

AMCTO SUBMISSION *on the* **MUNICIPAL ELECTIONS ACT**

JULY 2015



About AMCTO:

AMCTO represents excellence in local government management and leadership. AMCTO has provided education, accreditation, leadership and implementation expertise for Ontario's municipal professionals for over 75 years.

With approximately 2,200 members working in 98 per cent of municipalities across Ontario, AMCTO is Canada's largest voluntary association of local government professionals, and the leading professional development organization for municipal administrative staff.

Our mission is to provide management and leadership service to municipal professionals through continuous learning opportunities, member support, and legislative advocacy.

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July 22, 2015

Honourable Ted McMeekin
Minister of Municipal Affairs and Housing
777 Bay Street, 17th Floor
Toronto, ON M5G 2E5

Dear Minister McMeekin

RE: Municipal Elections Act Review

I am writing on behalf of AMCTO and the more than 2,200 municipal professionals who make up our membership, to present our submission as part of the *Municipal Elections Act Review*.

AMCTO is pleased to present our submission which is organized around the themes of *modernization and clarity*. It contains a series of recommendations that we hope will help to improve the administration of municipal elections in Ontario by providing greater clarity and consistency to the Municipal Elections Act (MEA) and narrowing the modernization gap. AMCTO has a long tradition of promoting excellence in election administration, and we would encourage the Ministry to rely on the expertise of our members to help improve this important piece of legislation.

We appreciate your consideration of our suggestions and look forward to hearing back in a timely manner. Should you have any questions about this submission, please do not hesitate to contact Rick Johal, Director of Member & Sector Relations at AMCTO. He is best reached at rjohal@amcto.com or 905 602 4294 Ext. 232.

Yours sincerely,



Chris Wray
AMCTO President

C. Deputy Minister Laurie LeBlanc
C. Assistant Deputy Minister Kate Manson-Smith
C. Pat Vinini, Executive Director – Association of Municipalities of Ontario (AMO)

INTRODUCTION

Since the last round of changes to Ontario's *Municipal Elections Act (MEA)*, 1996, local government elections in Ontario have undergone a significant period of transition. Though changes have occurred on multiple fronts, the overwhelming shift has been towards greater modernization. The use of technology has expanded at a rapid rate, and new voting methods have moved from the periphery to the core. These changes have all taken place alongside the rise of a technologically-enabled economy, an increasingly digitally-literate electorate, and in an era where information is traded instantaneously through a variety of digital media platforms.

Yet, despite these broader changes to society and the expansion of new elections technology and Internet voting, the majority of the *MEA* is still written for elections that use paper ballots in traditional brick and mortar polling places. The result, is a growing modernization gap between the way that elections are envisioned in the *MEA*, and the way they are increasingly administered in practice. The occasion of this legislative review provides an excellent opportunity to breathe new life into the *MEA*, and transform it into a modern piece of legislation that truly reflects the way that municipal elections are administered in 2015.

However, while closing the modernization gap is one of the key opportunities offered by this review, it is not the only one. There are additional issues¹ that have built up over time and become barriers to effective election administration. Some are systemic problems, like the poor quality of the voters' list, while others are tied specifically to existing gaps, ambiguity, or impediments, currently contained within the *Act*.

This submission is organized around the themes of *modernization* and *clarity*. It contains a series of recommendations that are designed to improve the administration of elections by providing greater clarity and consistency to the *MEA*, and narrowing the modernization gap. Its recommendations are the result of a thorough review conducted by an advisory group of Municipal Clerks, with experience conducting elections across all regions of Ontario. It is grounded in the commitment to ensure that elections at the municipal level are fair, free and accessible for everyone who seeks to participate.

Recommendations:

Recommendation 1: Amend the *Municipal Elections Act* to allow candidates to file financial forms electronically (Without passing a by-law)

¹ See Appendix B for a list of additional "housekeeping" recommendations.

Recommendation 2: Remove the requirement for original signatures for everything except for filing a nomination (Form 1) and/or appointing a proxy (Form 3)²

Recommendation 3: Remove the requirement for documents to be delivered by registered mail

Recommendation 4: Remove the “voting place” wording in s.48 (1), so that the provision also applies to voting that takes place outside an established polling location

Recommendation 5: Clarify the role of scrutineers where unsupervised or remote voting is in place, and establish a minimum age

Recommendation 6: Create a new requirement within the *Act* for municipalities to develop an election accessibility plan

Recommendation 7: Remove the requirement for election-related accessibility reporting to go to Council after the election, and instead allow it to be proactively posted to an accessible web page

Recommendation 8: Shorten municipal elections, and do not allow candidates to file their nomination form until June 1st of the election year

Recommendation 9: Work with the Ministry of Education to mandate Election Day as a province-wide professional development day for municipal and school-board elections

Recommendation 10: Provide candidates the authority to determine what payment methods will be accepted for contributions to their campaign

Recommendation 11: Clarify the rules and establish clearer procedures for municipalities to deal with third party advertising

Recommendation 12: Give municipalities the option to limit or prohibit corporate and union donations

Recommendation 13: Consider a nominal increase to the candidate nomination fee, and make it nonrefundable

Recommendation 14: Include the principles of the *Act*, as outlined in *DiBiase v. Vaughan (City), 2007*, in the *MEA*

Recommendation 15: Clarify the conflicting authority of Council versus staff with respect to election administration

Recommendation 16: Provide the Clerk authority to determine the vote casting and counting method in their municipality

Recommendation 17: Clarify Council's role in creating compliance audit committees, so that it is responsible for establishing the committee but not appointing its members

² This recommendation may also require amendments to the *Electronic Commerce Act*

Recommendation 18: Give the Clerk discretion to extend voting hours and provide special voting occasions on Election Day or for advance voting

Recommendation 19: Extend the Clerk's discretion throughout the election period under s.22 so that hearings are no longer required to remove a name from the voters' list

Recommendation 20: Create a new section dedicated to Question/ By-law Registrants, clearly defining the rules, who must register, and a process for noncompliance

Recommendation 21: Establish rules for finalizing financial statements and auditors' reports (Form 4), and clarify if a candidate is allowed to make changes before the filing deadline

Recommendation 22: Review the penalties and oversight contained in the *Act*, and consider a range of potential penalties, so that the severity of each punishment matches the nature of each offence

Recommendation 23: Clarify the role of the Clerk when it comes to enforcement

A note on the voters' list:

This submission does not include recommendations for reforming the voters' list (outside of minor adjustments to s.22). An accurate list of electors is a foundational element of any successful election, and yet currently one of the biggest barriers faced by election administrators. In the last few municipal elections in Ontario, the voters' list was plagued by inaccuracies, and despite promises of reform, has remained a thorn in the side of election administrators across the province. AMCTO believes that there are serious structural issues with the way that the voters' list is created in Ontario, and has called for a new approach to creating the list. For more on AMCTO's position, read our 2015 position paper *Time to Fix the Voters' List*.

MODERNIZATION

As our world becomes more deeply embedded in the use of technology, elections, at the local level at least, are beginning to follow suit. Though paper ballots and manual vote counting are still used by most communities in Ontario, they are increasingly becoming relics of a bygone era. In 2014 a growing number of communities used electronic vote tabulators and 97 municipalities incorporated some form of Internet voting³ into their election. Going forward the use of new digital technologies and alternative voting will only continue to expand,⁴ and the *MEA* must keep pace with this growth.

Modernizing central provisions of the Act

One of the most important ways that this legislative review can help to modernize the *MEA* is to reassess central provisions of the *Act*, and integrate a more nuanced recognition of the use of technology. This is especially the case with transactions that happen between a candidate and the Clerk, which are still largely defined by traditional methods of communication and interaction.

Outside of the *MEA*, transactions in Ontario are increasingly happening electronically. Residents of this province can now bank, study, socialize and shop in a completely digital environment. These transformations are impacting all areas of society, including the public sector, and will continue to push government's to deliver services and interact with their citizens in new ways. For instance, the government recently announced new measures that will allow real estate transactions to be completed with electronic signatures.⁵

Some sectors, such as healthcare, have embraced the transformational power of technology, and are increasingly making use of new digital innovations like electronic health records, telemedicine, and e-prescriptions.⁶ At present, however, the *MEA* does not create an enabling environment for the same changes to happen during municipal elections. Despite the widespread adoption of new technology across sectors, the *MEA* still requires Clerks and candidates to rely on hard paper copies, original signatures and registered mail. While there

³ Internet Voting Project, <http://www.internetvotingproject.com/learn/> (Accessed June 25, 2015).

⁴ 86 per cent of respondents to AMCTO's 2014 post-election survey indicated that they were satisfied with Internet voting, while 56 per cent said that they would recommend using it in 2018 (Source: AMCTO Post Election Survey, January 2015, n = 119).

⁵ Ministry of the Attorney General, "Ontario Allows Real Estate Documents to Be Signed Electronically," Government of Ontario, June 29, 2015.

⁶ ITAC, *Advancing Health and Prosperity: A Brief to the Advisory Panel on Healthcare Innovation*, 2014.

are some allowances for electronic filing, they are cumbersome and ineffective. For instance, following the completion of an election campaign candidates cannot file their financial statements electronically unless their municipality passes a by-law allowing them to do so.⁷

Given the range of activities now happening online, it should be easier for candidates to complete straight-forward tasks

electronically in a more efficient and less onerous manner.

Sec. 78(7): The Council of a local municipality may pass a by-law authorizing electronic filing under this section subject to such conditions and limits as are set out in the by-law

One of the roadblocks to allowing more election-related transactions to happen electronically, however, is the

requirement for original signatures. Sec. 14 of the *MEA*⁸ requires that any signed document being filed with an election official must bear an original signature. There are two circumstances—appointing a proxy and filing candidate nomination paperwork—where having an original signature is necessary. These are both situations where it is important for the Clerk to interact with either the voter or candidate, and important to have a record of that transaction. In all other circumstances, however, it imposes an unnecessary burden on candidates and administrators, and acts as a roadblock to modernization.

Alongside paper filing and electronic signatures, a final obstacle to enabling more modern transactions is the requirement for sending information by registered mail. Given the recent changes to Canada Post service, the ubiquity of email use, and the growing menu of an additional digital alternatives, this requirement is increasingly difficult to justify. It is time-consuming, expensive, and unnecessary.

Recommendation 1: Amend the *Municipal Elections Act* to allow candidates to file financial forms electronically (without passing a bylaw)

Recommendation 2: Remove the requirement for original signatures for everything except for filing a nomination (Form 1) and/or appointing a proxy (Form 3)

Recommendation 3: Remove the requirement for documents to be delivered by registered mail

⁷ See sec.78(7)

⁸ This recommendation may also require amendments to the *Electronic Commerce Act*

Reflecting the use of new technology and alternative voting

One of the most fundamental changes to municipal elections in Ontario in the past 5 to 10 years has been the gradual embrace of new technology and the growth of Internet voting. Local governments in Ontario began using Internet voting in 2003, and the number of municipalities to adopt the practice has grown in each subsequent election. Municipalities have been overwhelmingly satisfied with their use of Internet voting, despite the apprehension, uncertainty and fear expressed in the media. For instance, 86 per cent of respondent municipalities to AMCTO's 2014 post-election survey indicated that they were satisfied with the outcome, and more than half plan to recommend its use in 2018.⁹ The Town of Ajax even went to a completely paperless, Internet election in 2014. Some projections estimate that by 2018, almost 200 municipalities will be using some form of Internet voting.¹⁰

Yet, despite the steady growth of Internet voting, a number of provisions within the MEA do not yet reflect its use. For instance, while sec. 48 includes protections designed to prevent an elector from being influenced in a "voting place," it does not account for the fact that in jurisdictions with Internet voting, a polling place could be anything from a shared apartment, to a coffee shop, library, or anywhere a person takes their mobile device. As the use of Internet

Sec. 48(1): While an elector is in a voting place, no person shall attempt, directly or indirectly to influence how the elector votes

voting continues to grow, our idea of what a "voting place" is will also need to evolve, and a good place for this to start would be within the MEA.

The polling place is not the only election institution that will need to evolve with the expanding use of technology, however. The process of scrutineering is also changing in every community that incorporates the use of Internet voting into their election. As voting in the digital age is no longer neatly contained to school auditoriums or church basements, the rules are not as clear as they once were. The *Act* details significant attention to the role of scrutineers during an election, ensuring that candidates are permitted to appoint a scrutineer for each ballot box and voting place. But what happens when there are thousands of polling places and no formal ballot box? There is currently no clarity about how election results can be scrutineered in jurisdictions that use Internet voting. This is a gap that needs to be filled.

⁹ AMCTO Post Election Survey, January 2015, n = 119

¹⁰ Goodman, Nicole and Jon Pammet, "The Patchwork of Internet voting in Canada," *Internet Voting Project*.

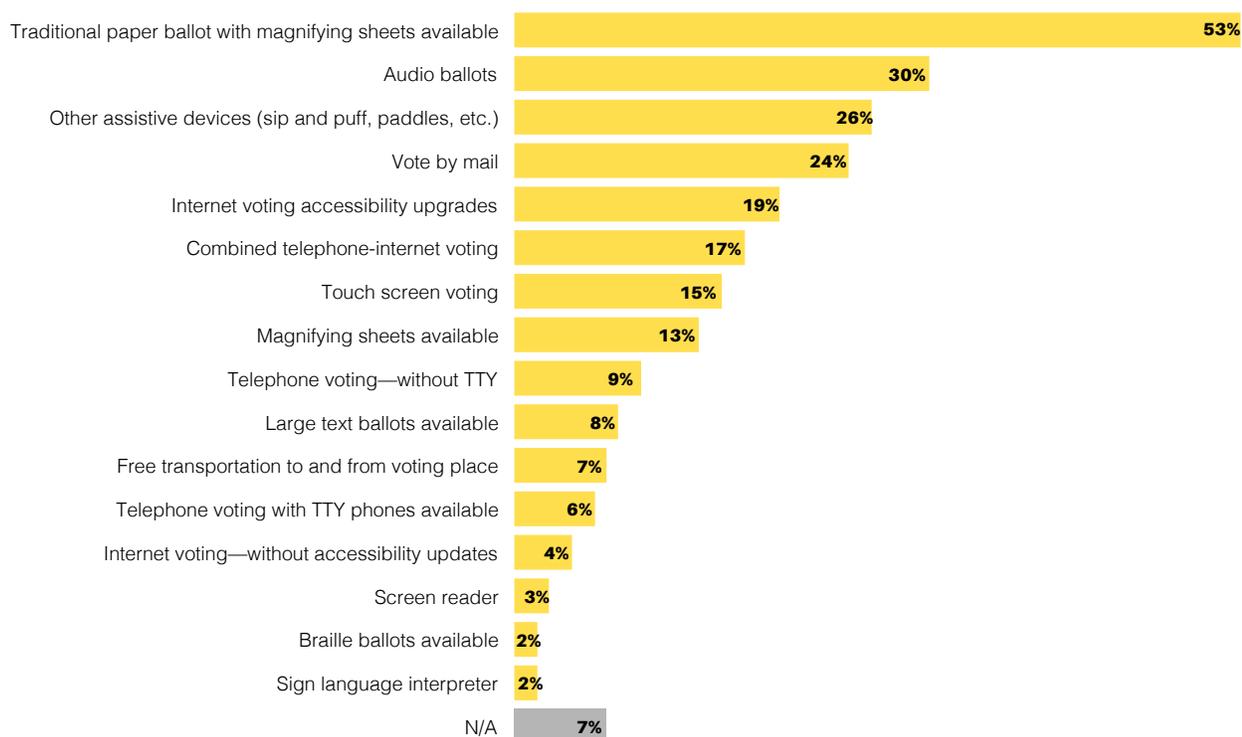
Recommendation 4: Remove the “voting place” wording in s.48(1), so that the provision also applies to voting that takes place outside an established polling location

Recommendation 5: Clarify the role and minimum age of scrutineers where unsupervised or remote voting is in place

Enhancing accessibility planning and reporting

Many Clerks would agree that making the voting process easy and open is one of their most important responsibilities during an election. The *MEA* requires that all voting places in municipal elections are accessible to all voters, and as seen in Figure 1, municipalities across the province are engaged in a wide spectrum of activities to promote openness, inclusivity, and accessibility during their election.

Figure 1:
Accessibility in the 2014 Municipal Election



Source: AMCTO 2014 Post Election Survey, January 2015 (n=112)

Yet while many municipalities are already working to comply with requirements under the *Accessibility for Ontarians with Disabilities Act (AODA)* and in some cases even going above and beyond those requirements, there is still room to make the election process more accessible. One way to ensure that accessibility holds a more prominent place during the election, would be to firmly embed it within the planning process before decisions are made, and require municipalities to formally report on how they intend to be more accessible.

Another way to improve election accessibility is to make the existing reporting requirements more effective. Sec. 12.1(2) of the *Act* requires municipalities to report to Council within 90 days about how they made their election accessible. However, there are a number of issues with this provision. As will be discussed in more detail below, reporting to Council on administrative issues creates confusion. It gives councillors and the public the impression that Council is responsible for administrative issues—in this case election accessibility—when in fact, the onus for ensuring that the election

Sec. 12.1(2): Within 90 days after after voting day in a regular election, the clerk shall submit a report to council about the identification, removal and prevention of barriers that affect electors and candidates with disabilities

has regard for the “needs of electors and candidates with disabilities” is clearly assigned to the Clerk. The more significant issue though, is that this provision is simply not effective. If the goal is, as it should be, reporting back to the community on what was done to make the election accessible, then taking a report to Council is not the best way to achieve that goal. Rather, if the information is meant for the community it should be made available directly to the community, by placing it where most people now go to get information: the Internet.

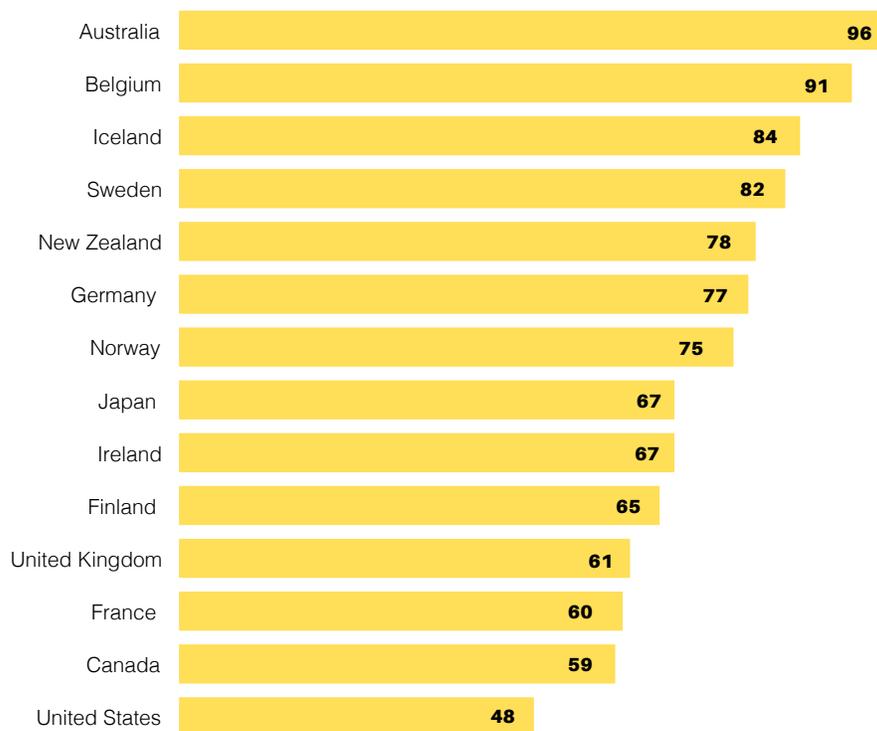
Recommendation 6: Create a new requirement within the *Act* for municipalities to develop an election accessibility plan

Recommendation 7: Remove the requirement for election-related accessibility reporting to go to Council after the election, and instead allow it to be proactively posted to an accessible web page

Streamline the campaign period

Voter turnout is an important indicator of social cohesion, however, like many other highly industrialized countries, Canada is facing a long-term trend of declining voter turnout.¹¹ In fact, as seen in Figure 2, turnout in Canada is low even amongst this cohort. During the 2011 federal election, only 53.6 per cent of eligible electors cast a ballot, the second lowest rate in Canadian history. AMCTO's 2014 post-election survey found similarly low levels of voter turnout at the municipal level (Figure 3).¹²

Figure 2:
Voter turnout, OECD Countries (2011)



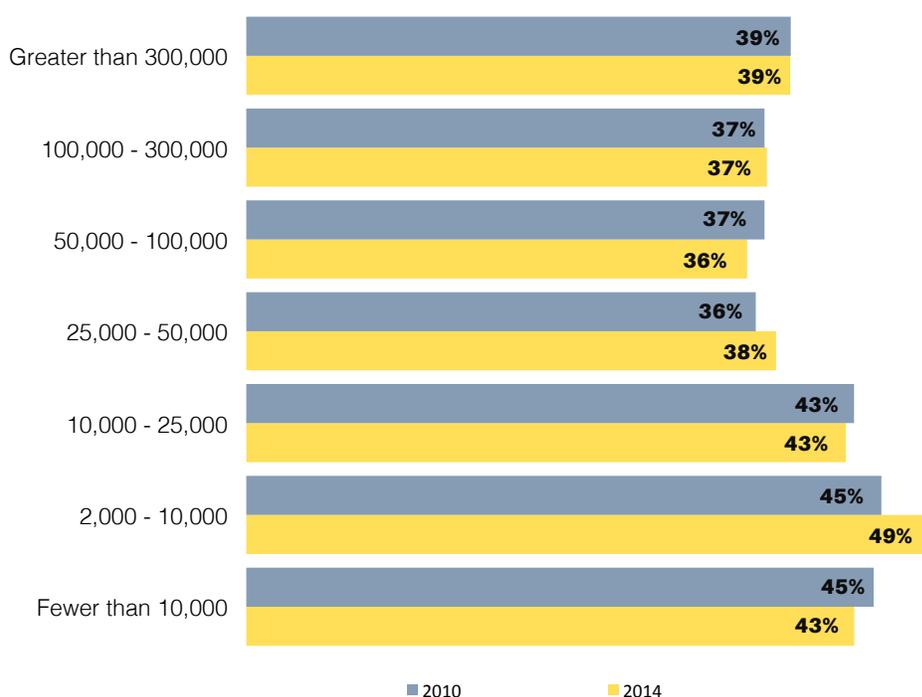
Source: Alberti, Mike, "Voter turnout in different OCED countries," *Organization for Economic Cooperation and Development*, 2011.

¹¹ Conference Board of Canada, Voter Turnout: How Canada Performs, January 2013, <http://www.conferenceboard.ca/hcp/details/society/voter-turnout.aspx>

¹² AMCTO Post Election Survey, January 2015, n = 119

There is no clear consensus about what factors contribute to low voter turnout. A study conducted by Elections Canada, for instance, found a variety of explanations, including vacations, being too busy, work or family.¹³ Yet, while the keys to electoral engagement are complex and difficult to locate, there are some steps that can be taken as part of this review to ensure that there are no unnecessary barriers to participation. The results will not necessarily lead to increased participation, but will ensure that those who wish to exercise their democratic franchise are free to do so.

Figure 3:
Voter turnout in Ontario 2010 and 2014 municipal elections, by population



Source: AMCTO 2014 Post Election Survey, January 2015 (n=112)

There is a growing recognition amongst local citizens and even the Minister of Municipal Affairs and Housing¹⁴ that the campaign period for local government elections is excessively long. As it stands the length of municipal elections far exceed the writ period for campaigning at either the provincial or federal level. For campaign finance purposes the election can run at least a full year, and in many circumstances even longer. While all communities benefit from vigorous

¹³ Elections Canada, Report on the Evaluations of the 40th General Election, October 14, 2008.

¹⁴ Rider, David, "Ontario open to big changes in municipal elections," The Toronto Star, April 27, 2015.

debate and hard-fought campaigns, there is a limit to how long candidates and voters alike can reasonably be expected to sustain an interest. Longer elections are more expensive for candidates, harder to run for administrators, and potentially disengaging for an already disengaged electorate. Moving the nomination period to June 1st would make the campaign period shorter, while also giving candidates in smaller municipalities—who may still be working full-time jobs with less sophisticated campaign infrastructure—enough time to campaign.

Aside from shortening the campaign period, another way to streamline the campaign period is to ensure that there are available places for municipalities to place polling stations. Schools are the most common polling places during elections, and there are few alternatives that have the same size, location and stature in a community that public schools do. They are easy to find and known to most citizens in the community, which can help limit barriers to voting on Election Day. However, there is a significant level of concern amongst parents that using schools during elections poses a significant safety and security concern, as schools have to relax security provisions to allow voters to enter. Many schools have responded by requiring municipalities to hire security personnel, or telling them to place the polling station somewhere else. The result is tension between Clerks, who are attempting to run municipal and school board elections, and school administrators who are trying to ensure the safety of their students and comply with the provincial *Safe Schools Act*.¹⁵

Continued access to school facilities for municipal and school board election purposes is important to the local electoral processes. The school safety concerns, which are legitimate, can be addressed. For example, in 2014 York Region made Election Day a professional development day, allowing municipalities in York Region to freely use schools as polling places, and relieving parents and school administrators from having to worry about safety and security. Replicating this York Region initiative across the province would resolve the concerns of municipalities and school administrators, paving the way for a smoother, simplified Election Day, and ensuring that voters' can easily locate their polling place. The Ontario Public School Board Association has already indicated its willingness to participate in further discussions about this with municipalities before the 2018 election.¹⁶

Recommendation 8: Shorten municipal elections, and do not allow candidates to file their nomination form until June 1st of the election year

Recommendation 9: Work with the Ministry of Education to mandate Election Day as a province-wide professional development day for municipal and school-board elections

¹⁵ Ontario's Safe Schools Policy, codified in the Safe Schools Act, requires schools to create an environment that is safe and secure. (Source: Ministry of Education, "Safe Schools Policy and Practice: An Agenda for Action," Government of Ontario, June 2006).

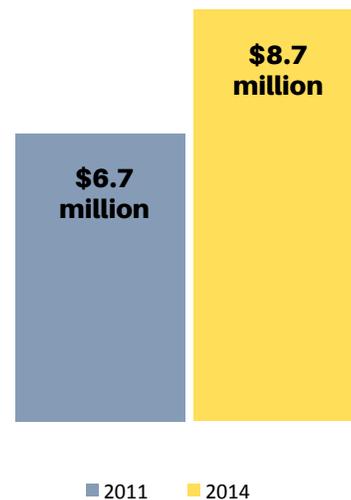
¹⁶ This may require further amendments to Regulation 304 under the Education Act

Modernize and update campaign finance

Perhaps no area of our society has felt the impact of increasing modernization as strongly as the financial sector. Since the last round of amendments to the MEA, there have been seismic shifts in the world of finance. Residents of Ontario can now complete most financial transactions online, sometimes simply with the use of a smartphone. Individuals and businesses meanwhile, are both increasingly relying on online tools and technological mobility as a means of enhancing productivity. The Canadian digital economy is growing,¹⁷ and has become a key priority for the federal government, which released its *Digital Canada 150* strategy in 2014.¹⁸ As a result, cheques and money orders have now been all but replaced by e-mail money transfers, PayPal, and variety of other emergent online payment methods. Given this shift towards increasingly sophisticated forms of digital and electronic finance, there is a reasonable case to be made that candidates should have the freedom to determine what payment methods they will use to accept campaign donations. A change along this line would give candidates and potential donors more options, and bring the MEA more in-line with the broader societal changes to the digital economy.

In addition to modernizing some of the rules around campaign finance, there is also a need to update a number of campaign finance provisions that have not changed at the same pace as technology. For instance, there is increasing concern about the impact of money in politics. Third-party advertising, in particular, is an issue of significant concern in Ontario. Recently given high-profile attention by the creation of several groups founded to advertise in the run-up to the 2015 federal election, striking a balance between our inherent right to free speech, and the distortionary effects of uncontrolled money in politics remains a challenge. In recent years the scale of third-party advertising during provincial

Figure 4:
Third-party advertising in Ontario, 2011 & 2014
Provincial Elections



Source: Office of the Premier of Ontario, "Backgrounder: Measures to Strengthen Ontario's Election System," Government of Ontario, June 4, 2015.

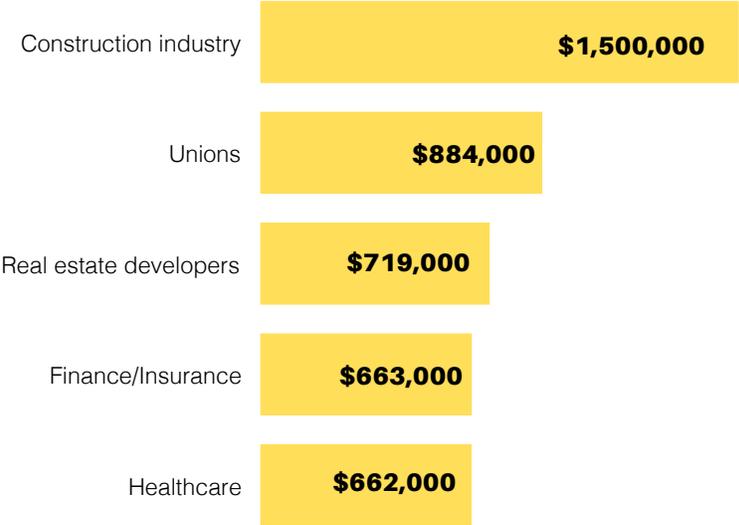
¹⁷ For example, between 2011 and 2012, Canada's e-commerce market grew from \$6.6 billion to \$7.7 billion. (Source: Statistics Canada, "E-commerce in Canada is a billion-dollar industry," Canada Business Network, September 4, 2014).

¹⁸ ITAC, Canada's ICT Sector and the Digital Economy, February 2015.

elections in Ontario¹⁹ has soared, growing from approximately \$6 to \$8.7 million between 2011 and 2014 elections.²⁰ It is an issue that all three levels of government are grappling with. In provincial elections in Ontario, third parties that spend \$500 or more on election advertising are required to register and report to the Chief Electoral Officer on their spending, while any spending of over \$5,000 must be audited. However, the province is currently considering a range of options to strengthening those rules,²¹ based on recommendations made by Ontario’s Chief Electoral Officer.²² Similar reforms are also needed for municipal elections in Ontario, and as much as possible, these rules should align with those at the provincial level, creating greater consistency.

There is also growing concern about the role of corporate and union donations in elections. Beyond the borders of Canada, there has been spirited debate over the past few months in a variety of jurisdictions from Kentucky to Australia about the role that businesses and organized labour should be playing in electoral politics.

Figure 5:
Top contributors in 2011 Ontario provincial election, by sector



Source: Elections Ontario, 2012

¹⁹ There is currently no accurate figure for the scale of similar advertising in municipal elections.

²⁰ Office of the Premier of Ontario, “Backgrounder: Measures to Strengthen Ontario’s Election System,” Government of Ontario, June 4, 2015.

²¹ Office of the Premier of Ontario, “Backgrounder: Measures to Strengthen Ontario’s Election System,” Government of Ontario, June 4, 2015.

²² Elections Ontario, Ready, Set Go! Managing Ontario’s 41st General Election, 2015.

Closer to home, Alberta recently passed Bill 1, *An Act to Renew Democracy in Alberta*, joining Quebec, Manitoba, Nova Scotia and the federal government, in banning corporate and union donations.²³ Other jurisdictions, like Vancouver, have been advocating for such change for years (including 7 unanimous council resolutions²⁴). In Ontario, sec. 70.1(1) of the *MEA* gives the City of Toronto the option of passing a by-law to prohibit donations from corporations and unions, but

Sec. 70.1(1): The City of Toronto may by by-law prohibit a corporation...or a trade union...from making a contribution to or for any candidate for an office on city council

does not extend the same prerogative to other municipalities. Giving all municipalities this option would allow those communities that are

concerned about the influence of corporate and union money in their elections to do something about it, without instituting a blanket ban across the province.

Finally, despite numerous changes to the fiscal climate surrounding elections, the fee charged to candidates who want to run for office has stayed the same.²⁵ The rationale for this is clear: there should be no financial hurdle that would prevent an ordinary citizen from running for office. However, maintaining the nomination fee at an artificially low rate opens up the process to those who are not serious about being elected to higher office, and doesn't adequately offset the administrative burden shouldered by the municipality. While it is important not to impose a financial litmus test on prospective candidates, it is equally important to ensure that only candidates who are truly serious about public service

run for office. A more serious concern, however, is that the nomination fee is still refundable for candidates who decide to withdraw their nomination.

Under s.34 of the *Act*, candidates receive a refund of their nomination filing fees if they withdraw their nomination, are

Sec. 34: A candidate is entitled to receive a refund of the nomination filing fee if he or she, (a) withdraws the nomination under section 36; (b) is elected to the office; or (c) receives more than the prescribed percentage of the votes cast in the election

elected to the office or receive more than 2 percent of votes cast. This comes at a potentially high cost for the municipality as it must nevertheless respond to candidate inquiries and provide them with copies of the voters' lists, forms, maps and information packages.

²³ Government of Alberta, Unanimous approval to ban corporate and union donation, June 23, 2015.

²⁴ Jackson, Emily, "Vancouver pushes province for campaign finance limits...again," Metro News, January 21, 2015.

²⁵ The current nomination fee is \$200 to run for head of council and \$100 to run for council.

Recommendation 10: Provide candidates the authority to determine what payment methods will be accepted for contributions to their campaign

Recommendation 11: Clarify the rules and establish clearer procedures for municipalities to deal with third party advertising

Recommendation 12: Give municipalities the option to limit or prohibit corporate and union donations

Recommendation 13: Consider a nominal increase to the candidate nomination fee, and make it nonrefundable

CLARITY

Aside from the need to modernize the *MEA*, one of the other key challenges faced by election administrators as they operationalize the *Act* is its lack of clarity. There are a number of opportunities to strengthen the foundations of the *MEA*, while closing loopholes that have been left open, and bringing greater precision and consistency. The recommendations contained in this section are all designed to make the *MEA* a more rigorous and effective instrument.

Clarifying central provisions of the Act

One of the most important ways to enhance the clarity of the *MEA*, is to ensure that the text of the *Act* matches its core guiding principles. In *DiBiase v. Vaughan (City)*, 2007, The Honourable Justice Peter Howden of the Ontario Superior Court wrote that in making its finding, the court had relied upon the principles articulated in a previous Supreme Court of Canada ruling (*Haig v. Canada*, 1993), namely that:

- The secrecy and confidentiality of the voting process is paramount
- The election shall be fair and non-biased
- The election shall be accessible to the voters
- The integrity of the voting process shall be maintained throughout the election
- There is to be certainty that the results of the election reflect the votes cast
- Voters and candidates shall be treated fairly and consistently
- The proper majority vote governs by ensuring that valid votes be counted and invalid votes be rejected so far as is reasonably possible²⁶

These principles are fundamental to the administration and exercise of elections at all levels of government in Canada. They are in fact, central to the *MEA* itself, and should be embedded in the *Act*.

Recommendation 14: Include the principles of the Act, as outlined in *DiBiase v. Vaughan (City)*, 2007, in the *MEA*

²⁶ Rust-D'Eye, Bar-Moshe, and James, *Ontario Municipal Law: A Users Manual* (2011).

Clarifying the role of the Clerk

The MEA gives the responsibility for administering elections, including establishing necessary policies and procedures, to the Clerk. However, there are a number of sections throughout the Act where the responsibility for what are in effect administrative decisions is unclearly distributed between both Council and staff. For instance, sec. 43(1)(a) requires Council to pass a by-law establishing dates for advance votes, and sec. 9(1) gives Council the responsibility

Sec. 43(1)(a): At least 30 days before voting day, the council of a local municipality shall pass a by-law establishing, one or more dates for an advance vote

for establishing which languages other than English to provide election materials in. Sections of the Act that conflate administrative responsibility between both Council and staff create unnecessary confusion for all parties involved. They call into question the separation of powers that is inherent to a healthy staff-council relationship, and in some cases compromise the

independence of election administrators. These sections also limit the effectiveness of the Clerk, potentially hampering her or his statutory responsibility for effectively administering the election, and could lead to ethical dilemmas. For instance, how is a Clerk supposed to respond if she or he feels that Council is exercising its authority in an inappropriate way, or if an administrative decision is becoming unnecessarily politicized? One doesn't have to strain to conceive of a

situation along these lines. For example, a member of Council who is running for re-election may have a direct interest in

Sec. 9(1): Notices, forms and other information provided under this Act shall be made available in English only, unless the council of the municipality has passed a by-law

exercising their control over what additional languages election materials will be provided in. Clearing up this ambiguity would help clarify the role of the Clerk and add extra ballast to the firewall between policy decisions that are the domain of Council and administrative decisions that are the responsibility of the Clerk and inherently tied to the sanctity of the electoral process.

One of the areas where the conflicting authority of Council versus staff is the most pronounced is in the determination of what vote counting and casting methods a municipality will use. Council currently has range of administrative responsibilities regarding vote counting and casting, from determining whether or not a municipality will use Internet voting, all the way to whether it can use electronic tabulators to count votes. Aside from unnecessarily involving Council in administrative decisions, this structure also places anyone on Council running for reelection in a conflict, as incumbent Councillors are given the responsibility for determining what method of voting will be used in an election that they are running in.

Determining the vote casting and counting method is not the only area of administrative responsibility where council has authority, despite an inherent conflict. Sec. 81.1(1) gives Council responsibility for

“establishing” a

compliance audit

committee to review

potential campaign finance

violations. In practice,

however, this section has been interpreted broadly, giving Council a more expansive mandate that includes appointing committee members. Yet there is a clear conflict of interest here for both Council and staff. It is not appropriate for Council to appoint members of a committee that is created to review the election finances of candidates, many of whom end up sitting as councillors.

Sec. 81.1(1): A council or local board shall, before October 1 of an election year, establish a committee for the purposes of section 81

There are additional areas where the Clerk’s role, as outlined in the *Act*, needs to be clarified. For instance, following the 2014 election, there was concern in a number of larger municipalities about limited voting hours on Election Day. Sec. 46(1) of the *MEA* limits voting to between the hours of 10:00am until 8:00pm. However, in larger communities this may not be enough time for commuters, or those who work irregular hours to get to their polling place before or after work. In February, Bill 68, the *Municipal Elections Amendment Act* was introduced as a private members bill with the sole intention of amending the *MEA* to allow voting places to remain open until 9:00pm. Rather than enacting a blanket statutory extension

Sec. 46(1): On voting day, voting places shall be open for the electors to vote from 10a.m. until 8 p.m.

of voting hours that would apply to small and large communities alike, a better approach would be to provide Clerk’s with the discretion to extend voting hours in their municipality. This would allow larger municipalities to keep their polling places open later, while not forcing smaller communities, where limited voting hours may not be a problem, to do the same.

Finally, the role of the Clerk seems to be unnecessarily limited regarding the voters’ list. Currently if a Clerk wishes to remove someone’s name from the list, sec. 25(3) indicates that, unless that person has died, the Clerk must hold a hearing to determine whether or not the name can be removed. The voters’ list in 2014 was plagued with errors, as it has been in the past. While many of these errors were the result of systemic issues, many were also the inevitable result of living in a country that experiences such a high degree of internal and external migration. Crafting an accurate voters’ list in such a context will always pose inherent challenges, and will always result in some level of easily detectable error. Requiring a hearing every time a name must be removed from the list seems unnecessarily onerous.

Recommendation 15: Clarify the conflicting authority of Council versus staff with respect to election administration

Recommendation 16: Provide the Clerk authority to determine the vote casting and counting method in their municipality

Recommendation 17: Clarify Council's role in creating compliance audit committees, so that it is responsible for establishing the committee but not appointing its members

Recommendation 18: Give the clerk discretion to extend voting hours and provide special voting occasions on Election Day or for advance voting

Recommendation 19: Extend the Clerk's discretion throughout the election period under s.22 so that hearings are no longer required to remove a name from the voters' list

Clarifying campaign finance

The current campaign finance rules in the *MEA* are important instruments to ensure fairness and accountability in our elections. There are, however, a number of ways that they can become more rigorous and effective by streamlining current requirements and filling in gaps. One of the most significant gaps currently in the *Act*, relates to question/ by-law registrants. In the course of an election, a municipal Council has the option to pass a bylaw allowing that community to include a question on their ballot. The ability to include questions on the ballot during municipal elections is an important way to allow local governments to engage their citizens and involve them in important decisions being made by the community. However, while the concept is clear, the rules and process, outlined in the *MEA*, is not.

A number of the sections dealing with question registrants are unnecessarily complicated and vague. For instance, sec. 82.1(1) of the *Act*, which applies to individuals, corporations or trade unions planning to register, contains at least 44 references to other schedules, sections, subsections, paragraphs, subparagraphs, and clauses (figure 6). Creating a new section that deals exclusively with registrants would enhance the clarity of the current rules, and save the reader the time required to cross-reference 44 sections of the *MEA*, just to learn the rules that govern registrants. Some of the rules themselves are also not sufficiently clear. For instance, it is not apparent in what circumstances a candidate, who has already filed their nomination, must also become a registrant. If a candidate has a platform position on the same topic as a ballot question, do they need to register a separate question registrant campaign, or is it covered under their candidate registration? Clearer rules for the ballot question process would also be strengthened by a better procedure for noncompliance with the *Act*. Under the current rules, someone or some group could spend money to influence the outcome of a ballot

question without ever registering, and the only recourse would be for a private citizen to take this person or group to court under sec. 91.

Figure 6:

Section 82.1(1) of the *Municipal Elections Act (MEA)*

Subject to subsection (2), the following provisions apply to an individual, corporation or trade union that is registered under section 39.1:

1. *Section 66.*
2. *Subsection 67 (1), and subsection 67 (2), except paragraph 9.*
3. *Subsection 68 (1), except subparagraph 4 ii, and subsection 68 (2).*
4. *Sections 69 and 70.*
5. *Subsections 71 (1) and (3).*
6. *Sections 72 to 78.*
7. *Subsections 79 (1) and (2), subsection 79 (3), except clause (b), and subsections 79 (4) to (7).*
8. *Section 81.*
9. *Subsections 92 (1) to (4). 2009, c. 33, Sched. 21, s. 8 (47).*

A similar yet smaller gap to the current campaign finance rules also exists regarding whether or not a candidate can amend a financial statement after it has been submitted. All candidates, including those who were acclaimed, withdrew their nomination, or did not appear on the ballot, are responsible for filing a complete and accurate financial statement by 2:00pm on the last Friday in March following Election Day. Candidates that received more than \$10,000 in total contributions and expenses must also have their financial statements audited. While the *Act* goes into substantial detail about this process, it does not account for a surprisingly common occurrence. There is no clarity about whether a candidate can make changes to their financial statement after they have submitted it, but before the March deadline. For instance, if a candidate submits a financial statement in January and then realizes in February that there is an error, there is no clarity about what either they or the Clerk should do. Both Clerks and candidates would benefit from some clarity on this provision.

Recommendation 20: Create a new section dedicated to Question/ By-law Registrants, clearly defining the rules, who must register, and a process for noncompliance

Recommendation 21: Establish rules for finalizing financial statements and auditors' reports (Form 4), and clarify if a candidate is allowed to makes changes before the filing deadline

Enhancing enforcement

As much as the current campaign finance rules are important tools to ensure fairness and accountability in our elections system, there is still much work to be done to ensure that they are followed and enforced. The *MEA* does not currently provide an effective mechanism for enforcement. Clerks have no authority to investigate or respond to complaints, despite receiving countless requests throughout the course of an election campaign, and the months that follow. If a municipality truly wants to enforce the election rules, set out in the *Act*, their only real recourse is to hire their own lawyers and go to court. However, the penalties contained in the *Act* continue to have very little meaning in the courts,²⁷ making this option even less appealing, and creating the potential for moral hazard within the municipal election system. As every election yields new stories of candidates violating campaign rules and being excused, the impetus for following the rules becomes less and less powerful. The compliance audit procedure also unfairly places the burden on electors to initiate a complaint. Even for those who do chose to file, the process is burdensome and costly for the applicant. At this point, there is no viable solution beyond a wholesale review of the current penalties and oversight that currently exists within the *Act*, in order to create rules that are actually followed, and penalties that are actually enforced.

One of the other significant gaps in the enforcement of the *MEA* is the ambiguity about the role of the Clerk in the enforcement process. The *MEA* contains both a section on the role of the Clerk and a section on offences, penalties and enforcement of the *Act*. However, neither of these sections provide sufficient clarity about how the Clerk is to exercise her or his powers and responsibilities to enforce the *Act's* provisions. This is an area of the *MEA* that is in desperate need of clarity, especially given the preexisting challenges with enforcing the penalties contained in the legislation, described above, and the precarious nature of the Clerk's relationship with candidates, some of whom eventually become members and even heads of Council.

Recommendation 22: Review the penalties and oversight contained in the *Act*, and consider a range of potential penalties, so that the severity of each punishment matches the nature of each offence

Recommendation 23: Clarify the role of the Clerk when it comes to enforcement

²⁷ The courts have consistently set aside the penalties in the *Act*. For example, see *Gleeson v. Conseil Scolaire du district catholique des aurores boréales, 2015* or *Ashby v. Town of Ajax, 2015*, to name but a few.

CONCLUSION

AMCTO has a long tradition of promoting excellence in election administration. The recommendations included in this report are based on that long tradition, and the countless years of collective experience that AMCTO members have running elections in the four hundred plus municipalities in this province. The context in which local government elections take place has evolved rapidly since the last round of changes to the *MEA*, and will continue to transform at a rapid pace in the future. The use of technology will continue to grow and push the boundaries of how governments offer services and interact with their citizens. As it contemplates this review, we would encourage the Ministry to use the expertise of our members to improve the clarity of the *MEA* and make it a truly modern piece of legislation that reflects the technological transformations that have already taken place in society, and is prepared for those that are yet to come.

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APPENDIX A: AMCTO Recommendations for reforming the Municipal Elections Act (MEA)

Modernize central provisions

Recommendation 1: Amend the Municipal Elections Act to allow candidates to file financial forms electronically (Without passing a by-law)

Recommendation 2: Remove the requirement for original signatures for everything except for filing a nomination (Form 1) and/or appointing a proxy (Form 3)

Recommendation 3: Remove the requirement for documents to be delivered by registered mail

Clarifying campaign finance

Recommendation 4: Remove the “voting place” wording in s.48 (1), so that the provision also applies to voting that takes place outside an established polling location

Recommendation 5: Clarify the role and minimum age of scrutineers where unsupervised or remote voting is in place

Enhancing accessibility planning and reporting

Recommendation 6: Create a new requirement within the Act for municipalities to develop an election accessibility plan

Recommendation 7: Remove the requirement for election-related accessibility reporting to go to Council after the election, and instead allow it to be proactively posted to an accessible web page

Streamline the campaign period

Recommendation 8: Shorten municipal elections, and do not allow candidates to file their nomination form until June 1st of the election year

Recommendation 9: Work with the Ministry of Education to mandate Election Day as a province-wide professional development day for municipal and school-board elections

Modernize and update campaign finance

Recommendation 10: Provide candidates the authority to determine what payment methods will be accepted for contributions to their campaign

Recommendation 11: Clarify the rules and establish clearer procedures for municipalities to deal with third party advertising

Recommendation 12: Give municipalities the option to limit or prohibit corporate and union donations

Recommendation 13: Consider a nominal increase to the candidate nomination fee, and make it nonrefundable

Clarify central provisions of the Act

Recommendation 14: Include the principles of the Act, as outlined in DiBiase v. Vaughan (City), 2007, in the MEA

Clarify the role of the Clerk

Recommendation 15: Clarify the conflicting authority of Council versus staff with respect to election administration

Recommendation 16: Provide the Clerk authority to determine the vote casting and counting method in their municipality

Recommendation 17: Clarify Council's role in creating compliance audit committees, so that it is responsible for establishing the committee but not appointing its members

Recommendation 18: Give the clerk discretion to extend voting hours and provide special voting occasions on Election Day or for advance voting

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Clarify campaign finance

Recommendation 20: Create a new section dedicated to Question/ By-law Registrants, clearly defining the rules, who must register, and a process for noncompliance

Recommendation 21: Establish rules for finalizing financial statements and auditors' reports (Form 4), and clarify if a candidate is allowed to make changes before the filing deadline

Enhance enforcement

Recommendation 22: Review the penalties and oversight contained in the Act, and consider a range of potential penalties, so that the severity of each punishment matches the nature of each offence

Recommendation 23: Clarify the role of the Clerk when it comes to enforcement

APPENDIX B: Additional ‘Housekeeping’ Recommendations for MEA Reform

Recommendation: Change the requirement (s.41.2.5) that a candidates surname and address must appear on a ballot where two candidates have the same surname

- Currently when there are two candidates with same surname, the Clerk must also include each candidate’s address on
- This an overly onerous requirement that takes up a lot of space on a ballot
- Especially a problem in larger centres where more candidates have the same name and there are more candidates and less space on the ballot

Recommendation: Change the proscriptive definition of “deputy returning officer” and to “election official”

- The Deputy Returning Officer title is no longer necessary
- Would create greater consistency to move away from having multiple terms and use just one term, consistently

Recommendation: Provide a clearer definition of occupancy and possession and clarify the definition of tenant, and spouse of a non-resident

- Unique eligibility rules at the municipal level, makes both of these terms important and unique
- Current definitions provided in the Act are not sufficiently clear, and create potential confusion for electors, candidates, and administrators

Recommendation: Shorten the extension period for by-elections (s. 68)

- Disproportionately long compared to the normal campaign period
- Overly burdensome and time-consuming for Clerk, who has just run a long regular election and will soon be preparing for the next election cycle

APPENDIX C: Members of AMCTO's Municipal Elections Act Advisory Team

AMCTO would like to thank the following members of its Municipal Elections Act Advisory Team for providing the technical expertise for this submission. Please note that the recommendations and opinions included in this report are AMCTO positions, and do not necessarily reflected the views of individual members.

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- Malcolm White, City Clerk, City of Sault St. Marie
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