

Rebalanced and Revitalized

A Canada Strong and Free

Mike Harris & Preston Manning



2006

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MIKE HARRIS

Mike Harris was born in Toronto in 1945 and raised in Callander and North Bay, Ontario. Prior to his election to the Ontario Legislature in 1981, Mike Harris was a schoolteacher, a School Board Trustee and Chair, and an entrepreneur in the Nipissing area.

On June 8, 1995, Mike Harris became the twenty-second Premier of Ontario following a landslide election victory. Four years later, the voters of Ontario re-elected Mike Harris and his team, making him the first Ontario Premier in more than 30 years to form a second consecutive majority government.

After leaving office, Mr. Harris joined the law firm of Goodmans LLP as a Senior Business Advisor and acts as a consultant to various Canadian companies. Mr. Harris serves as a Director on several corporate Boards including Magna International and Canaccord Capital Inc. and is Board Chair of the Chartwell Seniors Housing REIT. He also serves on a number of corporate Advisory Boards for companies such as Aecon and Marsh Canada. Mr. Harris also serves as a Director on the Boards of the Tim Horton Children's Foundation and the St. John's Rehabilitation Hospital.

He is also a Senior Fellow of The Fraser Institute, a leading Canadian economic, social research, and education organization.

PRESTON MANNING

Preston Manning served as a Member of the Canadian Parliament from 1993 to 2001. He founded two new political parties—the Reform Party of Canada and the Canadian Reform Conservative Alliance—both of which became the Official Opposition in the Canadian Parliament. Mr. Manning served as Leader of the Opposition from 1997 to 2000 and was also his party’s critic for Science and Technology.

Since retirement from Parliament in 2002, Mr. Manning has released a book entitled *Think Big* (published by McClelland & Stewart) describing his use of the tools and institutions of democracy to change Canada’s national agenda. He has also served as a Senior Fellow of the Canada West Foundation and as a Distinguished Visitor at the University of Calgary and the University of Toronto. He is currently a Senior Fellow of The Fraser Institute and President of the Manning Centre for Building Democracy.

Mr. Manning continues to write, speak, and teach on such subjects as the revitalization of democracy in the Western world, relations between Canada and the United States, strengthening relations between the scientific and political communities, the development of North American transportation infrastructure, the revitalization of Canadian federalism, the regulation of the genetic revolution, and the management of the interface between faith and politics.

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Of course, we take full responsibility for the ideas and interpretations presented here. While we have relied on the insights of many, we set the analysis and the policy choices this document reflects.

FOREWORD

A CANADA STRONG AND FREE

In March of 2005, under the auspices of The Fraser Institute, we published a report entitled *A Canada Strong and Free*. We began with positive recollections of the great things Canadians have achieved together in the past. But we also asked, what of the future? Where is that strong, clear, national vision that will unite and guide Canada for the twenty-first century? And what are the public policies that will make that future a reality?

In recent years, a vision and policy deficit developed at the national level, which, compounded by the revelations of the Gomery Inquiry, contributed to the defeat of the Liberal administration on January 23, 2006. Now the challenge of remedying that vision and policy deficit falls to a new administration and we are hopeful that the various reports of this *Canada Strong and Free* series will be of assistance in meeting that challenge.

To address the need for a fresh and substantive national vision we proposed in our first report that Canadians aim to achieve standards of living, economic performance, and democratic governance that are the highest in the world—achievements that would make Canada a model of international leadership and citizenship.

We proposed that this vision could be made a reality by public policies based on the principles of real democracy, freedom of choice, acceptance of personal responsibility, and “rebalanced federalism.”

We then illustrated how these principles might be applied in practice to health-care reform, improving economic performance, optimizing the

size of government, addressing Canada’s democratic deficit, rebalancing federalism, and advancing Canada’s national interests on the international stage. We also used data from a national public-opinion survey to assess the feasibility of gaining public acceptance of policies based on such principles and invited public feedback.

CARING FOR CANADIANS

In September 2005, we released the second volume in this series, *Caring for Canadians in a Canada Strong and Free*. In it, we focused specifically on the first component of our national vision—enabling Canadians to achieve the highest quality of life in the world.

Quality of life means different things to different people. In the second volume, we focused on applying our principles of democratization, freedom of choice, acceptance of personal responsibility, and rebalanced federalism to dramatically improving the quality of K-12 education, welfare services, health care, and child care in Canada.

We examined data showing that students from those provinces that provide greater freedom of choice in education performed significantly better in international tests in reading, science, and mathematics than students from those provinces that limit freedom of choice. We also examined data showing that, while the federal government insists on directing increased child-care funding to institutional child-care providers, the majority of Canadians would much prefer that child-care support payments go directly to parents to enable them to make their own child-care choices. The same data show that the number-one preference of such parents is to have their children cared for in their own homes.

We further examined data that demonstrate that those countries offering universal health-care coverage to all their citizens (just like Canada) but using a “mixed approach” (public and private) to health-care delivery, payment, and insurance achieve better health-care outcomes at lower total cost in virtually every category of measurement—from timely

access to doctors and advanced medical technology to reductions in infant mortality and deaths due to treatable illnesses.

We also explored the consequences of the federal government's respecting or failing to respect the principle that responsibility for the delivery and financing of services most essential to quality of life—health, education, and social assistance—should be allocated, along with the appropriate taxing authority, to those levels of government closest to the people to be served. We found that where the federal government has respected provincial and local jurisdiction—for example, in K-12 education and more recently in the provision of welfare services—and where the provinces have responded by innovating and expanding freedom of choice, there have been impressive improvements in the quality of service. But where the federal government has gone in the opposite direction by interjecting itself into areas of provincial jurisdiction and limiting freedom of choice—as it has done for decades with respect to health care and now threatens to do in the area of child care—the result has been an inferior quality of service (by international standards) despite huge and ever-increasing expenditures.

Based on this data and analysis we recommended: expanding freedom of choice in K-12 education via educational vouchers issued to parents by provincial governments; expansion of the shift from “welfare to workfare” pioneered by the Harris government in Ontario; getting the federal government out of the child-care field by ending federal spending initiatives in this area and ceding equivalent tax room to the provinces; directing provincial child-care support to parents and further increasing their freedom of choice by making the tax system neutral with respect to the form of child care chosen.

Further, in order to give Canadians the best health care in the world, we recommended a twenty-first-century health-care system characterized by universal coverage for every citizen regardless of ability to pay, combined with a “mixed approach” (public and private) to health-care delivery, payment, and insurance. To achieve such a system requires eliminating the federal role in health-care management and financing; granting the

provinces the vacated tax room; eliminating barriers to private health-care delivery, payment, and insurance; giving Canadians greater freedom to choose their health-care providers; and giving those providers (public and private) the opportunities, resources, and incentives to provide faster access to better care at lower cost.

BETTER GOVERNMENT FOR CANADIANS

In this third volume of the series, *Rebalanced and Revitalized: A Canada Strong and Free*, we focus on achieving another key aspect of our national vision—making Canada the best governed democratic federation in the world.

At a time when unethical behaviour by those in high government positions, gross misuse of large amounts of public money, and scandalous abuses of public trust have reached unprecedented levels in the government of Canada, we propose a variety of measures for significantly improving transparency and accountability in government. At a time when public participation in elections and public confidence in Parliament, political parties, leaders, elected officials, and even democracy itself continues at unacceptably low levels, we challenge Canadians to choose from a carefully researched Menu of Democratic Reforms those measures that they believe will best address the so-called “democracy deficit” in our country. At a time when major imbalances exist between federal and provincial responsibilities and resources, between the judicial, executive, and legislative arms of government, and between the portion of national income allocated to the public and private sectors—threatening national unity, the role of Parliament, the quality of our social services, and the productivity of our economy—we propose substantive measures for “rebalancing the federation.”

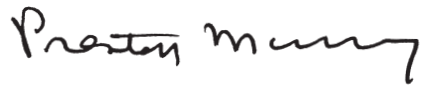
Making Canada a world leader in democratic governance and the practice of federalism is not dependent on the size of our population, our military, or our economy. Rather it is largely dependent on the extent to

which our citizens and politicians are prepared to commit themselves to this objective and to support and adopt the reforms and policies that will make it a reality.

With this end in view, we invite you to examine the policies proposed in this volume, support their adoption, and participate personally in the revitalization of democracy and federalism in Canada.



Mike Harris
Toronto, Ontario



Preston Manning
Calgary, Alberta

EXECUTIVE SUMMARY

Rebalanced and Revitalized: A Canada Strong and Free examines the “democratic deficit” present in Confederation today and applies to it these foundational principles: expanding Canadians’ freedom of choice; challenging Canadians to accept greater personal responsibility; and deepening Canada’s practice of federal democracy. The democratic deficit has three dimensions:

- 1 the immediate need to restore transparency and accountability to the operations of government, especially the federal government, as presently constituted;
- 2 the need to adopt measures that will strengthen our democratic processes and institutions and invigorate Canadian democracy over the longer term; and
- 3 the urgent need to address imbalances among the orders of government in the Canadian federation (federal, provincial, and municipal) as well as the branches of the federal order (legislative, executive, and judicial).

BETTER GOVERNMENT TODAY—RESTORING TRANSPARENCY AND ACCOUNTABILITY

To make government in Canada more responsive immediately, we must enhance its *transparency* (the extent to which citizens and their representatives have access to information about deliberations, decisions, and

actions) and its *accountability* (the ability of citizens and their representatives to hold individuals in government to account for their decisions and actions). Measures that will bring this about include:

- ✦ strengthening government financial reporting;
- ✦ reinforcing rights of access to government information;
- ✦ re-examining constraints upon cabinet confidentiality;
- ✦ improving documentation and access to the documentation of public-sector decision-making;
- ✦ placing an obligation on officials to release information bearing on public health or safety regardless of other considerations;
- ✦ enhancing the scope and traction of the Auditor General’s oversight;
- ✦ providing for an annual “report card” to grade government performance by measurable standards;
- ✦ enacting a “Sarbanes-Oxley” for government to place statutory requirements on government financial reporting, protecting “whistleblowers” who expose malfeasance, and providing appropriate sanctions for misconduct.

BETTER GOVERNMENT TOMORROW— A MENU OF DEMOCRATIC REFORMS

In chapter two, we offer of menu of 12 proposals for strengthening our democratic processes and institutions.

- 1 Investment in *civic education* would equip citizens better to exercise their democratic rights and responsibilities.

- 2 *Citizens' assemblies* can be effective in identifying potential democratic reforms with less risk of “capture” by partisan factions.
- 3 *Fixed dates for elections* are a means of reducing political manipulation of the electoral timetable.
- 4 *Electoral alternatives* to the current first-past-the-post system could produce more representative legislatures.
- 5 Well-managed *referendums* can facilitate democratic decision-making without courting the “tyranny of the majority.”
- 6 Provision for *citizens' initiatives*, including recall, put additional power directly in citizens' hands.
- 7 Reform of election-spending rules would liberate *third-party advocacy and issue campaigns* to make a greater contribution to the public debate.
- 8 Scrutiny of the *Court Challenges Program* will ensure it does not become a proxy for advancing government policy.
- 9 Relaxing House practice on “confidence” bills to permit more *free votes* would enhance the effectiveness of Members of Parliament to represent electors' interests.
- 10 Funding for aboriginal services redirected from band governments to individuals would create conditions for *responsible government for aboriginals*.
- 11 Reforming party financing and the administration of nomination and leadership contests will enhance the *transparency and accountability of political parties*.
- 12 Investment in *democratic infrastructure* (i.e., civil society institutions dedicated to policy research, political communications, and the training of political participants) will ensure the long-term vitality of Canada's freedoms, expand policy options, and improve political effectiveness.

OF TOP PRIORITY

- ✦ stronger non-partisan and non-ideological civic education;
- ✦ citizens' assemblies and referendums to choose the preferred democratic reforms;
- ✦ freer voting in legislatures and in Parliament.

**TOWARD A BETTER CANADA—
REBALANCING THE FEDERATION**

Chapter three proposes remedies for the serious imbalances among the federal, provincial, and municipal orders of government in the Canadian federation as well as among the legislative, executive, and judicial branches of the federal order.

The most serious of these imbalances results from the intrusion of the federal government into constitutionally assigned spheres of provincial responsibility such as health care, welfare, and child care. *Caring for Canadians in a Canada Strong and Free* provided compelling evidence that the quality of social-service delivery tends to vary inversely with the arbitrary exercise of the federal spending power in provincial areas of responsibility. Therefore:

- ✦ the federal government should remove itself completely from the fields of social assistance, child care, and health care;
- ✦ this withdrawal should be coordinated with a reduction in federal revenues by the current value of federal fiscal transfers to the provinces in support of these services, vacating the equivalent tax room to the provinces;
- ✦ the provinces, in fully assuming these responsibilities, should provide maximum freedom of choice to the recipients of essential social services;

- ✳ the current equalization formula should be amended to provide additional revenues to lower-income provinces for which a “tax point” is worth less than for higher-income provinces; and
- ✳ interprovincial agreements and memorandums of understanding (MOUs), facilitated by the Council of the Federation, should be used as powerful new forces for binding the nation together and maintaining national standards.

Secondly, there has been a progressive failure to maintain a democratic and dynamic balance among the powers of the three branches of federal authority. In particular, the legislative power of Parliament has been eroded by an excessive expansion of the authority of the executive (especially the Prime Minister’s Office) and of the judiciary. A rebalancing of these relationships requires:

- ✳ a democratically elected Senate to act as a more effective check on the power of the executive;
- ✳ a more vigorous role for parliamentary committees and a more secure tenure for their members;
- ✳ greater transparency in appointments to the Supreme Court; and
- ✳ rehabilitation of the “notwithstanding clause” of the *Charter of Rights and Freedoms* by subjecting its use to approval or rejection in a referendum.

OUR GOAL, AGAIN?

To make Canada the best-governed democratic federation in the world—the achievement of which is not dependent on the size of our population, military, or economy, but on the strength of our commitment to this goal and the reforms required to make it our reality.

PREAMBLE

“GOOD GOVERNMENT”: A PROMISE UNFULFILLED

They are probably the best-known words in Canada’s constitutional lexicon: “Peace, Order, and good Government.” The famous phrase is found in the opening passage of Clause 91 of the document that created Confederation in 1867, the *British North America Act*. It occurs in the preamble to the powers of the federal Parliament.

Canadians take pride in our accomplishment of a generally peaceful and well-ordered society. We are still waiting for the fulfillment of the promise of good government. It is time to make a break with patience. We envision a near future in which Canadians may justly boast that we possess not only “good” government but the very best democratic governance in the world. It is within our reach. We need only make a beginning by recognizing the principles of real democracy: freedom of choice, acceptance of personal responsibility, and institutions of government that are in balance with the citizen and the fulfillment of their own roles. These principles recur throughout the *Canada Strong and Free* series—for good reason. They are essential if we are to realize the sacred and enduring trust at the very heart of democracy: the idea that government serves the people and not the other way around.

This trust is embedded in the principles of a parliamentary government that is both representative and responsible. We might also say, in a word, “responsive.” But to make something as big and unwieldy as *government*, an enterprise that employs hundreds of thousands of Canadians and consumes four out of every ten dollars of our national wealth, behave in a truly responsive manner is no trivial task.

It is evident that the mechanics of democracy are subject to a wide range of flaws and failures. Perfection, certainly, is nowhere in sight here

or abroad. Canadians have been rightly scandalized by the venal misconduct disclosed during the recent inquiry by Mr. Justice Gomery. Looking beyond our own borders, we see that other advanced democracies also suffer shortcomings. For example, our American neighbours have recently been dismayed by evidence of influence peddling in Congress. And in 2005, citizens of Germany were left with a leadership vacuum for weeks while their legislators struggled to form a credible government.

The size and complexity of modern government are further brakes on democratic responsiveness. Large organizations inevitably develop a degree of institutional inertia. They are prone to empire building and resistant to changes in course. In a democracy, these tendencies conflict with the interests of the very citizens that governments exist to serve. Over time, the structures, conventions, and practices that once kept the many forces at play on government in some reasonable balance fall behind. In short, constitutional checks and balances lose effectiveness. It becomes necessary to update them.

It is encouraging to remember, however, that perpetual, organic improvement is an evolutionary feature of democracy (as it is, for entirely related reasons, of free markets). Furthermore, Canadians already possess every essential quality required to restore democratic responsiveness to our government: a vibrant, diverse, and well-educated citizenry; a flexible political structure already far advanced from its infancy; and, as we will see in the pages ahead, no shortage of good ideas.

One of the most admirable distinguishing characteristics of Canadians is our commitment to “balance”—our desire to avoid extremes and pick the best middle road among alternatives in our personal and national endeavours. Regrettably, Canadian public policy and its administration are characterized today by several serious *imbalances*. If our vision of Canada as the best governed democratic federation in the world is to be realized, these must be corrected. Identifying the means to do so is the task we set for this volume of *Canada Strong and Free*.

The first two chapters of this volume deal with rebalancing the relationship between government and the citizen. In chapter one, we tackle the out-of-control kleptocracy that is in danger of subverting the proper

responsibility of government to serve the citizen. We discuss practical steps we can take to restore the balance, to require that government agencies be transparent in their operations and accountable for their actions. We identify tools that will empower citizens to exercise their rights and responsibilities as “shareholders” in the enterprise of government. In chapter two, we offer a selection of strategies for strengthening the critical balance between government and citizen in the longer term, concluding with our views on the most promising of these alternatives.

Having dealt in chapter one with what needs to be done to restore a better balance to the government we have today and in chapter two with some ways we can nourish democracy over the long term, we turn in chapter three to what may be the most critical task for the medium term: redressing the serious and debilitating imbalances that have developed in the roles and performance of the different orders and functional branches of our federation. We make specific recommendations for “rebalancing” the activities of Ottawa and the provinces to restore their proper respective constitutional capacities. We also identify critical imbalances among the legislative, executive, and judicial branches of the federal government and propose remedies.

Taken together, the analysis and recommendations that follow suggest a course that can make our Canada into a land of truly unparalleled strength and freedom.

1 BETTER GOVERNMENT TODAY

RESTORING TRANSPARENCY AND ACCOUNTABILITY

We envision a future in which every Canadian has the tools necessary to exercise the most important right a democracy can confer on its citizens: the right to evaluate and judge those who govern, to correct laws that limit freedom, to check the waste of public monies, and to discipline those who abuse power. But for Canadians to exercise these critical responsibilities, there must first be transparency and accountability in government.

These goals may seem abstract; they are not. *Transparency*, in essence, means that governments must give us the information that we, as citizens, need to form a fair judgment of their performance. *Accountability* means that when errors do occur, someone—a minister, a senior deputy, or an entire administration—takes responsibility for that error. The two ideas go hand in hand. Without transparency, citizens and their representatives in Parliament have no way of knowing when officials or ministers depart from their wishes. Without some legal means to hold governments accountable, transparent access to information about their activities is useless. For Canadians to exercise the essential democratic role of evaluating their governments' performance, those who govern must act in a manner that is simultaneously both transparent and accountable.

Those who resist steps to improve transparency and accountability argue that respect for these values will constrain the ability of governments to act rapidly and decisively. Doubtless, a government with unchecked power can act faster than one subject to internal and external controls. But in a democracy such as ours, where government wields power only by consent of the people, the demands of efficiency can never be allowed to trump accountability to Canadians.

This principle is not merely ethical or ideological. Accountability and transparency are intimately linked to how well government performs. This might seem like simple common sense: a government that knows its citizens are watching will be more likely to tailor its behaviour to their interests. But there is empirical evidence for this link as well. One recent study found that free access to information was the single most powerful factor driving economic growth (Siegle, 2001). Other research shows that international investors consistently favour countries whose governments demonstrate high levels of transparency (OECD, 2003). This is hardly a surprise: the more open a government is, the less likely it is to make arbitrary and unexpected decisions; and the fewer opportunities it has for corruption. Still other findings suggest that more transparent government can reduce a country's risk of external conflict (Ritter, 2000). Presumably, when countries negotiate with ample information about one another, discussions are less likely to collapse and lead to confrontation.

But transparency and accountability make their most vital contribution to the functioning of a responsive democracy. Citizens with transparent access to information about their governments are able to hold public administrations to account for their acts and decisions. Only then is democracy's promise fulfilled: a government in service to the people, rather than a people in servitude to the powerful.

THE NEED: STOP THE ROT

We might complacently assume that Canada compares well to other democracies on this score. But we would be wrong.

Transparency International, a non-governmental watchdog against corruption based in Berlin, ranks nations around the world for their openness and accountability. Its annual "Corruption Perception Index" (Transparency International, 2005) is compiled by asking country experts, citizens, visitors, and both resident and non-resident business leaders to assess the extent of corruption in each country evaluated. By this ranking, Canada has slipped from being the seventh least corrupt country in the

world as recently as 2001 to placing a dismal fourteenth in 2005. While our standard has slipped, other countries like Australia, Austria, Norway, the United Kingdom, and Switzerland have moved ahead of Canada in this ranking.

But Canadians hardly need to look abroad for evidence that transparency and accountability have been in decline in our government. The Gomery Inquiry (www.gomery.ca) catalogued a disheartening accumulation of lapses in administrative ethics and responsibility: secretive partisan awards of federal sponsorship contracts, gross overspending, confusion and misdirection regarding the goals of the Sponsorship Program, scandalous flouting of applicable rules and guidelines, multiple conflicts of interest, evidence of criminal culpability, and a breathtaking refusal by those making flawed decisions to accept responsibility for their actions.

Yet even this sordid account ought not to have surprised us. The Auditor General of Canada foreshadowed Justice Gomery's conclusions as early as 2003. In her report that year she wrote: "From 1997 until 31 August 2001, the federal government ran the Sponsorship Program in a way that showed little regard for Parliament, the *Financial Administration Act*, contracting rules and regulations, transparency, and value for money" (Canada, OAG, 2003/Nov: 3.1). This obliviousness, unhappily, was neither unique nor exceptional. As the Auditor General continued: "The pattern we saw of non-compliance with the rules was not the result of isolated errors. It was consistent and pervasive. This was how the government ran the program. Canadians have a right to expect greater diligence in the use of public funds" (3.122).

That expectation remained unmet. In 2005, the Auditor General identified still more trouble spots. She found these to be especially rife in programs involving more than one level or department of government, or which included participation by the private and voluntary sectors, non-governmental organizations (NGOs), or individuals. Such "horizontal" initiatives are naturally complicated. Jurisdictions overlap. Responsibility for attaining goals becomes blurred (Canada, OAG, 2005/Nov: 4). Even when individual participants are subject to appropriate audit guidelines (not always the case), these may not capture the whole picture of what

is being achieved—and at what cost. When something goes wrong it is difficult or even impossible for Parliament, let alone the public, to assign responsibility.

These are avoidable problems. Remedies exist to redress the imbalance between sprawling, unaccountable, and unresponsive governments and the citizens they exist to serve. The proposals that follow would do much to restore transparency and accountability in federal affairs to a standard in which Canadians could take confidence and pride.

GETTING THE GOODS: IMPROVE GOVERNMENT REPORTING

Sound information is critical to good decisions and to accountability. Sadly, much of the information about government activity that reaches Parliament and Canadians at large is difficult to use. This is partly a legacy of reporting systems developed originally on a department-by-department basis—fragmented, disconnected, and rarely consistent. From these it is difficult to identify trends, compare effectiveness across departments, or grasp the government's overall performance. What is lacking is any integrated system to draw the spending and accomplishments of all departments into a single, useable report.

One Canadian province has been nationally recognized for its success in addressing this problem. Over the last several years, Ontario has deployed state-of-the-art information technology, replacing disparate financial systems in ministries and agencies throughout the province with a single, integrated system. This was no small task. Ambitious, expensive, and time-consuming, it took five years to accomplish. Since its completion in October, 2004, however, Ontario's Integrated Financial Information System (IFIS) has provided public-service managers with timely, comprehensive, and comparable financial data from across the range of provincial operations. Better informed managers are far better equipped to ensure that subordinates stay on task and costs are kept under control.

While costs would be significant, such an initiative at the federal level could significantly improve government performance, transparency, and accountability. Consistent and comparable reports from operations across the range of government activities would inherently improve monitoring. It should also enhance transparency, simplify evaluation, and promote better planning. Therefore, we recommend

- ✦ *that the Federal Government consider developing an integrated, government-wide financial reporting system.*

A RIGHT TO THE FACTS: EXPAND FREEDOM AND ACCESS TO INFORMATION

We are all familiar with the phrase, “garbage in, garbage out.” The quality of Canadians’ judgments about our government can only ever be as good as the quality of information available to us.

The right to know what our governments are up to in our name is basic to a responsive democracy. It underlies deeply rooted democratic values: freedom of the press, free elections, and ministerial responsibility. So important is this right, in fact, that it compels a key presumption: that when a citizen asks his or her government for information, that information should be forthcoming *as a matter of right*, unless there is good reason for it to be withheld. There may be such good reason: the protection of another citizen’s privacy or the security of the nation. But the citizen requesting the information should not have the burden of justifying the request and explaining its purpose. Government, in short, must disclose whatever information the public requests or provide a reasonable explanation as to why it may not be disclosed.

It was in this pro-user spirit that Canada’s *Access to Information Act* 1985 was originally designed. However, during the 20 years since the *Act* came into force, the federal government has continually whittled away its scope through arbitrary exclusions and exemptions. These often directly violate the *Act*’s explicit standard that “necessary exceptions to the right

of access should be limited and specific, and that decisions on the disclosure of government information should be reviewed independently of government” (*Access to Information Act 1985* [Can]: s 2).

The *Act* established an authority to conduct such independent reviews. Appointed by, and reporting directly to, Parliament, the Information Commissioner is further empowered to investigate complaints from citizens that information to which they are entitled is being arbitrarily withheld. The current Information Commissioner has been in office since 1988. Yet his *Annual Report 2004-2005* (Reid, 2005: 9) notes that many federal officials distrust and resist the *Act*. In defiance of its principles, they continue to control what information is disclosed and when, denying the right of Canadian citizens to the fullest possible information about the conduct of their government. Apparently not satisfied with violating the spirit of the existing law, the previous government assembled an internal Task Force in 2001 to reform the *Act* (Canada, Access to Information Review Task Force, 2002). Its recommendations would, if implemented, actually increase the potential for government secrecy rather than reduce it, the Commissioner warned (Reid, 2002: 11–14).

This is worrisome. It invites the conclusion that governments cannot be trusted to uphold our right to know what they are doing in our name, on our behalf, and with our money. As citizens, we must insist on better answers. In his “*Blueprint for Reform*” (Reid, 2001), the Information Commissioner made specific recommendations as to how better to meet the original intentions of the *Act*. The previous government, in its response, “*A Comprehensive Framework for Access to Information Reform*” (Canada, DoJ, 2005/Apr), rejected most of these.

We believe that several of the Information Commissioner’s proposed reforms deserve another look. The following changes should be adopted to ensure Canadians have the access they need to government information.

- ✦ *Extend the Access to Information Act to cover all crown corporations, offices of Parliament, and organizations that spend taxpayers’ money or perform public functions.*

Government delegates many activities to Crown Corporations and other arm’s-length bodies. Yet these organizations still spend taxpayers’ money in pursuit of a public objective. It follows that they should also be accountable under the *Act*. A number of these agencies and organizations are already subject to the *Act* but the list is limited and the *Act* does not require that new agencies of government be included as they are created. As a result the list, never complete, has become ever less so. Too many institutions that act for government—for Canadians—are not covered. Among these are the Canadian Broadcasting Corporation, the Canadian Mint, Canada Post Corporation, and the Canadian Wheat Board.

To bring all of government into the light, the law must be strengthened to extend the *Act*’s coverage to any entity that meets any one of a broad list of criteria such as: Is it funded by taxpayers’ money? Does the government own it or its parent entity? Does it perform a service essential to the public interest in a federal jurisdiction?

✦ ***Require public officials to document their actions and decisions and preserve the public’s right to access these records.***

Before we can hold individuals entrusted with authority to account for government’s performance, we must first be able to know, clearly and with confidence, who did what. For that, citizens must have access to some record of officials’ decisions and actions. Notebooks, correspondence, and file systems represent the primary source for this type of information. The previous government’s 2001 Task Force recommended that these sources be excluded from public access—hidden.

We agree with the Information Commissioner that this would severely threaten citizens’ access to information they are entitled to and need. The proposed *Federal Accountability Act* and Mr. Justice Gomery’s second report, *Restoring Accountability* (“Gomery Commission,” 2006), would confirm and preserve the public right of access to such records. Beyond that, they would require officials to document all activities and decisions. It should also be prohibited to destroy such records. Enacting

these reforms would establish a higher, yet still reasonable, standard of accountability for public officials.

- ✳ ***Put the health and safety of Canadians before the secrecy of government with a public-interest override of all exemptions.***

Few would argue that government should have a higher priority than protecting public health and safety. Yet federal law today sometimes places government secrecy ahead of these public interests. That has to change.

Secrecy could override health and safety: if, for example, information about an imminent threat to Canadians' health were revealed during a private Cabinet meeting, for example, not only does current legislation not compel the release of such information, but custom effectively forbids it. Cabinet deliberations, including briefings, are excluded from the *Act* and presumed to be confidential. Even in the face of public demands, this information would not—and arguably *could* not—be released. That is intolerable: Canadians deserve to be informed unconditionally of threats to their health or environment.

Two provinces, Alberta and British Columbia, have instituted a public-interest override in their Freedom of Information legislation. In British Columbia, this stipulates that “despite any other provision in the Act, the head of a public body must disclose any information about a risk of significant harm to the environment, to the health and safety of the public or to a group of people, or the disclosure of which is otherwise clearly in the public interest” (*Freedom of Information and Privacy Act R.S.B.C. 1996 [BC]: c 165, s 25*). A similar override is long overdue in federal access legislation.

- ✳ ***Transform the exclusion of Cabinet confidences into an exemption subject to review by the Information Commissioner.***

Clearly, Cabinet ministers need to be able to speak freely and frankly with one another in order to come to a consensus over policy. They argue and cajole. Horse-trading is done. For these exchanges to be effective, a degree of secrecy is required. But governments have chosen to interpret this re-

quirement with an uncalled-for absolutism, excluding Cabinet confidences entirely from public access (*Access to Information Act* 1985 [Can]: s 69). This directly contradicts the presumption that should apply, as stated in the *Act* and restated above, in favour of the public's right to information.

Mandatory exclusion of Cabinet confidences from the right of request under the *Access to Information Act* should end. These confidences should instead receive a *presumption* of exclusion, subject to independent review. A non-partisan outside authority, likely the Information Commissioner, should decide whether disclosing any requested material would breach a Cabinet's requirements for confidentiality or not.

Cabinets need their privacy. But it need not extend to every document that comes before them. Case-by-case determination of exemption is preferable to an absolute exclusion.

CLEAR EXPECTATIONS: "SARBANES-OXLEY" FOR GOVERNMENT

Citizens are sometimes likened to "shareholders" in government. Their counterparts in the private sector have weathered a parallel series of governance scandals in the behaviour of companies like Enron, Worldcom, HealthSouth, and Tyco. In response, shareholders in public companies are also demanding higher standards of disclosure, transparency, and executive accountability

In the United States, Congress answered these demands with the *Sarbanes-Oxley Act* 2002, which requires American public companies and their auditors to meet clear and extensive standards in their accounting, financial reporting, and disclosure practices. Some key *Sarbanes* provisions insist on complete independence for auditors and annual outside reviews of internal financial controls. Corporate executives who knowingly and wilfully misstate financial information now face larger fines and stiffer jail sentences.

Canadians have seen the results of slipshod financial controls, poor accountability and miserly disclosure over many years. In 1997 and

1998—just when the government of Canada was moving from a deficit to a surplus position—the Auditor General of Canada refused to give what is called a “clean” opinion of the government’s financial statements. Instead, he gave a “qualified” opinion, stating that the government misstated its bottom line by \$800 million in 1997 and by \$3 billion in 1998 (Canada, OAG, 1998/Apr). Few Canadians ever became aware of these serious misstatements of facts. No repercussions whatsoever befell the officials and politicians responsible for them.

Evidence has since emerged of numerous management failures in the federal government: the so-called “billion dollar boondoggle” at Human Resources Development (Manning, 2002: 219–22), another billion-dollar fiasco in attempting to create a gun registry (Toronto Star, 2004: A6) and, capping all, the Sponsorship Scandal. It is especially telling that the malodorous and possibly criminal activities involved in the last of these were successfully concealed from the public for years; this despite, according to testimony given to the Gomery Inquiry, their being known to hundreds of people, many of them public servants (Mullins, 2005). It is high time that Canadians held government to legally enforceable standards of disclosure, transparency, and accountability at least as high as those required of public corporations.

FISCAL RESPONSIBILITY IN NEW ZEALAND

We could learn from New Zealand’s example. Through the early 1990s the government of that nation had accumulated an irresponsibly large debt (almost 50% of GDP), using creative accounting to obscure the reality and seriousness of the situation from the public. In 1994, the citizens of New Zealand, through their representatives, drew the line. To encourage government to manage its finances more responsibly and transparently, New Zealand’s Parliament enacted the *Fiscal Responsibility Act 1994*. It established principles of responsible fiscal management and financial reporting and required government to operate in accordance with those principles.

The *Fiscal Responsibility Act* asked several things of New Zealand’s government, none of them radical. It asked the government to reduce the

spiralling public debt to prudent levels and maintain a net worth sufficient to buffer future economic shocks and demographic changes. It asked that government manage fiscal risks prudently and choose policies likely to preserve a predictable and stable tax rate. Beyond adopting these principles, government was asked to demonstrate adherence to them by issuing regular and comprehensive reports on its short- and long-term fiscal outlook. These must conform to Generally Accepted Accounting Practices (GAAP) (*Fiscal Responsibility Act 1994* [NZ]: s 4).

And like *Sarbanes*, New Zealand's *Fiscal Responsibility Act* holds those in charge to account. In that country a "chief executive," equivalent to a Canadian deputy minister, leads each government department. The chief executive is held responsible for the financial management and performance of the department; for establishing internal accounting controls and making sure that they produce reliable information; and, for ensuring that the department complies with legislative reporting requirements. Importantly, there is a separation created between the creation and execution of policy. Accountability is enhanced by holding the minister and deputy separately responsible for their tasks.

In the United States, executives in public companies know the standard of disclosure they are expected to meet and the penalty for failing to do so. In New Zealand, it is clear who is mandated to accept responsibility for the actions of each government department. Canadians should require no less from our public officials. We therefore offer the following policy recommendations for both the federal and provincial governments.

- ✳ ***Enact legislation that sets out acceptable principles for responsible fiscal management and reporting, and obliges government to act in accordance with them.***

Canadians must hold our governments to standards of disclosure, transparency, and accountability at least as high as those expected of publicly listed private companies. This involves regular reporting of financial and performance results in detail according to a standardized and easily understood accounting scheme. Good management is not a question of politics.

Policy objectives may change; fiscal rectitude should never deviate from the highest standards.

Setting out in clear terms the management principles and reporting standards that officials are expected to meet will give citizens and Parliament a powerful tool for evaluating government performance. Legislation that clearly identifies those office-holders who are mandated to accept responsibility for meeting these expectations will make accountability possible.

- ✳ ***For public officials who fail to comply with accountability legislation, assign clear consequences like those that corporate executives face under Sarbanes-Oxley.***

In his first report, *Who is Responsible?*, Mr. Justice Gomery criticized a system that shies away from punishing wrongdoers. During the scandalous heyday of federal sponsorships, employees who failed to certify that any work was done in exchange for public payments, a certification required of them by the *Financial Administration Act* (FAA), were not asked to resign. They were merely reassigned. Such feeble “consequences” are hardly adequate (“Gomery Commission,” 2005). *Restoring Accountability*, Mr. Justice Gomery’s second report, addressed this inadequacy. It urged that such a breach be treated as it would in the private sector—as grounds for dismissal (“Gomery Commission,” 2006). Many Canadians feel even stronger sanctions are in order.

Canada’s *Financial Administration Act 1985* sets out clear consequences for office holders who violate standards when collecting or managing public funds. It prohibits officials from “receiving compensation for performance of non-official duties, conspiring or colluding to defraud Her Majesty, permitting any contravention of the law by any other person, wilfully making or signing any false entry, failing to report knowledge of a contravention of law to a superior officer, demanding or accepting or attempting to collect payment for the compromise, adjustment or settlement of any charge or complaint for any contravention or alleged contravention of law” (*Financial Administration Act 1985* [Can]: s 80). Breaches of

the *Act* invite penalties ranging from written warnings through suspensions or demotions all the way to termination or, in extremely rare cases, criminal prosecution. Conviction of the offences itemized above exposes an official to a fine of no more than five thousand dollars, as well as possible imprisonment with a maximum term of five years.

By contrast, *Sarbanes-Oxley* punishes any corporate officer who knowingly or wilfully defrauds shareholders of a publicly traded company with fines of up to five million dollars, imprisonment for as long as twenty years, or both (*Sarbanes-Oxley Act 2002* [US]: s 1106). Canadians should hold those who manage our taxes to the standard of accountability that we demand of corporate managers. Penalties for officials who mismanage public money should reflect those faced by corporate managers who commit similar offences.

✦ *Require deputy ministers to sign contracts of employment.*

In New Zealand, a ministry's chief executive (equivalent to a deputy minister in Canada) is held personally responsible for the department's performance. That country's *Fiscal Responsibility Act* requires these officials to sign a "statement of responsibility" that accompanies every economic and fiscal update to Parliament. This written commitment puts pressure on the executive to be aware of decisions and actions the department takes, to ensure that its employees follow the law, and to demand performance in pursuit of its objectives (*Fiscal Responsibility Act 1994* [NZ]: s 12). If a department under-performs or fails to comply with legislation, this contract holds its chief executive to account.

Both Canada and New Zealand adhere to the Westminster principle of ministerial responsibility but its application in Canada has become lax and inconsistent. During the Gomery Inquiry, ministers excused themselves from responsibility on the grounds that they did not know what was going on. Deputy ministers excused themselves on grounds that they had not been the sole decision-makers. These justifications are unacceptable. We would certainly not allow corporate executives to duck responsibility so easily.

The buck must stop somewhere. Accountability must be made clear and binding. One way to do this would be to establish a contract that deputy ministers would be required to sign before accepting office. This contract would set out clear performance expectations; terms might include such requirements as meeting budget goals, providing good services, complying with legislation, and making accurate financial reports. Deputy-ministers who signed the contract would accept full and personal responsibility for their department's delivery of those outcomes.

✳ *Improve protection for whistleblowers.*

Protecting those who “blow the whistle” on misconduct promotes accountability in two ways. It empowers employees to take action when they encounter evidence of fraud. It also acts as an incentive for managers to conduct their affairs properly.

On November 25, 2005, the first federal legislation for the protection of whistleblowers in the public service was given Royal Assent. The *Public Servants Disclosure Protection Act* (Bill C-11) was introduced to establish a procedure for disclosing wrongdoing in the public sector. In protecting those who reveal misconduct from retaliation, it measures up well to *Sarbanes'* safeguards for private-sector whistleblowers. But, while this is surely a step in the right direction, we must agree with Mr. Justice Gomery that improvement is still in order (“Gomery Commission,” 2006: 186).

A great deal of government work is contracted out. As a result, many thousands of people who are not formally public servants are working for government. They should enjoy the same protection under this legislation as formal members of the public service.

Alan Cutler, one of those who blew the whistle on the Sponsorship scandal, described Bill C-11 as “fatally and fundamentally flawed” because it would require a whistleblower to *prove* that any subsequent discipline was in reprisal for his action (Harris, 2005: 31). This burden of proof, Cutler argued, serves only to deter potential whistleblowers. We agree. We believe the burden of proof should fall instead on the employer, who must demonstrate that actions directed at a whistle-blower were *not* a reprisal.

The legislation also amended the *Access to Information Act* and the *Privacy Act* to exclude from access any information gathered as a result of a whistleblower's disclosure. Finally, Bill C-11 stripped both a whistleblower and those they accuse of the right to read and correct even personal information about themselves that was collected under its provisions. Government justifies all these constraints by citing the need to protect whistleblowers' identities. We agree instead with the Information Commissioner: such constraints are unnecessary.

Both the *Privacy Act* and the *Access to Information Act* already protect identities during an investigation and allow information to be withheld if its disclosure might impede investigators or hamper law enforcement. Both *Acts* prohibit whistleblowers and accused persons from being identified to the Media and the public. Further constraints on the right of access to information should be withdrawn as unjustifiable.

A STRONGER WATCHDOG: ENHANCE THE POWER OF THE AUDITOR GENERAL

As an impartial observer of spending and performance, the Auditor General (AG) provides Parliament and Canadian citizens with information they need to hold government accountable. But the Auditor General's office is not as independent from government as it could be.

Like most federal departments and agencies, the Office of the Auditor General must negotiate its budget annually with the Treasury Board. In her 2002 report, Auditor General Sheila Fraser acknowledged that this reliance on government for funding poses a threat to the independence of her role. It leaves open the possibility, whether real or perceived, for government to withhold funds in order to influence the Auditor General's judgment. This should be corrected. The Office of the Auditor General should apply directly to Parliament—not the government—for its appropriation. This would preserve the independence of this critical function of accountability and transparency that has served Canadians so well in the past.

More is also needed. Under existing legislation, the Auditor General lacks authority to force the government to respond to her findings. In May 2002, the Auditor General alerted then Prime Minister, Jean Chrétien, to serious problems within the Sponsorship Program. Despite this warning, the wasteful program was not officially cancelled until December 2003 (“Gomery Commission,” 2005: 14). Had she possessed the authority to temporarily suspend programs displaying “consistent and pervasive ... non-compliance with the rules” (Canada, OAG, 2003/Nov: 3.122), the Auditor General could have saved significant amounts of the taxpayers’ dollars and prompted a review of the program 17 months sooner. We therefore make the following recommendations.

- ✦ *Parliament should fund the Auditor General’s budget directly through a special appropriation for that purpose.*
- ✦ *The Auditor General should be provided with statutory authority to audit, at his or her discretion, any organization or individual that performs a service for the government. (Exercise of this authority should be made subject to cost-benefit threshold levels to ensure that audits provide value for money.)*
- ✦ *In order to increase the capacity of the Auditor General to compel compliance with his or her recommendations, the office should be given the power to freeze funding to programs temporarily pending their demonstration of compliance or further investigation, and to impose penalties for non-compliance or ineffective compliance.*

“IF IT MATTERS, MEASURE IT”: A REPORT CARD ON GOVERNMENT PERFORMANCE

Economic freedom matters, so researchers at The Fraser Institute, working with others around the world, developed the Economic Freedom Index to measure how free individuals in various countries are to make their own economic decisions. The fiscal performance of government matters;

so the Fraser Institute’s researchers developed an index to score how Canada’s federal and provincial governments compare in performance of fiscal policy. School and hospital performance matter, and so these researchers, with others, developed the *Report Cards* on Canadian Schools and the *Hospital Report Card*, which rank the performance of these institutions on the basis of measurable outcomes, providing an objective basis on which citizens can exercise their freedom of choice in education and health care. (See **HOW THE FRASER INSTITUTE DOES IT**, page 29, for more on these reports.)

Plainly, the overall performance of government matters, especially since governments are largely responsible for the conditions that either expand or restrict economic freedom, as well as for policies that govern schools, hospitals, courts, and many other services that directly affect Canadian lives. In order to provide an objective measure of progress toward our goal of making Canada the best-governed federal democracy in the world, we therefore propose what may be the world’s most ambitious grading exercise: a report card on government performance in Canada.

We suggest that this initiative first measure the performance of the federal government—a report card on Ottawa.* It could then be extended gradually until there were annual reports measuring the performance of every provincial, territorial, aboriginal, and municipal government as well. Implementing this proposal will clearly be a large and complex task. Canadians from different regions of the country, from varying socio-economic circumstances, and from a spectrum of cultural backgrounds and political persuasions will obviously have a wide range of views on what constitutes “good” and “bad” performance by government. Arriving at criteria for evaluation on which all can agree, and that can be measured objectively, will be a major undertaking. So too will be the collection of the necessary data, the statistical analysis, and the publication and distribution of the results. It is, nevertheless, a task well worth pursuing. As a first step towards its accomplishment, we recommend a national conference on evaluating the performance of the government of Canada.

* For a sample of the type of analysis and the criteria that might be incorporated into such a report card, see Clemens et al., 2005.

RESPONSIBLE GOVERNMENT: WHAT WILL RESTORING TRANSPARENCY AND ACCOUNTABILITY DO FOR YOU?

Transparent, accountable government is more responsive government. It has to be. It is government that has no shadows in which to conceal violations of the public trust, and whose responsible officers receive no free passes if violations come to light.

If the steps we recommend are taken, public officials will have greatly enhanced incentives to give you good value for your tax dollars. The most senior public servants will be committed by contract to delivering not only sound financial statements but also effective programs. Your representatives in Parliament and an invigorated Auditor General will be better equipped to detect, challenge, and check excesses and off-the-rails initiatives. Your individual right as a Canadian citizen to expect accountability from your government will be protected by more robust access to government information and the record of official decisions. If in the face of this, public officials still fail to comply with legislation, and waste or misuse public funds, those who call attention to their misconduct will be protected. You will be able to feel confident that mismanagement will be promptly discovered, sanctioned, and corrected.

It is possible to imagine that as these policies are adopted, your trust in Canadian governments and their ability to deliver the results you want for yourself, for your family, and for this country, will be rebuilt.

HOW THE FRASER INSTITUTE DOES IT

SCHOOL REPORT CARDS

The Fraser Institute's *Report Cards* on elementary and secondary schools collect relevant, objective indicators of school performance into one public document so that anyone can easily analyze and compare individual schools. Typical indicators are: student performance on province-wide tests; rates of failure on the same tests; differences in the performance of male and female students on these tests; grade-to-grade transition rates; and participation rates in core subject areas. Where parents can choose among several schools for their children, the *Report Card* provides an objective basis for that decision. It further equips parents to ask more relevant questions when they speak with teachers and provides a measure that shows whether schools are improving over time. This in turn encourages schools to achieve better results—or see enrolment fall.

FISCAL PERFORMANCE INDEX

The *Fiscal Performance Index* reports how well Canadian federal and provincial governments manage their taxpayers' money. Based on 20 indicators, the *Index* focuses on three key areas of fiscal performance: (1) Government Spending, (2) Tax Rates and Revenues, and (3) Debt and Deficit. The first measures public-sector consumption relative to the economy in each jurisdiction, revealing how well governments control spending. Tax Rates and Revenues compares tax rates currently and over time, as well as the portion of revenue received in transfers from the other levels of government. Debt and Deficits tracks deficit financing and the relative burden of accumulated debt. The fiscal policy a government pursues can be a critical determinant of a provincial or national economy's long-term success. The *Fiscal Performance Index* is an independent measure by which taxpayers can hold their governments accountable.

ECONOMIC FREEDOM

Economic Freedom of the World measures how free individuals in 127 nations are to make their own economic decisions. These annual reports on economic freedom focus on the protection of property, respect for contracts, and the extent to which individuals engage in fully voluntary transactions. The index uses 38 variables from objective third-party sources grouped into five key areas: Size of Government, to determine how much of a citizen's wealth is expropriated by the state; Legal Structure, to determine how well property rights and contracts are protected; Sound Money,

to determine whether government uses inflation to expropriate property; Freedom to Trade; and Regulation of Credit, Business and Labour, to determine how freely individuals engage in voluntary agreements in these areas. Canada typically places in the bottom half of the top 10 nations, behind leaders such as Hong Kong, the United Kingdom, and the United States. In *Economic Freedom of North America*, a measure of economic freedom in Canadian provinces and US states, all but one of the provinces rate in, or close to, the bottom 10 jurisdictions. Alberta, the exception, rates in, or close to, the top 10. Indexes of economic freedom provide both a description of each economy and a prescription of how the economic freedom of citizens can be increased.

HOSPITAL REPORT CARD

The *Hospital Report Card* will rank acute-care hospitals in Canada in order of their outcome performance. It employs some 60 indicators of patient safety and in-patient care developed by the US Department of Health and Human Services' Agency for Healthcare Research and Quality. These indicators are used to measure hospital performance in 12 US states including New York, Texas, and Colorado. Indicators of in-patient care include mortality rates, the appropriate use of procedures, and the volume of procedures for which evidence shows that greater volume is associated with lower mortality. Indicators of patient safety focus on preventable complications and adverse events following surgeries, procedures, and childbirth. The indicators analyse data from the Canadian Institute for Health Information for the period of from 1997 to 2004. Of Ontario's 136 acute-care facilities, 46 hospitals, representing 40% of in-patient records in the province, have voluntarily agreed to participate in the first report. It is expected that the *Hospital Report Card* will contribute significantly to the national debate on health policy.

2 BETTER GOVERNMENT TOMORROW

A MENU OF DEMOCRATIC REFORMS

In chapter one, we addressed the crying need to restore transparency and accountability to the structures and operations of the Canadian government today. In chapter three, we shall come to grips with the most serious imbalances within our system of government, defects that demand our urgent attention if we are to be any better governed in the future than we have been in the past. But, neither restoring transparency to government operations today nor rebalancing its parts tomorrow will durably preserve the relationship at the very heart of any vibrant democracy. In that relationship, the people must always outrank those they elect or engage to serve them. As Canadian society continues to grow in size and complexity, however, as technologies advance and governments respond to new threats and challenges, the ways we ensure citizen oversight will continue to evolve.

In this chapter, we examine ways to improve the functioning of our Canadian democracy. Independent audits and accountable bureaucrats cannot keep the relationship in balance on their own. It takes informed, confident citizens, equipped with the tools they need to exercise their democratic rights and responsibilities. We need, as well, a flourishing *culture* of democracy: institutions that empower citizens to make their priorities known, support for citizens who seek to influence the public discourse, investment in the democratic “software” of policy ideas, and exploration of the best ways to choose representatives that reflect the diversity of Canadian views.

These requirements face us for the long term. In the end, whether we accomplish our goal of making Canada the best governed, most democratic, most productive country on earth may be determined by how well we Canadians meet these challenges.

Many different courses have been suggested for advancing democratic reform. In this chapter, we offer a menu of 12 proposals for strengthening our democratic processes and institutions. Most are non-exclusive; they could be pursued without ruling out other options. Some involve considerable investments of time and political capital, others little more than a decision by cabinet.

We do not put forward the ideas in the following pages as recommendations but as options worth considering. We invite readers to review this menu of democratic reforms for themselves, to consult the references for further information, and to make their own decisions as to which of them Canadians should pursue. At the conclusion of the chapter, however, the authors and The Fraser Institute recommend the reforms that we believe best deserve the attention of our fellow citizens.

1 CIVIC EDUCATION

Civic education is essential to meaningful democratic government. It is the vital knowledge of the idea of democracy itself and how government actually works that equips children and adults to exercise their political freedoms and participate effectively in democratic decisions.

Civic education is like “driver’s ed” that qualifies citizens to take the keys of the country. And it is largely missing from Canadian curricula. The extent of “civ-ed” in Canadian elementary and secondary schools runs from non-existent to spotty. Only four Canadian provinces require students to complete courses dedicated solely to civics before they can graduate from high school (Griffiths and Lyle, 2005). Comparable education for new Canadians and adults in general is even more limited.

It is worth doing more. In a poll conducted during the 2004 election by the Dominion Institute and the *National Post*, 69% of students between 14 and 18 years felt civic education helped them follow politics and make informed decisions. The degree of civic education also seems to increase political participation: in the same poll, those who had studied politics and government were 10% to 15% more likely to say they would vote if

given the opportunity and twice as likely to indicate support for a specific party (Griffiths and Lyle, 2005).

Of course, school-based civic education must be focused on the essentials of democratic citizenship and be as free as possible from the political biases of provincial governments, school boards, school administrators, and teachers' unions. To ensure this, parents should be directly involved and consulted in the development of provincial civics curricula and permitted to audit in-school delivery.

Given limited resources and classroom time, efforts to inculcate such basic civic habits as reading, voting, and communicating with public representatives should target students from 16 to 18 years (Milner, 2001: 22). An initiative by the Dominion Institute called the Democracy Project (www.thedemocracyproject.ca) has had some success engaging youth through national surveys, town-hall meetings, and a "democracy in the news" module. Employing new technologies such as SMS text messaging, the national surveys encourage youth to voice their opinions on the future of democracy in Canada.

Student Vote (www.studentvote.ca), supported by Elections Canada among many others, has developed a program to give Canadian students a parallel election experience during an official election period. Registered schools receive learning materials to complement a series of participatory activities that help students learn about the democratic process, party platforms, and local candidates. Events are organized to encourage critical thinking among students who might represent their chosen parties in a debate. On a day chosen by the school, students assume the duties of Deputy Returning Officers and Poll Clerks to conduct a school-wide vote whose results are released to the public, shared with the Media, and compiled by Student Vote.

During the 2006 Canadian general election, more than 450,000 students took part in Student Vote programs at more than 2,450 schools from all provinces and territories. In a survey completed by some participating students after the 2004 election, 88% said they would vote in the future, 87% said they believed voting is an important responsibility and 45% discussed politics with family or friends during the campaign (Student Vote, 2004).

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Milner, Henry (2001). *Civic Literacy in Comparative Context: Why Canadians Should be Concerned*. IRPP Policy Matters 2, 2. Institute for Research on Public Policy.

2 CITIZENS’ ASSEMBLIES

In 2003, the Government of British Columbia embarked upon a unique and innovative process to recommend changes in the province’s electoral system: it convened The Citizens’ Assembly on Electoral Reform. The Citizens’ Assembly comprised 159 members, two selected at random from the list of voters from every electoral district in the province, along with the chair. No current politician or anyone who had recently run for or held a public office was included in the Assembly. The citizens set their own governance and procedures and were given a budget of \$5.5 million, but were required to report no later than December 2004. The Assembly could recommend only one electoral system. If it chose to recommend something other than the current single-member riding, first-past-the-post model, its proposal would go to the people in a referendum held at the same time as the next provincial election, May 17, 2005. To be adopted, the proposal for reform would require the approval of at least 60% of validly cast ballots and a simple majority in 48 of the 79 electoral districts. Ultimately, the multimember riding, transferable-vote system proposed by the Citizens’ Assembly received significant public support but did not meet this threshold.

The accomplishment of the Citizens’ Assembly was nonetheless remarkable. It was a unique exercise in deliberative democracy, capable of being both plenary and conclusive. More often, the approach to potential democratic reform relies on some sort of advisory body—a Royal

Commission perhaps—or on elected bodies that have a vested interest in the outcome. The Citizens' Assembly separated the process of developing institutional and systemic reforms from the politicians and interest groups that might benefit from the reform. At the same time, legislation required that any proposal flowing from the Citizens' Assembly be considered through a referendum—both putting the decision to citizens at large and providing finality (Gibson, 2002: 7-8).

A 1996 experiment in deliberative democracy by the Canada West Foundation concluded that ordinary Canadians were amply capable of grasping complex policy issues. The conclusions these assemblies of citizens reached were often very similar to those of government hearings and policy conferences. For the citizens involved, the exercise proved highly educational; surveys before and after indicate that the opinions of many underwent significant change during the assembly (Vander Ploeg, 1996: 1).

To advance public understanding and acceptance of complex proposals, the citizens' assembly offers a valuable tool. Likewise, proposals for electoral or constitutional reform are likely to be more credible and acceptable to citizens in general if they have been developed through public deliberation. To be credible, the assembly must be representative, not just in terms of geography but also of demography. The body must be small enough to deliberate the question at hand effectively with appropriate support.

The challenge is in the details of the assembly: it is difficult to balance representation, effectiveness, and affordability. Beyond the costs to convene a sizeable body across a sizable geography over a long period of time, any effort to increase the transparency and educational effect of the exercise will cost additional money. British Columbia's Citizens' Assembly, held over 18 months, cost \$5.5 million. By comparison, the Royal Commission Citizens Forum on Canada's Future met for eight months in 1990 and 1991 and cost \$22 million. The Royal Commission on Aboriginal Peoples, which cost \$60 million and met from August 1991 to November 1996, was the longest and most expensive such effort in Canadian history (CBC News Online, 2004).

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3 FIXED ELECTION DATES

Elections are currently required at least every five years in Canada though historically they occur roughly once every four. In most provinces, they occur on dates picked by the party in power before the writs are dropped. Legislation has been proposed to require fixed election dates every four years, except when a government loses the confidence of Parliament or its legislature. The principal benefit claimed for fixed election dates is that they reduce the ability of governments and governing parties to manipulate the timing of elections with an eye to the polls solely for partisan advantage.

Fixed election dates already exist for some municipal and local elections. Ontario's *Municipal Elections Act* requires that municipal elections be held on the second Monday of November, every three years. In Alberta, the *Local Authorities Election Act* sets the date for local elections as the third Monday of October, every three years beginning in 1983.

Legislation fixing most election dates at every four years has been introduced in Ontario and put into effect in British Columbia, where provincial legislation now provides for provincial elections on the second Tuesday in May in the fourth calendar year following the previous general election. The first election held on this timetable was on May 17, 2005; the next will be on May 12, 2009. In Ontario, the *Election Act* affirms the Lieutenant Governor's power to dissolve the Legislature in the event of a vote of non-confidence. It also sets the first fixed election date for Ontario as October 4, 2007; subsequent elections will be on the first Thursday in October in the fourth calendar year following the most recent provincial election.

In the most recent federal election, the Conservative Party of Canada's election platform committed the party to fixed election dates modeled on the legislation of British Columbia and Ontario. The New Democratic Party and the Green Party likewise committed themselves to setting fixed election dates at the federal level.

Fixed election dates have been criticized on the grounds that flexible election timing is a necessary element of the Westminster parliamentary system. And it is true that a key component of the responsible government tradition is the principle that, if a government loses the confidence of Parliament, then Parliament ought to be dissolved and an election called immediately. Legislation in both British Columbia and Ontario allows for this possibility.

The cost of elections is a concern of those who oppose fixed election dates. Fixed election dates extend the campaign period beyond the current writ period, in which campaign spending and advocacy group participation are tightly regulated. Rules governing election spending might become effectively obsolete. On the other hand, there is a possibility that

fixed dates for elections will reduce their administrative costs, since election officials will be able to start work well in advance of polling dates. Likewise, government bureaucrats and parliamentary committees will be able to plan their agendas better without interruption from unexpected elections (Milner, 2005: 20-21).

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4 REFORM OF THE ELECTORAL SYSTEM

It is frequently complained that Canada's one-member-riding, first-past-the-post system of electing representatives to Parliament and provincial legislatures produces skewed results. In the 1997 general election, the Liberals won 155 seats or 51.5% of the House of Commons with only 38.45% of the popular vote (Chief Electoral Officer of Canada, 1997: 70).

A little more than three years later in the 2000 general election, Jean Chrétien led the Liberals to a third successive majority government securing 57.1% of the House of Commons with only 40.8% of the popular vote (Chief Electoral Officer of Canada, 2000: 18). In the 2004 and 2006 general elections, the disparity between votes received and seats allocated has not been as drastic. Even so, as table 2.1 shows, the Bloc Québécois continues to elect more MPs than its popular vote would suggest it should, while the NDP and Green parties find themselves at a disadvantage.

This discrepancy arises because our simple plurality, first-past-the-post system of selecting "winners" requires only that a candidate receive more votes than any other in the riding to be elected. The result tends to favour front-runners and regionally popular parties while under-representing parties whose support is spread relatively thinly across the country.

The current system often produces large majorities in the House of Commons that are little more than an artefact of the process (the last two elections being more the exception than the rule). The system also serves to exaggerate regional strengths and weaknesses, producing a House with strong regional overtones. This has exacerbated tensions and conflict as parties cater to their regional bases of support rather than to a broader national audience. Finally, many votes are “wasted,” since a candidate can win with as little as 30% of the vote. Indeed, in the last federal election there would seem to have been little point in voting for a Liberal candidate in Calgary or for a Conservative in downtown Toronto.

For all these reasons, many Canadians see a case for considering alternatives. The main objective in reforming the electoral system is to make representation in Parliament and the legislatures more genuinely representative of the views of Canadians at large. It is argued that doing so will also increase public confidence and participation in elections.

Still, Canadians are understandably cautious about embracing an unfamiliar system of electing their representatives. The current system may work to the disadvantage of small or new parties but in so doing it

TABLE 2.1: 2004 AND 2006 GENERAL ELECTIONS—DISPARITY BETWEEN VOTES RECEIVED AND SEATS ALLOCATED

| Political party | Number of seats | 2004 | | 2006 | | |
|-----------------|-----------------|---------------------|----------------------------|-----------------|---------------------|----------------------------|
| | | Percentage of seats | Percentage of popular vote | Number of seats | Percentage of seats | Percentage of popular vote |
| Bloc Québécois | 54 | 17.5% | 12.4% | 51 | 16.6% | 10.5% |
| Conservative | 99 | 32.1% | 29.6% | 124 | 40.3% | 36.3% |
| Green | 0 | 0.0% | 4.3% | 0 | 0.0% | 4.5% |
| Liberal | 135 | 43.8% | 36.7% | 103 | 33.4% | 30.2% |
| New Democratic | 19 | 6.2% | 15.7% | 29 | 9.4% | 17.5% |

Source: Elections Canada, <www.elections.ca>.

usually generates a strong majority government capable of advancing its platform. Parties that aspire to govern are forced to build broad coalitions, engaging diverse groups across regional and social divides. Extremist groups are seldom able to win seats unless their support is geographically concentrated. As a result, strong majorities are generally accompanied and held in check by a coherent opposition.

The existing system is also straightforward and easy to understand. A valid ballot requires only a mark next to the name of one of the candidates and the count is simple to administer. There is a clear link between votes received and seats won. Elected members represent a defined geographic region, which facilitates a strong association between representatives and their constituents. Voters can make their choice for a preferred party or an individual. And, while it happens infrequently, popular independent candidates are sometimes elected (Reynolds, 1998).

At the same time, alternative systems are not without unintended consequences of their own. One problem is that an electoral system designed to improve the *representativeness* of an assembly may not, under the British parliamentary system, be best at producing an *effective* executive capable of making decisions and taking action. Instead, an assembly that closely reflects the range of voters' views may have no party in a clear majority equipped to form a cabinet and advance legislation. The more "proportional" the electoral system adopted, the greater the demands on the coalition-building skills of elected members, if good decisions are to be made.

That said, ongoing concerns with the existing system have prompted some to seek electoral reform. The alternative most often proposed is some form of *proportional* representation. The goal of this approach is to distribute seats in the assembly in close proportion to the support that voters give each competing party. In theory, this would give a party that attracted a certain percentage of the popular vote something close to the same portion of seats in a legislature.

Desirable as this goal may appear, accomplishing it in practice is not necessarily simple or straightforward. It may require voters to sacrifice some degree of choice (as in the first option described below) or

subject vote tallies to the application of mathematical formulae in order to determine a “winner” (as in the other options described). Advocates of alternative approaches argue that these are modest difficulties in light of the more nuanced assembly that proportional representation achieves.

PRINCIPAL VARIANTS OF PROPORTIONAL REPRESENTATION

✦ LIST SYSTEMS

Most people associate proportional representation with list systems. Typically in these systems, parties submit a list of candidates. Voters cast ballots in support of the party of their choice. When the ballots are counted, seats are awarded to parties based on the total number of votes they attract. The parties then fill their seats from the candidates named on their lists, sometimes, though not always, starting with the first name on the list and working down.

Different jurisdictions take different approaches, however, to calculating the number of seats to be awarded to each party from the total number of ballots cast. One such approach establishes a “quota” of votes that signifies that a party has won a seat; depending on the chosen formula, this could be the number of votes cast divided by the number of available seats. A party wins a seat for each “quota” of ballots cast in its favour. Austria, Belgium, Greece, and Iceland all use some form of this “largest remainder” system (O’Neal, 1993: section B-1-A-a; Farrell, 2001: 71–73).

In a variant known as the “highest average” system, each party’s votes are divided by a series of divisors to produce an average vote. The party with the highest average vote after each round of the process is allocated a seat. Its votes are then divided by the next divisor (O’Neal, 1993: section B-1-A-b&c). Israel, Norway, and Sweden all use some form of the highest average system (Farrell, 2001: 73–74).

Both these systems achieve very proportional results, to the advantage of smaller parties. But it is difficult to win a majority government under them, often necessitating complex and fractious coalitions. Representatives have no territorial affiliation. This weakens elected members’ bonds with their constituents and reinforces party affiliation, especially

where party officials choose candidates' ranking on the electoral list. For these reasons, list systems tend to be more popular among smaller countries or lower levels of government.

✦ SINGLE TRANSFERABLE VOTE

The Citizens' Assembly on Electoral Reform recommended this type of system for British Columbia. Had the so-called BC-STV system been approved,* the province would still have 79 MLAs. But rather than 79 ridings with one representative each, many ridings would have been combined and represented by as many as seven MLAs, while still preserving the existing ratio of voters to representatives. In an election, each party could field as many candidates in a riding as there were seats to win. At the polls, voters could rank as many or as few candidates as they wished, in order of their preference, on a single ballot.

A weighting system and threshold formula using a quota designed for this purpose in 1868 by English mathematician and lawyer, Henry Droop, would then be used to allocate seats for a particular riding (BC Citizen's Assembly on Electoral Reform, 2004). A similar STV system is employed in Ireland and for Senate elections in Australia.

The STV achieves greater proportionality as the number of representatives per riding increases. But a greater number of representatives also weakens the relationship between electors and elected. The system is also somewhat complicated, which means that there is no simple correlation between the number of votes cast for a party or candidate, and the seats allocated. Finally, since candidates from the same party compete for the same votes in their riding, there is increased factionalism within political parties (Farrell, 2001: 144).

✦ MIXED MEMBER PROPORTIONAL

The Commission on Prince Edward Island's Electoral Future proposed this electoral model for that province. The Commission's proposal maintained

* In a referendum held on May 17, 2005, the BC-STV system proposed by the Citizens' Assembly won broad support but failed to meet the threshold set for its adoption.

27 seats in the Prince Edward Island's provincial legislature but each voter would have cast two ballots in order to allocate them. In the first, citizens in 17 districts would vote for their choice of local representatives through the current first-past-the-post system. But each party would also field a slate of ten additional candidates. The second ballot would allocate the remaining ten seats in Prince Edward Island's Assembly to these candidates on a province-wide proportional basis, using the highest-average method. The proposal was put to a plebiscite in November 2005 and failed by an overwhelming margin.

New Zealand adopted a mixed member proportional (MMP) system in 1996. The first coalition government elected under this system operated much as previous majority governments elected under the old system had. The speaker and deputy speaker, along with 14 of 17 committee chairs, came from the governing parties. The difference was evident, however, when the coalition government collapsed after 19 months. A new minority government was able to fill the vacuum and navigate the government through until the end of the normal three-year term (Shugart, 2001: 321).

While an MMP system is generally very proportional, the reliance on candidate lists can favour party executives over local candidates. It also creates two classes of representatives, those representing geographic regions and those representing their parties (Reynolds and Reilly, 1997).

✻ ALTERNATIVE VOTE

The alternative vote, or preferential ballot, has been used in Australia to elect members of the House of Representatives (their equivalent of our House of Commons) since 1918. The system preserves the single-member riding while allowing voters to rank candidates in order of preference. It can be employed without increasing the number of seats in a legislature and does not create two classes of representative.

Australian political parties field candidates for the lower house on a riding basis, as in Canada. But rather than vote only for their first choice of candidate, Australian voters must rank every candidate on the ballot according to their preference. If they do not, the ballot is considered spoiled. When ballots are counted, any candidate who receives a simple majority

is immediately elected. When no candidate wins a majority, the winner is the candidate who receives the highest number of first, second, and other vote preferences, using votes transferred from successively eliminated candidates with the least support (Farrell, 2001: 56). The system minimizes “wasted” votes because voters are afforded the opportunity to vote for a number of candidates with similar platforms, making their intentions relatively clear.

The alternative vote has been used historically in Canada. Provincial elections between 1926 and 1955 in Alberta used the system as did provincial elections in Manitoba from 1927 to 1957, and in British Columbia in 1952 and 1953. The Reform Party of Canada and the Alberta and Ontario Progressive Conservatives have all used the alternative vote for party elections and a growing number of parties employ it, rather than more expensive run-offs, to nominate local candidates.

The alternative vote does not necessarily produce more proportional results. It does, however, facilitate coalition building across partisan lines without forcing formal coalitions or mergers. This has been the case in Australia, where the National and Liberal parties together have managed to compete with the Labour party (Flanagan, 1998).

PROPORTIONAL REPRESENTATION IN SUMMARY

Each of the foregoing variants of proportional representation—List System, Single-Transferable Vote, Mixed Member Proportional, and Alternative Vote—as well as our existing first-past-the-post system has its own advantages and shortcomings. It is well to remember that political parties and interest groups have distinct partisan interests in any proposed reform to the current electoral system. The most credible proposal for any electoral reform is likely to be developed by an independent body, such as British Columbia’s Citizens’ Assembly or Prince Edward Island’s Commission.

Elections, moreover, are the defining exercise of a democracy. The public must have confidence in whatever system is adopted and must therefore be the final arbiter of its acceptance. Any referendum on electoral

reform must be accompanied by effective educational campaigns that explore the nature and implications of any proposed reform thoroughly.

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5 REFERENDUMS

Referendums are a way to refer an issue or series of questions to the electorate directly rather than leave the matter to elected representatives alone. They are especially attractive when the issue is one that bears directly on the interests of the representatives: the adoption of a new constitution, a constitutional amendment, or the recall of an elected official. But

they have also been used to determine citizens' views on a proposed law or a specific government policy. Referendums also serve educational ends.

The term "referendum" generally refers to circumstances in which the expressed will of the majority of the electorate is binding on the government. A "plebiscite" is generally consultative or advisory but not binding on a government, although the government might have a moral obligation to respect its result. That said, the terms are often used interchangeably.

There is no serious argument that "direct democracy" measures like referendums are a substitute for representative democracy but such measures can serve as an important and even necessary complement. The use of referendum mechanisms varies widely among democratic states, the most extensive use being made by countries like Switzerland (Fossedal, 2002).

National referendums have been used in Canada on prohibition (1898), conscription (1942), and the Charlottetown Accord (1992). Referendums have been used more often at the provincial level: in the 1990s alone, there were referendums in Quebec (1995 on sovereignty), Newfoundland (1995 and 1997 on denominational schools), Saskatchewan (1991 on public funding for abortion, balanced budget legislation, and constitutional amendments), British Columbia (1991 on direct democracy), Northwest Territories (1992 on division of the territory), and Nunavut (1997 on the composition of the new legislature) (Mendelsohn, 2001: 3).

More recently, on May 17, 2005, British Columbia held a binding referendum asking citizens if the province should adopt the single-transferable-vote (STV) electoral system. The measure received majority support in at least 48 of 79 electoral districts but only 57.69% of total valid ballots were cast in favour, short of the 60% threshold (Elections BC, 2005: 9). Prince Edward Island held a plebiscite November 28, 2005 asking if the province ought to adopt a mixed-member-proportional system. That measure did not meet either of its thresholds; in only two districts did the measure receive majority support and, province-wide, only 36.42% of ballots were cast in favour (Elections PEI, 2005).

The principal benefit of properly run referendums is the opportunity they provide for citizens to participate directly in policy decisions. This is particularly true if referendum campaigns are accompanied by ad-

equately funded educational campaigns on all sides of the issue, so that the public is thoroughly informed and engaged in the process before casting their ballots.

A criticism raised against referendums is that they invite a “tyranny of the majority.” While constitutional guarantees of minority rights mitigate this risk, it nevertheless exists. Consequently protection of minority interests must be an important consideration in the undertaking of any referendum. Experience has shown, however, that properly framed approaches need not exclude minority interests (Mendelsohn, 2001: 6).

The cost and timing of referendums can sometimes be deterrents. British Columbia mitigated this challenge by holding its referendum on electoral reform at the same time as a provincial election.

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6 CITIZENS’ INITIATIVES AND RECALL

Referendums and deliberative bodies like the B.C. Citizens’ Assembly rely on the government’s initiative. Citizens’ initiatives allow the people to lead. Various jurisdictions employ one or more of three general types of these mechanisms: “direct” initiatives, whose binding force bypasses legislatures; “indirect” initiatives, which include a role for legislatures; and “recall” initiatives, which allow citizens to dismiss a previously elected representative.

A principal criticism of top-down referendums is that governments employ them only when they are relatively certain of the outcome. Initiatives in the forms described below provide a counter-balance, allowing citizens themselves to effect legislative change.

There is reason for concern that citizens' initiatives might become frivolous and expensive exercises, manipulated by partisan or special interests to advance a specific agenda with little or no public support. Likewise, there is concern that initiatives, like referendums, may become tools used by the majority to over-ride the interests of the minority. These risks are real. Avoiding them requires careful consideration of how initiatives are approved for wider public consideration, how their financing is regulated, and what threshold levels for adoption are appropriate.

PRINCIPAL VARIANTS OF CITIZENS' INITIATIVES

✦ DIRECT INITIATIVES

Direct initiative allows citizens who can muster sufficient support for a proposition to give it legal effect without the consent of the legislature. Typically, if enough signatures are collected on a petition in the allotted time, the proposed measure is placed before the electorate through a referendum. If enough voters approve the measure, it becomes law.

California uses such a system, though it has sometimes proved problematic. Even though established political parties are usually not involved in the process, it tends to be dominated by advocacy groups and professional associations. Furthermore, legislation passed by initiative in California requires another initiative to be amended. While this protects the direct wishes of the electorate, in practice most legislation requires some amendment over time and the requirement for a further referendum becomes unwieldy (Mendelsohn, 2001: 10; Piott, 2003).

✦ INDIRECT INITIATIVES

Indirect citizens' initiatives involve the legislature. Its role is usually to frame the proposal or draft and pass any statute that may result from the people's vote.

British Columbia's *Recall and Initiative Act* (R.S.B.C. 1996, c. 398, www.qp.gov.bc.ca/statreg/stat/R/96398_00.htm) allows any registered voter to ask the Chief Electoral Officer to issue a petition on a legislative proposal. The proposal may cover any area within the jurisdiction of the provincial legislature. If the Chief Electoral Officer approves the request, the applicant has 90 days to collect signatures from at least 10% of the electorate in each electoral district. If that is accomplished, the petition and a draft bill are submitted to the Select Standing Committee of the legislature, which has 90 days either to recommend the bill's consideration by the legislature or to refer it back to the Chief Electoral Officer for a vote by the public at large. To be approved, more than 50% of registered voters must favour the measure, along with a majority in at least two thirds of the electoral districts in the province. If the threshold is met, the Government is required to introduce the bill at the earliest possible opportunity. Readings or amendments proceed as with any other bill and there is no guarantee the measure will be passed (Elections BC, 2002: 4–5). That said, there is a certain moral and political obligation on elected representatives to respect the wishes of the electorate.

In Saskatchewan, the *Referendum and Plebiscite Act* (S.S. 1990–91, c. R-8.01, <www.canlii.org/sk/laws/sta/r-8.01/20051216/whole.html>) requires a plebiscite under certain conditions. If a petition respecting a matter under provincial jurisdiction is submitted to the Minister of Justice bearing the signatures of at least 15% of Saskatchewan's electors, the Minister is required to initiate a plebiscite (Saskatchewan Justice, 2005). While not legally binding on the government, there is a moral and political obligation to act if the plebiscite is approved.

✦ RECALL INITIATIVES

“Recall” refers to a mechanism that allows voters to dismiss—or “recall”—an elected official for cause. Recall measures are generally grouped among citizens' initiatives because they require citizens to collect signatures in support of a petition. They may also trigger a new election.

In Canada, a strong populist movement after the First World War sought recall mechanisms for Members of Parliament. Many constituency

associations of the Progressive Party responded by requiring their candidates elected in 1921 to prepare undated resignation letters, so that constituents could later force their removal by dating and publishing the letters. The practice was later prohibited by the *Dominion Elections Act*.

The Social Credit Party came to power in Alberta in 1935 and the next year passed the *Alberta Recall Act*. Citizens promptly initiated a recall petition against Premier William Aberhart. The *Recall Act* was repealed in 1937 and the petition against the Premier was not completed (Lortie, 1991: vol. 2, 243–44).

More recently, British Columbia has taken up the recall mechanism. No member of the Legislative Assembly can be recalled for 18 months following their election. But after that period, any registered voter can apply for a petition to recall their representative. The application must include a 200-word statement indicating why, in the opinion of the applicant, the member ought to be recalled. If the application is approved, the proponent has 60 days to collect signatures from at least 40% of voters registered in the particular electoral district in the last election. If that is accomplished (and the proponent has complied with financial regulations), the member is removed. A by-election must be called within 90 days to replace the recalled member, who is permitted to run again (Elections BC, 2003: 4).

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7 “THIRD PARTY” ADVOCACY AND ELECTORAL FINANCING

There are many “third parties” in the Canadian public conversation. The term refers to any person or group other than a registered political party or candidate. “Third parties” include professional and trade associations, charitable groups, public-policy organizations, and interest groups of every persuasion. Under existing law, the broad collection of viewpoints these groups represent is severely restricted in expression, especially at election time.

“Issue campaigns” seek to bring a subject forward on the political agenda. They typically muster public support for some particular policy proposal, creating pressure on political parties and elected representatives to respond by adopting it. As political parties have withdrawn from issue campaigns, this tool has become more available to third parties.*

Efforts to restrict free expression by third parties have a long history in Canada. The 1966 Barbeau Committee on Election Expenses first recommended that candidates’ spending on print and broadcast media be limited. The committee also observed that such limits could be circumvented by third parties, spending on behalf of a specific candidate. The 1971 Chappell Committee on Election Expenses recommended both political parties and candidates be subject to spending limits during elections. The 1974 *Election Expenses Act*, therefore, prohibited anyone but candidates and political parties from incurring election expenses. There was, however, an exception: it permitted third parties to incur expenses to advance issues of public policy. The Liberal government of the day removed this exception in 1983 but the courts restored it. As a result, no limits applied to

* As an example of a current issue campaign, see the website of the Fireweed Democracy Project, <<http://www.fireweeddemocracyproject.ca>>.

third-party spending during the 1984 and 1988 federal elections (*Harper v. Canada (A.G.)*, 2001 ABQB 558, <<http://www.albertacourts.ab.ca/jdb/1998-2003/qb/Civil/2001/2001abqb0558.pdf>>).

After the 1988 election, the Royal Commission on Electoral Reform and Party Financing (the Lortie Commission) reviewed this subject once again. In its final report, the Commission argued that spending limits on candidates, registered parties, and third parties were necessary to guarantee some measure of fairness between those with access to significant financial resources and those without (Lortie, 1991: vol. 1, 339–40). The Commission further recommended that third parties be limited to \$1,000 in partisan election expenses. The number was chosen because it was more than the average individual contribution and would allow any individual or group to engage in significant political activity (Lortie, 1991: vol. 1, 352–53). Reflecting Lortie’s recommendations, the *Elections Act* was amended to limit third-party election expenditure to \$1,000, ban it outright as polling day approached, and prohibit third parties from pooling resources to defeat these constraints. Again, the courts overturned these limits.

Parliament next introduced Bill C-2, which became the new *Canada Elections Act* (2000, c. 9, <laws.justice.gc.ca/en/E-2.01/14253.html>) in 2000. The new legislation limits third-party election advertising expenses to \$168,900 during a general election and to not more than \$3,378 in any given electoral district to promote or oppose a particular candidate or candidates, indexed for inflation. Third parties must also disclose their financial contributors for the period from six months before the writ is dropped through to election day (Elections Canada, 2004).

The current law has twice been struck down by Alberta courts but was upheld by the Supreme Court in 2004 in the decision *Harper v. Canada* (2004, <www.lexum.umontreal.ca/csc-scc/en/pub/2004/vol1/html/2004scr1_0827.html>). In a dissenting opinion, however, Chief Justice Beverley McLachlin, Mr. Justice John Major, and Mr. Justice Ian Binnie argued that the law set spending limits so low that third parties were unable to communicate effectively on election issues during an election campaign. Their dissent noted that the Chief Electoral Officer had testified that to run a full-page advertisement in major Canadian newspapers

on a single occasion would cost \$425,000—in excess of the national limit. The Canada Post bulk mailing rate for a single mail-out, roughly \$7,500 in some electoral districts, likewise exceeded the local spending limit. The national spending cap further diminishes the local one, being set at a level that precludes spending to the local limit in all 308 electoral districts.

Federal law further restricts charitable organizations. Political activities are permitted, including public calls to political action, or communications urging government to adopt, change, or retain any policy or law. But the Canada Revenue Agency allows a charitable organization to devote no more than 10% of its resources in any year to such “political” activities (Canada Revenue Agency, 2003).

It is important to prevent abuses of third-party advocacy. At the same time, freedoms of speech and association are of central importance to a functioning, responsive democracy. That would seem to argue strongly for rules that encourage, rather than restrict, participation by third-party interest groups and advocates.

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8 REFORM OF THE COURT CHALLENGES PROGRAM

Litigation by interest groups serves a useful democratic purpose. Courts provide a check on government and they provide a forum for citizens, individually or as groups, to hold government policy, legislation, and actions up to scrutiny. The participation of advocacy groups in these cases is often viewed as setting justice against government or powerful private interests, particularly when the case relates to civil liberties.

In Canada, taxpayers have indirectly supported this kind of litigation for nearly 30 years. The Liberal government of Prime Minister Pierre Trudeau first created the Court Challenges Program in 1977. It was used for the first time to support the federal government's campaign against the Parti Quebecois' introduction that same year of French-language protection in Bill 101. In the 1980s, in an effort to appeal to progressive voters, Prime Minister Brian Mulroney's Conservative Government expanded the program to include equality rights.

The Court Challenges Program did not create interest-group litigation. Business interests and francophone, women's, and religious groups had all brought issues to Canadian courts before. Government support has instead equipped many small or marginalized groups for long court cases. Over the years, the Court Challenges Program nourished a network of such interest groups. These came together in 1992 to thwart an attempt to cancel the program altogether (Brodie, 2001: 358). The current iteration of the Court Challenges Program was established in 1994. It provides financial assistance to advance language and equality rights through court cases. In the decade since, the program has committed almost \$19 million, funded by Heritage Canada, to support litigation (Court Challenges Program of Canada, 2005: 19).

Such support is not inherently problematic. But when government intervenes on behalf of a social interest against some government interest, it incurs a conflict. By supporting both sides in such cases, government exhibits what Professor Ian Brodie describes as the embedded state at war with itself in court (Brodie, 2001: 376).

The principal benefit of the Court Challenges Program is in defraying the costs of court action by groups or citizens seeking the protection of the Constitution and the *Charter of Rights and Freedoms*. The challenges of independence and conflicted interest remain. The danger is that the Court Challenges Program becomes a tool to advance government policy through proxy cases in the courts rather than a bulwark for the rights of under-resourced plaintiffs.

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9 FREER VOTING IN PARLIAMENT AND LEGISLATURES

Convention in the name of party “discipline” demands strict obedience among backbenchers in Canada’s Parliament. Governments tend to interpret the defeat of any measure they introduce, or the passage of any substantive opposition measure, as a loss of Parliament’s confidence. This interpretation is used to coerce government members into supporting

measures they may disagree with, lest their vote topple the government of which they are a part.

Other factors also contribute to what has been called, derisively, the “trained-seal” effect. Though specifics vary, Canadian political parties choose their leaders in party-wide procedures; while their parliamentary caucus is important, the leader ultimately does not answer to it, but to party members. Further, the “perks” of a government MP’s life—committee chairmanships, parliamentary secretaryships, and cabinet positions—are in the hands of the leader, who may use them to reward loyalty and punish dissent. Likewise, the Prime Minister and Cabinet have little incentive to emancipate the back benches. They wish to advance their parliamentary agenda and protect the interests of their ministries. A compliant House facilitates both objectives.

It is difficult to shake off the shackles of party affiliation. First, it is tough to get elected as an independent. Even such a high-profile candidate as John Nunziata was unable to get re-elected after his expulsion from the Liberal caucus for criticizing the government’s failure to rescind the GST as it had promised. Rare exceptions include the late Chuck Cadman, who was an incumbent when he ran as an independent, and Quebec radio personality, André Arthur. Second, once elected, independents do not enjoy the parliamentary resources or procedural prerogatives available to party members. As a result, they find it difficult, not to say impossible, to pursue an independent parliamentary agenda effectively.

In provinces where one party consistently wins strong majorities, some efforts have been made to engage back-bench members’ participation through caucus. In Alberta, for instance, every bill is reviewed by caucus; as many as one in four get sent back to ministers for revision. Once caucus deliberations conclude, however, all are expected to support the government in the legislature. This practice effectively relocates the debate, deliberation, and compromise of the legislative function to caucus, reducing debate in the legislative assembly to a mere formality—and sharply diminishing the role of the vestigial Opposition (Dobell, 2003: 93).

These coercive tensions would be lessened, the effectiveness of Parliament and legislatures improved, and a better balance achieved

between the front and back benches, by a more limited interpretation of non-confidence. The Conservative Party of Canada promised in the federal election of January, 2006 to make nearly all votes free votes for back-benchers, conferring “confidence” status only on measures such as the budget and main estimates (Conservative Party of Canada, 2006: 44). Another practice worth considering for Canada is that used by the British House of Commons. There, the government employs a symbolic signalling system to designate the significance it attaches to votes. In addition to free votes, three levels of “whipping” signal whether the confidence of the government is at stake (a three-line whip) or the vote is of a lower grade that will not necessarily trigger the government’s defeat (two- and one-line whips) (Dobell, 2003: 90).

The principal benefit of freer voting in Parliament and legislatures would be to empower individual members to represent their constituents’ wishes and their own consciences more effectively. This has the further benefit of strengthening Parliament’s representative function, restoring the importance of debate and persuasion in the House and its committees.

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10 RESPONSIBLE GOVERNMENT FOR ABORIGINALS

In Canadian law, convention, and public opinion, there is a general consensus that aboriginal peoples are entitled to some form of self-government. There is at least as broad a consensus that the mechanisms put in place to realize that right have seldom worked well.

From early encounters on, colonial powers recognized aboriginals as self-governing. The principle was enshrined, rather than surrendered, in treaties negotiated with aboriginal representatives and in the *Royal*

Proclamation of 1763. The Canadian Constitution protects an aboriginal right to self-government and international law further entitles aboriginal peoples to self-government within existing states (Indian and Northern Affairs Canada, 2004). What form this right should best take, however, and how it should relate to other orders of government, remain in doubt.

Jean Allard, a long-time Métis activist, has criticized the current reserve system for its lack of accountability and balance. Allard argues that an elite exercise complete control on most reserves, ruling over a voiceless and impoverished underclass. This system has emerged while federal spending for aboriginals has grown from \$262 million in 1969 to more than \$6.3 billion in 1999 (Owens, 2002).

Historically, responsible government proved elusive until people elected a legislature that derived its revenues from the people it represented and controlled its own expenditures. “No taxation without representation” may have been the watchword of the American Revolution but the reverse is also true: there can be no accountable representation without taxation. When a legislative body collects money, it is obliged to be responsible to those from whom it collects, namely the electors. In the current structure, however, federal transfers flow directly to aboriginal governments, bypassing their constituents and severing this critical link.

Allard has proposed the radical idea that aboriginal spending be redirected from reserve and band executives directly into the hands of individuals (Owens, 2002). This would require amending numerous well-established arrangements to allow aboriginals to receive their share of treaty money or land-claims settlements directly. Coordinated amendments would be necessary to permit aboriginal governments to tax their constituents, restoring a link that compels a certain level of accountability (Owens, 2000).

Efforts to develop a democratic model for aboriginal self-government and “get it right” have not, to date, been crowned with success. While a dramatic departure, Allard’s proposal, along with other reforms to increase accountability and responsibility in aboriginal government, deserve serious consideration.

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11 REFORM OF PARTY FINANCING AND PROCESSES

Money is as necessary to politics as air is to life. Since the birth of democracy, however, it has also been the root of scandal, undue influence, and—as disclosures in both Canada and the United States have recently driven home—temptations to criminal conduct. Canada has wrestled with this dilemma for several decades but defects, gaps, and unintended consequences from policy persist.

Canada recently overhauled the rules that govern political financing (*An Act to Amend the Canada Elections Act and the Income Tax Act (political financing)*, 2002 [Can]). New regulations came into force on

January 1, 2004, that limited individual political contributions to: \$5,000 per year to each registered party and its affiliated entities, including nomination contests; \$5,000 per leadership contest for a registered party, in aggregate to all candidates; and \$5,000 per election to a candidate with no party affiliation. Corporations, trade unions, and unincorporated associations are limited to \$1,000 to each registered political party and its affiliated entities, as well as \$1,000 per election to candidates with no party affiliation. (These caps were indexed to inflation and have since been raised.)

The new rules raised the amount registered political parties are allowed to spend in a campaign (from \$0.62 to \$0.70 per voter) but included the cost of election surveys and research in the definition of “election expenses.” Spending limits were extended to nomination campaigns, at 20% of the spending limit in the most recent election for the electoral district at stake.

The reach of mandatory disclosure of political contributors was also extended. Reporting requirements now capture all registered electoral-district associations, as well as leadership and nomination contestants. Leadership campaigns must submit weekly reports of contributions for the last four weeks of the contest. Nomination campaigns are required to submit a financial report if they collect more than \$1,000 in contributions or spend more than that on expenses.

The most significant changes, however, affect the public funding of registered political parties. Parties that received at least 2% of the national vote in the last election (or 5% in ridings where they fielded candidates) are now eligible to receive an allowance, paid quarterly, of \$1.75 per year for each of those valid votes. The amount is again indexed to inflation and has already been raised (Elections Canada, 2003). The immediate effect of these changes has been to increase the total funds available to parties, despite the extraordinarily low contribution limits on corporations and trade unions. The total amount awarded from the public purse to all parties in 2004, excluding election expenses, was roughly \$22 million, more than double the \$10 million the parties expected to lose to the new contribution limits (Sayers and Young, 2004: 2).

These reforms have clearly been to the benefit of party bank accounts. And they have effectively removed almost all corporate and union contributions from the political process. But they have also severed an important link between political parties and the electorate. When a party is able to, indeed must, collect donations from a large number of people, its success or lack thereof reflects the strength of its organization and policy appeal. Parties have an incentive to appeal to the broadest possible group of voters and donors. A party out of favour with the general public will have thin support and be forced to reorganize or re-evaluate its positions. No longer is this the case in Canada. Rather, a party's financial fortunes are now based on past performance; its current appeal carries no financial consequences.

Parties should be encouraged to build broad coalitions, engaging as many people as possible, rather than to represent narrow interests. Reduced public financing, in conjunction with other reforms, could encourage small contributions from large numbers of donors rather than either large donations from small numbers of wealthy contributors or, just as worrisome, an unconditional allowance from a single donor—government.

Party nomination and leadership contests are now subject to contribution limits and reporting requirements. But consideration must be given to other aspects of these contests. The controversy surrounding recent nomination battles involving such prominent politicians as Sheila Copps, Michael Ignatieff, and Chuck Cadman calls into question the credibility of these processes. Top-down political influences have appeared to compromise democratic due process. It is worth considering whether Elections Canada should take an interest in the administration of nomination and leadership contests, or whether registered parties should be required to subordinate their internal processes to legally enforceable standards.

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12 DEVELOPMENT OF POLITICAL INFRASTRUCTURE

Political parties—maligned as they often are—play a vital role in the organization and performance of our democratic system. When political parties decline in capability and public respect, democracy itself suffers.

It has been argued by one of the authors that a principal reason for the decline in the effectiveness of, and respect for, political parties in Canada is the lack of adequate “democratic infrastructure” below the party level (Manning, 2005). He had in mind in particular the lack of numerous, well-funded, substantive think-tanks to generate ideas in a host of public-policy areas but the term also embraces other deficits. Academia generates fresh intellectual capital in some areas of public policy, but not all. Linkages with activists to carry those ideas forward into the political arena are fragmentary. “Political investors” willing to make significant contributions to the democratic process itself rather than simply to support an election campaign are scarce. Practical political education and training for the “human capital” of democracy—everyone from poll captains to constituency executives to candidates to political aides to cabinet ministers—are woefully deficient. Channels of political communication, from political publishing houses to credible journals of different political stripes to substantial websites, are few. So too are large forums, conventions, or trade shows that bring together partisan participants in the political process from across this vast country for broader and less contentious purposes than those served by party conventions.

Canadian political parties and their supporters need to pay greater attention to the development of this democratic infrastructure—organizations and programs that generate and re-generate the intellectual, financial, and human capital of politics and policy. It is essential to the renewal and continued vitality of the democratic process.

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MAKING A START: OUR RECOMMENDATIONS

Democracy places the citizen first; this is its value. But too often, in the face of government bureaucracies and institutional imperatives, the interests of the citizen are secondary. The purpose of democratic reform is to restore the balance, to give citizens effective tools for participation and clear reasons for confidence in the democratic process.

That goal demands that Canadians of every age and region, interest and background, be fully aware of the nature and implications of any proposed reforms. They must be fully consulted, informed, and engaged in the debate over “pros” and “cons” of the available choices. Most importantly, the choice must be *theirs*. Canadian democracy is no pet project of political activists or policy elites. It belongs to the people.

The preceding pages have presented a menu of proposed reforms of democratic processes and institutions. Each one—from electoral reform to citizens’ initiatives to party financing reform—deserves consideration. We commend them all to our readers’ attention.

For our own part, however, we are persuaded that three items on the menu deserve to be given Canadians’ highest priority. These will, we believe, have the greatest impact in encouraging Canadians to take their freedoms seriously, engage their governments and demand responses, and make their voices heard effectively in every decision that affects their interests. To advance democratic reform in Canada, therefore, we urge the following.

- ✳ *Strengthen non-partisan and non-ideological civic education in Canada (menu item # 1).*
- ✳ *Call together Citizens’ Assemblies to consider other reform options, investing in referendums supported by educational campaigns to let informed voters decide whether or not a particular reform should be adopted (menu items #2 and #5).*
- ✳ *Implement freer voting in legislatures and in Parliament, particularly on measures directed at advancing democratic processes and institutions (menu item #9).*

RESPONSIVE GOVERNMENT: WHAT WILL DEMOCRATIC REFORM DO FOR YOU AS A CITIZEN?

In the event that most or all of the foregoing reforms were adopted in some form or another, Canada would be *yours*, in a more practical and profound way than ever before. Government would be more truly at the public’s service. At the same time, you could find yourself making a direct personal contribution to Canada’s next-generation democratic “infrastructure.”

At school, your children would be learning how to make the levers of daily democracy, from the local school board to the local constituency association of a big national political party, respond to their priorities. A culture of democratic debate, fuelled by ideas emanating from new think-tanks and carried by invigorated party and issue campaigns, would be enriching your own understanding of the choices we face as a nation and that confront you in your community.

Your values and views—if you choose to express them—will be taken into account more seriously than at present in the development of public policies and laws affecting you and your family. Your vote—if you choose to use it—will mean more than at present in deciding who should represent you in elected councils, legislatures, and Parliament, and in deciding on those public-policy issues put to referendum. And your governments—if you choose to influence them—will be more responsive than at present, not only at election time but also between elections.

But democracy is not only about invigorated rights and responsive bureaucracies. It is also about responsibilities. Freedom of choice is not simply *possessed*; it must be *exercised*. To truly realize the dream of making Canada a shining example of democratic governance to ourselves and to the world, you must elect to become part of the process. That may mean making the effort to acquaint yourself with the implications of the choices being presented in a referendum. It may mean more. In the event that a Citizens' Assembly was struck to consider some of these reforms, you might find yourself at the table.

3 TOWARD A BETTER CANADA

REBALANCING THE FEDERATION

Democracy, we have said, is a balancing act. It must find ways to balance among myriad competing views, perspectives, and ideas. Its exercise demands a dynamic balance between loyalty and dissent, competition and consensus, citizens and the machinery and incumbents of government. Over time, every complex system tends to run out of adjustment, out of balance. Government is the most complex human system we know. But Canada's democracy has run seriously out of balance in several respects. Some of these, we believe, are critical.

In the first two chapters, we dealt with a profound and fundamental imbalance that has developed between the institution of government and Canada's citizens and suggested both immediate and long-term counter-measures. But once the most pressing defects in the day-to-day management of government are addressed and while we are still weighing our longer-term options for reform, a more threatening set of significant imbalances in the federal structure demands our attention.

The most urgent of these has been developing over decades and will come as no surprise to many readers. It is the yawning mismatch between the responsibilities and resources of the federal and provincial governments. Rivalry between the two orders of government may be as old as the federation but the present imbalance is one Canadians can ill afford. We offer several observations and recommendations aimed at breaking the deadlock.

Fix the federal-provincial imbalance and Canada will be in a position to fix much else. Relieved of unproductive tensions generated by federal intrusions into their areas of jurisdiction, and sustained by tax-points conceded by Ottawa, provinces would be freed to innovate and respond

directly to their citizens' priorities. The pay offs are likely to be most dramatic in the areas of social services, where there is exclusive provincial jurisdiction. We shall argue that the benefits of democratic "rebalancing," with the emphasis placed on pushing the locus of choice down ever closer to the citizen, will soon commend the same philosophy to other arenas.

That said, serious imbalances remain within the central federal structure itself. One of these is of long standing: the impaired legitimacy of the appointed Senate as a house of regional representation. Another is of more recent currency: the rising concern over so-called "activist" jurists and legislation "enacted from the bench." We see however, that these concerns are rooted in a deeper malaise: the dwindling of the legislative function of government against the other two legs of the classic triad of constitutional democracy, the executive and judiciary. In the concluding section of this chapter, we examine in detail how this relationship has fallen out of alignment—and how it can be restored.

We urge efforts to rebalance the Canadian federation not for theoretical or ideological reasons. We do so because we believe that to do so opens the door to a democratic evolution that will expand Canadians' freedom of choice and embrace of responsibility, that will enrich the quality of our lives, boost our productivity and prosperity, and increase Canada's capacity for international leadership.

BACK TO THE CONSTITUTION: REBALANCING FEDERAL AND PROVINCIAL CAPACITY

The most serious imbalance affecting the performance of Canada's governments—both federal and provincial—has been created through continued federal intrusion into areas of social service such as health care, which our Constitution clearly assigns to the provinces. For decades, the federal government has intruded into these areas of provincial responsibility through the arbitrary exercise of the federal spending power. This violates the spirit of the Constitution. More materially, it creates needless strains in federal-provincial relations. It runs counter to the principle that essen-

tial social services are best delivered by the government closest to those served. By dividing responsibility for the consequences of social policy, it diminishes Canadians' ability to hold any one level of government accountable when policies fail.

STRONGER PROVINCIAL GOVERNMENTS

The first step in rebalancing Canadian federalism should be, therefore, a devolution of power, responsibility, and revenue capacity from the federal government to the provinces in areas that the Constitution clearly and properly assigns to provinces. Provinces, in turn, should take the opportunity to consider a rebalancing and devolution of some provincial capacity to municipal authorities.

We urge this rebalancing primarily for its immediate effect on the improvement of government performance in Canada. But there are other good reasons to respect Canada's constitutional division of powers. Firstly, it is the Constitution, the foundational law on which all other statutes rest. The federal government should not be free to amend it *de facto* through the power to spend the taxpayer's money. That it has done so has played an important role in creating Canada's democratic deficit. People in provinces that voted strongly against the party in power in Ottawa found that the federal government, with little or no democratic representation from their province, would impose its unwanted policies in areas that the Constitution said were the province's to decide. The practice in effect disenfranchises provincial voters in areas of great significance to them—health and social services.

But perhaps the most powerful argument for rebalancing the Canadian federation is that *it works*. In our last volume, *Caring for Canadians in a Canada Strong and Free*, we showed that policy success relates negatively to federal intrusion into areas of provincial responsibility.

K-12 EDUCATION

The federal government has not much intruded into K-12 education. Here the Canadian provinces can boast of some of the best education results in the world. This is true particularly in Alberta, which respects another

key principle we have laid out: personal freedom of choice and acceptance of responsibility for those choices. Families in Alberta have more freedom—and responsibility—than parents in any other province to make educational choices for their children. They also have the world-beating education results to show for it.

WELFARE POLICY

In 1996, the federal government began to reduce restrictions on its transfers to the provinces for the provision of social assistance. Many provinces used their new freedom to reform and innovate in their programs. The results have been dramatic. Since the mid-1990s, the level of welfare dependency in Canada has been halved and more Canadians than ever before have joined the workforce.

HEALTH CARE

The federal government has intruded most forcefully into health care. And it is here that returns on social policy have failed most abysmally. On an age-adjusted basis, Canada has one of the highest levels of spending on health care in the world. Yet its results for that spending range from mediocre to near the bottom of the heap—not counting the pain, distress, and medical deterioration Canadians suffer as they queue for diagnosis and treatment.

In short, a pattern emerges. Where provinces are masters of their constitutional house, Canada outperforms most other nations. Where the federal government intrudes on areas the Constitution wisely placed in provincial jurisdiction, Canada has some of the worst policy results in the developed world. And when Ottawa reverses course and withdraws from provincial jurisdictions into which it once intruded, policy performance again picks up. With that in mind, we urge the following immediate steps to complete the rebalancing of federal and provincial roles in social services:

- ✦ that the federal government completely remove itself from the fields of social assistance, child care, and health care;

- ✦ that this withdrawal be coordinated with a reduction in federal revenues by the current value of federal fiscal transfers to the provinces in support of these services, vacating the equivalent tax room to the provinces;
- ✦ that the provinces assume in full their constitutional responsibility for providing essential social services (education, health care, child care, and social assistance) and for developing whatever national standards are desirable in these areas by means of inter-provincial agreements facilitated by the Council of the Federation;
- ✦ that the provinces, in fully assuming these responsibilities, provide maximum freedom of choice to the recipients of essential social services;
- ✦ that the current equalization formula be amended to provide additional revenues to lower-income provinces for which a “tax point” is worth less than for higher-income provinces, to the effect that no province be “worse off” after the transfer of tax points than under the current system.

Shifting taxing power to the provinces is as important as freeing them to meet their social-policy responsibilities as they like. It is imperative to achieve the kind of transparency and accountability we discussed in chapter one. For citizens, it means we can easily relate what we pay in taxes to what we receive in policy results—and hold the appropriate level of government accountable. Wasteful finger-pointing between federal and provincial governments would end.

How much tax room would Ottawa have to vacate? The main federal transfers to the provinces for social policy come in two areas: the Canada Health Transfer (CHT) for health care and the Canada Social Transfer (CST) for a grab bag of other programs including welfare and post-secondary education. Table 3.1 shows the size of these transfers and thus the tax room to be vacated. In other words, if our vision were accepted, Ottawa would reduce federal taxes by more than \$30 billion dollars to open up room for the provinces to raise money to fund the social programs that lie in their jurisdiction.

TABLE 3.1: FEDERAL TRANSFERS TO PROVINCES (MILLIONS OF DOLLARS)

| | 2006/07 | 2007/08 | 2008/09 | 2009/10 | 2010/11 |
|---|---------|---------|---------|---------|---------|
| Total transfers | 30,540 | 32,548 | 33,479 | 34,787 | 35,276 |
| CHT transfers (including Wait Times Reduction commitments) | 21,340 | 22,548 | 23,229 | 24,237 | 25,676 |
| CST including daycare commitments | 9,200 | 10,000 | 10,250 | 10,550 | 9,600* |

* Funding for the Early Learning and Child Care (ELCC) initiative included under CST ends in 2009/10.
Source: Canada, Department of Finance, 2005.

A STRONGER, MORE FOCUSED, NATIONAL GOVERNMENT

Thus far we have mainly discussed the need to rebalance the Canadian federation by devolving responsibility and funding capacity *downward*, to the levels of government closest to the people to be served. Some will argue that this will weaken the central government—reducing its importance and effectiveness, even weakening the ties that hold our federation together. “Not so,” we reply. To us, “rebalancing the federation” also means *strengthening* the national government in key areas of *its* responsibility—areas where no one disputes the need for a strong federal government. Coincidentally, these are often areas where the performance of the federal government has been less than stellar in recent years.

To that end, we recommend that the federal Parliament focus on strengthening the performance of the national government with respect to:

- * Canada’s foreign policy;
- * its defence and military capability;
- * the settlement of favourable external trade arrangements and the elimination of trade barriers within Canada;
- * a sound currency and monetary policy;
- * intellectual property law;
- * the criminal law and provision for public safety;
- * the discharge of federal responsibilities toward aboriginal peoples.

It should be noted here that *we do not say* there is no role whatsoever for the federal government in protecting Canadians' health, only that it not to finance or prescribe the delivery of core services. Federal support for health care should focus on areas where it can do the most good without compromising provincial jurisdiction: support for health science and research, equalization payments to enable have-not provinces to meet national standards, the collection and dissemination of performance data on the health-care system, and coordination of a national response to public health hazards such as pandemics.

UNITY IN NUMBERS: INTERPROVINCIAL AGREEMENTS TO STRENGTHEN THE FEDERATION

Some Canadians may worry that implementing our rebalancing proposals, particularly those that strengthen the provinces, must by definition weaken national unity. We reject that zero-sum formulation. In our view, the maintenance of national unity is not a monopoly of the federal government. Rather, it is a responsibility in which every Canadian, and every level of government, shares. Beyond that statement of principle, we envision an expanded role for the provinces and territories in strengthening the ties that bind our country together.

In the past, Canadians have relied heavily—excessively so—on the federal government to maintain Confederation's mortar. National initiatives like employment insurance, the Canada Pension Plan, equalization, regional development programs, government ownership of a radio and television network, and the *Canada Health Act*, were all supposed to bind the nation more tightly together. To some extent, they have. But the arbitrary use of the federal spending power that accompanied many of these initiatives also provoked many of the tensions that afflict Confederation today, including chronic fiscal imbalances between the federal and provincial governments.

Other federal initiatives have been even more damaging to national unity. The Trudeau government's insistence that it, not the Quebec government, should be the guardian and promoter of the French language

and culture in Canada, angered not only that province but also much of the rest of the country. The tactics employed by the same government to repatriate the Constitution so further alienated Quebec that that province has still not fully signed on. The National Energy Program, which arbitrarily transferred \$100 billion in wealth from petroleum-producing provinces to the federal treasury and to consuming provinces, fanned the embers of Western alienation.

In more recent times, near-exclusive reliance on the federal government to preserve the federal union has had even more disastrous consequences. The top-down road to constitution-making taken by the Mulroney government's failed Meech and Charlottetown Accords set in train a reaction that prompted Quebec to hold a vote on rupturing Confederation's ties. The Chrétien government's subsequent mismanagement of the federalist side in the 1995 referendum campaign brought us to within 28,000 votes out of 4.67 million of a full-blown secession crisis. And then, when the chief symbol and voice for Confederation in Quebec—the federal government—became tainted with corruption exposed by the Auditor General and Mr. Justice Gomery's Inquiry, support for separatism was once again dangerously re-energized.

Is there an alternative to relying so exclusively on Ottawa to keep the country together? Yes, there is! "Memorandums of Understanding" (MOUs) among the provinces and territories, initiated by premiers and territorial leaders, and facilitated by the recently formed Council of the Federation, have ample potential in this regard.

Such "bridge-building" MOUs commit signatory provinces and territories to working together in concrete ways to pursue common goals—jointly required infrastructure perhaps, or shared trade interests. Such memorandums already exist among a number of the provinces and territories, covering everything from energy development to French language instruction (table 3.2, p. 76). But their use could profitably be deepened and expanded, particularly between Quebec and provinces like Ontario, New Brunswick, Newfoundland, and perhaps Alberta, with which it shares significant interests.

Canadians have relied too long on a single anchor—the federal government—to keep our federal ship secure during separatist gales. Mismanagement and corruption have, at least temporarily, dangerously weakened this anchor. But there are alternatives. New, flexible bonds woven among the provinces and territories—especially between Quebec and its immediate neighbours—may well hold us more securely than even a repaired federal anchor. We therefore recommend:

- ✳ a greater use of Memorandums of Understanding by all provinces and territories to pursue common objectives and interests, facilitated and supported by the Council of the Federation;
- ✳ the negotiation as a priority of a Memorandum of Understanding between Quebec and Ontario committing them to concrete measures to pursue common interests in inter-provincial labour movements, compatible education standards, and the portability of health-care benefits, understandings and commitments that might become models for other provinces to emulate.

Do provinces and territories need inspiration to put their energy into agreements to strengthen the cause of national unity? Let them look no further than the greatest such effort in our history: the forging of Confederation itself.

When the idea of Canada was born in the nineteenth century, there was no federal government. The distant “Mother Parliament” in Britain was only mildly interested. It was the leaders of the disparate colonies, predecessors of today’s provinces, who rose to the occasion and made history. They embraced the vision of a new nation commensurate in scale and spirit with the land that inspired it. And it was they who agreed upon practical designs for its implementation, proposals to create a national market, a federal constitution, and the longest railway in the world. If those earlier “provincial” statesmen could have such vision, what cannot their present-day successors do?

TABLE 3.2: SAMPLE MEMORANDUMS OF UNDERSTANDING AMONG PROVINCES**Alberta and British Columbia**

Memorandum of Understanding: Alberta/British Columbia Partnership on Child Welfare—October 8, 2003
(Alberta, International and Intergovernmental Relations, 2003, <[www.iir.gov.ab.ca/canadian_intergovernmental_relations/pdfs/\(4.2.1.5\)%20AB-BC%20Child_Welfare_MOU.pdf](http://www.iir.gov.ab.ca/canadian_intergovernmental_relations/pdfs/(4.2.1.5)%20AB-BC%20Child_Welfare_MOU.pdf)>)

Alberta-British Columbia Memorandum of Understanding: Environmental Cooperation and Harmonization—May 26, 2004
(Alberta, International and Intergovernmental Relations, 2004, <www.iir.gov.ab.ca/canadian_intergovernmental_relations/documents/Environmental_Cooperation_MOU.pdf>)

British Columbia-Alberta Memorandum of Understanding: Bilateral Water Management Agreement Negotiations—March 18, 2005
(Alberta, International and Intergovernmental Relations, 2005, <www.iir.gov.ab.ca/canadian_intergovernmental_relations/documents/WaterManagementNegotiatingMOU_March22005_FINAL.pdf>)

Manitoba and New Brunswick

Manitoba and New Brunswick Sign Co-operation Agreement [news release]—January 23, 2003
(Manitoba, Information Services, 2002, <www.gov.mb.ca/chc/press/top/2002/01/2002-01-23-02.html>)

Northwest Territories and Alberta

Northwest Territories-Alberta Memorandum of Understanding for Cooperation and Development [in trade, transportation, tourism, and resource development]—October 17, 2003
(Northwest Territories, Department of Executive, 2003, <www.executive.gov.nt.ca/documents/AlbertaMOU-2003.pdf>)

Quebec and British Columbia*

Quebec and British Columbia Sign Agreement on Francophone Affairs [news release]—November 23, 2005
(British Columbia, Ministry of State for Intergovernmental Relations, 2005, <www2.news.gov.bc.ca/news_releases_2005-2009/2005OTP0135-001080.htm>)

Nova Scotia, Newfoundland, New Brunswick, and Prince Edward Island

Memorandum of Understanding on Atlantic Canada Cooperation [establishing the Council of Atlantic Premiers]—May 15, 2000
(Council of Atlantic Premiers, 2000, <www.cap-cpma.ca/images/pdf/eng/capmou.pdf>)

The Atlantic Procurement Agreement: A Memorandum of Agreement on the Reduction of Interprovincial Trade Barriers Relating to Public Procurement—April 17, 1996
(Council of Atlantic Premiers, 1996, <www.cap-cpma.ca/images/pdf/eng/APAEnglish.pdf>)

* This is not a unique agreement. Quebec has signed similar agreements with Nova Scotia, New Brunswick, Prince Edward Island, Yukon, Saskatchewan, and Alberta.

BALANCING THE BRANCHES: RESTORING THE LEGISLATURE TO EQUAL PARTNERSHIP WITH THE EXECUTIVE AND JUDICIARY

In liberal democratic systems of government, legislatures are said to make laws, executives to implement them, and the judiciary to interpret them in the context of concrete legal controversies (Dickerson and Flanagan, 2006: 297). This formal distinction among government functions is more or less reflected in the government institutions that are charged with putting it into practice. This does not, however, mean that the three branches of government are watertight compartments, limited exclusively to their nominal functions. Nor were they ever intended to be. John Locke, an acknowledged founder of the modern “separation of powers,” was quite clear that the executive has a “double trust” in the sense of having both “a part in the legislative and the supreme execution of the law” (Locke, [1690] 1980: 112). Or, as James Madison famously put it in the *Federalist Papers*, the checks and balances needed to generate moderate and decent government depend on at least some degree of “partial agency” of the formally separate branches in each other’s affairs (Hamilton, Madison and Jay, [1787] 2003: 294).

Accordingly, it comes as no surprise that even in the United States, which has a starker “separation of powers” than is found in Westminster-style parliamentary systems, such powers as the presidential veto make the chief executive a major law-maker, not just an executor of legislative will. At the same time, the American Senate’s power to confirm treaties and major appointments gives the legislature a role in traditionally executive functions. Such “partial agency” or “double trust” is even more obvious in parliamentary systems of responsible government, where the political executive (the prime minister and cabinet) sits as a committee of the legislature and generally controls the legislative agenda. In both presidential and parliamentary systems, moreover—indeed, in all rule-of-law democracies—courts inevitably “legislate” as they adjudicate competing interpretations of ambiguous law.

The real issue, in short, is not whether there is a mixture of functions among the three branches of government—there inevitably is, and a good

thing too—but whether we have the right set of inter- and intra-branch checks and balances. In Canada, a rebalancing of inter-branch relationships is needed as much as the rebalancing of federalism discussed above.

THE NEED FOR CHECKS AND BALANCES

Nearly every competent observer, whatever their political allegiance, nowadays agrees that the executive and the judiciary have grown substantially in power and stature at the expense of the legislature. Indeed some, such as Donald Savoie (1999), have argued that under the relentless bureaucratization of power from Trudeau through Mulroney to Chrétien and Martin, cabinet itself has become little more than a focus group, with real or effective power lodged in the central agencies, especially the Prime Minister's Office (PMO). As Justice Gomery put it in his report on the Sponsorship Scandal, “[t]he concentration of power in the PMO makes it progressively more difficult for counter-balancing forces in Cabinet, in the public service, and in Parliament to modify or to oppose measures advocated by the Prime Minister” (“Gomery Commission,” 2006: 128).

Indeed, so powerful have prime ministers become that according to some commentators, except in situations of minority government, we would be subject to “dictatorship” (though perhaps of a “friendly” sort) (Simpson, 2001) were it not for the increase in judicial power brought by the 1982 *Charter of Rights and Freedoms* (Greene et al., 1998: 6; Allen, 1993: 8). Because opposition and backbench legislators no longer constrain executives in any meaningful sense, our newly empowered courts can and do. In F.L. Morton's words, as “executive-dominated legislatures have fallen into disrepute, courts and judges have filled the vacuum.” Certainly public opinion surveys show that “many Canadians trust judges more than they do politicians” (Morton, 2003: 28).

The image of an executive “dictatorship” checked only by ermine-clad judicial guardians is exaggerated, however, notwithstanding the undoubted predominance of the executive. For one thing, real dictators who are unfettered by significant legislative constraints do not generally accept constraints from robed judges, who famously lack the power of either

sword or purse (Hamilton, Madison and Jay, [1787] 2003: 472). If judicial constraints work in Canada, as they clearly do, it is at least in part because political executives remain subject to other constraints, including legislative ones. Understanding full well that the so-called “trained seals” sitting on the government’s back benches can be pushed only so far, no prime minister wants to test the limits of his allegedly dictatorial power (J. Smith 2003: 157). As Dawson and Ward put it, any sensible prime minister will be “sufficiently wise and far-seeing to limit his demands ... to those which will gain the general acceptance of his followers,” or at least to those that will not provoke their outright rebellion (Dawson and Ward, 1989: 47).

A BETTER HOUSE: STRENGTHENING THE LEGISLATURE

Still, even if the claims of executive *dictatorship* are exaggerated, it remains true that the legislature has become the weakling among the three branches and that it needs to be strengthened. For the healthy system of checks and balances contemplated by liberal democratic theory, Canadian legislatures need to play a more vigorous role in counter-balancing the power of both executives and courts. As Justice Gomery has rightly noted, the infamous “sponsorship scandal” arose in part because Parliament, which ought to be “the front-line guardian of the public interest” (“Gomery Commission,” 2006: 4), had been unable “to exercise its traditional role as watchdog of the public purse” (7). He concludes that an institutional “rebalancing” (4, 6) is essential if the legislature is to regain its capacity effectively to “counter-balance ... the power of the executive in Canadian government” (8).

The weakness of legislatures stems from the fact that the first minister, whether premier or prime minister, has come to be the overwhelming source of legitimacy and authority for the entire cabinet and government. This symbolic as well as the effective centralization of power certainly imparts energy to the executive. At the same time, however, it brings with it considerable opacity and secrecy, and thus the avoidance of responsibility. To pose the problem of twenty-first-century governance in Canada in these terms invites a response, not so much in terms of solving a problem

as of mitigating some unfortunate consequences. Specifically, transparency and responsibility in government require sources of legitimacy and authority independent of the first minister and his or her secretariat. The following are some ways in which this might be achieved.

THE “OTHER PLACE”: STRENGTHENING THE SENATE BY THE BALLOT BOX

A revitalized bicameralism is the most obvious way of breaking the stranglehold of executive power over the legislature. Ironically, the executive’s need for the “confidence” of the Commons is precisely what sustains its dominance of that house. Within limits—and as we have noted, those limits remain important—government back-benchers in the Commons are loathe to risk the electoral consequences of defeating their own cabinet. Pressures for party discipline are lighter in the Senate because it is not a “confidence chamber.” On the other hand, the Senate often (though not always) is reluctant to flex its considerable formal muscle because, being an appointed body, it lacks democratic legitimacy. Electing senators would remedy this defect and create a locus of significant constraint on the executive-dominated Commons.

While election has traditionally been part of the agenda for reforming the Senate, that agenda has often emphasized giving provincial electorates equal representation in the federal upper house, a reform requiring the kind of formal constitutional amendment to which Canadians have become allergic since the Meech Lake and Charlottetown Accord debacles. Making the Senate a more effective legislative constraint on executive power through election, by contrast, can be achieved without formal amendment by allowing provincial electorates to signify their preferred candidates for “appointment” to the upper house, leaving the number of senators from each province untouched. Formal appointment by the prime minister would eventually become, by convention, simply the conduit for electoral processes, much as the appointment by the Governor General of a prime minister has become the formal implementation of underlying electoral processes that democratically send members to the lower house.

Alberta has pioneered such “Senate elections” and in 1990 Prime Minister Mulroney appointed Stan Waters, a Reform Party candidate, who had been elected in this way. Although several other Albertans have been elected to the status of “senator in waiting,” Waters remains the only one appointed to date. Although the “elected senators” would formally be appointed up to age 75, a mechanism could surely be developed to require them to stand for re-election at appropriate intervals, say at every second provincial election or at the next provincial election after six years in office. Certainly Alberta’s elected senators-in-waiting have made such commitments.

Critics of this approach to Senate reform worry that infusing the substantial formal power of the Senate with democratic legitimacy risks the kind of deadlock between the two branches that occurred in Australia in 1975, when an opposition-controlled elected Senate refused supply to a government that enjoyed the confidence of the lower house, thus threatening to bring essential government operations and activities to a standstill (Saunders, 2003; also D. Smith, 2003: 22–30). The Governor General had to step in and resolve the crisis by calling on the leader of the opposition to form a government, which then precipitated a new election. While the prospect of such deadlock is indeed a concern, it has happened only once in Australia and has not recurred since 1975, partly because an increase in the number of senators per state, in the context of a single-transferable-vote electoral system, has made it rare for either of Australia’s major parties fully to control the upper chamber. Some smaller parties always secure enough seats to leaven the process and prevent inter-chamber gridlock (Bach, 2003: 183–88).

In Canada, something similar could be achieved if Alberta’s precedent of electing candidates for senatorial appointment in conjunction with provincial elections is followed. New Brunswick has already offered to replicate the Alberta model (Laghi, 2004: A1) and a private member’s bill advocating it has been introduced in Ontario (Mackie, 2004: A7). Once the process started, other provinces would certainly follow suit. Selected at different times, in different partisan contexts, and subject to different timetables for re-election (with none coinciding precisely with the election

of members to the House of Commons), Senators would be unlikely to fall into the kind of disciplined partisan alignment that would produce deadlock between the two houses. No doubt, there are other ways of achieving the same end, such as devising an appropriate electoral system for national Senate elections. And new mechanisms for negotiation and accommodation between the two houses would have to evolve. But, if the goal is to constrain what everyone agrees is an overly powerful executive, this is all to the good and the recent platform promise of Stephen Harper's government to move in this direction is to be welcomed (Conservative Party of Canada, 2006: 44). Are there risks? Of course. But given the Australian example of an elected and effective upper chamber working well in a parliamentary system of responsible government, the risk is worth taking.

WORKING IN GROUPS: STRENGTHENING COMMITTEES

The business of Parliament is ordered by various rules, procedures, and conventions. There are special and standing committees with distinct powers determined by the House and by its standing orders. Justice Gomery correctly identifies the strengthening of committees as a key component of "rebalancing" the relationships between executive and legislature. His report focuses particularly on the Public Accounts committee and we do not propose to repeat his many valuable recommendations here ("Gomery Commission," 2006: 75–80). More generally, we draw attention to the valuable innovation of the House of Commons in 2002 of choosing committee chairs and vice chairs through secret ballot among committee members (Docherty, 2004: 298). In most cases, only government members may be elected chairs and opposition members as vice-chairs, though in some cases, such as the Public Accounts Committee, this is reversed so that the chair must come from the opposition benches (Canada, House of Commons, 2005: XIII, s. 106(2) [online]). In principle, this reform gives the committee leadership somewhat greater independence from the party leadership. An important side benefit is that it promotes parliamentary civility at the expense of overly aggressive partisanship; ambitious parliamentarians, in short, are no doubt more careful in how they frame

partisan challenges to those whose respect (and thus votes) they might need to attain a committee leadership position.

However, the beneficial effects of electing committee leaderships are undermined by the fact that party leaders retain the right to remove members of their caucus, including committee chairs or vice-chairs, from their committees and reassign them (Docherty and White, 2004: 623). Not only does this power weaken the independence of committee leadership, it can also weaken the policy expertise that comes with experience on a committee if members are moved around too frequently. Simply put, the expectation in *Standing Order* 114 that a committee's "membership shall continue from session to session within a Parliament," (Canada, House of Commons, 2005: XIII, s. 114(1) [online]) is in tension with the power of party leaders to move people around. This should be changed, so that committee members and their elected leaders have greater security of tenure during a legislative term. In Quebec, for example, committee memberships are fixed for two years (Canadian Parliamentary Review, 1996: 27).

Reforming the tenure and selection of committees and their leadership is worth the effort, of course, only if committees have real and important work to do and the resources to carry it out effectively. The importance of their work increases in proportion to how early in the legislative process they can begin to contribute to its outcomes. Most powerful is a committee that can initiate and formulate legislation with some expectation that it will be taken seriously. In Ontario, committees can initiate bills that are treated like private member's bills but with enhanced time for second reading during the regular "orders of the day" (Sterling, 2000 :7). Similarly, a committee that receives government legislation early in the process has greater influence than a committee that receives fairly complete legislation. In Ontario, legislation can be sent to committee right after first reading (7) and, at the federal level, it has been possible since 1994 to send bills to committee right at the start of second reading. Docherty and White (2004) note, however, that the federal provision has rarely been exploited. Perhaps a move to more free votes, as has been proposed by the Harper government (Conservative Party of Canada, 2006: 44), will create a legislative atmosphere in which earlier resort to committees will become

a more attractive strategy. The need to work out compromises between the Commons and a more powerful and independent elected Senate would also raise the profile and importance of committee work, especially that of joint committees.

As for resources to do the work, the imbalance between those available to government and the committees expected to hold them to account is a perennial issue. Justice Gomery's report notes that, while some important improvements have been made, the committees still lack the staff and research capacity needed to perform well ("Gomery Commission," 2006: 80). Here we note and welcome the Harper government's promise to "[i]ncrease the power of Parliament and parliamentary committees to review the spending estimates of departments and hold ministers to account" (Conservative Party of Canada, 2006: 44).

Better structured and resourced committees—including joint committees of the Commons and an elected Senate—can add value to our public life in many ways, not least by providing oversight or confirmation of appointments to some of the more important boards and commissions. We pay special attention in the next section to judicial appointments, because they involve the balance between the executive, the legislature, and the "third" branch of government.

A LEVEL BENCH: BALANCING THE JUDICIARY

Legislative reform should be seen as a way not only of reining in an overly powerful executive but also of balancing the growing power of the courts. Like executives, judges have an important role to play in the overall system but they, too, can become too powerful. Among other things, revitalizing legislatures makes it more difficult to present the courts as the only viable check on otherwise unlimited executive power and thus opens the door to a more healthy balance among the three branches. Certainly, judges are expected to protect rights against democratic excess under the *Charter of Rights and Freedoms* but, if democratic excess (like executive dictatorship) is made unlikely by healthy checks and balances within and between the executive and legislative branches, then *Charter* cases will

generally raise policy questions of reasonable disagreement rather than outrageous violations of rights (Knopff and Morton, 1992: 144–51; Morton and Knopff, 2000: 34–37). Indeed, many leading commentators believe this has been the case even in the era of excessive domination by the executive (Hiebert, 2004: esp. ch. 2; Roach, 2001: esp. ch. 12; Russell, 1983: 43–44). After all, judges themselves often reflect and reproduce the very disagreements found outside the courtroom. Our judicial policy-makers act as valuable checks on their counterparts in the other branches but, if the overall system is to be properly balanced, they need (and deserve) to be checked and monitored in return. Two areas of oversight and constraint deserve particular attention: judicial appointments and the *Charter’s* “notwithstanding clause.”

OPENING THE ROBES: REFORMING JUDICIAL APPOINTMENTS

No one doubts that the Supreme Court of Canada, our final court of appeal, is fundamentally a policy-making body. Given that the actual parties before the court have already had an initial trial and at least one level of appeal, this additional and final appeal is needed less to determine which party wins the case than to resolve important issues of legal ambiguity—that is, to “legislate” by authoritatively choosing between competing interpretations of the relevant law (Archer et al., 1999: 326–90). This is why the Court refuses to hear cases that raise no substantial interpretive issue regardless of how large the personal stakes of the parties may be and why it will hear apparently picayune cases when the issues of legal policy loom large (330–32). When the legal issues before the Court involve choosing between plausible interpretations of constitutional law, which is more difficult for legislatures to change, the judicial role in policymaking becomes even more substantial (336–38).

Canada is hardly alone in experiencing an increasing judicialization of public policy; high courts the world over have gained significantly in constitutionally based policy-making power in recent decades (Hirshl, 2004; Ginsburg, 2003; Stone-Sweet, 2004, 2000; Morton and Knopff, 2000; Epp, 1996). However, Canada lags behind the many other countries whose method of appointing high court judges better reflects their substantial

policy-making power. In the United States and many European countries, for example, appointing authority is shared between the executive and one or more legislative chambers (Morton, 2004: 2). In federal regimes, the involvement of a federally organized upper house ensures some degree of regional input into the appointments process (2). In even more dramatic recognition of the judicial policy-making role, appointments to some constitutional courts include both government and opposition nominees (2). In Canada, by contrast, appointments to the Supreme Court are effectively in the hands of one individual, the already too-powerful prime minister.

Chief Justice McLachlin recently repeated her view that prime-ministerial appointment is the best way to prevent the “politicization” of the judicial appointments (Cordon, 2006 [online]). As many observers have pointed out, however, prime-ministerial appointment is thoroughly politicized, with significant lobbying occurring in the backrooms (Morton, 2004: 3). The question is not whether politics will intrude into the appointments process but whether it will take place in an appropriately designed public process or out of public sight. Even retired Supreme Court judges (Ziegel, 1999: 3) have in recent years joined what Jacob Ziegel, one of our leading students of judicial appointments, calls the “near unanimous chorus of opinion among scholars reinforced by many publicly-sponsored reports that the existing system of appointments is incompatible with a modern federal democratic constitution governed by the rule of law and incorporating one of the most powerful bills of rights in the Western hemisphere” (19). In 2004, the federal Justice Committee examined proposals for reforming the appointments process but (over dissenting reports filed by all opposition parties) recommended only that a multi-partisan nominating committee propose candidates for prime ministerial appointment and that the Justice Minister or Chair of the nominating committee defend the appointments before a House of Commons committee after the fact (Morton, forthcoming). Candidates themselves would not be subject to public confirmation hearings or a public interview like that in South Africa.

Significantly, even Prime Minister Paul Martin, whose Liberal majority on the Justice committee produced these pallid 2004 recommendations,

considered them “too timid and intimidated that he favoured greater input from Parliament” (Morton, forthcoming). We agree. The valuable work begun by the Justice Committee in 2004 should be resumed and extended to bring Canada into line with the emerging norms and practices of other advanced liberal democracies with powerful, policy-relevant high courts. Some kind of pre-appointment hearing or confirmation process by an appropriate parliamentary committee (perhaps a joint Senate-Commons committee) should be given special consideration.*

We might also reconsider how we appoint judges of the provincial courts of appeal. Although these provincial high courts are “established” by the provinces, their judges are currently appointed by the federal government. Canada is one of only four federations whose central government appoints provincial or state judges in this way (Morton, forthcoming). Shifting the appointment power for these courts to the provinces would almost certainly diversify this crucial “talent pool” for Supreme Court appointments. This reform would require the more difficult and politically risky process of constitutional amendment but, if the federal government were prepared to relinquish this power, the provinces would no doubt accept it.

DETRACTORS NOTWITHSTANDING: USING THE “N-CLAUSE”

The “notwithstanding clause” is part of the *Charter of Rights and Freedoms* (s. 33). It was integral to the compromises that made the constitutional reforms of 1982 possible. Without it, there would be no *Charter*. It was supported by provincial premiers on both the left (e.g., Saskatchewan’s NDP premier Blakeney) and the right (e.g., Alberta’s Progressive Conservative premier Lougheed). The provision’s purpose was to prevent “public policy [from] being dictated or determined by non-elected people” (Lougheed,

* A tentative step was taken in this direction by the new Conservative government when a hearing of the Ad Hoc Committee to Review a Nominee for the Supreme Court of Canada was held on February 27, 2006 to examine the appointment of Justice Marshall Rothstein to the Supreme Court.

quoted in Morton, 2003: 26), or having “the courts heavily involved in decisions which are essentially political” (Blakeney, in Morton: 26) or as a “safety valve” to ensure “that legislatures rather than judges would have the final say on important matters of public policy” (Federal Justice Minister Jean Chrétien, in Morton: 26). In short, the clause was based on the widespread recognition that the *Charter* rights would often involve the kinds of reasonable disagreements that amount to “policy” or “political” choices. The clause—which had precedents in the 1960 *Canadian Bill of Rights* and several provincial bills of rights—reflected the view that judges were human beings whose decisions were not infallible and who often disagreed among themselves in ways that reflected legislative disagreements. From this perspective, it is unclear why a legislative minority should necessarily win the day just because it gained the support of, say, one or two more judges than the legislative majority.

However reasonable these original views might be, we cannot ignore the fact that the notwithstanding clause has fallen somewhat into disuse and even disrepute during the intervening years (Manfredi, 2001: 4–5). The repair of our legislatures envisioned above is no doubt part of what is required to give renewed legitimacy to the occasional use of the notwithstanding clause as part of the on-going policy dialogue between the branches of government. But it is also worth considering the proposal initially developed by Conservative MP Scott Reid (Reid, 1996) and later championed by judicial scholar (and now Alberta legislator) Ted Morton (Morton, 2003). Reid and Morton propose democratizing the legislative override by subjecting its use to approval or rejection in a referendum. Even rehabilitating legislatures may not give them the degree of public legitimacy and trust enjoyed by the court, in other words, in which case the solution may be to transfer ultimate control of the notwithstanding clause to “the only institution that commands more popular respect than the court system—the popular will itself” (Reid, 1996: 186).

In this proposal, a “decision to use the notwithstanding clause would be put to a provincial referendum at the next practical date,” often in conjunction with an election, asking the people “to choose between the court’s policy and the government’s policy, or perhaps a new compromise”

(Morton, 2003: 29). The process would work best if legislatures avoided pre-emptive uses of the notwithstanding clause, employing it only if the courts struck down a policy as unconstitutional. In this scenario, the legislature acts first without a notwithstanding clause, giving the courts an unfettered opportunity to respond. If the judicial response is negative and if the government feels strongly enough, the legislation is re-enacted with a notwithstanding clause that is then subject to the ultimate decision of the people. Even if the clause is upheld, moreover, it remains subject to the existing five-year limit. This is neither legislative dominance nor judicial supremacy; nor is it unguided populist will (the people having to choose between policies carefully deliberated by the other institutions). It is, in fact, a very thorough and balanced form of public dialogue. Alberta came close to adopting this proposal in 1999 (Morton, 2003: 29). It is time that both levels of government gave it serious consideration.

BACK ON THE BEAM: STEPS FORWARD

In summary, rebalancing the relationship between the executive, judicial, and legislative arms in Canada involves strengthening the legislature and constraining the growing powers of both the executive and the judiciary. To this end we recommend:

- ✳ providing a stronger check on the executive by strengthening the bicameral nature of Parliament, in particular by democratizing (electing) the Senate;
- ✳ strengthening the powers of parliamentary and legislative committees by giving them an earlier role in the legislative process, giving their members (especially their elected chairs) more security of tenure, and giving them the resources (budgets, staffs, research capacity) required to exercise those powers effectively;
- ✳ establishing a pre-appointment hearing or confirmation process for appointments to the Supreme Court by an appropriate parliamentary committee to improve the transparency and balance of those appointments;

- ✦ pursuing a constitutional amendment to shift the power of appointing justices to provincial courts of appeal from the federal government to the provincial governments;
- ✦ recognizing the notwithstanding clause as a legitimate and necessary part of our Constitution and encouraging its proper use through refining and democratizing its application.

BALANCED GOVERNMENT: WHAT WOULD REBALANCING THE FEDERATION MEAN TO YOU AND YOUR FAMILY?

A stronger, better balanced federation will have clear benefits for you, your family, and your community. Some of these benefits will be direct and practical: better health care, education, child care, and social services, delivered at lower cost, as provincial governments free themselves from federal shackles and respond to their own citizens' priorities.

Other benefits may come into play only at election time or even more rarely. Once the constitutional division of responsibilities is restored and lines of accountability clarified, you will know whom to reward when policies improve or whom to blame when they disappoint.

Still other benefits may appear in the negative. You will have less need to fear for the federation's future, for one thing, once provinces and territories begin to weave a sturdy web of "bridge-building" memorandums of understanding (MOUs) binding them to work together toward common goals.

You may have less to fear from external threats as well. A federal government focused on truly national constitutional responsibilities will strengthen Canada's defences and rebuild its credibility on the world stage.

4 THE ROAD AHEAD

IN PURSUIT OF PROSPERITY

The second volume of the *Canada Strong and Free* series recommended policies to achieve the goal of giving Canadians the highest quality of life in the world. This volume has recommended approaches to an equally important goal: making Canada the most responsive democratic federation in the world. We can get there by increasing the transparency and accountability of our ministries and public agencies, by restoring the standing of our citizens in relation to government, by strengthening our democratic infrastructure, and by rebalancing the federation.

But our vision of a *Canada Strong and Free* also aspires to the best economic performance in the world. We can do that, too—ensuring our global competitiveness, our citizens’ jobs and incomes, and our high quality of life. As we have found throughout, these gains come when governments shed old, paternalistic assumptions and place free choice—as well as responsibility—in the hands of Canada’s citizens. And again, we find that “rebalancing” is an essential part of the program: in this case, redressing the imbalance between the portion of our national wealth that ends up in the hands of governments—currently about 40% of GDP—and what is left to individuals, families, enterprises, and civil society to spend, save, or invest as they see fit. Policies to dramatically improve Canada’s economic performance will be the focus of the fourth volume in this series.

If Canadians and their leaders share our vision and adopt these policies, we can all look forward to the highest quality of life, the best governance and the most productive economy among advanced nations. These cannot help but raise Canada’s standing to that of model world

citizen and leader. Attaining this status and exercising a reinvigorated international influence will be the primary focus of the fifth and final volume in this series.

We conclude by renewing our invitation for you to join us in developing and refining the ideas presented in this and future volumes—policies to bring into being a future Canada that is, in every respect, truly strong and free.

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