



Chief Electoral Officer of Canada

July 29, 2019

DECISION OF THE CHIEF ELECTORAL OFFICER

Date of General Election

WHETHER TO RECOMMEND TO THE GOVERNOR IN COUNCIL A CHANGE IN THE DATE OF THE FEDERAL GENERAL ELECTION SCHEDULED FOR OCTOBER 21, 2019.

I. INTRODUCTION

The 2019 federal general election day, currently scheduled for October 21, 2019, and some of the advance polling days, coincide with Jewish holidays. On these days, members of the observant Jewish community are unable to cast a ballot or campaign.

Ms. Chani Aryeh-Bain, an Orthodox Jewish candidate who was selected in a nomination contest to represent the Conservative Party of Canada in the riding of Eglinton–Lawrence, and Mr. Ira Walfish, an Orthodox Jewish elector and political activist, brought an application to the Federal Court of Canada to judicially review my decision not to recommend to the Governor in Council to move the date of the federal general election to October 28, 2019, as the High Holiday of Shemini Atzeret falls on October 21, 2019.

On July 23, 2019, Madam Justice McDonald granted the application for judicial review and ordered that I make a redetermination of my decision and provide reasons that reflect a proportionate balancing of the rights of the applicants under the *Canadian Charter of Rights and Freedoms* (the Charter) with my statutory mandate.

In the process of reconsideration, I reviewed all materials and evidence previously available to me on this issue. I have also engaged with personnel at Elections Canada headquarters and have consulted with our Field Management Committee, which includes field election administrators from across the country, on the impact that a change in the election date would have on the delivery of Elections Canada's mandate.

My decision is also informed by the additional letters I received after the Court's decision from members of the Jewish community, including from Ms. Aryeh-Bain, Mr. Walfish, and their legal representatives, as well as from the Centre for Israel and Jewish Affairs (CIJA) and B'nai Brith of Canada League for Human Rights. These letters complement earlier interactions I had with Jewish organizations and individuals, including Ms. Aryeh-Bain and Mr. Walfish. I am grateful to the members of the Jewish community who have provided me with information and especially for the thoughtful way in which they have put forward their concerns.

What follows here are the reasons for my decision. Having carefully considered the impact of holding the election on October 21 on the ability of observant Jews to participate in the electoral process and having balanced that with my mandate to ensure accessible voting opportunities for all Canadians, I conclude that it would not be advisable to change the date of the election at this late stage. Accordingly, I will not be recommending to the Governor in Council that the date be changed.

II. THE ISSUE I AM CALLED UPON TO CONSIDER

Since the 2007 introduction of fixed election dates in Canada, s. 56.1 of the *Canada Elections Act* (the Act) provides that, subject to the exercise of the Governor General's discretion to dissolve Parliament at any time, each general election must be held on the third Monday in October in the fourth year following the date of the last general election (election day). Accordingly, the next general election is currently scheduled for October 21, 2019.

Section 56.2 of the Act grants me the discretion to recommend to the Governor in Council an alternate day for the general election if I am of the opinion that October 21 is not suitable, including by reason of its being in conflict with a day of cultural or religious significance or a provincial or municipal election. If I make such a recommendation, the alternate day must be either the next day (which in 2019 is also a Jewish holiday) or the following Monday, being October 28. Any recommendation I make to the Governor in Council must, according to the Act, be decided upon by the latter by the latest on August 1, 2019.

Should there be a change of election day, advance polling days would also be adjusted accordingly. Advance polling is fixed under s. 171(2) of the Act to be on the Friday, Saturday, Sunday and Monday, the 10th, 9th, 8th and 7th days before election day. Advance polls must be open from 9:00 a.m. to 9:00 p.m., local time.

The Act also provides electors with other voting opportunities throughout the election period by means of special ballots—ballots that can be sent by mail or filled out in person at a local Elections Canada office. If the election date were to change, the ability for electors to vote by special ballot would not change.

In making a determination as to whether or not to recommend a change in election day, I must consider the statutory objectives at play under the Act. I must then ask how the rights at issue under the Charter will best be protected in view of those statutory objectives by balancing the severity of the interference on the Charter rights with the objectives that I am called upon to deliver.

III. THE LIMITATION ON THE CHARTER RIGHTS OF OBSERVANT JEWISH CANADIANS

Members of the Jewish community, including Ms. Aryeh-Bain and Mr. Walfish, have provided me with information on the impact of holding the election on October 21 on their religious rights and their ability to participate in the electoral process.

Election day coincides with the Jewish High Holiday of Shemini Atzeret, which begins at sunset on October 20 and ends on October 21. In addition, two of the advance polling days conflict with either the Sabbath (which begins at sunset on October 11 and ends at sunset on October 12) or the first day of the festival of Sukkot (which begins at sunset on Sunday, October 13 and continues on the advance polling day of Monday, October 14). On these days, I understand that

Jewish law prohibits observant Jews from taking part in many ordinary activities, including writing, driving and working, and using any electronic devices such as televisions, computers and phones. This includes voting, volunteering or otherwise participating in election campaigns (e.g. as a scrutineer). Mr. Walfish writes that on election day, observant Jewish electors will not be able to participate in the election. He also writes that it will be difficult for observant Jews to engage in the electoral process the week before election day. I recognize that observant Jews will be precluded from voting at the polls on October 21 and, in addition, that many of them will be limited in their ability to participate in other activities through the election period owing to a conflict with the holidays.

These dates also present unique challenges for observant Jewish candidates. I am informed and I recognize that Orthodox candidates will be limited in their ability to get out the vote on October 21. Ms. Aryeh-Bain writes that neither she nor her campaign will be able to engage with electors on election day. I understand that they will be prohibited from knocking on doors of potential supporters, contacting electors by phone, email or text, and driving electors to polls who need assistance on that date. In addition, I understand that Orthodox Jews are prohibited from asking or encouraging anyone (even if they are not Jewish) from doing any work or any prohibited acts on their behalf on these holidays. I am aware of the practical impacts of this, as Orthodox Jewish candidates, therefore, will not be able to ask anyone to vote or campaign on their behalf on Shemini Atzeret, or ask anyone to act as a scrutineer to observe the voting process on their behalf at the polls. Their political activities on other days during the electoral period will also be limited by the holidays.

I do not question the sincerity of the religious beliefs that have been raised and the effect those beliefs have on the ability of observant Jews to participate in the general election, both as electors and candidates. I recognize that this situation engages their fundamental Charter rights to freedom of religion, to equality and to vote and to be qualified for membership in the House of Commons.

IV. THE STATUTORY OBJECTIVES

In forming my opinion as to the suitability of the election day, I must consider how the Charter rights can best be protected in view of my statutory objectives.

In particular and at this late stage in the electoral cycle, I believe I must pay particular attention to the impact that a change of date would have on my ability to fully meet my statutory obligations with only a limited amount of time left before the general election.

1. My Role and the Role of Elections Canada

As Chief Electoral Officer, I am the head of Elections Canada, an independent, non-partisan agency of Parliament. I exercise general direction and supervision over the conduct of elections, and I am authorized to exercise the powers and perform the duties and functions that are necessary for the administration of the Act.

The fundamental goal of Elections Canada is to be ready to deliver fair and accessible federal elections whenever they may be called. The core of its mandate is to offer all Canadian citizens aged 18 and over the opportunity to exercise their democratic right to vote and be a candidate.

More specifically, in the context of the issues at hand, my statutory duties include ensuring that voting services are provided at regular and advance polls, that poll locations are accessible and proximate to electors, and that alternative voting options are available to those Canadians who are not able to vote in person at regular or advance polls.

The office through which I carry out my mandate normally comprises some 500 permanent employees working in the National Capital Region and temporary hires working at the election. I appoint a returning officer (RO) for each of the 338 federal ridings in Canada for a 10-year term. The RO is responsible for managing and conducting the election in the riding in accordance with the Act and the instructions that I issue.

Although some may have the impression that an election is just a one-day event, conducting a nationwide general election is a highly complex undertaking that involves years of planning. It requires employing a temporary workforce of 300,000 working in over 16,000 locations across Canada to serve 27 million Canadian electors.

Many of these Canadians face a range of barriers that impact their ability to vote and/or be a candidate. These barriers can be related to geography, language, disability, work or family constraints; for some of these people, voting on election day is not an option. Part of the RO's responsibility is to know and engage with their local communities to alleviate barriers in the delivery of electoral services and provide information about voting options.

2. The Purpose of Fixed Election Dates

The purpose of a fixed election schedule informs my statutory mandate. The fixed federal election law dates from 2007. Some of the reasons for this legislative amendment included improving governance, increasing voter turnout, ensuring that all citizens know the date of the next election and increasing transparency.

Having a fixed election date has also improved Elections Canada's ability to deliver a fair and accessible election. I am also of the opinion that having such a date improves the ability of civil society to engage in the electoral process, as the election day is predictable.

Mr. Walfish writes that an election can be called upon a 36-days' notice. While Elections Canada must remain ready at all times to deliver a general election if required to do so, the existence of fixed-date elections has allowed for much more comprehensive and robust planning for the benefit of electors, candidates and political parties.

3. Proximate Polls and Accessible Voting

One of my statutory objectives is to ensure accessible polling locations. Under s. 121(1) of the Act, polling stations must be located on premises that are accessible to electors with a disability. To meet this critical requirement, Elections Canada has established a checklist of 35 criteria, 15 of which are mandatory. This checklist also reflects accessibility obligations under the *Canadian Human Rights Act*. The accessibility of polling sites is a critical component of the service I must deliver to all Canadians.

Preparations for the polling sites to be used in the 2019 election began in early 2018 based on the October 21 fixed election date. They continued over the next 18 months in view of this date. Although the fact that election day coincides with Shemini Atzeret was brought to my attention

during this period, the information I received from members of the Jewish community in August 2018 and the following months was that the religious constraints faced by observant Jews would be adequately addressed through outreach and alternative voting options and did not require a change in election day. Elections Canada's preparations to date were made on that basis. This was consistent with our experience of the 2008 general election, when election day fell on the Jewish holiday of Sukkot, during which observant Jews could vote either by special ballot or on two of the three advance polling days available under the legal regime at that time.

From April to September 2018, ROs made contact with civic administrators, school principals, school boards, community leaders and other private property owners to enquire, among other things, about the availability of their facilities for the set dates of advance or election day voting in October 2019. With school administrators, they advocated making October 21 a professional development day. ROs then visited potential polling sites, physically evaluated each one of them for compliance with the 35 accessibility criteria, and assessed their suitability in terms of proximity and familiarity to electors along with their capacity to accommodate electors in such a way as to avoid overcrowding. Those that met all the criteria, over 16,000 polling sites, were recorded as reserved for the prescribed dates of voting in the 43rd general election.

After identifying polling sites in the fall of 2018, ROs assigned polling divisions (geographic subdivisions, each comprising an average of 350–450 electors and which make up their riding) to each suitable polling site and redrew the boundaries of the polling divisions when warranted by population changes. This exercise was to ensure that the distribution of polling locations in any riding was as close as possible to the distribution of electors and—in response in part to concerns that had been raised in the 2015 general election—that all electors had places to go to vote that were located at reasonable distances. It resulted in the generation of new electoral maps for the use of candidates, political parties, and ROs, in which electors are divided into 72,223 polling divisions.

The extensive work done to identify accessible polling sites and assign electors to sites in such a way as to maximize proximity was based on the experience of prior general elections and the significant challenges encountered in this regard. This has led the agency to review the process and develop new geo-allocation software to assist field workers in their task for this election. As of today, the geography work has been completed, and approximately 74 percent of the 16,134 polling sites have been confirmed with leases signed or transmitted for signature based on agreements with landlords.

In the course of assessing the impacts of changing the election date to October 28, field personnel have expressed very significant concern about the loss of polling sites and the impact that this would have on electors from the perspective of proximity, accessibility and quality of services at the polls.

At this point in the electoral calendar, polling divisions cannot be redrawn given the complexity of the task. This means that existing groupings of electors would have to be assigned to a new location. While alternate locations may exist, they are often less accessible and less proximate to all the electors they are to serve. With time running out, it is also likely that, when faced with the loss of a facility, ROs will resort to reassigning more polling divisions to an existing and still available facility. In urban areas, the reassignment of electors to other locations creates issues of overcrowding and line-ups. In rural areas, field workers have indicated that, in many cases, the only option would be to require electors to travel outside their community to vote at polling

stations in other towns or villages several kilometres away or at locations that do not meet legal requirements for accessibility.

The deterioration of voting services for Canadians at large is a critical consideration for me when assessing the issue of whether or not to recommend a change in election day. A general reduction in the availability of polling locations and, specifically, accessible polling locations will have an impact on the ability of disabled and elderly electors to vote and may deter some electors from showing up at their polling station altogether.

4. Voting Locations in Schools or on Campuses

Section 122 of the Act mandates that, whenever possible, polling stations should be established in schools or other suitable public buildings. The rationale for this requirement is that schools make for very suitable polling stations: they are proximate in location, familiar to the community, and tend to meet the accessibility requirements of the law. In 2004, 40 percent of polling sites used during the general election were located in schools. Since that time, it has become increasingly difficult—primarily for safety reasons—to secure school sites for elections, and the number of schools available for polling sites has dropped significantly.

Understanding the preference of educational institutions that students not be in school while members of the public are on site to cast their ballots, Elections Canada wrote to school boards to invite them to consider designating October 21 as a professional development (PD) day. It began writing to the boards in August 2018, well in advance of the next general election and of the finalization of 2019 school calendars. Thirteen school boards, including school boards in Quebec, Alberta and Newfoundland, designated October 21 as a PD day.

In early July my staff contacted all 20 school boards with which we made arrangements to retain schools under their jurisdiction for ordinary or advance polling days. I can confirm that five school boards have designated as a PD day the Friday of advance polls (October 11, 2019). Schools are closed on Thanksgiving Monday (October 14, 2019), also an advance polling day. Designating October 11 as a PD day therefore allows for all four days of advance polls to be conducted at the relevant schools without students being present. Only two of these five school boards have confirmed that they will try to accommodate a date change while school might be in session.

I can also confirm that only two of the 13 school boards that have designated October 21 as a PD day would consider the option of seeking approval to change the PD day to October 28. Overall, 6 of the 20 school boards contacted felt very confident they could accommodate a date change but were in no position to make promises in this regard, as more validation would have to be made once schools are in session. Four of the school boards felt more negatively about the possibility of a date change and informed my staff that, although they would deploy efforts to accommodate an October 28 election day, they would not force schools to reschedule events already booked for that day. The 10 other remaining boards could not answer at this point in the summer, as they did not have access to individual school calendar bookings, with some school boards suggesting that ROs contact each school individually.

With respect to on-campus voting in post-secondary institutions, a pilot project was launched during the 2015 general election whereby ROs opened 39 offices at select university campuses to provide registration and special ballot voting services to students and the general public, no

matter where they lived in Canada. Elections Canada received positive feedback with respect to this initiative and more than 69,000 electors voted at these locations. Accordingly, I directed that this project be expanded in the 2019 general election from 39 campuses to some 115. On-campus voting will be available October 5–9, 2019, after all federal election candidates have been confirmed with Elections Canada. Moving the election would mean that candidates would not all be confirmed before October 9. Accordingly, to allow students to have a list of confirmed candidates on hand when voting, Elections Canada would reschedule campus voting days to the following week of October 14. Field administrators who have worked with university authorities over the last year have confirmed that this will lead to the loss of many campuses as voting locations.

The loss of schools and post-secondary campuses as polling locations for the upcoming election would negatively impact the ability of Elections Canada to provide electors with proximate and familiar polling locations to meet voter demand and limit the accessibility of the election. This is a consideration that factors significantly into my decision.

5. Other Relevant Factors

In exercising my discretion as to whether to recommend an alternative election day under s. 56.2(1) of the Act, I am directed by the Act to consider whether there is any conflict with a provincial or municipal election in addition to any possible conflicts with days of cultural or religious significance.

Nunavut's Municipal Council general election includes all 25 municipalities and is currently set by territorial legislation for October 28.

Although the October 28 conflict with the Nunavut municipal elections does not raise immediate Charter concerns, I must nevertheless consider this information in exercising my discretion, as it forms part of Parliament's statutory scheme. Mr. Walfish writes that residents of Nunavut can vote in two elections in one day. However, elections taking place concurrently in two jurisdictions create competition for local resources, including election workers and sites, and possible voter confusion. The general practice of election administrators in Canada is to try to avoid competing elections whenever possible.

V. GIVING EFFECT AS FULLY AS POSSIBLE TO THE CHARTER PROTECTIONS AT STAKE

1. Ways to Vote and Alternate Polling Days

The right to vote includes the ability to play a meaningful role in the electoral process. The Supreme Court of Canada has recognized that this signifies a certain level of participation, which to me means that each citizen has a genuine opportunity to participate in the electoral process, whether on election day or at another time during the electoral period.

In addition to voting on election day, or at advance polls, all electors including observant Jewish electors can also vote by special ballot, as mentioned above. Special balloting is a convenient voting tool, meant to meet the changing needs of the electorate and to increase accessibility of the vote. Special ballots are designed to accommodate electors in a number of ways, including by allowing in-person voting in hospitals or at remote mining operations; they are a flexible option that can be offered at the local level based on community needs.

In the upcoming election, an elector can register to vote by special ballot on any day from the election call to October 15. An elector can register online, by mail, or in person at a returning office (a local Elections Canada office), Elections Canada kiosks (points of service set up in ridings as the need arises to facilitate voting, such as at a remote mining operation), or a Vote on Campus office located at a post-secondary institution.

After registering in person, an elector can either proceed to vote immediately at the location of registration, or defer voting and cast the special ballot later, including until election day itself. Electors who apply online or by mail will receive their voting kit by mail.

Observant Jewish electors are unable to vote or ask others to vote on the following dates: Saturday, October 12, Monday, October 14, Tuesday, October 15, and election day—Monday, October 21. However, there are several days during the election period (being the period between the issue of the writs and election day) where voting is not in conflict with their religious beliefs and where the special ballot process is open to them as to any other elector. Observant Jewish electors will be able to vote as follows:

- from the date the election is called (being as early as September 1 or as late as September 15), by way of special ballot by mail or at a returning office
- from Sunday, October 6 to Tuesday, October 8 (by way of special ballot by mail, returning office, Elections Canada kiosk or Vote on Campus office)
- on Thursday, October 10 (by way of special ballot by mail, returning office or Elections Canada kiosk)
- on Friday, October 11 before sunset (at an advance polling station, or by way of special ballot by mail, returning office or Elections Canada kiosk)
- on Saturday, October 12 after sunset (at an advance polling station, or by way of special ballot by mail, returning office or Elections Canada kiosk)
- on Sunday, October 13 before sunset (at an advance polling station, or by way of special ballot by mail, returning office, Elections Canada kiosk or at the acute care hospital they were admitted to)
- on Wednesday, October 16 and Thursday, October 17 (by way of special ballot by mail, returning office or Elections Canada kiosk, assuming they applied for their special ballot prior to October 15)
- on Friday, October 18 before sunset (by way of special ballot by mail, returning office or Elections Canada kiosk, assuming they applied for their special ballot prior to October 15)
- on Sunday, October 20 before sunset (by way of special ballot by mail, returning office or Elections Canada kiosk, assuming they applied their special ballot prior to October 15)

2. Action Plan for Observant Jewish Community Voting

The Orthodox Jewish population is primarily located in urban areas in 36 of 338 federal ridings (whose population is from 1 to 13.4 percent Jewish according to the 2016 census), which makes it possible to design local solutions after consulting with community members, to ensure that Elections Canada's services are targeted and responsive to local needs.

Elections Canada has taken numerous steps to ensure that the observant Jewish community is aware of its ability to vote on days other than election day, including developing an action plan to: (a) enhance its election services to facilitate voting by Jewish electors during times that they are not restricted from voting; and (b) raise awareness in the Canadian Jewish community about these enhanced services and about alternative voting options. This plan comprises six steps. It was launched in April 2019.

First, Elections Canada has required an increase to the number of staff at advance polls in electoral districts in the country with a Jewish population of 1 percent or more based on the 2016 census.

Second, Elections Canada will require that the RO in each of these districts make available a community relations officer to work with the Jewish community. That officer will conduct presentations and provide information to Jewish electors on alternative and enhanced voting options. These options could include establishing a special voting kiosk to allow for special ballot voting on days that do not conflict with religious observances in locations that are convenient for Jewish electors.

Third, ROs in these districts are reaching out to local Jewish organizations, such as synagogues and community centres, to highlight alternative voting options and the enhanced voting services that Elections Canada will provide.

Fourth, during the election campaign, Elections Canada requires that the ROs hold a meeting with confirmed candidates to provide them with information about alternative and enhanced voting options.

Fifth, ROs in the 36 ridings will make sure their reception staff is prepared to discuss alternative voting options and the enhanced voting services available. They will also increase the frontline services of these returning offices so that Jewish electors are able to ask questions or obtain information when they are not otherwise meeting their religious obligations.

Sixth, in August, Elections Canada will launch an information campaign that is designed to reach out to Jewish electors across the country to provide information about alternative and enhanced voting options. Elections Canada has worked with Jewish community leaders to develop an information package for electors, finalize communications channels, and finalize messaging for the information campaign.

VI. BALANCING THE CHARTER RIGHTS AT ISSUE AGAINST THE STATUTORY OBJECTIVES

The question before me is whether I should exercise my discretion to recommend moving the election date *at this point in the electoral calendar*. To come to this decision, I must consider how the Charter rights at issue will be best protected in view of my statutory mandate and to balance the severity of the limit on the rights of the observant Jewish electors community that are engaged by my decision with the Act's statutory objectives to deliver a fair and accessible election for all Canadians.

One option that is open to me to protect the Charter rights of observant Jewish electors and candidates is to recommend to the Governor in Council that the election date be changed to October 28, 2019.

However, the impact of a change of date at this stage in the electoral cycle on the right of all Canadians to a fair and accessible election weighs heavily in the balance.

There is no such thing as a perfect election day, especially in a country as diverse as Canada. There are always Canadians who are unable to vote on election day. At the last election, some 4.3 million voters (over 25 percent) cast their ballot prior to election day, either at advance polls or through one of the various special ballot options. For most, this may well have been a matter of preference or convenience. For many, however, this was the only practical option.

I recognize that maintaining October 21 as election day means that observant Jewish electors will have to vote in one of these alternative ways. They nevertheless have a genuine opportunity to participate in the electoral process. The Act provides considerable flexibility to tailor voting services in ways that assist electors who face challenges, especially where those electors are geographically centred and solutions adapted to the local circumstances, such as voting kiosks, can be developed. As such, I will ensure that I exercise my statutory mandate to protect their ability to vote during the electoral period.

It is my opinion that Elections Canada can fulfill its mandate of ensuring a genuine opportunity for observant Jewish electors to participate in the electoral process by providing them with, and informing them about, the opportunities to vote ahead of election day.

In particular, given that observant Jewish electors are mainly located in certain identifiable ridings, this makes it easier for ROs, community relations officers and field liaison officers to put together, under my guidance, a plan for them to vote at advance polls and by way of special ballot. As such, I believe that I can mitigate the impact on their right to vote by providing them with these other opportunities to participate in the electoral process.

By contrast, the impact of losing accessible, proximate and familiar polling stations is not as easily remedied through targeted communication and engagement with voting populations in particular ridings. It is my opinion that the loss of these polling stations would have an adverse impact on the accessibility of the election across Canada.

Moreover, moving the election date will not remove all of the barriers that Jewish electors face in voting this election cycle. If the date is moved, the new dates for the advanced polls will also overlap with Jewish holidays.

For the reasons set out above, at this point in the electoral calendar, recommending a change in election day to accommodate observant Jews would negatively impact the provision of accessible voting services across Canada.

I recognize that in the case of an observant Jewish candidate, the impact of not moving the election date is very significant. Other than moving the date of the election, no arrangement can be made that would truly allow her to meet her religious obligations and compete on equal terms with non-observant candidates. This is a difficult situation that directly touches upon the very core values of our democracy. I nevertheless believe, when considering the entirety of my statutory mandate, and especially at this time in the electoral calendar, that it is not in the public interest for me to recommend a change to the date of the general election. This is not a decision that I make lightly, but with a view to providing the broadest possible range of accessible voting services to the population at large.

VII. DECISION

For all of the reasons given above, I will not be recommending to the Governor in Council an alternate day for the 2019 general election.

I am committed to continuing to work with the Jewish community to maximize voting options within the existing calendar in ways that are convenient and consistent with their religious beliefs.