Summary Report

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**Panel Theme:** *Electoral Integrity: Nomination Contests and Leadership Contests*

**Key Issues:**

This report addresses the following three questions listed on pg. 8 of the document "Schedule and Description of Policy Roundtables" produced by the Public Inquiry Into Foreign Interference in Federal Electoral Processes and Democratic Institutions' (the "Commission"):

1. *What are the advantages and disadvantages of regulating/imposing rules on political party processes?*
2. *How might rules around nomination and leadership contests be reformed to make them less vulnerable to foreign interference?*
3. *What type of rules should be set by political parties and what type of rules should be legislated (if any)? Who should be responsible for supervising and enforcing them?*

**Assessment:**

Question 1: *What are the advantages and disadvantages of regulating/imposing rules on political party processes?*

Political parties were traditionally treated as unincorporated associations like trade unions in the Westminster, common law tradition derived from the United Kingdom and inherited by Canada.[1] This position became untenable over time because of the essential role played by political parties.

Political parties are private entities with their own membership, constitutions and by-laws, and cultures.[2] In Canada, they are partly self-regulated. Self-regulation by parties serves a valuable function in a democracy. Self-regulation permits parties to make choices separate from the state and from the will of the legislature.

While parties have traditionally been private entities in Canada and self-regulation serves important goals, parties have an undeniable public role. The law has gradually evolved in response to the changing practices of parties and increasing citizen expectations. What has emerged can be characterized as self-regulation within a legislative framework reflecting public values. Federally, the *Canada Elections Act,*[3] applies to political parties and regulates core elements of their activities,

[1] Anika Gauja, "The Legal Regulation of Political Parties: Is There a Global Normative Standard?" (2016) 15:1 Election Law Journal; William Cross, "Considering the Appropriateness of State Regulation of Intra-Party Democracy: A Comparative Politics Perspective" (2016) 15: 1 Election Law Journal.
[2] R. Y. Hazan, and Gideon Rahat, *Democracy within Parties: Candidate Selection Methods and Their Political Consequences* (Oxford University Press, 2010).
[3] S.C. 2000, c.9.

including notably registration[4] and financial administration.[5] The registration requirements are relatively modest, while financial administration is arguably the most robust form of regulation. The legislative framework leaves consequential decisions to parties regarding candidate and leadership selection, including the method of selecting candidates and leaders, the process, and the timeframe. Under the current legal approach, there is a balance between self-regulation and the imposition of public values reflected in specific statutory obligations.

Party nomination and leadership contests reflect this hybrid and evolutionary approach. These events are partially regulated, but with an underlying assumption that the contests are primarily matters for parties to decide internally. Section 476 of the *Canada Elections Act* imposes obligations on nomination contestants, including submitting a nomination contest report and campaign return, and appointing a financial agent. A report must be filed with Elections Canada 30 days after the "selection date" of the candidate.[6] A nomination contestants' financial agent must open a bank account.[7] Nomination contestants face a limit on contest expenses set at 20% of the maximum permitted spending by a candidate in the last federal election in that riding.[8] It is an offence to collude to evade the limit.[9] Candidate selection within parties has increasingly been centralized, because of extensive vetting of prospective nomination contestants by the central party.[10]

The Commission's mandate provides an opportunity to consider whether the current legal framework provides the correct balance between self-regulation and legislative oversight. In my view we need to update the balance. Foreign interference has changed the equation. The risks of self-regulation have undeniably increased if internal party processes are the target of malicious state and non-state foreign actors. The potential consequences of foreign interference include not simply harm to party members, but to the democratic process itself. These realities mandate shifting further away from self-regulation than the current approach, without abandoning respect for political party autonomy.

Question 2: *How might rules around nomination and leadership contests be reformed to make them less vulnerable to foreign interference?*

Two values should be paramount in shaping reforms.

The first is "electoral integrity." "Electoral integrity" refers to the "agreed upon international conventions and universal standards about elections reflecting global norms applying to all countries worldwide throughout the electoral cycle, including during the pre-electoral period, the campaign, on polling day, and its aftermath."[11] Any reforms should have global norms and international standards in mind and consider the full electoral cycle.

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[4] *Canada Elections Act,* S.C. 2000, c.9 at s. 385.
[5] *Canada Elections Act,* S.C. 2000, c.9 at s. 425-445.
[6] *Canada Elections Act,* S.C. 2000, c.9 at s. 476.1(1).
[7] *Canada Elections Act,* S.C. 2000, c.9 at s. 476.65.
[8] *Canada Elections Act,* S.C. 2000, c.9 at s. 476.67.
[9] *Canada Elections Act,* S.C. 2000, c.9 at s. 476.68(2).
[10] Scott Pruysers and William Cross, "Candidate Selection in Canada: Local Autonomy, Centralization, and Competing Democratic Norms" (2016) 60:7 American Behavioral Scientist 781-798; Alex Marland, "Vetting of Election Candidates by Political Parties: Centralization of Candidate Selection in Canada" (2021) 51:4 American Review of Canadian Studies 573-591.
[11] Pippa Norris, *Why Electoral Integrity Matters* (Cambridge University Press, 2014) at 21.

The second relevant value is the "egalitarian model" of elections.[12] The Supreme Court of Canada has on multiple occasions upheld the constitutionality of electoral statutes which embody egalitarian values.[13] An egalitarian approach means legislation that seeks to ensure a level-playing field among political contestants, regardless of their size or likelihood of winning.[14] Small parties are therefore to be treated similarly to large political parties under this approach. The egalitarian model also entails attempts to reduce the impact of disparities in wealth or resources on the electoral process. Contribution limits and spending limits are key examples of egalitarian electoral regulation.

Question 3: *What type of rules should be set by political parties and what type of rules should be legislated (if any)? Who should be responsible for supervising and enforcing them?*

One of the options in the public discussion has been to severely restrict self-regulation by having Elections Canada administer nomination and leadership contests. I would not favour such an approach. Administration of internal party processes by an external entity undermines the private nature of political parties. It would be an example of unnecessarily "securitizing" election administration.[15]

The following recommendations would update the legislative framework, consistent with the values of integrity and an egalitarian approach, so as to reduce the risk of foreign interference and its impact on Canadian democracy while respecting party autonomy.

**Transparency -** Transparency is central to ensuring electoral integrity and a level-playing field. Nomination contestants must report 30 days after the "selection date," whereas leadership contestants have a more robust set of reporting obligations, including *during* the leadership contest. Nomination contestants should be required to report during the nomination contest so that there is additional transparency as to their activities.

**Political Finance –** Reforms related to political finance would further the values of electoral integrity and egalitarianism.

First, the contribution limit should be *decreased* for contributions to nomination contestants. The amount that can be spent in nomination contests is lower than the spending limit for candidates in a general election in the same riding. The contribution limit for nomination contests should also be reduced so as to be proportional to spending. This reform would reduce the amount of money in the system, consistent with the egalitarian model. It would also decrease the risk that a small number of maximum contributions from ineligible foreign entities could distort a nomination contest.

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[12] Michael Pal, "Is the Permanent Campaign the End of the Egalitarian Model of Elections?" in Richard Albert *et al,* eds *The Canadian Constitution in Transition* (University of Toronto Press, 2018); Colin Feasby, "*Libman v Quebec (AG)* and the Administration of the Process of Democracy Under the Charter: The Emerging Egalitarian Model" (1998) 44 McGill LJ 5.

[13] *Harper v Canada (AG),* 2004 SCC 33; *Libman v Quebec (AG),* [1997] 3 SCR 569; *R v Bryan,* 2007 SCC 12; *BC Freedom of Information and Privacy Association v BC (AG),* 2017 SCC 93.

[14] See *Figueroa v Canada (AG),* [2003] 1 SCR 912.

[15] Lisa Young, "Securitizing Election Law and Administration? Canada's Response to the Cyber-Security Threats to Elections" in Holly Ann Garnett and Michael Pal, eds, *Cyber-Threats to Canadian Democracy* (McGill-Queen's University Press, 2022) 31.

Second, the third party regime applicable in the regulated pre-writ period and election campaign period should be adapted and applied during nomination contests. Part 17 of the *Canada Elections Act* and related provisions set out a robust oversight regime for "third parties," which are individuals and groups other than political parties, candidates, nomination and leadership contestants, and electoral district associations. The legislation requires third parties to register, sets a maximum on the amount they can spend on certain activities during the period from June 30 to the fixed election date in the same calendar year (the "pre-writ period"), and sets a maximum on spending during the official election campaign period.

Nomination contests which occur prior to the regulated pre-writ period are outside of the operation of these rules. In other words, third parties can spend unlimited amounts in these contests and are not subject to the requirements to register and report that apply during the pre-writ and writ periods. Notably, third parties spending money outside of the pre-writ period in relation to nomination contests are not subject to s.349.02 and s.349.03 of the *Canada Elections Act*. Those provisions prohibit third parties from using foreign funds to engage in regulated activities, such as advertising or conducting election surveys, and from colluding to avoid the prohibition.

Third, non-monetary contributions (meaning goods and services not money or its equivalents) are treated as contributions by the legislation and subject to a contribution limit and rules on eligible contributors. Non-monetary contributions are a potential venue for foreign interference, as they may be harder of electoral authorities to detect than monetary contributions. Campaigns should be required to take steps to ensure increased transparency around non-monetary contributions, including by affirming that contributors are all eligible citizens or permanent residents.

**Eligibility –** Section 65 of the *Canada Elections Act* sets out certain categories of individuals as ineligible to stand as candidates. Section 65 should be amended such that individuals convicted of offences related to foreign interference in Canadian elections and democratic processes are ineligible to stand as candidates.

Such an amendment would become relevant in the scenario that an individual is convicted of an offence related to foreign interference in Canadian elections or democratic processes, but a political party would still nominate them as a candidate or allow them to contest for a nomination.

**Procedural Fairness** – Some allegations of foreign interference turn on claims that a party did not adhere to its own procedures, so as to favour a particular nomination contestant. There are long-standing concerns about procedural fairness within political parties. The *Canada Elections Act* should be amended to require political parties, while administering their own activities, to abide by basic standards of procedural fairness in the treatment of nomination contestants or potential nomination contestants.

**Recommendations**:

1. Require nomination contestants to report on financial and administrative matters to Elections Canada two weeks prior to the nomination "selection date";

2. Require disclosure of citizenship status and/or attestation of citizenship status by individuals making non-monetary contributions to nomination contestants;

3. Decrease the maximum amount that an eligible individual (citizen or permanent resident) can contribute to a nomination contestant;

4. Impose registration requirements and a spending limit on "third parties" that spend funds promoting or opposing a nomination contestant during a nomination contest outside of the defined pre-writ or writ periods;

5. Amend s.65 of the *Canada Elections Act* to prohibit individuals convicted of offences related to foreign interference from standing as candidates for a seat in the House of Commons;

6. Amend the *Canada Elections Act* to oblige political parties engaging in nomination contests to follow minimum standards of procedural fairness in respect of the nomination contest.