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Misinformed

Canada's Incomplete, Inconsistent, Ineffective and Partisan Anti-Disinformation System, and How to Make it Effective

Submission to the House of Commons
Standing Committee on Public Safety and National Security
for its Study on
Russian Interference and Disinformation Campaigns in Canada

(November 2024)

Table of Contents

1. Summary of How Canada's Incomplete, Inconsistent, Ineffective and Partisan Anti-Disinformation System

There are significant loopholes and flaws in several federal Canadian laws (and provincial and territorial laws) that have made it legal to date to secretly, unethically and undemocratically interfere in Canadian politics, especially given that enforcement of many of the laws is ineffective. The loopholes are in the elections, political finance, lobbying, ethics, anti-money laundering and border security laws, including loopholes that allow for anonymous, secret online disinformation and misinformation campaigns.

One area in which there are significant loopholes is that most disinformation activities are completely unregulated, and all existing regulations of disinformation activities are weak and allow for foreign interference in elections and political policy-making processes across Canada. This policy paper examines the history of Canada's incomplete, inconsistent, ineffective partisan federal anti-disinformation system and sets out proposals for key changes to make the system effective that the House of Commons Standing Committee on Access to Information, Privacy and Ethics should strongly recommend in its report to the House, including calling on all federal parties to work together to make the changes as soon as possible, and definitely before the next federal election.

Because most disinformation activities are unregulated, or existing regulations have loopholes, no government agency or official has had any power to track, monitor, investigate, prosecute or penalize disinformation activities, including by foreign governments, entities and individuals, which are also allowed to be done in secret.

While this policy paper addresses only the lack of rules and weak rules concerning unregulated and weakly regulated disinformation activities, it is important to note that almost all the enforcement entities for all the key laws that protect Canada's democracy lack independence, and are ineffective, underfunded, slow to act, secretive and largely unaccountable. Many are also subject to political interference by the ruling party Cabinet which chooses them all through secretive, partisan processes, and most serve at the Cabinet's pleasure.

Disinformation (and misinformation) is false information and, as a result, it poisons the information environment. Democracy Watch's position is that false claims are always an illegitimate exercise of freedom of expression, whether or not they are state-sponsored or amplified. False statements mislead voters, and so they are a clear violation of the fundamental *Charter* section 3 right of all voters to cast an informed

ballot. Protecting the right to cast an informed ballot is more important than protecting the right of people and entities to mislead voters.

Canada at the federal, provincial, territorial and municipal level already has many legal provisions that prohibit false claims, including in election laws. The problems are that the laws are incomplete and inconsistent and so they allow for disinformation and misinformation, and are ineffective because the enforcement agencies lack key enforcement powers and also lack independence from the ruling party Cabinet which makes them vulnerable to political interference and influence and undermines their legitimacy.

However, carefully designed and properly structured laws and enforcement systems to prevent and prohibit disinformation and misinformation can be established, and do not risk limiting access to diverse perspectives that enrich the information environment as they will only prohibit and penalize people and entities who make false claims that poison the information environment. To remove the risk of the government or any political party controlling the definition of what is true or false, the enforcement agencies must be fully independent from the government and all parties, with the heads of the agencies and employees appointed and hired by a fully independent process.

As in so many areas of public policy, an ounce of prevention in the area of foreign interference is worth a pound of cure. If loopholes are left open or flaws left uncorrected that allow for disinformation, those loopholes and flaws will likely be exploited. And if enforcement is tainted by political influence and is ineffective, secretive, underfunded, delayed and unaccountable, they will likely be exploited more.

In other words, changes must be made to effectively prevent disinformation, and if those changes are not made then disinformation campaigns will not only occur, but also will only be caught long after the interference has occurred, and the process that follows will take years more, with often no one being held accountable.

Part 2 of this policy paper summarizes some of the main theoretical frameworks and arguments for preventing disinformation, while Part 3 summarizes the difficulties with combatting disinformation. Part 4 summarizes the history and current state of the rules in the various federal laws and codes prohibiting disinformation during elections. Some of the past and existing federal enforcement systems and penalties are also summarized in Parts 4, including some of the key cases of disinformation in recent history that have not been prevented. Part 5 addresses how each existing rule prohibiting disinformation, and each existing enforcement and penalty system, can be made effective.

2. Reasons to Prevent, Prohibit and Penalize disinformation

In Plato's *Republic*, Socrates argues that philosophers alone are qualified to govern society because of their "spirit of truthfulness" and hatred of falsehood and love and dedication to the truth because "there is nothing more akin to wisdom than truth"[1] and so there will be no end of trouble unless they govern.[2] Only for very specific reasons does Plato allow for falsehoods – namely to thwart enemies and to prevent a friend who is mentally ill or a fool from doing something wrong.[3] These exceptions are specific but at the same time broad, as the public and legal justification of "protecting national security" is used as a reason not to tell the full truth to Canadians, as is the usually unstated reason that "voters are not intelligent enough to make good policy choices so they need to be misled in the right direction." However, neither of these questionable justifications for dishonesty in politics preclude prohibiting disinformation and requiring honesty in some key ways.

The importance of the right to free expression in politics is also upheld as a reason to allow for uninhibited speech even if it is dishonest. In its 1989 ruling in the case *Edmonton Journal v. Alberta (Attorney General)*, Justice Cory of the Supreme Court of Canada ("Supreme Court") wrote:

> "It is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression. Indeed a democracy cannot exist without that freedom to express new ideas and to put forward opinions about the functioning of public institutions. The concept of free and uninhibited speech permeates all truly democratic societies and institutions. The vital importance of the concept cannot be over-emphasized." [4]

However, the Supreme Court has also endorsed a framework that includes a principle that freedom of expression needs to be protected "as a means of attaining the truth" through "a competitive marketplace of ideas."[5] As a result, freedom of expression can be restricted if the expression is false. For example, in its ruling in the *Keegstra* case, the Supreme Court upheld the *Criminal Code* section prohibiting wilful promotion of hatred, with the only defence being if the person could prove, on the balance of

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[1] Plato, *Plato in Twelve Volumes, Vols. 5 & 6*, translated by Paul Shorey, 1969 (Cambridge, MA, Harvard University Press), at 6:485c.
[2] Ibid, at 6:501e.
[3] Ibid, at 2:382c-d.
[4] *Edmonton Journal v. Alberta (Attorney General)*, [1989] 2 SCR 1326, 1989 CanLII 20 (SCC), <http://canlii.ca/t/1fszp> at p. 1336.
[5] *Ford v. Quebec (Attorney General)*, [1988] 2 SCR 712, 1988 CanLII 19 (SCC), <http://canlii.ca/t/1ft9p> at para. 56.

probabilities, the truth of their statement(s).[6] Even though requiring the person making the statement to prove it was true reversed the onus and violated the presumption of innocence guaranteed by subsection 11(d) of the *Charter of Rights and Freedoms*, the Court judged that the violation of this right was justified because of the importance of the objective of preventing the harm of hate speech. The Supreme Court has also restricted publication of falsehoods in libel law cases, with limited defences allowed such as fair reporting (person making defamatory statement identified; statement qualified as not verified with context given; counter statements included in report)[7] and "fair comment" (honest, public interest opinions based on proved facts).[8] By analogy, prohibiting false claims in politics not only increases the likelihood that political discourse will attain the truth, but also protects participants such as parties, party leaders and candidates from having their reputations unjustly harmed.

According to the Supreme Court of Canada, only expression that "conveys or attempts to convey meaning" relating to "the pursuit of truth, participation in the community, or individual self-fulfillment and human flourishing" is protected by s. 2(b) of the *Charter*.[9] False claims during an election or any political process do not relate to the pursuit of truth because they are false, they subtract from the sum of human knowledge, they undermine participation in the community, they amount to cheating in any political process and, thereby, they harm the self-fulfillment and flourishing of others in politics because they eliminate the ability of candidates and party leaders to have a fair chance of being elected, and they eliminate the ability of voters to cast an informed vote and to make informed choices about which candidates and parties they support in elections and which positions they support in any policy-making process.

Specifically in the context of elections, Supreme Court justices have expressed the concern that the system must protect voters from disinformation in order to uphold their right to cast an informed vote, as the dissent in *Thomson Newspapers* ruling stated:

> Voters are free to cast their ballot as they see fit; however, the democratic process cares about each voter and should not tolerate the fact that, in the polling booth, some voters would express themselves on the basis of misleading, or potentially misleading, information that is *de facto* immune from scrutiny and criticism.

and:

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[6] *R. v. Keegstra*, [1990] 3 SCR 697, 1990 CanLII 24 (SCC), <http://canlii.ca/t/1fsr1> at pp. 790-795 esp. pp. 794-795.
[7] *Grant v. Torstar Corp.*, [2009] 3 SCR 640, 2009 SCC 61 (CanLII), <http://canlii.ca/t/27430> at paras. 120 and 126.
[8] *WIC Radio Ltd. v. Simpson*, [2008] 2 SCR 420, 2008 SCC 40 (CanLII), <http://canlii.ca/t/1z46d>.
[9] *Irwin Toy Ltd. v. Quebec (Attorney General),* 1989 CanLII 87 (SCC), pp. 976—979 and 1009; *Ford v. Quebec (Attorney General)*, 1988 CanLII 19 (SCC), paras. 54-57.

> Our democracy, and its electoral process, finds its strength in the vote of each and every citizen. Each citizen, no matter how politically knowledgeable one may be, has his or her own reasons to vote for a particular candidate and the value of any of these reasons should not be undermined by misinformation.[10]

Parliaments across Canada have made dishonesty illegal in many other areas of society. For example, misleading consumers through false advertising and/or labelling is prohibited by the *Competition Act*, including false claims about price, value or quality of a product or service, bait-and-switch selling, and misleading tests or testimonials.[11] The reasons for this legislation were set out in a 1987 article by now-Justice Robert J. Sharpe:

> "While our economic structure may choose to leave the ultimate choice of which product or which quality to the market, regulation designed to ensure that consumers receive truthful information so that they can make informed choices can hardly be struck down in the name of a process designed to get at the truth. The purpose of protecting expression in the commercial sphere, I suggest, is to ensure that consumers have the information they need to make choices. If those choices are to be facilitated, consumers need accurate information, and because manufacturers and retailers have ready access to the information and are in a better position than the consumer to verify the information they provide, laws requiring truth and fairness in advertising are entirely consistent with the argument that the constitution should protect commercial expression."[12]

By analogy, voters need accurate information from people in politics so that they can make informed choices. This includes the choice of which party and/or candidate to support on election day. The right of candidates to be dishonest under the current federal Canadian system, which is a form of disinformation, thwarts the fundamental right of voters to choose, and their ability to be an informed voter. No matter how closely voters study and compare candidate or party platforms and statements, if any of the statements are untrue voters cannot make an informed choice. Voters are in the position similar to playing poker – not knowing which of the other players are bluffing, with their money on the table (through taxes), and having to make a choice with only partial information.

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[10] *Thomson Newspapers Co. v. Canada (Attorney General)*, 1998 CanLII 829 (SCC), [1998] 1 SCR 877, paras. 40 and 56.

[11] Competition Bureau Canada, "False or misleading representations," online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/00513.html>. Competition Bureau Canada, "Misleading advertising and labelling," online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/02776.html>. Competition Bureau Canada, "False or Misleading Representations and Deceptive Marketing Practices," online: <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03133.html>.

[12] Robert J. Sharpe, "Commercial Expression and the Charter" (1987), 37 *U.T.L.J.* 229, at p. 236.

The need for accurate information is also connected to the democratic principle of the public's right to know. As the Justice LaForest stated in the Supreme Court's ruling in *Dagg*: "Rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable."[13] If the information disclosed is not accurate, not fully honest, then it is disinformation and all of these purposes are thwarted.

The federal Parliament has also, for example, prohibited false claims in several other areas of the law, including:

- on tax returns, with the penalties ranging from 50-200 percent of the amount owed, and a jail term of up to two years or up to five years (if indicted), and a limitation period on prosecutions of eight years;[14]
- in order to enter Canada as an immigrant or refugee, with the penalty ranging from a fine of $50,000 up to $100,000 and a jail term of up to two years or up to five years (if indicted) , and a limitation period on prosecutions of 10 years;[15]
- in order to obtain citizenship, with the penalty ranging from a fine of $50,000 up to $100,000 and a jail term of up to two years or up to five years (if indicted), and a limitation period on prosecutions of 10 years, and;[16]
- by federally regulated business executives filing records with the government, and disclosing financial statements to shareholders, with the penalty of a fine up to $5,000 and a jail term of up to six months.[17]

Parliamentarians have decided that it is important that people in various societal roles in Canada tell the truth, and that therefore legal rules are needed to ensure honesty, along with significant penalties for dishonesty. And yet, other than in a few, limited ways described below in Part 4, parliamentarians have not decided to impose a requirement on themselves, or on anyone involved in politics, including members of the public commenting on political processes, to not make false claims or use disinformation during elections or between elections. At the same time, the fact that parliamentarians have made some false claims illegal (including prohibiting misleading the House of Commons, and prohibiting false budget claims (the Parliamentary Budget Officer position was created to review and report on the accuracy/inaccuracy of spending projections) shows that there is a general belief among political parties that

[13] *Dagg v. Canada (Minister of Finance)*, [1997] 2 SCR 403, 1997 CanLII 358 (SCC), <http://canlii.ca/t/1fr0r> at paras. 61-63.
[14] *Income Tax Act* (R.S.C., 1985, c. 1 (5th Supp.)), sections 163(2) to 2(4), 163.2, 239(1) to (2.1), and 244.
[15] *Immigration and Refugee Protection Act* (S.C. 2001, c. 27), sections 126 to 129, and 133.1.
[16] *Citizenship Act* (R.S.C., 1985, c. C-29), sections 10 to 10.2, 29 to 30.
[17] *Canada Business Corporations Act* (R.S.C., 1985, c. C-44), sections 250, and 171(7) to (9). Businesses can also be sued by shareholders if they lose money due to being misled.

false claims can be effectively restricted and regulated. This raises the question of why not simply prohibit all false claims, all disinformation, in politics?

All of the legal sanctions in the above areas face the same barriers and difficulties of enforcement resources and actions – ensuring independent, impartial enforcement, and watchdog entities with staff and funds necessary to gather evidence through inspections and audits and complaint and whistleblowing processes, and tribunals and courts to hear and rule on cases – that an anti-disinformation system would face.

These laws in other areas give rise to a two-part argument for changes to rules and enforcement to effectively require prohibit disinformation in politics by anyone at any time. First, to ensure equality of the application of a key legal requirement that protects integrity in society (with the exercise of political power and integrity in all political processes considered no less important than paying taxes owed, entering the country legally, and exercising market power as a big business executive). And secondly, to remove the very justifiable, cynicism-breeding conclusion that politicians are being hypocritical and undermining public trust by requiring people in many sectors of society to be honest while not requiring honesty from themselves or others involved in political processes.

The danger of disinformation should not be understated. A disinformation campaign does not have to fool all of the people even some of the time, let alone all of the people all of the time, to affect election results. Instead, in most elections, it only has to fool a small percentage of voters in order to change the election result.

For example, the difference in percentage of votes between the winning party, and the second-place party, in the last seven federal elections was just over 6%.[18] It may seem from this statistic that 6% of voters would have to fooled by a piece of disinformation that caused them to switch their vote in order to change the result of the election. However, actually only 3.5% would have to be fooled because if the party leading by 6% over the party that is in second is the target of the disinformation, and just 3.5% of voters who support the leading party switch their support to the party in second, then the leading party loses 3.5% of the vote and the second party gains 3.5% and the second party moves into the lead. To clarify, if the leading party is supported by 38% of voters, and the second party by 32% of voters, if the leading party loses 3.5% support it is now supported by 34.5% of voters and the second party is now supported by 35.5% of voters. So only 3.5% of voters (only 350 voters out of every 10,000 voters)

[18] Andrew Heard, Canadian Election Results by Party: 1867 to 2021, online: <https://www.sfu.ca/~aheard/elections/1867-present.html>.

would have to be fooled by a piece of disinformation that caused them to change their vote in order to change the results of the election.

And while more voters may have to be fooled by a piece of disinformation in order to lead to enough pressure on a government to have it enact a change to a law, policy or program, that level of penetration by a disinformation campaign is possible, as was seen during the COVID-19 pandemic.[19]

Many commentators, and the federal government, have also proposed for the past several years the ineffective and unrealistic measure of expecting that members of the public can educate themselves to the point of knowing everything to the point where they will never be fooled by a false claim post. Several federal government programs and funding streams have been dedicated to this façade of a solution, ignoring the fact that many experts and mainstream media outlets, with all their resources and knowledge and expertise, have been repeatedly fooled by social media posts making false claims.

Supreme Court justices in the seminal 1998 ruling in *Thomson Newspapers* expressed the belief that voters "are more capable of making a free and informed choice, which engenders a freer and fairer election process" and "the Canadian voter is a rational actor who can learn from experience and make independent judgments about the value of particular sources of electoral information."[20] But this ruling was long before unregulated social media became a dominant form of political communication and AI generated deep fakes.

It is simply an approach of blaming the victims to assume that voters can protect themselves from disinformation.

In contrast to these ineffective measures, the two national surveys conducted in the past few years show that 70-75 percent of Canadian voters support regulating social media companies to prohibit and quickly remove false social media posts and fake accounts. Click here to see one survey (p. 5) and click here to see the other (pp. 15-16).

At its 2023 national policy convention, the Liberal Party of Canada passed a resolution calling on the federal government to enact "truth in political advertising" law enforced by an independent body with the power to impose penalties (click here, p. 17).

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[19] Kenneth Grad and Amanda Turnbull, "Harmful Speech and the COVID-19 penumbra," (2021) 19(1) *Canadian Journal of Law and Technology* 1.

[20] *Thomson Newspapers Co. v. Canada (Attorney General)*, 1998 CanLII 829 (SCC), [1998] 1 SCR 877, paras. 98 and 112.

The Citizens' Assembly on Democratic Expression's 2022 report (click here, pp. 52-53) calls for an independent online communications enforcement agency, but does not specify the many measures that are needed to ensure its independence.

As the above makes clear, in the same way that yelling "Fire!" in a crowded theatre as a false claim when there is no fire is illegal because it is likely to cause harm,[21] posting false claims about politicians, laws, public policies and political processes must be made illegal because they are likely to cause harms.

Finally, even if the questionable claim can be proven that anonymously posting on social media has provided an avenue for people to blow the whistle on actual wrongdoing by anyone or any entity, the much more fair, effective, systemic and sustainable way to provide an avenue for whistleblowing is to establish best-practice whistleblower protection systems for every government and business sector and area of society in which wrongdoing occurs.

3. Difficulties in Preventing, Prohibiting and Penalizing Disinformation

There are, of course, difficulties in combatting disinformation. Some commentators posit that it is impossible as all claims are relative and based on one's perspective.[22] For example, now-Justice Sharpe, in the article cited above, after defending legal requirements for truth in commercial advertising as a reasonable restriction of freedom of expression by businesses, goes on to state that: "The same argument, in my view, cannot be made in the areas of politics and art, where there is no universally accepted standard against which the truth can be gauged." The range of statements to which any anti-disinformation prohibition applies likely cannot, as in the area of libel law, include statements of belief or opinion – as long as the statement makes it clear that a belief or opinion, not a fact, is being expressed.

However, while many claims are based on rational belief determined by one's perspective, there are claims that can be called "facts".[23] Therefore, statements that these "facts" are not true, or that something else is true that contradicts actual facts, or

[21] *Irwin Toy Ltd. v. Quebec (Attorney General)*, 1989 CanLII 87 (SCC), [1989] 1 SCR 927, p. 1009.
[22] Richard C. Sinopoli, "Is There Room for Truth in Politics? The Limitations of Perspectivism," *Polity*, Vol. 26, No. 3 (Spring, 1994), pp. 363-386. Hannah Arendt, "Truth and Politics," in *The Portable Hannah Arendt*, ed. Peter R. Baehr, 2003 (New York: Penguin Books), pp. 545-575. Jean-Claude Monod, "Between post-truth and epistemocracy: Positioning a democratic politics," online: Eurozine (September 27, 2017; translated by Saul Lipetz), <https://www.eurozine.com/between-post-truth-and-epistemocracy-positioning-a-democratic-politics/>.
[23] Sinopoli, ibid at 385-386.

that something was or was not promised or that a promise was or was not kept, could be sanctioned by an anti-disinformation system. The question, of course, is how to design such a system so that it is workable and does not have unintended consequences?

Part of the challenge of designing such a system is to ensure that no political party can use the system to impose its version of the "truth." This concern caused courts in several U.S. states to strike down honesty in politics laws, and those rulings and how to overcome this problem is addressed below in Part 4.[24] While greatly exaggerating the concern, for example now-Justice Sharpe in a 1987 article stated that:

> "The essence of the market-place of ideas argument is that control and regulation of expression is intolerable because we can trust no government to know the truth. Those who purport to legislate the truth invariably turn out to be tyrants. The market-place of ideas argument prescribes an open process precisely because we cannot agree on what is the truth."[25]

Now-Justice Sharpe is exaggerating the concern because, while it is reasonable to say that voters should not trust a government to state the truth, it is not "invariable" that legislating truth makes one a tyrant, nor is it true that "we cannot agree on what is the truth" because, as explained above, there are such things as facts.

Related to this concern is that government regulation of truth may actually increase belief in false claims. Justice MacLachlin of the Supreme Court recognized this difficulty in her dissent (with Justice Sopinka) in the *Keegstra* case, stating that people hearing a dishonest statement might be just as likely to believe that there must be some truth to it:

> "… because the government is trying to suppress it. Theories of a grand conspiracy between government and elements of society wrongly perceived as malevolent can become all too appealing if government dignifies them by completely suppressing their utterance."[26]

Another difficulty is that disinformation is spread online through pseudo-media outlets and social media accounts. However, long before social media existed, freedom of expression was restricted through libel and defamation laws to prevent damaging false claims and several types of false claims were prohibited in Canadian election laws and other laws. In addition, just because social media now exists, it does not mean that

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[24] Amy Marie Fineberg, "Candidate False Statement Laws and the First Amendment: An Analysis of Constitutional Principles," A Thesis submitted to the Graduate Faculty of the University of Georgia, 2015, online: <https://getd.libs.uga.edu/pdfs/feinberg_amy_m_201505_ma.pdf>.
[25] Sharpe, *supra*, at p. 236.
[26] *R. v. Keegstra*, *supra*, at p. 853.

some new right to anonymously make false claims during elections or libel or slander others has been established.

Canada at the federal, provincial, territorial and municipal level already has many legal provisions that prohibit false claims, including in election laws, as well as perjury laws, libel and defamation law, and in securities, tax, welfare and immigration laws. The problems are that the laws are incomplete and inconsistent and so they allow for disinformation and misinformation, and are ineffective because the enforcement agencies lack funding or enforcement powers or have weak enforcement policies and practices, and also are all chosen by, and in many cases serve at the pleasure of, the ruling party Cabinet, which makes them vulnerable to political interference and influence and undermines their legitimacy.

Preventing disinformation through effective regulations that prohibit anonymous posting of false claims on the Internet will be the most effective solution, but also prohibiting it and penalizing disinformation will help, including through having independent regulatory agencies rule that posts and statements are false. Studies have shown that it is possible to switch voters from believing disinformation to believing facts if an authoritative correction to the disinformation is published.[27]

Yes, there is the long-recognized danger that government institutions and political parties should not be deciding which political speech is true. To remove the risk of the government or any political party controlling the definition of what is true or false, the enforcement agencies must be fully independent from the government and all parties, with the heads of the agencies and employees appointed and hired through a fully independent process, and with a guaranteed adequate enforcement budget from Parliament (not the government), full investigative powers, and required to impose significant penalties for all violations.

Unfortunately, several commentators have generally proposed that the ruling party Cabinet should appoint the heads of enforcement agencies. This would completely undermine the legitimacy of the enforcement agency and allow the public to justifiably claim that the agency is censoring social media posts that the ruling party (or political parties overall) does (or do) not like.

An enforcement agency on disinformation must, like the enforcement agency for any democratic good government law, be fully independent.

[27] Ethan Porter, Thomas J. Wood and David Kirby**,** "Sex Trafficking, Russian Infiltration, Birth Certificates, and Pedophilia: A Survey Experiment Correcting Fake News," (Summer 2018) *Journal of Experimental Political Science* Vol. 5(2), 159.

Four reports from commentators, from the TMU Leadership Lab (click here), the Media Ecosystem Observatory (click here and click here), and the Public Policy Forum's Canadian Commission on Democratic Expression (click here), recommend that enforcement agencies be established to investigate and rule on complaints about online disinformation. However, incredibly, the reports, as well as the report of the Government of Canada's Expert Advisory Group (click here), express concern for protecting legitimate dissent and freedom of expression, but don't in any way address the issue of ensuring that enforcement is fully independent from the government, and from all political parties, including through having the heads of enforcement agencies appointed by a fully independent committee made up of people who have no ties to the government or to any political party.

Beyond designing an enforcement entity or entities that have the independence and integrity to be believed by voters, and the resources to rule in a timely manner, and requirements to be transparent and accountable, another area of difficulty is designing effective penalties. Should a political misleader lose office, or pay a fine, or should a finding of guilt and public shaming be the only penalties? And what should the penalties be for members of the public? And how should online posts, including by pseudo-media outlets based in other jurisdictions that are actually advocacy organizations (sometimes backed by foreign governments), be prevented, prohibited and penalized.

All of these difficulties, and questions, are addressed in the parts below.

4. History of Canada's Incomplete, Inconsistent, Ineffective and Partisan Anti-Disinformation System

4.1. History, current state, and needed changes to election rules

There are several measures in Canada's federal election law, the *Canada Elections Act* (*CEA*), that prohibit false claims of various sorts, and the sub-parts below address how all the measures have loopholes that allow for many false claims, and how all are ineffectively enforced or are unenforceable by design.

4.1.1. General rules prohibiting disinformation and dishonesty

The CEA prohibits disinformation and dishonesty by political parties and third parties (filing false financial statements or forms), voters (claiming to be eligible to vote),

and election officials (pretending to be an official).[28] Current Bill C-65 proposes to add more provisions to the *CEA* that prohibit false claims but, even if Bill C-65 is enacted before the next election, many very damaging false claims will still be legal during elections, and between elections. Bill C-65 has passed at second reading and is currently awaiting review by a House of Commons committee.

Bill C-65 proposes to amend the *CEA* by adding section 92.1 and 92.2 (prohibiting false information in a nomination application form); expanding sections 481 and 482 (impersonating the CEO); adding section 482.01 (prohibiting various false claims including re: election results), and sections 82 and 92 and subsection 90(2) of Bill C-65 add these measures to the list of offences in the *CEA*.

At the same time, they have all committed to truth in budgeting through the establishment of the Parliamentary Budget Officer, who can't penalize false budget projections but can, at least, report that they are false (although the PBO is somewhat ineffective because governments often simply withhold the info that the PBO needs to judge whether or not a budget projection is true.)

In terms of misleading ads from parties and governments, voters can file a complaint with Advertising Standards Canada also about any advertising by a political party, third party or government. However, the Ad Standards Council doesn't issue a ruling that names a party or government advertiser if the advertiser changes or stops the ad, nor does it have any power to penalize the person/party/government that runs the false ad (so there is no real incentive to ensure an ad is honest). The rulings that name an advertiser include a lot of advocacy groups that clearly didn't care that their ad was false and continued to run it. As well, for an ad that is running during an election/referendum campaign period, the election/referendum will likely be over before the ad is even ruled on by the Council. As a result, it is not an effective system.

4.1.2. Rules concerning candidates misleading voters

Three prominent cases of misleading voters included the two robocalls cases in the electoral district in Guelph, Ontario, and the national robocalls scandal, exposed after the 2011 federal election. False robocalls had been used in a B.C. district during the 2008 election, but the Commissioner of Canada Elections (CCE), the front-line investigator and prosecutor and for the *CEA*,[29] gave up on the investigation because the

[28] *Canada Elections Act* (*CEA* - S.C. 2000, c.9), sections 89-92 (false registration as candidate, false statements about candidates – and see related subsection 486(2)) – sections 281-282 (false registration as voter, dishonest inducement of voters by foreigner – and see related clauses 491(3)(d) and (e)) – sections 480.1, 482-488 (dishonest inducement of voters (482(b)), voting, acting as an official).
[29] *CEA*, sections 509 to 521.1.

calls were made from outside Canada.[30] In one case, Conservative Party candidate staff person Michael Sona was convicted of arranging robocalls to voters that directed them to false locations for Guelph polling stations, not under a specific section prohibiting false claims but instead under a general subsection (281(g)) prohibiting preventing voters from voting.[31] Sona was sentenced to 9 months in prison and 12 months of probation.[32] In another case, the Guelph Liberal candidate's campaign was found guilty by the CRTC of failing to identify that he was the caller in the robocall to voters, and fined $4,900.[33]

The largest case though, complaints about misleading robocalls in multiple electoral districts across Canada, was ended when the CCE ignored clear, significant evidence of attempts to mislead voters with directions to incorrect polling stations and refused to recommend that the Director of Public Prosecutions prosecute the Conservative Party of Canada for the calls.[34] True, intent was required to be proven, but the CCE's investigators gathered evidence that the Conservatives booked the calls, and the Conservatives admitted the calls directed voters to polling stations. The evidence was as strong as in the Sona case. As a result, the CCE's error was not concluding that the Conservatives intentionally misled voters.[35]

The national robocall investigation was seeking to prove a violation of either subsection 281(g), or of 482(b) of the *CEA*, which states:

> "Intimidation, etc.
> 482. Every person is guilty of an offence who
> …
> (b) by any pretence or contrivance, including by representing that the ballot or the manner of voting at an election is not secret, induces a person to vote or refrain from voting or to vote or refrain from voting for a particular candidate at an election."

[30] Carlito Pablo, "Robocalls pioneered in B.C. during the 2008 federal election," online: The Georgia Straight, February 29, 2012, <https://www.straight.com/news/robocalls-pioneered-bc-during-2008-federal-election>.
[31] *R. v. Sona*, 2014 ONCJ 365 (CanLII), <http://canlii.ca/t/g8m0r>. *CEA*, subsection 281(g).
[32] Public Prosecution Service of Canada, Sentence in R. v. Sona, online: November 19, 2014, <https://www.ppsc-sppc.gc.ca/eng/nws-nvs/2014/19_11_14.html>.
[33] CRTC, Notice of Violation, online: August 23, 2012, <https://crtc.gc.ca/eng/archive/2012/vt120824.htm>.
[34] Commissioner of Canada Elections, Summary Investigation Report on Robocalls, online: April 2014, <https://www.cef-cce.ca/rep/rep2/roboinv_e.pdf>.
[35] Democracy Watch, News Release: Group plans private prosecution of Conservative Party officials for 2011 election fraud robocalls, online: <https://democracywatch.ca/group-plans-private-prosecution-of-conservative-party-officials-for-2011-election-fraud-robocalls-because-government-lawyers-wont-prosecute/>.

According to the CCE, this subsection first appeared in the predecessor versions of the *CEA* in 1860, based upon a provision in the United Kingdom's corrupt practices prevention statute relating to elections that was enacted in 1854.[36] The CCE's position is that "making false statements of material facts could, in some instances, be captured by the scope of" ss. 482(b).[37] In fact, the Commissioner entered into a compliance agreement with the Green Party of Canada in July 2016 concerning the distribution of results of a survey the party had commissioned for internal use in a Victoria, B.C. electoral district during the last few days of the 2015 federal election. The pamphlet failed to include required information concerning the margin of error of the survey (which was approximately plus or minus 9.8 percent), and also claimed the survey was the "latest results" showing a one percent margin between support for the Green Party and the NDP candidates – even though the polling company had actually conducted five subsequent surveys that showed a widening gap.[38] The CCE concluded the following about the pamphlet:

> "The deliberate use of unreliable polling data intended for internal use, which use did not meet the informational requirements of the Act—as well as the erroneous presentation of the polling data as being the latest results when subsequent polling data was trending down—was misleading. It constituted an attempt to induce a person to vote or not to vote for a particular candidate using a pretence or contrivance, and as such, an offence under paragraph 482(b) of the Act."

The penalty the CCE and the Green Party agreed to for the violation was public shaming through the posting of a notice about the violation on the homepage of the Party's website for 30 days, sending the notice to its federal council, and issuing a news release to the national media. If the Commissioner had prosecuted, the possible penalty was a fine of up to $20,000 or up to one year in jail or both (summary conviction) or up to $50,000 fine and up to five years in jail or both (indictment).[39] Before changes to the *CEA* made in 2014, the possible fine for violating subsection 482(b) was only up to $2,000 or up to $5,000.

While this compliance agreement is better than no sanction, it is questionable whether the notice and news release are effective penalties. A search of the Google News website produced only four online news articles about the violation all published a few days after the date of the compliance agreement, none of which were located in the electoral district where the violation took place (the closest was the *Vancouver Sun* – it is unclear whether that newspaper published the article in its print edition or whether

[36] Commissioner of Canada Elections, unpublished letter to Democracy Watch, March 13, 2018.
[37] Commissioner's letter, ibid, p. 2.
[38] Commissioner of Canada Elections, Green Party of Canada compliance agreement, online: July 22, 2016, <https://www.cef-cce.ca/content.asp?section=agr&document=jul2116&lang=e>.
[39] *CEA*, subsection 500(5).

there was any radio or TV coverage of the agreement).[40] There were no comments on the *Sun* article webpage, and a search of Twitter found that it was retweeted at least 34 times. There were 433 comments on the CBC.ca article webpage, and that article was retweeted at least 124 times. There were no comments on the GlobalNews.ca article webpage, and that article was retweeted at least 46 times. There were 9 comments on the Tyee.ca article webpage, and it was retweeted at least 35 times, and it was shared on Facebook at least 218 times. The other media outlets don't show the number of shares on their article webpages.

That compliance agreement was the first time subsection 482(b) was enforced by the CCE. This conclusion is not based on a search of all records of court case rulings back to 1860, but on an online search that produced a Supreme Court of Canada ruling from 1877 in which priests were found guilty of violating the past version of subsection 482(b) when they told their parishioners that it would be a "grave sin" to vote for one of the candidates in their electoral district, and the court additionally voided the election result even though the agents of the candidate had arranged the priests' action without the candidates' knowledge or consent.[41] In recent years, only one ruling has mentioned 482(b), and it was only discussed briefly as the case did not involve a violation of that subsection.[42] This is likely due to the fact that former CCE Yves Cöté, who was in office from July 2012 until August 2022, deploys a restrictive interpretation of the subsection based on a ruling in a court case concerning section 256 of B.C.'s election law that prohibits compelling, persuading or otherwise causing a person to vote a certain way (or not vote) through "abduction, duress or fraudulent means."[43]

In that case, *Friesen v. Hamell*, the B.C. Court of Appeal (BCCA) allowed a challenge to election results to proceed filed by voters who felt they had been misled by candidates of the winning party, but limited the grounds of the challenge. The BCCA examined the legislative history of, and case law for, the B.C. section concerning misleading voters with false claims which is similarly worded to the United Kingdom election law.[44] The BCCA rejected the claims of the politicians whose election was

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[40] Peter O'Neil, "Greens admit to deliberately misleading Victoria voters," online: *Vancouver Sun*, July 26, 2016, <https://vancouversun.com/news/politics/greens-admit-to-deliberately-misleading-victoria-voters>. Kathleen Harris, "Elections commissioner sanctions Green Party for peddling 'misleading' polling data," online: CBC.ca, July 26, 2016, <https://www.cbc.ca/news/politics/elections-commissioner-green-party-polling-1.3695519>. Kevin Neilsen, "Green Party sanctioned over misleading campaign material in Victoria," online: GlobalNews.ca, July 26, 2016, <https://globalnews.ca/news/2849268/green-party-sanctioned-over-misleading-campaign-material/>. Jeremy Nuttall, "Greens Slapped for Pumping Poll that Falsely Made Race Seem Tight," online: The Tyee.ca, July 27, 2016, <https://thetyee.ca/News/2016/07/27/Green-Party-False-Poll/>.
[41] *Brassard et al. v. Langevin*, 1 SCR 145, 1877 CanLII 23 (SCC), <http://canlii.ca/t/g7z4k>.
[42] *McEwing v. Canada (Attorney General)*, 2013 FC 525 (CanLII), <http://canlii.ca/t/fxqs4>.
[43] Commissioner's letter, *supra*, pp. 2-3.
[44] *Friesen v. Hammell*, 1999 BCCA 23 (CanLII), <http://canlii.ca/t/52jf>, paras. 35-73.

being challenged that "mayhem would result if candidates for election were required to justify every statement or representation made by them during the course of an election campaign"[45] and concluded that:

> "We are unable to find any sound justification for interpreting the legislation so narrowly as to permit electoral candidates or political parties to fraudulently mislead the public with respect to material issues which could reasonably be expected to affect their decision for whom to vote."[46]

However, the BCCA prohibited only:

> "misrepresentations of material fact which were intended to, and did, lead voters to vote for a candidate or party for whom the voter would not otherwise have voted, and which were made by or on behalf of a candidate or political party knowing that they were false, or without regard to their truth or falsity."

The BCCA excluded statements "of intention or belief, and statements which any reasonable person would attribute to mere puffery."[47] A subsequent ruling by the B.C. Supreme Court (BCSC) on the actual issue of whether the candidates had misled voters concluded that their statements had been "of intention or belief" and were therefore not fraudulent.[48] The ruling did not address one statement that was an election promise because, while the applicants had raised it in their initial case, they did not present arguments or evidence about the promise during the final trial.[49]

Based on this ruling, then-CCE Cöté rejected a complaint filed against Prime Minister Trudeau for misleading voters in the 2015 federal election by repeatedly making the unequivocal, unconditional promise that 2015 would be the last election using the first-past-the-post (FPTP) voting system."[50] Then-CCE Cöté committed two errors of law by refusing to prosecute the Prime Minister for making this misleading promise – misleading because he clearly broke his promise when he rejected ending Canada's use of the FPTP system. The first error is that *CEA* subsection 482(b) does not contain the words "fraudulent means" but instead refers to "any pretence or contrivance." Those are much broader words and, as a result, the Commissioner should have interpreted the subsection as applying more broadly than the B.C. law's section.

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[45] *Friesen* BCCA, ibid, para. 72.
[46] *Friesen* BCCA, ibid, para. 74.
[47] *Friesen* BCCA, ibid, paras. 75-76.
[48] *Friesen v. Hammell*, 2000 BCSC 1185 (CanLII), <http://canlii.ca/t/1fmvg>.
[49] *Friesen* BCSC, ibid, para. 4.
[50] Democracy Watch, News Release: Democracy Watch calls on Commissioner of Canada Elections to rule Prime Minister Trudeau violated federal elections law, online: <https://democracywatch.ca/democracy-watch-calls-on-commissioner-of-canada-elections-to-rule-prime-minister-trudeau-violated-federal-elections-law/>. Commissioner's letter, *supra*, at p. 3.

The dictionary definition of "pretence" is a false claim, and the definition of "contrivance" is a clever plan or trick.[51] The dictionary definition of "induce" is to persuade or convince somebody to do something and, under section 24 of the *Criminal Code of Canada*, an attempt to commit an offence is also a violation of the law.[52] As a result, the CCE should interpret the legal prohibition set out in subsection 482(b) of the *CEA* as:

> "It is an offence for anyone to make a false claim or use a trick to attempt to convince, or convinces, voters to vote or not vote (or to vote or not to vote for a particular candidate)."

The second error is that, just because the B.C. court did not address the allegation of a false election promise does not mean, as the Commissioner contends, that Parliament did not intend subsection 482(b) to apply to promises.[53] Given that the only reason the B.C. court did not address the promise was because the parties to the case did not raise it, the Commissioner's conclusion is particularly erroneous.

However, because the CCE's ruling was a decision exercising prosecutorial discretion that was not malicious, no challenge is allowed in the courts of the decision.[54] As a result, in order to have a rule prohibiting false election promises that the CCE will enforce, subsection 482(b) must be amended to explicitly prohibit such promises. Such a prohibition will likely only ever be applied to blatantly false promises like the promise Trudeau made, or similar blatantly false statements, but stopping even only those false promises and statements would make elections fairer for voters as it would improve the quality of the information they have before they vote.

The CCE should have done what a B.C. court did when considering a violation of the rule in B.C.'s *Local Government Act* that prohibits misleading voters, which was find to find the candidate for local city council guilty of misleading voters.[55] The first part of the penalty imposed in that case, that the councillor lost his seat on council, should also be the penalty imposed on politicians who mislead voters in provincial and federal elections. The second part of the penalty imposed in that case, that the violator and was required to pay the costs of the by-election to elect a replacement councillor, would not be appropriate in the case of a political party leader in a federal or provincial election

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[51] Oxford Learner's Dictionaries, online: <https://www.oxfordlearnersdictionaries.com/definition/english/pretence> and <https://www.oxfordlearnersdictionaries.com/definition/english/contrivance?q=contrivance>.
[52] Oxford, at: <https://www.oxfordlearnersdictionaries.com/definition/english/induce?q=induce>. *Criminal Code of Canada* (R.S.C., 1985, c. C-46).
[53] Commissioner's letter, *supra*, p. 3.
[54] *SNC-Lavalin Group Inc. v. Canada (Public Prosecution Service)*, 2019 FC 282, <https://decisions.fct-cf.gc.ca/fc-cf/decisions/en/item/365007/index.do>.
[55] *Todd v. Coleridge*, 2009 BCSC 688 (CanLII), <https://canlii.ca/t/23mzx>.

as it would be difficult to show that voters in every electoral district voted based on the false claim.

Often politicians claim when breaking promises that they don't know what changes might occur if they win the election, and therefore shouldn't be penalized. The simple solution is for candidates to make promises that honestly set out the circumstances under which they would change direction (instead of the usually dishonest iron-clad promises they currently make). While it is difficult to predict the effects if honesty was required, some candidates and parties may try to get away with making only vague promises. Possibly they would, over time, lose support if not lose to those willing to set out a well-defined, contract-like platform that tells voters exactly what they will receive, thereby increasing the likelihood of promissory representation.[56] A complicating, ironic, twist to such a system would be that, if Canada's voting system did change from FPTP to a proportional system, minority governments would likely occur more often, necessitating parties negotiate and compromise on their promises in order to reach the agreements necessary to form a coalition government.

4.1.3. Rules concerning false claims about candidates

Bill C-76,[57] enacted in 2019, amended section 91 of the *CEA* to narrow the prohibition on making false claims about candidates from:

> "with the intention of affecting the results of an election, knowingly make or publish any false statement of fact in relation to the personal character or conduct of a candidate or prospective candidate."

to cover only false statements concerning specific characteristics of a candidate, such as claiming that they have been convicted or charged, or a claim about their place of birth, citizenship, education, qualifications etc. The requirement that the statement be made with the intent to affect the outcome of the election remained.

Echoing a 2013 report by the Chief Electoral Officer (CEO) that called for measures to prevent disinformation,[58] both the CEO and the Commissioner of Canada Elections (CCE) appealed to the House of Commons and Senate committees that reviewed Bill C-76 to return section 91 to the broader past wording so that claims such as that a candidate was racist or homophobic would be covered, and also to remove the

[56] Robert Thomson and Heinz Brandenburg, "Trust and Citizens' Evaluations of Promise Keeping by Governing Parties," *Political Studies*, February 2019, Vol.67(1), pp. 249-266.
[57] Government of Canada, Bill C-76, online: LEGISinfo, <https://www.parl.ca/LegisInfo/BillDetails.aspx?billId=9808070&Language=E>.
[58] Elections Canada, *Preventing Deceptive Communications with Electors* (2013), online: <https://www.elections.ca/res/rep/off/comm/comm_e.pdf>.

requirement to prove intent as it would be very difficult, if not impossible, to prove in many cases.[59] In effect then, Bill C-76 legalized many false claims about federal election candidates.

The need to broaden the rule and increase enforcement (see recommendations below in Part 5) has been highlighted by many situations involving false claims about political party leaders and candidates. For example, an online advertisement concerning NDP Leader Jagmeet Singh during the by-election campaign that he won, claimed he owned a $5.5 million mansion, and a Facebook post in 2018 about Mr. Singh made another false claim about him and was shared 5,700 times.[60] While the CCE investigated, the by-election ended and the posts continued to circulate online.

The position of the CEO and the CCE that section 91 needs to be broadened in both scope and enforceability is correct. Further, the rule should simply be expanded to cover all false claims made during election campaigns, whether about a candidate or not.

Like the laws summarized above in Part 2 concerning false claims by taxpayers, immigrants and refugees, and businesses and business executives, such an expanded rule will not be enforced in every case successfully. As with the suggested rule prohibiting false promises proposed in the previous sub-part, a broad prohibition on false claims will likely only be applied to blatantly false claims. However, such a prohibition will likely change the behaviour of at least some people, hopefully including party leaders given their prominent role and profile during campaigns. Any reduction in disinformation during elections will improve the quality of election debates, if only by making them more connected to reality.

4.2. History, current state, and needed changes to in-between election rules

The in-between election honesty rules for politicians, their staff, appointees, government employees and lobbyists, can be summarized relatively easily given that few rules exist, and are largely discretionary, unenforced or unenforceable. First, while in Parliament or at its committees, MPs are not required to answer questions from other parliamentarians, but if they do they are required to give accurate information in

[59] Joan Bryden, “Bill won't stop hackers from sowing election confusion: watchdogs,” online: CTVNews.ca, November 6, 2018, <https://www.ctvnews.ca/politics/bill-won-t-stop-hackers-from-sowing-election-confusion-watchdogs-1.4166380>.
[60] Catharine Tunney, “NDP asks elections watchdog to investigate 'slanderous' ads targeting Singh,” online: CBC.ca, February 6, 2019, <https://www.cbc.ca/news/politics/ndp-elections-canada-singh-1.5007989>.

response to a request and can be held in contempt of Parliament if they don't, although they can libel and slander anyone while doing so, or in any parliamentary publication.[61]

Beyond these ancient parliamentary privileges inherited from the United Kingdom's traditions, federal politicians slowly, very slowly, developed ethics rules to govern their conduct, including dishonesty/disinformation, culminating in the current *Conflict of Interest Act* ("*COIA*") and the *Conflict of Interest Code for Members of the House of Commons* ("*MP Code*"), as summarized in this timeline:[62]

- 1964: first guidelines for Cabinet Ministers issued by the Prime Minister;
- 1973: Treasury Board of Canada "Green Paper" in response to conflict of interest allegations against some MPs and Cabinet Ministers, recommending the enactment of legislation;
- 1974: more specific conflict of interest guidelines ("*PM Code*") issued by the Prime Minister and creation of the Office of the Assistant Deputy Registrar General (ADRG) to administer the guidelines (with PM enforcing them);
- 1983: Starr/Sharp Report: *Ethical Conduct in the Public Sector: Report of the Task Force on Conflict of Interest*, recommending creation of an Office of Public Sector Ethics along with enactment of a conflict of interest code;
- 1986: a more detailed *PM Code*, entitled the issued by Prime Minister Brian Mulroney;
- 1987: *Commission of Inquiry into the Facts of Allegations Concerning the Honourable Sinclair M. Stevens* (the "Parker Commission") recommended comprehensive legislation;
- 1988: introduction of legislation that would have covered cabinet ministers, members of Parliament and the Senate (not enacted);
- 1994: ADRG changed to the Ethics Counsellor by new Prime Minister Jean Chrétien, who reported privately and directly to the Prime Minister and had no investigative or decision-making powers over the *Conflict of Interest and Post-Employment Code for Public Office Holders* ("*PM Code*");
- 2003: introduction of Bill C-34, *An Act to amend the Parliament of Canada (Ethics Commissioner and Senate Ethics Officer) and other Acts in consequence*, to create an office of a more independent conflict of interest commissioner for the House of Commons and the Senate (opposed by the Senate, who wanted its own commissioner); and *PM Code* revised in December 2003 by new Prime Minister Paul Martin;
- 2004: reintroduction of legislation with two commissioners, one for each chamber, leading to the enactment of Bill C-4,[63] *An Act to Amend the*

[61] University of Alberta's Centre for Constitutional Studies, Parliamentary Privilege, online: January 28, 2014, <https://ualawccsprod.srv.ualberta.ca/ccs/index.php/constitutional-issues/democratic-governance/739-parliamentary-privilege>.
[62] See more details in: Office of the Conflict of Interest and Ethics Commissioner, "History," online: <https://ciec-ccie.parl.gc.ca/en/About-APropos/Pages/History-Histoire.aspx>.
[63] Government of Canada, Bill C-4, An Act to Amend the Parliament of Canada Act (Ethics Commissioner and Senate Ethics Officer), online: <http://www.parl.ca/LegisInfo/BillDetails.aspx?Language=E&billId=1188061>.

Parliament of Canada Act (Ethics Commissioner and Senate Ethics Officer), creating an Ethics Commissioner for the House of Commons, responsible for enforcement of the *PM Code* and the newly enacted (in October 2004) *Conflict of Interest Code for Members of the House of Commons* ("*MP Code*"), and a Senate Ethics Officer to enforce the *Conflict of Interest Code for Senators* ("*Senator Code*" – created in 2005).

- 2004: Commission of Inquiry into the Sponsorship Program and Advertising Activities (Gomery Commission);
- 2006: enactment of the Bill C-2 *Federal Accountability Act* by new Conservative government includes, among other things, the new *Conflict of Interest Act* ("*COIA*") which contains only some rules from the *PM Code*, and some new rules, and renames the Ethics Commissioner the Conflict of Interest and Ethics Commissioner; enforcement of *PM Code* shifted back to Prime Minister;
- 2011: *PM Code* revised by Prime Minister Harper to add rules concerning relationships with lobbyists, stakeholders, especially while fundraising;
- 2014: amendments to the *Senator Code* to change its name to the *Ethics and Conflict of Interest Code for Senators*;[64] and
- 2015: New Prime Minister Trudeau issues his updated version of the *PM Code* for the newly-elected government.

Dr. Bernard Shapiro served as the first quasi-independent Ethics Commissioner from spring 2004 until he resigned in spring 2007.[65] The ethics rules for public office holders enforced by Ethics Commissioner Shapiro from 2004 to 2007, contained in the version of the *PM Code* in force at the time, were much more comprehensive than the rules in the *COIA*. One of the past rules required public office holders to: act with honesty and uphold the highest ethical standards (subsection 3(1)).

Similar to the *PM Code*, the ethics rules in the first version of the *MP Code* from 2004 to 2007 were also much more comprehensive than the rules from 2007 to the end of 2018. Subsections 2(a) to (d) of the *MP Code* contain very similarly worded broad principles as in the *PM Code* that members are "expected" to uphold, including a requirement to "act with honesty." The problem was that Commissioner Shapiro simply refused to enforce this rule. David Emerson was a Cabinet minister under then-Liberal Prime Minister Paul Martin and ran for re-election as a Liberal in the 2006 election. However, after the election, he accepted an offer from newly elected-Prime Minister Stephen Harper to switch to the Conservatives and become a Cabinet minister for his

[64] Senate of Canada, *Ethics and Conflict of Interest Code for Senators*, (June 16, 2014), online: <http://sen.parl.gc.ca/seo-cse/eng/Code-e.html>.

[65] I use the term "quasi-independent" because the Ethics Commissioner is chosen by the Cabinet even though the Commissioner enforces rules that apply to the Cabinet, and because the Commissioner has a renewable term (unlike, for example, judges who serve until retirement; the Auditor General and the Chief Electoral Officer who serve only one term). These two characteristics of the Ethics Commissioner, I argue, undermine the position's independence.

government. A complaint was filed by Democracy Watch with Ethics Commissioner Shapiro alleging the Mr. Emerson had violated the rule in the *PM Code* requiring Cabinet ministers to "act with honesty" as he was still a Cabinet minister during the election and had misled voters by running as a Liberal.[66] Democracy Watch also complained that Mr. Emerson had violated the similar honesty rule in the *MP Code*.

At the same time, Democracy Watch also filed a similar complaint about Conservative MP Belinda Stronach switching in spring 2005 to the Liberals in return for a Cabinet appointment from Paul Martin.[67] MPs also filed complaints alleging that Prime Minister Harper had violated the *MP Code* by improperly furthering Mr. Emerson's private interest with the Cabinet appointment. In his ruling, Commissioner Shapiro found no evidence that Prime Minister Harper had acted improperly by offering Mr. Emerson a Cabinet post in return for switching to the Conservatives. This was not surprising as Mr. Emerson and Prime Minister Harper were well aware of the criticism Ms. Stronach had faced the previous year when clear evidence had been disclosed that she refused to switch from the Conservatives unless she was given a Cabinet post.

What was surprising in Commissioner Shapiro's ruling[68] is that he completely ignored Democracy Watch's complaint alleging the violation of the honesty rule in the *PM Code*, as he had decided earlier that members of the public could not request investigations and rulings, and that he couldn't self-initiate an investigation under the *PM Code*. Even if Commissioner Shapiro was correct that he couldn't self-initiate such an investigation, he also dismissed Democracy Watch's complaint that Mr. Emerson had violated the similar honesty rule in section 2 of the *MP Code* even though he was allowed to self-initiate an investigation into that complaint. He instead claimed, incorrectly and without explaining why, that he couldn't enforce the rules set out in section 2 and that Parliament should deal with the matter.[69]

Nothing in the *MP Code* at the time prohibited Ethics Commissioner Shapiro from enforcing those rules (the prohibition was not added until June 2007). As well, Commissioner Shapiro had found that the section 2 rules were enforceable in his previous ruling on another MP Gurmant Grewal's party-switching, and that Mr. Grewal had violated those rules. The legally correct ruling would have been to find Mr. Emerson guilty of violating the honesty rule in both the *PM Code* and the *MP Code* as

[66] Democracy Watch, "News Release: Democracy Watch sends letters to Ethics Commissioner requesting details on when he will rule on complaints," (April 27, 2006), online: <http://www.dwatch.ca/camp/RelsApr2706.html#Emerson%20Letter>.
[67] Democracy Watch News Release (April 27, 2006), *supra*.
[68] Office of the Ethics Commissioner, *The Harper-Emerson Inquiry*, (March 2006), online: <https://ciec-ccie.parl.gc.ca/en/investigations-enquetes/Pages/HarperEmersonInquiry.aspx>.
[69] Ethics Commissioner Harper-Emerson Inquiry, at 14-15.

he misled voters in his riding by running as a Liberal and then switching parties right after the election. Commissioner Shapiro also never ruled on Democracy Watch's complaint that Prime Minister Martin had violated the *PM Code*, and Ms. Stronach had violated the *MP Code*, when she traded parties for his Cabinet appointment. In spring 2007, Commissioner Shapiro also refused to rule on another party-switching situation involving Wajid Khan, who also left the Liberals for the Conservatives.[70]

As a result of these complaints and rulings, in June 2007, based on the recommendation in a report by a House of Commons committee, the House changed the *MP Code* by adding section 3.1 which, through rather obscure wording, made the section 2 rules unenforceable, including the rule requiring MPs to act with honesty.[71] The Senator Code never contained a requirement to be honest, although in June 2014 a rule was added that, amongst other measures, requires senators to act with "integrity."[72] That rule has not been interpreted or applied by the Senate Ethics Officer in any public ruling since.[73]

Commissioner Shapiro also refused to enforce the honesty rules in the *PM Code* and the *MP Code* when Democracy Watch filed complaints about the Conservatives breaking election promises by failing to include specific measures in Bill C-2, the *Federal Accountability Act* (*FAA*), and also by making false statements re: measures in the bill.[74] Commissioner Shapiro also refused to rule on another Democracy Watch complaint about Conservatives breaking their promise not to tax income trusts.[75]

One of the false claims about the *FAA* made by Conservatives was that it transformed the rules in the *PM Code* (containing guidelines which were almost never enforced by the PM, including an honesty rule) into the *Conflict of Interest Act* ("*COIA*"), a federal law enforced by the Ethics Commissioner. In fact, the *COIA* did not include the rule requiring honesty or several other key, significant rules. As a result, since July 1, 2007 when the *COIA* came into force, Cabinet ministers, their staff, and all Cabinet

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[70] Democracy Watch, "News Release: Ethics commissioner refuses to deal with complaint about MP Wajid Khan switching parties and keeping report secret," (March 14, 2007), online: <http://www.dwatch.ca/camp/RelsMar1407.html>.
[71] House of Commons Standing Committee on Procedure and House Affairs, *Report 54: Matters relating to the Conflict of Interest Code for Members of the House of Commons*, (June 11, 2007), online: <http://www.ourcommons.ca/Committees/en/PROC/StudyActivity?studyActivityId=1516734> at A.3.
[72] *Senator Code*, section 7.2.
[73] Democracy Watch, News Release: DWatch calls on Senate Ethics Officer to rule Senator Campbell's corporate board position and investments violate ethics code, online: <https://democracywatch.ca/dwatch-calls-on-senate-ethics-officer-to-rule-senator-campbells-corporate-board-position-and-investments-violate-ethics-code/>.
[74] Democracy Watch, News Release: Ethics Commissioner again fails to enforce ethics rules -- refuses to deal with complaints about Accountability Act and income trust tax broken promises, (March 16, 2007), online: <http://www.dwatch.ca/camp/RelsMar1607.html>.
[75] Democracy Watch News Release (March 16, 2007), *supra*.

appointees have not been required by law to be honest. The *PM Code* continues to state that they are required to act with honesty, but the PM continues to not enforce that rule or any of the other rules in that code.

In contrast, federal Cabinet ministers have imposed rules on federal government employees,[76] and federal lobbyists,[77] requiring them to be honest. As a result, the lowest-level employee in the federal government, with the least political decision-making power, is required to be honest while the Prime Minister, Cabinet ministers and top government officials are all allowed to mislead. Employees can be penalized for failing to uphold the rule, up to and including being fired, with investigations handled by Deputy Ministers and other senior government officials and, if there is a whistleblowing complaint filed, also possibly by the federal Integrity Commissioner.[78]

The federal *Lobbyists' Code of Conduct*, Rule 2.1, prohibits registered lobbyists from making false claims in their lobbying communications, but many loopholes in the federal *Lobbying Act* allow for lobbying without registering, and the *Lobbyists' Code* only applies to registered lobbyists, so many lobbyists are not required to comply with the *Code*. As well, the only penalty lobbyists face is the possibility of a public report from the Commissioner of Lobbying stating they violated the rule, and the Commissioner's weak enforcement record makes this penalty only a remote possibility.[79]

4.3. Lack of independent, effective enforcement undermines legitimacy

As in almost every area of democracy protection law enforcement at the federal level in Canada, the Trudeau Cabinet continues the system under which the ruling party Cabinet chooses the head of the enforcement agency, board or commission, and often then head also serves at the pleasure of the Cabinet. This is extremely dangerous to the legitimacy of the enforcement system. As the Supreme Court of Canada has ruled, the test is whether an enforcement system appears to the public to be independent and

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[76] Government of Canada, *Values and Ethics Code for the Public Service*, online: April 2012, <https://www.canada.ca/en/treasury-board-secretariat/services/values-ethics/code/values-alive-discussion-guide.html>. The Democratic Values subsection in the Public Service Values section requires public servants to give "honest and impartial advice."

[77] Commissioner of Lobbying, *Lobbyists' Code of Conduct*, online: December 2015, <https://lobbycanada.gc.ca/en/rules/the-lobbyists-code-of-conduct/lobbyists-code-of-conduct>. The Integrity and Honesty principle, and Rules 1-3 (esp. 2), all require honesty.

[78] Public Sector Integrity Commissioner, Our Vision, Mandate and Values, online: <https://www.psic-ispc.gc.ca/en/our-vision-mandate-and-values>.

[79] Democracy Watch, News Release: Group calls on Auditor General to audit performance of federal Commissioner of Lobbying and RCMP, online: <https://democracywatch.ca/group-calls-on-auditor-general-to-audit-performance-of-federal-commissioner-of-lobbying-and-rcmp/>. Democracy Watch, News Release: House Committee recommends key changes to strengthen federal government whistleblower protection, online: <https://democracywatch.ca/house-committee-recommends-key-changes-to-strengthen-federal-government-whistleblower-protection-will-the-liberals-finally-make-the-changes/>.

impartial. When the ruling party chooses the head of an enforcement agency, let alone when the head serves at the pleasure of Cabinet, the public can easily and justifiably conclude that enforcement is partisan and lacks independence and, in the area of disinformation, that the enforcement agency would likely censor opponents of the ruling party and suppress legitimate dissent.

Very unfortunately, the Trudeau Cabinet continues to use a partisan, political appointment process for supposed watchdogs in key areas of democracy protection, including the area of the regulation of online communications, and continues to fail to recognize how much this undermines the legitimacy of all of these enforcement entities. Under current Bill C-63 before the House of Commons which, if enacted, will prohibits specific online harms, the watchdog established will also be a partisan, ruling-party Cabinet-controlled lapdog. The Bill proposes that the five members of the Digital Safety Commission (ss. 12-13), and the Digital Safety Ombudsperson (s. 29), and the CEO of the Digital Safety Office (s. 42) all be appointed by the federal Cabinet alone (no consultation with the opposition parties is required, nor is an independent, merit-based search for qualified candidates required). Bill C-63 also proposes that the CEO of the Digital Safety Office will serve at the pleasure of the Cabinet (s. 44 -- i.e. the CEO can be fired at any time for any reason). The RCMP will enforce some of the measures in the Bill, but under subsections 5(1), 6(3) and 6.1(1) of the *RCMP Act*, the RCMP Commissioner and Deputy Commissioner and the Commanding Officer of each Division of the RCMP, all of which head up the police force that enforces the anti-hate *Criminal Code* provisions in Bill C-63, are also all appointed by the federal Cabinet alone (no consultation with the opposition parties is required, nor is an independent, merit-based search for qualified candidates required) and all of them also serve at the pleasure of Cabinet (i.e. can be fired at any time for any reason). The Canadian Human Rights Commission will enforce the anti-discrimination/anti-hate provisions in Bill C-63. Under the *Canadian Human Rights Act* (*CHRA*), the members of the Canadian Human Rights Commission (ss. 26(1)) and Tribunal (ss. 48.1(1) and 48.2(1)) are also all appointed by the federal Cabinet alone (no consultation with the opposition parties is required, nor is an independent, merit-based search for qualified candidates required).

Under current Bill C-27 which, if enacted, will regulate online privacy, artificial intelligence and data operations, the enforcement entity established for artificial intelligence will be even more partisan and political, as it will be simply a Cabinet minister.

And under recently enacted anti-foreign interference Bill C-70, a very weak, ruling-party Cabinet controlled enforcement system will be established, with no requirement that enforcement will be effective, well-resourced, transparent, timely or

accountable. Click here to see Democracy Watch's full submission to the House of Commons on Bill C-70, and click here to see a summary of the submission.[80] To see analyses of Bill C-70 from three law firms that make similar points about the loopholes in the Bill and its weak enforcement system, click here and click here and click here.

5. How to Make Canada's Anti-Disinformation System Effective

The following changes are needed to prevent disinformation, especially for that special time period of an election campaign, given that once votes are cast, as court cases cited in earlier sections show, it is very difficult for a judge to overturn a result based on voters being misled. Currently, as a result of changes made by Bill C-76, large social media companies are only prohibited from knowingly running an advertisement paid for by a foreigner or foreign entity (section 190 of the Bill added new subsection 282.4(5) to the *CEA*), and required to publish a registry of election-related ads and maintain it for two years (section 208.1 of the Bill added new section 325.1).

While these measures expose election-related ads to accessible public view, they do not stop false social media ads or posts, and perversely make it easier to share false ads. As a result, the following additional enforcement measures are needed:

1. Prohibit false claims in elections and during policy-making processes by prohibiting anyone and any entity from having a social media account that is anonymous and does not identify the person or entity behind the account, and by prohibiting all false claims. Any statement made by anyone, at any time or place, including by a nomination contestant, election candidate, political party leadership contestant and person campaigning for them, politician, political staff, Cabinet appointee, government official, lobbyist, must be covered by the law. There should be no requirement to prove that the statement was intended to affect the outcome of an election or other political process.

2. Prohibit Internet, social media and all other companies from allowing fake videos and audio files to be posted on their sites and prohibiting TV, radio and telecommunications companies from allowing the transmission of a fake audio or video (especially that imitate politicians and public officials) or that concerns a politician or public official, an election or by-election, a policy-making process or any other political process.

[80] NOTE: Because Bill C-70 was rushed through Parliament, little time was provided to analyze it. As a result, please disregard point #B1 in the submission on Bill C-70 as it was made due to a misreading of one of the Bill's provisions.

3. To ensure that anyone posting on social media or paying to advertise a social media post can be monitored as closely as someone speaking through broadcast or print media or paying for TV, radio or print ads, require social media companies to disclose details about all election-related posts and ads to Elections Canada.[81]

4. Complaints about false or fraudulent advertising or statements or social media posts during elections should be reviewed by the elections watchdog agency (such as Elections Canada or, if the alleged false claim is about a specialized area, by the existing agency, board or commission that specializes in that area), which must have the power to penalize violators (as in B.C., and similar to the existing right to complain about false advertising or fraud by businesses that is enforced by the federal Competition Bureau).

5. Complaints about false or fraudulent advertising or statements or social media posts in between elections should be reviewed by the ethics/integrity commissioner (such as the federal Conflict of Interest and Ethics Commissioner or, if the alleged false claim is about a specialized area, by the existing agency, board or commission that specializes in that area).

6. The ethics/integrity commissioner must only be able to excuse a broken election promise if there is an emergency situation or a complete change of situation since the election that forced the government to break the promise.

7. Very importantly, to ensure independent, non-partisan enforcement of anti-disinformation rules, all the commissioners, agency heads tribunal members and/or judges involved in enforcing the rules must be appointed for a fixed-term through an independent, merit-based process that does not involve any politician from any party (similar to the system Quebec (sections 15 and 16) uses for appointing provincial judges (other than the last step of that process in which a Cabinet minister makes the final choice of who will be appointed from a short-list of nominees – a fully independent committee should not only conduct the search for nominees but also, as in the UK system for appointing judges, put forward only one nominee for each position)).

[81] Democracy Watch, News Release: More than 17,000 call on House Committee to strengthen Bill C-76 to stop secret, fake online election ads, October 11, 2018, online: <https://democracywatch.ca/more-than-17000-call-on-house-committee-to-strengthen-bill-c-76-to-stop-secret-fake-online-election-ads-and-invasions-of-privacy-by-political-parties/>.

8. The ethics commissioner, elections commissioner or other agency, board, tribunal or commissioner must have full investigative powers and be required to fine political “misleaders” and must have the power to require Internet and social media companies to remove posts that make any false claims, and to block access to Internet and social media sites that fail to comply.

9. Each enforcement agency must be given the right, as Elections Canada currently has concerning administering elections, to the funding needed to hire enough investigators in order to make rulings on claims that seem or are alleged to be false during an election campaign period, with the aim of removing social media posts that make false claims, and initiating prosecutions of violators before election day.

10. Reflecting the concern expressed by the CEO and CCE, all anti-disinformation provisions should be changed to strict liability, so that intention does not have to be proven, to make it easier to successfully prosecute violators, which should help to discourage violations.

11. The fine for anyone who is not a contestant, candidate, politician or public official must impose a significant cost on the misleader, and should increase on a sliding scale based on the misleader’s income, and the fine must be equal to at least 2 years’ salary of the candidate, politician, or government official, and loss of any severance payment, and a partial clawback of their pension payments, and if the candidate or politician is in a leadership position in a political party (e.g. party leader, Cabinet minister, opposition critic), their party should also be required to pay a similar amount as a fine. To be effective, the cost of the penalty multiplied by the chance of getting caught must be greater than the gain from the violation. Penalties should also be on a sliding scale that increases to match the wealth of the violator.

12. Another related significant loophole in the *CEA* is that foreign governments, political parties, businesses, unions, organizations and individuals are allowed to try to induce voters to vote, not vote, or vote in a specific way. Subsection 282.4(1) of the *CEA* prohibits foreigners doing this, but then clause 282.4(2)(a) exempts any action that does not involve expenses and 282.4(3) (together with section 330) allows three ways that would be the most usual ways a foreigner would try to influence a voter in Canada, including through online disinformation (as section 330 only applies to broadcasting). Provisions 282.4(2)(a) and 282.4(3) should be repealed, and 282.4 changed to prohibit attempting to do what the section prohibits.

13. Another related loophole is that there are no clear rules in the *CEA* to prohibit businesses, organizations and individuals (including foreign governments, entities and individuals) from establishing online "media" outlets inside or outside of Canada that are actually third-party advocacy outlets aiming to influence political processes and elections, including through disinformation, and are possibly funded by a foreign government, entity or individual. Click here to see an article, and click here to see a second article, and click here to see a third article, about the recently exposed example of Russian-funded Tenet Media that has intervened as a pseudo-media outlet, but really as a partisan third-party advocacy organization, in Canadian and U.S. politics in the past several months. The *CEA* needs to be changed so that the prohibitions on disinformation clearly apply to these pseudo-media outlets.

14. Another loophole is there are no clear rules in the *CEA* to prohibit businesses, organizations and individuals (including foreign governments, entities and individuals) from establishing a survey company that uses very questionable survey techniques that are not statistically valid, and then promoting the results on social media and Internet sites and with media releases to try to influence voters. Survey results being transmitted just before election day should be prohibited to prevent voters from being misled as they go to vote.

Recommendation #9 above is made with the full awareness of how difficult it will continue to be to counter false claims made during elections. As others have pointed out, it will remain impossible to stop a false claim made in the last few days of an election campaign from spreading.[82] An effective system would require such claims to be cleared with Elections Canada before they could be made – however that would very likely be impractical given the number of candidates and parties and advertisements and posts flooding the media and social media at any time during a campaign).

If all of the above changes are not made, it will remain easy for anyone and any entity, including foreign governments, entities and individuals, to use disinformation to interfere in and influence elections and political policy-making processes across Canada. However, again, even if all the changes listed above are made to close all the loopholes and correct all the flaws in the regulation of disinformation activities across Canada, if enforcement is tainted by political influence and is ineffective, secretive, underfunded, delayed and unaccountable (as the enforcement agency that will be established under Bill C-70 will likely be) then likely violators will be let off the hook.

[82] See, for example, Jonathan Rose, "Brexit, Trump, and Post-Truth Politics," online: 2017 *Public Integrity*, 19:6, 555-558, DOI: 10.1080/10999922.2017.1285540.