Opening Remarks by Paul G. Thomas, Professor Emeritus, Political Studies, University of Manitoba, to the House of Commons Standing Committee on Procedure and House of Affairs on Bill C-23, The Fair Elections Act on March 31, 2014

I Introduction

Thank you for the privilege of appearing before the committee.

I have submitted a brief which has been circulated to members. In that submission I tried to be balanced and constructive, as well as to provide evidence to support my assessment of Bill C-23.

Tonight I will make a series of brief points and, if there is interest and time permits, I would be pleased to elaborate on them and to answer any questions that you may have.

I start with the observation that there has been a considerable decline of public trust and confidence in politics and democracy in Canada. A similar trend has been happening in other established democracies. There are many long term causes and short term factors that have contributed to public disillusionment with the democratic process.

I fear that both the process by which Bill C-23 was formulated and is being passed in Parliament, and the substance of the bill, will further weaken public trust and confidence in the integrity of the election process, the one democratic activity in which a majority of Canadians participate.

Sound electoral governance arrangements based on as much consensus as possible contribute in important ways to public trust and confidence in the election process and to democratic legitimacy for the outcomes.

II The Process of Electoral Law Reform

On process, I would observe that the Canada Election Act is not ordinary legislation. It provides a foundation and framework for fair and free elections. Other countries have recognized that such fundamental laws should not be changed hastily and unilaterally by the governing party.

In the UK most election laws require advance consultation with the national Electoral Commission. Usually this involves a review of draft bills with Commission officials to ensure that proposed legislation is workable.

In New Zealand, the Electoral Act, 1993, requires in Section 268 that a "super majority" (75%) of the Members of the House of Representatives must approve the repeal or modification of a list of eight key features of the election law framework. This provision ensures there is some measure of cross-party support for changes and lessens the perception that the governing party is changing the law to gain partisan advantage.

I recommend that the bill be amended to provide for mandatory consultation with Elections Canada concerning future changes to the Canada Elections Act.

I also recommend that before the fixed date election scheduled for 2019 that a comprehensive evaluation of the framework of election law and administration put in place by Bill C-23 be conducted by an all-party committee of the House of Commons.

III The Mandate of Elections Canada

The proposal to restrict communication by Elections Canada to the mechanics of voting is wrong. Of the five other national election bodies that I have studied, none has such a narrow restriction on its communications activities.

Informing Canadians on when, where and how to vote is a core role of Elections Canada that the agency has always taken seriously. The agency did not unilaterally assume broader educational and outreach roles. On February 17, 2004 a unanimous motion was passed in the House of Commons calling on Elections Canada to expand its activities to ensure accessibility for disabled voters and to encourage younger Canadians to participate in the electoral process.

Politicians, political parties and Parliament have the primary responsibility to promote a more vibrant democracy. Other groups and organizations within society also have responsibility to inform and engage Canadians. Elections Canada is one of those organizations that should be involved.

If Parliament decides to reinforce the core task of Elections Canada by passing the new Section 18, it should add a parallel provision that recognizes the right of the agency to study, report and comment on the conditions within the domain of electoral democracy.

IV Moving the Commissioner of Elections to the DPP

I have not heard compelling arguments or seen strong evidence to justify the relocation of the Commissioner. My understanding is that the Commissioner acts independently of Elections Canada when conducting investigations and recommending prosecutions. The current location within the administrative framework of an Officer of Parliament provides more assurance of independence from political pressures than the proposed location within a department headed by a minister. As part of a department, the Commissioner will be restricted in his freedom to report on investigations and prosecutions. There are other issues associated with the proposed relocation that are discussed in my brief.

I recommend that the relocation of the Commissioner function be dropped from the bill. If there is a perception that the Commissioner needs more autonomy, this can be provided through amendments requiring structural and procedural arrangements (creating so-called "firewalls") that would separate different functions inside Elections Canada.

V Adding to the Toolkit of Enforcement

Changing political practices and new technologies of campaigning require that a broader range of enforcement tools be provided to Elections Canada and the Commissioner of Elections.

Whether the Commissioner is housed in Elections Canada or in the DPP, the Commissioner needs the authority to compel testimony, subject to judicial supervision. In five provinces the CEO or an Election Commissioner has the power to compel testimony.

Currently most violations of the Canada Elections Act must be treated as criminal matters through the courts. To achieve greater flexibility and fairness in the enforcement process, a broader array of tools should be included in the law. The UK example is instructive. Back in 2009 the election law was amended to provide a range of civil (not criminal) penalties such as monetary penalties (both fixed and variable), stop notices, enforcement undertakings and forfeiture orders under court supervision.

I recommend that Bill C-23 be amended to provide authority to the Commissioner of Elections to compel testimony under court supervision.

A second non-legislative recommendation is that the Procedure and House Affairs Committee develop, in consultation with Elections Canada, procedures to ensure due process to guide the use of

compelled testimony and to develop a plan for a wider range of enforcement mechanisms for the 2019 election.

VI Controlling Election Spending

Bill C-23 makes a couple of improvements to the rules on the raising and spending of political money. It imposes sensible restrictions on the use of loans to skirt the limits on donations. It imposes higher fines for over spending.

However, the bill also creates a loophole by exempting from ceilings on spending the costs of electronic communications with past donors for fund raising purposes. It is difficult to imagine that communications for fund raising purposes would not involve appeals for votes and other types of support and could even include attacks on political opponents. Also, there is no conceivable way that Elections Canada with its present authority could monitor and enforce compliance with the provision.

I recommend that the exemption for the costs of fund raising communications be dropped from the bill.

VII Voter Information Cards (VICs) and Vouching

The proposal to eliminate VICs and vouching is wrong. No hard evidence of voter fraud has been presented. There are already controls on the use of these devices and more safeguards could be introduced if this was deemed to be necessary. Elimination, however, does not strike the right balance between upholding the constitutional right of Canadians to vote and the highly remote risk of voter impersonation.

Already more and more election administration activities and campaign finance reporting takes place on line. Legislation should anticipate a continuation of this trend in anticipation of the time when on-line voting becomes an option.

Instead of eliminating the VIC and vouching, Bill C-23 should be granting authority to Elections Canada to conduct pilot projects with on-line voter registration and authentication of voter identity with the findings and recommendations being presented to Parliament.

VIII Missing Elements

There are two areas where Bill C-23 fails to move election law forward.

Political parties now collect a large amount of personal information about individuals. It is past time that the provisions of privacy laws are extended to political parties in order to ensure protection of the privacy rights of Canadians.

It is also time that political parties develop, with the support of Elections Canada, codes of conduct that will guide the behaviour of their candidates, paid staff and their volunteers. This is more than a symbolic gesture; codes can help political parties to comply with not just the letter but also the spirit of the Canada Elections Act.

IX Conclusion

Changes to the Canada Election Act should not lead to real or perceived advantages for one political party. Nor should they put the convenience of all political parties ahead of the voting rights of all eligible Canadians.

Research in other countries indicates that political attacks on election agencies and partisan involvement with election administration weaken public trust and confidence in the integrity of the election process and this leads in turn to lower turnouts and weaker satisfaction with the voting experience. This should not happen in Canada which has one of the strongest reputations in the world for staging fair and free elections under the supervision of Elections Canada, the oldest independent and impartial national election body among established democracies.