

# White Paper on the Independence and Accountability of Election Administration in the Northwest Territories

December 2016



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## Forward

Dear Legislators,

I present this *White Paper on the Independence and Accountability of Election Administration in the Northwest Territories* for your review and consideration. This paper is an important opportunity for members of the 18<sup>th</sup> Legislative Assembly of the Northwest Territories to review and ensure election legislation of the Northwest Territories reflects Canadian electoral best practices and confirms the autonomy of this election agency.

The paper is being brought forward at this time as a number of encumbrances in both electoral event and general administration of Elections NWT were identified. The contemplation of appropriate solutions subsequently revealed a number of barriers that are indicative of an agency bound to government and not truly independent as intended.

From a management perspective this acknowledgement brought forth a number of questions: What should true independence for Elections NWT look like? How does the independence of Elections NWT compare to other Canadian jurisdictions? What needs to be done to ensure the electorate's expectation of true independence from government is achieved?

To answer these questions I commissioned an independent report from one of the foremost authorities on election management issues in Canada, Mr. Lorne Gibson. Mr. Gibson's breadth of knowledge on election related matters was gained from years of being engaged in the elections field and includes serving as Chief Electoral Officer for Alberta. Mr. Gibson's biography is included at the end of this paper.

The expectation was he would work independently, without parameters, to: conduct an assessment of Elections NWT's current state of independence, undertake a comparative analysis of other Canadian election management bodies, draw comprehensive conclusions on his findings, and propose fitting recommendations. His response, *Assessment of the Independence and Accountability of Elections NWT* forms the basis of this white paper.

It is vital that Elections NWT operate as an independent, accountable and fiscally responsible agency. Adoption of the recommendations put forth in this paper will ensure Elections NWT is as current as other Canadian jurisdictions and well positioned to exercise the utmost of electoral best practices.

Sincerely,



Nicole Latour  
Chief Electoral Officer, Northwest Territories

# Assessment of the Independence and Accountability of Elections NWT

*A Report Commissioned by Elections NWT*

By Lorne R. Gibson  
December 2016

## **Note to the Reader**

This paper was commissioned by Elections NWT. The assessment, conclusions and recommendations presented in the paper are those of the author, not Elections NWT.

## 1. Introduction

The purpose of this review is to assess the governance structure of Elections NWT, with a particular focus on the independence and accountability of this election management body (EMB) and its Chief Electoral Officer (CEO). This was done by reviewing the published political science literature on this topic, the legislative authority for the organization, and its current operating practices, and comparing them to those of other provincial and territorial EMBs in Canada.

This comparative assessment focused on the following components of electoral governance:

- Independence of the Office from Executive government;
- Legal foundation for the establishment of the Office;
- Mandate of the Office and the duties, responsibilities and powers of the CEO;
- CEO's control over staffing levels & appointments;
- Financial autonomy and funding arrangements for the Office ;
- Processes for appointing and removing the CEO;
- CEO's term of Office and compensation setting;
- CEO's reporting structure and process;
- CEO's power to recommend changes to electoral law;
- CEO's enforcement authority;
- CEO's protection from legal action; and
- Nature of the accountability relationships of the Office

The assessment draws conclusions regarding those areas where the independence and accountability of Elections NWT could be strengthened and makes specific recommendations for improvement.

The review begins with the premise that free and fair elections, conducted in a non-partisan, professional, and efficient manner, cannot take place without an independent, credible, transparent, trustworthy and legitimate electoral authority that inspires public confidence.

## 2. Independence of Legislative Officers

In most Canadian jurisdictions, the term Legislative Officers – sometimes called independent or statutory officers of the Legislature – typically refers to such positions as the Auditor General, the Ombudsman, the Information and Privacy Commissioner, the Children's Advocate, the Conflict of Interest Commissioner and the Chief Electoral Officer. These positions are to be distinguished from another group of so-called legislative officers such as the Speaker, the Clerk of the Assembly, the Sergeant-at-Arms and Legislative Council. These latter positions assist the Legislature in procedural and administrative matters. However, the former positions, including

the CEO, perform a vital ‘watchdog’ function or check on government that supports the Legislature in its accountability and scrutiny functions. They are the eyes and ears of elected Members – monitoring and assessing Executive government’s programs, procedures and performance. While the CEO plays less of a watchdog role than other legislative officers, he or she requires a considerable degree of operational freedom in order to maintain a constant state of readiness to hold electoral events. For the CEO, it is the mandate to impartially conduct democratic elections, by-elections, referenda and plebiscites that enables the province’s or territory’s citizens to ultimately hold government accountable at the polls through the use of their constitutionally guaranteed voting franchise rights.

One of the hallmarks that define Legislative Officers is their independence. They are servants of the Legislature and not servants of the government. But there is an interesting dynamic at play between governments and Legislative Officers. One way for government to present itself as more reliable, transparent and trustworthy is to open itself up to independent scrutiny. Legislative Officers help them to achieve this by functioning as an independent arm of the Legislature that carries out vital oversight functions on its behalf. They do this in a nonpartisan manner and make recommendations to the government on the Assembly’s behalf.

This independent scrutiny of government activity has taken on many forms throughout the years – public inquiries, Royal Commissions, external audits and legal challenges, to name a few. These types of independent evaluation are usually issue-specific and can happen whenever a sufficient lack of public trust develops in regard to a particular issue, activity or government decision.

However, with matters of ongoing public interest, such as:

- how our elected officials gain their positions of power;
- how public funds are being spent;
- how recipients of public programs and government decisions are being treated; and
- how far reaching information held by the government is being used,

it has been prudent for governments to establish ongoing accountability mechanisms in the form of independent offices.

Given the vastness of modern governments, overseeing and controlling its operations have become increasingly more difficult functions to perform even by the professional public service. Recognizing this, governments have created different instruments to stretch their limited capacity to oversee some of the most important functions they perform, thereby reassuring the electorate that they have responsive, responsible and accountable government. Legislative Officers are one mechanism governments have developed to adapt to the pressing public expectations of responsible government. The creation of a Legislative Officer position with special powers and resources to oversee the electoral process, for example, assures individual members and the public that this vital function is being professionally managed and receiving the attention that it deserves. The public also seems to prefer that non-political individuals and

institutions provide guardianship of some of government's most important responsibilities and functions.

Legislative Officers report to all members of the Legislature, not to the Assembly bureaucracy or Executive government. Their offices collectively are sometimes referred to as the "integrity" or the "democracy" branch of government because they are protectors of the public interest. This is due to the trust that is accorded to these positions and their offices because of their independence. They are a powerful check on the collective government conscience. For this reason, they must have the independence to expose maladministration when it occurs and the power to enforce accountability. And since Legislative Officers act as a check on government accountability, it is necessary for them to be conspicuously independent from government, the public service, the Assembly bureaucracy and, at times, from the Assembly itself.

In no other example is this more evident than with the Office of the CEO since the holder of this office protects a core value of our political system – democracy itself. CEOs are typically armed with special powers and tools to engage in ongoing oversight of the electoral machinery. They protect our Charter right to vote and ensure that citizens can have free and fair elections.

There are several features of a CEO's independence that can give citizens the confidence to trust they will dispatch their duties professionally, prudently and without favour or fear of influence or reprisals from government, (political parties) and elected and non-elected officials.

1. There are usually professional qualifications for the job of CEO, such as formal education and experience, which help guarantee expertise in judgment and freedom from influence.
2. Typically CEO appointments are nonpartisan and have the confidence of the Assembly.
3. Typically CEOs have some degree of security of tenure. For example, most CEOs have a fixed term of office.
4. Most CEOs do not serve at the pleasure of government, whereby they can be removed from Office in a discretionary or arbitrary manner. Rather, in most jurisdictions, they can only be removed from office for cause and only upon a resolution of the Assembly.
5. The authority of most CEOs is regulated by written statutes passed by the Legislature that are available for any citizen to see. CEOs are not be guided by instructions and Cabinet orders from government.
6. Most CEOs provide written reports at least annually to the Legislature as a whole through the Speaker or through a legislative committee. They are not are not answerable to government and do not report through a government ministry.
7. And finally, most CEOs have a kind of institutional independence with regard to administrative matters, whereby they are free to exercise their powers without needing

to seek additional approvals from the bureaucracy and without fear of interference or retaliation by Executive government.

These are some of the reasons that citizens can have faith in the electoral process, the results of elections, the legitimacy of the government that is elected, and the reliability of information that CEOs provide to the Legislative Assembly. These are also some of the reasons why it is vital that the independence of the role of the CEO be safeguarded.

So how do we know when independence from government has been achieved?

The next section of this paper elaborates on the crucial features of independence of CEOs, but suffice it to say that independence exists when there is no political consequence for the actions of a Legislative Officer who is fulfilling the mandate of his or her office.

And while this paper posits that it is necessary for Legislative Officers to be independent from external influences, there must also be reassurance that their powers are not absolute. Legislative Officers must also be accountable to the Legislature that appoints them. In 2002, the former CEO for Canada, Jean Pierre Kingsley, remarked before a House of Commons committee that, "Independence as a virtue, does not travel alone. It must be seen in the constant company of accountability."

Independence and accountability are two of the essential attributes of Legislative Officers because they confer upon them trust and legitimacy. Public trust arises when Legislative Officers are seen to be independent from government and legitimacy arises when they are held accountable to the Legislature for the responsibilities for which they have been entrusted. The important question is whether there is sufficient independence for a Legislative Officer to be able to carry out his or her mandate effectively and sufficient accountability to maintain public trust in the institution.

### **3. Independence of an Election Management Body**

Independence refers to the insulation of electoral management, especially certain highly sensitive activities, from interference or undue influence by other institutions and actors. Most scholars and election administrators regard independence as the single most crucial test of the soundness of electoral governance arrangements. It is necessary to recognize, however, that EMBs cannot be completely independent and autonomous because they must also be accountable and responsive to the body that establishes them.

The capacity to act independently matters more in relation to some functions of an EMB than others. Independence is crucial, for example, with respect to such legal and quasi-legal functions as regulation, investigation, adjudication and enforcement – all functions for which both actual and perceived impartiality and fairness must exist. Independence is also important when the



mandate of the EMB requires it to provide independent policy advice that is informed by expert knowledge and devoid of political considerations. Many EMBs are also expected to engage in communication and educational outreach activities, and these activities should be conducted in an independent, non-partisan manner. Independence is usually less complete with respect to such administrative matters as budgeting and staffing, where an EMB is often required to negotiate with other parts of the governmental system and follow established merit-based hiring practices, classification systems and compensation formulas applicable to other public servants. However, once staffing or spending authority has been granted by the Assembly, an EMB should not have to seek additional approvals for the administrative decisions it makes.

An EMB cannot claim autonomy just because it is administratively convenient or even because a certain degree of independence has been long-standing. Rather, independence must be justified by upholding the essential values and properties of the institution, which are seen to be necessary for promoting a healthy democracy. In its current state, Elections NWT is independent from government in name, but appears to be bound to an administrative structure that does not suit the needs of an independent EMB.

The following section of this paper looks at some of the important features of independence, examining how they apply to Elections NWT and pointing to examples from other jurisdictions where they can be strengthened. A high degree of independence can be said to exist when the following features are codified into law, fully observed, and respected by the Legislature, the Assembly bureaucracy, and by government.

#### 4. Legal Foundation for the Establishment of Elections NWT

There should be clear and secure legal foundations for the establishment of both the position of CEO and his or her Office, such that they cannot be abolished at the whim of the Executive.

In the Northwest Territories (NWT), as in most other provinces and territories, the applicable elections legislation (the *Elections and Plebiscites Act*) establishes the position of CEO and a permanent office to administer elections.

- s. 5. *(1) The Commissioner, on the recommendation of the Legislative Assembly, shall appoint a Chief Electoral Officer.*
  
- s. 12. *The Office of the Chief Electoral Officer is established and may be operated under the name "Elections NWT".*

However, a clear legal foundation also means that the authority granted to the CEO is commensurate with the mandate assigned to an EMB. A CEO must be given the authority necessary to do the job that he or she has been tasked with.

## 5. Mandate of Elections NWT

A clear mandate helps to ensure stability, consistency and the reliability of an EMB. These qualities enable the public to better understand and have confidence in the organization that oversees the electoral process. Stakeholders, including the institutions and actors most directly affected by the EMB's actions and those who have authority and/or influence over its role, need to develop mutual understanding and respect for their different roles in the electoral process. Respect and trust in the reliability, consistency, impartiality and fairness of an EMB takes time to develop but can be quickly lost when interference occurs or when allegations of bias or incompetence are made. Relative continuity in the structures and procedures of an EMB also allows cumulative knowledge and skills to develop and enables a strong, shared culture of professionalism, precision, and integrity to emerge.

Over time, there will be changes in the political system, public opinion and so on, and these changes may require modifications to the electoral governance arrangements. Given the central importance of such arrangements to achieving a healthy democracy, any such institutional modifications should preserve the underlying foundational principles and the distinctive competencies that an EMB will have developed over time.

The mandate of an EMB should be articulated in legislation, not by Cabinet orders, which are used to create and reorganize government departments. The legal mandate of an EMB is both enabling and constraining; it provides legitimacy for the EMB's actions, as well as the legal means for it to carry out its work. At the same time, an EMB is obliged to respect the law, work within its parameters, and enforce its provisions to the best of its ability. Enshrining freedom from Executive direction and control in law is a crucial foundation for establishing independence.

In the case of Elections NWT, the *Elections and Plebiscites Act* does not lay out the mandate of the Office of the CEO, nor does it specify where the office sits in relation to other institutional constructs. Rather, the legislation only establishes an Office of the CEO and the position of CEO as the head of the organization. However, the legislation outlines the duties and responsibilities of the CEO, and there can be little doubt that these are essentially the mandate for the organization as well. More will be said about the completeness of the duties, responsibilities and powers of the CEO in the next section.

While it may be assumed that the Office of the CEO is the creation of and located within the Assembly by the fact that the Legislature recommends the appointment of the CEO, the location of the Office within the Legislative Assembly and the status of the CEO as an independent Legislative Officer should be made explicit. For example, Nova Scotia states that the EMB is an Office of the Legislative Assembly, which makes it clear that it is not simply another branch of government. Other jurisdictions (e.g. Alberta, B.C., Manitoba, Newfoundland and Labrador, New Brunswick, Nova Scotia, Nunavut, Ontario, PEI, Saskatchewan, Yukon) are explicit that the CEO is an independent officer of the Legislative or House of Assembly. PEI's election legislation states that, "In performing his or her duties, the CEO shall be responsible to the Legislative Assembly."

## Recommendation

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The *Elections and Plebiscites Act* should be amended to state that:

- the Office of the CEO is an office of the Legislative Assembly
- the Office of the CEO is established to ensure the impartial administration and conduct of elections and plebiscites
- the CEO is an independent officer of the Legislative Assembly
- the CEO reports to and is accountable directly to the Legislative Assembly for carrying out his or her duties and responsibilities under the Act and for the administration of his or her Office

## 6. Duties & Responsibilities of the Chief Electoral Officer

In most Canadian jurisdictions the mandate of the EMB can be discerned from the duties and responsibilities of the CEO as the head of the organization. These can be found in various provisions throughout the elections legislation and are usually summarized in a specific section of the statute. In the NWT's *Elections and Plebiscites Act*, the CEO's duties are described as follows:

s. 8. (1) *The Chief Electoral Officer shall*

*(a) exercise general direction and supervision over the conduct of elections and plebiscites;*

*(b) require all election officers to comply with this Act and to act fairly and impartially in the exercise of their powers and the performance of their duties;*

*(c) implement a program to disseminate information to electors about elections;*

*(d) inform the public, by the means that he or she considers appropriate, of the purpose of a plebiscite to be held under this Act and the manner in which it is to be conducted; and*

*(e) perform all other duties of the Chief Electoral Officer under this Act.*

While clauses (a) and (e) cover a lot of ground and could be considered to be all encompassing, it is often useful to highlight some of the more important duties and responsibilities of the CEO or to identify some of those that are not made explicit within the various sections of the legislation. To some extent, this has been done in clauses (c) and (d) above. A separate listing of the duties and responsibilities of the CEO provides a more complete picture of the CEO's authority and role. It is also imperative when the authority of the CEO is called into question and it can assist with the interpretation of other sections of the law.

In addition to the responsibility for administering elections, the following is a sample of some of the other major duties and responsibilities of the CEO found in the elections legislation of other Canadian jurisdictions:

- *The CEO shall administer, manage and control the CEO's office and the general business of the office. (Saskatchewan)*
- *The CEO shall oversee and direct members of the staff of the CEO and the persons appointed (as election officers). (Saskatchewan)*
- *The CEO shall issue to election officers any instructions as the CEO considers necessary to ensure the effective, non-partisan execution of this Act. (Nova Scotia)*
- *The CEO is responsible for issuing and distributing financial and administrative guidelines to candidates and registered political parties and their business managers, chief official agents and auditors. (Saskatchewan)*
- *The CEO shall assist registered parties and candidates in the preparation of returns required under (the Act). (Newfoundland & Labrador)*
- *The CEO shall publish on the Elections Nova Scotia website, or in such manner as determined by the CEO, the reports filed under this Act or the information contained in those reports as prescribed by the CEO. (Nova Scotia)*
- *The CEO shall prescribe forms and the contents of forms for use under the Act and provide for their use. (Newfoundland & Labrador)*
- *The CEO shall make any public advertisements he considers necessary. (Quebec)*
- *The CEO shall formulate policies regarding the conduct of elections. (Nunavut)*
- *The CEO shall ensure the training of election officers. (Quebec)*
- *The CEO must ensure that this Act is enforced. (BC)*

The NWT should consider providing a more complete list in of the CEO's duties and responsibilities under section 8 of the Act in order to identify areas that are not explicit or dealt with in the Act.

## **Recommendation**

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*The Elections and Plebiscites Act should be amended to state that:*

- *The CEO shall administer, manage and control the CEO's office and the general business of the office*
- *The CEO shall examine all statements, reports, forms and other information filed with the*

## CEO

- The CEO shall publish on the Elections NWT's website, or in such manner as determined by the CEO, the reports filed under this Act or the information contained in those reports
- The CEO shall formulate policies regarding the conduct of elections

## 7. Powers of the Chief Electoral Officer

It is important to outline the CEO's powers within the Act to identify the specific authority of the CEO. This is usually done to show where the CEO has the power to adapt the Act or exercise discretion. The NWT *Elections and Plebiscites Act* lists the following powers of the CEO:

- s. 8. (2) *The Chief Electoral Officer may*
- (a) *issue instructions to election officers that the Chief Electoral Officer considers necessary to ensure the effective administration of the Act;*
  - (b) *issue any form required by this Act; and*
  - (c) *exercise all powers of the Chief Electoral Officer under this Act.*
- s. 9. (1) *Subject to subsections (2) and (3), if the Chief Electoral Officer is of the opinion, during an election or plebiscite, that a mistake, miscalculation, emergency or unusual or unforeseen circumstance makes it necessary to adapt any of the provisions of this Act, he or she may, by written directive,*
- (a) *extend the time for doing any act;*
  - (b) *increase the number of election officers or polling stations; or*
  - (c) *otherwise adapt any of the provisions of this Act to carry out the intent of this Act.*

As in most Canadian jurisdictions, the CEO's power to adapt the Act does not extend to permitting nomination papers to be received after the deadline or permitting voting to take place before or after the specified times for opening and closing the polls, unless there has been a delay in the opening of a poll or unless voting has been interrupted.

It is also commonplace for the CEO to have the power to delegate to the Deputy or Assistant CEO any of his or her powers or duties. Such a provision is contained within the NWT's *Elections and Plebiscites Act* (s. 10), as are the powers to establish procedures and issue instructions in respect of voting by absentee ballot (s. 132), voting at multi-district polls (s. 136.1(3)), voting at mobile polls (s. 137), and voting in the office of the returning officer (s. 144(2)). The CEO also has fairly broad powers for investigation and prosecution of possible breaches of the Act.

There are other powers of the CEO related specifically to the appointment of a Deputy CEO, general staffing, and appointment of election officials. These will be discussed in a later section of this paper that deals with Control of Staffing Levels and Appointments. Powers related to the submission of annual and election reports will be discussed in a later section of the paper dealing with Accountability of the Office of the CEO and the power for making recommendations for legislative change will be discussed in the section dealing with Power to Make Recommendations for Legislative Change.

Currently, the powers associated with the role of the CEO are not clearly defined with regard to the general management and operations of the Office of the CEO. There is no mention of the CEO's administrative authority to manage the operations of Elections NWT – only powers directly related to delivering election events. Most CEOs in other jurisdictions have deputy minister-level authority for managing administrative matters within their offices.

Other Canadian jurisdictions have identified the following as the powers of their CEO:

- *The CEO may prepare and distribute policies, guidelines and codes of conduct for election officers and employees of Elections Nova Scotia with respect to any matter in this Act with power to vary such policies, guidelines and codes of conduct to existing circumstances. (Nova Scotia)*
- *The CEO may suspend or remove from office any election officer for disability, misconduct, or neglect of duty and appoint on a temporary basis an individual to hold the office of the suspended or removed election officer until a permanent appointment can be made. (Saskatchewan)*
- *The CEO may modify a provision of this Act to permit its use at a by-election. (PEI)*
- *The CEO may, using any media or other means that the CEO considers appropriate, provide the public with information relating to the provincial electoral process and the democratic right to vote and the requirements to be a candidate at an election. (PEI)*
- *The CEO may develop and make materials available to school boards for distribution to students who have reached voting age or will soon do so, including information on the Provinces electoral process, the right to vote, how to have one's name added to the Register of Electors, and any other matter that the CEO considers useful for electors. (Nova Scotia)*
- *The CEO may prescribe forms for use under this Act. (Manitoba)*
- *The CEO may decide the form and content of notices and other documents under this Act, and the way in which they are to be published when publication is required. (Manitoba)*
- *At a by-election, the CEO may direct the use of voting equipment, vote-counting equipment or alternative voting methods that are different from what this Act requires. (Ontario)*
- *The CEO may prepare directives and guidelines for registered political parties, registered constituency associations, candidates, financial agents and auditors respecting this Act. (BC)*
- *The CEO may conduct public hearings with respect to regulations, policies and guidelines or any issue related to the electoral process. (Nunavut)*

- *The CEO may make such agreements as necessary to perform his or her duties and to improve the Nunavut electoral system. (Nunavut)*
- *The CEO may enter into agreements with persons for the purpose of obtaining information to update the Register of Electors with provisions for reimbursement of reasonable costs associated with preparing the information. (Nova Scotia)*
- *The CEO may enter into agreements with any person for the purpose of obtaining or providing mapping, geographic or demographic information. (Nova Scotia)*

## Recommendation

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The *Elections and Plebiscites Act* should be amended to state that:

- The CEO may prepare and distribute policies and guidelines for election officers and employees of Elections NWT with respect to any matter in this Act with power to vary such policies and guidelines to existing circumstances
- The CEO may suspend or remove from office any election officer for disability, misconduct, or neglect of duty and appoint on a temporary basis an individual to hold the office of the suspended or removed election officer until a permanent appointment can be made
- The CEO may develop and make materials available to schools for distribution to students who have reached voting age or will soon do so, including information on the Territory's electoral process, the right to vote, how to have one's name added to the register of electors, and any other matter that the CEO considers useful for electors or prospective electors
- The CEO may prescribe forms for use under this Act
- At a by-election, the CEO may direct the use of voting equipment, vote-counting equipment or alternative voting methods that are different from what this Act requires
- The CEO may enter into agreements with any person or government department, agency or institution for the purpose of obtaining information, including personal information, to update the register of electors
- The CEO may enter into agreements with any person or government department, agency or institution for the purpose of providing address, mapping, demographic or geographic information, including geospatial information

## 8. Control of Staffing Levels and Appointments

Control over staff recruitment and appointment is another feature of independence. This involves the procedures and the basis for the employment of administrative staff and appointment of election officers, as well as the conditions that govern these employees and workers. It is important to ensure that the varied activities of an EMB are directed by the organization and not controlled by some other level of government or the Assembly bureaucracy.

Electoral management involves specialized knowledge and skills and, therefore, the freedom to recruit, appoint and classify personnel can be important to maintaining both the independence and the effectiveness of electoral authorities. The right to recruit staff and set the terms and conditions of employment, in accordance with the *Public Service Act*, should be the prerogative of the CEO. However, there is often the tendency by governments to treat EMBs as just another part of the departmental apparatus of government by insisting that they comply with a wide range of rules concerning, for example, human resource management, classification and compensation, and performance evaluation. This tendency can give rise to the appearance of (or actual) interference by individuals or central agencies that exist to serve the government. An example of this would be where an EMB is required to obtain secondary approvals before being permitted to exercise its administrative authority to hire staff or spend money. It is difficult for outside observers to determine how constrained electoral authorities are by central administrative policies and rules. On the other hand, EMBs cannot be completely exempt from established principles and practices of merit-based hiring and the changing financial realities of government.

In the case of Elections NWT, the organization has a staff of 4 employees, including the CEO, and one casual position. The CEO is not an employee in the public service but rather is appointed by the Commissioner of the Northwest Territories. All other staff, including the DCEO, are in the public service. The staff are all “excluded employees” from the Union of Northern Workers but their employment terms all mirror those of unionized Government of Northwest Territories (GNWT) employees. Aside from the CEO, the three staff positions are considered “indeterminate” or permanent, but the staff occupying these positions have, on occasion, been hired on a casual basis.

Position classifications are determined in cooperation with the GNWT department of Human Resources and compensation levels are determined through the GNWT job evaluation office and are consistent with other similarly classified civil service positions. Positions are advertised on the Government’s *eRecruit* website. Applications are screened, short-listed and interviews are conducted jointly between the GNWT department of Human Resources and Elections NWT. Payroll for the office is provided through the GNWT’s PeopleSoft payroll system. Benefits administration is handled through GNWT Financial Shared Services. On occasion, and depending on the case, the CEO will have to go before the Board of Management for approval of direct appointments.



The wording of section 15 of the *Elections and Plebiscites Act* makes it clear that the CEO's authority for hiring extends not only to the appointment of election officers, but to permanent office staff as well.

*s. 15. (1) Notwithstanding the Public Service Act, the Chief Electoral Officer may appoint*

*(a) the persons he or she considers necessary to administer this Act; and*

*(b) such additional persons on a temporary or casual basis as he or she considers necessary to prepare and conduct an election or plebiscite.*

*(2) A person appointed under paragraph (1)(a) is an employee in the public service.*

Despite this power, the CEO's appointment authority has been restricted to the appointment of election workers. The CEO is not permitted to exercise her authority to employ office staff without receiving secondary review and approval – even when these positions have been approved in Elections NWT's budget. Approval from the Assembly bureaucracy or GNWT Human Resources is necessary before staff vacancies can be filled. Such a bureaucratic system of approvals would not be required of deputy ministers or other department heads. Also, any new or additional positions would need to be approved by the Legislative Assembly's Board of Management.

It is sometimes difficult for an independent EMB to work within the Government system and to follow its HR policies in the context of administering elections. Often there are only loose position comparisons within the government to those within the EMB when it comes to matters such as classification. That is to say, the job evaluation criteria do not always fit for the positions in an election context. There is also the issue of finding an appropriate method of paying election workers. Having to set up as vendors hundreds of election workers, most of whom work for only a single day, and having another central agency review and approve payments to these workers, are not an efficient uses of time and resources.

Other Canadian jurisdictions have considerably more autonomy and independence when it comes to control over hiring staff and the appointment of election workers. The following are some of the provisions contained in elections legislation of other jurisdictions:

- *The CEO shall place employees in such positions as the CEO considers appropriate under such classification ratings and at such rates of remuneration within those classifications ratings established by the Public Service Commission as the CEO considers appropriate. (Nova Scotia)*
- *Subject to the approval of the Board, the CEO may employ such persons on his or her permanent staff as are necessary in the performance of his or her duties and for the efficient and proper operation of his or her office and may, establish job classifications for such employees and determine their salaries or wages and the terms and conditions of their employment. (Ontario)*

- *The CEO may make orders and rules for the conduct of the internal business of the office of the CEO and, after a hearing, may, in accordance with subsection (2), impose disciplinary measures, including suspension or dismissal, for cause on an employee of the office. (Ontario)*
- *The CEO shall (a) administer, manage and control the CEO's office and the general business of the office; and (b) oversee and direct the members of the staff of the CEO and the persons appointed pursuant to subsection (3) (i.e. election officials). (Saskatchewan)*
- *The CEO shall prepare and maintain human resources and financial management policies that apply to his or her staff and operations. (Saskatchewan)*
- *The CEO shall establish the qualifications for the Assistant CEO and establish a fair process for hiring based on merit and a fair process for removal. (Nova Scotia)*
- *The Civil Service Act does not apply to individuals appointed pursuant to subsection (2)(i.e. temporary workers) and the CEO may establish their remuneration and other terms and conditions of their engagement. (Nova Scotia)*
- *The Public Service Act applies to appointments under subsection (1) (i.e. for the appointment of a DCEO and other office staff) and, for purposes of that Act, the CEO is deemed to be a deputy minister. (BC)*
- *The staff of the Office of the CEO shall be paid such remuneration as the CEO determines. (Nunavut)*
- *The CEO may remove any election officer from office for disability or misconduct or for failing to perform his or her work satisfactorily and may order that election officer to deliver all materials in the election officer's possession relating to that office to a designated person. (Alberta)*
- *Notwithstanding any Government procurement rules or policies, the CEO may engage the services of such counsel, accountants, auditors or other professionals or experts to advise or assist the CEO in respect of matters the CEO considers necessary to carry out the CEO's powers and duties under this Act. (Nova Scotia)*
- *Payments made to experts under this Section may be determined by the CEO and must be within the limits of the appropriations, including any additional appropriations, for Elections Nova Scotia. (Nova Scotia)*
- *The CEO may appoint such assistants, legal counsel, auditors and other employees to the staff of Elections New Brunswick as he or she considers necessary for the efficient carrying out of the powers and duties of the CEO under this Act. (New Brunswick)*
- *The CEO and the staff of the Office of the CEO are not eligible for membership in a bargaining unit as defined in the Public Service Act. (Nunavut)*

## Recommendation

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The *Elections and Plebiscites Act* should be amended to state that:

- The CEO may employ any persons on his or her permanent staff that the CEO considers necessary in order to effectively exercise the powers and perform the duties of the CEO and ensure proper operation of his or her office
- The CEO may place employees in such positions as the CEO considers appropriate under such classification ratings and at such rates of remuneration within those classifications ratings established by the GNWT department of Human Resources as the CEO considers appropriate
- The CEO shall establish the qualifications for the Deputy CEO and other Elections NWT staff and establish a fair process for hiring based on merit
- The Deputy CEO and other staff of Elections NWT are employees in the public service
- The CEO shall oversee and direct members of the staff of the CEO and the persons appointed as election officers
- The CEO shall prepare and maintain human resources policies that apply to his or her staff and operations where such policies differ from those that apply within the public service
- The CEO may engage the services of such counsel, accountants, auditors or other professionals or experts to advise or assist the CEO in respect of matters the CEO considers necessary to carry out the CEO's powers and duties under this Act
- Payments made to professionals or experts may be determined by the CEO and must be within the limits of the appropriations, including any additional appropriations, for Elections NWT
- The CEO and the staff of Elections NWT are not eligible for membership in a bargaining unit for the Government of Northwest Territories public service

## 9. Financial Autonomy and Funding Arrangements

A crucial test of an EMB's independence is whether it is granted resources commensurate with its authorities, duties and responsibilities. An EMB may be granted control over its staffing levels and the full range of electoral functions, but it must also be given the resources to be able to properly exercise that authority and control over the initiation of its spending. Insufficient resources can create challenges for consistency, efficiency, effectiveness, and accountability for

results, as well as for the enfranchisement of voters. Some measure of autonomy in determining the budget of an EMB is often seen as a critical factor in achieving independence. Requiring an EMB to negotiate its budget with the political Executive and/or central budgetary agencies in government creates the risk of underfunding and interference in internal decision-making.

However, because constitutional principle and statutory law state that spending must originate with the “Crown”, governments have insisted on strict control over the expenditure budget process. And because of the principle that Cabinet must initiate spending, Canadian governments have been reluctant to allow legislative committees to negotiate budgets with Legislative Officers. However, removing the government’s Financial Management Board from the budget decision-making process strengthens independence. It is preferable to have a committee of members of the Legislature make these decisions. At minimum, the Office’s budget should be submitted to the Legislature via the Speaker. If control lies within the Executive, there is a risk that an independent office might be denied the organizational capacity to administer a properly funded election or the very real fear of budgetary retaliation may cause it to soften its recommendations for change.

In Cabinet-parliamentary systems, the dynamics of power mean that EMBs are basically dependent on government decisions, although some safeguards exist to avoid political interference. One such safeguard is to have two budgets: one is an annual appropriation for its staffing and operating expenses, which is approved by government and voted by the Legislature; and the second is statutory authority to spend the money needed to stage elections and plebiscites without further appropriation.

With regard to Elections NWT, the *Elections and Plebiscites Act* does not grant the organization with any degree of funding autonomy or reveal the funding mechanism that applies to annual appropriations. The Act only states:

*s. 13. Expenditures incurred by the Chief Electoral Officer for the administration of this Act must be paid out of moneys appropriated for that purpose.*

The elections legislation in many jurisdictions is silent when it comes to the funding of the CEO’s office. This is likely intentional so that the government can continue to exercise financial control by imposing whatever restrictions it feels are necessary on the resources it provides for elections. The process for identifying the funding required to operate Elections NWT and the resources required to properly administer periodic elections and plebiscites involves the annual submission of a budget to the Legislature’s Board of Management. The Board reviews the CEO’s budget, asks for any clarification or information it needs and is empowered to make any adjustments it wants to the numbers. The Board then sends the CEO’s budget as submitted or as adjusted to the Financial Management Board and the Legislature’s Standing Committee on Priorities and Planning for further review. Ultimately, the CEO’s Estimates are voted on and approved by the Legislative Assembly.

Other jurisdictions have considerably more control over their funding arrangements. The following are some of the provisions contained in elections legislation of other jurisdictions related to the funding of the CEO's office:

- *The following expenses are to be paid from the Consolidated Fund without further appropriation: (a) remuneration paid to election officials and other persons employed for the purpose of an election, and other expenses required for an election; (b) expenses related to public education and information programs under clause 29(b). (Manitoba)*
- *The CEO shall submit annually to the Members' Services Board for each financial year an estimate of the sum that will be required to be provided by the Legislative Assembly in a separate vote to defray the expenses of the office of the CEO in that financial year, the Members' Services shall review the estimate submitted and the Speaker shall deliver the estimate to the Minister of Finance for recommendation to the Legislative Assembly. (Yukon)*
- *The CEO shall present annually to the Board estimates of the sums of money that will be required, (a) for the purposes mentioned in subsection (1) (i.e. permanent staff salaries) and (b) for the performance of the CEO's functions under the Election Finances Act and the Taxpayer Protection Act, 1999. (Ontario)*
- *The Board shall review and may alter as it considers proper the estimates referred to in subsection (1.1), and the chair of the Board shall cause the estimates as altered by the Board to be laid before the Assembly, which shall refer them to one of its committees for review. (Ontario)*
- *The CEO shall submit to the Standing Committee on Legislative Offices in respect of each fiscal year an estimate of the sum that will be required to be provided by the Legislature to defray the various charges and expenses of the Office of the CEO for that fiscal year. (Alberta)*
- *The Standing Committee on Legislative Offices shall review each estimate submitted pursuant to subsection (1) (above) and, on completion of the review, the chair of the Committee shall present the estimate to the President of Treasury Board and the Minister of Finance for presentation to the Assembly. (Alberta)*
- *If the Legislative Assembly is not in session and the Standing Committee reports that the CEO has certified that in the public interest an expenditure of public money is urgently required in respect of any matter pertaining to the Office of the CEO ... the Lieutenant Governor in Council may order a special warrant to be prepared by the Lieutenant Governor in Council authorizing the expenditure of the amount estimated to be required. (Alberta)*
- *The CEO, through the Speaker, shall submit annually to the House of Assembly Management Commission ... for its approval, estimates of the sums that will be required to be provided by the Legislature for the payment of salaries, allowances and expenses of the office of the CEO under this Act during the next fiscal year. (Newfoundland & Labrador)*
- *The Commission shall review and may alter the estimates submitted under subsection (1) and, upon completion of the review, the Speaker of the House of Assembly shall submit the estimates as approved by the Commission to the House of Assembly for the purpose of inclusion in the estimates of the province for approval by the Legislature. (Newfoundland & Labrador)*

- *The CEO shall present annually to a committee of the House of Assembly, designated for that purpose by the House, estimates of the sums of money that will be required by the CEO to conduct the activities required under this Act and any other enactment or authority, together with any estimated recoveries. (Nova Scotia)*
- *Each year, the CEO shall prepare the budgetary estimates and remit them to the President of the National Assembly before 1 April. Where, during the fiscal year the CEO foresees that the budgetary estimates will be exceeded for purposes other than those contemplated in section 545, he shall prepare supplementary estimates and remit them to the President of the National Assembly. (Quebec)*
- *The National Assembly shall refer, to a parliamentary committee, the budgetary estimates of the CEO, and he shall furnish the parliamentary committee with a preliminary financial report for the proceeding fiscal year. (Quebec)*
- *The committee shall approve the budget and table its report in the National Assembly. (Quebec)*
- *The CEO may present a special report to the Speaker if, in the CEO's opinion, the amounts and establishment for the office of the CEO permitted under section 11(2), or the services provided by the BC Public Service Agency, are inadequate for fulfilling the duties of the office. (BC)*

## Recommendation

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The *Elections and Plebiscites Act* should be amended to state that:

- Expenses for the remuneration of election officials and other persons employed for the purpose of an election or plebiscite and other expenses required for an election or plebiscite are to be paid from the Consolidated Revenue Fund without further appropriation
- The CEO, through the Speaker, shall submit annually to the Legislative Assembly Board of Management for its approval, estimates of the sums that will be required to be provided by the Legislature for the payment of salaries and expenses of the Office of the CEO under this Act during the next fiscal year
- The Legislative Assembly's Board of Management must consult with the CEO to properly understand the content and rationale for annual estimates of expenditure submitted by the CEO
- If the Board of Management presents to the Legislative Assembly for approval annual estimates for the Office of the CEO that are less than the amounts requested by the CEO, the CEO may submit an objection in writing to the Legislature through the Speaker

## 10. CEO's Appointment and Removal Process, Term of Office, and Salary

### 10.1 Professional Qualifications

Professionalism and expertise are meant to be hallmarks of sound electoral governance. In an established democracy, such as we see in Canada federally and in our provinces and territories, citizens see elections as routine events and give little thought to the complications of planning and executing a decentralized election on a single day, with the voting process taking place at the local level and with returning officers in charge. Ensuring that citizens know where and how to vote, making it convenient for them to do so, preventing possible abuses of the law, and arranging for the accurate and timely reporting of election outcomes all pose significant operational challenges in a large and geographically dispersed territory such as the NWT.

Being the CEO of an electoral agency presents some distinctive leadership challenges based mainly on the need to balance independence and professionalism against responsiveness and accountability. Leaders need strong character, courage, contextual intelligence, balanced judgment, and effective communication skills. EMB leaders need to gain a reputation for integrity and credibility. The specialized knowledge and skills required to stage well run elections comes from the background education and experience of the CEO and the ongoing mentorship and training of EMB employees. In the EMB itself, there needs to be a culture of professionalism, accuracy, integrity, learning and improvement.

Professional qualifications required of the position of CEO, such as formal education and experience, help to ensure expertise in judgment and, therefore, confidence that the government will not control the officeholder. These qualifications are seldom included in legislation for CEOs but they would help to prevent the political appointment of unqualified individuals to the job. There is no Canadian jurisdiction that has codified the educational and experiential qualifications of its CEO. Some EMBs in other countries require their CEO or the head of their election commission to be a judge, a lawyer or the former head of a public agency. While the selection of a CEO based on previous occupation may, in some cases, provide a modicum of assurance of independence, it offers little guarantee the incumbent will possess all of the necessary qualifications and characteristics for this demanding position.

In Canada, there are no formal education programs that teach the complexities of administering elections. At minimum, such a program would need to cover the areas of: planning and preparedness for elections, plebiscites and referenda; electoral operations; elections law; voter registration systems; election management information systems; training election officials; public awareness and voter information campaigns; liaising with candidates and political parties; campaign finance; conducting financial compliance reviews; and investigations/enforcement. In most cases, CEOs receive their training on the job. Jurisdictions are fortunate when they can recruit a CEO with a successful track record of managing the functions of an EMB. In addition to this valuable experience, they need to seek out the other personal characteristics considered desirable in a CEO by recruiting for this position on the basis of merit rather than patronage.

## 10.2 Appointment Process

In terms of the process of appointing the CEO – the important question is whether or not the appointment is required to have the confidence of the Legislature, i.e. does the Legislature have to pass a resolution (nominate and approve) before appointing the successful candidate to the job? Ideally the CEO should be appointed based on input from and a resolution of the Legislature. This lends legitimacy to the position and clearly establishes the lines of reporting to the Assembly rather than the Executive.

Since it is not practical for the Legislature as a whole to conduct the recruitment for an independent officer directly, the task of setting the qualifications, advertising, interviewing and recommending a candidate for the position of CEO usually falls to a legislative committee or to a government entity to perform the role of nominating a suitable candidate. Nevertheless, it is still important symbolically to have the formal appointment process pass in the Legislature to demonstrate the Assembly's support for the officer.

In the NWT, the appointment mechanism for the CEO is described in the *Elections and Plebiscites Act*:

*s.5. (1) The Commissioner, on the recommendation of the Legislative Assembly, shall appoint a Chief Electoral Officer.*

While this provision gives the Legislative Assembly the important job of approving the appointment of the CEO, it could potentially be interpreted to suggest that the Commissioner (Executive Government) has the final say on the appointment and may override the recommendation of the Assembly. As will be seen below, this type of mixed message is reinforced with the process for the removal of the CEO and through other provisions of the Act.

Other jurisdictions make it clear that the person appointed to the position of CEO has the confidence of the Legislature (House of Assembly) by demanding a certain level of support for the appointment and outlining a transparent process for selecting and appointing the CEO:

- *Before an appointment is made under subsection (1), a selection committee shall be established for the purpose of identifying persons as potential candidates to be appointed CEO. The selection committee shall be composed of (a) the Clerk of the Executive Council or designate, (b) the Clerk of the Legislative Assembly or designate, (c) a member of the judiciary, and (d) a member of the university community. The selection committee shall develop a roster of qualified candidates and submit a list of names of qualified candidates to the Lieutenant-Governor in Council. The Premier shall consult with the leader of the other parties having representation in the Legislative Assembly during the most recent sitting with respect to one or more qualified candidates from the selection committee's list of qualified candidates. (New Brunswick)*
- *The CEO shall be appointed by the Legislative Assembly (a) on the recommendation of the Standing Committee on Legislative Management; and (b) following a resolution of the Legislative Assembly supported by at least two-thirds of its members. (PEI)*



- *The Commissioner in Executive Council shall, on the recommendation of the Legislative Assembly made by at least two-thirds of the members of the Legislative Assembly, appoint a person as an officer of the Legislative Assembly a CEO to exercise the powers and perform the duties set out in this Act. (Yukon)*
- *Subject to the approval of the House of Assembly by majority vote, the Governor in Council shall appoint a person to be the CEO. (Nova Scotia)*
- *On the recommendation of the Legislative Assembly, the Lieutenant Governor must appoint as CEO an individual who has been unanimously recommended for the appointment by a special Committee of the Legislative Assembly. The CEO is an officer of the Legislature. (BC)*
- *On the recommendation of the Standing Committee of the Assembly on Legislative Affairs, the Lieutenant Governor must appoint a CEO of the Assembly. (Manitoba)*

## Recommendation

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The *Elections and Plebiscites Act* should be amended to state that:

- A selection committee shall be established to conduct a merit-based competition for the purpose of recommending persons to the Legislative Assembly’s Board of Management as potential candidates for the position of CEO
- A CEO shall be appointed by Legislative Assembly, on the recommendation of the Board of Management and following the passing of a resolution supported by at least two-thirds of the members of the Legislative Assembly

### 10.3 Removal from Office

The process and reasons for removing the CEO prior to the expiry of his or her term of office should be clearly stated in legislation, as well. Consider the difference between an appointment “at pleasure” and an appointment “during good behavior”. An appointee who serves at pleasure may be removed at the discretion of the Commissioner or the Executive, while an appointee who serves during good behaviour may only be removed for cause. The latter is clearly a more secure appointment since it requires the showing of a legitimate or just reason before removal from office. However, it is also important to define what is meant by the term “good behaviour” or what constitutes “for cause”.

The term “good behaviour” technically refers to behaviour that is law abiding and a lapse in good behaviour occurs when the appointee breaches the law. But the term can also be construed to cover a host of other forms of misconduct that do not result in legal convictions and should not result in judgments about such characteristics such as integrity, fidelity and propriety. The definition of the term “for cause” is equally wide ranging and can cover any type of behaviour that is deemed undesirable.

There can be a high degree of consensus that intentional violations of certain laws and continued failure to perform duties are justifiable reasons for removal. There is less agreement on such transgressions as summary convictions, being charged with an offence, failure to follow policy, failure to take an oath or affirmation, minor breaches of contract, insubordination or code of conduct violations, for example.

Tenure, security of office, and removal procedures are important to the independence of a legislative officer. They eliminate the fear of losing one's job over criticism of the government. And the more difficult the removal process, the greater the independence granted to an individual because there will be less fear of losing one's job because of disapproval over government action.

In the NWT, the *Elections and Plebiscites Act* states:

- s.6. (2) *The Commissioner, on the recommendation of the Legislative Assembly may, for cause or incapacity, suspend or remove the Chief Electoral Officer from office.*
- (3) *If the Legislative Assembly is not sitting, the Commissioner, on the recommendation of the Board of Management, may suspend the Chief Electoral Officer for cause or incapacity.*

While these provisions provide the CEO with some protection against arbitrary removal from office they could be strengthened to allow less discretion. The provisions could also impose a higher threshold of support from the Legislature before the CEO could be suspended or removed from office.

Consider the following "removal" provisions from other jurisdictions:

- *The Lieutenant Governor in Council may suspend or remove the CEO from office on a resolution of the Assembly carried by a vote of 2/3 of the members voting. When the Assembly is not sitting, the Lieutenant Governor in Council may suspend the CEO for cause, if advised to do so in writing by a majority of a committee consisting of the President of the Executive Council and the recognized leaders of the members belonging to the political parties in opposition. (Manitoba)*
- *The Governor in Council may only remove the CEO for cause or incapacity on the passing by the House of Assembly of a resolution carried by a vote of two-thirds of the members voting thereon. (Nova Scotia)*
- *The CEO may be removed for cause by a resolution of the Legislative Assembly supported by at least two-thirds of the members. (PEI)*
- *The CEO shall hold office during good behaviour and may only be removed by the Lieutenant-Governor in Council for incapacity, neglect of duty or misconduct upon an address in which 2/3 of the members of the Legislative Assembly concur. (New Brunswick)*
- *The Lieutenant-Governor in Council, upon an address in which a majority of the members of the Legislative Assembly voting concur, may suspend the CEO, with or without pay, pending an investigation that may lead to removal under subsection (1.8). (New Brunswick)*

- *If the Legislature is not in session, a judge of The Court of Queen’s Bench of New Brunswick may, on an application by the Lieutenant-Governor in Council, suspend the CEO, with or without pay, for incapacity, neglect of duty or misconduct. (New Brunswick)*
- *The Lieutenant Governor in Council, on an address of the Assembly, may suspend or remove the CEO from office for disability, neglect of duty, misconduct or bankruptcy. (Alberta)*

## Recommendation

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The *Elections and Plebiscites Act* should be amended to state that:

- The Legislative Assembly may suspend, with or without salary, or remove the CEO for incapacity, neglect of duty or misconduct following the passing of a resolution supported by two-third of the members of the Legislative Assembly
- When the Legislative Assembly is not sitting, a judge may on an application by the Commissioner, suspend the Chief Electoral Officer, with or without salary, for incapacity, neglect of duty or misconduct but the suspension shall not continue in force beyond the end of the next sitting of the Legislature

## 10.4 Term of Office

The issue here is whether there is security of tenure against interference by the Executive in a discretionary or arbitrary manner. The legislation should establish a fixed term of office such that the fear of losing one’s job prematurely for independent thought or action is eliminated.

In the NWT, the *Elections and Plebiscites Act* sets the CEO’s term as follows:

- s. 5. (2) The Chief Electoral Officer holds office during good behaviour for a term of four years.*

Following the expiry of this term of office, the CEO continues to hold office for a period of six months unless he or she has previously resigned, been suspended or removed from office, or has been reappointed to the position. The contract for the NWT’s CEO also requires that the CEO take a leave of absence some time within his or her tenure without pay for a period of six months.

The term of office for the CEO in the NWT is the shortest in Canada and, for several reasons, it is not good practice for CEO appointments to be this short. Consider the typical election cycle, whereby elections occur on a four-year fixed schedule. Depending on when within this cycle a CEO is appointed, their term may be set to expire very close to the call of the next election. In such a case, the only options for the Legislature may be to re-appoint a CEO whom they would rather let go or to appoint a new CEO with insufficient time to prepare for the next election. Four years is also not enough time for a CEO to become completely familiar with the role and to be

able to add value to the election administration process, which can only occur following the experience of delivering of an election event.

Most CEOs in Canada have terms of appointment that are considerably longer than the NWT's CEO. Consider, the following terms in other jurisdictions:

- *A CEO holds office for a term commencing on the day of his or her appointment and ending on the day that is 12 months after the day fixed for the return of the writ for the second general election for which he or she is responsible (i.e. approximately 10 years). (Saskatchewan)*
- *The term of office for the CEO is from the date of appointment until 12 months after the date set for the return of the last writ for the second general election for which the CEO is responsible. The CEO may be reappointed to further terms of office. (BC)*
- *The CEO holds office for a term not exceeding ten years and may be re-appointed to further terms. (Nova Scotia)*
- *The CEO shall hold office for a term of ten years and is not eligible for reappointment. The Lieutenant Governor may extend the term of the CEO for a period of not more than 12 months. (New Brunswick)*
- *The CEO's appointment expires three months after the tabling under section 417 of the final report of the first Electoral District Boundaries Commission that is appointed under section 408 after that CEO is appointed. For the purposes of this section, an appointment includes a reappointment (i.e. two elections plus a year and a half or approximately 9 ½ years). (Yukon)*
- *The term of office for the CEO is 7 years. The CEO continues to hold office after the expiry of his or her term until reappointed, or until a successor is appointed. (Nunavut)*
- *The term of office of the CEO is seven years; notwithstanding the expiry of his term of office, the CEO shall remain in office until he is reappointed or replaced. (Quebec)*
- *Unless he or she resigns, dies or is removed from office, the CEO shall hold office for 6 years from the date of his or her appointment, and he or she may be reappointed for a second term of 6 years, but shall not hold office for more than 2 terms. (Newfoundland & Labrador)*

It should also be noted that there are no term limits on the appointment of the CEO in Manitoba and for the CEO and DCEO in Prince Edward Island. These appointments continue indefinitely until the incumbents resign, are removed from office for cause, or die.

## Recommendation

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The *Elections and Plebiscites Act* should be amended to state that:

- The term of office for the CEO is from the date of appointment until 12 months after the date set for the return of the last writ for the second general election for which the CEO is responsible

- The CEO may be reappointed to further terms of office

## 10.5 Salary of the CEO

Salary is another important factor in ensuring independence. Right to a salary, pension and other employment benefits should be established by law and should not be subject to arbitrary interference by the Executive. If government sets the salary, the Officer becomes dependent on the pleasures of the Executive for remuneration, thereby allowing governments that are dissatisfied with the actions or reports of the Officer to penalize or threaten to penalize them through salary reductions. The salary of an independent officer should be pegged to some reference point commensurate with the senior nature of the position, such as that of a deputy minister or judge.

In regards to salary and benefits, the NWT *Elections and Plebiscites Act* provides for the following:

- s. 4. (4) *The Chief Electoral Officer is not an employee in the public service.*
- (5) *The Chief Electoral Officer must be*
- (a) paid such remuneration as determined by the Board of Management; and*
- (b) reimbursed for reasonable travelling and other expenses necessarily incurred in the exercise of powers and the performance of duties under this Act, subject to any restrictions in respect of the amount or type of expense that may be set by the Board of Management.*

While it is typical for the CEO to be excluded from the public service, the legislation in most jurisdictions provides for a pension and other benefits to accrue for the CEO. The CEO in the NWT is on contract and her salary is negotiated with Assembly staff and approved by the Board of Management. There are also no provisions in the NWT concerning the reduction of such remuneration by the Board. These provisions for remuneration of the CEO are completely out of line with the way other CEOs in Canada are compensated.

Consider the following provisions from other jurisdictions:

- *Subject to subsections (2) and (3), the CEO is to be paid a salary equal to the average salary of all the deputy ministers and acting deputy ministers of the Government calculated as at April 1 in each year. The CEO is entitled to receive any benefits of office and economic adjustments that are provided generally to deputy ministers. The Public Employees Pension Plan Act applies to the CEO and the Assistant CEO. (Saskatchewan)*
- *The CEO must be paid a salary within the range of salaries paid to senior deputy ministers in the civil service, and is entitled to the same privileges of office as a senior deputy minister. The salary of the CEO must not be reduced except by a resolution of the Assembly carried by a vote of 2/3 of the members voting. The CEO is an employee within the meaning of the Civil Service Superannuation Act. (Manitoba)*

- *The CEO is entitled to be paid an annual salary as determined by the Lieutenant-Governor in Council within the deputy head pay plan, and is entitled to receive benefits similar to those received by deputy heads. The pension plan converted to a shared risk plan in accordance with An Act Respecting Public Service Pensions applies to the CEO. The CEO is entitled to receive the same benefits as a deputy minister. The CEO is subject to the Public Service Pensions Act, 1991 where he or she was subject to that Act before his or her appointment as CEO. Where the CEO was not subject to the Public Services Pension Act, 1991 before his or her appointment as CEO, he or she shall be paid, for contributions to a registered retirement savings plan, an amount equivalent to the amount he or she would have contributed to the Public Service Pension Plan. The salary of the CEO shall not be reduced except on resolution of the House of Assembly. (New Brunswick)*
- *The CEO must be paid remuneration within, but at or above the mid-point of, the annual salary rates for deputy ministers set out in the pay plan for deputy ministers together with any other remuneration payable to deputy ministers, which remuneration must be adjusted yearly by a percentage equal to the average increase for the remuneration for deputy ministers. The CEO is entitled to all rights, privileges and benefits, including pension benefits, to which deputy ministers are entitled. The salary of the CEO must not be reduced except on the passing by the House of Assembly of a resolution carried by a vote of two thirds of the members voting thereon. (Nova Scotia)*
- *The CEO must be paid out of the consolidated revenue fund a salary equal to the salary paid to the chief judge of the Provincial Court of British Columbia, and must be reimbursed for reasonable travelling and out of pocket expenses personally incurred in performing duties of the office. The Public Service Pension Plan, continued under the Public Sector Pensions Plan Act, applies to the CEO. When calculating the amount of a pension under the Public Service Pensions Plan, each year of service as the CEO must be counted as 1½ years of pensionable service. (BC)*
- *The salary of the Chief Electoral Officer shall not be reduced except on resolution of the House of Assembly. (Newfoundland & Labrador)*

## Recommendation

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The *Elections and Plebiscites Act* should be amended to state that:

- The CEO must be paid out of the consolidated revenue fund a salary within the range of salaries paid to senior deputy ministers in the public service, and the CEO is entitled to all rights, privileges and benefits, including pension benefits, to which senior deputy ministers are entitled
- The Public Service Pension Plan applies to the CEO
- The salary of the CEO must not be reduced except by the passing of a resolution supported by two-third of the members of the Legislative Assembly

## 11. Chief Electoral Officer's Reporting Relationship

It is now widely accepted by election professionals and scholars alike that locating electoral management functions in a government department does not provide sufficient distance from the partisan political process to inspire public confidence in the independence and integrity of the electoral process.

In terms of the reporting process, CEOs must not be under the control of the organizations they regulate or investigate, whether it is the Executive or individual elected members of the Legislature. Reporting to the Legislature through the Speaker indicates that the Officer is answerable not to government but rather to the Legislature as a whole. Legislative Officers, including the CEO, work on behalf of the Assembly and the public, doing things that individual members cannot do themselves, and doing them in ways prescribed by the Legislature. Standing committees of the Legislative Assembly are the link between Officers and the Legislature since accountability to individual elected members is not possible in a practical way.

Earlier in this paper it was recommended that the CEO should be appointed by the Legislative Assembly and that the Legislative Assembly's Board of Management should review the CEO's annual estimates of expenditure for approval by the Legislative Assembly. In the section that follows it is recommended that the CEO be obligated to submit to the Legislative Assembly through the Speaker an annual report, as well as a report following an election or plebiscite. These recommendations seek to clarify the CEO's reporting relationship.

## 12. Power to Make Recommendations for Legislative Change

Explicit provisions should be included in the legislation to enable the CEO to make recommendations annually to amend governing legislation in ways that would improve operational effectiveness and efficiency of electoral administration. It is the Legislature's prerogative to either accept such recommendations – or not – or to make other changes to the elections legislation, but the CEO is well positioned to comment on where these provisions are not working as intended, where they need to be updated to reflect changes in technology and in society, and where they need to be streamlined for greater efficiency and effectiveness.

In the NWT, the elections legislation provides for the CEO, as well as candidates and official agents, to make recommendations to amend the Act. While the CEO is obligated to bring forward any statements recommending legislative change submitted by candidates and official agents, the CEO may also make an independent recommendation in regard to these statements. The CEO may also report any matter in connection with the administration of the Act that he or she considers should be brought to the attention of the Assembly. The *Elections and Plebiscites Act* states:

s. 266. (1) A candidate or an official agent may send the Chief Electoral Officer a written statement containing

(c) a recommendation for a change to this Act.

(2) The Chief Electoral Officer shall, within six months after a general election, submit a report to the Speaker of the Legislative Assembly setting out

(a) any matter in connection with the administration of this Act that the Chief Electoral Officer considers should be brought to the attention of the Legislative Assembly;

(c) the statements referred to in subsection (1) with any recommendations of the Chief Electoral Officer;

(e) any amendments that the Chief Electoral Officer considers should be made to this Act.

Similar provisions for the CEO to make recommendations for legislative amendment can be found in the elections legislation of other jurisdictions:

- *The annual report shall include in particular, recommendations to improve this Act and the election process. (Nunavut)*
- *The chief electoral officer may, at any time, deliver to the Speaker of the Legislative Assembly a report setting out (a) any matter that has arisen in connection with the duties of the chief electoral officer that the chief electoral officer considers ought to be brought to the attention of the Legislative Assembly; or (b) any amendments that, in the opinion of the chief electoral officer, are needed to improve the administration of elections under this Act. (Yukon)*
- *The Chief Electoral Officer may, before or within ten days after the commencement of a session of the Legislative Assembly, make a report to the Speaker of the Legislative Assembly on*  
*(a) any matter which has occurred in connection with the administration of his or her office since the date of his or her last report and which he or she considers should be brought to the attention of the Legislative Assembly; and (b) any amendments which are, in his or her opinion, desirable for the more convenient administration of this Act. (PEI)*
- *The CEO has the following powers in addition to all others given by this Act: (a) to make recommendations to the Legislative Assembly respecting amendments to this Act or other enactments affecting election matters. (BC)*
- *In the annual report, the CEO may recommend any amendments to this Act that he or she considers advisable. (Ontario)*
- *The CEO must present the following reports to the Speaker of the Assembly: (a) an annual report on the work done under the direction of the CEO under this Act; (b) after each election, a report about the conduct of the election. A report may include recommendations for amendments to this Act. A report that contains recommendations about amendments to this Act stands referred to the*



*Standing Committee of the Assembly on Legislative Affairs. The Committee must begin considering the report within 60 days after it is tabled in the Assembly. (Manitoba)*

- *Chief Electoral Officer shall, immediately after each enumeration, general election, election under the Senatorial Selection Act, by-election or plebiscite or a plebiscite or referendum under any other Act, prepare and have printed a report including: (c) any recommendations for amendments to this Act or the Senatorial Selection Act, as the case may be. (Alberta)*
- *As soon as possible after the election, the CEO shall prepare a detailed report of the conduct of the election that includes: (d) amendments to this Act or any related enactment recommended by the CEO. (Nova Scotia)*

In the NWT, the *Elections and Plebiscites Act* requires the CEO to submit two types of reports: one detailed report immediately following an election or plebiscite, and another more general report within six months following a general election. This is the extent of the formal accountability of the CEO required by legislation.

s. 265. *(1) The Chief Electoral Officer shall, without delay after an election or a plebiscite, submit to the Speaker of the Legislative Assembly a report setting out, by polling division,*

*(a) the number of votes cast for each candidate or each response to a plebiscite question;*

*(b) the number of declined ballots;*

*(c) the number of rejected ballots;*

*(d) the number of names on the official list of electors; and*

*(e) any other information that the Chief Electoral Officer considers should be included.*

*(2) The Speaker shall cause a report referred to in subsection (1) to be laid before the Legislative Assembly at the earliest reasonable opportunity.*

s. 266. *(1) A candidate or an official agent may send the Chief Electoral Officer a written statement containing*

*(a) a complaint about the conduct of an election;*

*(b) a complaint about the conduct of an election officer during an election; or*

*(c) a recommendation for a change to this Act.*

*(2) The Chief Electoral Officer shall, within six months after a general election, submit a report to the Speaker of the Legislative Assembly setting out*

*(a) any matter in connection with the administration of this Act that the Chief Electoral Officer considers should be brought to the attention of the Legislative Assembly;*

*(b) any action taken by the Chief Electoral Officer under subsection 9(1), and sections 279, 280 and 282 that the Chief Electoral Officer considers should be brought to the attention of the Legislative Assembly;*

*(c) the statements referred to in subsection (1) with any recommendations of the Chief Electoral Officer;*

*(d) a statement of the expenditures made for each activity at the election; and*

*(e) any amendments that the Chief Electoral Officer considers should be made to this Act.*

In addition to the requirement to report on the results of elections (and plebiscites and referenda, if applicable) and general requirements to prepare budget estimates, other Canadian jurisdictions include the following accountability mechanisms for their CEOs:

- *Except as otherwise provided in this Act, Elections Nova Scotia shall follow Government policies but any approvals required by those policies are to be read as requiring the approval of the CEO. (Nova Scotia)*
- *The CEO shall: (a) prepare and maintain human resources and financial management policies that apply to his or her staff and operations; and (b) within the period set by the Board of Internal Economy, table with the Board a copy of the policies mentioned in clause (a). (Saskatchewan)*
- *The National Assembly shall refer, to a parliamentary committee, the budgetary estimates of the CEO, and they shall furnish the parliamentary committee with a preliminary financial report for the preceding fiscal year. (Quebec)*

## **Recommendation**

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The *Elections and Plebiscites Act* should be amended to state that:

- The Chief Electoral Officer shall submit an annual report to the Legislative Assembly on the work done under the direction of the CEO under this Act
- The Chief Electoral Officer shall submit to the Legislative Assembly a report after each election or plebiscite about the conduct of the election or plebiscite
- In the year of an election or plebiscite, the reports of the Chief Electoral Officer may be combined into one report
- The Chief Electoral Officer may submit a report to the Legislative Assembly at any other time on any matter that the Chief Electoral Officer considers necessary to be brought to the attention of the Legislature
- The Chief Electoral Officer shall submit all reports required to be submitted directly to the Legislative Assembly through the Speaker

- Any report submitted to the Legislative Assembly by the Chief Electoral Officer may contain recommendations for any legislative amendments that, in the opinion of the Chief Electoral Officer, are needed to improve the administration of elections and plebiscites under this Act or any related enactment
- The Speaker must promptly table in the Legislature any report submitted by the Chief Electoral Officer

### 13. Enforcement Authority

Enforcement authority refers to the ability of the CEO to fulfill his or her mandate to ensure compliance with the legislation which they have been tasked to administer. This involves being given the appropriate amount of authority, time, and the necessary tools to identify possible breaches of the Act through inquiry and investigation and the ability to expose wrongdoing through enforcement. The duty to enforce compliance with the Act must also be properly resourced. The CEO has little control over the actions of others who may breach the rules, but the job requires follow up on all complaints – many of which can lead to costly investigations and prosecutions. If the resources to perform this function must come from Elections NWT’s regular operating budget, the CEO may have no choice but to do less than a thorough job.

There should be no impediments to the scope of the CEO’s inquiries. In the case of an investigation, such powers should be supplemented by the powers to compel the production of information and to compel witnesses to speak with investigators. Willful obstruction of the CEO, or a representative appointed by the CEO, in the performance of his or her duties should be an offence.

In the NWT, the CEO has fairly broad powers to ensure compliance with the *Elections and Plebiscites Act*. Despite having the authority to prosecute offences under the Act, the CEO refers possible breaches to a prosecutor with the Territorial Court for enforcement.

*s. 279. (1) The Chief Electoral Officer may investigate any matter that comes to his or her attention in respect of an act or omission of an election officer, candidate, official agent or other person that may constitute an offence under this Act.*

*(2) A person may within one year after polling day, provide a written complaint to the Chief Electoral Officer in respect of an act or omission of an election officer, candidate, official agent or other person relating to the election or plebiscite, that may constitute an offence.*

*(3) The Chief Electoral Officer shall review a complaint provided under subsection (2), and shall investigate it to the extent that he or she considers warranted in the circumstances.*

*(4) For the purposes of conducting an investigation, the Chief Electoral Officer may, on reasonable notice,*

*(a) summon any person as a witness;*

*(b) require any person to give evidence on oath or affirmation; and*

*(c) require any person to produce documents and things that the Chief Electoral Officer considers necessary for a full and proper investigation.*

*(5) The Chief Electoral Officer has the same power as is vested in a court in civil cases*

*(a) to enforce the attendance of any person as a witness;*

*(b) to compel any person to give evidence; and*

*(c) to compel any person to produce any document or thing.*

*s. 280. The Chief Electoral Officer shall, if he or she considers it warranted, commence and carry on a prosecution for an offence under this Act.*

*s. 281. For purposes of an investigation or prosecution, the Chief Electoral Officer may engage the services of legal counsel, investigators, experts or other persons.*

*s. 282. (1) A prosecution for an offence under this Act, other than an offence under section 279 (this is not an offence section) or 331 (employee time off to vote), may only be commenced with the prior written consent of the Chief Electoral Officer.*

*(2) If a prosecution for an offence under this Act is commenced by a person other than the Chief Electoral Officer, the Chief Electoral Officer may, if he or she considers it to be in the public interest, intervene to assist in carrying on the prosecution.*

*s. 284. (1) Subject to subsection (2), a prosecution for an offence under this Act may not be commenced more than one year after the day on which the offence was committed.*

*(2) If a prosecution is prevented because the defendant leaves the jurisdiction, the prosecution may be commenced within one year after the defendant returns to the jurisdiction.*

In reviewing the enforcement regime within the NWT's *Elections and Plebiscites Act* and comparing it with that of other jurisdictions, there are several provisions that could enhance the CEO's ability to enforce compliance with the Act. It is particularly noteworthy to point out that the NWT has a very weak compliance regime for the electoral finance provisions of the Act. There are many rules for making and accepting political contributions, for incurring election expenses and for reporting to the CEO on the financial activity of a candidate's campaign during elections. However, there is no specific authority for the CEO to monitor this activity or to examine the financial reporting of contributions and expenses. There is also no requirement for candidate financial reports to be audited before being submitted to the CEO.

- *In relation to the authority under subsection (2) (power to inspect and make copies of records), the CEO or a representative of the CEO may enter at any reasonable time the premises where the records of an individual or organization are kept. The authority under subsection (3) must not be*

*used to enter a dwelling house except with the consent of the occupant or the authority of a warrant under subsection (6). (BC)*

- *For the purpose of determining whether this Part is being complied with, a representative of the CEO, upon production of his or her authorization from the CEO to enter the premises that are referred to in the authorization and in which the books, papers and records of a political party or candidate are kept, may at any reasonable time enter those premises and examine those books, papers and records. (Newfoundland & Labrador)*
- *The CEO may carry out inspections to verify compliance with this Act or the regulations. (Quebec)*
- *A provincial judge who is satisfied by information on oath or affirmation that there are reasonable grounds for believing that there is on a premises evidence with respect to a contravention of this Part may issue a warrant authorizing the CEO or his or her representative named in the warrant to enter and search those premises and to make inquiries and copies of books, papers and records that are necessary, subject to the conditions specified in the warrant. (Newfoundland & Labrador)*
- *Where the CEO has reasonable grounds to believe that a person has committed, is about to commit or is likely to commit an act or omission that is contrary to this Act, the CEO may, during an election period, after taking into account the nature and seriousness of the act or omission, the need to ensure fairness of the electoral process and the public interest, apply to a judge for an injunction ordering any person named in the application to refrain from committing any act that is contrary to this Act or to do any act that is required by this Act. (Nova Scotia)*
- *Where the CEO believes it is in the public interest to make public the outcome of an investigation, the CEO may do so on a public website and by such means as the CEO considers appropriate, and may include in the information provided the name of the person and the nature of the matter investigated. (Nova Scotia)*
- *The CEO may refuse to conduct or may cease an investigation if the CEO is of the opinion that the matter is frivolous or vexatious, or there are no or insufficient grounds to warrant an investigation or the continuation of an investigation. (Alberta)*
- *If a complaint is made in writing and the CEO decides not to conduct an investigation, the CEO must notify the complainant in writing of the reasons for the decision. (BC)*
- *A prosecution for an offence under this Act may not be commenced without the consent of the CEO. (Nova Scotia)*
- *Any person who obstructs any person carrying out an audit, inquiry, investigation, inspection, or examination under this Act or withholds from the person or conceals or destroys any records, documents or things relevant to the audit, inquiry, investigation, inspection, or examination is guilty of an offence. (Nova Scotia)*
- *No person shall: (a) resist, obstruct, hinder or interfere with the CEO, or a person aiding the CEO, in the performance of the CEO's duties; or (b) refuse to provide any record or information required by this Act to the CEO when requested to do so. (Saskatchewan)*

- *When the commissioner (appointed by CEO to investigate and prosecute offences) is of the view that prosecution is not required because an offence was inadvertent or of a technical nature, the commissioner may issue a formal caution to the person alleged to have committed the offence. (Manitoba)*
- *The deadline for commencing a prosecution under this Act is one year after the date on which the commissioner has reasonable and probable grounds to believe that an offence has been committed. (Manitoba)*
- *If it is made to appear to the CEO that an offence under this Act has been committed, the CEO shall: (a) make any inquiries that appear necessary under the circumstances; and (b) if it appears that proceedings for the punishment for the offence have not been properly taken or should be taken and that the intervention would be in the public interest, assist or intervene in the carrying on of the proceedings or cause them to be taken and incur any expenses as may be necessary for those purposes. (Yukon)*
- *If the chief electoral officer has taken any action under section 350 in respect of the apparent commission of an offence under this Act by an election officer, or if the chief electoral officer has suspended a returning officer under section 28, the chief electoral officer shall deliver a report of the matter to the Speaker of the Legislative Assembly within 10 days after the start of the session of the Legislative Assembly next following the election. (Yukon)*
- *Any expense required to be incurred for the purpose of an inquiry under section 350 and of any proceedings that, pursuant to section 350 (CEO authority to make inquiries), the CEO assists in carrying on or causes to be taken shall be paid out of the Yukon Consolidated Revenue Fund, (Yukon)*

## Recommendation

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The *Elections and Plebiscites Act* should be amended to state that:

- The CEO may refuse to conduct or may cease an investigation if the CEO is of the opinion that the matter is frivolous or vexatious, or there are no or insufficient grounds to warrant an investigation or the continuation of an investigation.
- If a complaint is made in writing and the CEO decides not to conduct an investigation, the CEO must notify the complainant in writing of the reasons for the decision
- For the purpose of ensuring compliance with this Act, the Chief Electoral Officer may examine the statements, forms and reports required to be filed with the Chief Electoral Officer under this Act
- For the purpose of examining any statements, forms and reports required to be filed under this Act, the Chief Electoral Officer may conduct inspections of the records of candidates and official agents that relate to information that is or should be in any statements, forms and reports

- At any reasonable time, the Chief Electoral Officer, or a representative of the Chief Electoral Officer, may visit the premises of a candidate or official agent to inspect and make copies of their records
- Any person who obstructs the Chief Electoral Officer or a representative of the Chief Electoral Officer appointed to carrying out an inspection or investigation under this Act or withholds from the person or conceals or destroys any records, documents or things relevant to the investigation is guilty of an offence.
- Where the CEO believes it is in the public interest to make public the outcome of an investigation, the CEO may do so on Elections NWT's website and by such other means as the CEO considers appropriate, and may include in the information provided the name of the person and the nature of the matter investigated
- A prosecution for an offence under this Act may not be commenced without the consent of the CEO
- The deadline for commencing a prosecution under this Act is one year after the date on which the Chief Electoral Officer has reasonable and probable grounds to believe that an offence has been committed
- Any expense required to be incurred by the CEO for the purpose of an investigation or prosecution under this Act shall be paid out of the Consolidated Revenue Fund, without further appropriation

## 14. Protection from Legal Action

Impartiality and fairness are two essential values to be protected by the condition of independence. An EMB needs some measure of insulation from outside pressures from various sources to perform in a professional and objective manner. CEOs are often called upon to make some difficult decisions within a highly charged political environment. For example, EMBs must have the authority and freedom to conduct a thorough investigation and reach an unbiased decision concerning a candidate, an official agent, a voter or members of the public or media.

There are both procedural and substantive aspects to the notion of an impartial and fair election process. Regarding procedure, the law must be applied with diligence and due process, and there must be no hint of bias or favouritism. In terms of substance, decisions must be based on the provisions of the law, an accurate and valid interpretation of the facts, and the application of sound professional judgments. In doing so, there can be winners and losers in such an adversarial system. Not everyone will be satisfied with the results. The CEO should, however, be protected by legislation from legal action when duties are exercised in good faith.

In the NWT, there are no provisions to protect the CEO from legal action. Such provisions are quite common in the elections legislation of other Canadian jurisdictions.

- *No action or proceeding shall be instituted against the CEO or any employee working in the office of the CEO, any election officer or any person aiding the CEO, where the CEO, employee, election officer, or the person aiding the CEO is acting pursuant to the authority of this Act or the regulations, for any loss or damage suffered for reason of anything done in good faith, caused or permitted or authorized to be done, attempted to be done or omitted to be done, by any of them, pursuant to or in the exercise or supposed exercise of any power conferred by this Act or the regulations or in the carrying out or supposed carrying out of any duty imposed by this Act or the regulations. (Saskatchewan)*
- *No proceeding may be instituted against the CEO, the commissioner, or any person appointed or employed by the CEO or the commissioner, including an election official or an enumerator, (a) for any act done in good faith in the performance or intended performance of a duty or in the exercise or intended exercise of a power under this or any other Act or regulation; or (b) for any neglect or default in the performance or intended performance or in the exercise or intended exercise in good faith of a duty or power under this or any other Act or regulation. (Manitoba)*
- *No proceedings lie against the CEO, or against a person acting for or under the direction of the CEO, for anything done, or omitted to be done, in good faith in the exercise or performance or the intended exercise or performance of a power, duty or function under this Act, the Election Finances and Contributions Disclosure Act or the Senatorial Selection Act. (Alberta)*
- *The CEO has all the powers, authorities, rights, privileges and immunities vested in the CEO by this Act, any other enactment, or the Governor in Council. The CEO has all the powers, authorities, rights, privileges and immunities exercisable by a deputy minister under the Civil Services Act, the Public Service Act or any other enactment, except for any specific powers, authorities or rights, related to the management of a particular department or program. For the purpose of exercising jurisdiction pursuant to this Act, the CEO has all the powers, privileges and immunities of a commissioner appointed pursuant to the Public Inquiries Act and may establish rules and procedures for the purpose of this Act. (Nova Scotia)*
- *In respect of his inquiries, the Chief Electoral Officer or any person designated by him is vested with the powers and immunity of commissioners appointed under the Act respecting public inquiry commissions, except the power to order imprisonment. (Quebec)*
- *No order shall be made, processed, or entered or proceeding taken in any court to contest, review, impeach or limit the action of the CEO. (Questions of jurisdiction are subject to judicial review) (Nunavut)*

## Recommendation

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The *Elections and Plebiscites Act* should be amended to state that:

- No proceedings may be instituted against the CEO, or against a person acting for or



under the direction of the CEO, for anything done, or omitted to be done, in good faith in the exercise or performance or the intended exercise or performance of a power, duty or responsibility under this Act

## 15. Accountability of the Office of the CEO

As noted earlier, accountability is a corollary to independence. In general terms, accountability means being required to answer for the exercise of authority and the use of public money based on providing valid information about performance. Electoral administration involves exercising discretionary authority and professional judgment within the framework of both the “hard law” of legislation and regulations and the “soft law” of administrative policies and codes of conduct. Formal rules set the boundaries for behaviour, but controversial situations will arise that require judgment about the facts and the interpretation of the rules and how they should be applied. When an EMB exercises discretion, its neutrality or competence can be challenged. This underscores the importance of insisting on accountability.

There are several ways to establish accountability for the CEO and the EMB. Legislative Officers are accountable to the Legislature and the public for their actions through their reporting obligations. An earlier recommendation in this paper suggests that some measure of accountability can be achieved through annual and other reports submitted to the Legislature through the Speaker; this accountability mechanism would be strengthened if the reports were reviewed consistently. Mechanisms of accountability are weakened when the reports of Legislative Officers are neglected by the Legislature.

Besides formal written reports about annual activities and election events, CEOs should also be expected to appear regularly before a committee of the Legislature. This committee should be able to scrutinize the Office’s use of financial and staff resources, as well as its plans and performance.

The requirement for an annual performance review of the CEO by a standing committee of the Legislature, if structured properly, could also be a way of holding him or her to account and provide constructive feedback to the individual concerning expectations and achievement. However, the output of such a process would need to be informational or advisory in nature so as not to usurp the protections of Office afforded to the position.

Another form of accountability would be to involve other Legislative Officers. For example, in some jurisdictions the Auditor General audits the finances of the Office annually. Considering that the NWT does not have its own territorial auditor general, an alternative may be to include a requirement for an independent external financial audit spelled out in legislation.

- *Within 30 days after the end of each quarter in each fiscal year, the CEO shall prepare and present to the Board of Internal Economy financial forecasts respecting the CEO's actual and anticipated operations for that fiscal year. (Saskatchewan)*
- *All accounts respecting such (election) fees and expenses shall be audited by the Auditor General. (Ontario)*
- *The accounts and financial transactions of the CEO under this Part (i.e. election finances) shall be audited by the auditor general. (Newfoundland and Labrador)*
- *At the request of the Public Accounts Committee, the CEO and any employee designated by the CEO shall attend meetings of the Committee or its subcommittees in order to (a) assist the Committee in its review of the reports of the CEO; and (b) discuss the plans and performance of Elections Nova Scotia. (Nova Scotia)*
- *The CEO shall provide the Public Accounts Committee with annual business plans and performance reports of Elections Nova Scotia and such plans and reports are public documents. (Nova Scotia)*
- *The strategic plan adopted by the CEO pursuant to section 8 of the Public Administration Act shall be tabled in the National Assembly by the President of the National Assembly. (Quebec)*

## Recommendation

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- The CEO should be required to take an oath of office affirming that he or she will exercise the CEO's powers faithfully and impartially and perform all of the CEO's duties and responsibilities fairly, objectively and with due care
- The CEO should be required to submit an annual business plan and performance report to the Legislative Assembly's Board of Management
- At the request of the Chair of the Legislative Assembly's Board of Management, the CEO should be required to attend meetings of the Board in order to assist the Board in their review of any report submitted by the CEO and to discuss the plans and performance of Elections NWT
- The Office of the CEO should be subject to independent financial and performance-based audits
- The Legislative Assembly's Board of Management should conduct an annual performance review of the CEO for the purpose of providing the CEO with constructive feedback concerning expectations and achievements

## 16. Conclusions

There is always room for debate about whether existing structures and processes of electoral management in a given jurisdiction adequately reflect and reinforce key criteria of democratic electoral management. However, among the values most coveted by electoral management bodies, independence has become a widely accepted international norm for their design and operation. Independence was the main focus of this assessment and this paper posits that the condition of independence from the political Executive and the Legislative bureaucracy is critical to the achievement of an effective electoral management body. Jurisdictions differ in how they interpret and apply the criterion of independence in the design and any subsequent modification of their electoral governance arrangements as circumstances change within society and the political system. In comparing the electoral governance arrangements of Elections NWT with those of EMBs in other Canadian provinces and territories, it is fair to say that this foundational principle that underlies the structures and processes of the electoral system can be strengthened.

The value of independence does not, however, stand alone. It must be paired with a sufficient degree of accountability in order for the organization to inspire public confidence and become a trusted authority for administering impartial elections. It is hoped that the recommendations in this paper regarding independence and accountability will serve to strengthen the governance foundations of the Northwest Territories' EMB and its relationship with the Legislative Assembly.

## 17. Summary of Recommendations

**Recommendation:** The *Elections and Plebiscites Act* should be amended to state that:

- the Office of the CEO is an office of the Legislative Assembly
- the Office of the CEO is established to ensure the impartial administration and conduct of elections and plebiscites
- the CEO is an independent officer of the Legislative Assembly
- the CEO reports to and is accountable directly to the Legislative Assembly for carrying out his or her duties and responsibilities under the Act and for the administration of his or her Office

**Recommendation:** The *Elections and Plebiscites Act* should be amended to state that:

- The CEO shall administer, manage and control the CEO's office and the general business of the office

- The CEO shall examine all statements, reports, forms and other information filed with the CEO
- The CEO shall publish on the Elections NWT's website, or in such manner as determined by the CEO, the reports filed under this Act or the information contained in those reports
- The CEO shall formulate policies regarding the conduct of elections

**Recommendation:** The *Elections and Plebiscites Act* should be amended to state that:

- The CEO may prepare and distribute policies and guidelines for election officers and employees of Elections NWT with respect to any matter in this Act with power to vary such policies and guidelines to existing circumstances
- The CEO may suspend or remove from office any election officer for disability, misconduct, or neglect of duty and appoint on a temporary basis an individual to hold the office of the suspended or removed election officer until a permanent appointment can be made
- The CEO may develop and make materials available to schools for distribution to students who have reached voting age or will soon do so, including information on the Territory's electoral process, the right to vote, how to have one's name added to the register of electors, and any other matter that the CEO considers useful for electors or prospective electors
- The CEO may prescribe forms for use under this Act
- At a by-election, the CEO may direct the use of voting equipment, vote-counting equipment or alternative voting methods that are different from what this Act requires
- The CEO may enter into agreements with any person or government department, agency or institution for the purpose of obtaining information, including personal information, to update the register of electors
- The CEO may enter into agreements with any person or government department, agency or institution for the purpose of providing address, mapping, demographic or geographic information, including geospatial information

**Recommendation:** The *Elections and Plebiscites Act* should be amended to state that:

- The CEO may employ any persons on his or her permanent staff that the CEO considers necessary in order to effectively exercise the powers and perform the duties of the CEO and ensure proper operation of his or her office

- The CEO may place employees in such positions as the CEO considers appropriate under such classification ratings and at such rates of remuneration within those classifications ratings established by the GNWT Human Resources as the CEO considers appropriate
- The CEO shall establish the qualifications for the Deputy CEO and other Elections NWT staff and establish a fair process for hiring based on merit
- The Deputy CEO and other staff of Elections NWT are employees in the public service
- The CEO shall oversee and direct members of the staff of the CEO and the persons appointed as election officers
- The CEO shall prepare and maintain human resources policies that apply to his or her staff and operations where such policies differ from those that apply within the public service
- The CEO may engage the services of such counsel, accountants, auditors or other professionals or experts to advise or assist the CEO in respect of matters the CEO considers necessary to carry out the CEO's powers and duties under this Act
- Payments made to professionals or experts may be determined by the CEO and must be within the limits of the appropriations, including any additional appropriations, for Elections NWT
- The CEO and the staff of Elections NWT are not eligible for membership in a bargaining unit for the Government of Northwest Territories public service

**Recommendation:** The *Elections and Plebiscites Act* should be amended to state that:

- Expenses for the remuneration of election officials and other persons employed for the purpose of an election or plebiscite and other expenses required for an election or plebiscite are to be paid from the Consolidated Revenue Fund without further appropriation
- The CEO, through the Speaker, shall submit annually to the Legislative Assembly Board of Management for its approval, estimates of the sums that will be required to be provided by the Legislature for the payment of salaries and expenses of the Office of the CEO under this Act during the next fiscal year
- The Legislative Assembly's Board of Management must consult with the CEO to properly understand the content and rationale for annual estimates of expenditure submitted by the CEO
- If the Board of Management presents to the Legislative Assembly for approval annual

estimates for the Office of the CEO that are less than the amounts requested by the CEO, the CEO may submit an objection in writing to the Legislature through the Speaker

**Recommendation:** The *Elections and Plebiscites Act* should be amended to state that:

- A selection committee shall be established to conduct a merit-based competition for the purpose of recommending persons to the Legislative Assembly's Board of Management as potential candidates for the position of CEO
- A CEO shall be appointed by Legislative Assembly, on the recommendation of the Board of Management and following the passing of a resolution supported by at least two-thirds of the members of the Legislative Assembly

**Recommendation:** The *Elections and Plebiscites Act* should be amended to state that:

- The Legislative Assembly may suspend, with or without salary, or remove the CEO for incapacity, neglect of duty or misconduct following the passing of a resolution supported by two-third of the members of the Legislative Assembly
- When the Legislative Assembly is not sitting, a judge may on an application by the Commissioner, suspend the Chief Electoral Officer, with or without salary, for incapacity, neglect of duty or misconduct but the suspension shall not continue in force beyond the end of the next sitting of the Legislature

**Recommendation:** The *Elections and Plebiscites Act* should be amended to state that:

- The term of office for the CEO is from the date of appointment until 12 months after the date set for the return of the last writ for the second general election for which the CEO is responsible
- The CEO may be reappointed to further terms of office

**Recommendation:** The *Elections and Plebiscites Act* should be amended to state that:

- The CEO must be paid out of the consolidated revenue fund a salary within the range of salaries paid to senior deputy ministers in the public service, and the CEO is entitled to all rights, privileges and benefits, including pension benefits, to which senior deputy ministers are entitled
- The Public Service Pension Plan applies to the CEO
- The salary of the CEO must not be reduced except by the passing of a resolution

supported by two-third of the members of the Legislative Assembly

**Recommendation:** The *Elections and Plebiscites Act* should be amended to state that:

- The Chief Electoral Officer shall submit an annual report to the Legislative Assembly on the work done under the direction of the CEO under this Act
- The Chief Electoral Officer shall submit to the Legislative Assembly a report after each election or plebiscite about the conduct of the election or plebiscite
- In the year of an election or plebiscite, the reports of the Chief Electoral Officer may be combined into one report
- The Chief Electoral Officer may submit a report to the Legislative Assembly at any other time on any matter that the Chief Electoral Officer considers necessary to be brought to the attention of the Legislature
- The Chief Electoral Officer shall submit all reports required to be submitted directly to the Legislative Assembly through the Speaker
- Any report submitted to the Legislative Assembly by the Chief Electoral Officer may contain recommendations for any legislative amendments that, in the opinion of the Chief Electoral Officer, are needed to improve the administration of elections and plebiscites under this Act or any related enactment.
- The Speaker must promptly table in the Legislature any report submitted by the Chief Electoral Officer

**Recommendation:** The *Elections and Plebiscites Act* should be amended to state that:

- The CEO may refuse to conduct or may cease an investigation if the CEO is of the opinion that the matter is frivolous or vexatious, or there are no or insufficient grounds to warrant an investigation or the continuation of an investigation.
- If a complaint is made in writing and the CEO decides not to conduct an investigation, the CEO must notify the complainant in writing of the reasons for the decision
- For the purpose of ensuring compliance with this Act, the Chief Electoral Officer may examine the statements, forms and reports required to be filed with the Chief Electoral Officer under this Act
- For the purpose of examining any statements, forms and reports required to be filed under this Act, the Chief Electoral Officer may conduct inspections of the records of

candidates and official agents that relate to information that is or should be in any statements, forms and reports

- At any reasonable time, the Chief Electoral Officer, or a representative of the Chief Electoral Officer, may visit the premises of a candidate or official agent to inspect and make copies of their records
- Any person who obstructs the Chief Electoral Officer or a representative of the Chief Electoral Officer appointed to carrying out an inspection or investigation under this Act or withholds from the person or conceals or destroys any records, documents or things relevant to the investigation is guilty of an offence.
- Where the CEO believes it is in the public interest to make public the outcome of an investigation, the CEO may do so on Elections NWT's website and by such other means as the CEO considers appropriate, and may include in the information provided the name of the person and the nature of the matter investigated
- A prosecution for an offence under this Act may not be commenced without the consent of the CEO
- The deadline for commencing a prosecution under this Act is one year after the date on which the Chief Electoral Officer has reasonable and probable grounds to believe that an offence has been committed
- Any expense required to be incurred by the CEO for the purpose of an investigation or prosecution under this Act shall be paid out of the Consolidated Revenue Fund, without further appropriation

**Recommendation:** The *Elections and Plebiscites Act* should be amended to state that:

- No proceedings may be instituted against the CEO, or against a person acting for or under the direction of the CEO, for anything done, or omitted to be done, in good faith in the exercise or performance or the intended exercise or performance of a power, duty or responsibility under this Act

**Recommendation:** The *Elections and Plebiscites Act* should be amended to state that:

- The CEO should be required to take an oath of office affirming that he or she will exercise the CEO's powers faithfully and impartially and perform all of the CEO's duties and responsibilities fairly, objectively and with due care
- The CEO should be required to submit an annual business plan and performance report to the Legislative Assembly's Board of Management



- At the request of the Chair of the Legislative Assembly's Board of Management, the CEO should be required to attend meetings of the Board in order to assist the Board in their review of any report submitted by the CEO and to discuss the plans and performance of Elections NWT
- The Office of the CEO should be subject to independent financial and performance-based audits
- The Legislative Assembly's Board of Management should conduct an annual performance review of the CEO for the purpose of providing the CEO with constructive feedback concerning expectations and achievements

## Biography of Lorne R. Gibson

Lorne Gibson was born and raised in Winnipeg, Manitoba. He obtained his Bachelor of Arts degree majoring in Psychology and Sociology and Master of Arts degree majoring in Sociology from the University of Manitoba. He then attended the Faculty of Graduate Studies and Research at the University of Alberta for 3 years as a Ph.D. candidate in the Department of Sociology. He has taught various undergraduate courses in sociology, criminology, and research methods and statistics over a 15 - year period at the Universities of Alberta, Manitoba, and Winnipeg.

For the past 18 years Mr. Gibson has been employed in the field of electoral management. He was the Deputy Chief Electoral Officer with Elections Manitoba from 1998 to 2006 and the Chief Electoral Officer with Elections Alberta from 2006 to 2009. Since 2009, Mr. Gibson has been an electoral management consultant conducting research, preparing reports and advising electoral management bodies in Canada and internationally.

Mr. Gibson has consulted internationally for the Commonwealth Secretariat, International Foundation for Election Systems (IFES), Electoral Reform International Services, Canadian International Development Agency, and Foreign Affairs, Trade & Development Canada. Within Canada he has conducted assignments for Elections Canada, Elections BC, Elections Saskatchewan, Elections Manitoba, Elections Nova Scotia, and Elections Yukon. For the past 4 years he has been assisting Saskatchewan with the restructuring of its election management body and assisting Elections Saskatchewan with its planning and preparations for electoral events. Currently, Mr. Gibson is assisting the Saskatchewan Metis Nation with its upcoming general election in 2017.

With regard to the issues of independence and accountability of electoral management bodies, Mr. Gibson has delivered a presentation on the Independence and Accountability of Legislative Officers to the Canadian Conference of Election Officials in Banff, Alberta, conducted a cross jurisdictional survey of human resource practices of Canadian election management bodies for Elections Manitoba, and co-authored, along with Dr. Paul G. Thomas (Professor Emeritus), a comparative assessment of the governance arrangements of central electoral agencies (Australia, India, New Zealand, United Kingdom & United States) for Elections Canada.

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