

**Observations
to the Twenty-ninth Report of the Standing Senate Committee on Legal and
Constitutional Affairs (Bill C-76)**

The Committee’s Study of Bill C-76, An Act to amend the Canada Elections Act and other Acts and to make certain consequential amendments (Elections Modernization Act)

The Senate of Canada and its Standing Committee on Legal and Constitutional Affairs (the committee) have a long history of closely examining the impact of proposed legislation on the constitutional rights guaranteed by the *Canadian Charter of Rights and Freedoms*.¹ Section 3 of the Charter guarantees the democratic rights of Canadians:

Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein.

The committee has undertaken many studies and made recommendations over the years with a view to protecting this right and the integrity of Canada’s electoral system.

The committee has studied Bill C-76, An Act to amend the Canada Elections Act and other Acts and to make certain consequential amendments (Elections Modernization Act). The bill was first introduced in the House of Commons by the Honourable Karina Gould, the Minister of Democratic Institutions, on 30 April 2018 and passed at third reading on 30 October 2018. It was introduced in the Senate on 31 October 2018 and referred to this committee on 7 November 2018. The committee held three meetings, received 4 written submissions, and heard from 14 witnesses, including the Minister, the Chief Electoral Officer of Elections Canada (CEO), Stéphane Perrault, the Commissioner of Canada Elections, Yves Côté (CCE), and Scott Jones, Head of the Canadian Centre for Cyber Security at Communications Security Establishment (CSE).

On 6 November 2018, the CEO informed the Senate in Committee of the Whole that “time is of the essence” in order for Elections Canada to prepare for the next general election, given the work required in updating manuals, technological systems, and other tasks to implement the bill.² Furthermore, he mentioned that, despite some weaknesses, Bill C-76 remains an essential piece of legislation that improves the *Canada Elections Act* (CEA)³ significantly. The CCE concurred, stating that while not perfect, the bill contains several measures that he recommended in the past to improve the enforcement of the CEA.⁴ He also stressed the importance for the bill to come into force “as soon as possible” in order for his office to prepare accordingly.⁵ Many of the amendments made in Bill C-76 reflect the recommendations made by the CEO and CCE in a 2016 report reviewing the 42nd General Election.⁶

For these reasons, the committee has worked diligently to complete its study in the time available and some members of the committee did not find that this was sufficient for a full study. Also, the committee underscores that the testimony it received indicates that there are still important and

¹ [The Canadian Charter of Rights and Freedoms](#), Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c.11.

² Senate, [Debates](#), Volume 150, Issue 244, 1st Session, 42nd Parliament, 6 November 2018.

³ [Canada Elections Act](#), S.C. 2000, c. 9.

⁴ Ibid.

⁵ Ibid.

⁶ Office of the Chief Electoral Officer of Canada, [An Electoral Framework for the 21st Century: Recommendations from the Chief Electoral Officer of Canada Following the 42nd General Election](#), September 2016.

pending issues to be addressed to ensure the fairness, transparency, security and integrity of Canada's electoral regime.

Controlling Foreign Influence in Canadian Elections

The committee remains concerned that the CEA does not sufficiently protect Canadian elections from foreign interference.

In June 2017, the committee tabled a report in the Senate entitled *Controlling Foreign Influence in Canadian Elections*, after examining the reports of the CEO on the 42nd General Election of October 19, 2015 and associated matters.⁷ One of the committee's conclusions was that in order to address concerns about foreign interference and better ensure transparency and electoral fairness, the existing regime that regulates third-party advertising requires modernization. The committee also concluded that:

[d]espite the challenges in countering foreign interference, Canada's electoral laws must include strong prohibitions and sufficient penal consequences to deter and denounce any violations. Amendments could be considered that would allow for the seizure and forfeiture of assets of foreign entities that attempt to interfere in our elections.⁸

The committee recommended that the Government of Canada review and revise the *Canada Elections Act* in order to:

- ensure that foreign funding does not play a direct or indirect role in Canadian elections;
- prohibit interference by foreign entities in Canada's elections by increasing criminal penalties, including by replacing section 331 with a provision that more clearly states that any attempt made by foreign entities to induce Canadian electors to vote in a particular way is prohibited;
- modernize the regulation of third parties' involvement in elections to address present-day realities, particularly concerning election advertising made through Internet-based communications and social media;
- remove the six month limitation on the requirement to report contributions made to third parties for the purposes of election advertising in order that all relevant contributions for this purpose are reported; and
- require that Elections Canada perform random audits of third parties' election advertising expenses and any contributions they have received that may be used during an election period.⁹

Bill C-76 addresses some of the issues highlighted by our report, although not entirely in the ways that were recommended. The bill regulates foreign funding in two ways: firstly, by preventing Canadians from using funds from a foreign entity to pay for partisan activities, partisan advertising and election surveys, and secondly by prohibiting foreign third parties from directly funding partisan activities, partisan advertising and election surveys. The bill also prohibits undue influence of Canadian electors by foreigners.

⁷ Senate, Motion, [Journals](#), Issue 68, 1st Session, 42nd Parliament, 1 November 2016, p. 912; Senate, Motion, [Journals](#), Issue 101, 1st Session, 42nd Parliament, 2 March 2017, p. 1320.

⁸ Senate, Standing Committee on Legal and Constitutional Affairs, [Controlling Foreign Influence in Canadian Elections](#), Seventeenth Report, 1st Session, 42nd Parliament, June 2017, p. 3.

⁹ Senate, Standing Committee on Legal and Constitutional Affairs, [Controlling Foreign Influence in Canadian Elections](#), Seventeenth Report, 1st Session, 42nd Parliament, June 2017, p. 1.

Regarding election advertising made through Internet-based communications, the bill prohibits any person or entity from selling advertising space to a foreign entity to broadcast an election advertising message. The bill also requires the owner or operator of an online platform who sells advertising space to publish a register of published partisan and election advertising messages on the platform itself.

The bill replaces the current requirement for a third party to provide an election advertising report with the requirement to produce an interim third-party expenses return, which is subjected to new reporting requirements. No provision of Bill C-76 explicitly permits Elections Canada to randomly audit third parties' election advertising expenses.

The committee is concerned about the measures included in the prohibitions against foreign entities from unduly influencing Canadian elections in new section 282.4(3)(c). These measures allow, among other things, a foreign entity to express its opinion on a desired outcome of the election through various forms of public transmission. This could allow a foreign government or other entity to encourage electors to vote for or against a party or candidate by broadcasting or publishing its message in a newspaper or other media in Canada. The CEO has provided comments on this matter to the committee that;

It is my understanding that this paragraph is not an exception to the offence *per se*, but is a further explanation of the scope of the offence against foreign interference found in s. 282.4. A similar structure delineating the scope of regulation is found in the current and proposed definitions of "election advertising" and the proposed definition of "partisan advertising". Presumably, these provisions reflect a considered balance between the constitutional guarantee of freedom of expression, including freedom of the press, and the objectives of restricting foreign interference and unregulated advertising. However, it is up to Parliament to draw the appropriate line in this area.¹⁰

The committee reiterates its conclusion from its 2017 report that the CEA does not sufficiently protect Canadian elections and underscores that more will need to be done by the Government of Canada and Parliament to address this concern above and beyond what is provided for in Bill C-76. The committee agrees with Minister Gould that it would be almost impossible to prevent all forms of foreign interference during elections and that Bill C-76 "is just one of the tools that we have with regard to how to deal with foreign interference."¹¹ Scott Jones explained to the committee the ways in which CSE is working with Elections Canada in the areas of cybersecurity, intelligence regarding cyberthreats, and systems support.¹² All this being said, the committee emphasizes that more can and must be done to deter foreign entities from interfering in Canadian elections and to hold them accountable if they do.

Gender Parity

The committee also recognizes other areas of reform that need to be addressed with regard to Canada's electoral regime. We are encouraged by the Minister's openness to consider ways in which the CEA could better address gender inequality among candidates put forward by parties in Canada's federal elections. The Minister stated that she was open to the idea of a parliamentary study focusing on this question.¹³ The CEO noted during his appearance before the Committee of

¹⁰ Chief Electoral Officer, *Letter to the committee*, 4 December 2018.

¹¹ Senate, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 1st Session, 42nd Parliament, 21 November, 2018.

¹² Senate, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 1st Session, 42nd Parliament, 28 November 2018 (Scott Jones).

¹³ *Ibid.*

the Whole that he could administer a regime containing “incentives” for women to participate as candidates in elections.¹⁴

The committee looks forward to seeing this study proceed and to the Senate’s own deliberations on this issue.

Privacy and Personal Information

On the subject of privacy, the Minister explained how Bill C-76 requires political parties to publish their own policy on what they do with personal information. While this is a first step, she stated that she would like to see a parliamentary study examining how political parties could be covered under one privacy protection regime.¹⁵ The CEO clarified that the bill permits oversight over whether or not a political party has a privacy policy, but not on the application of this privacy policy, and added that this type of oversight should exist.¹⁶

The committee also looks forward to seeing this study proceed and to the Senate’s own deliberations on this issue.

Electors Resident Outside Canada

The committee raised questions with witnesses about clause 152 of the bill, which amends section 222(1) of the CEA to remove the two limitations on voting for electors who reside outside Canada. The first is that they must have been residing outside Canada for less than five years and the second is that they must intend to resume residence in Canada in the future. Concerns were raised that a foreign government might try to interfere with Canadian elections by exerting its influence on Canadians in its territory, or that some Canadians abroad may try to register in a riding that is not the one where they last resided.

The committee believes that the CEO should use his expanded educational mandate included in the bill to properly inform Canadians residing abroad about their rights and the voting rules that affect them.¹⁷ Elections Canada should include key information on the application forms used for them to register to vote outside Canada.¹⁸ This information should clearly set out that significant penalties under the CEA could be applicable in the event of a false declaration.

The committee notes that the constitutionality of the five-year limit on voting for Canadians living abroad included in the current CEA has been challenged in court by two Canadians living in the United States. The Supreme Court of Canada has granted the applicants leave to appeal the Ontario Court of Appeal’s finding that while the limitation violates section 3 of the Charter, it is justified under section 1 as a reasonable limitation in a free and democratic society.¹⁹ The Supreme Court of Canada heard the case earlier this year, but has not yet released its decision.²⁰

¹⁴ Senate, [Debates](#), Volume 150, Issue 244, 1st Session, 42nd Parliament, 6 November 2018.

¹⁵ Senate, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 1st Session, 42nd Parliament, 21 November 2018.

¹⁶ Senate, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 1st Session, 42nd Parliament, 28 November 2018.

¹⁷ Bill C-76, An Act to amend the Canada Elections Act and other Acts and to make certain consequential amendments (Elections Modernization Act), clause 14.

¹⁸ Elections Canada, [Application for Registration and Special Ballot \(For Canadian electors residing outside Canada\)](#) (EC 78500-X).

¹⁹ [Frank v. Canada \(Attorney General\)](#), 2015 ONCA 536.

²⁰ Supreme Court of Canada, *Gillian Frank, et al. v. Attorney General of Canada*, [Docket 36645](#).

Online Platforms

The committee heard from three social media platforms during its hearings: Google, Twitter, and Facebook.

Twitter and Google informed the committee of their efforts to increase the transparency on their websites for advertisers who run political campaigning advertisements during elections. They raised concerns that the type of information being requested in the bill, such as new information concerning the terms “financial agent”, “registered agent,” and “official agent”, is very different from what they are already doing in the United States and what they are doing voluntarily. They consider that the way they currently publish information regarding an entity that has paid for an advertisement is more efficient to manage and is easier to search. They recommend a cooperative approach and prefer the method being implemented by the U.S. Federal Election Commission of providing an identification number to advertisers, who are then listed on a public database.

Twitter and Google are also concerned about the amendments in Bill C-76 that would create offences for online platforms, including Internet sites and applications, if they were to violate certain provisions regulating how they display elections advertising messages on their websites.²¹ Among their concerns, they note the difficulties in proactively monitoring advertising to detect partisan or elections-related messages in order to comply with their registration obligations. Both recommended that these offences be amended to make it clearer that online platforms should only face criminal penalties when they are knowingly in violation of the advertising rules that require that they identify partisan and elections advertising. Twitter also asked that a provision be added so that online platforms can use information provided by advertisers in good faith and not be penalized.

Facebook submitted its support for Bill C-76 in writing, adding that it will comply with obligations in the bill to “restrict entities from knowingly selling advertising space to foreign parties” and to “maintain a registry of partisan and election ads during the pre-campaign and campaign periods.”²²

The committee notes that several provisions affecting online platforms were added to the bill by the House of Commons Standing Committee on Procedure and House Affairs after Twitter and Facebook had testified before it.²³ They did not therefore have the opportunity to comment on these amendments sooner.

The committee notes that Bill C-76 should legislate a regime that reflects the realities of advertising practices on online platforms, while providing sufficient transparency to protect the integrity of Canadian elections. The Government of Canada should therefore continue to work with online platforms to ensure the most effective methods of regulating partisan and elections advertising.

Conclusion

The committee recognizes the importance of Bill C-76 receiving Royal Assent in time for Elections Canada and the Office of the Commissioner for Canada Elections to prepare for the next general election expected to be held on 21 October 2019.²⁴ The committee will continue to monitor and study

²¹ See new sections 495 and 496, as modified by clauses 333 to 337 of Bill C-76.

²² Senate, Standing Committee on Legal and Constitutional Affairs, *Briefs*, 29 November 2018 (Facebook).

²³ These included amendments to clauses 206 and 333 and new clause 208.1.

²⁴ Senate, *Debates*, Volume 150, Issue 244, 1st Session, 42nd Parliament, 6 November 2018.

the issues raised in this report and in its 2017 report to determine how they have been handled by the CEO and the CCE and will assess the overall impact of Bill C-76. Parliament should also take additional steps to address foreign interference in Canada's elections. As threats to Canadian cybersecurity are not limited to elections nor to Canada,²⁵ Parliament should continue to study these threats and the Senate should again hear from the Communications Security Establishment with regards to its efforts to address them.

²⁵ Senate, Standing Committee on Legal and Constitutional Affairs, *Evidence*, 1st Session, 42nd Parliament, 29 November 2018 (Rafael Jacob).