamation in order for a general election to be held.” See also *ibid*, s 57(1.2), which directs that the proclamation shall “direct the [CEO] to issue a writ to the returning officer for each electoral district to which the proclamation or order applies.”

43 House of Commons, *House of Commons Procedure and Practice*, edited by Robert Marleau & Camille Montpetit, Catalogue No X9-2/5-1999E (Ottawa: Chenelière/ McGraw-Hill, 2000), s 4 “The House of Commons and Its Members: the Writ of Election”.

amendments in the *Elections Modernization Act*, the election period as set out in the writs is between 36–50 days.<sup>44</sup> As the authority to command the issuance of writs lies with the Cabinet and the Governor General, they alone have the constitutional power to withdraw them in an emergency. The triggering of an election is therefore an involved constitutional process. The constitutional authority to call an election, to set its date, or to withdraw the writs does *not* rest with Elections Canada.

Section 59 of the *Canada Elections Act* covers the situation where the writs have been issued and the election has commenced, but is interrupted by an emergency. If an election is already underway, it can be postponed in one or more ridings due to a “flood, fire or other disaster” that make it “impracticable” to carry out an election.<sup>45</sup> In those narrow circumstances there can be a delay of up to three months before a new election is called. Section 59 contemplates specifically that the CEO has the power to certify that an election is impossible. It does not compel the CEO to consider any specific factors or to consult public health officials.

The provision could be interpreted as applying to a pandemic or a COVID-19 outbreak, but it is less clear than would be ideal. A pandemic certainly fits the colloquial understanding of a “disaster” as set out in section 59. Yet as a matter of statutory interpretation the phrase “flood, fire or other disaster” implies “disaster” could plausibly be interpreted as meaning only “natural disasters” rather than public health emergencies. Section 59 should be amended so that it clearly applies to public health emergencies. Bill C-19 unfortunately would not do so.

Section 59 provides discretion first to the CEO but then to the Governor in Council, which means the Cabinet under the Prime Minister. The statement by Elections Canada was helpful in pointing out to the political branches of government the potential consequences of dissolution and an election during a pandemic. While the administration of each election has changed with each subsequent set of amendments to the Act, the general constitutional framework of the Crown and executive directing an election to occur, and Elections Canada complying, has been stable.<sup>46</sup> In order to respect the constitutional conventions involved, this extraordinary

44 CEA, *supra* note 1, s 57(1.2)(c).

45 CEA, *supra* note 1, s 59(1). See also *Parliament of Canada Act*, RSC 1985, c P-1, ss 26(2), 29(2), 31(1).

46 See generally Elections Canada, “A History of the Vote Canada”, online (pdf): [www.elections.ca/res/his/WEB\\_EC%2091135%20History%20of%20the%20Vote\\_Third%20edition\\_EN.pdf](http://www.elections.ca/res/his/WEB_EC%2091135%20History%20of%20the%20Vote_Third%20edition_EN.pdf).



discretion should only be exercised where it is truly impossible to conduct an election.

Newfoundland and Labrador is again a cautionary tale here. The potential confusion over institutional roles and responsibilities lurking in an emergency election scenario was laid bare. After the COVID-19 outbreak during the provincial election, the CEO of the province wrote a dramatic letter to political party leaders.<sup>47</sup> The letter pointed to the significant powers of the Chief Medical Officer of Health (CMOH). The CEO wrote that, “Unlike the Chief Electoral Officer, [the CMOH] has significant and clear powers that may be relied upon to protect public health. In my opinion, to conduct a fair election [the CMOH] must exercise those powers to delay the election. Alternatively, the party leaders need to discuss the current issue with a view to contacting the Lieutenant Governor to explore a constitutionally sound mechanism to postpone polling day.”<sup>48</sup>

This letter appeared to put the onus on the CMOH despite the general authority of the CEO around the conduct of the election. It also encouraged the parties to act together and communicate their wishes to the Lieutenant Governor. This suggestion in the letter ignored the constitutional convention that it is the first minister who advises the Lieutenant Governor, even in minority legislatures as there was in the province. The CEO soon thereafter took action himself, rather than the CMOH or parties, presumably under his existing power to adapt the electoral statute.<sup>49</sup> Confusion over the unresolved roles and responsibilities among the institutional actors played out in real time.

In anticipation of such a scenario, some of the provinces already delineate the contours of such authority and the procedure that must be followed for writs to be withdrawn. Nova Scotia’s legislation is clear that its CEO has the discretion to certify that “it is impossible to hold an election” in a riding on election day. Once such certification is made by the CEO, the Governor in Council “may” withdraw the writ and require the

47 See “Election Unsafe, New Letter From Newfoundland and Labrador Chief Electoral Officer Suggests”, *The Telegram* (11 February 2021), online: <[www.thetelegram.com/news/local/election-unsafe-new-letter-from-newfoundland-and-labrador-chief-electoral-officer-suggests-551435](http://www.thetelegram.com/news/local/election-unsafe-new-letter-from-newfoundland-and-labrador-chief-electoral-officer-suggests-551435)>.

48 *Ibid.*

49 See “Elections Newfoundland and Labrador Postpones Voting in 18 Electoral Districts; Rest of Province Will Vote as Scheduled Saturday”, *The Telegram* (11 February 2021), online: <[www.thetelegram.com/news/local/elections-newfoundland-and-labrador-postpones-voting-in-18-electoral-districts-rest-of-province-will-vote-as-scheduled-saturday-551520](http://www.thetelegram.com/news/local/elections-newfoundland-and-labrador-postpones-voting-in-18-electoral-districts-rest-of-province-will-vote-as-scheduled-saturday-551520)>.



CEO to issue new writs with a new election day.<sup>50</sup> Prince Edward Island's statute also contemplates a similar procedure, though with a requirement of a new writ being issued within three months,<sup>51</sup> similar to the federal rule. These options still contain a role for Cabinet, which we might fear could exercise discretionary authority with partisan interests in mind. As the CEO makes the initial certification, however, Cabinet would have to repudiate the CEO's judgment if it chose to allow the election to proceed. There is no detail on what factors lead to a finding of impossibility, however, by a CEO.

Despite greater clarity in section 59 of the federal *CEA* than in the equivalent provisions in Newfoundland and Labrador, there are still questions as to what will happen if there are conflicting judgements regarding the feasibility of carrying out the election. Section 59 does not provide much comfort if there is conflict between the CEO and Cabinet on whether the "impossibility" threshold is met. Imagine a scenario where the CEO certifies that it is impossible to carry out the election in some ridings, but Cabinet disagrees and refuses to order the withdrawal of the writs, or not for all districts. The CEO would be legally required to carry out the election despite expressing the view that doing so responsibly is impossible.

There is also the potential for confusion in roles and responsibilities federally. The general assumption in Canadian constitutional law is that the Governor General should only act on the advice of the first minister, including in the issuance and presumably the withdrawal of the writ. It would be fair to say, however, that the residual power of the Governor General with regard to elections has not been well developed, thankfully because true emergencies during elections have been relatively rare in Canada.<sup>52</sup> If Cabinet or the CEO were considered to have misused or failed to exercise their discretion under section 59, there may be calls from the public or political actors for the Governor General to exercise residual powers due to the emergency. There have been such calls in other related scenarios, such as government formation and prorogation.<sup>53</sup> Such advo-

50 *Elections Act*, SNS 2011, c 5, s 33.

51 See *Election Act*, SPEI 1988, c E-1.1, s 8.

52 Bruce Hicks argues that the broader reason is that the pre-democratic nature of the Crown's powers do not fit well with accounts based in democratic theory. See Bruce Hicks, "The Crown's 'Democratic' Reserve Powers" (2010) 44:2 *J Can Studies* 5.

53 See Philippe Lagassé, "The Crown and Government Formation: Conventions, Practices, Customs, and Norms" (2019) 28:3 *Const Forum Const* 1 at 1: Lagassé points out the "regrettable tendency to exaggerate the Crown's involvement in government formation" for example. There were also calls for the Governor General to reject Prime Minister

cacy in the context of the withdrawal of the writs would run counter to the convention of responsible government. The minimalist approach of section 59 of the *Canada Elections Act* to setting out the details of what should occur in the event of an emergency while the election is underway, however, does not help the matter.

The role of public health authorities is also relevant and adds another layer of possible institutional confusion. The uncertain boundaries between the authority of the Newfoundland and Labrador CEO and the provincial CMOH caused great consternation. Federally, the CEO would presumably certify the impossibility of holding an election in a riding due to a public health emergency on the basis of advice from public health authorities. Elections Canada is not designed to have expertise in assessing public health data. No clear mechanism for gathering advice would appear to exist and there is ample potential for conflicting opinions to the CEO from federal, provincial, regional, and/or municipal public health authorities.<sup>54</sup>

All of these considerations point to the utility of clear lines of authority and procedures in the case of an emergency interrupting a federal election. Section 59 is preferable to the absence of a provision addressing the issue of withdrawing the writs due to an emergency mid-election, which was the case in Newfoundland and Labrador. Section 59 should be refined, however, to ensure that it applies in pandemics and to provide more detail on the respective roles of the CEO, Cabinet, Governor General, and public health authorities. The guiding principles should be the general non-partisanship of election administration within the constraints of the Canadian constitutional model.

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Harper's various requests to prorogue Parliament. See e.g. Peter H Russell, "Discretion and the Reserve Powers of the Crown" (2011) 34:2 Can Parliamentary Rev 19; Peter H Russell & Lorne Sossin, eds, *Parliamentary Democracy in Crisis* (Toronto: University of Toronto Press, 2009).

54 It is possible that a provincial or municipal public health authority could opine that an election would be unsafe or, even, issue orders that restrict political activity such as campaigning or the conduct of the election itself. Such an order would raise issues around the limitation of *Charter* rights and freedoms, including freedom of political expression and association and the right to vote. It would also raise federalism questions, around the application of otherwise valid provincial public health orders to federal polling stations or the conduct of the election by Elections Canada. Consider, for example, a province issuing a stay-at-home order during a federal election. I flag these issues here, though they are beyond the scope of the article.

### III. VOTING IN THE CANADA ELECTIONS ACT

The pandemic and the risks of in-person activity of all kinds have highlighted the particular mechanics for how ballots are cast in jurisdictions around the world. Canadians residing within the country already have a variety of options for voting pursuant to Parts 9–11 of the *Canada Elections Act*. Voters may cast ballots on election day in person, during the early voting period at an advance polling station, or pursuant to the special ballot provisions in Part 11, which includes voting by mail.<sup>55</sup> This section sets out the various options for casting a ballot and trends for how voters view their choice of method.

In recent federal elections prior to the pandemic, voting in person on election day remained by far the dominant practice. In the 2019 election, 70% of votes were cast in person at a polling station on election day.<sup>56</sup> Only 3.6% of voters opted to use the special ballot procedure, which includes voting by mail but also in person at any Elections Canada office during a set period prior to election day. Voting in person would likely remain the preferred choice of a majority of Canadian voters even during a pandemic. A survey commissioned by Elections Canada found that 29.4% would opt to vote in person at a polling station on election day and 28.6% would choose to vote in person at an Elections Canada office, for 58% of all voters.<sup>57</sup> Significantly, 20.8% of voters would do so by mail, which would be a huge increase from previous elections. The recent New Brunswick election, which was the first provincial vote during the pandemic, saw a large increase in requests for mail-in ballots from voters reluctant to attend the polls.<sup>58</sup> Voting in person remains the default option, however, for most voters. This data indicates that the procedures for both in person and

55 CEA, *supra* note 1, s 127.

56 See Office of the Chief Electoral Officer of Canada, *Report on the 43rd General Election of October 21, 2019*, Catalogue No SE1-1/1E-PDF (Gatineau: Elections Canada, 2020) [Elections Canada, “October 2019 Report”].

57 Elections Canada, “Impact of COVID-19”, *supra* note 4. See also Peter John Loewen & Eric Merkley, “Canadian Attitudes Towards Voting During the COVID-19 Pandemic—Wave 1” (23 June 2020), online: *Elections Canada* <elections.ca/content.aspx?section=med&dir=cor/cat&document=index&lang=e>.

58 See Greg Mercer, “Elections New Brunswick Sees Spike in Demand for Mail-in Ballots”, *The Globe and Mail* (2 September 2020), online: <www.theglobeandmail.com/canada/article-elections-new-brunswick-sees-spike-in-demand-for-mail-in-ballots>. New Brunswick’s Chief Electoral Officer stated that “[w]e expected the requests for mail-in ballots to be quite high, but we weren’t sure the degree to which people would be interested in that. It’s been significant.”

mail-in voting will be used widely in a pandemic election and need to be up to the task.

In person voting on election day normally occurs on a Monday or, exceptionally, on a Tuesday.<sup>59</sup> The early voting period is conducted over four days starting on the 10<sup>th</sup> day before election day.<sup>60</sup> The special ballot provisions permit voting in person at an Elections Canada office at any time during the election period up until the 6<sup>th</sup> day before election day.<sup>61</sup>

Voters within Canada can also cast ballots by mail according to the special ballot provisions in Division 4 of Part 11 of the Act. Any voter can apply to vote by mail, without having to provide a particular reason or excuse for not voting in person. Voting by mail requires that the voter be registered and apply for a special ballot by 6:00 pm on the 6<sup>th</sup> day before election day,<sup>62</sup> though the date can be altered by the CEO.<sup>63</sup> The mail-in ballot must be *received*,<sup>64</sup> not sent or filled in, by 6:00 pm on election day or by the close of the local polling station depending on the special ballot procedure used.<sup>65</sup> In other words, mail-in ballots received the day after the election would not be counted. Elections Canada proposed legislative amendments that would turn election day into an “election weekend” with mail-in ballots still counting if they are received on the Monday at the conclusion of the weekend.<sup>66</sup> Bill C-19 would not have created an election weekend, but would instead have implemented a new three day “long weekend” polling period of Saturday, Sunday, and Monday, inclusive.<sup>67</sup> It would also have imposed procedures for ballot drop boxes outside polling stations to facilitate contactless voting and to ensure the security of the ballots.<sup>68</sup>

There are separate procedures for incarcerated electors.<sup>69</sup> Students had the opportunity to cast ballots on post-secondary campuses, after a pilot project in 2015 was expanded for 2019. Elections Canada has indicated that since most students are taken classes online rather than on campus, on campus voting locations would be discontinued during the pandemic.<sup>70</sup>

59 CEA, *supra* note 1, ss 57(3)–(5).

60 *Ibid*, s 171(1).

61 *Ibid*, s 232(1).

62 *Ibid*.

63 *Ibid*, ss 232(2)–(3).

64 *Ibid*, s 239(1) [emphasis added].

65 *Ibid*, ss 239(2)–(3).

66 Elections Canada, “Impact of COVID-19”, *supra* note 4.

67 Bill C-19, *supra* note 21, s 564, amending CEA, *supra* note 1, s 56.1(2).

68 Bill C-19, *supra* note 21, s 592, amending CEA, *supra* note 1, s 239(2).

69 CEA, *supra* note 1, Division 5.

70 Elections Canada, “Impact of COVID-19”, *supra* note 4.

In circumstances where an elector cannot vote in person due to a disability, Elections Canada can arrange for voting in the elector's home.<sup>71</sup>

Canadians residing abroad vote by mail pursuant to Division 3.<sup>72</sup> All non-resident Canadian citizens of voting age can potentially cast a ballot in federal elections, following the Supreme Court of Canada's decision in *Frank v Canada* (AG)<sup>73</sup> and the *Elections Modernization Act*.<sup>74</sup> Turnout is relatively low among non-resident voters, though the absolute number increased significantly between 2015 (11,001 votes) and 2019 (34,144 votes) as eligibility was expanded to include even those out of the country for more than five years.<sup>75</sup> Canadian Forces electors stationed abroad vote at designated military polling stations.<sup>76</sup>

A brief comment is necessary on the possibility of online voting. Voting electronically from home or on a mobile device would address many of the health and safety issues for voters and poll workers. Estonia notably has online voting.<sup>77</sup> Canada is already a leading jurisdiction when it comes to experimenting with online voting, as the Northwest Territories<sup>78</sup> and many municipalities in Ontario<sup>79</sup> use it. Some First Nations and Indigenous organizations have opted to vote online as well.<sup>80</sup> Online voting has never been used in federal or provincial elections, however, and the preponderance of evidence suggests it is simply not secure enough to lead to reliable results.<sup>81</sup> Elections Canada has stated that it is not feasible to

71 CEA, *supra* note 1, s 243.1.

72 *Ibid.*, ss 220–30.

73 2019 SCC 1.

74 SC 2018, c 31.

75 Elections Canada, “October 2019 Report”, *supra* note 56.

76 CEA, *supra* note 1, s 205(1).

77 See Markus Reiners, “Electronic Voting in Comparative Perspective: Status Quo in Estonia and Trends in Central Europe” (2017) 10:1 J Comparative Politics 40.

78 See Hilary Bird, “N.W.T. to be 1st Province or Territory to Use Online Voting in General Election”, *CBC News* (4 July 2019), online: <www.cbc.ca/news/canada/north/nwt-election-online-1.5199115>.

79 See Aleksander Essex, Anthony Cardillo & Nicholas Akinyokun, “Online Voting in Ontario's Municipal Elections” (2020), online (pdf): *Whisper Labs* <e-vote-id.org/wp-content/uploads/2019/10/essex-cardillo.pdf>; Nicole Goodman & Zachary Spicer, “Administering Elections in a Digital Age: Online Voting in Ontario Municipalities” (2019) 62:3 Can Public Administration 369.

80 See Chelsea Gabel et al, “Indigenous Adoption of Internet Voting: A Case Study of Whitefish River First Nation” (2016) 7:3 Intl Indigenous Policy J 1.

81 See House of Commons, *Strengthening Democracy in Canada: Principles, Process and Public Engagement for Electoral Reform: Report of the Special Committee on Electoral Reform* (December 2016) (Chair: Francis Scarpaleggia); Chris Culnane et al, “Knights and Knaves Run

implement online voting during the pandemic.<sup>82</sup> Even outside of the feasibility challenges that might result from trying to implement online voting federally during a pandemic with a minority Parliament, online voting should not be an option on the table due to security concerns, at least for the time being.

#### IV. ADMINISTERING A PANDEMIC ELECTION: IN PERSON VOTING

In the event of a federal vote during the COVID-19 pandemic, the conduct of the election should be adjusted so as to minimize the risks to public health. In this section, I consider how in person voting can be adapted for the pandemic and the various tensions that arise among the competing approaches to election administration. Where ballots are cast in person, the physical location should be made as safe as possible. I consider first options for adapting in person voting at polling stations and Elections Canada offices and then the possibility of an expanded early voting period so as to decrease the number of voters that congregate in any one place.

##### A. Modifying In Person Voting

In person voting is likely to remain the dominant mode of casting a ballot, even in a pandemic. Jurisdictions around the world have continued to use in person voting despite COVID-19.<sup>83</sup> Voters are familiar with in person voting and the *Canada Elections Act* already sets out how it should operate. One of the appealing parts of focusing on polling stations is that most changes would not require Parliament to amend the *Canada Elections Act*. With only limited sitting time during the pandemic, a host of other priorities for legislative time, and the uncertainties of whether any bill will become law in the minority Parliament, the fate of any amendment to the statute is uncertain.

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Elections: Internet Voting and Undetectable Electoral Fraud” (2019) 17:4 IEEE Security & Privacy 62.

82 Elections Canada, “Impact of COVID-19”, *supra* note 4: “Elections Canada did not consider introducing Internet voting. Implementing such a change would require significant planning and testing in order to ensure that the agency preserves certain aspects of the vote, including confidentiality, secrecy, reliability and integrity. Given the current operational and time constraints, this option cannot be explored properly at this time.”

83 James & Alihodzic, *supra* note 6.

Even otherwise anodyne changes to the *Canada Elections Act* in response to COVID-19 might be seen by the political parties in Parliament through a partisan lens, which lowers the odds of the reforms occurring. The United States provides an example where election administration, including changes designed to provide safe access to voting during the pandemic, are highly politicized and subject to litigation.<sup>84</sup> In Canada, pre-pandemic packages of amendments to election law have been quite controversial and also highly politicized.<sup>85</sup> Changes that do not require legislative amendments are more likely to be implemented than those requiring Parliament to take action. The onus is therefore on Elections Canada to modify polling station procedures so as to decrease the risk of transmission of COVID-19.

Some relevant jurisdictions have successfully held elections during the pandemic and can serve as examples to follow. The most notable is South Korea. South Korea held elections for its National Assembly on April 15, 2020. Its National Election Commission (NEC) responded to the pandemic by expanding voting by mail to those who were in hospital or self-isolating at home, encouraging early voting, and changing polling station procedures.<sup>86</sup> A newly drafted “Code of Conduct for Voters” imposed obligations on voters themselves at polling stations, including being required to wear a face mask, temperature checks, keeping a safe distance from other voters, wearing plastic gloves, sanitizing their hands, and discarding their gloves at the exit.<sup>87</sup> The most important aspect of these procedures was that the NEC sought to ensure access by providing the required materials, gloves and hand sanitizer, so that there would be no additional burden beyond arriving masked at the location.

Elections Canada has already proposed a number of polling station modifications, including physical distancing at polling locations, single-use pencils for filling in ballots, and reducing the number of poll workers required.<sup>88</sup> Canadians will likely be more used to these measures and mandatory masks

84 See Richard Hasen, “Three Pathologies of American Voting Rights Illuminated by the COVID-19 Pandemic, and How to Treat and Cure Them” (2020) 19:3 Election LJ 263 for a discussion on partisan election administration and its effects during the pandemic.

85 See *Fair Elections Act*, SC 2014, c 12; *Elections Modernization Act*, *supra* note 74, which undid several of the changes implemented by the earlier legislation. The controversy surrounding the *Fair Elections Act* is described in Michael Pal, “Electoral Management Bodies as a Fourth Branch of Government” (2016) 21:1 Rev Const Stud 85, and Michael Pal, “Evaluating Bill C-76: the *Elections Modernization Act*” (2019) 13 JPPL 171 at 176, 180–81 [Pal, “Evaluating Bill C-76”].

86 Spinelli, *supra* note 9 at 2.

87 *Ibid* at 3.

88 Elections Canada, “Impact of COVID-19”, *supra* note 4.



indoors in shared spaces than at the beginning of the pandemic. Such modifications would therefore appear more familiar, as the pandemic has proceeded and voters have experienced similar measures in shops, schools, and so on. Health measures may unfortunately have the perverse outcome of actually *increasing* the time that some voters spend in the polling station, counter to the public health goal of moving voters through quickly and safely. New Brunswick's CEO warned of long lines at polling stations in the lead-up to that provincial election for that very reason.<sup>89</sup>

Poll workers may also not show up or be hard to recruit. Absenteeism was already a problem prior to the pandemic. In 89 of 338 ridings, the returning officer had "difficulties recruiting and retaining enough poll workers."<sup>90</sup> Five percent of poll workers across all ridings did not show up on election day.<sup>91</sup> It would seem reasonable to conclude that recruiting and retaining poll workers will be even harder during a pandemic, given the potential health risks that the workers would be taking on by engaging with large numbers of people. In Newfoundland and Labrador, the CEO pointed to "largescale refusal of staff to work at the polls on polling day" as partially causing the move to postal voting.<sup>92</sup> Poll workers are often senior citizens or retirees particularly at risk from COVID-19.<sup>93</sup>

Polling station modifications are key to successfully managing pandemic elections, but they cannot be the only response. Many voters will be reluctant to appear in person, physically unable, or even legally barred from appearing in public if they are under mandatory self-isolation. The possibility of transmission remains no matter the precautions taken, as illustrated by the Wisconsin example of increased rates of COVID-19 post-election.

## B. Early Voting

One option for decreasing the risks of congregation at polling stations is to expand opportunities for voting on days other than election day. Election day is typically on a Monday for federal elections. A reasonable approach to making voting safer would be to spread voting out over time.

<sup>89</sup> Mercer, *supra* note 58.

<sup>90</sup> Elections Canada, "October 2019 Report", *supra* note 56.

<sup>91</sup> *Ibid.*

<sup>92</sup> Chief Electoral Officer of Newfoundland and Labrador, *Report of the Chief Electoral Officer on Part I Adaptations for the 51st General Election* (St. John's: Elections Newfoundland and Labrador, 2021) at 1.

<sup>93</sup> See Alistair Clark & Toby S James, "Poll Workers" in Pippa Norris & Alessandro Nai, eds, *Election Watchdogs* (New York: Oxford University Press, 2017).



Allowing voters to cast ballots over a larger period of time than under the current rules would decrease the chance of congregating and the risk of transmission to a large number of voters. Elections Canada's proposal for an election weekend instead of day embodies this logic as does Bill C-19's three-day polling period.

In person early voting, however, is tightly circumscribed by the *Canada Elections Act*.

The legislation currently permits early ballots to be cast on the 10<sup>th</sup>, 9<sup>th</sup>, 8<sup>th</sup>, and 7<sup>th</sup> days prior to election day. As election day is typically on a Monday, this means the Thursday to Sunday in the week before are the set dates for early voting. Bill C-19 would have preserved the early voting period as the Thursday to Sunday the week prior to the new election "long weekend."<sup>94</sup> The official campaign must be between 36–50 days, so advance voting is only available for a small portion of the campaign.

An early or advance voting period can be justified as increasing access. If individuals have life circumstances which make it difficult to cast ballots on that particular day, they should not lose their right to cast a ballot. The logic behind the timing appears to be that voters should be able to experience as much of the official campaign as possible while also ensuring widespread access through early voting. The main argument against increasing access to early voting is that voters will be deprived of the full information available to those who cast ballots on election day. For example, an individual might cast a ballot in the advance voting period, but then regret her choice when new information came to light regarding a candidate's past or a party's policy commitments. Increasing access by moving advance voting earlier in the election campaign period does come at the inevitable cost to some voters who are deprived of late-breaking information. It remains up to individual voters, however, to choose when to cast a ballot, so presumably they will weigh the risk of missing out on relevant information in their decision-making as to when and how to cast a ballot. An expanded early voting period would increase access, though with the trade-off that voters will not have the benefit of watching the full campaign so as to inform their choice of candidate.

States in the United States in the most recent election cycle relied upon a mix of mail-in voting, early in person voting, and election-day turnout in adapted polling stations. Eight states saw early in person voting as an

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94 Bill C-19, *supra* note 21, s 577, amending CEA, *supra* note 1, s 171(2).

increasing component of their total turnout.<sup>95</sup> Some states purposefully encouraged early, in person voting.<sup>96</sup> Early voting was a key method of casting a ballot, even if voting by mail as facilitated by changes in election law was more popular.

While there are trade-offs in terms of resources expended and reductions in the information about candidates and parties available to voters, early voting should be expanded quite dramatically. Permitting voting in person at advance polling stations during the entire election period would be the most effective way to have safe in person voting. It would spread voters out over a longer time period than simply a four-day period prior to the week of the election, as is currently the case.

## V. VOTING BY MAIL

### A. Voter Behaviour

With the obvious risks to public health of in person voting and doubts regarding the security of online voting, voting by mail has been seen globally as a logical alternative. In the United States, voting by mail increased dramatically for the 2020 electoral cycle.<sup>97</sup> In Canada, over 18 million ballots were cast in the 2019 election.<sup>98</sup> Elections Canada's 2020 survey in the midst of the COVID-19 pandemic indicates over 20% would opt for voting by mail now. Assuming a similar number of ballots cast, 3.6 million people would want to vote by mail, which is an enormous increase over previous years.<sup>99</sup> That number might decrease due to mass vaccination or increase due to fears of COVID-19 variants. Given the low levels of voting by mail federally to date in Canada, there are likely to be significant challenges in a rapid shift to more widespread use.

Such a dramatic shift in voting patterns would require a shifting of resources by Elections Canada. Elections Canada is obliged to run

95 Persily & Stewart, *supra* note 17 at 166.

96 *Ibid* at 169. Persily and Stewart cite Kentucky and Maryland as examples.

97 See Charles Stewart III, "Revising Lost Votes by Mail" (2020) Harvard Data Science Rev 1 at 4.

98 See Elections Canada, "Forty-Third General Election 2019: Official Voting Results", online: <[www.elections.ca/res/rep/off/ovr2019app/51/table4E.html](http://www.elections.ca/res/rep/off/ovr2019app/51/table4E.html)>. The official turnout was 18,350,359: Table 4.

99 We could reasonably assume that the total number of ballots cast will increase in the next election in comparison to that of 2019. The total number of ballots cast increased from the 2008, 2011, 2015, and 2019 elections: *ibid*.

in-person polling stations by statute.<sup>100</sup> It can divert resources to processing requests for mail-in ballots and their distribution and counting. Yet time, budgets, and bureaucratic attention are not infinite. It is also possible and, perhaps likely as I will argue, that legislative amendments would be needed to ensure the vote by-mail system does not buckle under the strain of its increased role.

## B. Models for Postal Voting

To place Canada's approach in context, there are some basic distinctions to be drawn between different models of voting by mail or postal voting. Some jurisdictions have universal vote by mail. Where voting by mail is the default option, all eligible voters are provided with mail-in ballots, and election administration is geared around distributing, processing, and counting ballots received by post. Oregon is the most well-known example as in 2000 it became the first state in the United States to go to universal vote by mail.<sup>101</sup> Voters in Oregon automatically receive a ballot two to three weeks before an election. A "security envelope" is provided inside the "ballot return envelope," with the voter signing the ballot return envelope.<sup>102</sup>

Other jurisdictions have optional mail-in voting. In optional systems, voting by mail is combined with traditional in person voting at polling stations. Optional systems diverge on who may cast a ballot by mail. Some systems require the voter to provide an acceptable excuse for not being able to attend the polls, such as being out of the jurisdiction, in order to receive a mail-in ballot. The logic is that voting in person is the default, but those who legitimately cannot attend the polls on election day can vote by mail if they can prove why they would otherwise not be able to vote. Other systems are no excuse jurisdictions. While not universal, any eligible voter can vote by mail if they so choose, without having to justify their choice to electoral authorities.

In Canada, the federal regime establishes optional, no excuse voting by mail. Ballots are provided to those who request them without requiring

<sup>100</sup> See e.g. CEA, *supra* note 1, s 120.

<sup>101</sup> See Daniel Thompson et al, "Universal Vote-By-Mail Has No Impact on Partisan Turnout or Vote Share" (2020) 117:25 *Proceedings National Academy Sciences* 14052 at 14053; Sean Richey, "Voting by Mail: Turnout and Institutional Reform in Oregon" (2008) 89:4 *Soc Science Q* 902.

<sup>102</sup> Oregon Secretary of State Shemia Fagan, "Voting in Oregon", online: <[sos.oregon.gov/voting/pages/voteinor.aspx](https://sos.oregon.gov/voting/pages/voteinor.aspx)>.

a reason. The existing procedures for voting by mail in federal elections have the merit of being formally accessible to all, even if ballots are not automatically sent to all voters as in Oregon. There are no formal restrictions on access to a mail-in ballot, beyond the general requirements of being a citizen of voting age otherwise eligible to vote. Voters can receive a mail-in ballot whether inside or outside the country. As the procedures pre-date the pandemic, there are no age or health-based restrictions that some states in the United States have adopted, such as making them available only to senior citizens or those who are immunocompromised. The voter identification requirements are comparable as for in person voting.<sup>103</sup>

Nearly all provinces and territories provide some option to vote by mail.<sup>104</sup> British Columbia notably used mail-in ballots exclusively for its recent referendum on electoral reform<sup>105</sup> and quite extensively for its 2020 provincial election as voters responded to the health risks of in person voting in the pandemic.<sup>106</sup> As it was mandatory, all voters in Newfoundland and Labrador voted by mail in the recent election, except for those who had cast early ballots. The Canadian experience with voting by mail is relatively limited in comparison to the United States.<sup>107</sup> In the United States, nine states have adopted extensive mail-in voting: Oregon, Colorado, Hawaii, Utah, Nevada, New Jersey, Vermont, Washington,<sup>108</sup> and Montana.<sup>109</sup> Because of the now longstanding use of vote by mail in the

<sup>103</sup> CEA, *supra* note 1, s 237.1(1).

<sup>104</sup> See Elections Canada, *Compendium of Election Administration in Canada: A Comparative Overview* (Ottawa: Elections Canada, 2016) at 61–69. Refer to Table E.2 “Alternative Methods of Voting.”

<sup>105</sup> See *Electoral Reform Referendum 2018 Act*, SBC 2017, c 22, s 5.

<sup>106</sup> Out of a total of 3,485,858 voters, British Columbia issued 724,279 vote-by-mail packages and had received 596,287 by the close of voting. See Elections British Columbia, “Interim Report on Vote-by-Mail Package Processing: 2020 Provincial General Election” (20 November 2020), online: <elections.bc.ca/news/voter-turnout-estimate-updated-interim-statement-of-votes-available/>.

<sup>107</sup> With regard to recent Presidential elections, see US Election Assistance Commission, “EAVS Deep Dive: Early, Absentee and Mail Voting” (17 October 2017), online: <www.eac.gov/documents/2017/10/17/eavs-deep-dive-early-absentee-and-mail-voting-data-statutory-overview>.

<sup>108</sup> Thompson et al, *supra* note 101. California uses it for county elections. See Gabrielle Elul, Sean Freeder & Jacob M Grumbach, “The Effect of Mandatory Mail Ballot Elections in California” (2017) 16:3 Election LJ 397.

<sup>109</sup> Montana allowed mail-in voting for the 2020 election cycle, which was upheld by the courts: *Trump v Bullock*, 491 F Supp (3d) 814 (2020) (Mont Dist Ct). See John Kruzell, “Supreme Court Rejects GOP Effort to Block Mail Voting in Montana”, *The Hill* (8 October 2020), online: <thehill.com/regulation/court-battles/520242-supreme-court-rejects-gop-effort-to-block-mail-voting-in-montana#.X39nLyd3qSU.twitter>.

United States, there is a relatively well-established body of empirical research on its impact.

Vote by mail moderately increases turnout,<sup>110</sup> but has no obvious partisan impact as it does not appear to have disproportionately augmented votes cast for either the Democrats or Republicans.<sup>111</sup> There is no persuasive evidence from the United States that vote by mail increases electoral fraud.<sup>112</sup> States in the United States ensure the identity and eligibility of voters casting mail-in ballots in a variety of ways, including by checking identification, requiring signatures on the envelope, and then verification, including by affidavit or witnessing.<sup>113</sup> Integrity concerns about widespread fraud in mail-in voting like those raised by President Trump are therefore largely overblown. It is worth noting that there has been an ongoing debate about isolated instances of fraud in the United Kingdom.<sup>114</sup>

110 Alan S Gerber, Gregory A Huber & Seth J Hill, "Identifying the Effect of All-Mail Elections on Turnout: Staggered Reform in the Evergreen State" (2013) 1:1 Political Science Research & Methods 91; Thad Kousser & Megan Mullin, "Does Voting by Mail Increase Participation? Using Matching to Analyze a Natural Experiment" (2007) 15 Political Analysis 428; Jeffrey A Karp & Susan A Banducci, "Going Postal: How All-Mail Elections Influence Turnout" (2000) 22:3 Political Behavior 223; Paul Gronke, Eva Galanes-Rosenbaum & Peter A Miller "Early Voting and Turnout" (2007) 40:4 PS: Political Science & Policy 639; Priscilla L Southwell & Justin I Burchett, "The Effect of All-Mail Elections on Voter Turnout" (2000) 28:1 American Political Q 72.

111 Thompson et al, *supra* note 101 at 14053.

112 The Brennan Center for Justice found a miniscule rate of fraud in US elections overall, including for mail-in ballots. See Brennan Centre for Justice, "Debunking the Myth of Voter Fraud" (31 January 2017), online: <www.brennancenter.org/our-work/research-reports/debunking-voter-fraud-myth>. There is also an earlier study by Justin Levitt for the Brennan Centre: Justin Levitt, "The Truth About Voter Fraud" (2007), online (pdf): *Brennan Centre for Justice* <www.brennancenter.org/sites/default/files/2019-08/Report\_Truth-About-Voter-Fraud.pdf>. See also Elaine Kamarck & Christine Stenglein, "Low Rates of Fraud in Vote-By-Mail States Show the Benefits Outweigh the Risks" (2 June 2020), online (blog): *Brookings Institute* <www.brookings.edu/blog/fixgov/2020/06/02/low-rates-of-fraud-in-vote-by-mail-states-show-the-benefits-outweigh-the-risks>.

113 See the list of verification procedures for each state: National Conference of State Legislatures, "Voting Outside the Polling Place: Table 14: How States Verify Voted Absentee Ballots" (17 April 2020), online: <www.ncsl.org/research/elections-and-campaigns/vopp-table-14-how-states-verify-voted-absentee.aspx>.

114 In the United Kingdom, according to its Electoral Commission, there is also a relatively low level of fraud through mail-in voting, at least that are caught by authorities, for 2017–2019. See The Electoral Commission, "Electoral Fraud Data" (2021), online: <www.electoralcommission.org.uk/who-we-are-and-what-we-do/our-views-and-research/our-research/electoral-fraud-data>. See also Toby S James, "Postal Voting and Electoral Fraud: A Reply to Richard Mawrey QC" (12 March 2014), online: *Democratic Audit* <eprints.lse.ac.uk/57534/1/democraticaudit.com-Postal\_voting\_and\_electoral\_fraud\_a\_reply\_to\_Richard\_Mawrey\_QC.pdf>. There were credible allegations of fraud by postal voting in

### C. Critiquing the Federal Legal Framework

The formal access provided by the federal legislation is undermined by the relatively restrictive procedures involved, given vote-by-mail's origins in Canada as a boutique option. The timeframes involved are unduly short and, even, punitive. Voters must be registered. Registration occurs automatically in Canada, so most are already on the list, though some individuals may need to apply. Registration has moved partly online, and the registration form can be downloaded from the internet.<sup>115</sup> If a voter needs to apply to be registered, that increases the complexity and the probable time involved.

Even if registered, voters must apply for a special ballot. Voters must have their application processed by Elections Canada and approved, receive a ballot, and then return the ballot by election day.<sup>116</sup> While the registration form can be downloaded, the ballot is a different story. Ballots must be mailed by Elections Canada to the voter, filled in, and mailed back. Ballots must be received by 6:00 pm on election day or by the close of the polling station for those voting by special ballot within their own riding.<sup>117</sup> Given the possible disruptions to essential services during the pandemic, including postal services, the potential for a large number of mail-in ballots not counted is present.

Voters may also be unfamiliar with the procedures, fail to follow them properly, and have their ballots rejected. In the absence of an education campaign about how to correctly vote by mail, the procedures are likely to be unknown to voters accustomed to appearing in person. It is quite possible that where a much larger number of voters to cast ballots by mail in the next election, many would not be counted if the existing rules are in place because the voter did not follow the proper procedures. This problem of "lost votes" is endemic where vote by mail exists, especially where

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some communities: see Maria Sobolewska et al, "Understanding Electoral Fraud Vulnerability in Pakistani and Bangladeshi Origin Communities in England: A View of Local Political Activists" (January 2015) at 35–38, online (pdf): <[www.research.manchester.ac.uk/portal/files/31873216/FULL\\_TEXT.PDF](http://www.research.manchester.ac.uk/portal/files/31873216/FULL_TEXT.PDF)>. Sir Eric Pickles' conducted an independent review: see United Kingdom, *Securing the Ballot: Report of Sir Eric Pickles' Review Into Electoral Fraud* (London, UK: Cabinet Office, 2016) at 22.

115 The online voter registration portal is available here: Elections Canada, "Welcome", online: <[ereg.elections.ca/CWelcome.aspx](http://ereg.elections.ca/CWelcome.aspx)>.

116 CEA, *supra* note 1, ss 232(1), 236, 237(1), 239(1).

117 *Ibid*, s 239(1).

it is new and voters are unfamiliar with the procedures to follow.<sup>118</sup> A large number of ballots submitted by mail in the United States primaries were not counted on the grounds that procedures were improperly followed.<sup>119</sup> There is some evidence that errors by voters in following the procedures for voting by mail in the presidential election were less common than anticipated in general, but worse for first-time and minority voters.<sup>120</sup> Low turnout in a pandemic election decreases democratic legitimacy,<sup>121</sup> but doubly so if voters took action to participate in the election but their choices were ultimately not counted.

Voting by mail is done through the “special ballot” procedures in the *Canada Elections Act*, which also cover voting in person at an Elections Canada office. Casting a ballot in person at an Elections Canada office allows one to register, receive, and cast a ballot all at once, as on election day. Those worried about the health consequences of going to vote in person, however, are unlikely to avail themselves of that alternative.

#### D. Reforming Voting by Mail

How then should Canada alter the existing vote by mail system? Universal vote by mail systems, where it is the only method for voting, proactively ensure that each voter is sent a ballot in a timely fashion. It seems exceedingly unlikely that Canada would opt to move to a universal vote by mail system, as in Oregon. It would also be unwise to make such a change because of a pandemic which, while of the utmost seriousness at the moment, will not last indefinitely. The model of in person voting as the standard way to cast a ballot, with alternatives available, has served Canada well and is familiar to both election administrators and voters.

In systems where voting by mail is not universal, the goal should be to maximize access to the ballot for those who opt to use that mechanism for voting. Looking at the vote by mail process as a whole, there appears to be two weak links if it is used at a larger scale: voter education and deadlines.

<sup>118</sup> Stewart, *supra* note 97.

<sup>119</sup> See Elise Viebeck, “More than 500,000 Mail Ballots Were Rejected in the Primaries. That Could Make the Difference in Battleground States this Fall”, *The Washington Post* (23 August 2020), online: <[www.washingtonpost.com/politics/rejected-mail-ballots/2020/08/23/397fb92-d83d-11ea-809e-b8be57ba616e\\_story.html](http://www.washingtonpost.com/politics/rejected-mail-ballots/2020/08/23/397fb92-d83d-11ea-809e-b8be57ba616e_story.html)>.

<sup>120</sup> Persily & Stewart, *supra* note 17 at 161.

<sup>121</sup> See James A Gardner, “Democratic Legitimacy Under Conditions of Severely Depressed Voter Turnout” (26 June 2020), online (blog): *University of Chicago Law Review Online* <[lawreviewblog.uchicago.edu/2020/06/26/pandemic-gardner](http://lawreviewblog.uchicago.edu/2020/06/26/pandemic-gardner)>.



In this section I advocate for expanded voter education and moving to a postmark deadline for ballots to be counted, so as to ensure access. Bill C-19 unfortunately would not adequately address concerns around the deadline for receiving ballots.

### 1. *Voter Education*

Voting by mail will be unfamiliar to many voters. If it is correct that over 20% of voters will want to cast ballots that way, there is a risk that many ballots will be inadvertently spoiled by voters not following the unfamiliar rules, as occurred recently in the United States primaries. It is difficult to see a law reform solution to this problem. An education and outreach campaign would be one way for Elections Canada to address the lack of information about how to vote by mail.

Outreach programs by Elections Canada have been controversial in the past.<sup>122</sup> The *Fair Elections Act* curtailed the authority of Elections Canada to engage in voter education and outreach. The *Elections Modernization Act* undid these changes.<sup>123</sup> The CEO now has the clear legal authority to conduct voter education. Voter outreach by Elections Canada likely remains controversial to at least some Parliamentarians because of the perception that the voters being communicated to have particular partisan proclivities. Any outreach campaign over expanded vote by mail could be seen through a partisan lens, as other such messages in the past have been.

Voter education should be seen as an inevitable part of the mandate of an electoral management body, however, despite the potential partisan recriminations. A push for voter education around mail-in voting is essential given how little it has been used in the past. Otherwise, the voting rights of many Canadians will be at risk in a pandemic election where they choose to vote by mail. According to preliminary numbers, the rapid transition to postal voting in Newfoundland and Labrador led to an increase in rejected ballots compared to previous elections.<sup>124</sup> There was also a

122 See Alex Boutilier, "Pierre Poilievre Attacks Head of Elections Canada", *The Toronto Star* (8 April 2014), online: <[www.thestar.com/news/canada/2014/04/08/conservative\\_minister\\_launches\\_personal\\_attack\\_on\\_elections\\_chief.html](http://www.thestar.com/news/canada/2014/04/08/conservative_minister_launches_personal_attack_on_elections_chief.html)>.

123 Pal, "Evaluating Bill C-76", *supra* note 85.

124 See The Newfoundland and Labrador Gazette, Extraordinary, Part I, April 12, 2021 *Provincial Election Report* (St. John's: The Newfoundland and Labrador Gazette, 2021) at 6. Not counting one riding with a recount where there was no data available, there were 1,337 total rejected ballots and 1,412 rejected ballot envelopes in the 2021 election. In 2019, there were 1,757 rejected ballots.



noticeable number of rejected ballot envelopes, which was not a relevant category in previous elections without mass vote by mail.

While permitting voting by mail only by groups most at risk from COVID-19 is constitutionally controversial, as shown in litigation in the United States,<sup>125</sup> voter education can be more targeted. Senior citizens may have extensive experience of voting in person. They would be a natural group to target for education around voting by mail, given the likelihood that a significant percentage of seniors will have health concerns around attending the polls in person. First-time voters might also be another group for whom outreach would be of assistance.

## 2. *Deadlines*

The main weakness in the current approach to vote by mail is the hard deadline. Voters cannot request a ballot until the election campaign officially starts, partly on the rationale that they will not know who the candidates are in their riding before then. Those individuals who are not yet registered to vote face an additional hurdle, though they can now register online. The ballot must then be received by election day or, in Elections Canada's proposal and Bill C-19, on the Monday after election weekend. The existing deadline is onerous. The possible disruption to the mail service is also a possibility that cannot be discounted in a pandemic.

The principle of expanding voter access or convenience suggests permitting all ballots to be counted that are *posted* by election day or the end of the election weekend or long weekend.<sup>126</sup> Mailing a ballot by that deadline should be sufficient. It is beyond the control of the individual voter whether the mail is operating at peak capacity and speed or whether it is compromised due to COVID-19. Individuals may also be under 14-day isolation orders or other public health restrictions that make it more difficult for them to cast ballots in a timely way. A rule that ballots must

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<sup>125</sup> Persily & Stewart, *supra* note 17.

<sup>126</sup> In the United States, Richard Pildes argues that ballots postmarked by election day but received within a reasonable window afterwards should be counted: see Richard Pildes, "How to Accommodate a Massive Surge in Absentee Voting" (26 June 2020), online (blog): *University of Chicago Law Review Online* <lawreviewblog.uchicago.edu/2020/06/26/pandemic-pildes>. See section 3 of the article. Professor Pildes was unfortunately mis-cited for the opposite proposition by Justice Kavanagh in the Wisconsin mail-in voting case: see *Democratic National Committee v Wisconsin State Legislature*, 141 S Ct 28 at 33 (2020), Kavanagh J. Justice Kavanagh subsequently issued a correction involving a misstatement in his opinion regarding the law in the state of Vermont, but did not address his mistake with regard to his citation of the article by Professor Pildes.

be counted if posted by—rather than received by—the end of election day maximizes the chances that an otherwise validly cast ballot will be counted. Even a delay caused by the pandemic to the mail service will not have an impact on which ballots are counted. Such an approach is used in some states in the United States.<sup>127</sup>

There has been litigation in the United States around whether ballots need to be received *on* or postmarked *by* election day. In Wisconsin, the Democratic National Committee and others challenged various state statutes for limiting access for voters.<sup>128</sup> The District Court made a number of findings in the plaintiffs' favour, including ruling that mail-in ballots must be counted if postmarked by election day on November 3, 2020. The 7<sup>th</sup> Circuit Court of Appeals found that the appellants challenging that ruling did not have standing, which effectively ended any chance of it being overturned before election day.<sup>129</sup>

The trade-off to expanding access is at times to raise risks to the integrity of the ballot. There is no evidence of voter fraud, however, in vote by mail jurisdictions. There is similarly no such evidence in Canada among existing groups that vote by mail. These voters include military members, seniors residing in warmer climates, those abroad temporarily, and, since the *Frank* decision and amendments in the *Elections Modernization Act*, long-term non-resident citizens. There is no corresponding risk of fraud that would accompany the greater use of voting by mail in Canada that we can identify with current evidence.

Counting votes that arrive after election day (or the Monday after election weekend) would introduce one serious issue, namely a delay in final election results. Canadians are used to results in nearly all ridings being announced on election night, even if they are not the final, official results. Official results come in the form of the original writ of election for the riding being returned to the CEO with the winning candidate indicated and

127 For the list of state law on this point from, see National Conference of State Legislatures, "Voting Outside the Polling Place: Table 11: Receipt and Postmark Deadlines for Absentee Ballots" (29 September 2020), online: <[www.ncsl.org/research/elections-and-campaigns/vopp-table-11-receipt-and-postmark-deadlines-for-absentee-ballots.aspx](http://www.ncsl.org/research/elections-and-campaigns/vopp-table-11-receipt-and-postmark-deadlines-for-absentee-ballots.aspx)>. The law in specific states is changing at the time of writing in the lead up to the election as legislatures and governors take action to increase or decrease access to mail-in voting and litigation works its way through the courts.

128 See *Democratic National Committee v Bostelmann*, 488 F Supp (3d) 776 (2020) (Wis Dist Ct).

129 See *Democratic National Committee v Bostelmann*, 977 F (3d) 639 (2020) (7th Cir Ct) [*Bostelmann*].

the signature of the returning officer.<sup>130</sup> The process occurs within seven days of election day. Unofficial results, however, are generally proclaimed by the media within the hours after voting closes, except in the case of very close races. The public is accustomed to receiving relatively speedy results.

Voting by mail is likely to delay the release of results, as they may take longer to count or arrive after election day if they can be postmarked by that date.<sup>131</sup> British Columbia's provincial election of 2020, with a higher than normal amount of mail-in voting, saw release of its "final count" of the results on November 8 rather than November 6, which was the earliest possible date.<sup>132</sup> A delay in results being announced has the potential to reduce confidence in the integrity of the process. Canadians need to be conditioned to expect some delay in results.

Accepting ballots indefinitely after election day to maximize access would preclude the finalization of results; some cut-off time is necessary. One week would seem enough additional time so that even ballots sent in just before or on election day would be counted. The amount of additional time should be whatever period sufficiently balances the need to preserve access with the requirement of finality. In Wisconsin, the deadline was set at six days after election day<sup>133</sup> and in Pennsylvania it was three days.<sup>134</sup> Delays in reporting final results would seem to be a worthwhile trade-off to ensure voter access. If voting by mail is to be used by millions more voters during a pandemic election, then the risk of a large number of ballots not being counted for arriving too late is too serious to accept. Extending the deadline for accepting ballots goes some way to addressing this problem.

## VI. CONCLUSION: RUNNING A PANDEMIC ELECTION

The COVID-19 pandemic has forced jurisdictions around the world to adapt their electoral processes. The global experience, the recent United States presidential election, and multiple provincial elections provide a bevy of templates. Canada starts from a relatively advantageous position if the goal is to ensure access to the ballot box while adjusting to

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<sup>130</sup> CEA, *supra* note 1, ss 293–98, 313–18.

<sup>131</sup> Ballots that arrived by mail prior to election day were counted as they were received in some states in the U.S. Presidential election. Others only began the count after election day, which prolonged the uncertainty as to the outcome.

<sup>132</sup> Elections BC, "Final Count Complete" (8 November 2020), online: <elections.bc.ca/news/final-count-complete-2>. The election was on October 24, 2020.

<sup>133</sup> Bostelmann, *supra* note 129

<sup>134</sup> See *Republican Party v Boockvar*, 141 S Ct 1 at 2 (2020), Alito J.

the harsh realities of the pandemic. Voter registration is automatic, early voting is already established, and election administration is independent and non-partisan. The provinces have also shown that safely running an election in a pandemic is possible. On the other hand, the vote-by-mail system has never been tested federally as it will be during the pandemic. A significant number of voters are still likely to want to cast ballots on election day or the election weekend, which would increase the likelihood of close contact between individuals, and the risks of absenteeism by poll workers or serious difficulties in recruiting them are apparent.

The Newfoundland and Labrador example also highlighted uncertainty in who does what when in an emergency situation during an election. This uncertainty applies equally to federal elections. The respective powers and duties of the CEO, Cabinet, Governor General, and public health authorities should be clarified. Bill C-19 would reduce uncertainty around the scope of the CEO's power to adapt the legislation as needed in section 17, but does not address the broader problems of institutional conflict and cooperation that came to the fore in Newfoundland and Labrador, and which could also easily arise federally.

The warnings by Elections Canada that it may not be possible to conduct an election in each and every riding if the local public health conditions or their resulting logistical challenges are severe must be taken seriously. Elections Canada's subsequent proposals for legislative reform should be taken as the minimum that must be done to ensure a safe and secure pandemic election. More can be done, however, especially if the minority Parliament is willing to turn its mind to the problem. As suggested in this article, some precautions can be taken that do not require legislative amendments, mainly adjustments in how polling stations operate. Legislative changes are still required, however, to expand early voting and to make sure that votes cast by mail will be counted.

It seems probable that the pandemic will cause changes in Canada's political culture. Voters are likely to shift their behaviour to favour early and postal voting. Those predicted shifts may prove durable enough to alter voting patterns in the future. Behavioural changes in response to the pandemic may also prove ephemeral. This background makes flexibility in election administration a valuable commodity. Voters need multiple options for how to cast ballots, over a long enough period of time to offer convenience and to decrease the risk of crowding, along with the integrity and security that they should be able to expect.