



Government
of Canada

Gouvernement
du Canada

Commissioner of
Canada Elections

Commissaire aux
élections fédérales

2016-2017 ANNUAL REPORT

COMMISSIONER OF CANADA ELECTIONS



CONTACT US

ONLINE:

www.cce-cef.gc.ca

SECURE ONLINE COMPLAINT FORM:

[https://www.ccf-ccc.gc.ca/
complaint/index_e.aspx](https://www.ccf-ccc.gc.ca/complaint/index_e.aspx)

TELEPHONE:

1-855-759-6740

FAX:

1-800-663-4906 or
819-939-1801

MAIL:

Commissioner of Canada Elections
P.O. Box 8000 Station T
Ottawa, Ontario
K1G 3Z1

EMAIL:

info@cef-ccc.gc.ca

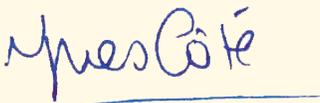
May 12, 2017

Ms. Kathleen Roussel
Acting Director of Public Prosecutions
160 Elgin Street, 12th Floor
Ottawa, Ontario
K1A 0H8

Dear Ms. Roussel:

Pursuant to subsection 16 (1.1) of the *Director of Public Prosecutions Act*, I am pleased to submit the 2016-2017 Annual Report for my office. In accordance with the requirements described in subsection 16 (1.1), this report provides an overview of our activities and operations from April 1, 2016 to March 31, 2017, but contains no details of any investigations.

Sincerely,



Yves Côté, QC
Commissioner of Canada Elections

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COMMISSIONER'S MESSAGE

I am pleased to present the 2016-2017 annual report for the Office of the Commissioner of Canada Elections (CCE).

Although the majority of complaints are received and resolved during an election period, our Office does not sit idle between elections: we use the time between elections to pursue more complex and in-depth investigations and to review the referrals we receive from Elections Canada's political financing division.

We also use this time to reflect, provide input and propose solutions to some of the challenges we face now, or may face in the future.

This year, we provided advice to the Chief Electoral Officer and his staff as they compiled their report on recommendations for legislative amendments following the 42nd general election. These included recommendations regarding:

- the ability to negotiate broader terms for compliance agreements and the creation of a regime of administrative monetary penalties (AMPs); and
- the power of the Commissioner to seek a court order to compel witness testimony in appropriate circumstances and subject to strict conditions.

Although the report provides for separate recommendations for compliance agreements and the AMPs regime, these tools could be used together. This would allow

for a coordinated use of both mechanisms in a manner that leveraged the compliance effects of each of these tools.

These recommendations are currently under consideration by the House of Commons Standing Committee on Procedure and House Affairs. I hope that Parliament will see the value of these recommendations and will move to adopt them in the near future.

2016-2017 also brought with it the introduction of new legislation, which, if adopted, would bring about a number of changes to the *Canada Elections Act* (the Act). Among the changes proposed by Bill C-33, which was tabled in Parliament on November 24, 2016, is the transfer of the CCE back to the Office of the Chief Electoral Officer. This amendment would reduce some of the impediments to obtaining information that currently exist as a result of the CCE being a separate institution. From an operational perspective, any change to the placement of our Office within the machinery of government that Parliament could choose to make, should be adopted at the earliest opportunity, to ensure that all related work is completed well in advance of the 43rd general election.

Elections in other countries captured the attention of many Canadians last year. They have given rise to, among others, allegations of voter fraud and foreign interference. In addition, a number of issues have arisen

in connection with the impact of fake news. Clearly, what happened abroad raises questions for the conduct of future elections here at home. These questions should be carefully considered in any review of our electoral legislation.

I close with a comment on the resources allocated to my Office. To ensure that we can continue to effectively carry out our work, we must have the proper resources in place. The Act allows us to supplement the relatively small number of indeterminate positions within the Office with individuals appointed on a temporary or contractual basis. However, the original intent was for these authorities to be used to fulfill short-term needs. Unfortunately, over the years, we have resorted to using them to ensure that ongoing functions of the office are performed. This is clearly not cost-effective and, in addition creates real recruitment and retention issues. I would hope that this can be addressed in the coming year.

None of the work we accomplished would have been possible without the dedicated efforts of the CCE team. My sincere thanks go out to each of them for their continued hard work in support of our mandate.

Yves Côté, QC
Commissioner of Canada Elections

ABOUT US

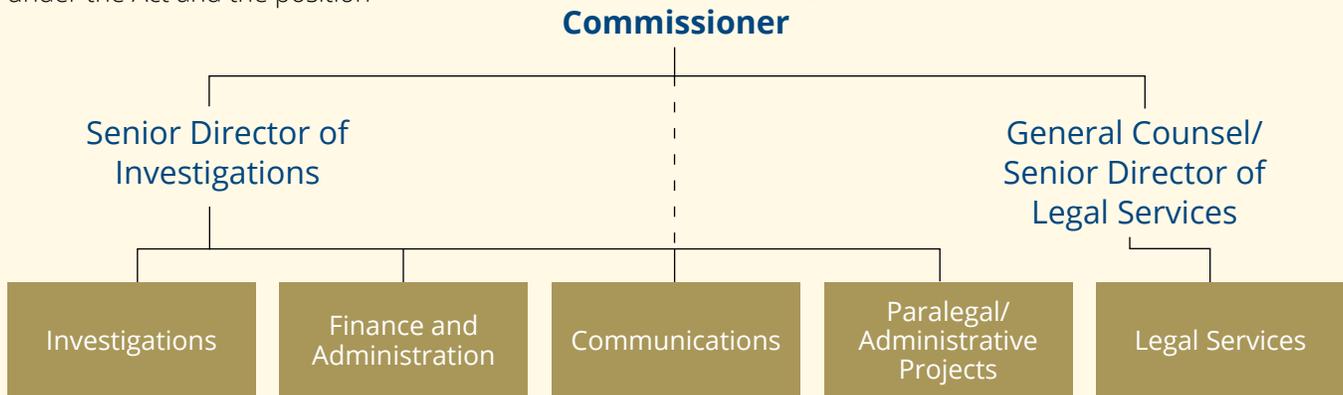
The position of Commissioner of Canada Elections was originally created in 1974. The powers of the Commissioner of Election Expenses (as it was known at the time) were limited to compliance and enforcement of rules relating to election expenses. In 1977, the Commissioner's powers were significantly expanded to include all provisions under the Act and the position

formally became known as the Commissioner of Canada Elections.

Today, the CCE continues to play an important role in safeguarding Canadians' trust in the democratic process. As an independent officer, the Commissioner's dual roles of ensuring compliance with, and enforcement of, the Act and the federal *Referendum Act*, are carried out with the aim of promoting the

integrity of the electoral process.

The Commissioner is supported by approximately 30 people, including federal public servants and independent contractors.



COMPLAINTS AND REFERRALS

All complaints received by the Commissioner with respect to the Act are assessed to determine if they fall within the mandate of the office. The Commissioner also receives referrals from Elections Canada. These are mainly files from both its electoral integrity and political financing divisions. In addition, Elections Canada transfers some complaints it receives from the public to the Commissioner.

Individuals whose complaints or allegations do not fall under the Commissioner's area of responsibility are advised and, wherever possible, are redirected

to the appropriate complaint mechanism.

If, following a preliminary review, the Commissioner concludes that the allegations made in connection with a complaint or referral may have merit, an investigation may be conducted to clarify the facts and gather evidence related to the alleged offence. At all times throughout the process, the Commissioner ensures that decisions are guided by the principles of independence, impartiality and fairness. Additional information regarding the Commissioner's mandate can be found in the *Compliance and Enforcement Policy of the Commissioner of Canada Elections* available on the Commissioner's Web site at: www.cce-cef.gc.ca.

Submitting a Complaint

The Commissioner receives complaints from a variety of sources. Anyone with a complaint or allegations of wrongdoing under the *Canada Elections Act* may contact the Commissioner's office:

by web form: www.cce-cef.gc.ca,

by e-mail: info@cef-cce.gc.ca,

by fax: 1-800-663-4906 or 819-939-1801, or

by postal mail:
Commissioner of Canada Elections
P.O. Box 8000, Station T
Ottawa, Ontario
K1G 3Z1

THE YEAR IN REVIEW: 2016-2017

Bill C-33

In November 2016, the Government introduced Bill C-33, which, if adopted, would make a number of changes to the Act including several that could have a direct effect on the CCE.

In 2014, with the adoption of amendments to the Act, the CCE was transferred to the Public Prosecution Service of Canada. The implementation of Bill C-33 would move the Office back so that would be within the Office of the Chief Electoral Officer. The proposed legislation would also see the Commissioner appointed by the Chief Electoral Officer, following consultation with the Director of Public Prosecutions (DPP), for a term of ten years. The Commissioner currently serves a seven-year term and is named by the DPP.

The bill also contains new reporting requirements for the CCE. These include the publication of:

- an annual report in the manner and form the Commissioner considers appropriate; and
- a report outlining any amendments to the Act that would strengthen the compliance and enforcement regime, which report would be included in a separate section in the Chief Electoral Officer's report on recommended changes to the Act following a general election.

RECOMMENDATION REPORTS AND PARLIAMENTARY RESPONSES

An Electoral Framework for the 21st Century: Recommendations from the Chief Electoral Officer of Canada Following the 42nd General Election

In September 2016, the former Chief Electoral Officer tabled a report in Parliament containing 132 recommendations stemming from the October 19, 2015 general election.

In addition to recommendations in support of both the adoption of an AMPs regime and granting the Commissioner the power seek a court order to compel witness testimony—both of which have long-standing and well-documented support from the Commissioner, the Chief Electoral Officer and the OSCE¹—the report also made recommendations aimed at modernizing the Act and granting the Commissioner the use of additional mechanisms through which to ensure compliance and enforcement of the Act. Other notable recommendations include:

- **Ballot selfies, the secrecy of the vote and social media**

The Chief Electoral Officer and the Commissioner agreed that the addition of prohibitions on taking, disclosing or sharing a photograph or digital image of a marked ballot were necessary to guarantee the secrecy of the vote. This proposed change would apply to photographs taken of one's own ballot or

that of another individual and would extend to social media platforms both during and after voting had occurred.

- **Impersonation offence**

At the request of the Commissioner, the report contains a recommendation that a new provision be added to include a specific offence for the creation and distribution of false candidate or party campaign communication material, including false websites or other online or social media content, with the intent to mislead electors.

- **Authority of Commissioner to lay charges**

Prior to 2006, the Commissioner had the power to lay charges in relation to his investigations. However, once the position of the DPP was created, that power was removed from the Commissioner. The report recommends that the Act be amended to reinstate the Commissioner's ability to lay a charge under the Act. Removing the requirement for the Commissioner to seek the DPP's approval before laying charges would reduce delays and increase transparency in the decision-making process and increase public trust in the system. This recommendation would not change the role traditionally carried out by the DPP: he would continue to be solely responsible for the conduct of the prosecutions before the courts.

¹ Organization for Security and Cooperation in Europe: OSCE/ODIHR Election Assessment Mission - Final Report.

- **Compliance agreements**

Although compliance agreements are one of the compliance tools most frequently used by the Commissioner, the terms that can be negotiated as part of these agreements are currently extremely limited. For that reason, compliance agreements are often perceived as not carrying real consequences for offenders. The report recommends that the Act be amended so that the terms and conditions of a compliance agreement are broadened to allow for any measures or sanctions that are negotiated with the contracting party. It is important to note that if the Office was to administer an AMPs regime, the use of compliance agreements with negotiated AMPs would allow for the optimal use of these two compliance tools, as is provided for in many other federal regimes.

The full report, including each of the 132 recommendations can be found on Elections Canada's website at: www.elections.ca.

An Interim Report in Response to the Chief Electoral Officer's Recommendations for Legislative Reforms Following the 42nd General Election (Parts I and II)

In March 2017, the Standing Committee on Procedure and House Affairs tabled two interim reports that addressed some of the recommendations put forth by the Chief Electoral Officer.

The Standing Committee members expressed unanimous agreement with a number of key recommendations. Specifically, the Standing Committee supported the recommendations with respect to the inclusion of provisions

that would protect the secrecy of the ballot and the distribution of false candidate or party campaign material. Standing Committee members also supported the creation of an AMPs regime.

As of March 31, 2017, other recommendations, including the one giving the Commissioner the power to apply to the courts for an order to compel witness testimony, were still being considered by the Standing Committee.

Both reports are available on the Standing Committee on Procedure and House Affairs page of the Parliament of Canada website at: www.parl.gc.ca.

ISSUES OF PARTICULAR INTEREST

The Act covers a wide array of topics and some can pose compliance and enforcement challenges for the CCE. Throughout 2016-2017 a number of issues arose that, while they may not be the subject of a high volume of complaints, are worth underscoring. Parliament may wish to examine these issues with a view to making the legislative changes required to clarify these areas of the Act.

Third Parties

Many questions were raised in 2016-2017 regarding the participation of third parties—and the financing of their activities in particular—in the electoral process. Currently, the financing of third party activities is regulated only to the extent that the financing is used to fund election advertising during an election period. This is limited to expenses incurred in the production and transmission of an advertising message. It does not include many other types of expenses,

such as those incurred for holding rallies, research and policy development, provided that they are independent expenditures not coordinated with a party or candidate. Given this, the following issues related to third parties have been identified:

- **Third party activities and financing**

The CCE received a significant number of complaints about third parties carrying out non-advertising activities to promote or oppose candidates or parties. A lack of regulation in the case of third parties incurring significant non-advertising expenses to promote or oppose candidates or parties may not be consistent with the need to maintain a level playing field. Further, complaints were received about third parties having received foreign funds to finance their election activities. Currently, foreign funds can be used to fund election advertising, if the contributions were made to the third party outside of the period beginning six months before the issue of the writs and ending on polling day. Moreover, foreign contributions can be used to finance any third party activity not related to election advertising.

- **Election Advertising Reports from Third Parties**

In 2016-2017, the CCE received a number of referrals from Elections Canada regarding third parties that failed to provide an election advertising report. The Act does not require registered parties to provide election advertising reports if they did not incur election advertising expenses. The CCE does not know whether a third party is in breach of the Act's

reporting requirement until after it looks into the matter. Absent a requirement that all registered third parties provide a report, even a nil report, there will continue to be unnecessary referrals from Elections Canada and unnecessary investigations carried out by our Office.

• False and misleading returns

The Act requires that third parties that incurred \$500 or more in election advertising expenses submit an election advertising report to the Chief Electoral Officer within four months of polling day, which report must contain specific information about expenses incurred and contributions received, among other things. During 2016-2017, the CCE received complaints alleging that certain third parties had not submitted accurate election advertising reports with respect to their activities during the 42nd general election. Contrary to the rules that apply to the various returns required of the five political entities regulated under the Act², the legislation does not make it an offence for a third party to submit a false, misleading or incomplete report. This should be corrected.

Replacing the Official Agent

Obtaining compliance in some cases where an official agent has failed to submit the candidate's return has been very difficult because the official agent considered themselves to be unable or unwilling to act. The requirement for a candidate to replace his or her official agent currently only arises in the event of

the death, incapacity, resignation or ineligibility of the official agent. In some cases, compliance could be much more quickly obtained if the candidate was required to replace his or her official agent where the latter refuses or is unable to act.

Transfer or sale of capital assets

The Act requires candidates to transfer any capital assets that constitute an election campaign expense, to the party or association before disposing of the surplus. Alternately, they may sell the property at fair market value and transfer the proceeds to the party or association as part of surplus disposal. However, the wording in the Act expressly prohibits anyone but the official agent from transferring goods. Although the intent was likely to refer to the candidate in the context of "the campaign of the candidate" when the duty to dispose of the capital asset was adopted—and that is clearly the best interpretation of the provision considering that the offence provision only names the official agent as the person who commits the offence—the ambiguity of the text could create an enforcement challenge.

Candidates' campaign expenses

In 2016-17, referrals were received that showed that certain candidates had paid campaign expenses other than their personal expenses. Currently, the Act only allows for campaign expenses to be paid by the candidate's official agent except in two specific instances: (1) a person authorized by the official agent can pay petty

expenses; and (2) the candidate can pay his or her personal expenses. The Act also only allows the candidate, the official agent or a person authorized by the official agent to enter into contracts or incur expenses in relation to the campaign. Parliament chose to make all of these rules enforceable through the adoption of a single offence-making provision. Unfortunately, this provision contains several important drafting anomalies that create enforcement difficulties. Specifically, the offence provision:

- does not exempt from its application a person who received written authorization from the official agent to pay petty or incidental expenses;
- completely exempts any person who paid or incurred expenses, provided that they obtained an authorization from the official agent to incur even a single expense; and
- completely exempts a candidate who paid non-personal expenses, despite the fact that the exception to the prohibition was only intended to apply to the payment of personal expenses (i.e., the only expenses that candidates are entitled to pay).

COMPLIANCE AND ENFORCEMENT

The integrity of the electoral process depends in large measure on the good faith of participants and their willingness to follow the requirements set out in Canadian election law. The Commissioner's mandate reinforces and strengthens oversight of the electoral system, ensuring that

² These are: registered parties, registered associations, nomination contestants, candidates and leadership contestants.

all participants can confidently participate in the electoral process. The *Compliance and Enforcement Policy of the Commissioner of Canada Elections*³ outlines how the Commissioner exercises his mandate under the Act.

Caution Letters

Caution letters are an informal means of encouraging future compliance with the Act. Between April 1, 2016, and March 31, 2017, the Commissioner issued 175 caution letters to address minor contraventions or inadvertent non-compliance. Currently, caution letters are not made public. However, in order to ensure greater transparency and maintain public confidence in the integrity of the enforcement scheme, Parliament may wish to consider providing the Commissioner with the discretion to publicly disclose the contents of some of these letters.

Compliance Agreements

The Act provides that the Commissioner may enter into a compliance agreement with anyone who he has reasonable grounds to believe has committed, is about to commit or is likely to commit an act or omission that could constitute an offence. Compliance agreements are voluntary and set out the terms and conditions the Commissioner considers necessary to ensure compliance with the Act.

Between April 1, 2016 and March 31, 2017, the Commissioner entered into ten compliance agreements:

- Four compliance agreements were entered into with employers who had failed to either provide their employees

with time off to vote or who had failed to pay employees for the time off work necessary during their hours of work to vote. The Act requires that employers provide the time required for the employee to dispose of three consecutive hours to vote and that no deduction can be made from an employee's pay with respect to time granted to vote.

- Two compliance agreements were entered into with individuals who removed ballots from a polling station. The Act makes it an offence for a person to alter, deface or destroy a ballot, or to take a ballot out of a polling station.
- One compliance agreement was entered into with a company for illegal contributions made to political entities. The Act specifically prohibits any person or entity other than an individual who is a citizen or permanent resident from making a contribution. Further, it prohibits any person or entity from circumventing or attempting to circumvent this prohibition or acting in collusion with another person or entity for this purpose or from concealing or attempting to conceal the identity of the source of a contribution, or acting in collusion with another person or entity for this purpose.
- One compliance agreement was entered into with a municipality for removal of a third party's election advertising messages during the campaign period of the 42nd general election. Under the Act, it is an offence to prevent or impair the transmission of an election advertising message to the public without the consent of a person with the power to authorize the transmission.

- One compliance agreement was entered into with an individual who acknowledged having committed offences under the Act related to the production and dissemination of election advertising after he created and displayed his own signs in a personal effort to support a candidate in the 42nd general election. The signs created confusion and led some to believe that they belonged to the candidate. The Act requires that a third party advertiser must identify itself in any election advertising and indicate that it has authorized the advertising. Further, the Act makes it an offence to prevent or impair the transmission of an election advertising message without the consent of a person with authority to authorize the transmission.
- One compliance agreement was entered into with a political party on the basis of the party's distribution of misleading polling information. The Act makes it an offence to use a pretence or contrivance to induce electors to vote or not vote for a particular candidate. It is also an offence to fail to provide a survey's methodological information.

Compliance agreements are published in the *Canada Gazette*. The full text of the agreements also appears on the CCE's website at: www.cce-cef.gc.ca

Charges and Prosecutions

If the Commissioner believes on reasonable grounds that an offence has been committed under the Act, he may refer the matter to the DPP, who has sole authority to decide whether charges will be laid. The DPP acts as an independent

³ The Compliance and Enforcement Policy of the Commissioner of Canada Elections is available online at www.cce-cef.gc.ca.

prosecution authority, with a mandate to prosecute cases under federal law and to provide legal advice to investigative agencies.

Two charges were laid on January 18, 2017 in the Provincial Court of New Brunswick against Mr. Martial Boudreau. The charges against Mr. Boudreau relate to wilfully altering, defacing or destroying a ballot, and taking a ballot out of a polling station.

On February 3, 2017, a charge was laid against Mr. Cameron Hastings in the Ontario Court of Justice. Mr. Hastings was charged with circumventing the former statutory contribution limit in relation to his electoral campaign for the general election in 2011.

Five charges were filed in the Provincial Court of Nova Scotia on March 16, 2017, against Mr. Joseph Shannon, regarding contributions to registered associations and candidates of registered parties. These contributions, made between January 1, 2008 and December 31, 2015, exceeded the contribution limits established under the Act.

As of March 31, 2017 all three of these cases were still before the courts.

On May 20, 2016, the Ontario Court of Justice found Mr. David Del Mastro not guilty of the charges that were sworn on October 2, 2014, that he had, during the 40th general election held in 2008, knowingly concealed or attempted to conceal the identity of the source of a contribution, and knowingly circumvented the campaign contribution limit. As reported last year, his co-accused, Ms. Tori-Lynn Manchulenko, pleaded guilty to

having concealed or attempted to conceal the identity of the source of a contribution, on January 29, 2016, and received an absolute discharge.

On April 11, 2016, a justice of the Ontario Court of Appeal granted leave to appeal to Mr. Dean Del Mastro, with respect to his conviction and sentence for the charges of having incurred election expenses in an amount more than the election expenses limit; of having wilfully exceeded the contribution limit for a candidate in his own election campaign; and of having provided the Chief Electoral Officer an electoral campaign return that he knew or ought reasonably to have known contained a material statement that was false or misleading. At the time of the writing of this report, the appeal was still pending.

WRITTEN OPINIONS, GUIDELINES AND INTERPRETATION NOTES

Under the Act, the Commissioner is required to provide comments on draft written opinions, guidelines or interpretation notes proposed by the Chief Electoral Officer.

Guidelines and interpretation notes discuss the application of a provision of the Act to registered parties, registered associations, candidates, and/or leadership or nomination contestants (referred to collectively as “regulated political entities”). A guideline or interpretation note is issued for information purposes only and is not binding on regulated political entities. Under the Act, the Commissioner has 15 days to comment on the drafts of these documents. When the guideline

or interpretation note is officially issued, the Chief Electoral Officer must publish the comments received from the Commissioner on the draft version.

Similar requirements exist when a registered party makes a request to the Chief Electoral Officer for a written opinion on the application of any provision of the Act. Here also, the Commissioner has 15 days to make comments on a draft opinion, and these comments are published along with the final written opinion. If all material facts submitted with the request were accurate, the final written opinion is binding on the Chief Electoral Officer and on the Commissioner with respect to the activity or practice of the registered party that made the request or of its affiliated regulated political entities. The written opinion has precedential value for the Chief Electoral Officer and the Commissioner.

During 2016-2017, the Chief Electoral Officer issued one guideline and interpretation note, and at the request of a registered party, issued one written opinion. The CCE provided comments on the drafts that were circulated for consultation. The guideline and interpretation note issued by the Chief Electoral Officer during this period dealt with the issue of determining what portion of an amount given during a fundraising activity constitutes a political contribution.⁴ The written opinion requested by the registered party dealt with the issue of whether a registered party could charge exhibitors at a trade show or exhibit facilities set up at its conventions.⁵

⁴ *Fundraising*: <http://www.elections.ca/content.aspx?section=res&dir=gui/app/2016-01&document=index&lang=e>

⁵ *Charging for trade show or exhibit facilities and setup at a party convention*: <http://www.elections.ca/content.aspx?section=res&dir=gui/app/2016-06&document=ts&lang=e>

LOOKING AHEAD

SUPPORT TO PARLIAMENT ON ELECTION LAW REFORM BILLS

As noted earlier in this report, Bill C-33 was tabled in Parliament on November 24, 2016, and as of the date of this report, had yet to receive second reading in the House of Commons. Moreover, the Government has indicated that other amendments to the Act would be forthcoming, to address issues identified in the February 2017 mandate letter to the Minister of Democratic

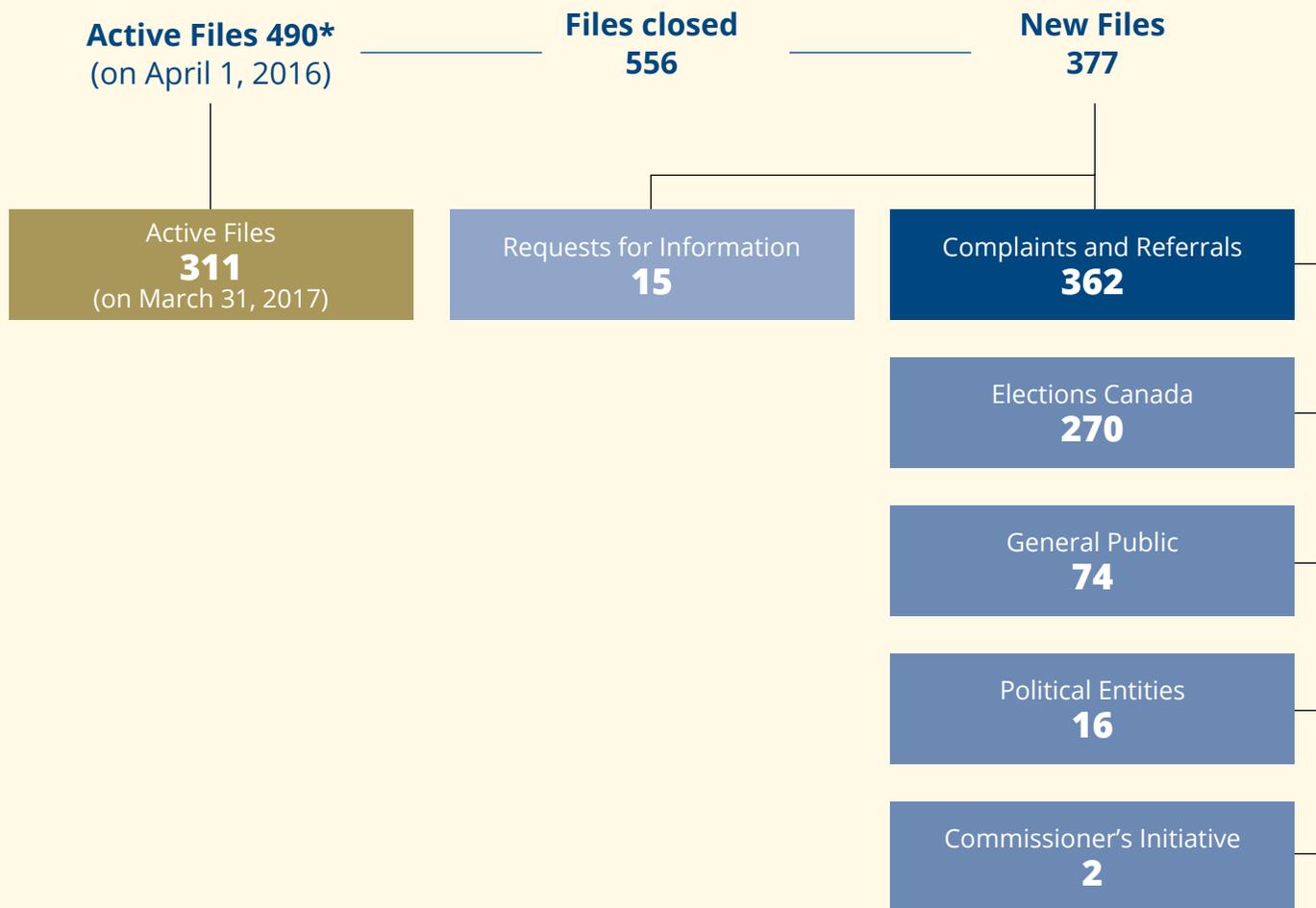
Institutions, and recommendations by the Chief Electoral Officer in his report following the 42nd general election. The Commissioner and his Office will be happy to offer any assistance to Parliament that it may request as it considers the proposed legislation.

SENATE COMMITTEE ON LEGAL AND CONSTITUTIONAL AFFAIRS

As of the writing of this report, the Commissioner had been invited to appear before the Senate

Standing Committee on Legal and Constitutional Affairs to discuss the recommendations contained in the Chief Electoral Officer's report on the 42nd general election. The appearance, scheduled for early April 2017, was expected to focus on recommendations related to the Commissioner's mandate as well as the third-party advertising regime.

APPENDIX A – DISPOSITION OF CASES (APRIL 1, 2016 TO MARCH 31, 2017)



* Following a review of the CCE case tracking system, this number was readjusted from 454 to 490.

COMPARISON OF ACTIVE FILES:

	2013-2014	2014-2015	2015-2016	2016-2017
Active Files (as of March 31)	346	254	490	311

All complaints and referrals received by the Office are reviewed to determine whether there is a basis for the allegation. The numbers outlined below reflect the number of complaints received prior to their evaluation. These numbers may also contain multiple complaints related to a single incident.

MOST COMMON REFERRALS FROM ELECTIONS CANADA:

- 84 files were referred as a result of possible irregularities and inconsistencies regarding potential instances of electors requesting a second ballot;
- 72 files were referred regarding the failure, on the part of a deregistered electoral district association, to provide financial reports or related documents;
- 41 files were referred regarding the failure to produce documents related to candidates electoral campaign accounts or related documents; and
- 14 files were referred regarding the failure, on the part of a registered association, to produce financial reports or related documents.

MOST COMMON TOPICS FROM THE PUBLIC:

- 17 complaints were received regarding election advertising expenses that were alleged to have exceeded the spending limits set out in the Act;
- 15 requests for information;
- 8 complaints were related to the failure to include an authorization statement on election advertising; and
- 6 complaints were related to preventing or impairing the transmission of election advertising.

APPENDIX B – FINANCIAL TABLE (APRIL 1, 2016 TO MARCH 31, 2017)

Fiscal Year 2016-2017			
	Appropriation	Unappropriated Funds - CRF	
	Indeterminate Positions	Other	Total
Salaries*	\$1,339,563	\$925,248	\$2,264,811
Expenditures		\$2,316,624	\$2,316,624
			\$4,581,435

* Employee benefits packages are included as part of unappropriated spending.