The Principles of Electoral Reform

by Pierre Lortie

The Royal Commission on Electoral Reform and Party Financing was established by the Government of Canada in November 1989. Its mandate was to inquire and report on the appropriate principles, processes and rules that should govern the election of members of the House of Commons and the financing of political parties and candidates during election campaigns. Pierre Lortie was Chairman of the Royal Commission. This article is based on his testimony to the House of Commons Special Committee on Electoral Reform on March 18, 1992.

The *Canada Elections Act* is one of the few acts of Parliament that is read and used by large numbers of Canadians. During elections, thousands of temporary election officials and volunteers — about 650,000 — must be able to understand this law. It affects what they do in the context of registering voters, administering the vote and conducting political campaigns.

One message delivered loud and clear throughout our mandate was the abysmal failure of the current Act to meet this test. Proceeding with further amendments to this law would only compound a problem that is already perceived to be, and is, very acute.

Canadians want a law written in language that is clear and explicit and that can be understood and adhered to without recourse to expert legal advice. Given that the strength of our electoral democracy depends on the volunteer efforts of thousands of Canadians, Parliament owes it to them that a new *Canada Elections Act* be made as accessible as possible.

The *Canada Elections Act* furthermore is a pre-Charter statute. Yet it encompasses the most fundamental of the Charter's democratic rights. The present electoral law does not secure the rights of Canadians under the Charter of Rights and Freedoms. It has been subject to successful Charter challenges. Without change, more challenges can be expected in the midst of the next election. The process for registering voters and the voting process, for instance, disfranchise voters who should not be legally or administratively disfranchised.

The law, moreover, is not enforced effectively and will not be so until administrative infractions are decriminalized and a process of administrative adjudication is established. In addition, the equality of Canadians is not sufficiently promoted by the present system.

> ***The Canada Elections Act is a statute frozen in time. It ignores the major technological, sociological and political changes that have taken place over the past 20 years.***

Finally, but most importantly, the present system has significant shortcomings in establishing the basic fairness that Canadians demand and have every right to expect in their electoral process.

Our commission consulted widely with Canadians generally, members of the House of Commons and with the experienced practitioners in election administration, political parties and the media. A set of fundamental principles for electoral reform emerged from these consultations. These objectives are based on the central values that Canadians hold with respect to our electoral democracy.

These principles are not motherhood statements. Anyone who followed our hearings will know that Canadians believe strongly in their democratic right to vote and to be candidates, and they insist that equality, fairness, and integrity govern the electoral process. These values are part of the Canadian political heritage; they also reflect the strong attachment of Canadians to the values explicitly and implicitly contained in the Charter. The electoral process belongs to Canadians, and they expect it to reflect their values.

The *first principle* that has guided us is the need to secure the democratic rights of voters. Securing that right is the most essential characteristic of a democracy. Our record on this score leaves no place for complacency. With an average voter turn-out in federal elections of about 73%, we fare better than the United States, but worse than 27 other democracies. Moreover and more troubling, Canada's turn-out rate is slipping further behind the international average. We must not accept this situation, particularly when there are many ways at our disposal to correct this disquieting evolution.

The right to vote must be established in the electoral law in ways that are consistent with the letter and the spirit of the Charter, which guarantees this most fundamental democratic right. Unjustified exclusions must be removed. Only those limitations that are demonstrably justified in a free and democratic society can be accepted.

The process of registering to vote must not disenfranchise voters on administrative grounds or because of administrative shortcomings. Our enumeration system is quite comprehensive; however, our research has shown that only about 80% to 85% of eligible Canadians in our large metropolitan areas are registered. We need to reconsider procedures for enumeration as well as revision. For instance, it has been noted that turn-out in jurisdictions that allow voting day registration is increased by up to 10%. Moreover, the new *Canada Elections Act* should recognize the fact that new technologies can improve the registration process and the new act must allow for closer co-operation between different levels of government in order to eliminate duplication and reduce total costs to Canadian taxpayers.

> ***Voting must be facilitated by changes to absentee voting and special voting procedures through introduction in federal legislation of the concept of mobile polls and greater responsiveness to the special needs of persons with physical and other disabilities.***

These are practical matters, and our recommendations offer practical solutions, which have been shown to work well in Canada. Our approach was to recommend procedures that are voter-friendly. The integrity of the vote must be ensured, to be sure, but practices elsewhere in Canada and abroad make it very clear that a much more voter-friendly orientation should be provided in the Elections Act to guide election officials in delivering what is the most basic public service in a democratic political system.

The *second principle* that has guided us is the need to advance access to elected office. The concept of representation is at the heart of liberal democracy. Elections establish who has a legitimate claim to political power and, in the process, a society signals its attitude to the demands of all citizens to stand as effective candidates, regardless of their social or economic characteristics. In this respect, a society is explicitly representing itself. In doing so, it reveals a great deal about its moral and ethical values.

At least three basic dimensions of representation must be considered in a reform of our electoral system. The first pertains to legal restrictions on access to elected office. The right to be a candidate must be established in the Elections Act in ways that are consistent with the letter and spirit of the Charter which also sets forth this most fundamental democratic right.

The second concerns the degree to which citizens are able to ensure the accountability of their representatives. Canadians are represented by individual MPs elected from geographically defined constituencies. Our political parties have been highly competitive and as a consequence citizens generally have been able to hold their representatives accountable both for their individual record and for that of the parliamentary party to which they belong. With our single-member, simple-plurality voting system, changes in citizens' preferences are easily translated into changes in representation. Our record is good as evidenced by an international comparison of an index of proportionality. We rank lower than political systems using proportional representation, but this, of course, ignores the advantages of responsiveness and accountability inherent in our constituency system. In this respect, then, the performance of our electoral system combined with our convention of "responsible government" has been quite effective. The third issue of "representation" arises from the fact that many Canadians do not feel that constituency or partisan representation fully captures the current range of citizen interests. Traditionally political parties have played a central role in ensuring representativeness in Parliament, gradually integrating various language, ethnic and religious groups into Canadian politics through the recruitment of standard-bearers. Their success in achieving a presence in Parliament is viewed as symbolic of the power these social groups have achieved within Canadian society.

In recent years, several other groups have laid claim to fair representation. Increasing demands for greater equality are a case in point. It is strongly felt that neither constituency nor partisan representation fully captures

the full range of citizens' interests. The Special Joint Committee on a Renewed Canada addressed this very point in its report as one of the important "challenges of inclusion".

The evidence gathered by and for the commission leads uniformity to one conclusion: measures are necessary to ensure that the equal right of citizens to candidacy is enhanced effectively. This requires that the electoral law seek to achieve a reasonable degree of fairness in the competition for nomination by a political party - the primary route to elected office. Since all citizens are not equal in their personal circumstances, and some have faced systemic barriers in securing their rights, equity and fairness demand that the law provide more than a simple statement of formal rights.

The key recommendations in this area are:

- extending to all employees the right to an unpaid leave of absence during the election period to contest a nomination and seek office;
- setting limits on spending by nomination contestants;
- providing tax credits for contributions to nomination contestants
- providing tax deductions for the extra expenses incurred by some groups of candidates, including women and persons with disabilities.

These recommendations are in keeping with Canadian traditions and our heritage of concern for fairness. They address specifically the shortcomings that have been identified in ways that are responsive to legitimate criticisms, yet respect the fundamental notion of representative governments and the ability of parties and voters to choose representatives freely and hold them accountable.

The *third principle* pertains to the need to promote the equality and efficacy of the vote. Our electoral system is meant to secure the effective representation of citizens in the House of Commons, both as members of provincial and territorial communities within our federation and as members of local communities. Provincial communities are meant to be represented in the Commons proportionate to their population. Local communities are meant to be represented on the basis of their population, but in ways that also acknowledge communities of interest.

The constitutional principle of representation governing the allocation of seats to provinces, namely proportionate representation, must be tempered in practice to ensure minimum representation of our smallest provinces and the territories. Beyond that, however, the constitutional equality of the vote must be secured. This is essentially a matter of using the most appropriate formula to achieve proportionate representation within the total number of seats in the Commons. The legitimacy of the Commons as a national legislature requires this fundamental equality of the vote.

Drawing federal electoral boundaries within provinces must also secure effective representation under our Constitution. This requires, as the Supreme Court has made clear, that the relative equality of the vote within provinces be the first and foremost objective. Deviations from this criterion, as the Supreme Court has also made clear, must be clearly justified. Moreover, the relative equality of the vote is not something we should concern ourselves with only once every 15 years. Rather, it must be made a fundamental characteristic of our system.

> ***The present formula for allocating seats to provinces is not related to any sound principle of representation. It fails to give sufficient weight to the constitutional principle of proportionate representation, and it discriminates against Alberta, British Columbia, and Ontario.***

The law governing the drawing of electoral boundaries within provinces is unnecessarily defective in achieving equality of the vote. Nor does it accommodate the effective representation of aboriginal people. Their right to an equal measure of representation, while preserving the equality of the vote for all Canadians, requires a different approach to recognize their unique status as first peoples as well as their geographically dispersed communities south of the 60th parallel.

The *fourth principle* is the need to strengthen political parties as primary political organizations. Our tradition of responsible parliamentary government has meant political parties are central to our system of representative governments. Indeed, ours is a system of party government. Our parties organize MPs into those who support or oppose the government of the day. Our parties accordingly organize the process whereby candidates are recruited and selected, and electoral support is mobilized on their behalf.

Consequently, parties must develop policy positions and programmes that encompass the complete range of issues confronting modern governments. This is especially the case in a parliamentary system, where the governing party forms the cabinet, has majority support

in the House of Commons, and is thus expected to provide leadership, make decisions, and manage its policies and programmes.

Canadians recognize that a true democracy under a parliamentary system of government require political parties as primary political organizations but they are increasingly critical of the way our national parties perform many of their essential functions. They are particularly critical of the ways parties manage processes such as the nomination of candidates and the selection of their leaders.

Given that parties are the primary gate-keepers of the nomination process, and that party leadership is critical to the effective choices of voters in indirectly selecting who will form the federal government, the public has a legitimate interest in ensuring they conform to and further the democratic rights of Canadians.

Our regulatory framework must not be indifferent, let alone hostile, to the primacy of political parties. Nor can it completely ignore the fact that although parties are private organizations, they are also trusted with crucial public functions. Our electoral law, accordingly, must be reformed with respect to the ways in which it relates to the public functions and responsibilities of political parties. It must provide a framework to ensure that parties registered under the law adhere to the principles that protect and enhance the democratic rights of Canadians; that registration be reasonably accessible to emerging parties; that registered parties are able to fulfil their role in developing policy alternatives and education of their members; and that the constituent parts of registered parties that receive the benefit of the law are also encompassed under the law.

With respect to the registration of parties, we acknowledge very clearly in our report that parties should set their own rules governing selection processes to reflect and affirm the distinct history and culture of each party and remain consistent with their structure, internal processes, membership base, and revenue base. But these rules should be clearly and consistently set out in party constitutions and bylaws. Moreover, since public funds are involved in the operation of parties, these rules must tie into overall framework of party and election financing and financial accountability if the fairness and equity of the system is to be protected.

We recommend that minimum standards with respect to spending limits, financial reporting rules, and rules on the use of the tax credit for nomination and leadership contestants be part of the Elections Act. This will ensure fairness among the parties and the availability of an enforcement mechanism. Parties would be free to set their own rules within this framework, but the rules would then have the force of the election law.

The *fifth principle* is the need to promote fairness in the electoral process. Fairness is clearly the pre-eminent value that Canadians want expressed in our electoral law and in the electoral processes. Canadians see fairness as the means whereby the fundamental equality of their democratic rights is achieved. Without laws that promote fairness, we may have a free society, but we will not have a truly democratic society.

It is absolutely essential that we all understand that the critical importance Canadian attach to fairness is not wishful thinking or misguided political naivety. Canadians want and expect their elections to be competitive. They recognize that financial resources are necessary to conduct effective campaigns, and they appreciate the openness of competition that is secured by their right to freedom of expression.

> ***Canadians do not accept the view that the electoral process is akin to the economic marketplace. They reject the model of electoral competition as in the United States where personal wealth, or access to wealth, is a precondition of access to elected office and effective campaigning by candidates and parties.***

In numerous and concrete ways, Canadian electoral laws have long accepted that fairness must be a central premise of our electoral process. Our laws concerning the state's responsibility for registering voters, the use of the independent boundaries commissions, the provision of free broadcasting time, and among other things, candidate and party finance have demonstrated conclusively that Canadians want, expect, and know is possible to have fair elections.

This means that measures must be adopted to ensure that citizens have a reasonable degree of equality in influencing elections outcomes. We also know from our own experience, as well as from comparative research, that measures to promote fairness do not dampen electoral competition. In fact, the increased access does enhance competition.

As our federal, provincial and territorial experience and that of other democracies demonstrate, fairness in the electoral process demands, first limits on election expenditures and thus a comprehensive definition of election expenses on the part of all election participants. That means candidates, parties, and independent individuals and groups. Second, it demands partial

public funding of candidates and parties. Third, there must be access to the broadcast media.

In determining the specifics of each of these measures, of course, fairness itself must be the guiding criterion. To the degree that this is the case, reasonable limits on rights, such as freedom of expression, are fully justified under the Charter.

The most thorny issue here is obviously the regulation of spending during the election campaign by individuals and groups operating independently of parties and candidates. Clearly, if there are no limits on independent expenditures, the spending limits on political parties and candidates are unfair and unenforceable. Therefore, a reasonable balance must be struck between the continuing principles of fairness and freedom of speech.

Our proposal is based on several criteria. First, a limit on election spending by individuals and groups, other than candidates and parties, must still allow for permitting freedom of expression.

Second, individuals and groups advocating their position on an issue must be allowed to refer specifically to candidates and parties in relation to that issue. Otherwise in the context of an election, their freedom to express a point of view will be restricted unduly. We must always recall that people vote for candidates, not for issues.

Third, independent individuals and groups cannot be equated with candidates and parties. Even a costly and intrusive regulatory system requiring individuals and organizations to register with election authorities and report their spending and their financing sources would not secure fairness.

Unlike parties and candidates, individuals and groups will be able to pool their resources or split into new groups to increase their impact or multiply the amounts they could spend. This is supported by the U.S. experience.

We propose a limit of $1,000 for individuals and groups operating independently and the exclusion from the expense limits of communications by companies, union, and associations addressed exclusively to their shareholders, employees, or members are consistent with the Charter and meet the tests that have been set out by the Supreme Court for determining what constitutes a reasonable and justified limit in a free and democratic society.

The *sixth principle* is to ensure public confidence in the integrity of the electoral process. This can be secured only to the degree that the election law curtails the exercise of undue influence through political contributions to candidates and parties; that the election law reduces the possibility of undue manipulation of voters through media reporting a public opinion polls; and that the election law ensures that elections are administered, and the election law enforced, in an impartial and independent manner.

Control of undue influence requires, at a minimum, a complete, timely accessible disclosure and reporting system respecting political finance. Transparency and public accountability for the use of public funds are essential. Undue influence can also be controlled through the use of public funding and political tax credits, which reduce the need for large contributions from a few sources, and by spending limits on candidates and parties, which reduce the requirements for seeking contributions.

Reducing the manipulation of voters by media reporting a public opinion polls, which are claimed to be "scientific" samplings of public opinion of election issues, requires, at a minimum, the following measures. First, measures to ensure that polls which are represented as such in the media actually exist and were conducted in a manner that satisfies scientific criteria. Second, that the public, especially election participants, have access to the date and methodology of reported polls. And, third, that polls not be reported when there is insufficient time to evaluate them or when their scientific validity is inherently deficient.

Finally, if the electoral law is to be administered and enforced in ways that enhance public confidence in the integrity of the electoral process, the electoral machinery must be, and be seen to be, impartial and independent. It must also be effective and efficient in coping with the complexities of conducting elections in a very short timeframe. Above all, moreover, the process must not place the hundreds of candidates and thousands of volunteers who engage in the election campaign at unnecessary risk because the law is unclear, unduly complicated or contains penalties that do not correspond to the gravity of the numerous possibilities of unintended or minor infractions. In particular, this means that administrative infractions should be enforced and adjudicated as matters that are not criminal. At the same time, those responsible for the enforcement of a law must have the necessary capacities to uphold the law, enforce its provisions and apply its sanctions.▲

Editor's Note: Following a report of the House of Commons Special Committee on Electoral Reform in December 1992, legislation was introduced in the House of Commons to amend the Canada Elections Act taking into account some of the recommendations of the Royal Commission. See page 37 of this issue.