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COMMISSION DE RÉFORME DU DROIT

REPORT

ON

CONTROVERTED ELECTIONS

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Report #39

The Manitoba Law Reform Commission was established by *"The Law Reform Commission Act"* in 1970 and began functioning in 1971.

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*The Commission records with deep regret the passing of Mr. Littler on March 15, 1980.

The subject of this Report is controverted elections, and in particular the operation of *"The Controverted Elections Act"*, C.C.S.M. c. C210. After basic research the Commission, in January 1977, issued a Working Paper setting out tentative recommendations to which we received very little response. In August of 1979 we retained Mr. Peter J.E. Cole, the former Senior Research Officer of the Commission, to write this final Report as he had been heavily involved in research in the whole area of the holding of elections during his years of service with the Commission.

"The Controverted Elections Act" was enacted by the Manitoba Legislature shortly after Manitoba became a province and has been little changed since that time. Although seldom used, it is a very important piece of legislation because it provides the one avenue through which an elector or a defeated candidate can legally challenge the return of a member to the Legislative Assembly. All of the sanctions, prohibitions and directions contained in *"The Election Act"*, C.C.S.M. c. E30, to ensure the honesty and fairness of a provincial election would be of little avail if there was no effective way of relating them to the outcome of the election, viz. the return of the elected member to the House. Prosecution for election offences can lead to fines and prison sentences, but the ultimate democratic safeguard must be the voiding of the election itself, and the holding of a new election for the due return of a properly elected representative.

The jurisdiction to try controverted elections is part of the ancient privilege of the House of Commons of control over its own constitution or membership. According to Erskine May's *Parliamentary Practice* this is expressed in three ways: first, by the order of new writs to fill vacancies that arise in the course of a parliament; secondly

by the trial of controverted elections; and thirdly by determining the qualification of its members in cases of doubt.

> The right of the Commons to determine all matters touching the election of its own Members has been regularly claimed and exercised since the reign of Queen Elizabeth and probably earlier, although such matters had been ordinarily determined in Chancery. Its exclusive right to determine the legality of returns and the conduct of returning officers making them was fully recognized by the courts in the case of *Barnardiston v. Soame*, 1674 upheld by the House of Lords in 1689 and by other contemporary cases. The Commons' jurisdiction in determining the right of election was further acknowledged by the Act 7 & 8 Will. 3 c. 7. But in regard to the right of electors the cases of *Ashby v. White* and *R. v. Paty* led the House of Lords to draw a distinction between the right of electors and the right of the elected, the one being a freehold by common law, and the other a temporary right to a place in Parliament. In the eighteenth century, however, the Commons continued to exercise the sole right of determining whether electors had the right to vote, while inquiring into the conflicting claims of candidates for seats in Parliament; . . . .
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> Before the year 1770, controverted elections were tried and determined by the whole House of Commons, as mere party questions, upon which the strength of contending factions might be tested.
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> In order to prevent so notorious a perversion of justice, the House consented to submit the exercise of its privilege to a tribunal constituted by law, which, though composed of its own Members, should be appointed so as to secure impartiality and the administration of justice according to the laws of the land and under the sanction of oaths. The principle of the Grenville Act, and of others which were passed at different times since 1770, was the selection by lot of committees for the trial of election petitions. Partiality and incompetence were, however, generally complained of in the constitution of committees appointed in this manner; and, in 1839, an Act was passed esta-

> blishing a new system, upon different principles, increasing the responsibility of individual Members, and leaving but little to the operation of chance. This principle was maintained, with partial alterations of the means by which it was carried out, until 1868, when the jurisdiction of the House in the trial of controverted elections was transferred by statute to the courts of law.[1]

Although the *Parliamentary Elections Act* of 1868 provided that,

> No election or return to parliament shall be questioned except in accordance with the provisions of this Act,[2]

it was determined that this applied to the questioning of returns by election petition only. Otherwise the House of Commons continued to exercise its consitutional jurisdiction it being, in fact, bound to take notice of any legal disabilities affecting its members and not raised by election petition.

"The Controverted Elections Act" of Manitoba, like other Canadian legislation on this subject, is squarely grounded on that originally drafted and enacted in the United Kingdom.

> The influence, in respect of examination of controverted elections, which the Parliament at Westminster has exercised on the procedure in various countries which have taken their inspiration directly or indirectly from it, is perhaps nowhere so marked as in Canada. The U.S. Congress, having once settled for the Westminster system which was in operation at its birth, did not change. The fall of the "old representative system" of government in the West Indies in 1865 and the emergence, first of Crown Colony government and then later of what has come to be called the Commonwealth Caribbean, caused the present system there to reflect that clean break with the past by the complete adoption of examination by the courts. Canada, however, has moved step by

> step with the United Kingdom, *i.e.* while at first recognizing that the power to examine controverted elections was exclusively a matter for Parliament, the legislature later granted the courts fixed statutory rights in this respect so that, as in the case of the United Kingdom, the courts today merely exercise those powers contained in various "Dominion Controverted Elections Acts".[3]

The inherent right of the various provincial Legislatures to deal with matters affecting the due return of their members was early recognized by Canadian courts, as was the limited nature of the jurisdiction conferred under the various controverted elections statutes. As in England, the statutes are strictly construed, and it is clearly understood that the House of Commons and the provincial assemblies retain any residual jurisdiction. An early pronouncement to this effect was made by Mathers, C.J.K.B. in the Manitoba case of *Davis v. Barlow*:[4]

> A very serious question here arises as to the jurisdiction of the Court otherwise than under the Controverted Elections Act, to interfere in any way with the return of a member either to Parliament or the Legislative Assembly. Until comparatively recent times, all controversies respecting the return of members were decided by the House to which the member had been returned, and the House of Commons always jealously guarded its jurisdiction in this respect from interference from outside. By the Controverted Elections Act power was delegated to Courts thereby constituted to deal with disputed elections in the manner therein specified. General jurisdiction over the return of members was not by these Acts conferred upon the Courts. No case has been cited to me, and I have found none, in which the Court has assumed directly to interfere with the return of a member of the legislature otherwise than under the Controverted Elections Act. In my opinion the jurisdiction to do so is confined to the Courts established by those Acts.

Turgeon, J.A. remarked in *Lamb v. McLeod*,[5] that

> In acting in cases of election petitions, the court is not exercising its ordinary civil or criminal jurisdiction. The assembly is the guardian of its own prerogatives and privileges, and the courts have nothing to do with questions affecting membership except insofar as they have been specially designated by law to act in such matters . . . .
>
> Therefore the courts will always approach questions concerning their jurisdiction over election contests with great caution, as being unwilling to interfere without undoubted authority.

In Quebec, in the case of *Poulin v. Casgrain*[6] it was held that a judge of the Superior Court of that province, sitting in the matter of a controverted federal election, acts as a delegate of the House of Commons and not as a court of original jurisdiction. He is consequently acting as an inferior court and a writ of prohibition may be issued to him by the Superior Court. This is an interesting point of view which was considered by Dr. Claudius C. Thomas in an article in the *Anglo-American Law Review*, "Comparative Study of Laws Relating to the Procedure for Settling Controverted Elections". In answer to the question of whether the election court acts merely as an agent of the House of Commons, which retains the prerogative of controlling its own composition, he writes,

> It appears that the right of the House of Commons to exercise its inherent prerogative to settle its own affairs is impaired; but this is only insofar as the question of affecting the seats of its members arises out of a controverted election. If the question does not arise out of a controverted election, the House can, of its own motion, take notice of it. Moreover, it is bound to notice any legal disability affecting a member and to issue writs in the room of members adjudged

> incapable of sitting. Therefore since as a result of section 107 of the Representation of the People Act, 1949, a controverted election is heard by an election court, and since the decision of the court is final to all intents and purposes, then the court cannot be said to be an agent of Parliament.[7]

The jurisdiction conferred upon the court under the controverted elections legislation is evidently a "special" jurisdiction, clearly outside any inherent power which they may have, and one which is treated with great circumspection. It is a delegation of part of the inherent jurisdiction of Parliament, and something of central importance to the heart of Parliament, the House of Commons. A controverted election is no mere civil dispute but an examination of the very roots of parliamentary authority in the democratic election of those who will serve in the House. It is solely because of the desire and need for impartiality in trying controverted elections and the difficulty of finding such impartiality within the House of Commons itself, that jurisdiction was delegated to the courts. It was a begrudging delegation and from their remarks the judges are keenly aware of the close scrutiny being kept upon them by the legislators.

The special nature of the jurisdiction to hear controverted elections is very apparent in the legislation detailing the manner of its exercise.

> Election petitions are not, in many respects, upon the same footing as private litigation. This is apparent from the care with which provision is made in the statute to prevent unnecessary delay, [the Ontario Controverted Elections Act] R.S.O. 1897, ch. 11, sec. 46, by the substitution of a new petitioner and by the somewhat elaborate provisions respecting withdrawals and abatements contained in the sections from 86 to 98 inclusive. A perusal of these sections leads to the conclusion that,

> once a petition is filed and served, it at once becomes a matter not of private but of public or quasi-public interest, in so far, at least, as the electors of the electoral district are concerned, and can only be withdrawn or abandoned in the manner pointed out by the statute, after public notice and the opportunity of another or other electors stepping into the breach as petitioners.[8]

Such statutes as *"The Controverted Elections Act"* of Manitoba also emphasize the peculiar nature of the subject matter by containing almost complete codes of procedure, rather than relying on the usual court rules drawn up by the judges. Many of these provisions are anachronistic and could well be abandoned or modified without any undue threat to the basic thrust of the statute. Such elaborate provisions no doubt reflect the original desire of Parliament to define as sharply as possible the jurisdiction being delegated.

One of the things to note from a comparative study of controverted elections legislation is the degree to which different jurisdictions have removed this matter into the ambit of the courts. Among the Anglo-Saxon family of nations, the Caribbean countries seem to have gone the farthest in this direction. In the United States the Constitution provides that each House shall be the judge of the elections, returns and qualifications of its own members and may determine the rules of its proceedings, punish its members for disorderly behaviour, and with the concurrence of two-thirds, expel a member. Although a number of attempts have been made to have Congress adopt a system analogous to that employed in the United Kingdom, nothing has been done to date. The American situation is essentially similar to the position which existed in England about the time of the *Grenville Act* at the end of the eighteenth century and is the

subject of the same criticisms of partiality and bias. The English system, as adopted in Canada, seems to have brought the needed degree of impartiality to deciding questions affecting the due return of members without entirely sapping the jurisdiction of the House to control its own constitution. As the range of cases which might arise outside the ambit of the existing legislation is very small, there appears to be no demonstrated need to enlarge the court's jurisdiction.

In terms of substantive law a most important area to be considered is the circumstances in which elections are found to be null and void. Sections 55 to 61 of *"The Controverted Elections Act"* specify that an election shall be void where a candidate or his agent has committed any election offence, unless the court finds that the offence was committed without the sanction or connivance of the candidate, that he took all reasonable means for preventing the commission of the offence, that the offence itself was of a trivial, unimportant and limited character, and that there were no other offences committed by the candidate or his agent. Apart from this, however, very little is given in the statute in the way of specific direction, the judges having been accorded a considerable degree of discretion in determining when an election should be declared invalid for reasons other than the commission of election offences. Section 146 of *"The Elections Act"* provides as follows:

> No election shall be declared invalid by reason of
> (a) any irregularity on the part of the returning officer or in any of the proceedings preliminary to the poll; or
> (b) a failure to hold a poll at any place appointed for holding a poll; or

> (c) non-compliance with the provision of this Act as to the taking of the poll or the counting of the votes or as to limitations of time; or
> (d) any mistake in the use of the forms contained in the Schedule;
>
> if it is shown, to the satisfaction of the tribunal having cognizance of the question, that the election was conducted in accordance with the principles laid down in this Act and that the irregularity, failure, non-compliance, or mistake, did not materially affect the result of the election.

The two saving graces to which the courts are referred by this section are "that the election was conducted in accordance with the principles laid down in this Act", and that the irregularities, etc., complained of ". . .did not materially affect the result of the election". While these directions assist the court in avoiding a finding of nullity, they do not in any way abrogate the common law as to the circumstances in which an election will be held null and void, and in this regard there has been criticism of the principles developed by the courts.

In an article in the *Anglo-American Law Review* 1975 entitled "Election Statutes and the Concept of Nullity", Edward A. Laing identified four common law formulae used by the English judges in election avoidance cases. The first two are derived from the leading cases of *Hackney, Case Gill v. Reed and Holms*[9] and *Woodward v. Sarsons & Sadler*[10] and are expounded in the judgment of the court in the latter case as follows:

> . . .that an election is to be declared void by the common law applicable to Parliamentary elections, if it was so conducted that the tribunal which is asked to avoid it is satisfied, as a matter of fact, either that there was no electing at all, or that the election was not really conducted under the subsisting election law.[11]

Although these remarks were *obiter dicta* they have been quoted and relied on in many subsequent cases in England and throughout the Commonwealth. The court gave illustrations of these common law principles as follows, beginning with the situation in which there has been no electing at all:

> . . . if it were proved . . . that the constituency had not in fact had a fair opportunity of electing the candidate which the majority might prefer. This would certainly be so, if a majority of the electors were proved to have been prevented from recording their votes effectively according to their own preference, by general intimidation or the general corruption or by being prevented from voting by want of the necessary machinery for voting, as,by polling stations being demolished, or not opened, or by other of the means of voting according to law not being supplied or supplied with such errors as to render voting means of them void, or by fraudulent counting of votes or false declarations of members by a returning officer, or by other such acts or mishaps. And we think the same result should follow it, by reason of any such or similar mishaps, the tribunal, without being able to say that a majority had been prevented, should be satisfied that there was reasonable ground to believe that a majority of the electors *may have been* prevented from electing the candidate they preferred. But, if the tribunal should only be satisfied either that a majority had been, or that there was reasonable ground to believe that a majority might have been prevented from electing the candidate they preferred, then we think that the existence of such mishaps would not entitle the tribunal to declare the elections void by the common law of Parliament.[12]

The second principle was particularized as follows:

> [W]e think, though there was an election in the sense of there having been a selection by the will of the constituency, that the question must in like manner be, whether the departure from the prescribed method of election is so great that the tribunal is satisfied, as a matter of fact, that the election was not an election under the existing law. It is not enough to say that great mistakes were made in

> carrying out the election under those laws, but under some other method. For instance, if, during the time of the old laws, with the consent of a whole *constituency, a candidate had been selected by* tossing up a coin, or by the result of a horse-race, it might well have been said that the electors had exercised their free will, but it should have been held that they exercised it under a law of their own invention, and not under the existing election laws, which prescribed an election by voting . . . But if . . . the election was substantially an election by ballot, then no mistakes or mis-conduct however great, in the use of the machinery of the Ballot Act, could justify . . . declaring the election void by the common law of Parliament. We agree . . . .[13]

Formula three is also derived from the *Woodward* case, although as the author admits:"It is somewhat difficult to find conclusive English authority for this proposition", which is, *"Has the result been affected?"*[14] *This, of course, bears some similarity to the direction contained in section 146 of "The Controverted Elections Act"* of Manitoba. The last formula is the "well-known method of classifying statutory provisions as mandatory or directory".[15] In this regard the courts fall back on the established rules of statutory construction in deciding whether a particular irregularity will render an election null and void.

Laing concludes that these perceived formulae are not adequate, primarily because they cannot be used in all situations where election avoidance might be justified, and the courts have no direction about priority of the formulae or how they should be combined, if at all. This uncertainty, in his opinion, points to a statutory solution. While there may be some merit to the contention that the technical application of the common law principles in this area is confusing, we have found no evidence that this has adversely

affected the operation of the Manitoba Act or that our courts have been prevented from arriving at just and reasonable verdicts.

The operation of section 146 was considered most recently in the case of *Pollard v. Patterson and Richards*[16] in which the validity of the 1973 election in the constituency of Crescentwood was challenged. The grounds alleged were numerous mistakes and irregularities in the conduct of the election by the officials in charge, and the petition was brought following a tie-vote which had been decided by the Returning Officer casting his vote in favour of Patterson. Wilson, J., in his judgment drew attention to ". . .the oddity of the expression 'The principles laid down in this Act'" and quoted with apparent approval the following remarks of Rose, C.J.H.C. in the Ontario case of *Rex ex rel Fennessy v. Wade et al*:[17]

> "The Act does not lay down principles; it lays down rules of procedure which are to be followed, and the 'principles' referred to are, as Riddell J.A. said, the principles upon which an election to which those rules apply is to be conducted. And when sec. 163 says that no election shall be or be declared to be invalid for non-compliance with certain provisions of the Act or by reason of certain mistakes or irregularities, provided it appears that the election was conducted in accordance with the principles laid down in the Act, it does not mean merely that no election shall be invalid for such non-compliance, mistake or irregularity, provided there was in all instances a following of the relevant rules. On the contrary, what is enacted is that certain breaches of the rules shall not cause the avoidance of the election if there has been an adherence to the principles; and what appears to be intended, although not expressed as clearly as it might have been, is that, if there is a general adherence to the principles some isolated breaches of the rules, not shown to have affected the result, shall not avoid the election . . . ."
>
> . . .

> "Sometimes it has been applied; sometimes it has not. In general, I think, it has not been applied where, as in Rex ex rel. Jacques v. Mitchell (1924), 55 O.L.R. 286, the irregularities were widespread and not mere informalities; but there are exceptions to that general statement, and there are even instances of a difference of opinion as to whether the facts of a particular case warranted the application of the section, for instance, Re Sinclair and Town of Owen Sound (1906), 12 O.L.R. 488. There is, then, no object in comparing the cases in the hope of extracting from them a formula that can with confidence be applied in every case that may arise. In each case, as it comes up, the tribunal, I think, must try to form a practical conclusion as to whether, upon the facts as they appear, there was a general endeavour to conduct the election upon the principles in accordance with which an election held under the Act ought to be conducted, and whether that endeavour was so far successful as fairly to call for the application of the section. On the one hand, care must be taken not to create the impression amongst those in charge of municipal elections that the Courts will be astute to find excuses for the ignoring of the regulations prescribed by the Legislature: see the judgment of Anglin J. in the Orillia case. On the other hand, it must be remembered that the section is remedial legislation which is to be given full effect. The finding of the middle ground may be difficult, but the attempt must be made."[18]

Mr. Justice Wilson continued to the effect that

> Sensibly, and of course assuming the election was conducted in accordance with "the principles" of the statute, the section provides the result is not to be disturbed, if the Court is satisfied the irregularities demonstrated by the petitioner "did not materially affect the result of the election".
>
> To be sure, the Court can only approach with reluctance the invitation to overturn the result of an election by reason of matters which were no fault of the individual voter or candidate

> concerned. For, "It is a very serious thing, after the electors have gone through the stress of a contest of the kind these contests are . . . that some trifling irregularity on the part of some officer, entirely innocent, and which in all probability had not the slightest effect upon the result, should be held to undo what has been done", Meredith, C.J. in Hickery, supra, p. 323.
>
> On the other hand the curative effect of sec. 146 may not be invoked to condone what is more than a mere irregularity, but rather a failure in the observance of the statutory requirements for the conduct of the poll. The saving grace afforded by the section can hardly cover a substantial omission of a positive requirement.[19]

The election in question was found to be void essentially because of additions made to the voters' list on polling day without being properly sworn or vouched for, a situation which the court held could not be shown to have had no material effect on the outcome, especially as the outcome was decided by only one vote. There were many other errors found to have been committed and although Wilson, J. raised the possibility of such errors cumulatively taking the election out of the ambit of the curative provisions of section 146, he declined to base his decision on such a finding. The other judge in this case, Hamilton, J. concurred with the conclusions of Wilson, J. and went on to identify three particular irregularities, which in his opinion were sufficient to void the election, namely, the marking by one of the Deputy Returning Officers of electors' voting numbers on 17 ballots, the improper addition of six persons to a poll after being vouched for by persons not resident in the electoral division and the opening of some ballot boxes by the Returning Officer. The first-mentioned irregularity is described by Hamilton, J. as

> . . . wrong, contrary to the requirements of the Election Act, and opposed to every principle of

> secrecy and freedom of choice . . . . On this ground alone then, with 17 ballots so marked and with a plurality of one, a further election is required in order to clearly ascertain the wishes of the majority.[20]

The learned judge concluded his remarks as follows:

> An extensive review of the relevant principles is found in a decision of the Court of Appeal in England in Morgan v. Simpson dated July 18, 1974. Lord Denning, M.R. propounds three propositions that apply:
>
> > "(1) If the election was conducted so badly that it was not substantially in accordance with the law as to elections, the election is vitiated, irrespective of whether the result was affected or not.
> >
> > (2) If the election was so conducted that it was substantially in accordance with the law as to election, it is not vitiated by a breach of the rules or a mistake at the polls provided that it did not affect the result of the election.
> >
> > (3) Even though the election was conducted substantially in accordance with the law as to elections, nevertheless if there was a breach of the rules or a mistake at the polls and it did affect the result, then the election is vitiated".
>
> In this case the election must be declared void as it was conducted so badly that it was not substantially in accordance with the law as to elections, and is vitiated by irregularities that may have affected the result.[21]

We agree with the remarks of Chief Justice Rose, of the High Court of Ontario in the *Fennessy* case, *supra*, that there is no particular formula which can be applied to every case with confidence. *"The Election Act"* is far too complicated in its requirements for a precise deli-

neation to be made of the point at which irregularities will render an election null and void and we see no necessity for such a delineation to be attempted through statutory enactment. There have been very few cases in Manitoba, in which elections have been overturned and most of those have concerned election offences. We think the general reluctance of the courts to interfere unnecessarily with the verdict of the electors is in keeping with the nature of the jurisdiction conferred, and will in the long run tend to preserve that jurisdiction in the courts, where it belongs. The only change in section 146 that we think should be considered is in regard to the words "the principles laid down in this Act". Wilson, J. commented on the "oddity" of this expression and we note that the comparable section of the English legislation, section 16 of the *Representation of the People Act 1949*, now refers to "the law as to elections".[22] We think this is a salutary amendment and one that would remove some of the apparent confusion caused by the word "principles".

It is in the area of procedure that *"The Controverted Elections Act"* can be most fruitfully amended and we will tackle this on a section by section basis proceeding through the Act.

One of the characteristics of legislation based on the United Kingdom law is that the grounds for a petition are largely inferential, ie. nowhere does *"The Controverted Elections Act"* specifically state on what grounds an election may be challenged. This is understandable considering the complexity of *"The Elections Act"* itself and the myriad things which may be ignored or breached by election officials and candidates. We do, however, take some issue with section 16

of the Act which states that:

> A petition presented under this Act may be in any prescribed form; but if, or in so far as, no form is prescribed, it need not be in any particular form, but it shall complain of the undue election or return of a member, or that no return has been made, or that a double return has been made, or of matter contained in any special return made, or of some such unlawful act as aforesaid by a candidate not returned; and it shall be signed by the petitioner, or all the petitioners if there are more than one.

This provision is mandatory in regard to the contents of the petition in that it uses the word "shall", although it makes no mention of the conduct of any returning or deputy returning officer. If we turn to section 2(e) which defines "election petition", we note that the conduct of the returning or deputy returning officer is mentioned. Section 2(e) reads as follows:

> In this Act,
>
> . . .
> (e) "election petition" means a petition complaining of an undue return or undue election of a member, or of no return, or of a double return, or of any unlawful act by any candidate not returned by which he is alleged to have become disqualified to sit in the assembly, or of the conduct of any returning or deputy returning officer; . . . .

It should also be noted that section 2(e) makes no reference to any matter contained in a special return, although this is referred to in section 16. We think these two sections should be similar in their content to avoid any confusion as to the requirements for a petition.

We also note that the language of sections 4 and 92 is very similar. Sections 4 states:

> All elections of members of the assembly shall be subject to this Act; and their validity shall only be contested in conformity with this Act.

Section 92 states:

> All elections are subject to this Act, and shall not be questioned otherwise than in accordance with this Act.

We believe one of these sections should be eliminated and therefore recommend that section 92 be repealed.

We considered whether the Chief Electoral Officer or some member of the Attorney-General's Department should also be accorded the right to bring a petition under section 10 of the Act. That section presently provides that an election petition may only be brought by a person who had a right to vote at the election being contested, or a candidate at that election. In other words, the right to bring a petition is restricted to those persons with a direct interest in the election, the potential representatives and the represented. We think there is considerable danger in allowing a public official to challenge such an essentially political act as the election of a member of the Assembly. The executive branch of the government should be kept well clear of the rights of the Assembly and its elected representatives. Such matters as the election and due return of members are too fundamental to be entrusted to the care of any but those who have the direct and personal right to participate.

Section 11 provides that an affidavit must accompany

the petition to the effect that the petitioner has good reason to believe, and verily does believe, that the person or persons against whom the petition is filed, or his or their agent, or agents, has or have been guilty of election offences sufficient to avoid the election. This, no doubt, was intended to be a precaution against the filing of frivolous or vexatious petitions. In fact an affidavit on belief could be filed for virtually any alleged infraction. It also constitutes a procedural trap for an unwary petitioner in that it is a mandatory requirement. Should the affidavit be false or improperly sworn it could void the petition. We think the affidavit is an unnecessary requirement and especially so in view of the fact that the petitioner is required to post security in the amount of $1,000 for the payment of costs. We recommend that the requirement of an affidavit to accompany the petition be abandoned.

The amount of the security required to cover costs is fixed in section 19(2) at $1,000. Across Canada this is the maximum to be found in any province, and it has not changed substantially from the very earliest days of the legislation. In 1887 the amount fixed in the Manitoba statute was $750.[23] We think the present requirement of $1,000 is not an unreasonable sum to deposit as security and it does constitute a crude but effective guarantee of sincerity on the part of every petitioner. We recommend that it be maintained.

One of the primary aims of *"The Controverted Elections Act"* is to ensure that the trials of disputed elections are heard as rapidly as possible. To that end an overall time limit of six months from the date of presentation of the petition is prescribed in section 44(1), unless it

is necessary for a respondent who is a sitting member of the House to attend at the trial, in which case the trial may be delayed until the House is no longer in session. There are various other time limits specified in the Act including that contained in section 17(1) to the effect that a petition must be presented not later than 30 days from the date of publication of the notice of election in the Manitoba Gazette by the Chief Electoral Officer, or not later than 30 days from the date of commission of any alleged election offence. We considered the possibility of amending this section to read that a petition could be brought within 30 days of the discovery of any such alleged election offence. However, in our opinion this would defeat the basic policy of quickly bringing certainty to the election of members of the Assembly. As far as the other time periods are concerned there are several provisions allowing the court to enlarge the given limits in proper circumstances, and we therefore see no pressing need for any changes.

We have already remarked on the extent to which the Legislature has attempted to set up a complete code of procedure for the hearing of trials concerning controverted elections, quite separate and apart from the usual court rules. While this may have been prompted by a perceived need to keep close control over the delegated jurisdiction, we do not think there is any justification for perpetuating the procedural redundancies and anachronisms contained in the Act. For example, there are detailed provisions in regard to the examination of parties to a petition prior to trial and it is in particular provided that their testimony shall be taken in the form of depositions. This is no longer a feature of normal court practice in Manitoba. Indeed in the recent

case of *Pollard v. Patterson and Richards, supra*, by agreement of counsel the more usual examination for discovery was resorted to in accordance with the Rules of the Court of Queen's Bench. Section 34(2) perpetuates the anachronism of allowing a witness to demur to any question put to him in taking his deposition. Section 36 provides for the production of documents. All of these sections could be removed and reference made to the usual Rules of the Court without in any way altering the intent or purview of *"The Controverted Elections Act"*. We recommend that the Act be so amended and that sections similar to the following taken from *"The Controverted Elections Act"* of Saskatchewan be included:[24]

> 32. The petition and all proceedings thereunder shall be deemed to be a cause in the court and all the provisions of *The Queen's Bench Act* and rules of court made thereunder, in so far as applicable and not inconsistent with this Act, shall be applicable to the petition and proceedings; and the tariff of costs for the registrar and local registrars, sheriffs, solicitors and counsel and interpreters whether prescribed by *The Queen's Bench Act* , under its authority or otherwise by competent authority shall be applicable to the proceedings.
>
> 33. The rules of court respecting long vacation do not apply to any proceeding or appeal under this Act.
>
> 34. Applications to a judge shall be made in chambers and unless authorized to be made *ex parte* shall be made by notice of motion.
>
> 35. An application by notice of motion shall be deemed to have been made within the time prescribed by this Act, if the notice of motion is filed, served and made returnable within the prescribed time.

> *36. The judge hearing an interlocutory application* made under this Act has the same powers, jurisdiction and authority as a judge in chambers in ordinary proceedings of the court.

One of the more noteworthy features of our Act is section 43(1) which provides that every election petition shall be tried by two judges without a jury. Norman Ward relates in regard to the early years of Confederation:

> It is thus apparent that when cabinet ministers and party leaders informed the House of Commons from time to time that the controverted election laws seemed designed to *prevent* inquiry into corrupt practices and that the law in general was practically a nullity, there is no reason to assume that they were overstating the case. It was not that the House made no attempts whatever to improve the law; on the contrary, as a contemporary newspaper once remarked, there was a strong disposition to regard the disgraceful results of controverted election petitions as being due largely to defects in the law, and the law was tinkered with accordingly. Thus in 1891 it was declared that two judges instead of one should sit on election trials, a measure intended as much to protect individual judges from partisan attack as to reform the general system.[25]

One might speculate that in those days of passionate two-party politics there could have been another unuttered reason. Although judges then, as now, must scrupulously avoid actual or apparent partisanship, many judges have in the past actively engaged in political affairs, a fact which is not erased from public knowledge by the judicial appointment. Perhaps a prudent Chief Justice, knowing that each member of the Bench almost certainly had been

an adherent of one or the other of the two political parties, would have been expected to assign two judges of *disparate* partisan backgrounds. In such event, a unanimous judgment of this double trial court would always be above reproach on *partisan* grounds, at least.

It seems to be validly questionable that there remains any purpose to having a controverted election trial adjudicated by *two* judges. Seven provinces provide for the trial to be before one judge, without a jury (British *Columbia, Alberta, Saskatchewan, Ontario, New Brunswick,* Nova Scotia and Prince Edward Island). Quebec's legislation stipulates that the trial shall be before three judges. Only Manitoba and Newfoundland call for trial before two judges.

We think the need for more than one judge, if it ever existed, has long since passed. There seems little sense in tying up two judges when the caseloads of our courts are already fairly heavy, and the provision of an appeal to the Court of Appeal ensures that, if necessary, more than one judicial scrutiny can be brought to bear on the matters at issue. Accordingly, we recommend that the trial of controverted elections be heard before one judge of the Court of Queen's Bench.

Sections 54 to 61 of the Act deal with the circumstances in which the election of a candidate "shall" be void. These sections enshrine the one certain principle upon which an election will be found null and void, namely, the commission of election offences by a candidate or by persons acting for him who he knew or should have known

were committing such offences. There is considerable overlap between these provisions and sections 137 to 142 of *"The Elections Act"* and we suggest that these two sets of provisions be consolidated in *"The Elections Act"*. This seems the more natural place for them as *"The Controverted Elections Act"* is essentially concerned with the procedure for the hearing of controverted elections and not the substantive grounds for such challenges.

As mentioned above there is a right of appeal to the Court of Appeal for Manitoba. However, there is some question whether a further appeal would lie to the Supreme Court of Canada. *"The Controverted Elections Act"* of 1914[26] expressly provided for such an appeal:

> An appeal by any party to an election petition . . . shall lie to the Court of Appeal for Manitoba, and a further appeal shall lie to the Supreme Court of Canada . . . .

However, this provision was repealed in 1916,[27] and has not since re-appeared. In two 1913 cases, one a Manitoba Court of Appeal decision[28] and the other a Supreme Court of Canada decision on an appeal from Alberta,[29] it was held that in the absence of an express provision allowing a right of appeal beyond the provincial Court of Appeal, no such right of appeal existed. In the Supreme Court case, *Cross v. Carstairs*, it was held that under the provisions of the Alberta *Controverted Elections Act*, the judgment of the Supreme Court of that province is final and no further appeal lies to the Supreme Court of Canada. Again the special nature of the jurisdiction was discussed by the judges, as in the following comments of Idington, J.:

The provincial legislatures are each entitled to declare how the members of its legislative assembly are to be elected, the validity of their elections are to be tested and determined, in the case of dispute thereabout, and how the proceedings adopted to apply such test and procure such determination are to be had and the consequences of such determination.

Parliament has not the slightest right of its own mere will to interfere.

It never was intended by section 101 of the "British North America Act" that the appellate court therein contemplated should be given, as against the will of the legislature, any jurisdiction over the subject of elections to the legislative assembly.

Such a mode of determining the right to sit in any parliament or legislature (of higher order than a municipal council), as trial by the judges of the ordinary courts of the country had not, when the "British North America Act" was passed, either in England or here, ripened into a practical legal conception.

Such bodies had always guarded as one of their most precious privileges the right to determine all such questions.

When the time came for provincial legislatures to confer the power of doing so, in whole or in part, on the courts and judges, the cry was rather that no such power could be constitutionally exercised, and it was somewhat grudgingly conceded as an improvement on old methods though a great step in modern civilization as developed under constitutional government to effectively help purify public life.

It has long been conceded to be part of the inherent power of each legislature to so enact by way of delegating the execution of that power inherent in the legislature, or to speak more accurately, the legislative assembly, to such authority as it might see fit to entrust with the duty of deciding and determining what should be done in the premises.

> Until the legislature has determined otherwise than it has, the delegation of power cannot be held to have gone so far as an appeal here would involve.
>
> The "Controverted Elections Act" of Alberta has certainly intended that the Supreme Court of the province should be the ultimate appellate court and its decision end all disputes arising under said Act.
>
> Everything indicates that when proceedings were taken they should be so conducted as to enable an appeal there before constituting a final result and when once decided there that the proceeding should be ended and that the result reached there is to be treated as final.
>
> Parliament can in no way add to this delegation of power by the legislature or meddle with it or with its results in any way.[30]

One of the other factors raised was the fact that *the statute provided for a report from the registrar of the* Court of Appeal to the judge appealed from certifying the decision of the appeal court, which report was then in turn forwarded to the clerk of the Executive Council. Our legislation has similar provisions, namely sections 71 and 62(2). Section 71 provides that:

> The registrar of The Court of Appeal shall certify to the Speaker of the assembly, the judgment and decision of The Court of Appeal, confirming, changing or annulling any decision, report, or finding of the trial judges upon the several questions of law as well as of fact upon which the appeal was made; and therein he shall certify as to the matters and things as to which the trial judges would have been required to report to the Speaker, whether they are confirmed, annulled, changed, or left unaffected by the decision of The Court of Appeal.

Section 62(2) states that the determination of the trial

judges, when duly certified in writing to the Speaker of the House within four days after the expiry of the time limited for launching an appeal, ". . . is final for all intents and purposes".

We think the cases cited above still reflect the position that would be taken by the Supreme Court, and that in the absence of an express statutory provision allowing a further right of appeal, no such appeal will lie. The question then becomes, should there be such a right of appeal? We do not think there should be as it would constitute a breach of one of the most fundamental objectives of the statute, namely, that controverted elections should be tried and settled as quickly as possible. Provincial controverted elections statutes are, as the Supreme Court has pointed out, matters of peculiar concern to the provincial Legislative Assemblies. To extend the jurisdiction to try such matters beyond the borders of the province would be a serious erosion of the privileges of the Assembly and could leave the due return of a member in limbo for an unwarranted length of time. It should be remembered that governments rarely go beyond four years between elections, so the matter in dispute is not a perpetual privilege or right. We recommend that there be no change in the statutory provisions in regard to appeals.

The question of costs naturally engenders some debate when raised in connection with a quasi-public statute such as *"The Controverted Elections Act"*. It has been suggested that petitioners are performing a public duty in successfully controverting an election and should not therefore have to bear the cost of sustaining the litigation.

And what about the Returning Officer, who finds himself involved in a legal dispute? As matters stand under the present legislation all costs are in the discretion of the court subject to certain statutory guidelines. The relevant sections are reproduced below:

> 75(1) All costs, charges, and expenses of, and incidental to, the presentation of an election petition under this Act, and to the proceedings consequent thereon, with the exception of such costs, charges, and expenses, as are by this Act otherwise provided for, shall be defrayed by the parties to, or those opposing, the petition, in such manner and in such proportions as the court or trial judge determine, regard being had
>
> (a) to the disallowance of any costs, charges, or expenses, that, in the opinion of the court or trial judges, have been caused by vexatious conduct, unfounded allegations, or unfounded objections, on the part either of the petitioner or of the respondent; and
>
> (b) to the discouragement of any needless expense by throwing the burden of defraying it on the parties by whom it has been caused, whether those parties are or are not on the whole successful.
>
> 75(2) The costs may be taxed in the manner that, and according to the same principles under which, costs are taxed between parties in actions in the court; and the costs are recoverable in a manner that is the same as that in which costs are recoverable in those actions.
>
> 76(1) Where the trial does not last longer than one day, no counsel fee or fees shall be taxed, as between party and party, in respect thereof or in connection therewith greater than fifty dollars, and where the trial continues beyond one day, a sum not exceeding forty dollars for each additional day the trial continues, whether one or more counsel are engaged at the trial.
>
> 76(2) Except as to such witness fees and other actual disbursements, in respect of evidence taxable in

> ordinary actions between party and party, as are allowed by the judgment or order of the court allowing or apportioning costs, no amount including counsel fees, greater than three hundred dollars shall be taxed or taxable against either party as costs in the cause.

We debated at some length the question of subsidizing part or all of the costs out of the public purse and came to the conclusion that this would not significantly improve the quality or the availability of the remedies provided under *"The Controverted Elections Act"*. Costs are a salutary part of the calculated risk involved in litigation and are part of the price we sometimes have to pay for being the bearers of individual rights and duties. We also think that challenges under *"The Controverted Elections Act"* will usually be made by those with a particular stake in the outcome, such as the defeated candidates, or will at least be funded by such individuals or their political parties. We think the risk of a bad election escaping controversion because of a lack of funds is exceedingly unlikely, given the presence of highly partisan individuals and political parties who, if they can raise money for an election, can certainly raise money to fund a petition to the court. We do recommend, however, that it should be possible for the court, in its discretion, to allow the costs of a returning officer to be added to his election expense account.

In keeping with our earlier recommendation in regard to using the established procedures of the Court of Queen's Bench, we also recommend that section 76(1) and (2) be repealed, and that the question of counsel fees be settled in the manner provided in the Queen's Bench Rules.

SUMMARY OF RECOMMENDATIONS

1. That there be no enlargement of the court's jurisdiction to hear cases under *"The Controverted Elections Act"*. (p.8)

2. That section 146 of *"The Election Act"* be amended by deleting the words "the principles laid down in this Act", and substituting therefor the words "the law as to elections", so that the relevant part of the section would now read:

> No election shall be declared invalid . . . if it is shown . . . , that the election was conducted in accordance with *the law as to elections* . . . . (p. 16)

3. That sections 2(e) and 16 be amended to make their content similar. (p. 17)

4. That section 92 be repealed. (p. 18)

5. That the right to bring a petition under section 10 continue to be restricted to a person who had a right to vote at the election being contested, or a candidate at that election. (p. 18)

6. That the requirement under section 11 of an affidavit to accompany the petition be abandoned. (p. 19)

7. That the present requirement of security in the amount of $1,000 be maintained. (p. 19)

8. That there be no change in any of the time limits specified in the Act. (p. 19-20)

9. That in matters of procedure, reference should be made to the Rules of the Court of Queen's Bench. (p. 20-22)

10. That the trial of election petitions should be before a single judge of the Court of Queen's Bench. (p. 22-23)

11. That sections 54 to 61 of the Act dealing with the circumstances in which an election shall be void be repealed and the substantive grounds for challenging an election be consolidated in *"The Election Act"*. (p. 23-24)

12. That there be no change in the provisions of the Act relating to appeals. (p. 24-27)

13. That costs continue to be in the discretion of the court and borne by the parties themselves without public subsidy, with the one exception that the court should have discretion to allow the costs of a returning officer to be added to his election expense account. (p. 27-29)

14. That section 76(1) and (2) dealing with the question of counsel fees be repealed. (p. 29)

This is a Report pursuant to section 5(3) of *"The Law Reform Commission Act"* signed this 21st day of April 1980.

Clifford H.C. Edwards, Chairman

Patricia G. Ritchie, Commissioner

David G. Newman, Commissioner

A. Burton Bass, Commissioner

Beverly-Ann Scott, Commissioner

Knox B. Foster, Commissioner

1. Erskine May, *Parliamentary Practice*, 17th ed., 1964, pp. 175-184.

2. *The Parliamentary Elections Act, 1868*, 31 & 32 Vict. c. 125.

3. Dr. Claudius C. Thomas, "Comparative Study of Laws Relating to the Procedure for Settling Controverted Elections", (1973) 2 *Anglo-American Law Review* 219 at 266.

4. *David v. Barlow* (1910) 15 W.L.R. 49 at 51.

5. *Lamb v. McLeod* (1932) 1 W.W.R. 206 at 208.

6. *Poulin v. Casgrain* (1950) Q.P.R. 91.

7. Thomas, Dr. Claudius C., *op. cit.* pp. 222-223.

8. Garrow J.A. in *Re North Renfrew (Prov.); Wright v. Dunlop* (1904) 8 O.L.R. 359.

9. (1874) 31 L.T. 69.

10. (1875) L.R. 10 C.P. 733.

11. *Ibid.*, p. 743.

12. *Ibid.*, p. 743-44.

13. *Ibid.*, p. 743.

14. Laing, Edward A., "Election Statutes and the Concept of Nullity" (1975) 4 *Anglo-American Law Review*, 80 at 91.

15. *Ibid.*, p. 91.

16. (1975) 50 D.L.R. (3d) 542. Affirmed on appeal (1975) 53 D.L.R. (3d) 215.

17. (1939) O.R. 537 at 541.

18. *Pollard v. Patterson and Richards, op. cit.*, p. 545.

19. *Ibid.*, p. 546.

20. *Ibid.*, p. 558-559.

21. *Ibid.*, p. 560.

22. *Representation of the People Act 1949*, 12, 13 and 14 Geo. VI c. 68.

23. Statutes of Manitoba 1887-1889, c. 46, s. 1.

24. Statutes of Saskatchewan, 1971, c. 5.

25. Ward, Norman, "Electoral Corruption and Controverted Elections", *The Canadian Journal of Economic and Political Science,* Vol. 15, 1949, pp. 82-83.

26. R.S.M. 1914, c. 25.

27. S.M. 1916, c. 22, s. 6.

28. *Re Gimli Election, No. 3* (1913) 23 Man. R. 863.

29. *Cross v. Carstairs* (1913) 47 S.C.R. 559.

30. *Ibid.*, pp. 564-565.