[1]Comments on the Fair Elections Act (Bill -C23) by Professor Paul G. Thomas, Political Studies, University of Manitoba*

I Introduction

My comments flow from the underlying premise that sound electoral governance arrangements contribute in important ways to public trust and confidence in the election process and to democratic legitimacy for the outcomes.

Voting in elections is the one act of democratic citizenship in which the majority of Canadians participate and there is evidence from empirical studies in other countries that confidence in the integrity of the election process has an impact on voter turnout and on voter satisfaction with the process.

In Canada a 2011 survey found that 77.6 % of respondents had a great deal or quite a lot of confidence in Elections Canada. After the May, 2011 general election in another survey, 85% of eligible voters felt that Elections Canada ran a fair election. When it comes to confidence in the various institutions involved in the electoral process, Elections Canada was the most trusted-80% of respondents said they had quite a lot or a great deal of confi-

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Professor Thomas is a member of the Elections Canada Advisory Board but the interpretations and opinions expressed in this document are strictly his own.

dence in the agency. Respondents were least likely to have confidence in political parties, with 56 % saying they had not very much or no confidence at all in those institutions.

The relatively high levels of public confidence in the integrity of Elections Canada are reassuring but for two reasons they have to be interpreted cautiously.

First, most Canadians have limited knowledge of the legal rules and the administrative practices involved with staging a national election. Accordingly, their responses in surveys are based on their own experience of voting every four years and on their general perceptions of elections that come mainly from the media.

Most Canadians take the election process for granted. They show up to vote without knowing a great deal about what is involved with staging a large, complicated event called a national election on a single day. They are not well informed about how, under the campaign finance rules, political parties and individual candidates raise and spend money. They are not familiar with new campaign techniques designed to identify and get out the vote. Given the lack of knowledge among the general public, a comprehensive evaluation of the soundness of the election law framework and the quality of election administration must also incorporate the perspectives of expert observers.

Secondly, that there are recent developments that risk in the longer term undermining the public perception of Elections Canada as an independent, impartial, fair, professional and effective administrator of the Canada Elections Act, including its campaign finance provisions that are intended to ensure a relatively level playing field for partisan competition. When there are election irregularities that cannot be dealt with appropriately under the existing Elections Act and/or when the impartiality and effectiveness of Elections Canada is challenged, public confidence in the integrity and fairness of the election process suffers.

Elections Canada should expect scrutiny and it can benefit from constructive criticism. However, the CEO and the agency should not be forced to spend time and resources responding to narrow, partisan attacks for actions they have taken based on both the letter and the spirit of the Elections Act.

There are a number of causes for the recent unfortunate entanglement of Elections Canada in political controversy. Only two will be mentioned here.

First, the Elections Act is a complex, detailed, highly prescriptive statute with a large regulatory component, especially in relation to campaign finance matters. The relatively rigid nature of the Act makes it difficult for Elections Canada to adjust to changing electoral practices and technologies within the campaign processes.

There is no authority under the Act for Elections Canada to engage in secondary or subordinate law making; in other words, it cannot formulate and apply binding regulations in response to new practices like robocalls. Furthermore, the main sanctions available to Elections Canada require the use of criminal prosecution through the courts, even though many violations of the Elections Act are not serious enough to justify such action.

Secondly, questioning the neutrality and effectiveness of Elections Canada reflects the prevailing condition of more intense partisan competition based on non-stop campaigning and the rise of new political practices, partly based on new technologies. Campaigning has become more professionalized than in earlier decades and the staff serving political parties and candidates are constantly looking for ways to gain political advantage in ways that may run afoul of election rules.

II Sound Election Laws and Electoral Governance Arrangements are Crucial to Democracy

The laws that govern elections and establish the design and procedures for the national election body are not ordinary pieces of legislation. They represent a crucial component of a healthy democracy; at least as important as other recognized fundamental laws, such as those protecting access to information and personal privacy.

The Government, acting through Parliament, has the legitimate, democratic right to modify election laws as

they deem appropriate. However, in doing so they must recognize the potential for a real and a perceived conflict of interest. The existing Elections Act is sweeping in its provisions, many of which serve the regulatory purpose of supporting and ensuring fair and free elections. However, unlike regulation in other fields of public policy, political parties, especially the governing party, are in a position to create the regulatory framework that they will be required to obey when acting as political organizations engaged in partisan competition.

Therefore, it is critically important to avoid any appearance that parties are writing the election rules to gain partisan advantage or to serve the political convenience of political parties in general rather than to uphold the rights of voters, to ensure fair partisan competition and to preserve integrity in the election process.

In the current context of debate over Bill C-23, there are risks that both the procedures being followed and some of the substantive provisions in the bill, as well as potential reforms not included in the bill, will in combination weaken the effectiveness of Elections Canada and over the longer term undermine public confidence in the integrity of the election process.

For reasons of space, my commentary focuses on the worrisome aspect of the latest round of election law reforms. I acknowledge that there are a number of valuable changes introduced in Bill C-23, for which the gov-

ernment deserves credit. Many of those improvements had been proposed earlier by the CEO of Elections Canada and endorsed by the House of Commons Standing Committee on Procedure and House Affairs. In accepting the government's claim that it has acted on past recommendations from Elections Canada and the parliamentary committee, we need to ask which of the past reform recommendations have not been included in Bill C-23.

III The Process for Changing Election Laws

For election laws to be seen as fair and legitimate they must reflect widely held values within a democracy and must be based as much as possible on an all-party consensus within Parliament.

There is currently no legal obligation for governments to consult Elections Canada about proposed legislative changes, but I understand that such consultation was a fairly consistent political practice in the past.

Seeking the advice from the CEO and other professionals at Elections Canada makes sense because they have distinctive knowledge about the complexities of staging elections and they are responsible for implementing any new legislative provisions. In many other fields of public policy governments consult with the groups most directly affected by changes to legislation, even at times previewing draft bills with advocacy organizations in order to receive detailed input.

The minister for Democratic Reform has indicated in interviews that he met with the CEO of Elections Canada for an hour months before the bill was introduced. He has explained that he did not preview Bill C-23 with the CEO of Elections Canada out of respect for Parliament which should hear about new legislation first. This argument ignores the fact that the CEO is an agent or officer of Parliament. His office exists to serve Parliament, not the government of the day. Elections Canada also serves individual Canadians in helping them to exercise their democratic rights in the electoral process. As a repository of a great depth of knowledge and skills about staging elections the advice of the Elections Canada on the details and implementation requirements for Bill C-23 would be invaluable.

A comparative example is useful here. Most of the numerous laws that govern various types of elections in the UK contain provisions for mandatory, advanced consultation with the Electoral Commission concerning potential amendments to such laws. Such a statutory requirement cannot guarantee how meaningful the consultation will be and the government remains free to decide whether or not to accept the advice of the Electoral Commission. However, a requirement for advance consultation respects the role and expertise of the national election body and it results in greater onus on governments to explain why they have rejected advice from the Electoral Commission.

I recommend that BillC-23 be amended to provide that advanced consultations with Elections Canada on proposed changes to the Elections Act be mandatory.

Section 535 of the Elections Act requires the CEO of Elections Canada to report to Parliament after each general election on any amendments that he considers desirable for better administration of the Act. This provision could be read narrowly to imply that the CEO is restricted to identifying the need for technical amendments to the Act and its administration. However, given the sweeping and in some instances highly controversial changes being introduced by Bill C-23, a review after the 2015 general election that was narrowly confined to matters of election administration would not examine some broader policy issues arising from Bill C-23.

Therefore, I recommend that a requirement for a mandatory evaluation within five years (i.e. to be completed at least six months before the 2019 election) of the Election Act regime established by Bill C-23 be included in the bill and that the Commons' Standing Committee on Procedure and House Affairs be in charge of that evaluation.

IV Restricting the Communications Role of Elections Canada

In several different ways, Bill C-23 narrows the mandate of Elections Canada. This section discusses the re-

strictions placed on the communications and outreach activities of the agency.

As proposed in Bill C-23, the replacement version for the existing section 18 of the Elections Act will restrict communications activities of Elections Canada to informing Canadians about when, where and how to vote, along with the requirements for voter identification. This is a crucial, core role of an election agency. To my knowledge Elections Canada has always treated it with the utmost seriousness and has sought to develop innovative ways to make voting more convenient and satisfying for Canadians. Adding more advanced voting days has taken place. Allowing voters to cast a ballot at central locations, like at universities for students, rather that restricting voting to the "home" constituency of the voter, have been used. Pilot projects with on-line registration to vote and voter authentication on-line have been considered for the future.

Bill C-23 removes the authority for Elections Canada to engage in broader efforts to communicate with Canadians about the health of Canadian democracy. The government argues that by commissioning research on political disengagement and by developing educational and media strategies to promote citizen participation, Elections Canada moved beyond its core mandate which is to ensure sound election administration. The government further argues that past outreach efforts by the Elections Canada have failed to increase the persistent, relatively

low levels of turnout by such groups of voters as Aboriginal citizens, students and low income Canadians. Of course, this argument begs the question of whether turnout rates would have dropped even lower had it not been for the outreach efforts of Elections Canada.

In my view restricting the research and communications activities of Elections Canada to the mechanics of voting is wrong in principle. It is also bad public policy because it would deprive Canadians of an important perspective on the challenges of achieving a more vibrant democracy in the 21st century.

On the matter of principle, all the national election bodies that I am familiar with have as part of their mandate, either explicitly or implicitly, a responsibility to promote participation in the election process through the provision of information and through education. In response to declining turnouts, election authorities in most countries have experimented with new channels of communication, such as social media, to reach voters who are currently detached from the democratic process. Educational initiatives have been undertaken in collaboration with schools, colleges and universities to create awareness and understanding of the importance of voting and to counter the risk of non-voting becoming a habit for younger generations as they age. Elections Canada has been seen as a leader among national election bodies because of its efforts to promote voting among all demographic groups.

Turnout in elections reflects both the **motivation** to vote and the **propensity** to make the time to vote. I would argue that low turnout reflects a deeper malaise within the political system more than the shortcomings of Election Canada in terms of informing Canadians about where and how to vote. Over several decades more and more Canadians became turned off by the political process. Public trust and confidence in politicians and political institutions, such as political parties and Parliament, have gradually declined over the past several decades. Younger Canadians are interested in public policy issues, but most of them have chosen avenues of participation other than the traditional route of joining a political party, becoming active in campaigns and voting.

Surveys indicate that a significant percentage of Canadians lack knowledge of the basic features of Canadian democracy and do not pay close attention to public affairs. The lack of a strong foundation of knowledge contributes to many Canadians holding sentiments towards the political process that range from hostility, discontent, frustration, futility, passive acceptance and pessimism that politicians will ever work together to serve the public interest. Under these conditions the motivation to vote declines.

There are many causes of voter disillusionment, but the behaviours of politicians and political parties are a big part of the problem. Today, most people see politics as mainly about scandals, broken campaign promises, ex-

cessive partisanship, a lack of responsiveness by MPs to the people who elected them, the waste of public money, conflicts of interest, secrecy and a lack of accountability. This negative stereotype is highly exaggerated and unfair. However, the actions and inactions of politicians and political parties have definitely contributed to their poor reputation with voters. When asked by pollsters to rank the trustworthiness of various occupations, Canadians typically place politicians last or second last.

Elections Canada should not seek to solve the deeper problems of Canadian democracy. On its own, it cannot do much to address the lack of public trust and confidence in the political process. In his speeches, Mr. Mayrand, the CEO of Elections Canada, makes it clear that his office will focus on improving electoral democracy, not seek to influence the wider conditions within the political process. He has also offered the services of his office to work with other actors within the political system.

The responsibility for addressing the deeper problems of discontent within the political system rests primarily with politicians and political parties. It must be recognized, however, that parties are mainly interested in encouraging their own supporters to vote and less interested in total turnout. Also, we know that political parties, even the mainstream parties, have vastly different resources at their disposal to promote voting by their supporters.

Teachers and academics have a role to play in promoting interest and participation in the electoral and wider political processes, as do various elements within civil society. Most Canadians develop their impressions of politics based on the information and images presented in the media so journalists and other commentators have an important role to play in promoting more informed public opinion.

Rather than be excluded, Elections Canada should be part of this process. It can provide practical wisdom based on its experience of operating electoral and campaign financing regimes. However, it would be useful to clarify the boundaries of its participation.

The example of the UK Electoral Commission might be helpful here. In the initial years after its creation in 2000, the Electoral Commission conducted research and made statements about broader issues of political engagement. This orientation brought criticism from government and in Parliament. Around about 2007, the Commission decided that it would restrict its research to the propensity to vote among different demographic groups. Its communications would be primarily focused on creating awareness of the electoral system, not on urging voters to vote.

While limiting itself in this way, the Commission acknowledged that it could not completely ignore the motivation and incentives to vote, especially for groups

that historically played a marginal role in the political process. This admittedly somewhat vague understanding of the appropriate role of the Commission was reflected in changes to the election law passed in 2009. The result has been to reduce the complaints from politicians that the Commission was exceeding its mandate. The Commission recognizes that better awareness of the electoral process will have an appreciable, but not major impact on the propensity of citizens to vote.

I recommend that Section 18 of the Fair Elections Act be amended to ensure that it does not silence the voice of Elections Canada in ongoing debates over how to improve electoral democracy in Canada. In terms of its outreach and communications activities, Elections Canada should concentrate on awareness of the election system, the mechanics of voting and the challenges faced by different demographic groups in exercising their right to vote. To support such outreach activities, Elections Canada should continue to conduct research on the propensity to vote.

V Removal of Investigations/Enforcement from Elections Canada

Section 509 of the Fair Elections Act moves the position of Commissioner of Canada Elections (henceforth referred to simply as the Commissioner) out of Elections Canada and into the Office of the Director of Public Prosecutions (henceforth referred to simply as the DPP), which in turn

is housed within the Justice department with the Attorney General, a cabinet minister leading the department. The Commissioner position was created in 1974. The Commissioner used to have prosecution power but this authority was removed in 2006.Now the Commissioner must refer prosecutions to the DPP.

The government argues that the placement of the position of Commissioner in the DPP will increase the independence of the Commissioner and lead to stricter enforcement of the provisions of the Election Act. So far as I have been able to discover, strong arguments and evidence to support these claims have not been provided.

I will present my concerns in a series of brief comments:

- In 1920 Canada was the first among western democracies to move the election management function outside of the traditional location inside a government department by placing the role in the hands of an independent officer of parliament. Other countries followed suit later in the 20th century by establishing mainly independent commissions rather than single headed agencies. Placing the crucial investigative/enforcement functions of a national election body back inside a government department has both practical and symbolic implications.
- While the Commissioner is currently appointed by the CEO of Elections Canada, I do not recall complaints and evidence that the Commissioner lacked inde-

pendence in the conduct of investigations of violations of the Election Act. What is the nature of the problem related to the independence of the Commissioner that the shift is meant to solve?

- Under Bill C-23 future Commissioners will be appointed by the DPP for non-renewable term of seven years. In making the appointment, the DPP cannot consult the CEO of Elections Canada. The provision for non-renewal is meant to avoid the reality or the appearance that the Commissioner would make decisions with an eye to reappointment. There is merit in this argument. However, under the fixed-date election law elections are meant to happen every four years. This means that in the normal course of events the Commissioner will oversee only one election during his/her term. The consensus among experts in the field is that serving through at least two election cycles is needed for senior election officials to master the complexities of the law and the administrative aspects of national elections.

I recommend that the Commissioner be appointed for a ten-year non-renewable term.

The prohibition on consultation with the CEO of Elections Canada on the appointment of the Commissioner creates the impression that the Elections Canada is not a neutral, professional overseer of the election law but rather it is seen a "player" in the

"election game" whose main "competitors" are political parties. The implication is that the office of the Commissioner needs to be distant from Elections Canada so that it is free to investigate the agency.

This sports metaphor trivializes and misrepresents the role of impartial administrator that Elections Canada has played since 1920. Prohibiting consultation on appointments would not allow the DPP to benefit from the experience and distinctive knowledge found in Elections Canada.

- Placing the Commissioner position under the DPP inside the administrative framework of Justice Department involves its own risks to the independence of the Commissioner. The DPP provides advice and support to the minister of Justice and Attorney General on general policy matters. On matters of prosecution it operates free of political direction and control. Structural and procedural safeguards exist to preserve the independence of the DPP on enforcement matters. The reputation of the DPP for independence on law enforcement is somewhat reassuring.

  However, the placement of the Commissioner position under the DPP still is cause for concern. The Commissioner would no longer operate within the office of an agent of Parliament. It would no longer report to Parliament through the CEO of Elections Canada, but instead it would report to Parliament

through the DPP and the minister of Justice. As part of a department, the Commissioner will be more exposed to the communications and cultural norms of serving the government.

- The minister has indicated that the Commissioner will control his own budget and staff. Exactly what this means in practice is not clear. Presumably, the Commissioner will have to negotiate his budgetary/staffing requirements initially with senior departmental officials and then with the Treasury Board (TB) of ministers supported by the Treasury Board Secretariat (TBS).

  As an agent of Parliament, Elections Canada obtains its budgets through the TB and Parliament in two streams: open-ended statutory spending to support the planning and execution of elections and an annual appropriation voted by Parliament which covers its core operating expenses. For his core funding the Commissioner is subject to the annual appropriation process, involving the vote of funds by Parliament to Elections Canada. It needs to be confirmed that funds required by the Commissioner to conduct investigations will continue to flow automatically as a statutory appropriation, not subject to negotiation with government and an annual vote by Parliament.

- The movement of the Commissioner position outside of Elections Canada will create coordination and

communications challenges. The trend in other jurisdictions is towards integration rather fragmentation of election management functions. In New Zealand, for example, until 2004 three separate parts of government were responsible for planning, executing and overseeing elections. In recognition of the interdependence of the various activities related to the national election process and the potential for coordination problems with three separate bodies, the government decided that a consolidated model would work better. Consolidation in a single government department was rejected because it would not provide sufficient assurance that election management was free of direct political inference or indirect political influence. The choice was for an independent, three-person commission that was responsible for all aspects of election planning and execution.

- Neither Bill C-23 nor statements by the minister make it clear how the communication and coordination between Elections Canada and the office of the Commissioner will take place in the future. The impression left by official pronouncements is that the CEO of Elections Canada has no more status than ordinary Canadians who may observe violations of the Election Act and bring them to the attention of the Commissioner for possible investigation. Elections Canada gathers a great deal of information form political parties and candidates. As a familiar, trusted institution,

it regularly hears from citizens about irregularities in the election process. Communications between Election Canada's staff and the Commissioner is currently facilitated by the shared knowledge of election law and by the shared organizational/cultural space they occupy.

The government's view seems to be that the present arrangements which combine administrative/support functions and investigative/enforcement functions inside Elections Canada places too much power in the hands of the CEO. If there is evidence that the CEO has used his authority inappropriately or failed to ensure due process for all parties and candidates accused of non-compliance with the law, then structural changes inside Elections Canada could be introduced to separate functions and additional procedural safeguards could be adopted to guarantee due process without taking the risks involved with sending the investigative/enforcement function over to a government department.

To my knowledge the current CEO has not followed an aggressive, heavy-handed bureaucratic approach to enforcement. Instead the motivating philosophy has been regulatory reasonableness based on the recognition that most mistakes are honest ones, often made by volunteers working for parties at the constituency level. Working with parties and candidates to bring about compliance has been the predominant pattern. The relationship with political actors must be cordial, but not cozy. The CEO

must ultimately act to uphold the Election Act, which in the worst cases means involving the courts in criminal prosecutions. The need for a wider array of tools for Elections Canada is discussed in the next section.

VI Creating a Fuller Toolbox of Enforcement Instruments

Whether the enforcement functions is moved to the DPP or remains in the hands of Elections Canada, there is still the need to strengthen the enforcement function by legislating a wider range of investigatory powers and sanctions for the body responsible for overseeing the election process.

In an appearance before the Commons Standing Committee on Procedure and House Affairs on March 29, 2012, the CEO of Elections Canada indicated that his office was conducting an in-depth review of the investigation and enforcement capacity of the agency. If the review was completed, hopefully the minister responsible for Bill C-23 took steps to learn from the findings. Bill C-23 makes some improvements to the enforcement function, but does not go far enough.

At present the rules governing elections come directly out of the Elections Act. There is a not provision for subordinate law making by Elections Canada so it is difficult for the agency to deal with new technologies and practices adopted by political parties which have an incentive to bend the rules to achieve electoral success.

When offences are discovered by Elections Canada or brought its attention, there are limits on its powers of investigation. When serious violations arise, the case must be made that they rise to the level of an offence justifying criminal prosecution through the courts. Bill C-23 does not provide the Commissioner (whether that office is housed in Elections Canada or the DPP) with the right to compel testimony subject to court supervision. The CEO of Elections Canada had recommended that his office should be granted such authority citing his recent difficulties investigating matters like the practices of in-and- out schemes in the campaign finance area and the use of robocalls to deceive voters.

There are lesson to be learned from recent changes to election law in the UK. In 2009 in the UK amendments made to the Political Parties and Elections Act provided clarification of the authority of the Electoral Commission to monitor compliance with rules respecting party registration, the raising and spending of money, political advertising and other matters. The Commission was granted permission to take such steps as it considered necessary to monitor and to regulate compliance with the law. It was authorized to publish best practice guidelines on compliance. New powers were granted to the Commission to require the production of information for certain purposes and, with the permission of a magistrate to enter premises to inspect and make copies of relevant doc-

uments, even when the Commission is not conducting a criminal investigation.

The 2009 act also set a new range of civil penalties available to the Commission including monetary penalties (fixed and variable), compliance notices, stop notices, enforcement undertakings and forfeiture orders under court supervision. To protect dues process, schedules to the law set forth circumstances when the Commission might apply the different sanctions and sets forth appeal processes for parties and individuals subject to a sanction.

The Commission was not granted a general power to formulate and apply regulations. However, the UK Parliament did grant authority to the Commission to develop regulations that would govern referendums.

In 2010, after consultation with stakeholders, the Commission published a guidance document on its Enforcement Policy. The objectives of enforcement activity were described as follows:

- Ensure the transparency and integrity of party and election finance that voters expect;
- Eliminate any benefit that parties and candidates might obtain by failing to comply with the law;
- Bring individuals and parties into compliance
- Deter non-compliance.

The Commission goes on to state that it acts at all times to maintain public confidence in the integrity of the election process. It does this by seeking to regulate in a way that is effective, proportionate and fair. Whenever possible it will use advice and guidance proactively to secure compliance.

VII Guidance and Interpretation Notes

As part of its proactive, preventative approach the UK Commission has made growing use of what are called advisory opinions. Something comparable is provided for under Section 16 of Bill C-23 which requires the CEO of Elections Canada to provide in response to an application from various types of party officials what are called "guidance and interpretation notes" on the application of the Elections Act. These documents will be sent to political parties and posted on line for a 30-day notice period during which comments can be made. Once the review period is completed and subject to certain other conditions, the guidelines /interpretations become legally binding on the CEO and on the Commissioner of Elections.

In general, I endorse the addition of the instrument of guidance and interpretation notes to the regulatory toolbox of Elections Canada. However, the UK experience, admittedly relatively short, indicates that this regulatory tool must be used carefully. There should be some discretion granted to Elections Canada to decide

whether it acts on every application for an advanced ruling. In the UK the Electoral Commission has reserved the use of advisory opinions for serious matters of more general application. The Commission will not issue opinions with respect to hypothetical matters. Nor will it provide advisory opinions about the activities of a political party other than the one making an application. Publication of advisory opinions is not automatic, but is decided by the Commission on a case-by-case basis. If generic issues are raised in an application, the advisory opinion is usually published. The Commission sets a target of 30 days from the date of application for the release of advisory opinions.

VIII Eliminating Voter Cards and Vouching

In presenting Bill C-23 the minister used rhetoric about giving control over democracy back to Canadians and talked about instilling a "customer service" approach to the delivery of election services. Making voting easier, more convenient and more satisfying for Canadians had already been part of the philosophy and practices of Elections Canada. The use of voter cards and allowing for vouching were adopted recently as expressions of this philosophy.

Bill C-23 eliminates the practice of having one voter vouch for the identity of another voter who appears at the polling booth without appropriate identification. Vouching has been in the Canada Elections Act for dec-

ades and predated voter ID procedures. The government claims that vouching has created serious problems of ineligible voters being allowed to vote.

As evidence of the extent of voter fraud, the government refers to the findings of a report commissioned by Elections Canada and conducted by the former Chief Election Officer of British Columbia. The Neufeld Report discovered that there were irregularities or administrative errors in the registration and voter identification process for the 1.3% of the votes cast in the 2011 general election. The report did not point to any serious problem of improper vouching. Rather, the issue was poor documentation of the vouching process by election officials, problems that arose in part because of the legalistic and complicated forms that local election officials had to complete. It is significant that the Neufeld Report made no recommendations to end or to modify the vouching process (which involves a number of safeguards to prevent abuse) or to eliminate voting cards. Instead, the report recommended the adoption of a new voting services model along with better recruitment, selection, training and support for the 200,000 local election officials who conduct.

Voter cards and vouching procedures were only adopted several years ago and have not been the subject of an in-depth evaluation. According to Elections Canada approximately 100,000 individuals made use of the vouching provision during the 2011 election. These voters were

mainly Aboriginals who were off reserve, young people who were generally mobile, many by reason off attending college or university, and senior citizens in care facilities. These are the very same groups with a low propensity to vote who have been the primary targets of outreach activities by Elections Canada. The government insists that multiple types of identity cards and voter authentication procedures will ensure that eligible voters are not deprived of the franchise. However if the goal is to increase turnout and the evidence suggests that voter fraud is miniscule, why is it necessary to eliminate alternative voter identification mechanisms that are of recent origin and have not been evaluated in any systematic manner.

Instead of eliminating these mechanisms, Bill C-23 should be granting Elections Canada with authority to conduct pilot projects to refine on-line registration and authentication of voters so as to reduce potential problems at the polls.

IX Escalating the Money Race

Bill C-23 will reinforce the trend that is already underway towards making the raising of money from private sources a principal form of competition among political parties. Earlier the current government had Parliament pass legislation to gradually eliminate the annual per-vote party allowances that substituted to some extent for the revenue lost by an earlier ban on corporate and

union donations to political parties. Fund raising by political parties has become a highly professionalized operation that relies on innovative communications techniques with potential donors. As part of the arrival of the era of the "permanent campaign", fund raising is non-stop, not just an activity that ramps up during campaign periods. There are philosophical disagreements over this trend.

Supporters of the trend think in terms of a "political marketplace" equivalent to the economic marketplace and favour limited regulation of the raising and spending of private money for campaign purposes. The ability to raise funds is taken as an indicator of political support within society. Creating incentives for parties to raise money from a large number of donors contributing small amounts will create a broad base of citizen involvement and avoid the undue influence that would come with dependence on a small number of wealthy donors. The raising and spending of money is seen as a form of political free speech, a perspective that flows over the border from the United States where the "Citizens United" ruling by the Supreme Court in 2010 eliminated existing restrictions on political communications by corporations, unions and political action committees.

The opposite perspective sees political parties, as not simply private associations of like- minded people competing for power, but also as organizations that perform a number of crucial functions within modern democracies. Over time in Canada, political parties were gradual-

ly brought within the framework of public law, particularly with respect to campaign financing. Election laws were intended to avoid the reality and the appearance of corruption and undue influence by well- financed and well - connected special interests. They were also intended to create the conditions for a more even playing field among well established and better financed political parties and parties that were less in the political mainstream and/or were less mature. Eliminating public subsidies increases the premium on having an infrastructure to raise private money on a full time basis. The risk is that parties will see their members less as engaged citizens looking to contribute to the democratic process (for example through debates on public policy) and more as donors providing the fuel for the campaign machine that now operates full time.

Given these two contending perspectives (admittedly simplified here), the public policy challenge when writing election laws is to strike an appropriate balance between political freedom of association and speech and the need to ensure integrity and fairness in the election process. Most knowledgeable observers believe that the election and campaign financing regimes established in Canada achieve a better balance than the USA regimes where private money with the potential for undue influence has always been a greater risk. Today in the USA, ideological polarization between the two main parties has been reflected in the bi-partisan Federal Election

Commission (despite its title it only regulates campaign finance matters) being deadlocked and unable to enforce its rules. Court rulings all the way up to the Supreme Court have further undermined the Commission's regulatory role.

I am not arguing that Bill C-23 will bring rampant unregulated campaign spending north of the 49th parallel. The minister in charge of the bill argues in fact that the bill will reduce the role of big money in Canadian elections by creating a stronger watchdog in the Commissioner, requiring tougher audits of party finances and by imposing higher fines for things like overspending. It will also ban the use of loans to evade donation rules. Finally, it provides for a modest increase in the donation and spending limits.

Generally I endorse these changes, although there are legal and implementation questions that need to be asked. More problematic, however, is a provision in Bill C-23 (Section 376, 3) which provides that the cost of soliciting funds by mail, telephone, email and other electronic means will not in the future be counted as an election expense provided that the solicitation of support is targeted to donors who have contributed $20 or more during the five years preceding the election then taking place. The minister defends this provision by arguing that fund raising and campaigning are two separate activities. This may be true in the abstract but in practice it is hard to imagine that a calls or emails soliciting funds would

not usually include encouragement to vote for the party in question and sometimes would include an attack on political opponents. A comprehensive, tight operational definition of what constitutes an election expense has been developed over the years and Section376 (3) could create an opening for parties with more sophisticated fund raising machinery to gain an advantage.

X Regulating Robocalls

The use of computer-based automatic calling has been part of political messaging for decades. It has been used for many purposes such a polling, getting out the vote, fund raising, informing voters and attacking political opponents. The most extensive and aggressive use of robocalls has been in the United States. Many voters find such calls intrusive and annoying. Others find them objectionable when they present misinformation or engage in negative or highly personalized attacks. A few states in the USA have sought to ban robocalls but have been challenged in the courts on free speech grounds. Other states have legislated requirements for disclosures at the beginning of calls about who is sponsoring and paying for the messages.

There is not a lot of empirical research done on the effectiveness of robocalls in terms of increasing or decreasing turnout. There is evidence that impersonal robocalls are a less effective way to capture votes than more personal contacts like person-to-person telephone calls and

old-fashioned doorstep conversations. Still the incredibly low cost of robocall and the speed with which computer-based calls can reach a large number of voters means that they will continue to grow in popularity. New technologies are always being developed to increase the reach and speed of automated calling and there is a growing industry of consultants promoting their use.

In Canada robocalls have been used for some time, but only became highly controversial during the 2011 general election. In a report titled "Preventing Deceptive Communications with Voters" tabled in Parliament on March 27, 2013 the CEO of Elections Canada made a number of recommendations to deal with robocalls that were intended to discourage voting. The report recommended a new Criminal Code offence of impersonating an election official for which there would be maximum fine of $250,000 and up to five years in jail. The report also recommended a requirement for call display of the party calling and a disclosure at the start of the message identifying who was paying for the call.

The government has responded to the controversy by introducing a number of measures that will only be described in general terms here. First, the CRTC will maintain a registry and all telephone service providers making voter contact calls will have to register by providing identifying information. This registration information will be made publicly available 30 days after polling day. Se-

cond, recordings and scripts for voter contact purposes will have to be retained for one year after an election. Third, there will be a separate reporting category for expenses associated with voter contact activity. Third, new offences of impersonating election officials, failing to register and providing false information to an investigator are created. The fines for preventing or attempting to prevent a voter from voting are increased from$2,000 to $20,000 on summary conviction and from $5,000 to $50,000 on indictment.

As a non-lawyer I am not able to offer an expert opinion on whether these legal changes are an adequate response to the serious offences that took place in 2011. The new rules will definitely deter to some extent a repeat of the attempts to deceive voters that took place. The levels of the fines proposed by the minister are less severe than those proposed by the CEO of Elections Canada. There needs to be an explanation for why publication of information about which parties have registered with the CRTC will only take place after polling day. In principle voters should be entitled to have as much information as possible about who is seeking to influence their vote before they go to the polls. Fines for providing false information or otherwise obstructing an investigation makes sense, provided that investigators working for the Commission have the legal authority (subject to court supervision) to enter premises, compel the production of documents and to insist on testimony would be

more reassuring that no repeat of the robocall scheme will happen again.

X One Final idea

There are a couple of potential components of an election regulation framework that are not provided through Bill C-23.

The CEO has talked recently about the introduction of a Code of Conduct for Political Parties. The Code would be developed in consultation with the registered political parties who would then agree to adhere to its principles and values. The Code would cover those grey areas of campaign activity that cannot be addressed through the detailed, legal provisions of the Election Act. There are many examples of jurisdictions where such codes have been adopted, including my home province of Manitoba.

Codes are not a panacea in terms of offsetting the incentives and temptations for political parties to play fast and loose with the rules. Given the public suspicion that surrounds political parties today; many Canadians will dismiss a code as symbolic window dressing. However, development and acceptance of a code would represent a first step by the parties themselves to rehabilitate their image and reputation. It would remind the paid professionals who work for parties that election campaigns should not be about winning at all cost. Political parties are meant to play crucial roles in representative government, but are expected to do so in accordance

with fundamental principles/values of electoral democracy. Awareness and understanding of the code could become part of the orientation for paid political staff and could be the subject of discussions with volunteers at the local level. The code would provide a source of leverage for the CEO of Elections Canada and the Commissioner of Elections in seeking voluntary compliance by the parties with the provisions of the Elections Act.

XI Conclusion

When second reading debate on BillC-23 was cut short, the government insisted that real, constructive work on the bill would only during hearings of the parliamentary committee when witnesses would be heard. The onus is on the government to respect that commitment by being open to reasoned amendments to the bill. Hopefully, it will not insist that second reading constituted approval in principle and that substantive amendments must be ruled out of order or automatically voted down by the government majority. The committee stage is when the minister in charge of the bill should provide more complete arguments and supporting evidence for the more contentious provisions of Bill C-23. At the end of the hearings on the bill, he should be invited back to indicate why certain proposed amendments are unacceptable to the government.

When it comes to election law, the devil is often in the details. The committee stage is when a careful examina-

tion of the details needs to take place. For example, the government should explain why Bill C-23 provides for the appointment of central poll supervisors by political parties. Until recently Returning Officers were appointed by the parties, but this was changed to have them appointed by Elections Canada. Parties are still free to nominate individuals to be Returning Officers, but only a third of the Returning Officers in recent elections were party nominees. The provision to central poll supervisors come from a partisan background could undermine voter confidence in the integrity of the election process. In the USA where state and local election officials are appointed or elected on a partisan basis, voter confidence in the integrity has been shown to suffer. This is one of probably many detailed provisions that need to be explained and justified.

The Elections Act is a fundamental piece of legislation which means it is part of Canada's constitutional order. It should not be changed unilaterally and in haste by the governing party of the day. Changes to fundamental laws require more objective study, analysis and informed debate than ordinary laws. The government should demonstrate that it is prepared to take the time and to consider proposals for constructive amendments in order to ensure broader consensus regarding the changes and more legitimacy for the final legislative framework for Canada's electoral democracy.