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February 10, 2014 [www.gardiner-roberts.com](http://www.gardiner-roberts.com)

## CANADA'S PROPOSED *FAIR ELECTIONS ACT* BILL:

MORE CAN BE DONE TO RESTORE INTEGRITY IN ELECTION PROCESS

### By Stephen Thiele

Canada's 2011 federal election caused Canadians to question the integrity of their electoral system and to lose faith in the electoral process.

#### *Serious administrative errors exposed*

In the electoral district of Etobicoke-Centre, a contested election application brought by Liberal Borys Wrzesnewskyj exposed to the Canadian public serious administrative errors in the practices of election officials. A subsequent report commissioned by Elections Canada (the "Neufeld Report") found that on average there were 500 serious administrative errors made in every electoral district.

One of the serious administrative errors challenged in the Wrzesnewskyj application involved the issue of voters, who presented themselves at a polling station without proper identification, being allowed to cast a ballot by "vouching".

Under the current *Canada Elections Act*, such a voter must swear an oath as to their identity. The person who vouches for this voter must also swear an oath which, among other things, confirms the identity of the elector.

Records confirming that the oaths have been taken and listing the identities of the voter and the voucher are required to be kept by election officials in a Poll Book.

However in more than a dozen instances argued in the Wrzesnewskyj case, records were not properly maintained, thus casting into doubt whether eligible voters had properly been identified and had properly cast a ballot.

Although the Supreme Court of Canada, in a narrow 4-3 decision, rejected Wrzesnewskyj's application to overturn the results of the 2011 election in Etobicoke-Centre, Canada's Conservative government has now introduced Bill C-23, the *Fair Elections Act*, for the purposes of restoring integrity to Canada's electoral system. Under the proposed Bill, voting by vouching has been repealed.

This is a vindication for Wrzesnewskyj and a victory for integrity in the election process.

In many cases, improper vouching has been the sole issue in having closely contested elections overturned.

#### *Lengthy Bill proposes many changes*

But the proposed *Fair Elections Act* is not only concerned with vouching.

This lengthy Bill proposes amendments to various parts of the *Canada Elections Act*.

In my view, as will be described below, some of those amendments will restore the confidence of voters in the electoral process. However other amendments are contrary to good electoral practices and will continue

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Gardiner Roberts LLP is available to provide advice on a variety of political and government related issues, including those affecting elections and those involving individual elected officials.

Stephen Thiele represented former Member of Parliament, Borys Wrzesnewskyj in the Etobicoke Centre judicial recount and in Mr. Wrzesnewskyj's contested election application, along with Gardiner Roberts LLP partner, Gavin Tighe.

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to leave the integrity of Canada's electoral process in doubt.

### *Eliminating vouching is a plus*

As already stated, the proposed Bill will eliminate the ability of an elector to vote by way of vouching. This is a plus.

Voting by way of vouching is a remnant of a bygone era when many people did not necessarily possess government issued forms of identification. In today's modern era, relatively few Canadians should be without any form of government issued identification or be unable to identify themselves as required.

Although there may be some debate that eliminating vouching may disproportionately impact aboriginals, youth, seniors and the homeless, the significant problems caused by vouching has been well-documented. Therefore there is justification for its elimination.

In general, there is no need for voters in most parts of Canada to be allowed to vote by vouching. In Ontario, for example, voting by vouching is confined to voters living in rural electoral districts.

### *VIC no longer can be used for identification*

Similarly, an elector will no longer be allowed to use the Voter Identification Card (the "VIC"), which is mailed to all registered electors shortly before Election Day, as a valid piece of identification.

The use of the VIC has often resulted in complaints that votes have been cast by impersonators. Therefore elimination of their use as proof of voter identity is a positive step.

### *Protection from rogue phone calls*

The proposed Bill also seeks to protect electors from rogue phone calls.

Telephone soliciting has always been part of election campaigns. However with new technology permitting candidates and political parties to "robocall" electors, seeking to regulate such practices is timely.

Among the many proposals, the Bill will create a new registry for voter contact services by telephone, require any person or group using internal services to make automated calls for voter contact purposes to register with the CRTC, and require any person or group using a telephone service provider for voter contact purposes to have their identity verified by providing identification to the CRTC and the telephone service provider. Recordings of messages and scripts will also need to be retained for one year.

While the proposals in this area represent a step in the right direction, there are other reforms which should be considered.

For example, voters should be empowered with the right to have their telephone number(s) removed from any telephone list utilized by a registered party or candidate during an election. While a voter may wish to receive phone calls from a certain registered party or candidate, he or she may wish to not receive calls from other registered parties or candidates.

In addition, other than a registered party or candidate being allowed to keep a record of voter intent for specific voters, neither voter contact service providers, registered parties or candidates should be allowed to keep any data concerning the political views of voters, which might be solicited through either automated phone call messages or "Town Hall" telephone surveys.

Identifying political views of voters can lead to unwarranted elector intimidation or harassment.

### *Separation of distinct roles*

Another good part of the Bill seeks to



separate the administrative functions of running an election from the enforcement function of investigating and prosecuting breaches of election law.

There has been some criticism directed at Elections Canada for its failure to promptly investigate complaints.

Accordingly, clearly delineating the administrative role of the Chief Electoral Officer from the investigative and prosecutorial role of the Commissioner of Elections has merit.

However the Bill fails to give the Commissioner the necessary powers to fully exercise the role of investigator.

Nowhere in the Bill is the Commissioner provided with the authority to compel a witness to answer questions during an investigation.

Canada's Democratic Reform Minister Pierre Poilievre defends the absence of such a power on the basis that law enforcement authorities have no power to compel witnesses to provide information. This is not exactly correct.

There is precedent in granting to enforcement authorities the ability to compel witnesses to answer questions during an investigation.

For example, pursuant to s. 13 of the *Ontario Securities Act* a person making an investigation thereunder has the same power to summon and enforce the attendance of any person and to compel him or her to testify on oath or otherwise, and to summon and compel any person or company to produce documents and other things, as is vested in the Superior Court of Justice for the trial of civil actions.

Refusal of the person to attend or to answer questions or of a person or company to produce such documents or other things as

are in his, her or its custody or possession makes the person or company liable to be committed for contempt by the Superior Court of Justice as if in breach of an order of that court.

To protect those persons who are compelled to testify as part of an investigation from self-incrimination, the *Ontario Securities Act* expressly states that the testimony given under s. 13 of the *Ontario Securities Act* cannot be admitted in evidence against the person from whom the testimony was obtained in a prosecution for an offence under s. 122 of the Act or in any other prosecution governed by the *Provincial Offences Act*.

Accordingly, Parliament should seriously consider giving to the Commissioner the authority to make witnesses compellable during an investigation of breaches of the *Canada Elections Act* and to promptly obtain necessary records in furtherance of an investigation. The rights of individuals and companies against self-incrimination can then be protected by expressly restricting the use of testimony for other purposes.

Without the authority to compel witnesses to comply with an investigation, the integrity of Canada's electoral system remains open to abuse.

### **Changes to election finances**

Rules concerning election finances are being changed under Bill C-23 as well.

Donation limits are being increased, rules concerning loans are being strengthened, and the process surrounding the need for an elected Member of Parliament to comply with requests to amend his or her expense return will now permit the Member to present a disputed case to the courts before a suspension of privileges can be sought by the Chief Electoral Officer.

In my view, the proposed amendments



related to donations and to loans are appropriate.

However, the proposal to permit an elected Member of Parliament to go to Court before the Chief Electoral Officer can take action where there is a dispute over a financial expense filing may not be the best solution to the problem of ensuring that candidates properly comply with the financial rules which are designed to ensure that elections are fought by respective candidates on an even financial playing field.

The current process permits greater certainty in the system and assures compliance.

By permitting a Member to now make an application to the Court, unnecessarily brings the judicial system into what is otherwise an administrative process.

Notwithstanding that the proposed Bill would allow the Court to deal with a Member's application on an "expedited basis", Court resources are generally limited and legal posturing can result in delays.

Although Canadians may not necessarily want their respective Member of Parliament to be sidelined for a period of time over the issue of a financial expense filing, ensuring that Members elected to Parliament have properly complied with financial reporting requirements protects the integrity of democracy.

If an elected Member has nothing to hide with respect to complying with campaign expenditures, then the Member should be easily able to comply with requests from the Chief Electoral Officer to amend his or her financial expense return.

Contrary to the argument raised in the Background: Fair Elections Act – Respecting Democratic Elections & Defending Freedom of Speech, this is not a matter of protecting free speech.

### ***Customer service proposals represent a danger***

Under the guise of promoting better customer service for voters, Bill C-23 proposes a host of changes to the *Canada Elections Act*.

First, the Bill will result in an additional day in which to cast a ballot at an advance poll. This is helpful.

However government can provide voters with even more options as to when they can cast a ballot.

For example, in Ontario, voters are provided with 13 days in which to cast a ballot prior to Election Day.

Furthermore, proposed changes would allow for additional election officials to be appointed to ease congestion at polling stations and allow the Chief Electoral Officer to appoint liaison officers to facilitate communication between his or her Office and electoral district Returning Officers. Although these changes appear more cosmetic than substantive, they should be supported.

But the proposed Bill also seeks to restrict the information that Elections Canada will be able to provide to electors.

This is controversial because Elections Canada, among its other responsibilities, has in the past been responsible for promoting voter turnout.

The Bill if passed unchanged would restrict the Chief Electoral Officer to providing the public with information only on:

1. how to be a candidate;
2. how an elector may have his or her name added to a list of electors and may have corrections made to information respecting him or her on the list;



3. how an elector may vote under s. 127 and the times, dates and locations for voting;
4. how an elector may establish his or her identity and residence in order to vote, including the pieces of identification that he or she may use to that end; and
5. the measures for assisting electors with a disability to access a polling station or advance polling station or to mark a ballot.

There is some merit to ensuring that Elections Canada focuses on the tasks necessary to ensure that an election is administratively run well.

In the May 2011 federal election, the numerous serious administrative errors discussed in the Neufeld Report suggests that Canada's election was not run as well across the country as it should have been.

As a matter of integrity, it is imperative that serious administrative errors are minimized. An election body focused on the task of administering an election in accordance with the prescribed requirements established in the *Canada Elections Act* ensures that the integrity of the electoral process is protected.

However encouraging Canadians to exercise their democratic right to vote also has value.

By restricting Elections Canada to the pure function of an administrative agency, Canadians will be left potentially vulnerable to receiving information about turning out to vote from only the political parties and candidates or other partisan groups.

Although candidates and political parties have an interest in "getting out the vote", the only votes they are interested in encouraging to go to the polls are those who will cast ballots in their favour. This is not healthy for democracy.

Accordingly, the Chief Electoral Officer and

Elections Canada, in general, should retain responsibility for trying to encourage voters to cast their respective ballots.

In the alternative, government should consider creating a sub-agency within Elections Canada or a separate independent agency whose sole responsibility will be to encourage all Canadians to vote in federal elections.

The tasks to be performed by this sub-agency or independent agency could be specified by legislation or regulation.

The Bill also proposes a greater role for electoral district associations and registered political parties in recommending names for election officer positions at polls and would require nominations by the 24<sup>th</sup> day before polling day.

This proposal is bad for democracy.

The current *Canada Elections Act* which already permits certain candidates to recommend names for election officer positions is contrary to general principles of democracy.

The proposed amendments make the situation worse.

In fact, the Neufeld Report expressed the following concern about the role of partisan candidates recommending names for election officers:

The entire concept of pairing partisan election officers at each polling station "to make sure things are done right" quite naturally becomes ineffective unless each campaign nominates enough officers. Additionally, a vast majority of Compliance Review participants strongly believed that appointing election officers on any basis other than merit is inconsistent with the principle of administrative



neutrality, and contrary to predominant Canadian values. Some suggested the appointment of partisan election officers is also inconsistent with established international electoral practices.

The Neufeld Report ultimately recommended that the *Canada Elections Act* be amended to remove all authority for candidates to nominate election officers.

The Bill has entirely ignored this valuable recommendation and thus the proposed changes in this area are contrary to Canadian values.

In order to ensure integrity in the electoral process, Elections Canada must have the freedom to recruit a professional or “quasi-professional” work force to satisfy its staffing needs.

Political parties and their candidates should be entirely removed from the staffing process. The Bill’s proposed amendments in this regard should be resoundingly rejected.

#### ***Proposed advisory committee unnecessary***

Another highlighted proposed change to the *Canada Elections Act* would result in the creation of an Advisory Committee of Political Parties.

The purpose of this Committee is to ensure that the views of registered parties are taken into account in the management of electoral laws.

While the proposal appears to be neutral, it is arguable that the Committee will unnecessarily politicize the electoral process.

In the Background: Fair Elections Act – Easy-to-Follow Rules for All, the government states that “...the Committee would act as a safe-guard for the arm’s-length administration of elections by reviewing and suggesting improvements for any interpretation by the

Chief Electoral Officer.”

This statement is puzzling since Parliament already acts as a “safe-guard” of the process.

There is also nothing in the proposed Bill to suggest that meetings between the Chief Electoral Officer and the Committee will be open to the public and therefore there is a danger that the stronger political parties will unduly influence the arm’s-length administration of elections behind closed doors.

The arm’s length administration of elections is worthy of protecting. Accordingly, the provisions seeking to create the Committee should be removed from the Bill.

#### ***Judicial recount procedures***

Bill C-23 also proposes amendments which impact judicial recounts.

The most significant amendment is the creation of a “Procedure for Recounts”. This is helpful.

However, s. 1(c) of the procedure unduly restricts the rights of a candidate to legal representation.

This subsection restricts a candidate to only having one legal counsel present during a recount.

The number of legal counsel who can be present for the Chief Electoral Officer is not similarly restricted.

Accordingly, this subsection should be amended to permit a candidate to have more than one lawyer present at a recount, if he or she chooses. There is no justification in law or otherwise for the proposed restriction.

#### ***Restrictions on electronic voting***

Lastly, among other amendments, which



include the creation of new offences and the imposition of higher fines, Bill C-23 proposes restrictions on the ability of Elections Canada to introduce electronic voting.

While the Bill continues to permit the Chief Electoral Officer to devise and test alternative voting processes for future use in a general election or a by-election and that such processes cannot be used for an official vote without prior approval of the committees of the Senate and of the House of Commons that normally consider electoral matters, electronic voting processes cannot be used, even as a pilot project, without full approval of both the Senate and the House of Commons.

This added layer of approval is unnecessary and could potentially hamper Canada's ability to modernize its electoral system so as to permit electronic voting for all Canadians or even a limited number of Canadians, such as the disabled, who might find electronic voting a suitable alternative to voting in person.

Electronic voting has been used in other countries and at the municipal level in some Canadian cities. In Markham, Ontario the use of electronic voting increased voter turnout by 10 percent.

### **Conclusion**

Based on the foregoing, Bill C-23 represents a promising start toward restoring the confidence of Canadians in its electoral system. But unless various proposed amendments to the *Canada Elections Act* provisions are revised or removed from the Bill there is a significant danger that Canadians will continue to lose faith in our electoral system and that federal elections will continue to be filled with controversy in hotly or closely contested races.

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