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Reform of Electoral Campaigns

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Keynote Address

Reforming Canada's Electoral Campaigns

Mr. Patrick Boyer, MP

RESPONSE TO SCANDAL or crisis has been the usual impetus for electoral reform in Canada, whether it was the Pacific Scandal, the Winnipeg General Strike, or the FLQ crisis. Often the problem was not the absence of law but inadequate enforcement of what existed.

Today the law governing the conduct of federal elections is found not only in the *Canada Elections Act* but also in the *Broadcasting Act*, the *Criminal Code* and the *Income Tax Act*. This body of law is of fundamental importance and an integral part of the Constitution, underpinning the provisions for regular elections and the guarantees of democratic rights set out there.

As such, electoral law is a means of civilizing the power struggle, of ensuring that known rules and understood procedures are in place to govern the process by which people contend for the right to control the apparatus of the state. From time to time, as abuses of these rules are detected, reform becomes necessary.

The last major reform of federal electoral law was in 1974, when a decade-long debate culminated in new law placing limits on election spending, requiring the source and amount of donations to be revealed, and regulating broadcasting by candidates and parties. Since then, a number of legislative developments have reinforced the spirit of the 1974 reforms including the *Charter*, with its declaration of democratic rights and freedoms, and legislation covering access to information, conflict of interest, and the registration of lobbyists — all reflecting the desire of Canadians for cleaner elections and government processes.

Electoral reform is overdue again, however. The current Royal Commission on Electoral Reform and Party Financing was preceded by a committee of the Progressive Conservative caucus in 1985, a 1986 white paper on electoral law reform, response to the paper by a parliamentary committee, and a bill introduced in the House of Commons (Bill C-79), together with numerous recommendations to Parliament by the Chief Electoral Officer of Canada.

Since entrenchment of the *Charter*, some recommendations have been implemented as a result of administrative decisions or court challenges; examples include the accessibility of polling stations to disabled persons and the extension of the franchise to mentally disabled persons. But for the most part, the reforms put forward in Bill C-79 have not yet been implemented, even though there was significant consensus on the nature of the changes required. During parliamentary committee hearings on the bill, it became clear that C-79 had to be amended to clarify issues involving both "election expenditures" and "campaign expenses" (the definition in the *Canada Elections Act* not distinguishing adequately between these two concepts). But with the approach of the 1988 election, the government members on the committee were reluctant to open up this area of the law, and the bill died on the order paper when the thirty-third Parliament was dissolved for a general election.

Finally, a Royal Commission was appointed in November 1989, but it is not certain that the commission's recommendations will be produced in time to influence the conduct of the next election, given that legislative change will be time-consuming and the fact that the Chief Electoral Officer needs time before an election to implement changes of this magnitude.

Outstanding Issues

Among the issues that remain to be addressed in electoral reform, Boyer distinguished between two broad categories:

- Matters of **procedure**, such as scheduling to standardize poll closing times in all time zones, voting by non-resident citizens, and the differing treatment of urban and rural voters in the preparation of the voters' list and eligibility to vote without being on the list.

Other issues in this category include the need for a permanent voters list (which would permit shorter campaigns and could also serve as the list for national referenda or plebiscites); and the suggestion that the format and procedures for a televised election period debate among the party leaders be set out in the *Canada Elections Act*. Boyer also believes that subsequent use of tape or other material from such debates (for example, in paid advertising) should not be permitted.

- Matters of **principle**, such as advertising and other spending during elections by persons or

groups that are neither candidates nor official political parties, and public opinion polling.

The issue of third-party spending during an election period is particularly difficult because it involves drawing the line between freedom of expression on one hand and the efficacy and effectiveness of election financing laws on the other. The lines have been redrawn at least twice, first in 1983 when Parliament amended the provisions of the *Canada Elections Act* limiting spending to that by official parties and candidates, and then again in 1984, when the amendments were declared unconstitutional in Alberta following a court challenge by the National Citizens' Coalition.

The provisions have not been enforced since; one result was the millions of dollars spent on non-party advertising during the 1988 campaign. At least one issue that remains is whether, given their right of free expression, spending by such organizations and individuals should be subject to the kinds of limits that apply to candidates and parties.

Polls Distort Process

Boyer argues that public opinion polls have distorted the democratic process by turning election campaigns into horse races. Among their destructive effects are these:

- Media reports on polls displace scarce media time and space that might otherwise be devoted to examining issues, candidates and parties. And when news media commission polls that they later publish, they cross the line between reporting the news and making the news.
- Published polls can discourage party workers in a system that depends significantly on the persistence and thoroughness of party militants in reaching and informing electors.
- Polls encourage negative advertising campaigns on the part of trailing candidates or parties.

Bill C-79 would have allowed for at least some degree of public awareness about the potential reliability of published polls by requiring disclosure of information such as who conducted the poll and when, the size of the sample and the questions asked. Boyer also pointed to the example of France, which bans the publication of polls for the last two weeks of the campaign.

Boyer was heartened to learn that the Royal Commission was considering tabling its recommendations in legislative form, but he questioned whether the legislative machinery could move quickly enough to ensure that the excesses of the 1988 campaign can be avoided in the next election.

Question Period

Much of the discussion centred on the issue of polling — both during election campaigns and as a basis for government policy. Boyer identified problems with both types, arguing that in a democratic society it is reasonable to place some limits on the publication of polls during election campaigns (such as the two-week ban). In addition, excessive use of polls by governments to shape public policy eventually produces a homogenizing effect between federal and provincial governments, despite their different constitutional jurisdictions, and in the positions of the political parties, on most issues.

One participant suggested that public opinion polls could be compared to the referenda or plebiscites Boyer favours for national issues. But Boyer countered that a referendum is not a snapshot of public opinion; rather it is a process of education and debate, culminating in a vote, through which people struggle with an issue and reach a decision. In one sense the process is more important than the vote, because voters are not allowed to remain spectators on the issues — they are forced to become involved.

Panel I

Election Financing

Moderator:

Mr. Jean Marc Hamel
Former Chief Electoral Officer of Canada

Panelists:

Mr. Donald C. MacDonald
Chairman, Ontario Commission
on Election Expenses

Mr. Louis Massicotte
Department of Political Science
Carleton University and
Research Officer, Library of Parliament

Mr. Donald H. Oliver, QC
Commissioner, Royal Commission
on Electoral Reform and Party Financing

ESTABLISHING A CONTEXT for the discussion, **Jean Marc Hamel** quoted three authorities on election financing. "He bought votes but votes did not buy him" was a phrase used to describe Canada's first prime minister, while another cabinet minister of that time noted, "On ne fait pas des élections avec des prières." This epigram was paraphrased recently at the hearings of the Royal Commission by an electoral strategist of some success: "You can't run national campaigns by selling fudge."

These quotations point to the fact that money has always been an important factor in the political process, and that where there is money, there is the potential for abuse. Canada's first comprehensive election financing law was passed by Parliament in 1974, though its origins dated back to the early 1960s, when the province of Quebec, followed by Nova Scotia, pioneered controls on election financing in Canada. Several factors contributed to the advent of the 1974 law, but the single most important one was the skyrocketing cost of elections as television took on a greater role in Canadian society.

Concern that only those with substantial means would be able to participate in future elections prompted the appointment of an advisory committee (the Barbeau Committee, which reported in 1966), but it was not until 1971 that a parliamentary committee examined the issue and 1974 before the *Election Expenses Act* was adopted. That law rested on four principles:

- **fairness** in providing a level playing field by setting limits on the amount of money candidates and parties could spend
- **equality of access** by providing public funding to candidates and parties to run their campaigns
- **openness** through public disclosure of campaign contributions and expenses
- **public participation** through the tax credit system to encourage individuals to get involved in the political process

The circumstances that obtained when the law was passed have changed dramatically in several ways. It is no longer the case, for example, that everyone is scrambling for election funds, and the *Canadian Charter of Rights and Freedoms* has added a new dimension as well. In addition, we now have 15 years' experience with the law as a basis for formulating recommendations for reform. This was the context for the remarks of three panelists.

Profound and Salutary

By comparison with the traditional approach to campaign financing, where secrecy reigned and lawmakers were suspected of becoming lawbreakers in the process of being elected, today's system is comparatively open, argued **Donald C. MacDonald**, chairman of the Ontario Commission on Election Expenses. Canada's achievement in this respect has been remarkable.

The impact of electoral reform and the current law has been both profound and salutary. The system is not uniform across all jurisdictions, but every jurisdiction except Yukon has at least some disclosure of contributions and spending, 6 of the 13 jurisdictions limit contributions, a further 4 offer tax credits as an incentive to democratize the sources of financing, and 10 of the 13 limit campaign spending. This does not mean that there will never be contraventions, or even scandals, but at least standards have been set against which behaviour can be measured.

As for changes that might be proposed to improve the system, MacDonald believes that limits on both contributions and spending must be preserved, at least until the distinction between election expenses and campaign expenditures has been clarified.

Second, at the federal level, controlling election spending requires that not only parties and candidates be registered and accountable (by filing a financial statement) but also riding associations.

Third, further disclosure requirements in the area of nominations and pre-writ expenditures should be introduced. At present there is no means of knowing how much candidates or riding associations are spending in the pre-writ period or on securing nominations. Parties are required to file annual financial returns, which can reveal pre-writ spending, but candidates are not subject to the same disclosure requirements.

Riding associations are registered in Ontario, making it possible to discover pre-writ spending. Candidates are not allowed to incur election expenses because their registration as candidates does not become effective until a writ is issued, but the same limit does not apply to riding associations or to spending to secure a nomination.

A fourth area requiring examination is third-party expenditures (the topic of the next panel). MacDonald's view is that the present situation is grossly unfair. Registered parties and candidates have limits on spending and contributions and must disclose these figures, but third parties are subject to no such limits. No one knows who contributes, how much they contribute or how the money is spent unless the organization reveals the information voluntarily. The result will be erosion of the integrity of the system in the short term and its eventual destruction.

Leadership Campaigns

Finally, MacDonald raised the issue of spending by party leadership candidates. Ontario amended its act in 1986 to move toward controlling spending on leadership campaigns. Candidates must register and provide disclosure through audited financial statements, but there is no limit on spending or contributions and no tax credit for contributors. Disclosure is an important first step, but beyond that the issue becomes one of whether the rules should be a matter for internal party decisions or whether all parties should be subject to the same rules under the election expenditures or another statute.

The federal New Democratic Party and Liberal Party, for example, set limits on their leadership campaigns (although the amounts varied dramatically). Without advocating one course or the other, MacDonald pointed out that the introduction of limits on election expenditures in Ontario in 1986 had not resulted in any criticism that the electoral process had been inhibited by the new limits. On the contrary, parties welcomed the limits because of the difficulty of imposing limits themselves.

MacDonald therefore argued that limits on spending by leadership candidates should not be considered an unwarranted intervention in the process.

The Innovative Province

The province of Quebec has been a leader in electoral reform in Canada. Reform occurred in two phases, resulting in the provisions of the 1963 *Election Act* on election expenses and the 1977 act governing party financing. **Louis Massicotte** traced the origins of Quebec's system to the early 1960s, when the Lesage government borrowed from the British system to introduce requirements such as the official agent, disclosure of contributions and ceilings on expenditures.

At the same time, Quebec introduced two innovations: the partial reimbursement of candidates' expenditures and the placement of limits not only on candidates but also on parties.

The second phase of reform also had elements of both old and new, incorporating ingredients from the federal, Ontario and U.S. systems while including several provisions unique to Quebec. The borrowed components included the registration of political parties, riding associations, and independent candidates; disclosure of contributions and the names of donors giving more than $100; limits on contributions; an independent agency to administer the party financing law; and income tax credit for donations to political parties.

The innovations were to limit contributions to individual electors — unions, corporations and non-residents were not permitted to contribute to political parties; and to provide for subsidies to political parties based on the total number of voters in the province ($0.25 per voter). Since 1977, the law has been refined several times, including the amalgamation of the various bodies administering electoral law in 1982.

Significance for Parties

Reform has produced significant change in the operations of political parties. Massicotte identified two major effects:

1. The Parti québécois was already financed through individual contributions, but the Liberal Party had relied heavily on corporate donations. Nevertheless, contrary to expectations, the Liberal Party was able to make the adjustment successfully, even surpassing for many years the PQ in the number of donors.

2. A second fear expressed at the time the changes were introduced was that parties might not be able to attract sufficient donations to finance their operations. In fact, however, the provincial parties have been able to raise as much as the federal parties on a per capita basis.

Finally, Massicotte addressed the issue of whether this system, designed for the province of Quebec, has application for other provinces or for the country as a whole. Massicotte identified several peculiarities of the Quebec situation that should be borne in mind in answering this question:

- The 1977 law was introduced by the Parti québécois; as is often the case, a newly elected government may be more willing to change the rules of the electoral game.
- In addition, the PQ had not relied on either corporations or unions for funding, making it easier to introduce the rule about individual donors. This situation does not apply at the federal level, where two major parties receive substantial contributions from corporations while the unions contribute to a third one.
- Further, the business community in Quebec was somewhat estranged from the population at the time the new law was passed, making it easy for the PQ to cut off that potential source of funds. Again, the situation is quite different at the federal level.

As a result, proposals to transfer the Quebec system to another province or to the federal level should be viewed with caution.

Issues for a Royal Commission

After more than a decade and four elections under the current federal electoral regime, the government appointed the Royal Commission on Electoral Reform and Party Financing to take a fresh look at the system. Royal commissioner **Donald Oliver** identified some of the developments that have made this fresh look necessary:

- The spiraling cost of elections, resulting from the fact that the cost of communicating with electors has outpaced the inflation rate.
- The participation of third-party advocacy groups in campaigns and the fact that the current provisions governing their participation are in limbo as a result of court decisions.
- The introduction of the *Charter* in 1982, which adds a new dimension to electoral law and party financing.
- The growing tendency to challenge the legitimacy of political institutions and the resulting need to ensure high ethical standards in law, in institutional arrangements, and for participants in the political process.
- The experience of a number of Canadian and foreign jurisdictions with electoral systems introduced since 1975, some of which contain approaches and provisions different from the federal law of 1974.
- The unintended and unanticipated consequences of the 1974 law since its introduction.

The Commission's assessment of the current electoral regime will include at least four broad areas: election contributions, election expenses, the reporting of contributions and expenses, and the scope and coverage of election financing law.

Election Contributions

The central issues relate to the appropriateness and efficacy of limitations on who may contribute to candidates and parties and how much they may contribute. The current law contains no such restrictions, relying instead on identifying and regulating the recipients of contributions and requiring them to disclose contributors and the amount of contributions. This approach was based on two assumptions: that limits on contribution sources or amounts could not be made effective; and that public disclosure would discourage candidates and parties from relying exclusively on a limited number and type of contributor.

Other jurisdictions have taken another approach, defining who may contribute and/or how much they may contribute. In determining whether such an approach would be applicable to the federal system, three questions arise:

- Is there sufficient evidence that such restrictions can be implemented effectively and economically?
- Are the objectives of such restrictions better accomplished by limits on expenditures rather than on contributions?
- Are the objectives of such restrictions sufficient to justify them?

These questions are particularly important in light of the evidence that increasing numbers of Canadians perceive a relationship between significant election contributions and subsequent influence on political decisions.

It should also be remembered that parties do not rely entirely on private donors; the state plays a role

in financing the electoral process through tax credits and the reimbursement of electoral expenses. If the objectives of election law include promoting a degree of equality among the players and eliminating the prospects for (or at least the perception of) undue influence in the political process, what is the appropriate balance between public funding and private contributions? Can this balance be established without freezing the status quo forever in favour of the established players?

Election Expenses

Here the issues concern the relationship between the definition of election expenses and the limits, if any, to be imposed on election expenditures by candidates and parties. The present definition assumes that meaningful distinctions can be made between different kinds of expenditures incurred by candidates and parties. Only certain expenditures count as 'election expenses' and are therefore subject to the total limits imposed by the law.

The overall limits on election expenses do not include all possible campaign expenditures; as a result, the limits are segmental or partial, and various campaign activities on which money is spent escape the strictures of the law. The effectiveness of the limits is thus in doubt, because not all expenditures are defined as expenses, and total expenses may not necessarily be equal to total expenditures. Two questions arise from this analysis:

- What purposes are served by distinguishing between different kinds of election expenditures, such that only some count as 'expenses'? Doing so adds uncertainty to election administration and may invite disrespect for the law.
- If limits are to be imposed on total expenditures, what criteria should be used to determine that ceiling? Should we attempt to achieve rough equality among the players? Or are we attempting to restrict any excessive use of economic resources in the pursuit of political power?

Reporting Contributions and Expenses

The central issues are twofold — the experience with compliance under the current disclosure rules, and the need to ensure a proper and thorough accounting for the use of public funds in the form of election expenses reimbursement. Oliver sees two major questions:

- Have we so complicated the reporting requirements that we have lost sight of their purpose? The credibility and usefulness of reporting requirements are diminished unless information is requested and presented in ways that provide clear, concise and consistent accounts.
- Do the reporting requirements ensure an appropriate accounting for the use of public funds, and that funds are used for the purpose for which they were provided? At stake is the continued willingness of taxpayers to subsidize candidates' and parties' election spending.

Scope and Coverage of the Law

The main issues revolve around which participants and activities should come under regulation of electoral law. Third-party advocacy groups have been excluded *de facto* from the current law; nor does the law cover local party associations, party leadership selection processes, or the processes by which parties select candidates for each riding. Again, several groups of questions arise:

- Is it appropriate to regulate the activities of some but not all players in the electoral process? What justifies treating candidates and political parties in one way and advocacy groups in another? Where do we draw the line between freedom of association and of expression and the regulation of electoral competition?
- Why do we regulate only the process of election to the House of Commons? Is it appropriate that the process of selecting party leaders, and by extension potential prime ministers, remain outside the pale of election law? If we are concerned about the possibility or the perception of undue influence on the electoral process, on what grounds do we assume that party leadership candidates are immune to such influences? Or are such matters internal to a political party? How intrusive can the law be before political parties become too intertwined with the state apparatus?
- What is the justification for the complete or partial exclusion of local party associations and nomination processes from the election finance law?

In concluding Oliver noted that by asking the questions he was not implying the answers; these are simply the questions that need to be addressed by the Royal Commission and that have arisen as a result of criticisms of the present regime, suggestions for reform, and the experience of other jurisdictions.

Question Period

Discussion from the participants concerned several aspects of the Quebec law, including whether it will be realistic to continue prohibiting donations from corporations as Quebec's indigenous corporate sector develops and its isolation is reduced. A second issue is whether, if corporate donations are prohibited, all directors of a corporation cannot simply contribute to a political party as individuals. Is there any way of controlling this?

Massicotte agreed that the change in the makeup of the Quebec business community may in the long term change public perceptions about the desirability of excluding corporate donations; but this has not occurred yet and the law remains popular. He also agreed that controlling contributions by directors through legislation is difficult if not impossible, but he has no evidence yet that this has occurred, despite suggestions to the contrary in the press. At the same time, information disclosed by the political parties shows that contributions are weighted heavily in favour of smaller donors, with relatively few people giving the maximum donation of $3000.

A second area of questions concerned state subsidies to political parties in non-election periods. The Royal Commission will be considering whether to recommend changes in the level and timing of these contributions. One participant commented that these subsidies seem to contradict the objective of encouraging public participation in the electoral process — as it is, only 1 per cent of eligible voters contributed to a political party in 1988. MacDonald agreed that the tax credit system encourages participation and is the better route to take. However, state subsidies do give smaller or new parties an opening into the political process. In New Brunswick, for example, the subsidy is based on $1 (indexed for inflation) per vote in the previous election.

At the same time, Massicotte argued, the absolute number of donors has actually increased since state subsidies were introduced in Quebec. Moreover, state subsidies account for a minority share of party revenues — between 15 and 38 per cent of total annual Parti québécois revenues and 7 to 20 per cent of Liberal Party revenues between 1982 and 1988. If state subsidies were the sole source of funds for parties, however, the danger might increase.

Participants also raised criticisms of the federal ad hoc committee, with membership from the three parties, which in the past has in effect determined how the electoral law will be interpreted and applied. Hamel pointed out that the parties have a legitimate interest in ensuring that they have a common interpretation of the law, that changes in the act are implemented quickly and efficiently, and that issues that had been overlooked in the law were dealt with (for example, what to do with surplus campaign funds after the election). The ad hoc committee has not met, however, since the last election.

MacDonald agreed that the committee (a similar one exists in Ontario) is useful but also that it is open to criticism because it is not a public body and excludes those that are not established players. He suggests that criticism could be allayed by holding public parliamentary committee hearings on recommendations by the ad hoc committee. A member of the audience recommended that whenever the Chief Electoral Officer needs to consult the political parties, this should be done through the House of Commons Standing Committee on Elections, Privileges and Procedure. Oliver agreed to take these suggestions back to the Royal Commission.

Other questions raised by participants that may be of interest to the Commission include the relationship between election spending and electoral success (can an election be 'bought'?); the issue of how to offset some of the benefits of incumbency, such as allowances for hiring staff, sending mail, travel and other means of getting a candidate's name before the public; and the question of how government advertising outside election periods fits into the picture of spending that may promote the re-election of the party holding office.

Panel II

Campaign Advertising

Moderator:

Professor John Courtney
Department of Political Science
University of Saskatchewan

Panelists:

Ms. Janet Hiebert
Department of Political Science
University of Toronto

Hon. John Reid, PC

Mr. David Somerville
President
National Citizens' Coalition

TO INTRODUCE THE DISCUSSION panel moderator **John Courtney** posed several questions about political advertising in general and the prohibition of third-party advertising in particular:

- What limitations, if any, should be placed on party and candidate advertising?
- Should the *Canada Elections Act* address in more detail than it does now the matter of political advertising, or are the present provisions sufficient?
- What about negative advertising? Is Canada moving in the direction of American practice of excessively negative party advertising? If so, is this of concern?
- To what degree and by what means should individuals and interested third parties participate in election campaigns through advertising? Should third-party advertising be allowed? If so, on what terms? If not, what statutory restrictions, if any, can realistically be placed on the rights of individuals and groups to present their views through paid advertisements? Can those limits, in the words of section 1 of the *Charter*, be found to be "reasonable" and "demonstrably justifiable in a free and democratic society"?
- Should parties and candidates be entitled to certain statutory protections denied others who might want to participate in the electoral process through paid advertisements? Indeed, would such special treatment lead to invidious and unjustified comparisons among categories of political actors that would prove damaging to the body politic?
- Can freedom of political expression through advertisements be reconciled with equality of political access?
- Is the question of advertising by interested third parties simply a reflection of the growing strength and prominence of special interest groups in electoral politics, or are there more fundamental issues and values at stake?

To begin the search for answers, **Janet Hiebert** explored the relationship between free elections and freedom of expression under the *Charter*. The issue is delineated by the *Charter*'s unqualified language, which does not specify what circumstances are actually protected by its open-ended guarantees, and section 1, which requires that courts assess the justification for legislation that conflicts with protected rights to determine whether the legislative decision to limit a right was constitutionally correct. The courts, in other words, are being called upon to perform an enhanced policy role in balancing litigants' protected rights with the public good.

Many of these decisions will be made by the Supreme Court of Canada, but one lower court has already had a profound impact on the issues. The decision of the Alberta Court of Queen's Bench in *National Citizens' Coalition Inc. and Brown* v. *Attorney General of Canada* declared unconstitutional the provisions of the *Canada Elections Act* regulating election campaign spending by interest groups on the grounds that they violated freedom of expression. What makes the case interesting is its broad policy implications and the political decision not to contest the outcome.

The contentious sections of the Act represented the culmination of many years' efforts to prevent interest groups from negating the effect of financial regulations governing what candidates and parties can spend during elections. Although the invalidation occurred in a lower court and the law in question was considered an integral part of the financial regulatory scheme to improve the accountability of electoral participants, the decision has neither been appealed nor prompted the enactment of alternative legislation.

The reasons for the silence that now pervades Ottawa on the issue of interest group spending, Hiebert suggests, include the timing of the decision, a change in government and a weakened political

resolve to acknowledge, let alone redress, the potential impact of unregulated spending by interest groups during election campaigns.

Origins of Controversy

The origins of the controversial provisions date back to the Barbeau Commission, which suggested that if interest group spending were not controlled, financial restrictions on parties or candidates would be ineffective. The provisions of the 1974 Act prohibited interest groups from financially promoting or opposing a candidate but allowed a defence of 'good faith', a loophole that was plugged in 1983 following the acquittal of a man who had hired an airplane to tow a banner urging members of his union local to vote anything but Liberal.

The 1983 amendments effectively prohibited all opportunity for interest groups to oppose candidates or parties financially during an election campaign. Although members acknowledged that it would likely impinge on individual rights, the legislation was supported by all three parties. This was the law challenged by the National Citizens' Coalition (NCC) in 1984.

The NCC argued that the assumptions underlying the policy objectives of the legislation were flawed; the regulations attempted to reduce the inequities between the three principal parties but did little to facilitate the chances of new parties or independent candidates. Nor did the regulations encourage or enhance public participation in the electoral process; indeed, they made a vital aspect of public participation — advertising by interest groups — unlawful.

The federal government's case hinged on the argument that uncontrolled spending by interest groups would disadvantage candidates, who are subject to strict financial regulations. The legislation ensured a fair electoral process because participants' chances were not jeopardized by the impact of unaccountable and unregulated money. A second justification for the law was that citizens not be denied an opportunity to receive a full and balanced exposition of all election issues. In other words, integral to the government's argument was the belief that restrictions on interest group spending during an election campaign would enhance, not detract from, freedom of expression. The government argued:

> . . .if the aim of free expression is to ensure that a variety of viewpoints will be heard, there may be circumstances in which that goal will be served by action which prevents the monopolization of the freedom by powerful elements.

Judgement Rendered

In his decision on the case, Mr. Justice Medhurst declared that the law violated freedom of expression and therefore could be considered valid only if it satisfied section 1 of the *Charter*, the 'reasonable limits' clause. But for the legislation to be sustained, the government would have to convince him that the perceived harm or mischief was indeed likely to occur. A limitation of freedom of expression could not be justified unless the government demonstrated that other social values would be harmed:

> Fears or concerns of mischief that may occur are not adequate reasons for imposing a limitation. There should be actual demonstration of harm or a real likelihood of harm to a society value before a limitation [on freedom of expression] can be said to be justified.

The Alberta court's judgement was rendered before the Supreme Court of Canada decision in the *Oakes* case, which established the principles on which the Court will determine whether laws that infringe rights constitute a reasonable limit and the criteria that must be satisfied to demonstrate the reasonableness of a limit. The principles are *first*, that the objective must be of sufficient importance to warrant overriding a constitutionally protected right or freedom, and *second*, that once a sufficiently significant objective has been recognized, the government must show that the means chosen are reasonable and demonstrably justified. This principle involves a proportionality test with three components:

1. The measures adopted must be rationally connected to the objective and cannot be arbitrary, unfair or based on irrational considerations.
2. The means should impair as little as possible the right or freedom in question.
3. There must be a proportionality between the effects of the measure and the objective.

While this test is difficult to meet, its requirements are less rigid than Medhurst's stipulation that "there should be actual demonstration of harm or a real likelihood of harm". Hiebert went on to examine the government's legislative options in terms of these principles and criteria, concluding that difficulties might arise in meeting the second part of the test — the question of whether freedom of expression is impaired "as little as possible" by legislation prohibiting interest group spending during an

election campaign — although the argument could certainly be made that this is the minimum required to achieve the desired effect.

Resolve Undermined?

The government (albeit a different government from the one that introduced the 1983 legislation) has failed to exercise any option, however, legislative or otherwise. Hiebert speculates that negative publicity and editorial reaction surrounding the NCC case may have undermined political resolve. Opposition members (now members of the Government) who originally supported the bill made statements distancing themselves from it. But the government of the day continued to defend the law. Prime Minister Trudeau:

> It is as well to remind [the National Citizens' Coalition] that there remains freedom of speech in this country. Anyone can get up and oppose any party and any member in any way. It is just that he cannot use the power of money . . . to give him an advantage over other candidates.

The Alberta judgement coincided, however, with the change in the Liberal leadership and the 1984 election call. The government decided not to appeal the judgement and was defeated at the subsequent election (Hiebert did not suggest that the two events were connected). The Progressive Conservative government has neither introduced alternative legislation nor acted on the advice of the Chief Electoral Officer that a fair electoral process requires the regulation of interest group spending. The probable reasons include the assessment that the political cost of doing so outweighed the benefits and the desire to avoid the type of criticism that greeted the law initially, as well as the fact that Conservative candidates likely feel less threatened by interest group campaign spending than do members of other parties. On the other hand, the perceived threat did not materialize in the 1984 election, a factor that may also have contributed to inaction on the issue.

Interest group spending reached unprecedented levels in the 1988 campaign, however, in particular spending by pro-free trade and anti-abortion groups. Of particular concern was the prevalence of unauthorized spending and the flurry of last-minute advertising on the eve of the election, when candidates and parties were unable to respond (because of the legal blackout imposed on them in the final days of the campaign).

The 1988 campaign may have been an isolated phenomenon arising from the importance of the free trade issue. On the other hand, advocacy advertising is becoming an increasingly popular and effective tool for promoting the sale of ideas. Given the successes of the 1988 campaign, there is no reason to presume that, in the absence of new legislation, interest groups will confine future advocacy advertising to non-election periods.

Rethinking Assumptions

This development was not anticipated at the time the *Canada Elections Act* was drafted. The legislators of 1973 assumed, explained **John Reid**, that if significant restrictions were to be placed on the spending of political parties and candidates, there also had to be controls on who could enter the game. Without restrictions on who can participate, no restriction on spending could be effective. As long as third-party interest or advocacy groups had a way in— that is, the ability to advertise on issues (as opposed to particular parties or candidates) — then the system would be relatively easy to develop and police.

The advent of political action committees (PACs) in the United States put an end to these assumptions. In Canada, the political parties were in part the authors of their own misfortune, having decided that opinion polling would not count as an election expense and that advertising expenditures would not have to be reported in full but only in part.

The 1988 election saw the emergence of PACs in Canada, and the next election will undoubtedly see more. Those that have emerged have relied to a great extent on negative advertising, and with good reason: it works. This is not a development to be welcomed.

Reid recently attended a seminar where the 1988 election campaigns in Canada and the United States were compared. Participants were particularly impressed with the quality of the leaders' debate in the Canadian campaign; they attribute the decline in the quality of debate in the U.S. race to the rise of PACs. Their presence makes it risky for candidates to adopt public stands if they don't have the resources to defend that position by countering the negative advertising they are likely to attract from PACs. The cost of maintaining a position is thus to say nothing.

Two areas are of particular concern: the development of the black art of negative advertising

and the lack of development of advocacy advertising as a means of promoting ideas. Third-party advertising is not the only concern in election campaigns. The amount of affirmative advertising by political parties, particularly in the United States, is declining, and parties are coming to depend on the use of negative advertising. In these circumstances it becomes difficult for candidates to say what they believe and for citizens to understand what parties stand for (which merely exacerbates the tendency of parties to blur the distinctions between them).

The situation in Canada is mitigated somewhat by the party system, which is the main focus of the political contest (rather than individual candidates, as in the United States). The *Election Expenses Act* has also worked well with respect to protecting the spending limits of candidates. But it has collapsed at the party level; this is cause for concern because the next election will likely be operated under the same rules as the last one. (There will not be time for the Royal Commission's recommendations to be implemented before then.)

Values at Stake

Advertising by third parties is a separate issue, however, because society's values are at stake. What is the role of politicians in our society? Traditionally, the answer has been to make decisions on issues that have to be decided by the community, and political parties have been the traditional instruments of this process, the means by which the positions are taken before voters vote.

The system is tough — 40 per cent of the membership of the House of Commons turns over each election, 28 per cent of incumbents are defeated when they stand for re-election, and 12 per cent choose not to stand again. Canadians do not join political parties in large numbers, but they do turn out to vote — an average of 75 per cent of those eligible to vote in the elections since 1945 have done so. If the political system is to offer voters a choice, it must encourage debate and must not discourage politicians from taking risks. Electoral laws must be one element of this system.

The alternative is a system based on interest groups, with the boundaries of free speech being determined by the possession of resources. Yet dollars are not a determinant of wisdom and judgement. The notion that free speech is attached to the amount of money at your disposal violates the fundamental notion of the equality of individuals in a democratic society. Third-party advertising must therefore be yoked to the common good.

More Government, Less Freedom

David Somerville took issue with the restrictions advocated by the first two panelists. The National Citizens' Coalition believes "they will result in more government and less freedom." The gulf between Somerville and the rest of the panel was evident in the terms of the debate. What they called third parties, he calls citizens, what they called advertising and negative advertising, he calls freedom of speech and citizens exercising their freedom of expression to tell their fellow citizens things about politicians that politicians don't want said.

The NCC's 'negative advertising' during the 1988 election was based on polls showing that people who intended to vote for the NDP did not know where the party stood on a number of issues (issues on which the NCC took the opposite view from the NDP). The advertising, Somerville maintains — which cost some $700,000 and was targeted to constituencies in western Canada — was intended to inform voters about the party's position. Somerville sees this as a valuable function for the NCC to perform. The right to vote is useless unless it is an informed vote.

Somerville disputes the idea that elections can be bought. This notion assumes that people are not competent to see past the advertising and make their own judgements. It also ignores the evidence of the lack of electoral success on the part of a number of candidates who spent large sums of money in the pre-election period — some of them could not even win a nomination. Similar arguments could be made about political parties. In 1979, the Liberals outspent the Progressive Conservatives substantially but failed to win as many seats. The NDP gained only half as many seats as the Liberals in 1988 but outspent them. There may be a tenuous connection, but even if there is, it doesn't matter.

The NCC conducted a public opinion poll on the issue: 73 per cent of those surveyed said it would not have much influence on their voting behaviour if one candidate spent substantially more than other candidates; 19 per cent said they would be less likely to vote for such a candidate; and 5 per cent said they would be more likely to vote for that candidate.

The fairness argument does not hold much water. The idea that only rich candidates will present themselves if there are no restrictions on spending,

and that the poor will suffer as a result, is contradicted by the fact that Canada's social welfare net was put in place before there were any restrictions on election spending. Besides, the presence of a PAC in a given riding is not always a negative factor.

If politicians want to put restrictions on themselves, they can choose to do so, but they should avoid infringing on the freedoms of citizens. The concept of the level playing field confuses two types of equality — equality of opportunity and equality of results. The first is the concept upon which Canadian society is founded. Equality of results does not work; it simply can't be enforced. It is therefore wrong for the government to restrict how much people of differing abilities and ideas may spend.

If the state is serious about making a level playing field, the spending limit should be $1000 per riding. This will not happen, of course, because the law and regulations are drafted in the self-interest of the people in power.

Drawing the Line

Even more dangerous are suggestions that restrictions be extended to nominations and party leadership campaigns. Why stop there? Why not all the time? If advocacy advertising is to be prohibited during a campaign, why not restrict editorial expressions of support for one party or another? Where do you draw the line? How many freedoms do you trample? It would be wiser not to start in the first place.

The fact is that Canada's political system is based on voting for candidates and parties, not voting on the issues. For the process to be meaningful, citizens must be able to support or oppose candidates or parties. But political parties reject the participation of interest groups because the parties want to be able to set the political agenda themselves. Who speaks for the citizens when all the politicians get together to decide an issue that affects their own interests?

The political process should be informed and driven by a respect and a love of freedom; this should be our central preoccupation. A democratic society must place its faith in a free marketplace of ideas. The process of adversary politics can be messy, but it is an essential part of our value structure. The 1988 election was the most exciting, free election the country has ever had. Somerville hopes to see this trend blossom further in the next election.

Question Period

Much of the debate among audience and panelists hinged on two issues: the effects of spending and advertising on voting behaviour and the boundary between freedom of expression and the public good. Several participants disputed the assertion that elections cannot be bought, while others continued the debate about whether restrictions on election spending by interest groups constitute reasonable limits in a democracy. On the relationship between spending and electoral success, Somerville suggested that it may well depend on the type of election, who is spending, what they are spending it on, and the nature of the issues involved. Yet, countered Reid, would interest groups have spent the large sums they did in the last election if they thought it had no impact?

On the issue of the friction between freedom of speech and a fair election system, a number of participants said it was difficult to understand how the application of the same rules to all participants in the electoral process could possibly offend the concept of equality. If the perceived problem is the domination of speech by monied interests, one participant suggested, the solution would seem to lie not in restricting what groups can spend but in limiting the sources from which they can accept contributions.

Resolving the apparently irreconcilable positions on these issues, suggested a listener, will require more thought about the fundamental questions: what we mean when we say people are equal in a democracy, why we insist on equality, and what kind of equality is involved; what the meaning of voting is in a democracy, and why we extend to people the right to vote. Important consequences flow from the answers to these questions.

Panel III

Opinion Polling

Moderator:

Professor Paul Fox
Professor Emeritus
University of Toronto

Panelists:

Mr. Christopher Waddell
National Editor
The Globe and Mail

Mr. Robin Sears
Principal Secretary and Chief of Staff
Leader of the Ontario New Democratic Party

Mr. Michael Adams
President
Environics Research Group

A SERIES OF QUESTIONS from the moderator began the session. **Paul Fox** asked how accurate public opinion polls are. Are they scientific, are they impressionistic, or are they propaganda? Do they contribute to a bandwagon effect or a backlash, or do they have no effect at all? Should their publication be controlled by law, for example, in the last two weeks of an election campaign? Finally, should the results of polls conducted privately for governments be kept private?

The 1988 election demonstrated how polling is a powerful tool for shaping strategy. **Christopher Waddell** cited the successful Progressive Conservative strategy, devised with the help of polling, to counter the strong performance of John Turner in the leaders' debate. Because parties use polling in this way, Waddell argues, the news media must become involved in polling, but they must go beyond simply reporting the results of a horse race. They have a responsibility to make the public aware of how polls are conducted, the questions asked, the results, the probable accuracy, and how the parties are using polls to shape their strategies.

In general, however, the media have not done an adequate job in this regard. Approaches varied widely in 1988. Some media outlets reported the results of all polls, while others reported only on polls they themselves had conducted or commissioned. (There is now a degree of overlap in the ownership of media and polling organizations; for example, Southam owns a majority holding in Angus Reid.) There were also instances of joint polling by television and newspapers, with the results shared.

Despite the amount of polling, the reporting of results was not always helpful to citizens wishing to make informed judgements about the meaning or significance of polls. The results of too many polls were reported at too frequent intervals, in part because of competition among media outlets and the fact that reporters often lose their perspective on the campaign when they travel with the party leaders. The pressure to cover the horse race places too much emphasis on poll results; reaction to the latest poll is the easy daily story. Inexperience among reporters also contributes to the surfeit of poll reporting.

Waddell believes that reported poll results probably do have some effect on voters and on the campaign. In the first instance, the results affect how some reporters see the campaigns of the various leaders and candidates and thus how they report the story. In the second place, the political parties believe the polls influence voters and adjust their behaviour accordingly.

The case can be made that the results of polls should not be reported in the last two weeks of the campaign. *The Globe and Mail* has adopted its own rule about not reporting poll results in the final ten days because they are concerned about their potential effect on voters. Other outlets did not follow this practice, and it may well have been that the polls reported on the final weekend of the 1988 campaign, especially when coupled with last-minute advertising appeals by the business community, did affect the election outcome.

The Most Important Tool

Robin Sears reports that his attitudes about polls and polling have been transformed over the past 20 years. Initially he regarded polls as important but not central instruments of political strategy; today polling has become the most important private and public weapon available to a North American political strategist after television advertising. Their exclusion from election expenses is therefore illogical.

Polls also have their dangers. They are efficient and effective tools but can also be extremely destructive if used inappropriately. Again, this

argues for measures to control their production and use.

Certainly polls affect voting behaviour. There may be no way of measuring their impact accurately and in a way that would provide proof of their effects. But based on Sears' experience with election campaigns, reported poll results affect contribution levels, canvassing numbers, the morale of party workers, and the news coverage the party subsequently receives. If these factors do not influence voting behaviour, then the whole art and science of politics is a waste of time.

Given this assessment, what should we do about it? Sears does not believe that publication can be prohibited; apart from democratic and ethical considerations, a ban would simply not be enforceable. By extension, then, banning polls for a specified period of the campaign is not practicable; this would simply pique the hunger for 'secret' polling information. The answer therefore lies in regulation, and Sears accepts the pollsters' argument that regulation should rest with them. A trade organization of pollsters, perhaps with the participation of journalists and others, could establish standards, apply tests, make decisions about appropriate behaviour and respond to complaints, much as press councils have done over the years.

Finally, polling should become part of the curriculum for students of politics. Broader public understanding of the importance and central role of polling in the political process is necessary.

Proliferation of Polls

From just a handful in the 1979 and 1980 elections, the number of public opinion polls mushroomed to 11 in 1984 and 26 in 1988 — or about four per week of the campaign. Will weekly or daily polls be the norm in 1992, asked **Michael Adams**.

Public opinion polling has come a long way since 1936 when George Gallup asked 1000 randomly chosen Americans about their preferences in the presidential election. Earlier examinations of the phenomenon tended to talk in terms of the perils of polling, but now the focus has shifted to the power of polling. The fear is no longer that polls will be wrong but that they will be right. With the exception of the odd rogue poll, polling has become remarkably accurate; polls conducted within a few days of the vote are reasonably successful in predicting the outcome within the usual 1- or 2-point margin of error.

Adams attributes the explosion of media-sponsored polls in the 1980s to a shift in Canadians' political attitudes and behaviour. They no longer remain loyal to one party or the other, they no longer defer automatically to political authority, and they recognize that a single vote on election day will not necessarily produce representation that reflects their views on all possible issues that may come up between elections. The proliferation of polls is thus symptomatic of frustration with political institutions shaped by traditional notions of elite accommodation and brokerage politics and of a desire to see a greater range of views reflected in public policy.

As for shaping public policy, Adams argues that responsible pollsters do not ask about the solutions to problems but about people's hopes and fears and values and how these should be reflected in public policy. Successful practitioners use polling not to help them follow public opinion but to help them lead it. The politician who simply follows public opinion soon loses credibility, while the successful strategist is the one whose values are in sync with those of the majority of the country.

Bandwagons and Underdogs

Perhaps the harshest criticism is reserved for polls published during election campaigns — in particular their potential to create a bandwagon effect, or sympathy for the underdog, or voter apathy. In the last case, at least, polling has not had any noticeable effect on voter turnout. Adams argues that polls may even increase people's interest in election campaigns.

As for the bandwagon effect, Adams returned to the example of the turning point of the 1988 campaign. Early polls had shown the Conservatives well ahead, but John Turner's performance in the leaders' debate struck a nerve and began to change the picture. Public opinion actually turned around several times in the campaign, but Adams argues that the polls did not *cause* changes in voters' attitudes, merely reflected them.

Decision Factors

Environics did ask Canadians a week after the election about the factors that influenced their vote. These were the results:

- 27 per cent said **advocacy (third-party) advertising** had been a major factor in their decision

- 27 per cent cited the **leaders' debate**
- 13 per cent mentioned **party advertising**
- 11 per cent mentioned **candidate literature**, and
- 11 per cent said that **public opinion polls** had an effect on how they had voted.

Finally, if it is true that people take polls seriously and are becoming more knowledgeable and sophisticated in their voting behaviour, why shouldn't voters have available polling information if they wish to vote strategically?

Overall, however, Adams argues that the much more profound effects on politics and political institutions have come from television, not from polls. By comparison with the impact of television on political institutions and public policy, opinion polls are mere entertainment.

Discussion Period

The panelists explored the distinction between public polls and private polling. Sears pointed out that the 'beauty contest' polls are not as consequential to political parties as is private qualitative research — group discussions, for example, to elicit attitudes and reactions to issues and individuals and polling to test reactions to public events to see whether a particularly strategy is working. This is a relatively new form of polling in Canada, and a growing percentage of party spending on polls is being channelled into this form of polling. This type of research raises many more ethical questions than traditional public opinion polling.

Members of the audience identified the problem as not so much polling but the uses to which polls are put, the inexpert handling of information by users of polling data, and the lack of understanding on the part of consumers about what polls mean. Adams agreed on the importance of how results are published, asserting that newspapers are the best medium for reporting polls because of the need to explain how results were obtained — methodology, responses, regional variations, margin of error, etc.

A second area of discussion concerned why voters are interested in polls in the first place. Why does *The Globe and Mail* consider polls newsworthy enough to report them on page 1? Polls turn up on page 1 for one simple reason: readership surveys reveal that this is what sells newspapers. But Adams contends that people are interested in polls for several reasons: because voters are more interested in what ordinary Canadians think than in what elites or interest groups think; because they want to know what people in other parts of the country are thinking; and because the public is looking for ways to communicate with their political leaders and see polls as a way of doing this. Interest in polls is an indicator of the shift in attitudes toward politics and the desire to see a more open, participatory political process.

On the other hand, polling may have the effect of narrowing the debate or excluding some points of view. Waddell gave the example of the government's shift in its approach to child care, a shift based on polls showing that general public attitudes about day care did not coincide with those of the day care advocacy groups.

The negative consequence of this process, as Sears pointed out, is that minority views on issues may get less attention than they deserve because governments can predict very accurately what public reaction will be. The government has reversed its position on child care and has even cut funding in this field because detailed polling revealed that only a limited portion of the electorate cared deeply enough about the issue to let it influence their vote. International development assistance offers a similar example.

Polling of this type tends to homogenize party positions and to narrow the range of subjects that governments are willing to address and the array of options considered in deciding on a course of action. Is this a helpful influence on public policy and priority setting? Is it only issues that can command a high enough level of 'salience' that should get a significant degree of political energy and attention? Or should politicians be more interested in changing the numbers on issues they believe to be important than in acting on the basis of what the polls reveal?

Participants also asked about the ethics of using polling information. What is the responsibility of journalists, pollsters, and those offering advice on the basis of polling information? Waddell asserted that the standards for journalists relate to ascertaining the quality of the poll they wish to report and reporting it as fairly as they would any other story. An additional issue is when and how polls are reported. One view is that polls should always be reported in the same place in the newspaper, to avoid any appearance of bias in the placement of a particular poll. The other approach is to decide on the basis of the news flow on any given day.

Adams agreed that the role of pollsters has evolved toward providing information that is becoming more and more important in the

development of public policy. But he maintained that the ethical issue for the pollster is to ensure a random sample and appropriate methodology, to ask properly phrased questions, and to impart to clients the information discovered from the answers. At that point the information becomes part of the public policy process; values must come through the political process, not the polling process.

Sears termed this one of the most profound issues in polling. The fact is that polling information can be used for socially destructive purposes and to devise extremely negative campaign strategies. We have yet to come to grips with this fact in establishing acceptable norms of behaviour. Adams commented that Canadian political parties will certainly be prepared to use polling information to prepare negative advertising of the type seen in the last U.S. election. But they will continue to use such ads only if they gain acceptance among Canadians and are effective in achieving their purposes.

But parties are also naïve sometimes in their use of polls. Pollsters sometimes become party gurus and have even been known to tailor their analysis of data in subtle and not so subtle ways to produce the results they know the client wants. The advice of pollsters has to be filtered through political judgement; letting pollsters run political campaigns can be dangerous and counterproductive.

The secrecy of privately commissioned polls presents another ethical question. Adams said this is not an issue for him. He explained that most polling done for governments usually becomes public eventually through access to information (although Waddell pointed out that there are significant limitations on our ability to obtain polling information by this route). Information provided to the private sector does remain secret, but Adams' clients know that if they release information in a way that distorts the actual poll results, Adams will release the entire poll.

But as Sears pointed out, raw polling information is seldom useful; what is really interesting is the analysis pollsters provide. And of course this information is strategically valuable only if it remains secret; as a result, access to this information tends to be limited even within parties, a tendency Sears does not see as healthy for internal democracy.

A related question arises when public funds are used for private polling. Waddell wondered how much private government polling is used for public policy formation and how much is used for political party positioning, particularly as an election approaches.

A final question concerned the prevalence of abuse of polling information by those who commission it, for example, by withholding information deemed damaging to their interests. Adams said there have been occasions where media outlets have not used poll results if they conflicted with the editorial stance of the newspaper or station. Other abuses include the use of party pollsters to poll for media outlets, particulary during election campaigns.

— rapporteur, Kathryn Randle

Learned Societies Panel

Implications of the Charter for Electoral Distribution

Moderator:

Professor John Courtney
University of Saskatchewan

Panelists:

Professor Donald Blake
University of British Columbia

Mr. James Rabbitt, MLA
Yale-Lilliooet
British Columbia

BEFORE INTRODUCING THE PANELISTS, **John Courtney** drew attention to the influence of the *Canadian Charter of Rights and Freedoms* on electoral reform. In the last half of the 1980s the *Charter* was used as the legal basis for challenging provisions of the electoral laws in both federal and provincial jurisdictions. The *Charter* has thus been seen as a tool for reshaping electoral laws, some of which have been in existence for 100 years.

No sooner was the *Charter* in place than provincial civil liberties groups challenged the electoral boundaries of British Columbia. The most significant decision was that of Madam Justice McLachlin, who broke new ground in *Dickson* v. *The Attorney General of British Columbia 1984* by stating: "Equality of voting power is the single most important factor to be considered in determining electoral boundaries."

As Courtney emphasized, this is the most crucial question we can ask about electoral reform. What does equality of voting really mean for Canadians? This is among the issues dealt with by the Fisher report on British Columbia's electoral boundaries and the Royal Commission on Electoral Reform and Party Financing.

The first panelist, **Donald Blake**, offered an overview of the situation at the national level and recent developments in British Columbia, together with an analysis of the key issues in electoral representation. The democratic rights set out in the *Charter* are seen to imply equality of representation and equality of voting power. What does this mean? Ultimately, equality of representation means 'one person, one vote', and this is the benchmark Blake used for purposes of discussion.

Judged by this standard, and by comparison with countries like Australia and the United States, Canada presents glaring inequalities at the federal level. U.S. court decisions have instructed that voting districts be as equal as possible in terms of population. In many cases the United States is only 2 or 3 per cent away from this standard, while Australia accepts deviations of plus or minus 10 per cent. By contrast, the Canadian standard is plus or minus 25 per cent. It is true that Canada has other criteria governing the distribution of electoral boundaries. Provinces are guaranteed a certain number of seats, and no province can have fewer representatives in the House of Commons than in the Senate. Thus Prince Edward Island has four Commons seats, while some ridings in central Canada have a population equal to the entire Island population of 125,000.

On the other hand, greater equality prevails in Canada than in Great Britain, in part because of continued strict adherence to traditional county boundaries in setting electoral districts. In addition, Scotland, Ireland and Wales are allowed more MPs per population than England has.

Arbitrary Rule, Enforced Unevenly

The ± 25 per cent rule appears to have been set arbitrarily and is not uniformly enforced. The original proposal in 1966 was that the rule should be ± 20 per cent, but many members were concerned about what this would do to their electoral chances. Since the turn of the century Canada had been evolving toward greater equivalency in the size of districts, but now the population of many constituencies falls outside the 25 per cent rule. In Ontario there are six federal constituencies with populations below what they would be if the -25 per cent level were adhered to, while Quebec has five such ridings. The distribution record varies between provinces, however, with Saskatchewan constituencies relatively equal (the range is +15 per cent to -7 per cent). By contrast, the ranges in Quebec and Ontario are -41 to +38 per cent and -37 to +57 per cent respectively.

British Columbia has a history of inquiries into the issues surrounding electoral boundaries, the first commission having been conducted in 1966 by Henry Angus. Angus recommended abolishing multiple-member ridings and reducing the imbalance between urban and rural ridings by

amalgamating some rural ridings. Both suggestions were turned down by Premier W.A.C. Bennett.

The New Democratic government appointed the Norris Commission in 1975, which recommended boundary changes, an increase in the number of members of the legislature, the retention of dual-member ridings, and the adoption of a ± 40 per cent deviation standard in the population of ridings. The recommendations had not been adopted, however, before Premier Dave Barrett called the 1975 election, in which his government was defeated.

In 1978 Judge Eckardt presided over yet another electoral boundary commission. This commission too favoured elimination of dual-member ridings, but an opinion survey showed the public to be satisfied with the system and the ridings remained as they were. At the same time, the criteria for setting boundaries by population (if any) produced singularly unequal results; the population of the riding of Atlin was 88 per cent below the equal population quota, while that of Richmond was 85 per cent above.

Derril T. Warren constituted a one-man commission in 1982, recommending that an additional member be added to seven of the single-member districts and that a permanent electoral boundaries commission be established. The first recommendation was not implemented, but the second was adopted in 1984.

Finally, the Fisher Commission, reporting in 1988, recommended that equality of population in each electoral district be based on a rule of ± 25 per cent of the average population. These recommendations were accepted by the Legislature. However, the legislation that will cover future redistributions in the province allows for a deviation beyond 25 per cent under "special circumstances".

Remaining Issues

At least three issues arise from this experience, Blake suggests. First, how equal must districts be to achieve the *Charter* goal of equal voting power? The B.C. court decision in *Dickson* suggests that Canada should not go the way of the United States:

> Democracy in Canada is rooted in a different history. Its origins lie not in the debates of the founding fathers but in the less absolute recesses of the British tradition. Our forefathers did not rebel against the English of tradition of democratic government as did the Americans. On the contrary they embraced and changed it to meet their own perceptions and needs . . .

The judge goes on to argue that pragmatism rather than conformity to a philosophical ideal has been the watchword of the evolution of Canadian democracy.

A second issue is whether it is necessary to have to demonstrate the same devotion to technical and philosophical problems. What is the justification for deviating from absolute equality among electoral districts? The ± 25 per cent rule is clearly not sacrosanct, as it has been exceeded by considerable margins. If there is to be a limit, should it be adhered to strictly?

Finally, less central to the discussion but just as important, how should redistribution be accomplished? What should the process be? Who should do the redistribution and what role should elected officials play? Should judges be used, as is often done now, or should we find alternative methods, such as committees of the legislature? Or would the use of legislative committees add an element of self-interest or bias to the process? If legislators are not involved in the initial process, should they be allowed to amend the decisions or recommendations of a boundaries commission?

As the representative of a riding in the interior of the province, **James Rabbitt** argues that electoral reform must be fair to all British Columbians, including those in the interior and the north. Rabbitt chaired the special legislative committee appointed to respond to the Fisher Commission's recommendations. He explained that the current round of electoral reform in British Columbia had come about as a result of a "slip of the lip" on the part of Bill Vander Zalm during his 1986 bid for the leadership of the Social Credit Party. Vander Zalm had revealed to a reporter that he would do away with dual-member ridings if elected.

As a result, when Judge Thomas Fisher was appointed to look into electoral reform, his mandate covered all dual and contiguous ridings. After preliminary investigation, Judge Fisher determined that all ridings should be included in the examination; his mandate was therefore expanded to include all 57 ridings in the province, 17 of which are dual-member ridings.

Parallel Mandates

In parallel with the Fisher inquiry, the legislature set up a special committee to make recommendations on Fisher's preliminary findings. This created something of a problem; communication with the Judge had to be indirect, making it awkward and

difficult. In addition, the committee's mandate was to deliver recommendations that had the unanimous consent of the parties represented on it. Unanimity could not be achieved on the major questions, however. As a result, only a few observations could be advanced, the recommendations had little effect, and nothing significant was achieved through the legislative process.

Two days after the special committee tabled its recommendations, Judge Fisher filed his report, recommending that the number of seats in the legislature be set at 75, that dual-member ridings be abolished, and that the permitted variation in the population of electoral districts be ± 25 per cent of the provincial average of 38,523.

Rabbitt supported the recommendations, believing that they will work in the short run, although the problem will no doubt have to be revisited in ten years' time. Some members of caucus believed, however, that the elimination of two-member ridings would spell the end of the Social Credit Party in British Columbia. (This had also been W.A.C.Bennett's reason for opposing earlier recommendations to end the practice.) Premier Vander Zalm disagreed, however, and the process went forward.

What remained was the technical job of dividing the province into electoral districts based on Fisher's recommendations. Rabbitt questioned whether the process was adequate to address the concerns of rural ridings. When only demographic considerations are taken into account in boundary decisions, urban ridings may be well served but rural areas may not be. The principle of service to the constituency is as important as one person, one vote. Serving a riding like his, which has 35,000 people spread out over 12,000 square miles, presents considerable difficulties when compared with an urban Vancouver riding that can be crossed by bicycle in 20 minutes. In addition, urban MLAs tend to handle problems for constituents that involve fewer government ministries, whereas the range of problems dealt with by rural members is much greater, often covering all 21 ministries.

Rabbitt sees this process as part of a more general trend whereby the interests of the 65 per cent of the population that is clustered on the lower mainland and southern Vancouver Island are determining the outcome of decisions that may or may not be in the best interests of residents of the northern and interior regions of the province. He challenged the academic community, whose members often advise the commissions that recommend electoral boundaries and redistribution, to put their minds to the issue of how to accommodate not just equality in representation but also equality of service. When demographic considerations dominate the decision, urban areas will always benefit while rural ridings will not be as well served. The definition of equality must go beyond numerical equality to include a qualitative component as well.

Question Period

Participants suggested that the solution to the equality question may lie in another electoral system or in a political institution that provides for the regional representation not otherwise available under the current system based on one person, one vote and first-past-the-post elections. For example, a second chamber with the clout of Australia's senate or the triple-E Senate proposed for Canada would go some way to address concerns about under-representation of the Atlantic region and western Canada.

At the same time, commented another participant, political culture plays a significant role in perceptions of equality and fairness, and this may well change as a result of the *Charter*. Blake agreed, noting that the Australian's definition of 'fair' is 'equal', whereas the Canadian's interpretation is more likely to be that everyone has a chance to express a point of view. Blake suggested that there is likely considerable public sympathy for Rabbitt's point of view, a suggestion that was supported by several participants from other provinces, where declining populations in rural ridings have made the problem of unequal representation as serious as it is in British Columbia, if not more so.

Several questions concerned alternatives to the current ± 25per cent rule. Australians seem to be satisfied with variations as small as two to five per cent, which must mean that some constituencies are very large indeed. What would be acceptable to Canadians? Perhaps the ± 25 per cent should really be considered a range offering sufficient flexibility to account for all possible variations among the various urban and rural ridings. Rabbitt emphasized again that the process of reaching an acceptable figure must take into account the interests of rural ridings and the quality of the representation they receive.

Yet there may well be further court challenges under the *Charter* that ask why fairness and equality are not being achieved in the electoral process. To deal with such challenges, the ± 25 per cent

standard must be justified. Rabbitt emphasized that while ± 25 per cent is acceptable now, any lowering of the percentage in the future would simply exacerbate the problems of legislators attempting to serve rural ridings. Blake suggested that pragmatism would rule on the issue. In a *Charter* case, the issue of whether running for election in and subsequently serving a rural riding is manageable under the current boundaries would weigh heavily in the court's decision.

The suggestion was also made that other mechanisms, such as interest groups, exist to serve people in the political system. Perhaps the role of MLA is being interpreted too narrowly as the only ombudsman for people living within a particular riding. Rabbitt disagreed with this interpretation, while Blake suggested that a solution to equalize the load for MLAs serving rural ridings may be to give MLAs greater administrative support to deal with constituent' problems.

Finally, a participant suggested that other factors, such as racial, social and linguistic considerations, should enter into redistribution decisions if better representation of such groups is an objective of reform. Precedents exist in the form of seats reserved for Maoris in New Zealand and hispanic districts set up in Los Angeles for the California electoral system.

— rapporteur, Graham Gomme