

Greg Vezina Submission to Standing Committee on Canadian Heritage, May 25, 2021
Re: Bill C-19 An Act to amend the Canada Elections Act (COVID-19 response)

Recent changes in legislation and court decisions have rendered conflicting campaign contribution and expense and election broadcasting contents of the Broadcasting Act and Canada Elections Act to the point they are clearly both unconstitutional, a position confirmed by the:

Chief Electoral Officer of Canada in his November 30, 2017 appearance before the *House of Commons Standing Committee on Procedure and House Affairs*;

The March 2018 [Creation of an Independent Commissioner Responsible for Leaders' Debates majority Report](#) of the *Standing Committee on Procedure and House Affairs* warning that government involvement in leaders' debates without accommodating smaller party Charter rights would be unconstitutional;

The Federal Court in an October 7, 2019 injunction application *Lawton v. Canada* (Leaders' Debates Commission), regarding two news service representatives previously excluded from attending the Leaders' Debates and the media scrums after to ask questions;

And the Ontario Superior Court of Justice October 11, 2019 decision in *Vezina v. City of Mississauga*, which found it was unconstitutional to exclude candidates from election campaign debates held on public property.

Longstanding conflicts in the Broadcasting and Elections Acts regarding political debates broadcast and/or located upon public property remained, notwithstanding the CRTC simply ignoring the recognition almost 30 years ago by the Ontario Court of Appeal in *Regina ex rel. Vezina v Canadian Broadcasting Corp. et al* October 5, 1993, that S.8 of the CRTC television regulation was not applicable to debates concluding, "In any event there is nothing to preclude a rethinking by the C.R.T.C. of the wording of s. 8 to more clearly effect the policy considerations with which it is charged and concerned."

After corporate, union and third party donations were prohibited in 2004, the 2008 Elections Canada's official policy was that debate expenses did not have to be considered as a contribution of a good or service and campaign expense, as does all advertising that promotes or opposes a party, leader or candidate, so long as "all candidates" were invited. In 2015 they changed the official policy to as long as "two or more candidates" were invited.

This policy was used in the 2019 Federal election by third parties to spend many thousands of dollars promoting special interests causes by holding thousands of local and regional candidate debates that excluded the vast majority of candidates from all but the major parties. Chambers of commerce and environmental organizations got further cover from Third Party Spending rules and limits in many cases by involving national and local broadcasters, as well as community stations in many of the hundreds of debates they organized during the campaign.

Chief Electoral Officer Stéphane Perrault and Elections Canada replied to complaints and the threat of a legal proceeding about this change being interpreted as allowing the exclusion of

candidates saying to multiple complaints from independent and new and smaller party candidates during the 2018 Federal election with the following statement, "*As previously stated, debates between candidates or political party leaders are not regulated by the Canada Elections Act (either at the national or electoral district level)*".

According to a December 1, 2017 CBC story "News Elections Canada wants no part in organizing leaders debates during campaigns" Perrault had the exact opposite opinion when he appeared before the Parliamentary committee reviewing the Leaders' Debates Commission law when he said:

"Debates are an important element of the campaign and often contribute to defining the ballot-box issues ... The chief electoral officer should not be involved in matters that could be perceived as having an influence on the orientation of the campaign or the results of the election."

Some small parties have in the past gone to court to challenge their exclusion from the debates. But those cases failed because the debates were considered "essentially private events" that were not subject to scrutiny under the charter, he said.

"This would likely no longer be the case if the state, or an entity created by the state, were to play a role in organizing the debates."

The [Creation of an Independent Commissioner Responsible for Leaders' Debates majority Report](#) of the *Standing Committee on Procedure and House Affairs* warning that government involvement in leaders' debates without accommodating smaller party Charter rights would be unconstitutional was also ignored by the government.

In an October 7, 2019 injunction application *Lawton v. Canada* (Leaders' Debates Commission), [2019 FC 1424](#), regarding the Federal Leaders' Debates the Federal Court of Canada sided with Chief Electoral Officer Perrault's earlier position on public involvement in debates attracting Charter scrutiny, when it issued an injunction allowing two news services representatives previously excluded, to not only attend the Leaders' Debates, but to be able to attend the media scrum after to ask questions. The government of Canada subsequently abandoned an appeal of the decision. The Court had ordered:

"The Leaders' Debates Commission / Commission des Debats des Chefs is to grant David Menzies and Keenan [*sic*] Bexte of Rebel News the media accreditation required to permit them to attend and cover the Federal Leaders' Debates taking place on Monday, October 7, 2019 in the English language and Thursday, October 10, 2019 in the French language."

Section 88.18 of the [Ontario Municipal Act](#) requires municipalities to establish rules and procedures for the use of municipal resources during the election period. Sections 88.8(4) and 88.12(4) of the Act also provides that municipalities cannot make a contribution (including money, goods and services) to any candidate, registered third party advertiser or political party during an election.

The *Election Finances Act* and the *Canada Elections Act* impose similar contribution restrictions on municipalities for provincial and federal election campaigns, respectively; however, the change in Elections Canada policy exempting debates that include two or more candidates from being considered an expense or contribution has been used as a loop hole to exclude all but major party candidates from broadcast and public debates, including those on public property.

Many municipal governments directly engage in partisan activities to promote the major parties and their candidates in political events for ridings located within their boundaries, in some cases where relatives of elected mayors or councillors ran campaigns of or assisted candidates in these ridings, while totally excluding all other candidates from not only the debates and also from all other coverage and related content in the municipal government websites during and after federal and provincial elections. These practices are clearly illegal during municipal elections.

Such was the case in Mississauga Ontario where the City held an “All candidates debate” in city council chambers in the 2018 Ontario election and tried to again in the 2019 Federal election. The City was warned not to try to do this again in the October 11, 2019 decision of the Ontario Court of Justice in *Vezina v. City of Mississauga*, 2019 ONSC 5925, in which Justice James Stribopoulos found:

[14] Turning to the first question, is there a serious issue to be tried? Although trite, it deserves mention that the City of Mississauga forms part of the government and its actions are subject to the *Charter*: see *Godbout v. Longueuil (City)*, [1997 CanLII 335 \(SCC\)](#), [1997] 3 S.C.R. 844.

The idea that the government would take responsibility for organizing political debates and, in the process, invite certain candidates for public office to participate while excluding others, raises serious constitutional concerns. As the Supreme Court of Canada has noted, participation in political debate “is ... the primary means by which the average citizen participates in the open debate that animates the determination of social policy”: *Figueroa v. Canada (Attorney General)*, [2003 SCC 37](#), [2003] 1 S.C.R. 912, at para. [14](#).

[15] The organization of political debates by the government in the lead up to an election, with government actors choosing which candidates will be permitted to participate and which candidates will be excluded, represents a significant intrusion on the expressive and political rights guaranteed to all citizens under the *Charter*. As Dickson C.J. stated in *R. v. Keegstra*, [1990 CanLII 24 \(SCC\)](#), [1990] 3 S.C.R. 697, at p. 765: “[t]he state ... cannot act to hinder or condemn a political view without to some extent harming the openness of Canadian democracy and its associated tenet of equality for all.”

[16] It would seem to run afoul of fundamental *Charter* guarantees for the city to organize candidates’ debates in the lead up to an election and decide to invite certain candidates to participate while also excluding others. If such a debate were scheduled, I would not hesitate in granting Mr. Vezina the injunctive relief he is seeking. However, at this point, the possibility that such a debate will be organized remains, at very best, highly speculative. Speculation about a potential *Charter* violation taking place in future is not something that furnishes a basis for the court to issue an injunction: see *Operation Dismantle Inc v Canada*, [1985 CanLII 74 \(SCC\)](#), [1985] 1 S.C.R. 441.

This is the case in USA where partisan political activities by federal employees and the use of public funds and property are prohibited under the *Hatch Act*, 5 U.S.C. 7323(a) and 7324(a) and US Federal Election Campaign laws compiled by the US *Federal Election Commission*.

Effective in 2019 Ontario Colleges and Universities must comply with the new “Free Speech Law” which many violated by holding candidate debates that excluded many candidates, including in Mississauga, Ontario during the 2019 federal election where the Mississauga Board of Trade sponsored an “All candidates debate” for the 6 Mississauga area ridings that only had candidates from the Liberal, Conservative, NDP and Green parties. Many universities demanded all candidates be included or the debate be cancelled, but not a single one that violated the policy has yet to face the penalty of having their funding reduced or cancelled as required in the law.

So there are really two policies at issue regarding political news and debate broadcasting during elections, and to the same degree in between elections, which in some cases overlap: campaign debates that are broadcast; and campaign debates held on public property, which in both instances recent case law has drastically changed.

Clearly broadcast debates are under the preview of the CRTC which is mandated by the Broadcast Act to issue regulations to implement the underlying policy in S.3 Broadcasting Policy of Canada, and under the Canada Elections Act including an obligation to issue election broadcasting guidance and policy directives for all federal elections. Similar requirements exist under provincial and territorial laws respecting provincial and municipal elections.

However the CRTC has chosen not to remedy the problems regarding campaign debates since the October 5, 1993 Ontario Court of Appeal decision in *Regina ex rel. Vezina v Canadian Broadcasting Corp. et al* [Indexed as: *R. v Canadian Broadcasting Corp.*] Court File Nos. C12311; C12313; C12314, Ontario Court of Appeal, Dubin C.J.O., McKinlay and Carthy JJ.A., October 5, 1993, finding S.8 of their regulation was not applicable to debates by ignoring the Court’s finding, “In any event there is nothing to preclude a rethinking by the C.R.T.C. of the wording of s. 8 to more clearly effect the policy considerations with which it is charged and concerned.” (Underline added).

Indeed just two years earlier the *Lortie Royal Commission on Electoral Reform and Party Finance* extensive study of campaign finance and political broadcasting found serious problems in election broadcasting that the CRTC had theretofore ignored. Lortie also made specific recommendations regarding the CBC and 24-hour news. Lortie wrote in *Vol. 21, Election Broadcasting in Canada, Recommendations*, pages 172-173, Inclusion of Minor Parties in Campaign Coverage:

According to the CBC's promises of performance, a 24-hour news channel should air alternative points of view, should "provide airtime for more programs of opinion" (CBC 1988, 17) and should relax conventions of balance within news and current-affairs programs -conventions which have often served to exclude minority interests from the regular networks' public-affairs schedules (CRTC 1987b, 3066). In our view, current operating procedures are often at odds with these original statements of intent. The CBC's pledge to "rigorously enforce" its

standard procedures for fairness and balance in political programming, coupled with its insistence that Newsworld adhere to current CBC policies concerning the "equitable" coverage of minor parties, suggests to us that the news channel has little to offer in the way of an alternative public access strategy. Such a strategy was certainly not in evidence during the Ontario and Manitoba campaigns. We would advise the CBC to re-examine its current policies in this regard. To remain wedded to traditional public access formats (which were essentially developed for 22-minute news and current-affairs programs) would, in our view, represent a very regrettable lost opportunity in Canadian political broadcasting. As a second recommendation, then, we suggest that the all-news service use its extra election broadcast time to provide a forum for Canada's minor parties and social movements, both in its news and in its current-affairs schedules.

Similarly the 1986 *Caplan & Sauvageau, Report of the Task Force on Broadcasting Policy* recommendations on reducing media concentration, expanding political and public affairs programming and for the CRTC to strengthen its policy on the separation of news room were also ignored.

Unfortunately almost 30 years later in spite of decades of controversy, legal proceedings, the CBC Ombudsman finding multiple violations of their journalistic policies, and hundreds of complaints to the CRTC, no action has been taken to remedy the situation.

After corporate, union and third party donations were prohibited in 2004, the 2008 Elections Canada's official policy was that debate expenses did not have to be considered as a contribution of a good or service and campaign expense, as does all advertising that promotes or opposes a party, leader or candidate, so long as "all candidates" were invited.

The original Elections Canada policy directive regarding *Issues Related to Political Financing* titled Responding to Changing Needs – Recommendations from the Chief Electoral Officer of Canada Following the 40th General Election (2008) stated:

“In light of the importance of such debates to our democratic system, the Chief Electoral Officer’s interpretation of the political financing rules has long been that expenses incurred to organize a forum for debate that allows the public to hear and question candidates do not constitute a contribution to any candidate, provided that the following conditions are met:

- The forum must be open to the public, and the invitation must be extended to all of the candidates. (Where this is not the case, there must be a reasonable basis for the exclusion.)
- The forum must be conducted in a politically impartial fashion.

While the Chief Electoral Officer believes that this interpretation is consistent with the intent of Parliament, this matter continues to generate complaints that are difficult to address during an election period.”

In 2015 in Elections Canada *Interpretation Note: 2015-03 Candidate and leader debates Issue* they changed the official policy from "all candidates" to as long as "two or more candidates" were invited. According to Elections Canada this totally opposite interpretation was now

consistent with the intent of Parliament. In spite of multiple complaints of it being used to exclude candidates from several hundred if not a thousand or more campaign debates during the 2019 election they refused to clarify their justification for it. The previous policy clearly intended to cover all campaign expenses and contributions and this exemption wasn't included in the law.

The Chief Electoral Officer and Elections Canada replied to complaints and the threat of a legal proceeding about this change being interpreted as allowing the exclusion of candidates saying to multiple complaints during the current election with "As previously stated, debates between candidates or political party leaders are not regulated by the Canada Elections Act (either at the national or electoral district level)". (Underline added).

The CBC Ombudsman Jack Nagler has confirmed complaints against the CBC on many occasions for violations of their journalistic policy regarding election coverage and the total exclusion of newer and smaller parties from on air and online news, most recently involving daily coverage of the party leaders during the 2019 Federal election when in Jan 30, 2020 ruling called Party Talk he summarized a complaint writing:

“During last Fall’s federal election campaign, CBCNews.ca published a daily article highlighting what the party leaders were up to. Well, not all of the leaders - just six of them. Complainant Greg Vezina said that there were 21 registered political parties last election, so excluding most of them from this coverage was an example of bias. Was it?”

The CBC Ombudsman found the “CBC’s ‘Where the leaders are’ feature was rooted in sound editorial judgment, but violated journalistic standards by failing to make any account for the fact that 15 other political parties were competing for votes.”

The situation at TVO is even worse. During the entire 2014 Ontario election TVO mentioned the new None of the Above party, which nominated eight candidates, on air a single time. That was the only time between then and today in May of 2021, including throughout the entire 2018 Ontario election (when the NOTA party nominated candidates in 42 or 30% of all ridings) TVO mentioned the party or its candidates.

The CRTC has refused to take action on complaints including those involving public broadcasters the CBC and TVO, and similar complaints against private broadcasters and community cable television licencees. The CRTC has demanded complainants provide it with detailed logs verifying virtually everything broadcast twenty four hours a day, seven days a week during the campaign period, which can last as long as 42 days, while only requiring broadcasters to keep logs for 30 days, making it virtually impossible for a complainant to prove their claim.

The CRTC Election Broadcasting Guidelines require parties, leaders and candidates to receive “equitable” coverage, but complaints to the CRTC and Elections Canada have been ignored or dismissed out of hand. No reasonable or credible definition of “equitable” includes a share for some and none for others, but that is what it means under the laws in Canada.

The Ontario Ombudsman has decided that TVO’s editorial policies are not covered by his mandate or the Charter and the matter is up to the CRTC or Elections Canada to deal with.

For the record, there are two precedents in Federal elections in 1993 and 2000 for holding separate debates for leaders of the new and smaller parties. Both were organized by the *Democracy Channel*®, who was unsuccessful in organizing a 2019 Federal election Canadian New and Smaller Party Leaders' Debate proposed to be broadcast into Canada by US public broadcasters WNED and PBS that was to be moderated by MIT professor Dr. Noam Chomsky.

Fortunately the courts have basically taken this decision away from the CRTC, and they will from Parliament too if it doesn't act to remedy the situation during the present review and updating of the Broadcasting Act and potentially the Canada Elections Act.

The absence of mainstream coverage cripples the new and smaller parties and Independent candidate's ability to reach the 2-5% threshold of votes cast to even qualify for campaign subsidies. To achieve this threshold, a smaller or new political party would have to spend many times the total legal campaign limits for parties and candidates on advertizing.

The most influential events during elections are leaders and candidate debates and news coverage which in Canada almost totally exclude all but the major parties. Party leaders, candidates and voters in Iran and Russia have more rights than those in Canada have.

Clarification is needed for "the transmission to the public of an editorial, a debate, a speech, an interview, a column, a letter, a commentary or news" definitions for elections advertising and *partisan advertising expense* exemption for election contributions and expenses for contributions by all media of news and public affairs programs or reporting that does not provide "equitable time" to all rival parties and candidates.

The Broadcasters and news media have argued for decades against hard and fast rules in laws falsely claiming they would comply with the letter and spirit of the elections and broadcasting law to the CRTC, Parliament, Elections Canada and the public. Faced with prosecutions for violations they then claim laws are void for vagueness and lack clarity or incorrectly drafted.

CRTC Public Notice CRTC 1987-334 has been quoted in Election Broadcasting since 1988.

"It is the broadcaster's duty to ensure that the public has adequate knowledge of the issues surrounding an election and the position of the parties and candidates. The broadcaster does not enjoy the position of a benevolent censor who is able to give the public only what it 'should' know. Nor is it the broadcaster's role to decide in advance which candidates are 'worthy' of broadcast time.

From this right on the part of the public to have adequate knowledge to fulfill its obligations as an informed electorate, flows the obligation on the part of the broadcaster to provide equitable — fair and just — treatment of issues, candidates and parties. It should be noted that 'equitable' does not necessarily mean 'equal'."

Complaints to Media associations and industry groups about unprofessional, biased and outright false newspaper reports that exclude the mention of more than three or four of the old line parties are dismissed virtually out of hand without a hearing, concluding for example in one complaint:

“While the complainant is correct to point out that there are far more federal political parties and leaders than covered by media, including the Star, it is generally recognized that comment is limited to the traditionally dominant parties. The column outlined the issues that voters should be aware of and was not meant to outline all party platforms. The complaint is dismissed by the Ontario Press Council.”

The current Canadian [National NewsMedia Council](#) complaints policies include provisions that; they will not deal with any matter where legal or regulatory proceedings are under consideration or underway; the complaint must be raised with the offending media member first; the parties are requested to treat the content, submissions, and correspondence related to the complaint as confidential during the complaints process; the Council may also determine to call a hearing into a complaint on the basis of public education, public interest, or in the case of a significant journalistic issue or matter of complexity; and decisions published on the Council’s website are final and not subject to appeal.

The Ontario Press Council policy regarding political and campaign reporting responsibilities that “comment is limited to the traditionally dominant parties” is the opposite of the CRTC’s unenforced policy a “broadcaster does not enjoy the position of a benevolent censor who is able to give the public only what it ‘should’ know.... or to decide in advance which candidates are ‘worthy’ of broadcast time.”

The lack of enforcement of our broadcasting and election laws by government agencies and election officials, has even allowed US social media corporations to seriously affect our elections in harmful ways, and things will not get better unchecked.

Furthermore, it is very important to note the unfair influence of unscientific and unprofessional polls promoted by parties, candidates, third parties and the media in our elections.

A ThreeHundredEight.com research project “*The polling plight of the little parties*” found, “The average result for a party that was included in polls was 1.7% compared to 0.4% for parties that were not included. On a per-candidate basis, small parties included in the polls averaged 3.4% support, compared to 0.9% for parties that were not included. And this despite the average slate of small parties included in the polls being 54.7%, only slightly higher than the 44.9% of parties not included in the polls. In other words, parties included in polls did 3.8 times better than parties that were not, despite running only 1.2 times the candidates.”

We cannot rely on news or polling industry associations or organizations to police the conduct of their members any better than the CRTC has broadcasters.

According to an August 2019 Digital Democracy Project report “*Research Memo #1: Media, Knowledge and Misinformation*”, a joint initiative by the Public Policy Forum and the Max Bell School of Public Policy at McGill University, Canadians’ media-consumption habits lead to misinformation.

“The one troubling point seems to be that, while social media exposure is associated with higher levels of misinformation, so is exposure to traditional or mainstream media (though to a lesser extent),” writes the report.

“It appears that simply consuming news, regardless of source, makes people susceptible to being misinformed about the issues,” the report says.

Protecting voters’ most fundamental right to cast an informed vote is especially important now that recent reports show that about 50% of voters do not support the major parties and for the majority of voters political integrity is the most important issue.

This was the intent of 2004 electoral law changes in Canada after corporate, union and third party donations were prohibited, and third party spending limits were subsequently enacted.

Our campaign leaders’ and candidates’ debate practices, combined biased polling, follow-the-leader horse-race election coverage news coverage and feckless enforcement of election and broadcasting laws have rendered our elections to the point they do not function democratically.

These practices violate basic democratic principles of free and fair elections under Canadian and International law and most importantly have been found by our highest courts in numerous decisions to violate the Charter of Rights and Freedoms.

In conclusion, we believe that Canada’s democracy has waited long enough for our elected officials to bring our election and broadcasting laws into compliance with the Charter and international laws, covenants and commitments. Our Courts have clearly shown Parliaments for many years that if they will not make such necessary changes the Courts will do it for them.

Recommended changes to the Bill C-10 An Act to amend the Canada Elections Act and Bill C-19 An Act to amend the Canada Elections Act:

Enact a ‘*Fairness Doctrine*’ similar to the legislation that existed in US broadcasting legislation the Federal Communications Commission (FCC) enforced and the US Supreme Court affirmed to guarantee a right of reply to misleading or untruthful reporting to provide a real remedy for offended individuals badly served by in many cases inapplicable or expensive court processes.

Ensure voters get to see and hear the fifteen or more new and smaller parties, and independent candidates during elections, especially where the use of public property is involved.

Require the Leaders’ Debate Commission and Canadian Debate Production Partnership to assist with the production and dissemination of “All Party Leaders’ Debates” in French and English for leaders not included in the main debates, to be held at the same public venue as the main debates.

Re-enact the rule that any debates broadcast and/or occurring on public property that do not offer to accommodate all candidates or leaders will be treated as an illegal contribution of a good and service that promotes or opposes some but not all candidates, and that organizers and participants may face prosecutions, and participating candidates who win election face loss of their seats.

At the start of every federal, provincial, territorial and municipal election the Elections Canada and the CRTC shall advise all candidates, parties and leaders, as well as all broadcast licencees including community cable television organizations, and the news media and social media companies operating in Canada, that under no circumstances can a campaign debate can be broadcast or held on public property unless all accredited candidates or party leaders are accommodated, and further that all news and social media internet websites that contain or aggregate political and/or election content must comply with the equity and fairness provisions.

Advise all media and polling organizations that all political polls must include specific mention of all accredited political parties and nominated candidates, otherwise such polls will be considered as an illegal contribution of a good and service that promotes or opposes candidates.

News media, social media, news aggregators and special interests including unions, industry associations, private foundations, charities and any third party should not be allowed to unfairly support or suppress registered political parties and candidates in their activities during elections.

Since the CRTC and Elections Canada have clearly proven they are incapable of enforcing the existing laws in ways to guarantee our elections are free and fair, and there is no process to compel them to other than costly court proceedings, it is important to have a “savings” provision similar to the one in previously included in the Ontario Elections Act allowing a citizen “at any time” to appear before a Court to swear and information for a prosecution under the Broadcasting Act or Canada Elections Act, without the consent of Commissioner of Canada Elections, The Chief Electoral Officer or Elections Canada.

A similar provision was used in the 1988 to 1983 proceeding *Regina ex rel. Vezina v Canadian Broadcasting Corp. et al* after the crown had dismissed a CRTC prosecution against CBC, CTV and Global Television for Violating S. 8 of the Television Regulations for not providing ‘equitable’ coverage to the leader of the Green party after exclusion from the Leaders’ Debates.

Voters and party candidates and leaders must have a viable mechanism outside of the regulators to have complaints resolved in ways that protect the integrity of elections and prevent abuses from being ignored or unfairly dismissed, and violations being encouraged by regulatory fecklessness including consent agreements in which the public has no say or right to appeal.

Smaller, new party and independent candidates face higher COVID-19 risks in order to obtain nomination signatures compared to the major parties with larger memberships. The number of signatures needed should be reduced from the present level of 100 to 25 (matching Ontario’s), and for party registration or semi-annual renewal lowered from 250 presently to 100 signatures.

Respectfully,

Greg Vezina
1048 Springwater Crescent, Mississauga, ON, L5V 1G4

cc. *House of Commons Standing Committee on Canadian Heritage* - Bill C-10 Broadcasting Act.