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BILL C-9: AMENDMENTS TO THE CANADA ELECTIONS ACT AND ELECTORAL BOUNDARIES READJUSTMENT ACT

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9 March 2001

LEGISLATIVE HISTORY OF BILL C-9

HOUSE OF COMMONS		SENATE	
Bill Stage	**Date**	**Bill Stage**	**Date**
First Reading:	15 February 2001	First Reading:	2 May 2001
Second Reading:	27 February 2001	Second Reading:	9 May 2001
Committee Report:	26 March 2001	Committee Report:	
Report Stage:	23 April 2001	Report Stage:	
Third Reading:	1 May 2001	Third Reading:	

Royal Assent:
Statutes of Canada

N.B. Any substantive changes in this Legislative Summary which have been made since the preceding issue are indicated in **bold print.**

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BACKGROUND

Bill C-9, An Act to amend the Canada Elections Act and the Electoral Boundaries Readjustment Act, was introduced in the House of Commons by the Leader of the Government in the House of Commons, the Hon. Don Boudria, P.C., M.P., on 15 February 2001.

The bill has two basic objectives:

- to address a decision of the Ontario Court of Appeal regarding the identification of the political affiliation of candidates on election ballots; and
- to make a number of technical and administrative changes and to correct certain drafting

errors in the new *Canada Elections Act*, which was passed in 2000.

The major impetus for Bill C-9 was the ruling of the Ontario Court of Appeal in *Figueroa* v. *Canada (Attorney General)* in August 2000. Miguel Figueroa is the leader of the Communist Party of Canada, which was founded in 1921, and had been registered as a party under the *Canada Elections Act* since party registration began in 1974. In the 1993 federal general election, however, the party lost its status as a registered party, and all of the associated benefits, because it failed to nominate at least 50 candidates. As a consequence of de-registration, the party was forced to liquidate its assets, pay all its debts, and remit the outstanding balance to the Chief Electoral Officer. Several other parties were de-registered at the same time, and for the same reason.

Mr. Figueroa, on behalf of the members of the Communist Party of Canada, commenced an action against the Attorney General seeking a declaration that several provisions of the *Canada Elections Act* infringed various provisions of the *Canadian Charter of Rights and Freedoms* and were, therefore, of no force and effect. The original decision was rendered on 10 March 1999 by Madame Justice Molloy of the Ontario Court of Justice (General Division). She held that the requirement that a party must nominate at least 50 candidates in order to be a registered political party in federal elections violated section 3 of the Charter(1) and could not be saved by section 1. She ordered that the relevant provisions be amended by changing the word "fifty" to "two." She also struck down the prohibition against identifying on the ballot the party affiliation of candidates who were not endorsed by a registered political party as contrary to section 3.

The Attorney General appealed this judgement and, in August 2000, the Ontario Court of Appeal delivered its decision. Writing for the unanimous Court, Mr. Justice Doherty held that the purpose underlying the right to stand for election in section 3 of the Charter was effective representation. Political parties enhance effective representation by: structuring voter choice; providing a vehicle for public participation in politics; and giving the voter an opportunity to be involved in the process of choosing the government of the country. He noted that these roles require a significant level of involvement in the electoral process. Some meaningful level of participation is, therefore, properly a prerequisite condition to eligibility for the benefits available to registered parties, and the number of candidates is a legitimate means of measuring that participation. Although reasonable people might differ on the specific measure or number, the Court found that the 50-candidate requirement was within the bounds of reasonableness. It also rejected Mr. Figueroa's arguments that the 50-candidate requirement infringed sections 15 (equality rights) and 2(d) (freedom of association) of the Charter.

Mr. Justice Doherty, however, went on to hold that the sections of the *Canada Elections Act* which provided that only registered parties may have party affiliation listed on the ballot violate the right to vote in section 3 and are not justifiable under section 1 of the Charter. The right to vote contains an informational component, and the listing of party affiliation on the ballot is an important piece of information for voters. Although the provisions of the Act seek to avoid confusing or misleading voters, it did not follow that because a political party nominated 49 or fewer candidates that the listing of party affiliation on the ballot would mislead or confuse the voters. In fact, for smaller parties, it may provide the only information that the voter has about that particular candidate. These provisions of the Act were, therefore, declared invalid, but that declaration was suspended for six months to allow Parliament a reasonable opportunity to amend the legislation. (Because of the dissolution of Parliament for the 27 November 2000 federal general election, Parliament did not sit very much during the six months.)

The legal recognition and registration of political parties is a relatively recent development. Registration was introduced in the early 1970s, as part of various changes to Canada's electoral legislation, although the *Canada Elections Act* does not attempt to define or describe a political party.

To register, a political entity can file an application for registration signed by the leader of the party and containing certain information. The basic requirements are relatively simple to satisfy; for instance, each party is required to have an auditor and a chief agent. Under the Act, each application must be accompanied by the names, addresses, occupations and signatures of 100 electors who are party members; the intent of this requirement is to ensure that the party has a certain minimum level of support. On receipt of the application for registration, the Act requires the Chief Electoral Officer to examine the application and determine whether the party has complied with the requirements for registration. There are certain prohibitions against registration in the Act: for instance, if the name of the party, its abbreviation or a party logo could be confused with that of a party that has already been registered, the application will be refused. If the application is in order, registration will be subject to the following condition: the party must nominate at least 50 candidates in the next general election. Failure to nominate 50 or more candidates in a general election results in mandatory de-registration, even if the party meets all the other requirements of the Act. It should be noted that the requirement is only for a certain number of candidates to be *nominated*, not that they be elected or receive a certain minimum percentage of voter support.

Another key point is that political parties are not required to register under the *Canada Elections Act*, i.e., unregistered political parties can participate in elections. Upon registration, various provisions of the *Canada Elections Act* apply, such as the need for the party to file certain reports. Failure to comply with any of these provisions, or certain others, can lead to deletion of registration (de-registration).

However, registration does convey significant benefits and opportunities to a party. For example, only registered political parties are entitled to:

- issue tax receipts;
- receive reimbursement of certain election expenses;
- receive airtime on radio and television; and
- receive lists of electors from the Permanent Register of Electors on an annual basis.

Registration also gives parties the exclusive right to have their candidates identified – on ballots – as belonging to the party. Until 1970, election ballots listed the names of candidates as well as their addresses and occupations. There was no provision for identifying their political affiliations; therefore, before entering the voting booth, a voter had to know which candidate represented a particular party. There was great scope for voter confusion – both inadvertent and sometimes consciously planned by candidates, e.g., where candidates with similar names ran in the same riding. The law was changed in 1970 to allow the political affiliation of candidates to be shown on the ballots and to delete the address and occupation of candidates. Not only did these changes assist voters, but they accorded better with the reality of modern political campaigns. The changes coincided with the enactment of a new *Canada Elections Act* which,

for the first time, formally recognized political parties.

The Royal Commission on Electoral Reform and Party Financing (the Lortie Commission), in its 1991 Report, addressed the issue of political parties and ballot identification. The report noted that the failure of some parties to nominate at least 50 candidates had denied them the opportunity to have their party names on the ballot beside their candidates' names. (Referring to the 1988 general election, it noted that about half of the 154 candidates without political affiliation specified on the ballot were actually candidates for unregistered parties.) The report stated:

> The absence of unregistered parties' names from the ballot has two consequences. First, these parties lose the opportunity to present clear choices to voters, because the public is unaware that the parties have nominated candidates to act as standard bearers for their ideas and policies. Second, voters are deprived of the opportunity to make a full assessment of the choices they are offered. If the smaller parties had their names on the ballot, voters would be better informed about candidates' ideas and policies, as expressed through their parties. The electoral law can be amended to allow the smaller parties to have their names on the ballot, while retaining procedures to ensure that parties applying for this privilege have some measure of public support and are committed to electoral competition. These parties would not be able to issue tax receipts for financial contributions, nor would they qualify for reimbursement of election expenses; however, during the election period, their candidates would. In sum, the electoral law should be amended to recognize the legitimacy of these smaller parties in the electoral process.

The Commission went on to recommend that the names of unregistered parties be allowed to be shown on the ballots, provided certain qualifications were met. One of the recommendations was the suggestion that such parties endorse at least 15 candidates by the close of nominations.

Canada's electoral legislation was overhauled in 2000, when Bill C-2, the new *Canada Elections Act*, received Royal Assent on 31 May 2000.(2) The Act came into force on 1 September 2000, and provided the framework for the 27 November 2000 general election. Subsequently, a review of the Act and the experience of the election resulted in a number of "technical" changes and corrections, which have been incorporated into Bill C-9. These include:

- elimination of minor inconsistencies between the French and English texts and correction of various incorrect internal cross-references;
- extension of the approval of alternative voting processes to the appropriate Senate committee;
- harmonization of blackout provisions; and
- clarification of the calculation of election expenses.

DESCRIPTION AND ANALYSIS

A. Unregistered Political Parties and Party Affiliation on Ballots

Pursuant to the judgement of the Ontario Court of Appeal, Bill C-9 sets out a regime for the political affiliation of candidates who do not belong to registered parties to be indicated on the ballot. It introduces a new concept of a "political party," to describe those groupings or entities that nominate at least 12 candidates. This is to be distinguished from a "registered party," an "eligible party" and "a suspended party."

- Registered party: a party that is registered under the *Canada Elections Act*.
- Eligible party: a party that has applied for registration under the Act, and been accepted, subject to its nominating at least 50 candidates in the next general election.
- Suspended party: a registered party whose registration has been suspended for some reason.

In the Ontario Court of Appeal ruling, the Court indicated that it was unconstitutional to prohibit all political affiliations from being shown on ballots except those of registered parties. It did not, however, specify what criteria or rules should apply to identification of political affiliation. In Bill C-9, the government has chosen not to allow open-ended identification; it has decided to allow "political parties" to have the affiliation of their endorsed candidates shown on the ballots, and this is defined as requiring that at least 12 candidates be endorsed and have their nominations confirmed in a general election. In other words, a political grouping or party can run candidates in an election, and have them identified as such, provided it runs candidates in at least 12 electoral districts.

Clause 12 amends the provisions of the Act regarding election ballots. It allows candidates other than those who are endorsed by a registered political party to have their affiliation shown.

It presumably would be possible for a party with more than 50 candidates to take advantage of this provision, as there is no upper limit. However, it would not make sense for such a party not to apply for registration, given the accompanying benefits to registration under the Act.

Under proposed new section 117(2)(d), in the case of a by-election, only those parties that had nominated at least 12 candidates in the preceding general election are entitled to have their candidates identified on the ballot. Thus, new or emerging parties are still not allowed to be shown on a ballot until the next general election. This, however, is not different than in the case of eligible parties, i.e., parties that have applied for registration under the Act and been conditionally accepted, subject to their having at least 50 candidates in the next general election.

The proposed Act continues to make registration as a party the key to being eligible for the other benefits accruing to parties. Such benefits include: entitlement to issue tax receipts; reimbursement of election expenses; access to broadcasting time; and access to copies of the voters lists on an annual basis. These parties will also continue to have their candidates identified on the ballots.

The number 12 has been chosen because it is the number used for recognition of parties in the House of Commons.(3) There is nothing special about this number. It was first used in 1963 when the government decided to pay an additional allowance to leaders of parties other than the government and official opposition. This was achieved through an amendment to the *Senate and House of Commons Act* [now the *Parliament of Canada Act*]. The number appears to have

been chosen without consultation, although it was based on the historical representation in the Commons of the CCF/NDP and Social Credit Party. (Shortly after the Act was amended, the Social Credit split into two factions, neither of which had 12 Members.) The requirement for 12 Members has subsequently been applied generally in the House of Commons, and has become the threshold for eligibility for various benefits and opportunities.

The introduction of the concept of a "political party" requires a number of consequential changes to the Act. Clause 1 amends the definition of "political affiliation" to include a "political party" that has endorsed a candidate. The term "political party" is also used in clauses 7 (section 66(1)(a)(v)); 8 (section 67(4)(c)); 9 (section 68); 13 (section 165); 14 (sections 166(1)(a) and (b)); and 15 (section 279(3)). The use of the term "independent" on ballots is also covered in section 117(3) (clause 12).

Clause 24 amends section 504 of the Act, which deals with judicial proceedings and compliance agreements. It clarifies that the section is applicable to registered, eligible and suspended parties, but not to "political parties."

B. Electronic Voting

Clause 2 amends section 18.1 of the *Canada Elections Act*, which was added during committee consideration of Bill C-2 in the House of Commons. It allows the Chief Electoral Officer to carry out studies on voting, including alternative voting means such as electronic voting processes, provided he or she obtains prior parliamentary approval. As originally drafted, the section only required the approval of a House of Commons committee. During the passage of Bill C-2 in the Senate, the exclusion of the Senate from this process was criticized. The amendment in clause 2 requires the prior approval of committees of both the Senate and the House. There has been criticism that the Senate, as an unelected body, should not be involved in such matters. On the other hand, it has been argued that because they do not have to run in elections, Senators are more objective about electoral matters than are Members of the House of Commons.

C. Technical Changes and Corrections

Clause 5 replaces section 57(1) of the Act, which deals with writs of election. It introduces a distinction between a proclamation for a general election, and an order for a by-election. A consequential change is made to section 58 by clause 6.

Clause 11 amends section 109 of the Act, which deals with the final lists of electors. It amends section 109(3) to make it clear that extra copies of these lists can be requested by a registered party as well as a candidate. This right is not available to unregistered parties.

The blackout provisions of the Act are harmonized to reflect the fact that the blackout period was reduced in Bill C-2 to polling day (section 323(1)). These provisions define the period when broadcasters are required to make free or paid time available to candidates and registered parties. Clause 17 replaces section 355, which deals with the provision of broadcasting time to registered parties. Similarly, clause 18 replaces part of section 345(1) dealing with free broadcasting time. Clause 19 replaces section 348(a) dealing with the rates charged to parties and candidates for broadcast advertising time. Clause 20 makes changes with respect to section 359(1) regarding the election advertising time for registered third parties.

Clause 21 amends section 403 to clarify that financial reports are to be prepared in accordance with generally accepted accounting principles. Other financial reporting requirements in the Act provide for the application of such principles, and this amendment is designed to ensure consistency.

Clause 22 replaces section 441 of the *Canada Elections Act*. This section deals with the calculation of the electoral expenses limit, and is designed to clarify it by inserting a reference to the revised list of electors. This provision of Bill C-2 was amended at committee stage in the House of Commons to allow the expense limits of candidates and registered parties to be adjusted using the revised list of electors, when the use of this list increases their expense limits. The proposed amendment is, therefore, a consequential one: as the current Act now reads, the section is not clear as to how the calculation is to be made, referring only to the preliminary lists for the adjustment factors.

Certain linguistic errors in the Act are corrected by the following clauses:

- clause 1(2) (section 2(1)(f)(v) – English);
- clause 3 (section 32(d) – English);
- clause 10 (section 91 – English);
- clause 16 (section 324(a) – English);
- clause 20(2) (section 359(2)(a)(ii) – English);
- clause 23 (section 467 – French); and
- clause 25 (section 517(7) – English).

Two clauses of the bill correct cross-references: clause 4 (section 44(2)); and clause 20(3) (section 359(2)(b)). Clause 26 amends section 558, which is a transitional provision.

D. *Electoral Boundaries Readjustment Act*

Clause 27 amends the *Electoral Boundaries Readjustment Act* to refer to 10, rather than 11, commissions.

DISCUSSION

In the *Figueroa* decision, the Ontario Court of Appeal made it clear that the political affiliation of candidates shown on ballots should not be restricted to those candidates endorsed by a registered political party. In other words, the political affiliation of candidates of unregistered parties could be shown on ballots. The Court indicated the existence of a public interest in providing electors with more information on candidates, and that, in order to comply with the *Charter of Rights and Freedoms*, the *Canada Elections Act* would have to be amended. The Court did not, however, provide direction or indicate the specific nature of a regime for identifying unregistered parties.

The government, in Bill C-9, has chosen to use the number 12 as the threshold or base for parties to be identified: a political party or grouping must run at least 12 candidates in a general election. As noted above, this number is based on the number that has been used for recognized parties in the House of Commons for almost 40 years.

Any number that is chosen has a certain arbitrariness about it. The relationship between party recognition in the House of Commons, and participation of unregistered parties in general elections, is somewhat tenuous. Nevertheless, the number 12 does have a certain familiarity and historical resonance about it. It is possible that at some point a group with only 11 candidates will challenge the new provisions. The number used in 1963 for the recognition of parties in the House of Commons was itself somewhat random, and it has not been adjusted to reflect the increased membership of the House from 265 to the current 301. On the contrary, the number has acquired an importance far beyond that originally envisaged.

In the trial decision in *Figueroa*, Madame Justice Molloy indicated that as few as two people could constitute a party. Many observers, however, have argued that this is too low a standard, and that it would result in a proliferation of parties and a diminution of the idea of a group of people joining together for common political purposes or ends. The Lortie Commission suggested that the figure should be 15, but this recommendation was never implemented.

During debate on Bill C-9 in the House of Commons, many issues and concerns were raised regarding the new *Canada Elections Act* and, in particular, its operation during the 2000 federal general election. Many of these are beyond the scope of Bill C-9. It should be noted that after each general election, section 535 of the Act requires the Chief Electoral Officer to report to the Speaker of the House of Commons any legislative amendments that are desirable for the better administration of the Act. It is likely that further legislative changes will be proposed, and the Government House Leader has indicated that he expects to introduce further amendments at a future date.

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* For clarity of exposition, the legislative proposals set out in the Bill described in this Legislative Summary are stated as if they were already adopted or in force. These are, of course, simply proposals that are brought forward for the consideration of Parliament and will have no force or effect unless and until they are passed by both Houses of Parliament and receive Royal Assent.

(1) Section 3 of the *Canadian Charter of Rights and Freedoms* provides as follows:

> 3. Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

(2) See James R. Robertson, Parliamentary Research Branch, Library of Parliament, *Bill C-2: The Canada Elections Act*, LS-343.

(3) See James R. Robertson, Parliamentary Research Branch, Library of Parliament, *Political Parties and Parliamentary Recognition*, BP-243.