

Presentation to the Standing Committee on the Legislative Assembly
regarding **Bill 254, Protecting Ontario Elections Act, 2021.**

March 29, 2021

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Good afternoon. My name is Dr Robert MacDermid and I am a retired York University Politics professor who has researched and written about campaign and party financing for the last 25 years. In the very short time I have to speak about complex matters and evidence I want to briefly cover four topics: the increase to the contribution limits; enhanced disclosure of information about contributors; further limits on third parties outside the election campaign period and; the changes the Bill makes to the provisions for independent candidates and independent members of the Legislative Assembly. On the last subject I will make some longer comments and I have included my sworn affidavit as an expert witness for the Attorney General of Ontario in Randy Hillier's application to strike sections of the *Election Finances Act* that are part of the amendments in Bill 254. The decision on the application is pending. The lengthy affidavit is the only comprehensive piece of research on the topic of independent candidates in Canada.

Raising the contribution Limits

This really is a policy change for a fraction of 1 percent of the electorate who make large contributions to parties and candidates. In other words, it is a policy that will extend the influence of the wealthy over the political process by allowing them to increase the money they can give to candidates and parties to pursue policies that advance and defend their interests.

It is important to understand the tiny size of this influential group that wants to give thousands of dollars to parties and candidates in hope of gaining favour or avoiding censure. In 2018 there were 10,246,066 registered electors in Ontario. As the table below

shows, just 25,917 people made disclosed contributions to the three main parties and their associations in 2019. This is not the exact number of individuals who made contribution because it does not include undisclosed contributions, those under \$100. But even if as many as 50,000 people made a contribution to one of the three parties in 2019, it would still represent just 0.5 percent of the electorate. But the group of super influencers helped by the raising of the contributions limits is much smaller than a half of one percent of the electorate. As the Table below shows, there were just 809 contributors who gave the then current \$1600 maximum and presumably were able to give more. A larger number, 4,161 people gave \$1000 or more in 2019. Even this larger group, the only people likely to take advantage of the raised contribution cap make up something less than 0.04 percent of the electorate. It is this tiny fraction of the electorate whose influence will be expanded. It is hard to overlook the fact that 83 percent of them made their contributions to the PC party.

I understand the economics of political fundraising drives parties and candidates into appeals to the wealthy as the most efficient way to raise large sums. But some thought should be given to increasing the incentives to pursue small contributions perhaps by increasing the contribution tax credit for small contributions or subsidizing the parties' mass fundraising costs.

Large contributions to main Ontario parties, electoral districts and candidates in 2019

Ontario Party	Number of contributors disclosed	Number of contributions of \$1600	% of all maximum contributions	Sum of contributions		Number of contributions GTE \$1000	% of all contributions GTE \$1000	Sum of contributions
New Democratic Party	5222	86	10.6	\$137,615		376	9.0	\$503,527
Ontario Liberal Party	7828	110	13.6	\$176,047		317	7.6	\$430,166
Progressive Conservative Party	12867	613	75.8	\$982,022		3468	83.3	\$4,319,791
TOTAL	25917	809	100	\$1,295,684		4161	100	\$5,253,484

Taken from the website of Elections Ontario, March 29, 2021

<https://finances.elections.on.ca/en/contributions?partyId=4&fromYear=2019&toYear=2019>

Better Disclosure

Prompt and complete disclosure of political contribution information is the best way to ensure that elected officials are not perceived as being influenced by political contributions. Better disclosure rules are in the interests of citizens and elected officials.

What is wrong with the system we have now?

All contribution information should be available quickly on-line and the information should be sufficient to identify the potential interests of a contributor. Voters must be able to know who are funding candidates and parties. Under the current rules that information is unobtainable and or uncertain.

A significant percentage of contributions, those that go to electoral district associations, are not disclosed in real time.

The information disclosed about contributors is not sufficient to link them with certainty to particular interests and to link together groups of donors with the same interests. Nor is the disclosure sufficient to ensure that contributors are always giving their own funds and not money given to them for the express purpose of donating to a party or candidate.

The two following tables are screen shots that compare the information available about US Federal contributions and Elections Ontario. In Ontario, some address information (not always a home address) may be available on contributors from paper filings in Elections Ontario's now closed offices. Finding that information would be a very onerous task and would not reveal enough information to identify political interests or even donors of the same name.

ScreenShot from the US Federal Election Commission website showing some of Elon Musk's 134 political contributions and the required and disclosed contributor information.

Contributor name	Recipient		Open image
MUSK, ELON	REPUBLICAN NATIONAL COMMITTEE	▶	
MUSK, ELON	REPUBLICAN NATIONAL COMMITTEE	▶	Contributor information
MUSK, ELON	THOM TILLIS COMMITTEE	▶	Name MUSK, ELON
MUSK, ELON	CHRIS COONS FOR DELAWARE	▶	City and state AUSTIN, TX, 78734
MUSK, ELON	ALASKANS FOR DAN SULLIVAN	▶	Occupation ENGINEER
MUSK, ELON	THE REED COMMITTEE	▶	Employer SPACEX
MUSK, ELON	PETERS FOR MICHIGAN	▶	Year to date \$2,800.00
MUSK, ELON	WINRED	▶	Contribution information
MUSK, ELON	WINRED	▶	Amount \$2,800.00
MUSK, ELON	WINRED	▶	Receipt date November 3, 2020
MUSK, ELON	WINRED	▶	Report year 2020
MUSK, ELON	WINRED	▶	Memo
MUSK, ELON	WINRED	▶	Reported on Form 3 on line 11A1
MUSK, ELON	WINRED	▶	Election type GENERAL
MUSK, ELON	SHAHEEN FOR SENATE	▶	Recipient information
MUSK, ELON MR.	TEXANS FOR SENATOR JOHN CORNYN INC.	▶	Committee THOM TILLIS COMMITTEE
MUSK, ELON	JONI FOR IOWA	▶	Political party REPUBLICAN PARTY
MUSK, ELON	COLLINS FOR SENATOR	▶	Type Senate
MUSK, ELON	ACTBLUE	▶	State North Carolina

Taken from: https://www.fec.gov/data/receipts/individual-contributions/?contributor_name=Elon+Musk March 28, 2021

Screenshot from Elections Ontario Contribution disclosure website showing some of the contributions from people with the last name “Degasperis”

The search returned 49 matches (2 pages)

	Contributor	Recipient	Recipient Type	Party	Electoral District	Amount	Source
+	DeGasperis, Angela	Ontario Liberal Party	Party	LIB		\$1,625.00	RTD
+	DeGasperis, Ada	Ontario Liberal Party	Party	LIB		\$1,600.00	RTD
+	DeGasperis, Alana	Progressive Conservative Party of Ontario	Party	PCP		\$1,600.00	RTD
+	DeGasperis, Carlo	Progressive Conservative Party of Ontario - Etobicoke North	Association	PCP	030 - Etobicoke North	\$1,600.00	Final
+	DeGasperis, Carlo	Ford, Doug	Leadership Contestant	PCP		\$1,600.00	Final
+	DeGasperis, Silvio	Progressive Conservative Party of Ontario	Party	PCP		\$1,600.00	RTD
+	DeGasperis, Silvio	Progressive Conservative Party of Ontario - Etobicoke North	Association	PCP	030 - Etobicoke North	\$1,600.00	Final
+	DeGasperis, Silvio	Ford, Doug	Leadership Contestant	PCP		\$1,600.00	Final
+	Degasperis, Angelo	Progressive Conservative Party of Ontario	Party	PCP		\$1,500.00	Final
+	DeGasperis, Carlo	Progressive Conservative Party of Ontario	Party	PCP		\$1,433.00	Final
+	DeGasperis, Silvio	Progressive Conservative Party of Ontario	Party	PCP		\$1,433.00	Final
+	Degasperis, Giancarlo	Progressive Conservative Party of Ontario	Party	PCP		\$1,222.00	Final
+	DeGasperis, Silvio	Progressive Conservative Party of Ontario	Party	PCP		\$1,222.00	Final

Taken from:

<https://finances.elections.on.ca/en/contributions?contributorNames=degasperis&fromYear=2017&toYear=2021> March 28, 2021.

Controlling Third party spending

Tightly controlling third party spending during election campaigns makes sense. Only candidates are being chosen and voters need to hear from them during the short period of a campaign. Trying to control political messaging in a short pre-campaign period is difficult and trying to regulate it up to a year out from election day is very unlikely to withstand a free speech Charter challenge.

Constituency associations for independent members

The attached affidavit examines the history of the treatment of independent candidates in

the ten provinces and at the federal level in the post-war period. Several provinces have, for several decades permitted independent candidates to preserve surpluses and to form constituency associations. However, this historical review demonstrates that these provisions have had almost no effect on the election of independent candidates. Moreover, the election of independent candidates is exceedingly rare in Canadian politics not because of the rules but because such candidates promote peripheral ideas that are clearly not attractive to voters, are poorly organized and contest just a single election. Moreover, these provisions discriminate against what I refer to as “true independent candidates,” those who have *not* sat as an independent member or been removed from caucus after election as a party candidate. “True” independent candidates, are upwards of 90% of the class, but under Bill 254 would have to contest an election against another independent candidate who will have had a constituency association raising money on their behalf prior to the campaign period plus the many resources available to a sitting member of the Assembly to promote their own re-election.

There are other good reasons why personal constituency associations for independent members removed from party caucuses are not a good idea. Poorly understood solutions to what appear to be undemocratic situations can work in opposite directions to intentions.

First, a personal electoral district association for an independent member would be unlike all other current registered constituency associations. Its sole purpose would be to raise funds to spend preparing for and contesting the independent member’s re-election campaign. By contrast, party associations recruit and train future leaders, spend funds to promote the principles and ideas of the party in the electoral district, contribute to the development of policies at the central party level and help to maintain the party’s organization and finances. Local party associations are the entryway for people into democratic politics. A personal constituency association would have none of these greater democratic responsibilities or commitments. It would instead be a vehicle for a single person’s ambitions.

Second, a personal or private constituency association would not be an open and

democratic organization. There would be no possibility of challenging or replacing the independent member as the association's future candidate. There could be no adopting of policy options not preferred by the independent member. The member would exercise complete power through control of the constituency registration process. If the member's political position was challenged, they could simply dissolve (or threaten to dissolve) the registration and presumably forfeit the contributions of the member's onetime supporters.

Third, an independent member with a personal electoral district association would enter a campaign having been allowed the opportunity to raise resources that had been denied to all other independent candidates. There would now be two types of independent candidates, those with a personal constituency association promoting that person and raising funds prior to the campaign period and those without similar opportunities in the pre-campaign period. This, coupled with the considerable resources of a sitting member of the legislature's office, would create a very meaningful and unwarranted advantage for this class of independents, an advantage that was documented many times in voting outcomes in my review of the history of independents in different provinces. A personal constituency association would also be very different from party associations in the handling of any surplus election funds. Any surplus funds that a party candidate returns to a local association after an election are not sequestered for that candidate's future campaign, as it would be in the case of a personal constituency association, but are instead often clawed back by the central party to pay its costs or spent on activities promoting the party. By contrast, a personal constituency association would merely be a vehicle to accumulate future campaign funds for a single individual.

Fourth, personal constituency associations would create a challenge to fairly regulate spending in the pre-campaign period. For a personal association attached to a future candidate, any and all spending, with few exceptions, should be seen as spending for a candidate campaign (since there are no party activities to support) and thus would be forbidden in the pre-campaign period. Under the current rules, an independent candidate who is not an independent member of the legislature cannot do anything to promote a candidacy and in most cases, party associations in the pre-campaign period will not have a

candidate to promote until close to the campaign period and will be required to spend money on other organizational maintenance.

Thank you for your attention, I look forward to answering your questions.

Some explanation of the following

The sworn Affidavit that follows was provided by me for the Attorney General of Ontario in response to an application by Randy Hillier to the Ontario Superior Court of Justice. Some of the discussion above is taken from a further affidavit in response to filings by Mr Hillier and his expert witnesses, Professor Loewen and Dr Morden. Other court documents and transcriptions of cross-examinations are or will be available from the court.

**ONTARIO SUPERIOR COURT
OF JUSTICE**

B E T W E E N:

RANDY HILLIER

Applicant

- and –

ONTARIO (ATTORNEY GENERAL)

Respondent

***APPLICATION UNDER Rules 14.05(3)(d), (g.1) and (h) of
the Rules of Civil Procedure***

AFFIDAVIT OF ROBERT MACDERMID

I, ROBERT MACDERMID, of the City of Perth, in the Province of Ontario, affirm and say as follows:

1. I am a Professor Emeritus of Political Science at York University. I received my BA Hon. in Political Science from Carleton University, and then received my MA in Political Behaviour from the University of Essex, where I later became the Senior Research Officer on the British Election Study, a large in-depth academic opinion survey of UK voters. I completed my PhD at the University of British Columbia in 1985 and then was awarded Killam Foundation and SSHRC Post-Doctorial Fellowships.
2. In 1986 I became an Assistant Professor in Political Science at the University of Toronto. I then became an Assistant Professor at York University from 1987 to 1991, and a tenured Associate Professor at the same university from 1992 to 2018.

At York University, I taught undergraduate and graduate courses on political parties, election campaigns, Canadian politics, public opinion surveys, research methods and statistics.

3. My research has focused on campaign and party finance at municipal, provincial and federal levels in Canada, as well as on political advertising. Outside of my academic work, I gained a practical understanding of political parties and elections through serving as the president of electoral district associations in Ontario at both the federal and provincial levels, and through organizing and advising on election campaigns on several occasions. My curriculum vitae is attached as **Exhibit A**.
4. I was an expert witness for Her Majesty the Queen and Attorney General of Canada in the *R v. Bryan*, [2007] 1 SCR 527, in which I provided expert evidence at first instance and for the Supreme Court appeal.
5. I was retained by the respondent in this proceeding to provide an independent, objective and fair opinion in respect of the following questions:¹
 - a. What is the role of political parties in Ontario's political system, and more generally, in Westminster systems of government? How do independent candidates fit within this system?
 - b. How does money move among the structures of Ontario parties before and during a campaign, and how does that compare to independent candidates and MPPs in Ontario?

¹ The letter from counsel for Ontario to myself containing these questions, dated August 12, 2020, is attached as **Exhibit B**.

- c. Please explain your views on limiting registration for constituency associations under the *Election Finances Act* to those constituency associations that are endorsed by a registered political party.
 - d. Please review the evidence (including any expert evidence) replied on by the Applicant and indicate where you agree and disagree and why.
- 6. I understand that my role is to provide opinion evidence that is fair, objective and non-partisan, that is related only to matters that are within my area of expertise, and to provide additional assistance as the court may require.² In preparing my evidence, I have reviewed the documents and sources cited in the footnotes to this affidavit.
- 7. Some aspects of these questions have never been examined in published research. I have therefore collected and presented new data on a number of these questions.

Summary of my response to Loewen and Morden

- 8. I have reviewed the affidavit of Peter Loewen sworn May 8, 2020 and the report of Professor Loewen and Dr. Morden attached to that affidavit as Exhibit C. In summary, and as set out in more detail below, my response to the report of Loewen and Morden is as follows:
 - a) Loewen and Morden assert that the success of independent candidates in Ontario in raising funds and garnering votes is low and attempt to link this lack of success to the impact of the *Election Finances Act* (EFA or the Act). I agree that the electoral success of independent candidates in Ontario has been low, but not

² My signed Acknowledgement of Expert's Duty is attached to this affidavit as **Exhibit C**.

because of the Act. Rather, it is because the vast majority of independent candidacies are disorganized, raise fringe issues, and lack the brand recognition and distilling of issues that party infrastructure provides for voters – infrastructure that independent candidates explicitly eschew by choosing to run as independents.

- b) Loewen and Morden assert that independent candidates are disadvantaged compared to party candidates by not being able to retain surplus funds. I disagree. Any advantage that independent candidates would gain by being able to retain surpluses is more theoretical than real. The vast majority of independents never run again and so retaining any surpluses for future elections would be irrelevant for them. Independents raise very little money and almost never conclude a campaign with a surplus and are more likely to end with a deficit. In other Canadian jurisdictions that permit independent candidates to retain surpluses, independent candidates have rarely used the provisions because they generally do not run any surpluses. Allowing independent candidates in Ontario to retain surpluses for use in their next election is a solution in search of a problem.
- c) Loewen and Morden assert that independent candidates are disadvantaged compared to party candidates by not being able to raise money outside the campaign period through constituency associations. I disagree. Again, independent candidates generally raise little support because of the disorganized and fringe nature of their campaigns, which has nothing to do with their inability to raise funds through constituency associations. In Canadian jurisdictions that permit independents to form constituency associations, they have rarely been used, and to little effect.

- d) Loewen and Morden assert that the *Election Finances Act* reflects a “cartel-style model” which favours established parties and discriminates against independent candidates. I disagree. As noted, the Act has a trivial impact on the election prospects of independent candidates as compared to the other reasons for their lack of electoral success articulated above. Furthermore, Ontario has one of the least restrictive sets of rules for independent candidates to participate in elections or for the registration of new parties, and the Cartel theory has no utility in understanding the role of independents in party politics. My quantitative analysis of the numbers of independent candidates participating in Ontario elections over time finds no correlation between the Act’s enactment and the participation of independent candidates.

The substance of my report follows.

A. What is the role of political parties in Ontario’s political system, and more generally, in Westminster systems of government?

9. While Loewen and Morden are certainly not proposing that Ontario abandon political parties altogether, it is useful to imagine a world without parties, in order to highlight the particular benefits that the party system provides to Ontario’s political system. To that end I discuss that hypothetical situation in the following paragraphs.
10. A parliament without parties would be unaccountable, contradictory, leaderless, motivated by personal and purely local interests rather than collective and provincial or national goals, exasperatingly slow to action, of completely uncertain ideological commitment, incoherent in its policy choices, and prone to brevity and

repeated election periods as coalitions form and fracture. Sooner or later party-like structures would begin to emerge.

11. Parties have a central place in elections and election finance legislation because they play a vital role in representative democracy. They organize the legislature as government and opposition and prescribe its daily rituals. Parties also orchestrate the business of government, bundling responsibilities for different party members or cabinet ministers. Parties organize the opinions of and for the electorate in general platforms or collections of guiding principles and simplify choices for voters that without parties would have an insurmountable task of assessing the half-conceived and poorly promoted ideas of multiple independent candidates. At the very least, party principles give voters a general idea of how a government might behave in future unspecified events. Parties also get people out to vote through the drama of campaigns, convincing many that much is at stake in the marking of a ballot. Parties recruit and train leaders and candidates and party workers in how to conduct politics and comport themselves in interactions with the media and the electorate. Through specific election promises and general ideological statements, parties create the possibility of accountability, of holding a government responsible at a future election for what it promised and what did and did not happen, thus allowing voters to vote both retrospectively and prospectively. Without parties and just a gaggle of independents, it would be very difficult to know who did what and how it differed from what they promised.

12. While these party functions are repeated in nearly every political science discussion,³ what is often overlooked is their role in organizing the funding of democratic politics. Parties when in government, write (or purposely leave unwritten) the basic rules for access to elected office and for funding themselves and representative democracy. While the machinery of elections, ballot printing and counting, supervision and so on is paid for by the state (or a party acting in its guise), many of the important functions noted above are done by parties, though as will be discussed later, by increasingly calling on funds from the state. Parties developed partly because leaders' ties to the wealthy could provide cash and support to those that could be tempted to run on the party ticket.⁴ Parties still hold the financial and organizational key for anyone with real political aspirations.

How do independent candidates fit within this system?

13. Independent candidates, or even independent members of the legislature, cannot do most of the things we rely on parties to do without themselves evolving into an informal or even formal party. While an independent member may very rarely be in the position to cast a deciding vote to bring down a government, they have no role or influence in policy-making or spending by governments and they must overcome some very long odds just to get elected.

³ See a classic statement of the functions of parties in: Anthony King, "Political Parties in Western Democracies: Some Sceptical Reflections," Polity 1969 2:2, 111-141, attached as **Exhibit D**.

⁴ See for example: Reginald Whitaker The Government Party: Organizing and Financing the Liberal Party of Canada 1930-58. Toronto, University of Toronto Press, 1977, and; Khayyam Zev Paltiel, Political Party Financing in Canada, Toronto, McGraw-Hill, 1970.

14. If elections are about choosing groups of representatives to govern and only representatives that are party members in contending parties can participate in governing, then independent candidacies are less attractive to most voters. They can be a means to show dissatisfaction with party politics or the set of ideas expressed by registered parties, but simply not voting could be interpreted as an even better measure of this dissatisfaction. It may even be a better indication of anti-party sentiment, for as I will show, some - and no one knows how many - independent candidates express ideas beyond the pale of acceptable campaign discourse.
15. Given the apparent lack of seriousness of many independent campaigns, something I will demonstrate below, there is always the question of where the balance should be struck between “letting everyone have their say” and requiring some display of relevance and seriousness in the election of a government. Bertram discusses this challenge:

In the *Canadian Charter of Rights and Freedoms*, the right to candidacy, as we have seen, arises out of the right to vote, and not out of the right to free speech, although all three rights are closely related. This understanding of the origin of the right is, interestingly, similar to the right that has emerged from American jurisprudence on this matter. It is an interpretation that recognizes that while it is true that the free expression and discussion of ideas are essential elements of the election campaign, the ballot should not be merely a soapbox from which anyone who wants to can have a say. The main purpose of elections campaigns is to elect a government. Candidacy confers benefits and legitimacy on the candidate, but only in order that the candidate might express ideas on behalf of other citizens and so give them the opportunity to cast their votes in a way they

consider meaningful. The right to free speech is conferred by citizenship; but the right to candidacy must be earned with the trust of others.⁵

16. Election processes confer legitimacy on political ideas and candidates through the nomination process, the privileges of campaigning, access to public funds through the tax credit for contributions, and campaign expenses reimbursements. All candidates must fulfill nomination petition requirements, assembling a minimum number of names to show that there are supporters for their ideas and candidacy. Party candidates have additional legitimacy flowing from the local party nomination process and the approval of the party leader. The rules of the nomination process give a candidate the right to be heard and to participate in the regulated campaign process. Independent candidates may legitimately claim the right to take part in campaign debates, which seems to be what most candidates want. But the “right to speak” can often conflict with a voter’s right to hear what the main contenders have to say rather than the views of fringe candidates who have almost no chance of winning and none of governing. From a political science perspective, the rules must balance the right of voters to focus on the choices of potential parties to govern while still allowing their right to choose a representative from outside the range of party candidates on offer.
17. However, a discussion of where independent candidacies fit into a theory of representative democracy dominated by parties is uninformed without a close look at whether reality fits our preconceptions. Basic questions about the frequency of

⁵ Eric Bertram, “Independent Candidates in Federal General Elections” in F Leslie Seidle, Editor, Issues in Party and Election Finance in Canada, Volume 5 of the Research Studies for the Royal Commission on Electoral Reform and Party Financing, Toronto, Dundurn Press, 1991, p. 282. The Bertram article is attached as **Exhibit E**.

independent candidacies, their voter support, their campaign characteristics, how they are regulated in Ontario compared to other jurisdictions, an examination of remedies for perceived problems applied elsewhere and like questions need to be asked even if they cannot be fully answered in this brief statement.

i. What is an “independent?”

18. An independent election candidate is anyone who completes the formal registration process described below but is not a candidate for a registered political party. In Ontario, a candidate without party affiliation may request either that the label “Independent” be placed below their name or the space be left blank on the ballot. In some other provinces and at the federal level, candidates do now or have in the past been classified as “independent” or as having “no affiliation” in the official reports and statistics. In the discussion and presentation of tables that follows, I have added these two categories together as it is not clear what the distinction means for candidates or voters.
19. The discussion of independents in Mr. Hillier’s application and in much of Professor Loewen and Dr Morden’s opinion often gets reduced to a discussion of *independent members of a provincial assembly or Canadian parliament*; elected representatives who do not sit with a recognized party’s caucus.⁶ Since the General Election of 1990, there have been 14 Independent Members of the Ontario Legislative Assembly but just one of them was elected as an independent

⁶ ““Recognized Party” means a party that has a recognized membership of at least 10 per cent of the total number of seats in the Assembly. For the purpose of this Standing Order, if the party’s percentage of the total number of seats is not a whole number, it shall be rounded to (i) the next lowest whole number, in the case of a percentage that ends in less than .5; or (ii) the next highest whole number, in the case of a percentage that ends in .5 or more. (“parti reconnu”)”, Ontario Legislative Assembly, *Standing Orders 2020*

candidate. All of the others contested the prior election under a party label, initially sat in the Assembly as a member of a party caucus and only later left their caucus through resignation or expulsion. Two were expelled but were readmitted to their former caucuses,⁷ another two joined a different caucus after a brief time as an independent,⁸ and two others joined a different party to run unsuccessfully in a subsequent election.⁹ The largest group resigned and did not contest the next election.¹⁰ At the time of writing, the current Ontario Legislative Assembly has three independent members.¹¹ Since 1990, just one independent member contested and won re-election as an independent candidate and subsequently sat in the Assembly as an independent for the full term¹².

20. Every reason for leaving a party caucus -- either through expulsion or a genuine or engineered resignation -- is in some sense unique. That said, most of the 15 cases are for bad behaviour such as allegations of improper sexual behaviour, substance dependency, or improper influence or legal charges. Undoubtedly some of these may have been the result of party infighting as allegations that lead to expulsion can take a very long time to be substantiated. Probably less than four expulsions or resignations were for pure policy differences.
21. This distinction between independent members and true independent candidates (those who were not first elected as party candidates and later left caucus to sit as

⁷ Bill Murdoch, 2008; Tony Rizzo, 1990.

⁸ Alex Cullen, 1998; Amanda Simard, 2018

⁹ Tim Peterson, 2007; Jack MacLaren, 2018

¹⁰ John Sola, 1993; Claudette Boyer, 2001; Patrick Brown, 2018; Michael D. Harris, 2018.

¹¹ Randy Hillier, 2019; Belinda Karahalios, 2020; Jim Wilson, 2018

¹² Peter North, 1993

independents) is important for two reasons that will surface repeatedly in the discussion that follows. First, almost all independent members were party candidates and party Members of Parliament (MPs) who then left their caucus and thereby undermined important principles in representative democracy. Voters know what they are getting when they elect an independent candidate or a party candidate, but when an elected MP leaves a caucus it sets off several fractures in the structures of representation.

22. Second, Mr. Hillier's application and Professor Loewen and Dr Morden's opinion refer frequently to the idea that independent candidates are treated unfairly. What they are actually saying is that *independent members* are being treated unfairly. In their view, fairness demands that independent members should be able to do what party candidates can do. However, this argument sets up an even greater unfairness between true independent candidates, the vast majority of the class, and independent members running as independent candidates. As I will show below, independent members already have very substantial advantages over true independents and most true independents could not access the remedies that the Applicant is recommending. Moreover, there are already remedies within the current legislation to achieve some of the Applicant's goals and good reasons why others should not be considered.
23. As was mentioned above, whenever an elected member leaves the caucus and severs ties with their former party to sit in isolation as an independent, it results in multiple failures of representation. Votes cast for the member on the assumption that they would support the policies of their party label are now in doubt. How will the representative vote without the party policy and the party whip to guide them?

Voters may have thought they were electing someone on the government side who could get things done for the district. As an outcast from the party, that is now in doubt. The local party members of the district association will now be divided, some pulled by a personal loyalty into support for the MP while others stay with the party and work to select and prepare another candidate to displace the independent member. Even the newly independent member must go through a sobering re-evaluation of their career prospects and political future. There is no hope for advancement for an independent member, no choice committee or party caucus assignments, no cabinet or critic position, no parliamentary secretary roles or other preferments and salary enhancements. Even being noticed by the Speaker, let alone the media, is a challenge for the independent member. In short, there are far fewer opportunities to represent the interests of their constituents. Constituency work can fill the time but even here a member's effectiveness is likely to be diminished by being ostracized by their former caucus members. Those who leave their party to join another or sit as independents have often been looked on either as opportunists or outcasts and lead to discussions about whether a legislator should have to face re-election upon leaving the caucus to which they were elected.¹³.

24. If an independent member does choose to contest an election as an independent candidate, they have some very substantial advantages over the other 99 percent of independent candidates. As a member of the Assembly they would have

¹³ New Zealand briefly had a law that required this: The Electoral (Integrity) Amendment Act 2001.

important name recognition, a set of policy positions drawn from a former party affiliation, access to local media, a history of representation and, perhaps most importantly, the resources of their office: an annual budget of almost \$300,000 and 3 or 4 paid staff members who could form the core of their election campaign in the pre-campaign period and even during the campaign. While none of this money or staff time should be spent on election campaigns, it would be very surprising if ways were not found to take advantage of these resources.

25. The real world of true independent candidates is quite different from that of members of assemblies and parliaments who leave parties to sit as independents. The following three tables present data on independent candidacies in Ontario from 1945 to the present. Table 1A includes columns with data for the entire period while Table 1B has columns with information from the post-1995 period. Table 1C looks at the success of independent candidates in by-elections since 1995. Tables 1A, 1B, 1C, 2A, 2B and 3, which I prepared to accompany this affidavit, are attached as **Exhibit F**.¹⁴
26. Table 1A presents the data on independent candidacies in Ontario in the past 73 years. The table is divided after 1995 to present some summary measures for that period that will later on be used in comparisons to other jurisdictions. The columns of the tables are referenced in the text below by a number in the second line of each column to save repeating the lengthy titles. In the following points I highlight

¹⁴ The data in these tables comes from official reports on websites created by provincial and federal election authorities, for example, Elections Ontario (www.elections.on.ca) and Elections Canada (www.elections.ca), parliamentary and provincial assembly websites and a few media reports.

the trends in the data that are important to an understanding of independents' campaigns:

- i. As Column 11 in Table 1A indicates, in 73 years just a single independent candidate has been elected out of 462 independent candidacies (the sum of Column 2), a very high rate of rejection.
- ii. The number of independent candidates in Column 2 grew until the high points of the 1995 and 1999 elections but has then declined and leveled off with some variation. Both those governments and elections drew large street protests and may have presented added encouragement for independents to take part in the process. That said, there is no research or data to support any solid conclusions about the fluctuations in these numbers. It seems likely that changes in the rules affecting independents have not had any sustained one-way effects. Even the number of seats in the House does not explain the trends.¹⁵
- iii. The pattern of growing and then declining participation of independent candidates that appears in Columns 2 through 5 does not fit the pattern suggested by Professor Loewen and Dr Morden who believe that parties have conspired to exclude independents or in their opinion that Ontario's legislation on independent candidates inhibits them. Ontario's first election finance legislation did not begin until 1975.¹⁶ The theory that Ontario legislation hinders independent participation should describe a pattern with a sharp and continuing decline of independent participation from a period when there were no fundraising rules for independents (pre 1975) to the current time. But that is clearly not the pattern of independent involvement. I will return to this point to discuss the rules for independent candidacies.

¹⁵ The correlation coefficient between the percent of electoral districts with an independent candidate and the number of seats in the Legislative Assembly is *minus* 0.1 for the period since 1990. For the entire post-war range it is 0.30, not surprisingly. ¹⁶ For an early history see: Ewing, Keith D. "The Funding of Political Parties in Ontario." *Osgoode Hall Law Journal* 27.1 (1989) : 27-91, attached as **Exhibit G**. <http://digitalcommons.osgoode.yorku.ca/ohlj/vol27/iss1/2>

- iv. Column 3 presents the number of electoral districts where independent candidates were on the ballot, and Column 4 presents the percentage of districts where a voter could choose an independent. With the exception of the 1995 and 1999 elections, independents are generally on the ballot in one-quarter or usually fewer of the electoral districts. It is possible that some voters have never had the opportunity to vote for an independent.
- v. Column 5 again shows the unimportance of independents as a percentage of all candidates. In most elections they constitute about 5 percent of all candidates.
- vi. Columns 6, 7, 8, 9, and 10 present voter support for independent candidates in different ways. Since 1995, they have won an average of 395 votes or 1.1 percent of the votes cast in districts where they were on the ballot. In 2018, the vote totals for all independent candidates added together, just 8,226 votes, would not have won an electoral district south of Timmins.
- vii. Table 1B presents further data for the post 1995 period that is not available for the longer time series. The first four columns, 12 through 15, compare the gender makeup of independents to that for all candidates.¹⁶ Female candidates are about half as likely to have been an independent candidate as a party candidate in 2018. Given that the numbers of female independents are even smaller in prior years and then higher in 1995 and 1999, it seems that this has probably always been the pattern. Men are far more likely to run as independents than women.
- viii. Column 16 shows the number of political parties winning votes in each election since 1995. This number has doubled and almost tripled since 1995. Ontario has made it easier for minor parties to register and contest elections (for example, in 2007 the number of names, addresses and signatures required to apply for registration of a party was reduced from 10,000 to 1,000), and this may

¹⁶ The Ontario candidate nomination form (FO400) does not collect information on the gender of a candidate so I had to assign gender for a long list of candidates. As a result, I coded gender for only the most recent election for all the 823 candidates. The coding I produced matched the gender numbers that major parties announced before the election.

have led to the rapid growth in the registration and involvement of new political parties.

Once again, this evidence directly contradicts Professor Loewen and Dr Morden's belief that Ontario's governing parties have acted to suppress competition from minor parties and independent candidates. I will return to this point below.

- ix. Columns 19, 20 and 21 in Table 1B summarize the information on *independent members* discussed above. Of the 15 members I identified as spending a brief period as an independent before joining another party or being readmitted to their former party or ending a parliament as independents, just one ran as an independent in the next election. Independent members are the tiniest subset of independent candidates.
- x. Columns 17, 18 and 22 relate to a remedy suggested by Mr. Hillier to correct what he believes to be unfair treatment of independent candidates. The remedy or provision - that we will see in a moment exists in other provinces to little effect - would allow independent candidates to preserve a current post-campaign surplus for a future campaign. The Applicant argues that this would put independent candidates on the same footing as party candidates whose campaign surplus, if there is one, goes back to the electoral district association of the party of the candidate. At the present time, as in several other provinces, an independent candidate's campaign surplus is forfeited to the Chief Electoral Officer. The misconceived idea that this could assist all independent candidates misunderstands two aspects of virtually all true independent campaigns. First, almost all independent candidates, just under 92 percent, ran a single time and never again. For them, the possibility of reclaiming a surplus is pointless and it is hard to imagine that the promise of retaining a surplus would alter this behaviour. Second, the provision fails to appreciate the minimalist nature of independent campaigns. Most independents raise nothing or next to nothing. Between 1995 and 2018, they were much more likely to end in deficit than in a surplus and they are far more likely than party candidates to not file a campaign finance report and

thereby flaunt the campaign finance rules. Twelve percent of independent candidates in this period did not file a financial statement showing campaign period income and expenditures and thus ended up being prohibited from being a candidate in the next election. I will look more closely at independents' fundraising and spending in a section below. But for the moment, Column 17 shows that just 24 – or 9 percent – of all independent candidates from 1995-2018 ended with a surplus, and the largest was \$350.

- xi. Table 1C confirms that the success of independent candidates in by-elections is no different from general elections. There have been 42 by-elections since 1995 and just over 50 percent of them had one or more independent candidates. However, the wider media attention that by-elections tend to garner did not help independents and they averaged about the same percent of votes as they do in general elections and not one of them was elected.

27. The first three tables provide a view of independent campaigns in Ontario, but it will be useful to look at this province in comparison to others and to the federal level. Professor Loewen and Dr Morden refer to legislation in other provinces without observing behaviour and also to the experience of selected independent members at the federal level. Tables 2A and 2B present period totals or averages over similar periods for each of the ten provinces and the Federal level. In Table 2A each row is a province with the second column indicating the period covered and the third one indicating the number of general elections during that period.

- i. Columns 4, 5, 6 and 7 in Table 2A show the incidence of independent candidates in different jurisdictions. The totals and per election averages in Columns 4 and 5 are of limited use given the variation in the size of provinces and the number of electoral districts. However, they do show how rare independent candidacies can be in some provinces. Column 6 presents the

average percent of electoral districts with an independent candidate providing a basis for comparison. British Columbia, Ontario, Quebec and Canada have the highest percentage of electoral districts with independent candidates, all more than 20 percent. Alberta, Nova Scotia, New Brunswick and Newfoundland have about half as many ballots with independents. In Saskatchewan, Manitoba and PEI, on average, almost 95 percent of districts do not have an independent on the ballot. Why is there such variation in the number of independents? I am not going to be able to provide a conclusive answer. It may have something to do with the hold parties have over politics or the way they incorporate maverick views, or it may have to do with the rules about independent candidacies. I will return to these points below. The one important thing to take away from this is that Ontario has one of the highest rates of independent candidate involvement in elections in Canadian jurisdictions.

- ii. Columns 8, 9, 10 and 11 show the vote appeal of independent candidates and their success in getting elected, and the last general election at which an independent was elected. Over the 70 provincial general elections covered by the table, just 5 independents were elected. The two in Newfoundland were both elected as Liberals at the prior election, were removed from caucus and ran and won as independents. Vicki Huntington, the BC MLA who won her Delta riding twice, was a true independent, never having previously sat in the Legislative Assembly, though she did have a long career as a municipal politician prior to running as an independent. I mentioned the one Ontario winner in this period, Peter North, who left a party caucus and ran and won as an independent. The other provinces did not elect an independent in this period and in some, as Column 11 shows, such an event is multiple decades and even a century in the past.
- iii. At the Federal level, with of course many more electoral districts, independents have been elected seven times since 1993. Professor Loewen and Dr Morden discuss four independents. One of them, David Kilgour, never contested an election as an independent candidate although on two occasions he did sit as

an independent member before moving to another party. Bill Casey and Jody Wilson-Raybould were first elected as party candidates, then left or were expelled from their caucus, sat as independent members and were then elected as independent candidates. After losing a nomination contest, Chuck Cadman served out his term as a Conservative member and when the election was called became an independent candidate. Professor Loewen and Dr Morden do not mention four other successful independent candidacies in this period. John Nunziata and Gilles Bernier, both independent members, left their caucuses and won once as independent candidates. Nunziata lost the next election as an independent and Bernier, a former Progressive Conservative MP, accepted a patronage appointment from Liberal Prime Minister Jean Chretien and never ran again, freeing the seat for a Liberal to win. André Arthur is the only true independent in this period. The Quebec City radio host was elected twice as an independent in 2006 and 2008 and lost a close third election. His 2008 reelection owed something to the Conservative Party's decision not to run a candidate against him as he had consistently supported the Harper government in confidence votes. Monsieur Arthur did not dedicate himself wholeheartedly to the role of representative, shouldering a very light committee load and he took two second jobs, driving a tourist bus and hosting a TV talk show.¹⁷ Critics noted that he was absent for almost one third of Commons votes. Comments he made about Montreal cab drivers prior to becoming an MP were deemed to be racist in a 2011 Supreme Court decision.¹⁸

- iv. To get an idea of the rarity of voters choosing to be represented by an independent candidate, there were elections in 7,751 electoral districts in the period covered in Table 2A but on just 12 occasions, 0.15 percent of the time, did voters elect one.

¹⁷ Julian Sher "Andre Arthur the MP who moonlights as a bus driver," The Globe and Mail, March 7, 2011. <https://www.theglobeandmail.com/news/politics/andre-arthur-themp-who-moonlights-as-a-bus-driver/article569583/>

¹⁸ CTV News "Top court cite Quebec MP for racist cabbie rant but grants appeal spares damages." The Canadian Press, February 17 2011. <https://montreal.ctvnews.ca/top->

- v. Table 2B repeats the first three columns and then compares the percentage of independents that are female to the percentage of all candidates that are female in Columns 10 and 11. The pattern discussed above for Ontario is repeated in all jurisdictions with women being far less likely to be independent candidates than to be party candidates. Ontario has the highest percentage of female independent candidates. Some provinces do not collect the gender of candidates so, where needed, I coded the gender of all candidates in a selection of elections.
- vi. Columns 14 through 16 track the number of independent members at dissolution, whether they ran, and their fate. While just 9 of the 47 that chose to run as independents were elected, this rate of success was much higher than for true independents (those not sitting as members) who were elected at the rate of 4 out of 1612 candidacies. As one might expect, independent members running as independent candidates have a huge advantage over true independents.
- vii. Column 17 presents the average number of political parties with candidates that gained votes in general elections during the period. Ontario is second only to BC in terms of the number of parties securing votes and far surpassed the number of party choices available to voters in most other provinces. I will return to this below in the discussion of Professor Loewen and Dr Morden's belief that the Cartel Theory correctly describes the real behaviour of Ontario parties in suppressing the number of parties that could challenge their dominance.
- viii. Columns 18 and 19 present evidence about the Applicant's argument that allowing independents to reclaim surpluses would correct a perceived inequality.

court-cites-quebec-mp-for-racist-cabbie-rant-but-grants-appeal-spare-damages1.609049

Column 19 shows once again that the vast majority of independent candidates contest a single election. In some provinces, this was the pattern for all candidates and in most of the others for more than 85 percent of independents. The lower figure in Column 19 for Nova Scotia owes much to the presence of

one candidate who ran in every election in the period. Any reform that permitted independents to reclaim a previous campaign surplus would be completely pointless for upwards of 85 or 90 percent of candidates. Column 18 shows this in a slightly different way by showing the percentage who could have reclaimed a surplus because they contested two consecutive elections. Once again the number is tiny and once again the Nova Scotia figure is skewed by the one individual.

28. One conclusion we can draw from these comparisons is that Ontario has more independent candidates than most other provinces, a point that I return to below in a discussion of differences in registration regulations.

29. One of the hallmarks of independent candidacies in Ontario is a lack of money. Another is non-compliance with the filing of campaign spending details. Thirty two of the 260 general election independent candidacies between 1995 and 2018, or 12 percent, did not file the required financial statements. This is a much higher rate of ignoring the provisions of the *Election Finances Act* (EFA) than for party candidates, even minor party candidates who must file to maintain their registration and to take advantage of election expenses subsidies should they qualify for them. The failure to file financial statements is more than a simple breach of campaign finance law, for it also breaks important rules and norms about openness and disclosure in democratic campaigns. Candidates that fail to file financial statements with the EFA may use public tax credits improperly, and may deceitfully use election campaigns to spread messages that cannot be held to account.

30. About 20 percent of independent candidacies spend nothing at all on their election bids. Another 52 percent spent less than \$500. Just 10, or four percent, raised and spent more than \$10,000 and just two -- Peter North who won in 1995 and

John Sewell -- were the only ones to spend more than \$30,000, about two-thirds of most spending limits.¹⁹ 31. The small sums of money that go into a large majority of independent campaigns make it very unlikely that they could end in significant surpluses. Just 24 of 228 campaigns that filed statements ended with unspent sums, and none was bigger than \$345. One could and probably should interpret all of these as mistakes in matching revenue and expenditure, since one would assume no candidate wanted to give money to Elections Ontario rather than spend it on their campaign. It is also very likely that more than a few campaigns simply did not know the rules until the accounting was complete months after election day.

32. On the other side of the ledger, far more campaigns -- almost 28 percent of those who filed -- ended with deficits that ultimately the candidate would have had to assume. In most of these instances, the candidate and their financial agent should have been fully aware that they were spending far more than they were receiving in contributions. This overspending effectively allows independent candidates to violate the personal contribution limit without fear of being prosecuted.²⁰ Up until 2016, candidates were limited to the same contribution levels as all other citizens, corporations and unions. This limit has been adjusted upward for inflation, but by 2014 it was \$1,330. Party candidate

¹⁹ Sewell spent \$71,250 and North just \$34,500. Sewell's expenditures under the limit were \$56,300 and the limit was \$77,954. North spent \$34,505 with an expenditure limit of \$47,289.

²⁰ The Annual Report from the Chief Electoral Officer of Ontario has for the last few years stated that the *Election Finances Act* needs to be reformed to give the power to levy administrative fines for lack of compliance with statement filing rules and breaches of the Act that the reports state may not warrant full-blown prosecution. The statistics for prosecution and fines for things like not filing statements or exceeding contribution limits are not readily available if in fact any prosecutions have occurred. For example, see:

campaign deficits, like surpluses, are passed on to the electoral district association and become their responsibility. Like all candidates, independents can raise money following election day to help defray costs but after the deadline they are responsible for any remaining deficit and that effectively becomes the candidate's contribution. In several cases the deficits exceeded the contribution limit. A new contribution limit of \$5,000 for candidates was enacted in 2016 as part of the reforms that ended contributions from corporations and unions. In 2018, at least one independent campaign had a larger deficit than even that new limit.

ii. What do we know about true independent candidates?

33. Much of the discussion of independents to this point has been about independent members rather than true independent candidates, with the exception of Andre Arthur. What do we know about the class of true independents whose interests the Applicant is championing? The tables above show that independent candidacies are infrequent, usually one-off events and almost never result in election but not much is known about the motivations of independent candidates in Ontario or elsewhere. The overwhelming majority of these campaigns neither attract many votes nor raise much money from supporters to publicize their ideas, and there are few traces of their passage and little to

Office of the Chief Electoral Officer of Ontario, Implementing Change, 2017-2018 Annual Report, p. 34. <https://www.elections.on.ca/en/resource-centre/reports-andpublications.html#accordionAnnual-Reports> study. Moreover, 82 percent of the independent candidates in Ontario general elections between 1995 and 2018 contested one election and either accomplished their goal

(hopefully something other than being elected) or appreciated the difficulty of getting elected and did not run again. A very small number, just 19 candidates, contested more than one election, 14 did it twice, three ran three times, one stood four times and one was a candidate five times. Those 19 persons contributed 46 of the 260 candidacies. These 19 individuals are the only ones for whom saving a campaign surplus for a future election would make any sense.

34. As anyone who has been to an all-candidates debate surely knows, some independent candidates can be annoying gadflies with semi-coherent messages that are tolerated only to a point, if at all, by voters, party candidates and debate organizers. A noteworthy case, partly because his videos remain on the internet, is John Turmel, who has contested eight general elections as an independent and three more as a minor party candidate, in addition to 15 by-elections and another nine as a minor party candidate. One of his ambitions seems to have been to be added to the *Guinness Book of Records* for the most campaigns contested and lost.²¹ Several of his YouTube videos and of candidates' debates show how disruptive a candidate like this can be.

35. Some candidates have darker motivations. David Popescu, who has also run in 6 provincial elections, was charged with advocating or promoting genocide and wilful promotion of hatred partly as a result of his campaign activities.²² It is worth noting that

²¹ John Turmel or John C Turmel. www.johnturmel.com. See <https://www.youtube.com/watch?v=HbA9AfKAapQ> and <https://www.youtube.com/watch?v=UFJfYH5waPs>. Several others can be easily searched.

²² CBC News David Popescu facing charges for sharing offensive material in Sudbury, Sept 3, 2015. <https://www.cbc.ca/news/canada/sudbury/david-popescu-facing-chargesfor-sharing-offensive-material-in-sudbury-1.3214171>. Popescu campaign video: <https://www.youtube.com/watch?v=76q8HrvBca0>. ²⁴An interview with Wong

political parties are usually, though not always, successful at screening out candidates who have a message of hate.

36. But there are also energetic and politically informed true independent candidates who against all odds were able to craft competitive independent campaigns. John Sewell, the former councillor and Mayor of Toronto, ran as an independent in Ontario in 1999 and won almost 20 percent of the vote while spending more than \$70,000. More recently, Nicholas Wong, an independent candidate in the 2017 BC General Election, ran a well organized and very competitive campaign winning 25 percent of the vote but losing in a riding that an independent, Vicki Huntington, had represented in the previous two elections.²⁴ But even marginally competitive true independent campaigns probably make up less than 5 percent of all independent candidacies.

37. Some independent candidates are not even independents in any more than an administrative sense. Over the seven Ontario general elections in Table 1a, at least 30 candidacies and 22 independent candidates were members of the Communist Party of Canada-Marxist Leninist. The party was registered at the Federal level though never by Elections Ontario at that time so the candidates stood as independents while using the slogan “Renew Ontario” in 2003.²³ Gilles Duceppe, the future leader of the Bloc Quebecois (BQ), was first elected as an independent, though he made sure that everyone knew he would become a BQ MP as soon as the party was properly registered by Elections Canada. Some other candidates in Ontario were endorsed and possibly backed

illustrates his preparation: <https://www.youtube.com/watch?v=uy2yHeXqLPQ> and one of his campaign videos: <https://www.youtube.com/watch?v=3f8O7RiV7LE>

²³ TML Daily, “Vote for Independent Candidates who represent the Renewal of Ontario,” Sept 30, 2003. <https://web.archive.org/web/20051110120116/http://cpcml.ca/Tmld2003/D33178.htm> ²⁶ <https://www.campaignlifecoalition.com/events/view/id/142> ²⁷ Bertram, 287

by pro-life organizations, and that might have been their prime motivation for running: to get the chance for some publicity for their messages. For example, Queenie Yu, who ran as an independent in a by-election in 2016, was assisted by Campaign Life Coalition.²⁶ Organized groups or nascent parties may be more involved in independent candidacies than we are aware of. Bertram's study of the 1988 Federal election found that "at least half of the independent candidates represented unregistered political parties."²⁷

38. There is no systematic research on independent campaigns in Canada that would allow generalizations about them. The research presented above tells us that an overwhelming majority of them are poorly financed and often spend nothing on promoting the ideas to be represented through a candidacy. The lack of funding – which is essentially support from voters for the ideas and policies represented in the candidacy - strongly suggests that the campaigns are poorly organized last-minute affairs. As in most endeavours, experience matters, but a large majority of independents are only briefly inspired or else learn some painful realities from the experience. Being a serious candidate is hard work. Going through a party candidate nomination process can be a winnowing and learning experience. It takes full dedication, ideas, strong community ties, preparation, a willingness to listen, and money and friends with experience in elections to become a competitive candidate. However, even a casual encounter with an independent candidate in a campaign debate will show that most of them are so poorly organized and funded they have no prospect of even being competitive. Their campaigns are often vehicles for personal promotion and unusual ideas that will never be tested without effective campaigning. Sometimes, and we don't really know how often because there is little effort to spread messages and little trace is left on the internet, the ideas of

independents are on the fringe of political dialogue and once in a while they go over the edge into hate speech.

iii. How do independents fit into the regulation of candidacies in Ontario?

39. Elections in Ontario are generally governed by two Acts, the *Elections Act* (EA) and the *Election Finances Act* (EFA), and before that the *Election Finances Reform Act* of 1975.²⁴ Unlike other jurisdictions where all election matters are contained in a single act, the administration of elections and the financial oversight of parties and candidates have been divided in Ontario.²⁵

40. The *Ontario Elections Act* (EA) defines a candidate as any person of voting age who is a Canadian citizen, has resided in Ontario for the six months prior to the election and has not been disqualified from voting.²⁶ All candidates must complete the same nomination paper and submit it to the electoral district returning officer. If a person is an independent candidate they must indicate if they want the word "Independent" to appear on the ballot below their names. If a person intends to represent a party, they must present a signed statement by the leader of the party endorsing their candidacy. Candidates are also required to present the signatures of 25 nominating electors. For a party candidate it is normal for party members to sign the nomination form. For an independent candidate, finding 25 people to sign a nomination form should not be a

²⁴ For an early history of the development of campaign and party finance in Ontario, see Keith D Ewing, "The Funding of Political Parties in Ontario," *Osgoode Hall Law Journal* 27 (1) 1989 pp. 27-91, attached as **Exhibit G**.

²⁵ For example, all federal election matters are contained in the *Canada Elections Act*.

²⁶ Ontario Elections Act 26(1) (a)(b)(c)(d)

problem. From my perspective as a political scientist, these registration rules do not discriminate against independent candidates in any way.

41. Ontario has one of the lowest nominating requirements in Canada. At the Federal level, candidates need to present 100 nominators, as does Quebec. Alberta requires 75, Manitoba 50, some provinces 15, and even as low as 4 in Saskatchewan. The number of electors signing a nomination form is a demonstration of community support and to some extent a licence to allow someone the privilege to promote ideas in the tightly regulated election forum. One could argue that the number should be higher to exclude candidates whose ideas do not have broader community support; however, ever shorter campaigns would mean a larger percent of the campaign period would be spent collecting signatures for registration.

42. Nomination deposits could be a deterrent for independent candidates, but since 2010, Ontario has had no fee whatsoever. In 2017, as a result of *Szuchewycz v. Canada*²⁷, the Canada nomination deposit of a \$1000 is no longer in force but the deposit is still \$500 for Alberta provincial elections, \$250-in BC and most of the others at \$200 or less.²⁸ Prior to 2007, the nomination deposit had been \$200 for as far back as the mideighties. The deposit was refunded if the candidate received 10 percent of the vote, a very high bar for an independent but still a small sum to realize an ambition to become a candidate and get some attention from voters and the media.

²⁷ <https://www.elections.ca/content.aspx?section=med&dir=pre&document=nov0817&lang=e>

²⁸ Elections Canada, *Compendium of Election Administration in Canada: A Comparative Overview* Table F3. <https://www.elections.ca/content.aspx?section=res&document=index&dir=loi/com/compendium&lang=e> . This is attached as **Exhibit H**.

43. When it comes to the registration process for independent and party candidates alike, Ontario is probably the easiest jurisdiction for someone to register as an independent candidate.

B. How does money move among the structures of Ontario parties before and during a campaign, and how does that compare to independent candidates and MPPs in Ontario?

44. In order to form a government, parties must find candidates and work with party members in each district to convince voters to elect them. Parties form electoral district associations to promote their ideas and attract members who can help find, select, fund and campaign for a candidate of their party. The central party organization oversees and shares the regulation of the candidate nomination process with the local association and Elections Ontario. Finding people that have accomplishments that suggest they could become successful candidates and convincing them to run and supporting their campaigns is a crucial function of parties. To do this, they must be able to shift resources, money, expertise, or labour from one part of the party to another, strengthening weaker areas with resources from the stronger ones. Tom Flanagan, an academic who has written about election campaigns and who worked closely with national Conservative campaigns in 2004 and 2006 notes that the “*Concentration of resources on battleground ridings is the essential strategic principle* (his emphasis),” and goes on to explain the many ways this achieved.²⁹

²⁹ Thomas Flanagan, “Campaign Strategy: Triage and the Concentration of Resources” in Heather McIvor, ed, Election (Toronto, Emond Montgomery, 2010) p. 159, attached as **Exhibit I**.

45. The central organization of a party is constantly raising money through events and mail, phone and internet appeals. Local associations also raise money, though typically all of the local associations of a party taken together will raise less and sometimes much less than the central party in most years. The parties differ in their fundraising practices and success and in the wealth of their supporters as reflected in the average size of contributions. There is also a good deal of variation in association fundraising totals according to the local strength of the party. If a party has an incumbent member, they are usually able to raise more money locally than their competitors.

46. Before an election campaign begins, the campaign strategists will assess the likelihood of winning each electoral district and draw up a plan to transfer resources to support a candidate in an electoral district that they think they will be able to win again or win back from a rival party. This ability to transfer funds and resources is a core function of a political party. Without the ability to move funds around and support candidates in weaker areas, the electoral map might become frozen and voters' choices become limited to the locally dominant party. This means that funds raised by the central party's professional fundraising apparatus and money raised by party members through events and subscriptions is constantly passing between associations and the central party and, during election periods, to local candidate campaigns as well. In an election year, there are thousands of these transfers between parts of a party. But there are constraints and disclosure rules about these multiple transfers that preserve some fairness and ultimately there are expenditure limits that a candidate or central party may not exceed.

i. Spending Limits

47. All candidates in an electoral district are subject to the same per voter spending limit whether they represent a party or stand as an independent candidate. The expenditure limit is a formula that escalates with inflation, and is calculated by multiplying the number of voters on the register for the electoral district by an amount to create a limit for certain types of expenditures. The spending cap ensures that no candidates can spend an unlimited sum to “buy” an election and ensures a rough equality between all candidates. Though as we have seen, independent candidates seldom spend more than trivial amounts. When they are able to organize well funded and staffed campaigns, they are able to compete partly because of the limit on other candidates.

48. If a candidate represents a party, the spending limit applies to the sum of money spent during the campaign period by both the party candidate and the local electoral district association:

38 (3) The total campaign expenses incurred by a registered candidate, the constituency association endorsing that candidate and any person, corporation, trade union, unincorporated association or organization acting on behalf of the candidate or constituency association during a campaign period shall not exceed the amount determined by multiplying the applicable amount by the number of electors in the candidate's electoral district. *Ontario Election Finances Act 1998, c. 9, s. 70.*

49. In the 2018 Ontario provincial election the expense limit for all candidates, party and independent alike, was \$1.30 times the number of voters on the electoral register in that district³⁰, producing a range of limits that went from \$26,585 for candidates in the

³⁰ The remote electoral districts of Algoma-Manitoulin, Kenora-Rainy River,

electoral district of Kiiwetinoong with 13,159 electors to \$138,906 for candidates in Niagara Falls, a district with a preliminary elector count of 106,851.³¹

50. The candidate expenditure limit is applied to the total sum of the candidate's spending plus any spending by the constituency association on behalf of the candidate:

Campaign expenses incurred by a registered constituency association are for the benefit of its registered candidate's campaign, and as a result the constituency association's CFO and candidate's CFO must work closely together during the campaign. It is ultimately the responsibility of the candidate's CFO to create a campaign budget and managing spending to stay within the joint campaign expense limit.³² And further on:

The Election Finances Act sets a joint limit on the amount that a registered candidate and constituency association may spend during a campaign. This is to help ensure that all candidates have an equal chance of being elected.

The total campaign expenses incurred by a registered candidate, its registered constituency association, and anyone acting on behalf of the registered candidate or constituency association during a campaign period must not exceed the amount determined by multiplying an indexed amount, currently at \$1.35, by the number of electors in the candidate's electoral district.³³ And again:

A registered candidate's CFO must state in writing to a registered constituency association endorsing that candidate the aggregate amount

Kiiwetinoong, Mushkegowuk-James Bay, Nickel Belt, Thunder Bay-Atikokan, Thunder Bay-Superior North, and Timiskaming-Cochrane, were permitted to spend an additional \$9,478 to compensate for the enormous size of these ridings.

³¹ Elections Ontario Campaign Expense Spending Limit by Electoral District for the 2018 General Election, attached as **Exhibit J**.

³² Elections Ontario, CFO Handbook for Constituency Associations p. 56. This is attached as **Exhibit K**.

³³ Ibid, p.56 ³⁸

Ibid, 58

the constituency association may spend during a campaign. A registered constituency association must not spend in excess of this amount without written approval by the candidate's CFO. [see the EFA, s. 38(5)]³⁸

51. I emphasize this point because the report of Loewen and Morden does not make this point clearly in its discussion of party transfers and says, "In addition to the money spent directly by the candidates, the Liberal and PC candidates benefited from substantial spending by their constituency associations, net of transfers they already made directly to their candidates."³⁴ The sentence leaves the incorrect impression that party candidates can spend more money on election expenses or benefit from extra electoral district association expenditures. The transfer of funds between components of a party, candidate campaigns, electoral district associations (EDAs), the central party, and nomination and leadership campaigns can be difficult to track but they do still have to comply with expenditure limits.

52. For example, a party candidate's electoral district association can transfer campaign goods such as signs or other materials, but these must be recorded at replacement cost as an expense of the current campaign. This may seem like an advantage, as some incumbents may be able to start with a store of signs from a previous election. However, many party campaigns declare in campaign-ending financial statements that they have no material surpluses indicating that they have not saved things like campaign signs.³⁵ After a campaign, signs are often in poor shape and some local

³⁴ Loewen and Morden report at p. 6.

³⁵ I have not done a systematic study of what is declared surplus at the end of a campaign and what is transferred back at the beginning of the next. My comments are based on looking at many campaign financial statements over the years and working on many local campaigns.

party member must store a considerable volume of material for a lengthy period. Moreover, parties often redo logos and colours and candidates change with surprising frequency making a store of signs a headache to be trashed or recycled. Do some electoral district associations flaunt this law? Probably to some small degree, but independent candidates are equally able to break the law (that is supposing they have learned it) and especially a law that relies only upon complaints for enforcement.

53. Professor Loewen and Dr Morden's report looks at campaigns in the electoral district of Mississauga Malton but presents only part of the relevant information and provides a somewhat misleading conclusion. The *Election Finances Act* focuses on controlling expenditure rather than income. Parties and candidates are free to raise as much money as they can but they must comply with the spending limit. That means the total spending of both the candidate (CR1 statement) and their party's district association (CR3 statement) cannot exceed the spending limit. After the multiple transfers between party units, the final spending by candidates complied with the campaign expense limit of \$98,185 for the electoral district for the 2018 election ³⁶ as my Table 3 shows.

54. Certain kinds of expenditures are excluded from under the limit for all candidates, party and independents alike. Excluded expenses include items such as transfers of money out of the campaign to another part of the party, expenses for a victory party, the cost of research and polling, expenses for fundraising, daycare expenses, the financial statement audit, travels costs and so on.³⁷ As a result, any independent or party

³⁶ This limit is determined at the outset of the campaign but is revised according to changes to the voting register. I was not able to recover the final limit and it is possible that the Liberal candidate did not exceed it.

³⁷ For a complete list of excluded expenses see: Elections Ontario *CFO Handbook for Candidates* Jan 2020. P. 49

candidate's total spending could exceed the sum of the items that are capped when the excluded items are added.

55. The financial statements of the three major party candidates and electoral district associations in Mississauga Malton show upwards of 30 transfers of money moving to and from parts of the party but these make no difference to the expenditure limits. It is important to emphasize that this movement of resources to support candidates to win government is the essence of what a party is and what an independent is not. But that does not create unfairness, for an independent stands against the idea of party. Moreover, as I explain further below, the rules allow an independent candidate to compensate for what may appear to be a disadvantage.

56. Party candidates seem to benefit unfairly from being able to spend as soon as the election begins. Local associations can transfer funds and campaign materials into a candidate's campaign as soon as she is registered, although most of the parties in Table 3 do not make such transfers or expenditures. However, an independent candidate could also raise funds quickly in a number of ways if they were organized and understood the legislation. First, candidates can now contribute up to \$5,000 to their own campaigns and they could do so on the day they register. Just one independent candidate took advantage of this in 2018.³⁸ While this may seem like a small amount to start a campaign with, it would be more than any candidate in Table 3 except for the Liberal and Conservative candidates.

<https://www.elections.on.ca/content/dam/NGW/sitecontent/Compliance%20Documentation/English/Candidates/CFO%20Handbook%20for%20Candidates.pdf> , attached as

Exhibit L.

³⁸ Narine Sookram, Kitchener South—Hespeler

57. Second, s. 35 of the *Election Finances Act* allows party and independent candidates to borrow from financial institutions. An independent candidate could negotiate a loan at the outset of the campaign and immediately be able to spend on a more or less equal footing with a party candidate. Party candidates in electoral districts where their support is not strong have often had to do this in the past. The current Ontario *Election Finances Act* requires that all loans must be repaid within two years. The loans of a party candidate will become the obligation of the electoral district association. All loans must be signed by guarantors, each responsible for no more than the maximum contribution, currently \$1625. So any significant loan would require multiple guarantors. If an independent candidate cannot repay the loan from fundraising following election day or from their own allowable contribution, then the institution can call the loan from the guarantors.

58. A third solution would be for a prospective independent candidate to begin a process of developing ideas for a candidacy, thinking about what groups and individuals might support them, even talking to acquaintances about running as an independent and asking if they might help at sometime in the future. Well prepared candidates would learn the rules and even begin to think about the costs of a campaign and how the money might be raised and from what individuals and groups. A serious and prepared independent candidate could do much of this work in advance of registration and be prepared to ask for help and money as soon as a campaign begins. The *EFA* prohibits a future candidate from raising or spending any money until the campaign period begins and they are registered. But I don't believe this could exclude the kinds of activities mentioned above; in fact, the same sorts of things a prospective candidate for a party nomination would probably do before jumping into a candidate nomination race.

59. Another solution is to register as a party before the campaign begins. This may sound an odd solution for an independent but Ontario now has one of the simplest set of requirements for registrations. In between elections, the signatures of 1,000 citizens are required to register and there is no fee. Once registered, a party can create one or more electoral district associations and commence raising funds and issuing political tax credits. A person may even create a political party during an election providing they can register a minimum of two candidates. While many independents choose the label to signify that they are being anti-political party, there is no reason why they could not state this as the purpose of the formation the party and find at least one other candidate to run or 1000 citizens who share their convictions. There is at least one currently registered anti-party party, the None of the Above Direct Democracy Party.³⁹

60. These solutions to starting a campaign as early as possible and as early as some party candidates are not perfect, but they are not the reason that independents spend less and run uncompetitive campaigns. The problem is that far too few independent candidates are well organized or knowledgeable campaigners. The evidence suggests that they leave the decision to register until the last moment and then are unable to gather enough resources in money and supporters to mount an effective campaign, if in fact that was the point. However, an organized independent, such as a sitting member of the legislature who has left a caucus, would certainly have resources available, as I explained above, and could take advantage of these methods for funding a campaign at its outset. Once the campaign begins, the former member with some fundraising help from his former supporters could raise significant sums of money if their campaign messaging

³⁹ None Of The Above Party, “About”, online: <https://nota.ca/ontario/about/>

attracted funders and convinced voters. Across all the provinces in Table 2 and at the Federal level, it is these former independent members who organize the best funded and highest vote attracting campaigns. The tiny sums that most true independent candidates spend are a testament to this lack of strategic organization.

ii. What should happen to a campaign surplus?

61. The Applicant and the report of Loewen and Morden both have said that independent candidates should be able to save any campaign surplus so that they can be on the same footing with party candidates who may transfer any final surplus to their local association. As was noted above, a small fraction of independent campaigns in the last seven Ontario general elections have concluded with surpluses and of course under the existing rules, and to the extent that candidates knew them, any surplus was forfeited.

The *EFA* states that:

42 (5) Any surplus, determined by taking into account in the financial statement of a registered candidate the money, if any, paid to the candidate's chief financial officer under subsection (1), shall be forthwith paid over,

(a) in the case of a candidate endorsed as the official candidate of a registered party, to that registered party or to the registered constituency association endorsing the candidate; and

(b) **in the case of an independent candidate, to the Chief Electoral Officer.** R.S.O. 1990, c. E.7, s. 44 (5); 1998, c. 9, s. 79; 2007, c. 15, s. 40 (1). [Emphasis added]

62. What to do with a surplus at the end of a campaign is not a frequent problem for independent candidates in Ontario in the past two general elections. Of the 46 independent candidacies in 2014 and 2018, seven declared a surplus, with the largest

being \$232 and the others less than \$50. And as Column 19 in Table 2B shows, most independents run just once, so saving and reclaiming a surplus is probably not within their thought horizons.

63. Many party candidates do transfer campaign surpluses to their EDAs and of course many others transfer deficits. While I did not conduct a systematic analysis of these transfers, frequently, a large proportion of the surpluses are the result of the Campaign Reimbursement Entitlement that all candidates receive if they secure more than 5 percent of the vote and represents 20 percent of their campaign spending (*EFA* 44(1)). This is paid after the candidate's financial accounts are closed and so must be part of any surplus. While party and independent candidates alike can qualify for this entitlement if they meet the threshold requirements, in the 2014 and 2018 elections, not one independent candidate would have qualified for this subsidy because none achieved the threshold 5 percent of the vote. Moreover, because all but two of the independent candidates spent less than \$10,000 and almost 40 percent spent nothing, any reimbursement, had they achieved the 5 percent, would have been tiny or nothing. To a significant extent, this explains why almost all independent candidate campaigns conclude without a surplus.

64. The report of Loewen and Morden and the Applicant's own affidavit both make the argument that independent candidates should be permitted to deposit surpluses and reclaim them at a future election. For the purpose of this section I want to largely separate this issue from the issue of independents being allowed to form an electoral district association, which I will return to below. They note that recent reforms in British Columbia, Alberta, Saskatchewan and Newfoundland and Labrador have permitted independent candidates to do this. Manitoba passed a similar provision in 2014 and the Federal level

adopted one in time for the most recent election. The report of Loewen and Morden talks approvingly of this reform while not providing any evidence for any measurable effect. The reality of independent candidates under these recent reforms, which I document below, suggests that this is a solution in search of a problem.

65. Federal, provincial, territorial and even municipal legislation on independent candidates' surpluses varies a great deal, reflecting different political cultures, size, and the history of independent candidacies. Independent candidates are permitted to reclaim previous campaign surpluses in just 5 provinces and now at the federal level. It is worth looking at these briefly to determine how the rule may have affected independent candidates' behaviour.

66. In Newfoundland and Labrador, where independent candidates can have surplus campaign funds held in trust for a subsequent election campaign, independent candidates have not used the provision in the last 20 years. In the last six Newfoundland and Labrador general elections going back to 1999, just 36 independents have stood for election. In the most recent 2019 election, two independents were elected, the only ones since 1996.⁴⁰ Apart from those winning campaigns, just four others won better than 10 percent of the votes and as in other places, many campaigns spent nothing or next to it and often garnered less than 100 votes. Just a single candidate ran in more than one election so only he could have benefitted from a right to save a surplus, though he registered deficits on both occasions.⁴¹ Overall, just four independent campaigns ended

⁴⁰ Eddie Joyce elected in Humber Bay of Islands was a former Liberal cabinet minister removed from caucus on ethics issues. Paul Lane, Mount Pearl – Southlands, was previously elected as both a Progressive Conservative and a Liberal member resigning from the first caucus and being removed from the second.

⁴¹ Ed Cole, Carbonear – Trinity – Bay de Verde, 2015, 2019

in surpluses, two did not subsequently reclaim them as they did not run again and the other two were candidates in 2019.⁴² Both of those surpluses were less than \$1000. So at this point in time, the return of funds provision has not been utilized in the last 20 years, though it may occur for the first time at the next election.

67. Independent candidates have been very rare in recent Manitoba elections, another jurisdiction where the return of funds provision has never been used by an independent. Since 1999 there have been just 19 independent candidacies over six general elections, with one who ran twice. None of them were elected, though one independent *member* removed from caucus ran a well-financed campaign but did not win 10 percent of the vote.⁴³ Financial statements are available for the past five elections and they indicate that no independent ended a campaign with a surplus while eight concluded with a deficit. It would appear that Manitoba's return of surplus provision has never been used since its adoption in 2013 and will not be used at the next election either.

68. Alberta has the longest standing provision for the return of a surplus to an independent candidate, going back to its enactment in 1977. Since the provision came into force, only one independent candidate has been elected and he could not have reclaimed a surplus.⁴⁴ The recent effects of the provision can be examined in the financial statement data since 2004. In Alberta general elections since 2001 there have been 97 independent candidacies but just five individuals ran more than once. One ran five general elections after his first effort and so would not have been eligible to reclaim a

⁴² Paul Lane and Jim Learning, 2019, John Baird, 2011 and Doug Cole 2003.

⁴³ Cliff Graydon, 2019 General Election

⁴⁴ Dr Walter Buck ran and won as an Independent in the 1982 election after having been elected as a Social Credit candidate in the previous four general elections.

surplus. Three of the remaining candidates did not have a surplus and so nothing to reclaim at the next election. Just one candidate had a surplus that they reclaimed in a subsequent election.⁴⁵ Nine other campaigns ended with a surplus but none of the candidates ran again so they went unclaimed. It is quite possible that the Alberta provision has been used just once in the last 11 general elections as there are only four multiple independent candidacies between 1982 and 2001.

69. British Columbia's provision for reclaiming surpluses has been in force since at least 1997. Financial statements and voting data are available for the four general elections between 2005 and 2017. In that period there were 102 independent candidacies mounted by 95 individuals with one candidate running three times and winning twice, the first independent to win a seat since 1949 and the first ever to be reelected as an independent.⁵¹ BC also has a provision to allow a newly elected independent member, or a member who has been removed from a caucus and becomes an independent, to start an electoral district association and transfer any funds raised by it to their campaign should they decide to run. Between 2004 and 2019, three independents formed electoral district associations when they left a caucus and sat as an independent member in the Legislative Assembly.⁴⁶ In those three cases, the electoral district association was de-registered following their loss as an independent in the subsequent election. In the fourth case, an independent, Vicki Huntington, won, twice, and formed and maintained an electoral district association until her retirement in 2017.⁴⁷

⁴⁵ Jeff Willerton reclaimed a \$960 surplus in 2015 he had put in trust in 2011. ⁵¹ Vicki Huntington ran and lost in 2005 but was elected on a recount in 2009 and reelected in 2013 then retired in 2017.

⁴⁶ Paul Nettleton, John van Dongen, Bob Simpson

⁴⁷ Vicki Huntington won Delta South in 2009 and 2013

While these four individuals conducted a total of six campaigns as independents, not one of them ended in a surplus to be transferred to their electoral district association or placed in trust for a subsequent election. One hundred of the candidacies ended in defeat and of those, just two ended with a surplus.⁴⁸ Neither of them ran again. It would appear, once more, that a provision that allows an independent to reclaim a surplus has never been used.

70. In 2018 the *Canada Elections Act* was amended to allow independents to save and reclaim a surplus. At this point in time, because not all financial reporting from the 2019 election is available, a complete picture of behaviour under the new rules is not yet available. Of the 125 independent candidates that ran in 2019, just 70 have a financial statement on the Elections Canada website.⁴⁹ Of those, just three have filed a Statement of Surplus although there will be others judging from the returns. Time will tell if any reclaim those surpluses.

71. The report of the Parliamentary Committee that reviewed the legislation said very little about the reasons for the change, only stating that it “serves to level the playing field between candidates representing political parties and those who run as independents.”⁵⁰ They did not present any evidence for this belief nor was any presented to the committee and 16 of the committee’s sessions were *in camera*.

⁴⁸ 2013, Heather Campbell, Cowichan Valley , \$150 and 2009 Alan Clarke, Kelowna Lake Country, \$250.

⁴⁹ September 24, 2020

⁵⁰ The Standing Committee on Procedure and House Affairs, Twenty-Seventh Report. A Second Interim Report in Response to the Chief Electoral Officer’s Recommendations for Legislative Reforms Following the 42nd General Election, 42nd Parliament, First Session. (<https://www.ourcommons.ca/DocumentViewer/en/42-1/PROC/report-27/>)

72. We should also remember that a very significant portion of party candidates, probably at least a third to a half, do not end with a surplus to transfer because they raise so little money, as Table 3 showed. Only candidates from the major parties, and not even all of them, would be transferring surpluses and sometimes deficits to electoral district associations. The experience of established parties and their candidates is not the experience of the 25 other parties that ran candidates in the 2018 Ontario general election.

73. Any surplus that a candidate returns to a local association is not sequestered and saved for the next campaign in the way that the Applicant's proposal would work for independent candidates. It goes back to the constituency association and is often partially seized by the central party to pay its costs. If the local party gets to keep some, it is spent on activities promoting the party at the local level.

74. Preserving and reclaiming a surplus also raises troubling questions for contributors to independent candidates. Parties have reasonably stable and known ideological positions and long run party attachments suggest that voters trust them to favour certain solutions. Independent candidates have no ideological bridle to keep them in check. They can advocate one idea at one election and, should they stand again, an opposite idea at a subsequent election. Donors at the first election now have the troubling thought of some of their contributions being saved and then spent to support a candidate with which they now disagree. With those contributions go public funds in the form of contribution tax credits that have been directed to this candidate on an initial premise that later changes.

75. Half of Canada's provinces have now run medium to long-term experiments with the return of an independent candidate's surplus provision. The overwhelming conclusion

from the data is that the provision has almost never been used. True independent candidates seldom run more than once as I have shown, and seldom if ever accumulate a surplus even when the rules allow them to do so. This suggested reform has done nothing to encourage different behavior because it misunderstands what motivates the large majority of independents.

C. Please explain your views on limiting registration for constituency associations under the *Election Finances Act* to those constituency associations that are endorsed by a registered political party.

76. Professor Loewen and Dr Morden and Mr. Hillier appear to make the argument that independent candidates and independent members should be able to register an electoral district association so that money can be raised before the election campaign begins. It is clear that they are proposing that a sitting member of the Legislature who has been removed from a caucus should be able to form an independent electoral association mostly so that they can raise money, access the contribution tax credit and accumulate resources to transfer to their independent campaign should they decide to run. This reform would also permit a newly elected independent to form an association for the duration of their time in the Legislative Assembly. Since this reform is now in effect in BC and Alberta and other variants enacted elsewhere, it is useful to look at the experience and efficacy of these provisions. But before doing so, I want to emphasize that it is unclear whether Loewen and Morden and Hillier are proposing that even true independents, prospective candidates who are not independent members, should be allowed to form electoral district associations or some variant of this reform and what its effect might be.

77. Loewen and Morden refer to the *Canada Election Act* provision that allows candidates to appoint an official agent and open a campaign bank account and accept contributions before an election is called, something of a “halfway house reform”, not an electoral district association but an expanded campaign period. The interpretation of this provision reads: “The campaign can start incurring expenses and accepting contributions, loans or transfers before the election is called as long as the campaign has an official agent and a bank account. Keep in mind that tax receipts cannot be issued for contributions received before the candidate is officially confirmed by the returning officer.”⁵¹ Loewen and Morden suggest that “the role of independents in the federal Parliament has been strengthened through legislative reforms, namely the longstanding practice of allowing independent candidates to raise money before election periods,”⁵² yet they offer no evidence to support this assertion. I did not do a systematic study of the percentage of independent candidates who took advantage of this provision over several elections. However, in 2019, as one might expect given all of the findings above, the two independent members at dissolution who ran as independent candidates, Jody Wilson Raybould and Jane Philpott, did raise very significant sums of money in the pre-campaign period. As much as 43% of Wilson Raybould’s disclosed contributions came before the election was called and so contributors should not have received a tax credit. Of all of the money raised by independents prior to the writ, by 13 in number or 11 percent of all independent candidates, 87 percent of the money was raised by the two

⁵¹ Elections Canada, The Political Financing Handbook for Candidate and Official Agents (November 2019) p. 12
https://www.elections.ca/pol/can/man/ec20155_c76/2019-09_e.pdf . This is attached as **Exhibit M.**

⁵² Loewen and Morden, p. 7.

independent members using their very substantial resources and connections that other true independents manifestly did not have. So once again this reform has, in practice, helped independent members and not true independent candidates.

78. It is likely that there has been just a single instance of an independent Alberta MLA registering an electoral district association since the changes to election finance rules in 1977.⁵³ In 2010, Dave Taylor, who was elected as a Liberal member in 2008, resigned from the caucus in dissatisfaction with the party leadership and registered an independent electoral district association in Calgary-Currie.⁵⁴ However, Taylor's experiment with independence was short-lived as he joined the Alberta Party in 2011, becoming their first sitting MLA.⁵⁵ Taylor was not a candidate in the 2012 General Election. His independent association was deregistered by Elections Alberta in 2011 and the \$4,600 raised by the electoral district association was subsequently forfeited to Elections Alberta for failure to comply with reporting rules.⁵⁶ Since 1993, seven Alberta MLAs have sat as independent members at dissolution and therefore could have registered an electoral district association, but none did. Four of the seven contested the next election as an independent and lost but still they did not register an association to help with fundraising prior to the election. Since no independent candidate has won election since 1982, there are no further examples.

⁵³ Registrations are reported in the Annual Report of the Chief Electoral Officer of Alberta. Reports are available online back to 2000 and just the one independent registration was found.

⁵⁴ MLA Resigns from Alberta Liberals, slams party, *Edmonton Journal*, April 12, 2010

⁵⁵ "Taylor becomes Alberta Party's first MLA." CBC News, January 24, 2011

⁵⁶ 2011 Annual Report of the Chief Electoral Officer, Edmonton, AB, Chief Electoral Office 2012, p.5)

79. BC independent MLAs have the right to form an electoral district association but again this has been infrequent. In 2013, three independent candidates formed associations. John van Dongen was an incumbent and a former Liberal Cabinet Minister who crossed the floor to the Conservative party for a few months and then became an independent member who ran and lost the next election. This long-serving member clearly had a loyal following and experience with an electoral district association and successfully raised more than \$71,000 to transfer to his campaign. It seems possible that he could have raised that money just as easily at the beginning of the campaign period. Bob Simpson, a former NDP member removed from caucus also formed an association and raised almost \$28,000 for his campaign. The final candidate to take advantage of the reform was an incumbent independent, Vicki Huntington, who has been discussed previously. One other candidate, Paul Nettleton, formed an association for the 2005 election. He had been a two term Liberal but was removed from caucus because of policy dissent. Only Huntington was re-elected.

80. Saskatchewan has a different approach. *The Election Act* does not have any registration requirements for electoral district associations so nothing would prevent an independent candidate from creating an informal one. As there is no regulation there is no record or data to determine if informal associations have been formed. But as Table 2A shows, there have been just 17 independent candidates in the past six elections and not a single independent elected since 1948, This strongly suggests that something like the reform discussed by Mr Hillier has not helped any independent candidates in Saskatchewan gain office.

81. New Brunswick has chosen yet another path. Very briefly, they divide independent candidates into those who spend next to nothing and those who spend more and accept

contributions. The latter group can form an association in between elections but can spend only trivial amounts prior to the beginning of the election. Once again, these provisions do not appear to have helped elect independents as the last win was in 1912.

82. This brief description of other provinces' experiences suggests that variants of the suggested reform have had little or no effect on outcomes for independent candidates. The Applicant claims this reform would create fairness but that is not at all apparent from the record.

83. More importantly, the suggested reform creates even greater *unfairness* within the class of all independent candidates and gives a further advantage to a tiny minority of the class who already have substantial advantages. True independent candidates would not be permitted to raise funds in advance of a campaign and yet would, in some circumstances, have to contest elections against independent members with this advantage. If his proposed reform would apply only to independent members, as in Alberta and BC, it would not help true independents. If it applied to all independents, it would be a radical change not present in any Canadian jurisdiction.

84. I have not had the opportunity to look closely at the now-disappeared electoral district associations of independent candidates in British Columbia or Alberta, but they must have been and will be very different from party associations. It would appear that the sole purpose of an independent association would be to build a campaign organization to support one individual. The nomination function that party associations fulfill would be unnecessary in an independent association. Party associations also take part in party policy development. They debate and promote policy measures that can be adopted in convention and become components of an election platform. They raise money for the local and central party. They are also the cornerstones of local party

financial regulation that depends upon local members having a greater loyalty to party than to any candidate. None of this would be true for independent associations and in some sense they could be said to have an unfair advantage over party candidates.

85. There is also the possibility that permitting independent members to raise funds outside the election period would increase the potential for misuses of the political tax credit. The tax credit for political contributions is a sliding scale reimbursing smaller contributions at a higher rate through a refundable tax credit.⁵⁷

86. Over the years, Elections Ontario has ruled in a variety of cases that certain contributions are not solicited for purposes within the *Election Finances Act*. Such specific purposes include to assist refugees, to finance candidates at a municipal election, to provide landscaping for a public park, to fund advertising for “peace education”, to fund a candidate running for an office within a political party, to foster improved relations with Latin America, to support the YES Committee in the federal referendum, and to pay legal costs for an officer of a constituency association in defending a lawsuit. Generally speaking, donations for groups or causes that would not themselves be entitled to tax receipts are not eligible for tax receipts in Ontario.⁵⁸

87. As we have seen, the ideas of some independent candidates should not be granted the legitimacy of candidacy and public funds should not be used to underwrite those views. Parties try to weed out candidates with unacceptable views, yet those might end

⁵⁷ For the 2019-20 tax year this is estimated to be 10 million dollars. See Ontario, Financial Accountability Office, Tax Expenditures: Oversight, Growth and Distribution Table 6-6; (https://www.fao-on.org/en/Blog/Publications/tax_expenditures_2020). The provisions of Ontario’s Political Contribution Tax Credit are described here: <https://www.fin.gov.on.ca/en/credit/pctc/>

⁵⁸ Elections Ontario, CFO Handbook for Constituency Associations 2020. P.43 , attached as **Exhibit K**.

up gaining greater legitimacy and funding if all independents could form an association. At the very least, much more thought and study needs to go into the possible outcomes of independent candidate associations.

D. Additional Comments on Professor Loewen and Dr Morden's report

i. The Royal Commission on Electoral Reform and Party Financing

88. Professor Loewen and Dr. Morden refer to the Royal Commission on Electoral Reform and Party Financing, also known as the Lortie Commission, as an inspiration for the discussion of fairness in the rules relating to independent candidates. I believe they overstate this case as the Commission's concern for the plight of independents was about as peripheral as independent candidates are in elections. Some background is needed.

89. The Lortie Commission was a response to the 1988 Federal General Election when corporate interests spent millions of dollars in advertising in support of free trade, overwhelmed political party spending limitations and, some believed, help re-elect the Mulroney government. Many voices called for restrictions on spending by corporations, unions and other associations during election periods as well as more open and transparent party financing measures. The Lortie Commission was meant to address campaign spending and party finance issues but did make recommendations on a wide range of other issues. One of the report's six core objectives was "strengthening political parties as primary political organizations" while another was to "promoting fairness in the electoral process." The situation of independent candidates was very much an afterthought. The party strengthening objective was a main preoccupation of the report and further cemented the importance of state financing in parties. The fairness objective

turned out to be the tool to justify the broadening of campaign expenditure limits and the increasing reliance on public subsidies for parties.

90. The two volume 750-page report made 267 main recommendations and several times that number of sub-recommendations. It produced 23 volumes of over 100 research papers, but the issue of independent candidates received two full pages of discussion, two recommendations and one research paper, possibly the only published research paper on independent candidates in Canadian political science.⁵⁹ Many recommendations such as those on limiting third party spending and a permanent register of voters did come to pass while others like electoral districts for Indigenous voters, subsidized political party foundations or initiatives to increase the number of female candidates never came into existence.

91. The Lortie Commission did recommend that independent candidates be permitted to reclaim campaign surpluses at a subsequent election and it recommended allowing independent *members* to register constituency associations (recommendations 1.6.12 and 1.6.13). The latter recommendation was inspired by Alberta's similar provision and it referred directly to the province in the report. There was no in-depth research to support the efficacy of either of these recommendations partly because of the lack of transparency of campaign spending at that time at both the federal and provincial levels. There was no data to study and these ideas seemed "fair" to the Commission even if their effects were unknown. It is surprising how often campaign legislation is a trial and error process. But even if they made sense to the Commissioners, the realization of these changes was

⁵⁹ Bertram, *supra* note 4 above.

far from urgent and eight subsequent Governments ignored the recommendations despite the Chief Electoral Officer's periodic urgings. **ii. The Cartel Theory**

92. Professor Loewen and Dr. Morden believe that the *Cartel Theory* is a useful - even accurate - description of the behaviour of political parties in Ontario, and from that, deduce that Ontario legislation is unfair to independents. The Cartel Theory, as originally developed by Katz and Mair,⁶⁶ argues that major parties, those who hold or are likely to

⁶⁶ See: Richard S. Katz and Peter Mair, "Changing Models of Party Organization and Party Democracy: The Emergence of the Cartel Party," Party Politics Vol 1. No.1 pp.5-28; Richard S. Katz and Peter Mair, "The Cartel Party Thesis: A Restatement," Perspectives on Politics, Vol. 7, No. 4, pp. 753-766.

hold government, develop election regulations to exclude or hobble potential competition from minor parties and shift the source of party financing from reliance on individuals and corporations to funding from the state, thus freeing themselves from some degree of public influence. Parties, the theory suggests, do not behave as a conspiratorial cabal; they still seek advantages over other competitors in rule changes; but the major parties at least share similar goals to limit and exclude competitors, and that makes them look like a cartel from the outside. MacIvor looked at Canadian Federal parties through the lens of the Cartel Theory but dedicated just a couple of sentences to independents and did not provide any evidence.⁶⁰

93. There are two serious problems with this line of argument as support for the Applicant's requests. First, neither of the Katz and Mair articles referred to in the report of Loewen and Morden mention independent candidates at all. The theory is about

⁶⁰ Heather MacIvor, "Do Canadian Political Parties Form a Cartel?" Canadian Journal of Political Science / Revue canadienne de science politique , Vol. 29, No. 2 pp. 317-333.

parties. It is only by inference that one might conclude that major parties would aim their collusion at excluding independent candidates as well. But all of the research presented above shows the immense futility of independent campaigns taken as a whole. It seems unimaginable that parties are threatened by independents.

94. Second, the discussion above of Ontario regulations for independent candidates and party registration as well as the comparative data shows that Ontario has one of or maybe the least restrictive set of rules for independent candidates and new party participation in elections. More parties, 28 of them, won votes in Ontario in 2018 than at any time in the past and the number has grown very significantly in recent years.⁶¹ Ontario is also a leader in the percentage of districts with independent candidates, surpassed only by BC.

Conclusion

95. In my opinion, independent candidates in Ontario elections suffer no systematic disadvantages because of the campaign and party finance laws. Independent candidates must do some things differently, but they have alternatives that could create equal circumstances were independent candidacies willing to execute more effective campaigns. As they are now, almost all independent campaigns are token efforts that are not realistically aimed at gaining office.

96. The ultimate guarantee of equality between independent and party candidates is the spending limit. Within the electoral district, all candidates are limited to the same expenditure totals. Party candidates do benefit, sometimes, while at other times they are hurt by central party campaigns. Losing party candidates will sometimes blame the leader

⁶¹ See Table 1B Column 16, attached at **Exhibit F**.

and the central party campaign for their own local defeat. The recent 2020 BC General Election seems one example of this. But leaders and policy and platforms are something independent candidates eschew. They want nothing to do with, in their view, the slavish adherence to party principle. It is at the least contradictory to make a virtue of being outside parties while at the same time wanting to benefit from some of the things parties provide such as province-wide campaigns.

97. As I have shown, the tiny number of independent members who become independent candidates have very significant advantages over other independent candidates and in some cases even over other party candidates. I would certainly judge that to be unfair, but the balance point for fairness is elusive at best. The current legislation does not prohibit independent candidates from potentially competing on an equal footing with candidates from parties.

AFFIRMED by videoconference

From Perth, Ontario (location of affiant) To
Toronto, Ontario (location of lawyer
administering oath)

This 30th day of October, 2020



Commissioner for the Taking of Affidavits
Otto Ranalli (LSO# 72362U)

ROBERT MACDERMID

Table 1A. Independent Candidates in Ontario General Elections 1945-2018

Year of general election	Number of Independent and No Affiliation campaigns	Number of electoral districts with Independent candidates	Percent of electoral districts with Independent candidates	Independent candidates as a percent of all candidates	Total votes for all Independent candidates	Valid votes in electoral districts with an Independent candidate	Percent of votes for Independent candidates in electoral districts where they contested	Valid votes cast in Ontario	Percent of votes cast for Independent candidates as a percentage of all votes	Independent candidates elected
1	2	3	4	5	6	7	8	9	10	11
2018	32	28	22.6	3.9	8,226	1,315,897	0.63	5,744,860	0.14	0
2014	14	14	13.1	2.3	3,816	543,941	0.70	4,820,547	0.08	0
2011	36	29	27.1	5.5	9,021	1,190,447	0.76	4,316,382	0.21	0
2007	32	28	26.2	5.3	8,326	1,203,314	0.69	4,423,898	0.19	0
2003	24	23	22.3	4.6	13,211	953,917	1.38	4,497,244	0.29	0
1999	62	50	48.5	10.9	26,980	2,095,170	1.29	4,390,207	0.61	0
1995	60	51	39.2	9.2	33,077	1,594,392	2.07	4,158,370	0.80	1
Total	260	223								
Mean	37.1	31.9	28.4	6.0	395		1.1		0.3	
1990	25	22	16.8	4.1	13,307	636,351	2.09	4,018,079	0.33	0
1987	19	17	13.1	3.8	13,632	483,033	2.82	3,777,311	0.36	0
1985	28	25	20.0	6.3	27,368	749,175	3.65	3,635,699	0.75	0
1981	27	21	16.8	6.2	10,585	529,739	2.00	3,182,484	0.33	0
1977	25	21	16.8	5.3	7,415	566,614	1.31	3,341,844	0.22	0
1975	17	15	12.0	3.7	4,093	367,858	1.11	3,306,397	0.12	0

1971	23	23	19.7	6.0	16,959	661,195	2.56	3,292,717	0.52	0
1967	5	5	4.3	1.4	2,382	91,899	2.59	2,421,227	0.10	0
1963	7	6	5.6	2.1	2,759	118,431	2.33	2,165,773	0.13	0
1959	2	2	2.0	0.7	832	33,112	2.51	1,882,572	0.04	0
1955	5	5	5.1	1.6	9,169	99,037	9.26	1,761,525	0.52	0
1951	4	4	4.4	1.5	1,869	96,289	1.94	1,776,616	0.11	0
1948	1	1	1.1	0.3	1,766	13,877	12.73	1,758,037	0.10	0
1945	14	12	13.3	4.4	11,895	280,251	4.24	1,765,793	0.67	0

Table 1B Independent Candidates in Ontario General Elections 1945-2018

Year of General Election	Number of female Independent candidates	Percent of female Independent candidates	Number of female candidates	Female candidates as a percent of all candidates	Number of parties winning votes	Number of all independent candidacies that declared a surplus	Percent of all independent candidates that ran consecutively and could have reclaimed a hypothetical surplus	<i>Independent members</i> at dissolution of previous parliament	Number of Independent members at dissolution that ran as independent candidates	Number of Independent members at dissolution that ran and won as independents	Percent of single election Independent candidacies
1	12	13	14	15	16	17	18	19	20	21	22
2018	5	15.6	291	35.4	28	5	3.1	3	0	0	
2014	1	7.1			20	2	14.3	0	0	0	
2011	3	8.3			20	4	8.3	0	0	0	
2007	4	12.5			12	4	12.5	0	0	0	
2003	3	12.5			9	2	29.2	1	0	0	
1999	14	22.6			11	2	11.3	1	0	0	
1995	8	13.3			10	5		2	1	1	
Mean or N	5.4	13.1			16	24		7			91.8

Table 1C. Independent Candidates in Ontario By-Elections 1995-2018

Byelections	Number of byelections	Number of Independent candidates	Number of by-elections with Independent candidates	Percent of by-elections with Independent candidates	Total votes for all Independent candidates	Valid votes in by-elections with an Independent candidate	Percent of votes for Independent candidates in byelections	Independent Candidates Elected
1995-2018	42	41	22	52.4	8,026	768,062	1.04	0

TABLE 2A. Independent Candidacies at the Federal and Provincial Levels in Canada.

Province	Period	Number of general elections	Total number of Independent campaigns	Average number of Independent and No Affiliation campaigns per election	Average percent of electoral districts with Independent candidates	Average Independent candidates as a percent of all candidates	Average percent of votes for Independent candidates in electoral districts they contested	Average percent of votes for Independent candidates as a percent of all votes	Independent candidates elected in this period	Date of the last Independent candidate elected
1	2	3	4	5	6	7	8	9	10	11
BC	1996-2017	6	174	29.0	30.1	7.2	4.1	1.3	2	2013
Alberta	1993-2019	8	124	15.5	16.8	4.0	3.3	0.5	0	1982
Saskatchewan	1995-2016	6	17	2.8	4.8	1.3	2.8	0.2	0	1948
Manitoba	1999-2019	6	19	3.2	5.3	1.5	4.1	0.2	0	1969
Ontario	1995-2018	7	260	37.1	28.4	6.0	1.1	0.3	1	1995
Quebec	1994-2018	8	278	34.8	22.5	4.9	1.9	0.4	0	1966
NB	1991-2018	8	44	5.5	10.2	2.6	3.9	0.4	0	1912
NS	1993-2017	8	47	5.9	11.4	3.2	3.8	0.4	0	1988
PEI	1996-2019	7	6	0.9	3.2	0.9	4.4	0.4	0	1919
NFLD	1999-2019	6	36	6.0	12.7	4.6	6	1.1	2	2019
Canada	1993-2019	9	654	75	21.8	4.9	2.2	0.5	7	2019

TABLE 2B. Independent Candidacies at the Federal and Provincial Levels in Canada.

[illegible]

Canada	1993-2019	9	12.8	26.0	45	21	5	15.9	8.4	82.4
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Table 3. General election spending by candidates in Mississauga-Malton, 2018.

Candidate	Party	Candidate expenditure subject to limitation: CR1 form	District association expenditure subject to limitation: CR3 form	Total expenditure subject to limitation	Electoral district expenditure limit	Total expenditures as a percent of the limit	Votes	Percent of votes
Deepak Anand	Progressive Conservative	\$41,682	\$25,308	\$66,990	\$98,185	68.2	14,712	39.1
Nikki Clarke	NDP	\$10,971	\$0	\$10,971	\$98,185	11.2	12,351	32.8
Amrit Mangat	Liberal	\$95,033	\$3,299	\$98,332	\$98,185	100.1	7,813	20.8
Caroline Roach	Independent	\$14,797	\$0	\$14,797	\$98,185	15.1	1,187	3.2
Eryn Sylvester	Green	\$0	\$1	\$1	\$98,185	0.0	674	1.8
Alex Vezina	None of the Above Direct Democracy Party	\$0	\$0	\$0	\$98,185	0.0	217	0.6
Michelle Ciupka	Libertarian	\$0	none	\$0	\$98,185	0.0	657	1.7