

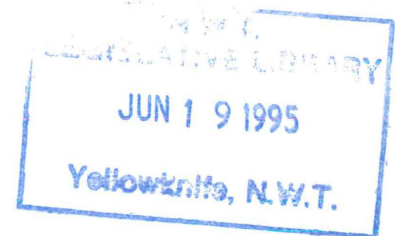


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Legislative Action Paper on the Recall

*Prepared by: Government of the NWT
June 1995*



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Report Outline

Executive Summary	3
Introduction and Purpose	10
The Recall: A Short Description	10
The History of the Recall	11
The Recall and Democratic Theory	12
The Recall and the Constitution	13
The Recall and Parliamentary Democracy	14
Recall Practice: Assessing Options	16
1. Periods of Immunity / Protection	16
2. The Petition	17
3. The Filing Fee	18
4. Rationale for Initiating Recall	18
5. Required Signatures	20
6. Time Limits	21
7. Circulation of the Petition	22
8. Validation and Verification	23
9. Consequences of a Successful Petition	24
10. Recall Campaign Spending and Financing	25
11. Enforcement and Penalties	25
12. Administration Costs of Recall	26
Arguments in Favour of the Recall	27
Arguments Against the Recall	28
The Recall in the NWT: Advantages	29
The Recall in the NWT: Disadvantages	29
Conclusion	30
The GNWT's Position	30
Appendices	32
Appendix I: Standing Committee on Rules, Procedures and Privileges Report	33
Appendix II: Recall Roadmap	36
Appendix III: Relevant Literature	38

*Executive
Summary*

RECALL: Executive Summary

What is Recall?

Recall is a formal “citizen-driven” process where an elected representative can be removed from his or her seat during the “normal” life of a legislature.

What is the Purpose of Recall?

Elections are usually held only once every four years or so. The recall allows voters to express their dissatisfaction with an elected representative at a time of their own choosing. Recall encourages representatives to become continually accountable since they could be called to face the voters at any time.

Is the Recall Constitutional?

The answer to this question ultimately rests in the hands of the courts. Advocates of the recall say there are legal precedents which confirm that it is acceptable under Canada’s Constitution. For example, the recall is consistent with the right to vote - a right guaranteed in S.3 of the *Charter of Rights and Freedoms*. Opponents of the recall say that a small number of unhappy voters should not be allowed to overturn the decision of the majority, and that recall should not produce a situation where constituents are unrepresented for an unreasonable period of time.

Where Did Recall Come From?

The recall is essentially an American invention, growing out of the “progressive” movement which took place early this century. Recall is only one of three “direct democracy” reforms, the other two being the citizen initiative and the referendum. By 1914, nine western U.S. states had adopted the recall. Today, 15 states have recall legislation. No U.S. state adopting the recall has ever repealed it.

The progressive movement and the drive for direct democracy also spread north to Canada. Manitoba passed legislation providing for initiatives and referenda in 1916. In 1936, the Social Credit Government of William Aberhart passed legislation providing for recall. (The Manitoba Act was later ruled unconstitutional on a “technicality.” Alberta’s *Recall Act* was repealed shortly after being passed when it became apparent that the premier was about to be the first one recalled under the act).

Within the last decade, direct democracy has again emerged as an increasingly popular set of democratic reforms. In 1991, recall was supported by 81% of British Columbians in a province-wide referendum. Legislation providing for citizen’s initiatives and recall was passed in British Columbia in 1994. In the past two years, private member’s bills have introduced the recall into the House of Commons, the Alberta legislature and, most recently, the legislature in the Northwest Territories.

How Does Recall Work?

There are three ways in which to handle the recall:

- (1) *“Three-Step” Recall:* If a petition (step 1) is successful, a “recall referendum” is held (step 2). If this vote succeeds, the member is recalled and a by-election held (step 3).
- (2) *“Two-Step” Recall:* A petition for an elected member’s recall is first circulated (step 1). If a certain number of voters sign the petition, the member is immediately “recalled” and a by-election held to elect a new representative (step 2).
- (3) *“Two-Step, Single-Vote” Recall:* A petition is first circulated. If it is successful, a vote is held which asks voters if they support the recall of the member, and, if so, who they want as their representative.

Can Recall Work Within a Parliamentary Democracy?

Since the recall is an American invention, some say it can only work within a “republican” model of democracy. But recall can be used in Canada once special consideration has been given to two unique aspects of the Canadian parliamentary system - cabinet ministers and the notion of party discipline.

Canadian cabinet ministers are both local representatives and territorial, provincial or national leaders. Should they be subject to territorial, provincial, national or local recall? Should they be protected against recall? The U.S. experience suggests that broad recalls (eg province-wide) are seldom successful. Wider recalls also have more potential to create a crisis for a government. Immunity from recall would likely be challenged in the courts as infringing on the equality rights in Section 15 of the *Charter of Rights and Freedoms*. The best answer may be to leave cabinet members subject to local recall.

Canada’s political system is also marked by a rigorous “party discipline” - where individual representatives are expected to support the leadership of their party - even if it runs counter to the interests or convictions of their constituents. Given the non-partisan and consensus-oriented style of government in the NWT, this may not present a huge problem.

However, in other Canadian jurisdictions, parties would clearly have to lessen the amount of control they exercise over their members. Refusal could result in a wave of recalls should voters be seriously at odds with a party’s position on a controversial issue.

What About Details?

There are many specifics that must be carefully weighed when considering the use of recall. It is not possible to fully discuss them here, but here are a few brief items:

- *Periods of Immunity:* Representatives may be given a period of time during which they are immune from recall. This allows them time to develop a track record. It also prevents frivolous recall attempts.
- *The Petition:* Signatures on a petition need to be collected in an orderly fashion and must be capable of being verified. The number of signatures needed is very important. If the number is too high (over 50%), recalls may never succeed. If the number is too low (under 15%), recalls may become far too common.
- *Time Limits:* The amount of time given to petitioners to collect signatures is another important consideration. Again, if the time is too short (less than a month), a recall attempt may never succeed regardless of its level of support. On the other hand, if the time is too long (over 12 months), a recall campaign may lose its primary focus and be a continual thorn in the side of an elected representative.
- *Petition Consequences:* A successful petition itself can trigger the recall, or it can trigger a “recall referendum.” Choosing between the three different recall approaches carries its own implications of cost and time.
- *Administration Costs:* There will be initial start up costs to put recall in place and, depending upon approach used, recall by-elections could cost between \$25,000 to \$50,000.

Would Recall Make a Difference?

Recall may not make a big difference in how things work now, but representatives would know that they could be removed if voters ever got upset enough. Whether or not the recall is ever used matters very little in the end. Its mere presence may be enough to ensure greater accountability of representatives to the people who put them there in the first place.

What is the GNWT's Position?

The upcoming general election will provide NWT voters and candidates with the opportunity to debate the recall issue. The GNWT encourages this debate to ensure that the next Assembly has a mandate or direction on how to deal with the recall.

In the coming years, both the Government and the Assembly will have to make difficult decisions on division, aboriginal self-government, devolution, delivering programs and services with fewer resources, and generating increased revenues from territorial sources.

These decisions will require accommodation and compromise from all members; however, it is likely that in reaching a consensus for the welfare of the Northwest Territories, constituents may not be pleased with the results and positions taken by their MLAs.

While the GNWT respects the need for greater accountability by MLAs, measures such as recall may undermine the ability of both the Government and the Assembly to make these difficult decisions.

Arguments in Favour of the Recall

A review of the relevant literature suggests a range of arguments in favour of the recall. These arguments can be organized into several different general categories:

1) *Arguments based upon democratic principles:*

- The recall strengthens popular control of government by allowing voters to remove elected officials who are incompetent or who behave inappropriately, or who fail to reflect accurately the views of the electorate on major issues.
- The availability of the recall increases citizen interest in public affairs and reduces alienation by providing for continuous accountability, allowing them to act when they have lost confidence in their representatives.

2) *Arguments based on fear of corruption and special interests:*

- The recall provides a backstop when the normal processes of the electoral system fail to produce accountable and responsive elected officials.
- The recall reminds elected officials that corruption and inefficiency will not be tolerated.
- Recall helps check undue influence by narrow special interests, allowing voters to act promptly when such influence manifests itself.

3) *Arguments stressing spin-off benefits:*

- Recall increases the willingness to remove restrictions on the actions of elected officials because it provides a recourse against officials who betray their trust.
- The recall encourages the electorate to accept longer terms of office for elected officials.
- Recall offers a safety-valve mechanism for intense feelings.

4) *Arguments from experience with the recall:*

- There is no indication from U.S. experience that recall petitions have been used to harass elected officials, or serve vested interests.

Arguments Against the Recall

A review of the relevant literature suggests a range of arguments against the recall. They can be organized into the following general categories:

1) *Arguments based on democratic principles:*

- The very premise of the recall is antagonistic to representative principles, specifically to the idea of electing good lawmakers, allowing them a chance to govern until the next election, and then judging them on the package of their accomplishments.

2) *Arguments based on suggestions of redundancy:*

- There are other ways of removing elected officials when it is necessary to do so, and these ways do not suffer the disadvantages of the recall.

3) *Arguments suggesting the unavoidable dangers of possible misuse:*

- Use of the recall for ideological or partisan reasons is both unavoidable and undesirable.
- Frivolous recall petitions can be circulated to harass conscientious elected officials.
- The recall may be abused by well organized and well financed organizations to achieve their special interests.
- The recall may be used to remove individuals from public office for petty or transient reasons - that is - recall in haste or at leisure.

4) *Arguments stressing harmful side-effects:*

- Recall will restrain innovative and energetic elected officials.
- Recall will discourage highly qualified men and women from seeking public office when controversial issues call for difficult decisions.
- The recall increases governmental costs with the need for recall elections and special elections.
- Recall elections are divisive, disruptive, polarizing, and subject to many abuses. They are often confusing, and place too much burden on the voters to keep informed between elections.

***Legislative Action Paper
on the Recall***

Main Report

Legislative Action Paper on the Recall

Introduction and Purpose

The purpose of this Legislative Action Paper is to provide information concerning the concept of the recall. In particular, this report:

- 1) *describes the concept of the recall;*
- 2) *relates the recall to democratic theory and the Canadian constitution;*
- 3) *describes the use of recall in other comparable jurisdictions;*
- 4) *describes and assesses various options in putting together a practical model of the recall;*
- 5) *considers special advantages and disadvantages of the Northwest Territories' (NWT) experience as they relate to the possible workings of the recall mechanism; and*
- 6) *outlines the Government's position on the recall and its application in the Northwest Territories.*

This Legislative Action Paper was prepared in response to a recommendation (in Appendix I) from the Standing Committee on Rules, Procedures and Privileges.

It attempts to address the Committee's specific questions as well as many of the issues and proposals raised during the past two years by Mr. Brian Lewis, MLA for Yellowknife Centre, and by other Members who have spoken on the recall.

As the Assembly's debate has almost exclusively focused on recall in the context of Canadian and American political institutions, this Legislative Action Paper does not examine how traditional aboriginal political cultures dealt with leaders who had lost the support of their constituents.

The paper was prepared with the assistance of the Canada West Foundation which has extensively studied the recall. Advice was also received from the GNWT's Department of Justice, and Elections NWT.

The Recall: A Short Description

The recall is a process whereby an elected representative can be removed from his or her seat by a formal citizen-initiated process part-way through the "normal" life of the legislature. The culmination of a successful recall is a by-election to fill the newly vacated seat. Recall is similar to the idea of impeachment, except that it need not carry any overtones of legal wrongdoing, but only political disapproval of a representative by the electors.

The initiating device for the recall is a petition signed by a required proportion of the electorate. In some - but not all jurisdictions - a successful petition must be further validated by a "recall election" or "referendum" which is logically (but not always) distinct from the "by-election" used to fill the vacancy created by a successful recall.

It is sometimes said that there already exists a method of recall - it is called a general election. Supporters of recall would argue that such comments completely miss the point. Elections are held once every four years or so, during which time much can happen given the pace of modern life. In any event, a representative who may have so annoyed the electorate may decide not to run again. The recall petition allows voters to express dissatisfaction at a time of their own choosing.

All defences of the recall stress that its utility is not to be measured only in terms of how often the petition succeeds and whether the representative is removed. If a representative is able to explain his or her actions to the electorate's satisfaction, regardless of whether a recall petition is initiated, this is no small victory for democracy (when democracy is conceived in terms of communication and persuasion as opposed to sheer political power).

TABLE 1: U.S. Recall Provisions of State Officials

<i>State</i>	<i>Year</i>	<i>Officials Affected</i>	<i>Petition Requirements</i>
Oregon *	1908	All elected officials	15% of votes cast at last election
California *	1911	All elected officials	12% / 20% of votes cast at last election
Arizona	1912	All elected officials	25% of votes cast at last election
Colorado	1912	All elected officials	25% of votes cast at last election
Nevada	1912	All elected officials	25% of eligible voters at last election
Washington	1912	All elected officials (except judges)	25% / 35% of eligible voters at last election
Michigan *	1913	All elected officials (except judges)	25% of votes cast at last election
Kansas	1914	All elected officials (except judges)	40% of votes cast at last election
Louisiana	1914	All elected officials (except judges)	25% of eligible voters at last election
North Dakota *	1920	All elected officials	25% of votes cast at last election
Wisconsin	1926	All elected officials	25% of votes cast at last election
Idaho *	1933	All elected officials (except judges)	20% of eligible voters at last election
Alaska	1959	All elected officials (except judges)	25% of eligible voters at last election
Montana	1976	All elected & appointed officials	10% / 15% of eligible voters at last election
Georgia	1978	All elected officials	15% / 30% of eligible voters at last election

* Indicates successful use of recall.

SOURCE: Adapted from *Provisions for Recall of State Officials*, pg. 217.

The History of the Recall

The historical starting point for the recall of elected officials is the populist or "progressive" movement which occurred early this century in the United States. By 1914, nine western U.S. states had adopted the recall. Another half dozen subsequently followed suit. Montana and Georgia were the latest states to adopt recall, doing so in 1976 and 1978 respectively. The general features of the recall in these 15 U.S. jurisdictions are summarized in TABLE 1.

The recall was originally defended primarily in terms of containing the power of vested interests whose wealth and influence often prevailed in legislatures, even over the clear wishes of the electorate.

The successful recall of elected state officials is rare. There are only about a dozen examples in all. (see TABLE 2 on page 14). Aside from state-wide recalls, most state recall legislation in the U.S. also permits the recall of municipal

politicians. Municipal recalls are more frequently accomplished. It is important to note that no state adopting the recall has ever repealed it.

Switzerland has long used the recall for cantonal (or provincial) elected officials, but not for national officials. The recall of national representatives would be very difficult given the use of "multi-member" ridings, and possibly unconstitutional given the requirement of Article 91 of the Swiss Constitution which states that members must vote "without instructions" of any kind. The now-vanished Soviet Union also had extensive - but seldom used - recall provisions.

For many years in Canada, there was only one example of recall. In 1936-37, the newly elected Social Credit Government of William Aberhart in Alberta enacted recall legislation. However, with the premier himself on the verge of being recalled, the act was abruptly and retroactively repealed (see box).

Recall in Canada: The Alberta Experience

In April 1936, the Alberta Government passed a Recall Act. The legislation was closely modeled on the U.S. examples, although the number of signatures required for a petition (two-thirds of eligible voters) was almost triple the normal U.S. state requirements.

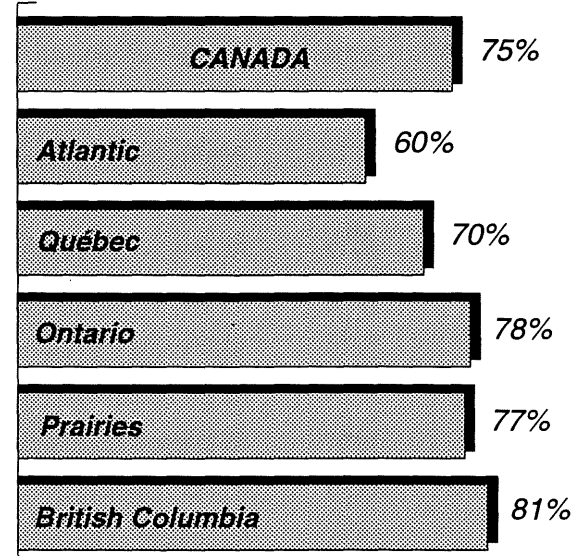
Within a few months of the passing of the Recall Act, a petition began circulating in the premier's riding seeking to recall Premier William Aberhart. Support for the recall was based upon a wide range of issues related to the Social Credit's proposed fiscal policies, a perceived disregard for traditional rights and liberties, a backbenchers' revolt against the premier, etc. In return, the premier claimed that oil company executives were bribing and intimidating their workers to support the recall, and that the main purpose for the recall initiative was to intimidate his government's attempt to carry out social credit programs.

Canada's only provincial experiment with recall ended quickly. In October 1937, the premier retroactively repealed the legislation. The episode demonstrates the potential vulnerability of premiers and other cabinet ministers in a parliamentary system with recall legislation.

Within the last decade, the recall has again emerged into the realm of practical politics. A 1991 provincial referendum in British Columbia saw over 80% of voters strongly endorse the use of recall. The British Columbia legislature passed recall legislation, in 1994. In addition, numerous private members bills, although unsuccessful, have proposed the idea in the Parliament of Canada and the Alberta legislature. The details of the British Columbia legislation and the other proposals in Alberta and the NWT are compared in the *Recall Roadmap* on page 36 and 37.

In general, Canadians show strong support for the concept of recall. The results of a March 1994 *Gallup Poll* indicated that fully three quarters of Canadians support the recall mechanism (FIGURE 1). While support varies between provinces, a majority are in favour of the idea in

FIGURE 1: Support for Recall



SOURCE: Gallup Poll, Thursday, March 3, 1994.

every region of the country. Generally, support for the recall rises as one moves from east to west across the country. No data is available regarding public support or opposition to recall in the NWT.

The Recall and Democratic Theory

Democratic theory normally considers the role of elected representatives in terms of three models:

- 1) the "delegate" who carries out the specific wishes of the electors;
- 2) the "trustee" who promotes the best interests of the electors by using his/her personal best judgment and is held accountable at the time of the next election;
- 3) the "responsible party" model which requires that elected representatives vote to support the position of their party.

The normal practice of Canadian politics has long been based primarily on the responsible party model, augmented by the trustee model and the delegate model. This means that on occasion elected representatives in the provinces or in Ottawa leave a party caucus or even "cross the floor" to join (or leave) a government without any need to seek the approval of the electors for such a

dramatic change in the nature of the representation that they possess.

In a non-partisan legislature like that of the NWT, the responsible party model is non-existent or minimal, and the traditional dichotomy between “delegate” and “trustee” more adequately reflects the relevant choices.

If the “trustee” theory obliges voters to put their representatives on a very long leash, the recall and “delegate” theory shortens that leash considerably. Advocates of recall would argue that, since the debate between these two has gone on for centuries, the “delegate” model of recall theory is not a repudiation of parliamentary democracy, but a tilting of the balance between two alternatives that have framed the debate. Opponents of recall focus on the inability of representatives to exercise their best judgement on controversial issues because of the fear of being recalled.

The Recall and the Constitution

In the preamble to the *Constitution Act 1867*, there is a phrase stating that the Canadian constitution is to be “a constitution similar in principle to that of the United Kingdom.” Since Britain has never provided for the recall of elected representatives, some argue that the recall is therefore unconstitutional. Recall supporters would point out that this constitutional phrase has never been applied by either the *Judicial Committee of the Privy Council* (before 1949) or the *Supreme Court of Canada* (since 1949) to declare statutes unconstitutional.

The *Judicial Committee of the Privy Council* considered Manitoba legislation on binding legislative initiatives and referenda in 1919. It did not find these devices of “direct democracy” to offend the notion of “a constitution similar in principle” even though Britain had never employed either. Rather, their reason for invalidating the statute was that it might deny the lieutenant-governor the power to refuse royal assent to citizen-driven legislation. Advocates would therefore argue that the recall, the third of three staples of populist democracy, would not be any more unconstitutional.

Moreover, recall advocates say that it is unlikely that the “right to vote” provisions in section 3 of the *Canadian Charter of Rights and Freedoms* could preclude the recall. Recall would be exercised by those very electors who selected the representative, and the outcome of its successful exercise is another opportunity for those same electors to use their right to vote for the purpose of electing a new representative. Since the Supreme Court in *Carter v Saskatchewan* explicitly defined the right to vote in terms of “voting power,” recall would probably be seen as an expansion rather than a limit to the exercise of the charter right to vote, neither constitutionally required nor constitutionally prohibited.

On the other hand, opponents of recall say that the British system intended to be reflected was a system of “responsible government” or cabinet or parliamentary government. In such a form of government, the formal head of state acts under the “advice” or direction of ministers who are members of the legislative branch and who enjoy the confidence of a majority in the elected house of the legislative branch. A constitution similar in principle to the United Kingdom would also bring in the concept of a government in which the elected members of the legislative branch, are elected not necessarily to state only the views of the electorate, but to represent the electorate to the best of their ability and according to their consciences. The electorate demonstrates its disapproval with its representatives by electing a different member at the next election.

Opponents of the recall also argue that if it is adopted, considerable care will have to be taken in implementing recall to ensure that the procedures chosen do not permit a very small number of disgruntled voters to disenfranchise a majority of voters. Similarly, the recall could be implemented in such a way that it resulted in voters going unrepresented for an unreasonable period of time.

Both supporters and opponents of the recall agree that in the final analysis, the answer to constitutional questions ultimately rests in the courts.

The Recall and Parliamentary Democracy

Canada lives under a *parliamentary* system of government, and while the Northwest Territories Legislative Assembly and Government are non-partisan with some unique conventions, they still are parliamentary. Therefore, if the recall is to be considered in the Canadian and territorial context, allowances must be made for this fact. More specifically, if the recall is to be implemented, the general mechanics of recall must be “fitted” with respect to two features unique to parliamentary systems - the representative basis of cabinet ministers and the concept of party discipline, or, in the NWT, cabinet discipline.

a) *The Problem of Cabinet Ministers:*

In Canada, members of cabinet lead a dual existence, belonging to both the political executive and the elected legislature. Cabinet members are *territorial, provincial or national* officials as well as *local* representatives. The question emerging is “should cabinet members be subject to a territorial, provincial or national recall or a local (constituency) based recall?”

While the U.S. experience with recall is extensive, it cannot help solve this uniquely “Canadian” problem. In the United States, members of cabinet are elected separately from the legislature. This makes possible a “double-tracking” recall procedure - state-wide recall for elected state officials and localized recall for officials with a more geographically restricted mandate.

By virtue of their prominence and thus the potential for inflicting a blow to the government, cabinet ministers may be particularly vulnerable to the recall. It is surely not by chance that Canada’s only experience with the recall at the provincial level was an attempt to recall an Alberta MLA who was also the premier (see box on page 12).

There are three possible solutions to the problem presented by cabinet ministers in the NWT:

<i>State</i>	<i>Year</i>	<i>Official Removed</i>
California	1913 1913 1919	State Legislator State Legislator State Senator
North Dakota	1921 1921 1921	Governor Attorney General Secretary of Agriculture
Idaho	1971 1971	State Legislator State Legislator
Michigan	1983 1983	State Legislator State Legislator
Arizona *	1987	Governor
Oregon	1988	State Legislator

** Technically, Governor Meecham of Arizona was impeached by the legislature before recall election was scheduled for May 1988, but it is generally agreed that it was the recall petition that forced the resulting impeachment (Cronin, pg. 127). There are no statistics available on how many times recall has been initiated. In many states the initiation of a recall is not formally sanctioned.*

- 1) *A territory-wide recall procedure for those elected members who are also members of cabinet.*

This may be an unnecessarily big solution for what may be no more than a theoretical problem. The American experience suggests that state-wide recall procedures are so difficult that they almost never succeed. The entire list of successful *state-wide* recalls includes a single series of events in North Dakota in 1921. Even adding the 1978 Arizona episode (where a recall was cut short only by a successful impeachment) leaves only two successes out of 950 “state-years” of opportunity (TABLE 2).

Employing a territory-wide recall for cabinet ministers threatens to create the very danger it pretends to prevent. Such a recall process might very well create a political momentum making it impossible for a government to carry on. It would also create a confidence process outside the current confidence process existing within the legislature, and irrevocably transform responsible government. Thusly, it would maximize, rather

than minimize, the incompatibility of the recall and the parliamentary system. This is quite unlikely - if not impossible - with a purely local recall process for cabinet ministers.

- 2) *Immunize cabinet members from the reach of recall that affects all other elected representatives.*

Recall supporters argue that "executive immunity" would be a cure worse than the disease, accentuating the growing gulf between elected representatives and the more high profile cabinet officials which is one of the greatest problems of parliamentary democracy in the last half of the twentieth century. If recall were adopted, the partiality of "executive immunity" might well prove only a temporary exemption, untenable in the long haul. There is also the possibility of a charter challenge, either on the grounds that the voting rights of cabinet ministers' constituents were being infringed, or on the basis of the equality rights in Section 15 of the charter.

- 3) *Leave cabinet members subject to the same recall process as other members of the legislature.*

In the end, this may be the least problematic of the three alternatives. While members of the cabinet - especially those in the senior portfolios - enjoy a special vulnerability as a tempting target, the reverse side of the coin is they enjoy special advantages in resisting such attacks. For example, electors have a certain pride in the prominence of their representative (not unmixed with expectations of more immediate and concrete benefits flowing from this prominence). While any disgruntled group can start a recall petition, gathering enough signatures to force a recall ballot and then rallying the voters to recall the incumbent is a different proposition altogether. The American experience suggests that the recall cannot be used casually by small groups with petty grievances. Rather, it demonstrates how little of the anti-government grumbling so prevalent in a democratic society can stand the harsh test of petition and election.

A further advantage of retaining *local* recalls, even for those elected representatives who are also cabinet ministers, is that it contains and limits the possible damage of a successful recall. For a premier or a senior cabinet minister to lose their seat in such a fashion would be profoundly embarrassing, but by no means politically fatal to either the individual politician or the government of which they are a part. Not even the most panicky lieutenant-general could read it as a question of confidence suggesting the need for a new government or an immediate election. For example, in 1989, the Alberta Conservatives called a provincial election and held 60 of the 84 seats, but their leader, and incumbent provincial premier, failed to be re-elected in his own constituency. While Premier Don Getty may have been profoundly embarrassed by this development, there was no doubt that the Conservatives remained the provincial government and Getty himself premier. The same would be true of a premier recalled by unappreciative constituents in a single riding. Should the premier in the NWT be unsuccessful in the by-election, then presumably the NWT Legislative Assembly would be obliged to elect a new leader.

In a non-partisan legislature, the cabinet is the only party (that is, the only organized and strategically coherent bloc of members) in the legislature. Since this "party" only emerges after an election and is not the direct result of voter preferences, under some circumstances, the recall could be the only way for the voters to "break" the power of such a bloc.

b) Party Discipline:

While the NWT currently does not have a partisan system, consideration of the recall at this time should take into account the party discipline issue as outlined below.

The flip side of the importance of the cabinet in the Canadian parliamentary system and in its provincial counterparts is the emphasis on disciplined party caucuses. Usually, voters cast their ballots for particular candidates not so much because of their own special attractiveness, but because they are the medium through which to

express support for a particular party, party platform or party leader.

Once elected, members thusly find themselves part of a disciplined and organized team, built around loyalty to party and leader, and buttressed by the petty - and sometimes not so petty - "perks" and punishments of legislative life. This can leave the member trapped between a party with a message to deliver to the voters, and local voters who have quite a different message to deliver to the government. Members may be punished by the party caucus now or by the voters later.

To the extent that recall loosens the bonds of party unity, it could be problematic for parties, particularly the governing party. It is possible that recall could get in the way of a party fulfilling its electoral mandate or responding to subsequent developments. The more that representatives are directly accountable in a practical way to their constituents, the less they are likely to be amenable to the leadership of the party. The problem that always looms large under the shadow of an approaching election - that of prescribing unpleasant medicine for the voters and getting the members to deliver it - could persist though the entire life of a legislature.

For elected representatives, the situation is more ambivalent. Recall would confront them with hard choices between annoying the party leadership or drawing the anger of local constituents. But, it is unclear whether recall would be part of the problem here or part of the solution. Research suggests that many elected officials are frustrated by the constraints of party discipline - the "trained seal" role that is often forced upon them. Indeed, many would appreciate an opportunity for a more independent role. Party whips cannot casually shrug off a member's concern about being recalled by indignant local citizens. The advantage of having two masters is that one can be played off against the other.

Recall clearly presents potentially greater problems for a parliamentary system than for a congressional one. But these problems should not be exaggerated in light of the American experience. Recalls are seldom attempted and

even more rarely succeed. True, cabinet members may suffer more than their share of challenges, a shaky government with a paper-thin majority may fall, and some government backbenchers may become marginally more ready to speak out and ignore the party whips, but none is a wound that cuts to the heart of responsible government.

Recall Practice: Assessing Options

The general idea of the recall is to remove and replace an elected representative by means of a formal petition and subsequent by-election. This raises a number of specific questions and issues. What follows is a brief consideration of these issues.

1. Periods of Immunity / Protection

There is often a period after a general election - as short as 90 days in some jurisdictions to one year in others - during which an elected representative cannot be the subject of a recall petition. In part, this concern is logical. In some cases, voters cannot react to the track record of an elected representative who has not had enough time to establish a track record.

However, there is also an important practical implication. A period of protection or immunity from recall prevents the mechanism from being used by an unsuccessful candidate for a quick second chance. Initiating an immediate recall petition could be tempting after an extremely narrow election result, accompanied by an unusually low voter turnout. Whatever passions the election may have generated, after three, six, nine or 12 months, those passions will cool, if not among a handful of the loser's staunch supporters, then at least among the broader electorate whose signatures and support are necessary to trigger a recall effort.

A similar logic argues for the protection or immunity of an elected representative who has already survived a serious recall attempt, whether for a certain period of months or for the entire remainder of the term. The problem is, however, that a frivolous recall petition early in the term may protect an elected representative from a much more serious and justified recall attempt

Periods of Immunity / Protection: Options

- 1) **No immunity periods:** Undesirable. Risks spillover from hotly contested election.
- 2) **Three, six, 12 months immunity after election of representative:** Modest protection period desirable for logical and practical reasons.
- 3) **Immunity (time-constrained or total) after unsuccessful recall:** Casual or insincere recall petition absolutely blocks subsequent more serious attempt.
- 4) **Three or six months immunity before general election:** Does not avoid confusion of a recall running into an early election, or the possibility of an unpopular legislature prolonging its own life.
- 5) **Special immunity for premier and/or cabinet:** Politically risky for government. Risks charter challenge.

later. Unless this provision is considered with extreme care, it is conceivable that an elected representative with enough friends might launch a recall petition and then sit on it, effectively protecting himself or herself against a more serious recall effort in the future.

2. The Petition

The legal impact of a recall petition calls for a more formal process than the petitions that are often found at a local shopping centre or gas bar. For one thing, the signatures on such a legal binding petition need to be witnessed (either by the person circulating the petition or by a third party) and names and addresses need to be legibly printed so they can be verified against the eligible voters' list.

Just as important, the petition process needs to be channeled through an official check point such as the Chief Electoral Officer. It is not several different petitions started by different people at different times for different reasons that should somehow combine to unseat an elected representative. Rather, it must be a sufficient number of signatures organized behind specific objections. Similarly, to reduce the possibility of casual honest error undercutting an otherwise valid recall petition, it is probably better to establish a formal process for initiating the petition, again channeling the initial grievors through the official check point, and also providing for the public printing of official

petitions that clearly call for the necessary information.

There needs to be some signature threshold for the application of an official recall petition. This should be neither so low (15%) as to encourage frivolous recall attempts, nor so high (50%) as to unnecessarily hobble reasonable ones.

The Petition: Options

- 1) **No registration / informal petitions:** Undesirable. Trivializes the process and invites technical problems.
- 2) **Registration / officially approved petitions:** Prevents frustration of legitimate attempts. Should be conceived as administrative rather than regulatory function.

3. The Filing Fee

In the interests of preventing frivolous recall attempts and also to defray some of the administrative and other costs (such as printing up the necessary official petition forms), it may be deemed desirable to require a reasonable but not prohibitive filing fee in order to commence the recall process. The B.C. *Recall and Initiative Act* calls for only a \$50 processing fee which seems on the low side. The private member's bill in the NWT suggested a fee of \$1,000. These two figures can be taken as the outside bracket for a reasonable solution. U.S. jurisdictions tend very much to the lower end, usually requiring no payment at all and, at most, asking a modest (\$100) filing fee.

Another logical alternative, and one that fits well with the current governmental philosophy of user fees to recoup actual costs wherever possible, would be to set the fee on a cost recovery basis for the processing of forms, issuing of petition forms,

Filing Fee: Options

- 1) **No filing fee:** Clearly the most "citizen friendly" option. Probably encourages frivolous petitions.
- 2) **Modest filing fee:** Fee similar to candidate election deposit seems a reasonable compromise.
- 3) **Cost recovery filing fee:** True cost recovery is substantial - probably upwards of \$5,000. Would clearly discourage reasonable recall attempts.
- 4) **Significant filing fee (more than \$500):** Could discourage even reasonable recall attempts, especially if fee is not refundable upon achieving a certain threshold.
- 5) **Refundable fee (upon success or some reasonable percentage of signatures):** Discourages frivolous petitions but not those that are reasonably grounded.

and the validation and verification of signatures. The drawback is that few citizens have any realistic idea of how much it actually costs to perform these seemingly straightforward clerical and bureaucratic functions.

Alternatively, the fee might be thought of as a deposit subject to repayment should the recall achieve a certain level of success - a parallel to the old rules regarding the return of a candidate's deposit in a general election. At a minimum, this might occur should the petition succeed, but also should the petition come within some fraction (say 50%) of the number of signatures needed for success. The possibility of a repayment would very much undercut the deterrent appearance of such a fee.

The filing of an appropriate application and the payment of a fee would trigger the printing of the appropriate forms (which need not take long in the age of desk-top publishing), while the availability of the forms would start the clock ticking on any time limit for the collection of signatures.

The point of the filing fee, like the official time limit, should not be to prevent recall petitions, but to *regularize* them - to ensure that the sponsors of a petition understand the rules and procedures, that appropriate forms are provided, time limits enforced, relevant immune periods taken into consideration, that no more than one active recall petition is directed toward any given representative at any one time, and so on. The essential purpose of the recall device is to generate a "hands on" "user friendly" style of democracy, and this is facilitated more by steering petitioners away from potential hazards than frustrating their efforts with a host of legalities.

4. Rationale for Initiating Recall

In most U.S. jurisdictions, the recall petition must include a brief statement of specific reasons for dissatisfaction with the representative - the action(s) or omission(s) which are felt sufficiently serious to merit removing them from the legislature. The reasons need not amount to accusations of wrongdoing or impropriety - the point is not to provide a way of ruling potential

recalls out of order before they can start, but only to provide a logical focus to the recall campaign and a point of response to the challenged member. If an issue is controversial enough, and the constituency homogenous enough in its feeling toward it, then a single “wrong” vote for even the best-intentioned of reasons would suffice.

To be sure, there is a problem here that is both practical and philosophical. When is a reason not a reason? What if the filed reasons contain an assertion that is factually incorrect? The bill considered by the NWT legislature had a solution to one very important aspect of this problem - only the signers of the petition were immune from any legal liability for the claims within the petition, but not the initial “promoter” and “sponsors.” However, this still leaves the problem of an honest but important error on relevant facts. More problematic would be proposed reasons that are either incoherent or irrelevant. The only alternative other than simply trusting the good sense of the electorate (which is, after all, what put the elected representative in office in the first place) would be a carefully drafted requirement of coherence and relevance with unfit petitions subject to rejection by the Chief Electoral Officer with possible appeal to the courts.

Ideally, a brief and focused set of reasons would provide a logical centre of gravity for the recall campaign. Community opinion should be rallied for or against a representative’s specific action rather than around a scattered rainbow coalition of disgruntled factions with different or even mutually contradictory grievances. Voters should be moved to sign a petition not because a particular member had once voted or behaved in a way in which they disapprove, but because they agree with the sponsors of the petition that on this particular occasion the member had simply ignored the wishes or the interests of the electors in a critically important fashion.

A clear focus for a recall campaign has two further important effects. First, the challenged representative knows the issue on which to do a better job of explaining the reasons for the action. Second, the failure of a recall campaign objecting to a specific vote or action itself adds to the member’s legitimacy and credibility on that and other issues.

From a practical perspective, Elections NWT advises that if the Chief Electoral Officer (CEO) is going to be given the authority to accept or reject petitions, then it is very important that the CEO be given clear guidelines or instructions upon which to base decisions. Some questions to consider in developing these guidelines include the following:

- Will the MLA in question be allowed to provide comments on the petition and, if so, to whom?
- Will the CEO be permitted to ask the GNWT for comments on the contents of a petition if, for example, the petition deals in some way with government policy?
- Can the CEO ask the petitioner to clarify or change the wording of a petition?
- What if the petition is libelous or alleges fraud or other conduct that may be more appropriately dealt with through other means? Could the CEO refer these petitions to the Legislative Assembly, the RCMP or other agencies for investigation and action?

Providing Reasons for Recall Initiatives: Options

- 1) ***Focused reasons alleging wrong doing:*** Confuses the political remedy of recall with normal legal remedies.
- 2) ***Focused reasons coherently identifying any relevant issue accepted by the Chief Electoral Officer:*** Risks problems regarding Chief Electoral Officer’s role. Possible litigation from frustrated petitioners.
- 3) ***Required reasons but little / no regulation:*** Provides considerable latitude to those initiating the recall; risks problems with an unfocused campaign and the subsequent difficulty of representative’s response or defence.
- 4) ***No reasons:*** Undesirable. Renders generalized complaining potentially lethal. Fails to alert representative’s supporters to the real issue in question.

5. Required Signatures

The signature issue raises several questions. How many signatures should be required and from what population should they be drawn? Who can solicit signatures and how long should they be given to do so? How should signatures be verified and validated?

Each of these will be dealt with in turn, but to begin, how many signatures should be required and from which population should they be drawn? The signature threshold must be designed to avoid two unsatisfactory extremes. On the one hand, if the required number of elector signatures is too low, representatives can be removed too casually, too easily and too often by small factions within the electorate. This is a spectre which does no one - not the legislature, not the government, not the electors nor even the democratic theory on which the argument for recall is based - any good. The recall of elected members on even the most generous of readings must be exceptional rather than routine, generated by circumstances that are unusual rather than everyday.

On the other hand, if the required number of elector signatures is too high and too difficult to achieve through practical measures within a restricted time frame, then the recall provisions become a cynical pretense, offering the illusion rather than the reality of increased representative accountability. However, one must bear in mind that even the 66.7% threshold of the 1935 *Alberta Recall Act* was not enough to save the premier from a recall that was forestalled only by the retroactive repeal of the legislation.

Most U.S. jurisdictions find the appropriate balance around 15% or 25% of the number of registered voters at the previous election. The "outliers" are Montana at 10% and Kansas at 40%. But it should be kept in mind that in most of these jurisdictions the *petition* itself does not trigger the immediate removal of the member. Rather, a successful petition triggers the further hurdle of a recall "election" or "referendum." (See discussion below under "9. Consequences of a Petition" on page 24).

Most of the recent Canadian proposals, such as the British Columbia Act, the NWT bill, and the private members bill in the Commons, assume a 50% signature threshold. Each assumes that a successful petition is enough to effectively trigger the recall of the member. The bill debated by the Alberta legislature proposed 40% for a petition that would trigger an intervening recall referendum, which, if successful, would then trigger the actual by-election.

A related matter - on which U.S. jurisdictions are divided - is whether the signature threshold should be considered in terms of the *eligible voters* or the *actual votes cast* at the preceding election. The latter is the more permissive alternative. For example, consider a constituency with 50,000 voters, a 60% turnout, and a 50% signature threshold for a recall petition. The "eligible voters" route would require 25,000 valid signatures. The "actual votes cast" requirement would only ask for 15,000. In jurisdictions where the electoral divisions are large and turnout sometimes very low, the difference can be considerable.

In the context of the NWT, neither issue is pre-emptively important - the constituencies are small (averaging about 1,200 voters), and the turnout averages over 70%, seldom falling below 60% in any riding.

There is a second and potentially more critical issue which affects both the calculation of the actual number of signatures needed and the population from which signatures can be solicited. The eligible voters' list from that electoral division for the previous election is the obvious starting point, but it suffers a triple disability as an accurate reflection of the current body of eligible voters:

- 1) *some eligible voters move out of the constituency (or die) and to this extent the voters' list **overstates** the current voting population;*
- 2) *some eligible voters move into the constituency (or achieve the relevant birthday), and to this extent the voters' list **understates** the current voting population;*

Signature Threshold: Options

- 1) **Low signature threshold (10% to 15%):** Maximizes citizen empowerment at cost of facilitating recall petitions to the extent of disrupting legislative process and the composition of legislature.
- 2) **Moderate signature threshold (40% to 50%):** Higher threshold justifies a greater legal weight for a successful petition, such as triggering the actual recall as opposed to a recall election.
- 3) **High signature threshold (>50%):** Very high requirements make recall petitions prohibitively difficult and unworkable except in the most extreme circumstances. But, it also makes them a far stronger statement when they are achieved.

3) *the difficulties of voter enumeration in the NWT mean that some voters may have been omitted and can complete an application for registration as a voter at the same time that they cast their votes. To this extent, the voters' list again **understates** the current voting population.*

Some would argue that it is not desirable to exclude from the list of potential petition signers those individuals who were omitted from the eligible voters' list, but who voted at the previous election on the basis of an application for registration. Not only must the numbers of such voters be added to the count from which the voter threshold is generated, but a list of the names of such actual voters must be added as an appendix to the voters' list to become part of the population from which valid signatures may be drawn. Without some idea of how numerous such applications might be - and more relevantly, how proportionately numerous they might be in the riding or ridings where they are most common - it is impossible to know how important this provision would be.

Citizens who subsequently qualify through birth or relocation as electors within the constituency cannot be added to the list because of the difficulty of imagining or establishing a workable counterpart to the registration application process that applies during an actual election.

Finally, citizens who cease to be eligible through relocation or death might remain part of the base for the calculation of the required number of signatures. In some schemes, such as

the *BC Recall and Initiative Act*, people can remain valid signatories even if they now reside outside the actual constituency. Usually (as in the bills of both the NWT and Alberta legislatures), both current residency and established voter eligibility in the relevant constituency are required. This makes the signature threshold slightly harder to achieve than would appear at first glance for the number of electors actually qualified to sign a recall petition is, in reality, slightly smaller than the list of eligible voters from the previous election. In the interval between a single pair of NWT elections, neither of these factors changing the pool of eligible voters is likely to be significant.

6. Time Limits

Some U.S. jurisdictions have no time limit for the circulation of recall petitions, letting them meander casually through the entire term of a legislature gathering signatures by fits and starts. The process is called to an end only by the achieving of the magic number of signatures or by the election of the next legislature. Such an unstructured, open-ended process compromises the dialogue between electors and elected representatives that the recall offers. It also puts the representative in an impossible corner with an impossible hill to climb. The point of a recall is not to fill a bag with a random hodge-podge of complaints - people annoyed with the member's legislative attendance, people who feel he or she is not available enough in the constituency office, people outraged at the support for one bill, people upset with opposition to another, people offended by a chance remark during a televised debate, etc. Rather, the point of a recall is to provide an outlet

Time Limits: Options

- 1) **No time limit / generous limit (eg 12 months or more):** May move the recall dialogue away from focused community opinion on a "live" issue, leading to an unfocused campaign.
- 2) **Modest time limit (eg 3 to 6 months):** Functional in that only strong community response on a focused issue can reach signature threshold.
- 3) **Tight time limit (eg 1 month):** Maximum protection for representatives, but precludes even strong community opposition from being effective unless accompanied by first-rate organization.

for a clear concern on a focused issue. This is all the more important because there is no practical way of "unsigned" a petition should individuals come to have second thoughts months later.

The recall dialogue is best facilitated by the combination of a focused petition with a firm but reasonable time limit from the issuing of a formal petition to the closing date for its submission to the Chief Electoral Officer. An unfocused petition (eg representative X is never available in the constituency; representative Y voted against a job-creating resource development project; or representative Z voted for a tax increase) with no time limits - or time limits that are too generous - undercut the recall, and their apparent generosity obscures this deeper flaw.

On the other hand, the collection of signatures is a time consuming process, more so than people realize. Just keeping volunteers at a booth in a shopping centre on a continuous basis calls for a roster of reliable individuals, and a door to door canvas (complete with call-backs) rapidly consumes time and resources - much more so in a rural setting than in an urban one. The comparatively small number of electors in most NWT constituencies - although considerably offset by the geographical extent of many of them - makes modest time limits credible and functional.

The private member's bill on the recall in the Alberta legislature included an interesting wrinkle: if the recall petition is within a certain range of the required number of signatures (within 85%) on the deadline day, then the deadline should be extended by five days to give the sponsors time for one last effort.

7. Circulation of the Petition

Petitions do not circulate or collect signatures on their own. A successful recall, even in a riding with a relatively small number of electors, calls for a considerable degree of organization and cooperation. The tighter the time limits involved, the more serious the demands on the sponsors of the petition.

Both the existing BC act and the proposed Alberta bill allowed any elector from the riding to circulate the petition and gather and witness signatures. The signature requirement makes it possible to validate the eligible voter status of the witness.

Circulating Petitions: Options

- 1) **Open circulation / no limit:** Increases chances of organized interests from outside the jurisdiction targeting members for broader political objectives.
- 2) **General circulation / any elector from electoral division:** Most user friendly option. Allows petition movement to "snowball" and gather supporters, while limiting it to the immediate constituency.
- 3) **Narrow circulation / signed petitioners:** Tightest control over process and validation, at possible cost of hobbling genuine popular recall movement.

The recall bill considered by the NWT legislature defined this group rather more narrowly, allowing only the signers of the initial recall application to circulate the petition. To some extent, the differences may be more apparent than real, particularly given the smaller scale of NWT constituencies, and given that prior organization is the only realistic way of completing a petition within a time limit. Recall sponsors who plan to start a recall and then find the foot-sloggers as they go are probably dreaming in technicolor. The core principle here is the one mentioned in all three bills - that only *eligible electors* from the challenged representative's *constituency* can play any part in the collection of signatures. This seems to be a logical extension of the nature of the recall itself. It also reduces the chances of an elected representative being assailed by organized interests from outside the district.

Narrowing and pre-identifying the circulators of petitions presents an advantage to the officials charged with overseeing the process and confirming its outcome. Since the recall cuts to the heart of the practice of political representation, and the impact of one or more by-elections in a small legislature could be striking, this is no small consideration. On the other hand, a popular recall petition building on genuine community feeling may well "snowball" to generate supporters who want to do more than simply sign the petition, and this becomes more critical if the original sponsors turn out to have underestimated the difficulty of achieving the required signatures within the provided time.

8. Validation and Verification

The list of signed petitions must be both *validated* and *verified*. There is a distinction between these two terms that is either assumed or overlooked by current proposals. First, the individual signatures and addresses must be *validated* by matching them up against the official list of electors (as modified by at-the-poll applications for registration) from the previous general election. In the smaller ridings (such as the High Arctic), this could reasonably be done for every signature. In the larger ridings (such as Yellowknife South) it might be more practical to do it for every fourth or fifth name.

Second, the signatures must be *verified* by taking some random sample of the total list and contacting the specific individuals to ensure that they have indeed signed the petition in full understanding of its import and without any improper inducements. For both purposes, an every-single-name double-checking in every case, regardless of the size of the relevant electorate, seems excessive and unnecessarily time-consuming and expensive.

To accommodate practicality while acknowledging the widely differing sizes of constituencies, it would seem more functional to express both validation and verification in "either/or" terms: say "two hundred and fifty signatures or 25% of the signatures, whichever is greater" for validation, and "fifty names or 10% of the signatures, whichever is greater" for verification.

The time factor is particularly relevant. The "recall petition season" is presumably already squeezed between the post-election immune period and (possibly) a pre-election immune period as well. Saddling the Chief Electoral Officer with an unduly massive and lengthy validation and verification process risks an unworkable expansion of the time needed to carry even a successful recall into the by-election period, which in turn subjects that office to possible perceptions of politically-motivated foot-dragging. The interests of the system, the involved officials, the electors and the

Validating and Verifying: Options

- 1) **No validation / verification:** Minimizes time and the cost to government, but invites padded or fraudulent signature lists.
- 2) **Random sample validation / verification:** Balances time and cost factors against a formal check on the genuineness of the petition.
- 3) **Total validation / verification:** Achieves total reliability at the cost of maximizing expense and time delay.

representative are all best served by procedures that are as streamlined as possible, without compromising the integrity of the process.

9. Consequences of a Successful Petition

The experience of U.S. jurisdictions suggests three different “models” or variations of the recall mechanism.

a) *The “Three-Step” Recall:*

The most common recall model treats a recall petition as triggering a “recall election” or “referendum” which functions similarly to a by-election. This is a “three-step” process. In the first step, the proponents of the recall must submit a petition meeting all certain signature and time requirements. The entire constituency electorate is then given the opportunity to vote for or against the recall of their current elected representative after a short campaign in which each side can present its case - the second step. If the “yes” vote wins this general ballot, the representative is effectively recalled and the process moves to the third step - a by-election to replace the recalled member. This is the process envisaged by the bill debated in the Alberta legislature.

b) *The “Two-Step” Recall:*

In this model, used in Arizona, Nevada and British Columbia, the petition accomplishes the recall of the targeted representative once the required number of valid signatures is achieved. In this process there is no separate recall “election” but instead an immediate by-election. The advantage of this model is the significant savings in time and expense, the natural consequence of one campaign, and one constituency-wide voting process instead of two.

The logical flip-side (but one that is not always fully realized) is that there should be a *higher* signature threshold for a petition that actually removes an elected representative than for one that refers the question to a separate constituency-wide vote. The earlier discussion on signature thresholds has assumed this “two-step” model. Lower figures would be more appropriate should a “three-step” process be used.

c) *The “Two-Step, Single-Vote” Recall:*

This is a much less common and somewhat voter-confusing alternative, used only in Colorado and Wisconsin. Following a successful petition drive, a single vote is held, asking voters to indicate *at the same time* whether they support the recall, and if this is successful, which of several candidates - possibly including the one against whom the recall is directed - they would support to fill the vacancy. If the recall (first) vote fails, the second vote is simply ignored. If it succeeds, the second vote is the by-election to fill the vacancy and the successful candidate immediately enters the legislature.

Petition Consequences: Options

- 1) **A “three-step” process where petition triggers recall election followed by possible by-election:** Increases cost and time needed to resolve member’s status. Not necessary if petition has high signature threshold.
- 2) **A “two-step” process where petition triggers removal of member and by-election:** Greater legal impact of petition alone calls for higher voter threshold and stricter validation/verification process.
- 3) **A “two-step, single-vote” process where petition triggers both a recall and by-election vote:** Problems with “what-if” nature of by-election votes. Combining recall and by-election campaign may contaminate both. May confuse voters.

10. Recall Campaign Spending and Financing

With the comparatively small electorate that characterize NWT constituencies, and without the complication of major party organizations carrying the battle to more dramatic levels, the costs of a recall campaign need not be as expensive as they would be if some group of Californians decided to recall the governor. Much of an NWT campaign would probably be small-group and personal, conducted more on a face-to-face basis than through the airwaves.

But even in the more intimate context of NWT politics, it might be naive to assume this, and it would certainly be naive to take for granted that it could never take any other form. The decisions of elected legislatures can sometimes matter a great deal to interests that routinely deal with large sums of money. Any barrier between the two, on the recall or any other issue, cannot be taken for granted. The absence of any rules or limits would almost seem to invite, and certainly would do nothing to prevent, the involvement of monied interests. This would curiously invert the historic origins of the recall, which was conceived as a way for the citizens to fight special interests.

There should be some basic rules surrounding the expenses incurred in the course of a recall campaign. Certainly, there should be rules about reporting the sources of funds and the way they have been set. There might possibly be limits on total spending, presumably related to the geographical size and voter population of the electoral division itself.

It is also becoming increasingly common in recent decades to make provision for the partial defraying of election campaign expenses - most mildly through tax deductible contributions, through the provision of "free-to-user" media time, and most directly through the partial subsidy from the public purse of direct expenses. Consideration should be given as to whether such measures are justified.

Campaign Spending: Options

- 1) **No limits:** Seems to invite, and certainly does not avoid, heavy involvement by monied interests - possibly from outside the area.
- 2) **Spending limits / reporting requirements:** Does something to limit high-spending interventions, or at least to identify and highlight such involvement for an appropriate public response.
- 3) **Partial public funding:** Encourages participation of less affluent segments of society, but it may be mildly irregular to subsidize such "extra-normal" political measures.

11. Enforcement and Penalties

Because the recall is fundamentally a "user friendly" style of citizen empowerment, one is inclined to think about it in terms of reasonable encouragement and facilitation rather than enforcement and punishment.

The two obvious options here are simple: either a recall petition follows a reasonable set of rules to achieve a pre-defined objective of valid signatures, or it does not. The "does not" is most likely to be thought of in terms of a failure to pass the signature threshold, but it is logically possible that it could also take the form of a detected violation of the rules as well. In either case, the failure of the attempted recall is a consequence that seems to carry its own punishment. This seems to be the logic of the bill debated in the Alberta legislature, which defined no offences and cited no penalties for its contravention.

However, one should never forget that legislatures deal with important matters of public interest, and they make decisions which often have a serious impact on the lives of all citizens or a select groups of citizens. We often think of politics as a game, but it is one played for high stakes indeed. This being the case, the matter of selecting or unselecting a democratically legitimate

Sanctions: Options

- 1) **No penalties / punishment:** Avoids discouraging citizen involvement, but an implicit "softness" could encourage, or at least not actively discourage, violations of the rules and procedures.
- 2) **Significant penalties / punishment:** Protects interests of elected representatives and treats the recall as seriously as elections themselves are treated.

representative is not one that should be treated lightly. At the same time, because the stakes are so high and the ripples of impact can spread so wide, it is a matter about which various interests may from time to time have strong motivation for involvement.

The electoral process itself, and therefore the by-election that results from a successful recall, is surrounded by rules backed up with penal sanctions. It is reasonable that the recall process then be formally defined and legally enforced as well.

The BC *Recall and Initiative Act* establishes punishments for contraventions of the act, providing for fines of up to \$5,000 and/or one year's imprisonment. The bill debated in the NWT legislature suggested double the fine, but half the possible imprisonment. Both carry the same message - recall is as serious a matter as the election process that it would supplement.

12. Administration Costs of Recall

The Elections NWT Office advises that each by-election in the NWT costs in the neighbourhood of \$25,000. This budget includes minimal administration costs for the Elections NWT Office which is currently staffed on an "as needed" basis. If the demands on the Elections NWT Office increase because of recall, costs will increase.

In addition Elections NWT has indicated that depending upon the recall system that is adopted, there will be a number of other administrative costs. Some examples include:

- developing and administering rules respecting spending on recall petitions;
- receiving and verifying validity of contributions and providing receipts for tax deductions;
- writing, printing, distributing and explaining information brochures on the recall process;
- developing and providing the necessary recall forms and other related documents;
- verification of signatures on recall petitions;
- advertising to make people aware that a recall petition has been filed and accepted;
- enforcement of time limits; and
- reviewing how recall petitions are funded.

Having a three-step process as suggested above (filing a petition, having a recall vote, then having a by-election if the recall vote is successful) would probably cost twice as much as a by-election, or approximately \$50,000.

If the two-step process were used (a petition, if successful triggers a by-election), the costs would be approximately \$25,000, plus initial preparation costs and any administrative costs for the Elections NWT Office. If steps were taken to have people appointed to various electoral districts to accept recall petitions or otherwise administer the process, additional costs would be involved.

Administration Costs

- 1) Depending upon the approach used, there will be initial and some ongoing administrative costs associated with developing and implementing recall.
- 2) A recall by-election under the two-step process would cost about \$25,000 and under the three-step process, about \$50,000.

Arguments in Favour of the Recall

A review of the relevant literature suggests a range of arguments in favour of the recall. These arguments can be organized into several different general categories:

1) *Arguments based upon democratic principles:*

- The recall strengthens popular control of government by allowing voters to remove elected officials who are incompetent or who behave inappropriately, or who fail to reflect accurately the views of the electorate on major issues.
- The availability of the recall increases citizen interest in public affairs and reduces alienation by providing for continuous accountability, allowing them to act when they have lost confidence in their representatives.

2) *Arguments based on fear of corruption and special interests:*

- The recall provides a backstop when the normal processes of the electoral system fail to produce accountable and responsive elected officials.
- The recall reminds elected officials that corruption and inefficiency will not be tolerated.
- Recall helps check undue influence by narrow special interests, allowing voters to act promptly when such influence manifests itself.

3) *Arguments stressing spin-off benefits:*

- Recall increases the willingness to remove restrictions on the actions of elected officials because it provides a recourse against officials who betray their trust.
- The recall encourages the electorate to accept longer terms of office for elected officials.
- Recall offers a safety-valve mechanism for intense feelings.

4) *Arguments from experience with the recall:*

- There is no indication from U.S. experience that recall petitions have been used to harass elected officials, or serve vested interests.

Arguments Against the Recall

A review of the relevant literature suggests a range of arguments against the recall. They can be organized into the following general categories:

1) *Arguments based on democratic principles:*

- The very premise of the recall is antagonistic to representative principles, specifically to the idea of electing good lawmakers, allowing them a chance to govern until the next election, and then judging them on the package of their accomplishments.

2) *Arguments based on suggestions of redundancy:*

- There are other ways of removing elected officials when it is necessary to do so, and these ways do not suffer the disadvantages of the recall.

3) *Arguments suggesting the unavoidable dangers of possible misuse:*

- Use of the recall for ideological or partisan reasons is both unavoidable and undesirable.
- Frivolous recall petitions can be circulated to harass conscientious elected officials.
- The recall may be abused by well organized and well financed organizations to achieve their special interests.
- The recall may be used to remove individuals from public office for petty or transient reasons - that is - recall in haste or at leisure.

4) *Arguments stressing harmful side-effects:*

- Recall will restrain innovative and energetic elected officials.
- Recall will discourage highly qualified men and women from seeking public office when controversial issues call for difficult decisions.
- The recall increases governmental costs with the need for recall elections and special elections.
- Recall elections are divisive, disruptive, polarizing, and subject to many abuses. They are often confusing, and place too much burden on the voters to keep informed between elections.

The Recall in the NWT: Advantages

In two important respects, the NWT legislature is uniquely situated in terms of considering the recall. For one thing, the relatively small size of the electorate in most ridings makes more credible the notion of a community operating to replace an unsatisfactory representative. In most countries and in the rest of Canada, a constituency is an arbitrary and frequently changing bloc of electors, often lacking the practical focus or the psychological unity of a meaningful community. The more intimate scale of the NWT legislature and electorate better replicates the type of interaction that traditional democratic theory assumes.

A second relevant advantage is the non-partisan nature of the NWT legislature. One recurrent concern about the recall is the fact that it can potentially be used by one partisan group seeking tactical advantage against another. Where neither elections nor the legislative assembly are organized in terms of political parties, this concern is less important. Similarly, in a non-partisan legislature the spectacle of a string of recalls toppling a government with a narrow majority to force a general election is much more remote from political affairs.

A non-partisan legislature may in fact be better positioned to benefit from the recall. For example, without the discipline imposed by a party caucus concerned with its own long-term accountability, individual members do enjoy a freedom that may more easily be abused. The recall can provide a balanced check in the absence of traditional political parties.

It can also be suggested that in a non-partisan chamber, the cabinet becomes in effect the only "party" (that is, the only strategically organized and internally coherent bloc of members), without the discipline of an institutionalized opposition to call them to account. The recall could then constitute an extra-legislative mechanism to re-establish such governmental accountability, as well as the more localized accountability normally implied by the practice.

The Recall in the NWT: Disadvantages

The recall does face certain problems in the NWT. First, the large geographic size of many ridings makes both the collection of signatures on a petition and the verification of those signatures more difficult than it would be in a geographically compact urban constituency. Weather conditions are particularly problematic in some seasons of the year. To some extent, this problem is self-limiting - the constituencies with the largest difficulties for transportation and communication are often those with the smallest number of electors. But, the concern is far from negligible.

Second, the sometimes high proportion of acclamations (three in 1987 and six in 1991) creates some minor problems. Although (presumably) the basic voters' list has been generated before the end of the official nomination period, the absence of a contested election means that qualified electors left off the official list are denied the chance to make an application for registration at the poll. The larger the proportion of voters who make such applications in practice, the more serious this problem. An acclaimed candidate also precludes expressing the required proportion of signatures on a recall petition in terms of "votes cast in the previous election" rather than "eligible voters in the previous election." For these constituencies, only the latter basis could logically be used.

Finally, the non-partisan practices of the NWT do nothing to reduce, and in some sense may even heighten, the problem of the special vulnerability on controversial issues of cabinet ministers - territory-wide officials who are also local representatives. In a non-partisan setting, these individuals retain the high profile that invites attack in any parliamentary region, but without the protection of party organization, party resources and party loyalty that exist in a partisan legislature. If the positive side of the non-partisan experience is that it means there is no opposition party organization in place in the minister's riding as a built-in launching pad for a politically-timed recall, the negative side is that there is no government party organization in place as a built-in organizing centre for a campaign against the recall, discouraging signatures by answering the specific objections.

Conclusion

It is often customary to draw a distinction between two different types of democracy. One is "representative democracy" built around periodic elections and elected members (or perhaps parties) who, during the period between elections, act on the basis of a "mandate" that the vote result has given them. The other is "direct democracy" organized around pro-active opportunities for the voters between as well as during elections, through devices such as the initiative, the referendum and the recall.

But of the traditional trio of direct democracy devices, the recall is clearly the odd man out, logically parked somewhere on the dividing line between the two notions of democracy. It is the concept which tries to use the pro-active initiative of voters not to undermine or deny, but to reaffirm and reinforce, the representative assembly. The recall is a reform which takes the individual member of the legislature seriously.

Can the recall make a real difference in a parliamentary democracy? Clearly, the potential exists. In partisan legislatures, majorities could be chipped away and backbenchers dragooned into rejecting the party whip. In partisan and non-partisan bodies alike, premiers and cabinet ministers could be removed from the legislatures, or distracted by the need to fight petition drives that could cost them their seats. At the very least, it would not make their jobs any easier.

But, would the recall in practice really make a massive difference? The American experience suggests that it would not. Successful recalls are highly unusual events, generated by exceptional circumstances. The fact is, that recall petitions fail more often than they succeed.

If the recall were adopted, there could possibly be a flurry of activity as voters used and overused and possibly abused their new powers, after which things would drop back *almost* to normal. But this *almost* could be important to both voters and representatives. On the one hand, representatives would know that they could be removed from their seats whenever enough electors got upset enough with them. On the other hand, voter grumbling

would face the "put up or shut up" of the recall opportunity, and the knowledge that a failed recall would simply enhance the status of the challenged member. The question is how much reassurance to how many individuals would be purchased at how much cost to the office holders? Striking this balance is what the debate on the recall is all about.

The GNWT's Position

The Government recognizes that NWT residents are demanding more accountability from their elected representatives. In response, conduct guidelines were adopted by this Legislative Assembly, and steps have been taken to enforce some of these guidelines. For all MLAs, the Assembly has already taken measures to ensure that Members have to accept the consequences of their behaviour, even to the point of losing their seats. In the case of Ministers, the Assembly has given the Premier the authority to discipline them and, depending upon the circumstances, to ask for their resignation or remove them from cabinet.

With respect to measures which the general public can initiate, two conflict of interest statements have been filed with the Clerk during this Assembly. While the conflict charges were dismissed in both cases, Members have agreed that provisions respecting the filing of charges need to be revised to ensure that a complainant adequately prepares their case and that Members are not subjected to frivolous and unfounded charges. Nevertheless, the conflict provisions remain a powerful instrument for making Members accountable.

The recall measure, which has been the subject of this Legislative Action Paper, provides another measure for constituents to express dissatisfaction with, and seek the removal of, their sitting member. As the Paper suggests, there need not be legal grounds for initiating a recall petition. Constituents can base their action on any number of grounds, including, for example, a Member who refuses to meet with constituents, or a Member who gets into trouble for voting or working against constituents' wishes.

The Government believes that there may be legitimate grounds for seeking the removal of a Member. Constituents should have some means to deal with a Member who moves to Yellowknife after being elected and consistently refuses to return to the communities to meet with them.

On the other hand, one feature of the Assembly, which has worked from time to time over the past twenty years, is the ability of Members to reach compromises on difficult issues. This has involved taking positions and reaching decisions which are not necessarily popular with constituents.

In the coming years, the Northwest Territories Government and Legislative Assembly will face some major challenges, including implementing the establishment of two new territories and Aboriginal self-government; delivering programs and services with significantly reduced budgets; raising revenues to offset cutbacks in federal transfer payments; reaching decisions on devolution and mining resource development; and generally trying to improve upon the social and economic circumstances of the Northwest Territories.

In dealing with these issues, Members will inevitably have to make trade offs which may not be popular with their constituents. Recall will provide constituents with the means to remove a Member, even though the Member was trying to reach a consensus or compromise for the benefit of all Northwest Territories' residents.

The upcoming territorial general election provides both candidates and their constituents with the opportunity to debate the accountability issue, and whether additional measures such as recall are required. The Government encourages this debate to ensure that the next Assembly has a mandate or at least some indicators of how to address the recall issue.

However, both the public and candidates must take into account the consequences of recall at a time in the evolution of the Northwest Territories where Members must have the ability to reach an accommodation and consensus on major issues.

Without having some assurance of tenure, making collective decisions on these issues may be compromised for both the Cabinet and the Assembly.

Appendices

**Appendix I: Standing Committee on Rules,
Procedures and Privileges**



**Northwest
Territories**

Legislative Assembly

Standing Committee on Rules, Procedures and Privileges

REPORT ON ISSUES REFERRED BY CAUCUS

OCTOBER 1994

**Henry Zoe, MLA
Chairperson
Twelfth Assembly**

RECALL LEGISLATION

Recall is a legal mechanism whereby a specified percentage of voters can petition for a vote to remove an elected official. If the vote is in favour of removal there would be a by-election to fill the vacancy. Caucus asked that the Standing Committee on Rules, Procedures and Privileges examine this issue in more detail as it might relate to the NWT Legislative Assembly.

The committee studied the various strengths and weaknesses of this aspect of direct democracy. Although there are special problems in using recall in a parliamentary system, implementation in the Northwest Territories is a possibility.

If the concept of recall was approved in the Northwest Territories' legislature, it would be up to the government to devise and implement the recall procedures by way of legislation. Factors which would have to be addressed in detail in the legislation would include:

1. Should there be specific grounds for recall, such as misconduct or incompetence? Should the grounds for recall be unlimited?
2. Should there be periods in which representatives are immune from recall attempts?
3. How many signatures would be required for a successful petition for recall?
4. Should there be restrictions on spending during the petition process? Who pays for the costs associated during the petition process? Should there be a fee for the petition, and what would that fee be? Should there be limits to the number of petition attempts?
5. Should there be a time limit for gathering petition signatures? What signature verification process would there be?
6. How long after a successful recall vote should a by-election be held?
7. Should there be a recall vote, or should a successful petition remove the elected official from the seat?
8. Which voters are eligible to vote in a recall election?

The Standing Committee reviewed the issue of recall and feels that although the issue is important and deserves serious consideration, this committee does not have the authority to pursue the issue to its conclusion.

RECOMMENDATION #11

Therefore, the Standing Committee on Rules, Procedures and Privileges recommends:

that the Government develop a Legislative Action Paper on the issue of Recall of Members of the Legislative Assembly for tabling in the House.

CONCLUSION

This concludes the review of the issues referred to our committee by caucus. The Standing Committee on Rules, Procedures and Privileges would like to thank members for their continued interest and support in these issues that affect us all. Suggestions for improving our rules and procedures are always welcome and appreciated.

APPENDIX II: Recall "Roadmap"

BASICS

THE PETITION PROCESS

BY-ELECTION

OTHER

NWT PRIVATE MEMBER'S RECALL BILL

BC RECALL AND INITIATIVE ACT

PROPOSED ALBERTA LEGISLATION

<i>How does recall work?</i>	Provides for a "two-step" recall process: (a) petition with enough signatures triggers the "recall" and leaves the legislative seat vacant; (b) a by-election is then held to fill the vacant seat.	Provides for a "two-step" recall process: (a) petition with enough signatures triggers the "recall" and leaves the legislative seat vacant; (b) a by-election is then held to fill the vacant seat.	Proposed a "three-step" recall process: (a) a recall petition; (b) a "recall referendum" or vote which if successful recalls the member; (c) a by-election to fill the vacant seat.
<i>How to start a petition?</i>	An application must be filed and a \$1,000 fee paid.	File an application and pay a \$50 processing fee.	File an application to the Chief Electoral Officer.
<i>What is needed on the application form?</i>	Applications must include: (a) the name of an official "promoter" and at least 14 "sponsors"; (b) the reasons for the recall; and (c) a sworn declaration from the promoter about any prior "dealings" between the promoter and the MLA.	Applications must include: (a) the name of the official "proponent"; (b) the reasons for the recall; and (c) the name of the MLA being recalled.	Applications must include: (a) the name of an official "chairman"; (b) the reasons for the recall; (c) the name of the MLA being recalled; and (d) signatures of 50 other electors from the member's constituency.
<i>Can applications be rejected?</i>	Applications will be refused if the member being recalled has held office for less than 12 months or has been subject to a prior recall petition (whether successful or unsuccessful).	Petitions will not be issued for the recall of a member if that member has served for less than 18 months since the date of his or her last election.	Only one recall petition per member may be issued during a term. No petition may be issued for a member who has served only half a year of his or her term, nor after the member has served three and one half years.
<i>Who collects signatures?</i>	Only the designated "promoter" and "sponsors" of the petition may canvass for signatures. Promoters and sponsors must be persons who (a) are eligible electors under the Elections Act; (b) are ordinarily resident in the constituency of the member being recalled; and (c) were eligible to vote at the date of the last election of the member.	<i>Canvassers of signatures must be:</i> (a) residents of British Columbia for at least six months; (b) be registered to vote with the Chief Electoral Officer.	Any elector from the constituency may canvass for signatures. There is no limit to the number of copies of a petition that can be circulated. Copies of the petition become part of the original petition when submitted to the Chief Electoral Officer.
<i>Who can sign?</i>	To sign the petition, a person must: (a) be an eligible elector under the Elections Act; (b) be ordinarily resident in the electoral district; and (c) must have been eligible to vote for the member in the last election in which that member was elected.	To sign the petition, a person must have been a voter who, on the date of the last election of the member, was registered to vote in that member's electoral district.	To sign the petition, a person must be resident in the member's constituency and at the date of the approval of the application of the petition, must have been eligible to vote.
<i>How many must sign and in what time frame?</i>	Promoters and sponsors have 90 days to collect the signatures of at least 50% of all eligible voters at the time of the district's last election.	Canvassers have 60 days to collect the signatures of at least 40% of all eligible voters at the time of the district's last election.	60 days to collect the signatures of at least 40% of all eligible voters in the district at the last general election. If less than 100% but more than 85% of the required signatures have been collected, an extra five days will be granted.
<i>Who witnesses signatures?</i>	Statements, confirmed by oath, must be made by the promoter, sponsors and every signatory that: (a) they were not paid to either collect signatures or sign the petition; (b) reasonable measures were taken to ensure that signatories to the petition were eligible; and (c) that the signatories understood and agreed with the reasons for recalling the MLA. Promoters and sponsors may not have these oaths made before him or her - necessitating the use of a Commissioner of Oaths or a Notary Public for the securing of each signature.	<ul style="list-style-type: none"> Each signature must be witnessed by the person who canvassed the signature. It is illegal for a canvasser to pay, or a signatory to accept, any payment or other inducement for signing the petition. The Chief Electoral Officer must decide within 42 days whether the petition is successful. 	The Chief Electoral Officer must indicate the number of signatures required based on the voters' list at the time of approval of the petition.
<i>Are there other things to consider?</i>			Canvassers must sign an affidavit stating that: (a) the electors who signed the petition did so in their presence; (b) the signatures, to the best of their knowledge, genuinely represent the people signing the petition; and (c) all those who signed were eligible to do so.
<i>What triggers the recall?</i>	A successful petition means the MLA is "recalled" and the seat then becomes vacant. A writ for a by-election in the district will then be issued.	A successful petition means the member is officially "recalled" and the seat declared vacant.	If at least 90% of 15% of the signatures on the petition are valid, the petition is successful. A recall referendum will then be held. If more than 50% of eligible voters cast ballots agreeing to recall the member, the member is officially "recalled" and the seat declared vacant.
<i>What is the time frame?</i>	Not stated	A writ for a by-election must be issued within 90 days of the "recall."	The recall referendum to be held within 50 days of the petition being filed. Timing for by-election governed by the <i>Legislative Assembly Act</i> .
<i>Can the MLA run again?</i>	The recalled member is not prohibited from seeking the seat again.	The recalled member is not prohibited from seeking the seat again.	Recalled members can seek the seat again.
<i>Are there other special things to consider?</i>	A by-election will not be held if: (a) a general election is expected within six months or (b) the Legislative Assembly is dissolved.	Only one recall by-election per district is allowed between general elections.	The number of recall referendums and by-elections is limited indirectly through limits on the number of petitions that can be issued.
<i>Are there regulations on financing a campaign?</i>	No limits on expenditures. The promoter must furnish a list of persons making financial contributions towards the recall effort and a list of all expenditures incurred within 120 days of the issuing of the recall petition.	Regulations accompanying the act allow cabinet to limit the amount of money that can be spent on a campaign and sets out numerous requirements for the reporting of financial information and the incurring of expenses.	There are no spending limits or other restrictions in the act. Cabinet has the right to develop such regulations, however. Provisions of the <i>Elections Act</i> apply unless specified by cabinet.
<i>Are there penalties under the Act?</i>	Contraventions of the act are punishable by fines of up to \$10,000, imprisonment of up to six months, or both.	Contraventions of the act can result in fines of up to \$5,000 and imprisonment of up to one year, or both.	No penalties cited for contraventions under this act.

Appendix III: Relevant Literature

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LEGISLATIVE ACTION PAPER ON RECALL
- EXECUTIVE SUMMARY

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