Submission to

The Ministry of Community, Sport and Cultural Development

of British Columbia

On the White Paper on

Local Government Elections Reform

Issued by:

Canadian Bar Association

British Columbia Branch

Municipal Law Section

October 23, 2013

PREFACE

The Canadian Bar Association nationally represents over 38,000 members and the British Columbia Branch itself (the "CBABC") has more than 6,700 members. Its members practice law in many different areas and the Branch has established 78 different sections to provide a focus for lawyers who practice in similar areas to participate in continuing legal education, research and law reform. The Branch also establishes special committees from time to time to deal with issues of interest to the Branch.

The Municipal Law Section (the "Section") has over 130 members. The Section focuses on the law which establishes the form and powers of municipal government and regulates the manner in which such powers are exercised. The Section's Executive are:

Lindsay A. Parcells – Co-Chair;

Rina Thakar – Co-Chair;

Troy DeSouza – Legislative Liaison;

Philip Huynh – Secretary; and

Michael Hargraves – Treasurer.

The comments expressed in this submission reflect the views of the Section only and are not necessarily the views of the CBABC as a whole.

This fall, the British Columbia Ministry of Community, Sport and Cultural Development published a White Paper on Local Government Elections Reform (the "White Paper"). The White Paper proposes a new *Local Elections Campaign Financing Act* (the "Act"). The BC government expects to introduce the Act in the BC Legislature in the Spring Session of 2014.

The BC government has invited submissions on the workability and clarity of the Act, and has requested that comments be provided by October 23, 2013. Accordingly, the Section's Executive invited comments from its membership on the White Paper and Act. This Submission has been prepared on behalf of the Section in response to the government's request for comments, and consists of a summary of the comments provided by the Section's membership.

EXECUTIVE SUMMARY

The stated purpose of the White Paper is to provide election participants with advance knowledge of proposed campaign finance changes in advance of the 2014 local elections, as these changes are embodied in the Act. The purpose of the Act is to "create a more robust local government elections campaign finance system". As stated in the White Paper, anticipated impacts on local government elections participants include the following:

- Disclosure and registration by third party advertisers;
- Sponsorship information requirements for all election advertising;
- Requirements for all campaign finance disclosure statements to be filed 90 days after an election rather than 120 days;
- Banning anonymous contributions; and,
- Enabling a key role for Elections BC in the compliance and enforcement of campaign finance rules in local government elections.

The Section's Executive would like to compliment the authors of the White Paper on the comprehensiveness of the Act and the important improvements that this Act will make to the local government election process. In response to the BC Government's request for comments on the White Paper and the Act, the Section's Executive canvassed its members for feedback, which has been collected and summarized in the form of this Submission.

Many of our members raised a concern with respect with to the complexity of the Act as drafted. One purpose of the Act should be as a "workbook" for election participants; however the Act is too

detailed, complicated, and difficult for laypersons to use. Concerns were raised that an unintended consequence of this would be that participation in local government elections would be discouraged. Suggestions include shortening the Act to remove unnecessary duplication and simplifying defined terms.

The potentially broad scope of the Act, including the definition of "election advertising", was raised as another concern. The current definition would, perhaps unintentionally, capture on-line news reporting and other situations that would trigger the financial disclosure obligations under the Act. The wide net of the Act is a particular concern, given the serious penalties attached to non-compliance with the financial disclosure obligations of the Act.

Concerns were raised that Part 8 of the Act, which provides Court Orders for Relief from the financial disclosure requirements, may result in uncertainty in the election process given that the ultimate resolution of a candidate's disqualification would be determined by a hearing before the Supreme Court, the scheduling of which is not prescribed by regulation. Further, there is no prescribed schedule in which the Supreme Court must render judgment following a hearing. Some members have recommended firm dates be set in which a hearing must be held, and a court order must be made.

There are also problems identified with the proposed procedure for a local government chief election officer to bring a challenge of a nomination to Provincial Court, namely that the extremely short time span would make such a challenge impractical.

Further concerns expressed by the membership have been collected and summarized at the end of this Submission. Many members believe that in light of all the matters that require consideration and revision, that no part of the Act should take effect for the 2014 local government elections. Further, the Section's Executive requests that the government extend the comment period for the White Paper, in order to allow for further consideration by members of the Section and the Bar.

TABLE OF CONTENTS

MAIN BODY OF SUBMISSION

A. Complexity of the Legislation

Many of our members have expressed a concern about the complexity of the Act as drafted, and that it is much too detailed, complicated, and difficult to use. The Act will be used by individual candidates, elector organizations, sponsors, and other persons as a "workbook" to guide their conduct in local government elections. However, the Act is an impractical workbook for a lay reader. Further, since Council members invariably seek advice from the local government corporate officer (or other person who is or was the chief election officer), the complexity of the legislation will place a burden on local government staff. An unintended consequence of this is that participation in local government elections may be discouraged. The general consensus from the Section's membership is that the Act, which currently stands at almost one-hundred pages, should be shortened to eliminate repetition and made simpler to understand.

For example, the Act sets out separate rules for "candidates", "elector organizations", "third party sponsors", and "assent voting" participants -- yet most of the rules for each of these categories are the same and are simply repeated throughout the Act. (See, for example, sections 3.02, 4.02, and 6.14 of the Act regarding time limits for filing disclosure statements.) The Act should be streamlined to set out only once the rules common to each category, and then after to articulate the particular rules for each.

In a similar vein, attached to the end of the Act is a Schedule of "Definitions and Interpretation". Many of the definitions, however, simply consist of references to sections of the Act. The Schedule does

not appear to be necessary to the extent that it simply refers to definitions already contained in the main body of the Act.

Members stated that some of the defined terms in the Act are unwieldy and difficult to understand. One member cited, as an example, the multi-part definition of "sponsor of election advertising" set out in section 1.10 of the Act. There is also confusion with the use of the terms "campaign period" and "election campaign". Lay people may find it difficult to follow the different sets of rules applicable to a "campaign period" versus "election campaign", or to even determine which set of rules apply in the circumstances at hand. At the very least, the nomenclature of these terms should be changed to provide greater differentiation between the two.

B. Scope of Act

Concerns were raised that the definition of "election advertising" in section 1.06 casts an unnecessarily broad net. Election advertising is the "transmission to the public by any means" during the campaign period, subject to certain exclusion under subs. 1.06(2). One exclusion is "the transmission of an expression by an individual, on a non-commercial basis on the internet, by telephone or by text messaging, of his or her personal views" [subs. 1.06(2)(d)]. This would arguably not exclude, for example, a person putting up a poster on his or her living-room window, and would subject him or her to the financial disclosure requirements of the Act.

Similarly, subsection 1.06(2)(a) excludes "the publication of without charge, in a bona fide periodical publication or a radio or television program, of news, an editorial, an interview, a column, a letter, a debate, a speech or a commentary." This would arguably not exclude on-line news sources, like the Vancouver Sun on-line or CBC News on-line.

Concerns were raised about the penalties for noncompliance with the Act. Under sections 9.14 and 9.15 any offence, whether it is considered a "higher penalty offence" or "lower penalty offence" carries with it a potential fine and term of imprisonment. Further, the failure to file the disclosure statement is considered a "higher penalty offence". Under section 154 of the current *Local Government Act*, higher penalties are generally reserved for such offences as "vote buying" and "intimidation", which may often include elements of a fraudulent scheme or intention. Under the *Local Government Act*, noncompliance with campaign financing rules (such as the duty to file disclosure statements) generally attracts the less severe category of penalties. The severity of punishment under the Act is particularly concerning, given the lack of clarity regarding what circumstances trigger the financial disclosure obligations, and the difficulty that lay persons will have complying with the Act as drafted.

The range of persons and groups who will be required to register as third-party advertising sponsors is broad, and consists of persons who would likely not be aware of the requirement for registration and reporting, nor of the severe penalties for non-compliance. Members have recommended a significant educational program informing the public of these changes. A poorly understood law will reduce public confidence in the election process.

C. Court Orders for Relief

Concerns were also raised regarding the procedures for Court Orders for Relief in Part 8 of the Act in relation to candidate disclosure requirements. Generally, candidate disclosure statements must be filed within 90 days after general voting day for the election [see subsection 3.02(1)], or within 120 days on paying a late filing penalty [subs. 302(2)]. Under Part 8 of the Act, candidates or their financial agents may apply to the Supreme Court for relief from the disclosure requirements. The application to court must be made before the compliance deadline for the disclosure statement [subs. 8.01(2)], and the matter must be set down for hearing by the Supreme Court no later than 14 days after the petition

is filed [subs. 8.01(5)]. However, there are no requirements in the Act concerning when the date of the hearing must be, or when a decision must be rendered by the Supreme Court following the hearing. The scheduling is left with the Supreme Court.[1]

Meanwhile, under subsection 308(2) of the Act, candidate disqualification penalties begin to apply 42 days after the compliance deadline. Although the court may in its discretion extend this time [under s. 805], it is possible that an elected candidate could be disqualified for an indefinite period of time, pending the Supreme Court proceedings. Further, the Supreme Court's order can be appealed, yet the Act sets no specific timelines as to when an appeal must be heard or an order by the Court of Appeal rendered [see s. 8.08]. There are no stays of disqualification pending the appeal [subs. 808(2)]. Therefore, the time frame as to the resolution of the outcome of an election may be uncertain.

D. Challenge to Nomination

The short length of time for a local government chief election officer to bring a challenge of a nomination to Provincial Court was identified as another problem. Under section 73.2 of the proposed revision to the *Local Government Act*, a challenge must be made by 4 p.m. on the fourth day after the end of the nomination period. Invariably, candidates file their nomination documents at the last minute on the Friday nomination deadline. The 1st day after that is a Saturday, the 2nd day after is a Sunday, and invariably the 3rd day after is Thanksgiving Monday. This effectively leaves one day - the Tuesday - for all the paperwork to be completed to commence the court challenge – which is an impossible deadline.

Further, section 73(5) of the *Local Government Act* should make clear that the nomination deadline is 4 p.m. or other usual closing time for the municipal hall. The wording "by the end of the 29th

[1] This process should be contrasted with the procedure for challenges of nomination under s. 73.2 of the proposed revisions of the *Local Government Act*, where the Provincial Court "must hear and determine the matter and must issue an order" within a prescribed period of time. Similar wording is suggested for Part 8 of the Act.

day" suggests a nomination could be filed as late as midnight. If so, addressing the short time frame for challenges is even more important.

Another comment was made that since the Elections BC disqualification list is on-line, the *Local Government Act* should allow a local government election official to refuse to accept the nomination of someone who is on the disqualification list. The local government should not have to use public monies to commence a challenge under section 73.2(5) of the *Local Government Act* if someone is on the disqualification list. It is recommended that the onus should be on the person on the disqualification list to apply to court to be removed from the list before their nomination can be accepted.

E. Implementation

Members of the Section expressed concern that the Act will be enacted during an election year. In so doing, part of the election year will be governed by the *Local Government Act*, while the latter part will be governed by the Act and the *Local Government Act*. The transition between the two sets of rules requires clear transitional provisions.

Further, concern was expressed that implementing the Act in 2014 would be too soon, and would not give sufficient time for local governments and other levels of governments to assemble the resources necessary to provide the requisite training to election participants on the new procedures. The Act should be implemented with strong supporting regulations in order to:

- provide local governments adequate time to properly plan for and implement the Act's changes;
- provide training and education to local government election officials who will be called upon to explain the Act to candidates, elector organizations, third-party advertisers, and sponsors;

- provide candidates, elector organizations, third-party advertisers and sponsors adequate time to learn about and comply with the Act; and
- ensure elections are conducted in accordance with the Act and so minimize risk of post-election litigation, candidate disqualification and election irregularities.

Under both the Act and the *Local Government Act*, campaign accounts must be set up as early as January 1 of the election year. If the Act is enacted in early 2014, elector organizations and candidates will have to apply the *Local Government Act* rules to expenses and contributions paid/received between January 1 and the enactment date of the Act and the rules under the Act thereafter. Thus, the Act requirement for separate campaign accounts for each jurisdiction (and any other differences in accounting treatment or scope of expenses) will require transitional rules or principles to be developed and understood by local government, candidates and the public prior to enactment of the Act and its supporting regulations.

F. Other Comments

The following are some additional comments and suggestions received by the membership of the Section:

- Enforcement Role of Local CEOs - In the White Paper, on page 11, an explanation should be provided for the following statement: "Local chief electoral officers (local CEOs) will continue to have an "on-the-ground" enforcement role." What is meant by this? Section members have expressed the view that the Act does not adequately define the respective roles and responsibilities in the area of investigation and enforcement as between Elections BC and the local chief electoral officer.

- Stand-Alone Assent Voting - The Act seems unclear whether it applies to "assent voting" that is done entirely separate from any election (that is, entirely separate from a general local election

or a by-election). Section 1.02 suggests that it does apply. But subsections 1.06(1)(b) and (c) suggest otherwise.

- Local Government Promotion - The legislation should make clear that a local government may spend public money promoting a matter that is subject to assent voting (which court decisions have confirmed) – without being subject to any of the rules in this legislation. It is unclear whether subsection 7.02(2) of the Act is sufficient for this purpose.[2]

- Early Campaigning – Sections 1.04 and 1.05 of the Act define "election campaign", however, it is unclear whether the Act provides a commencement date, so that the first day of an "election campaign" can be known. Therefore, the term could capture a period of many months or years in advance of the election. Although the Act defines the "campaign period", there is no clear link between the "campaign period" and an "election campaign".

- Printing of Ballots – The Act should confirm that no requirement for updated information (see, for example, subsection 2.05(6) of the Act and elsewhere) will affect ballots that have already been printed. The time frame for local governments to print ballots is tight and they are a major election expense.

- Statutory Duty of Local Government Chief Election Officers - Subsection 42(1)(d) of the *Local Government Act* statutorily requires local government chief election officers to "do all other things necessary for the conduct of an election in accordance with this Part and any regulations and bylaws under this Part". Careful consideration should be given to powers given under this legislation to local government election officers – such as the ability to request a solemn

[2] Subsection 7.02(2) of the Act states: "Exemption for local governments – Part 6 [Third Party Election Advertising] does not apply to assent voting advertising by a local government."

declaration under Subsection 5.03(2) or (3) of the Act – because the presence of this power may create a duty to do so on the part of local government chief election officers.

Again with reference to subsection 42(1)(d) of the *Local Government Act*, it may also be good for the Act to decide the question of whether local government chief election officials have a statutory obligation to refer apparent election offences to the police for investigation.

- Notices to Local Government Election Officer - Section 4.04(3) of the Act and elsewhere requires notice to be given to the local government election officer of a failure to file the requisite disclosure statement. However, it is the BC Chief Electoral Officer who will ultimately, under section 10.03 of the Act, prepare and publish a disqualification list for both candidates and elector organizations. The Act should therefore explain the purposes for which the particular notices are provided to the local government election officer.

- Information to the Public – Subsection 10.02(1) of the Act requires the local government election officer to provide public access to Elections BC information. It is unclear, however, how local governments will be able to obtain information from Elections BC in order to provide a copy to the public at the counter. If Elections BC does not deliver the information to the local government, the local government would have to provide a computer at municipal hall available to the public so that they could review this information on the Elections BC website – assuming the information will be there.

- Fees for Election Materials – Subsection 10.02(3) of the Act states that a local authority, by bylaw, may impose a fee for providing election materials. However, subsection 194(3) of the *Community Charter* does not allow imposition of a fee in relation to elections or other voting. These provisions should be clarified to ensure that they do not contradict each other.

- Document Retention and Destruction - Section 11.06 of the Act sets out provisions regarding the retention and disclosure of records. Further examination should be made concerning whether the *Local Government Act* or other legislation needs corresponding changes in relation to the retention and destruction of local government election information.

- Report by Local Authorities - Section 11.08 of the Act requires local authorities to report non-compliance. Since disclosure statements are filed with the BC chief election officer, it is not clear why local authorities must prepare a report – or even how they could do so. Is the report to be based on the published list prepared by Elections BC? If the purpose of the report is to allow Council to consider whether to declare an elected Council member is disqualified under section 111 of the *Community Charter*, why does the report need to include unelected candidates and elector organizations?

- Anonymous Contributions: The Act does not allow for anonymous contributions of any kind – including minor fund raising events. However, in provincial elections governed by the BC *Election Act*, anonymous contributions are allowed at such events provided certain requirements are met. Some Section members have expressed support for restrictions on anonymous contributions similar to the *Election Act*.

RECOMMENDATIONS AND CONCLUSION

As discussed above, the Section has received many recommendations from its members. The major ones include the following:

- Simplifying the Act by removing repetition and simplifying a number of its defined terms;
- Clarifying the scope of the Act, including the definition of "election advertising";
- Providing certainty as to when Court Orders for Relief under Part 8 would be resolved; and
- Putting the onus on the person on the disqualification list to apply to court to be removed from the list before his or her nomination can be accepted, or at least providing more time for local government chief election officers to bring a challenge of a nomination in Provincial Court.

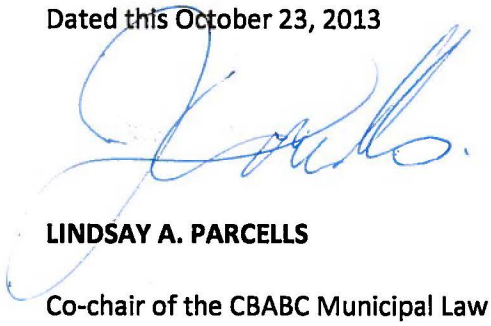
Many members believe that it would be impractical to implement the Act too soon, and would not give a meaningful opportunity for local governments and other levels of governments to assemble the resources necessary to provide the requisite training to Councillors, candidates, financial agents, and other election participants on the new election regime. The Section recommends that these reforms should be tabled to the next election cycle. The Section also recommends that the comment period for the White Paper be extended, to allow for further suggestions from the Section's membership and the Bar.

We look forward to discussing these important matters further to assist the government in the implementation of this important legislation.

Communications in this regard can be directed to:

LINDSAY A. PARCELLS
Lidstone & Company, 1300-128 Pender St W
Vancouver, BC V6B 1R8
Tel: (604) 899-2269
Email: parcells@lidstone.info

Dated this October 23, 2013



LINDSAY A. PARCELLS

Co-chair of the CBABC Municipal Law Section