Submission to the House of Commons Electoral Reform Committee

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Constitutionality

1. Barring radical changes that affect specific constitutional guarantees, there are no legal or constitutional constraints on Parliament's ability to implement electoral reform. As is explained below, electoral reform may count as a constitutional change requiring formal amendment, but it is one that Parliament is free to implement unilaterally under section 44 of the amending formula.

2. The electoral system itself is not explicitly set out in the constitutional text or the amending formula. Yet recent Supreme Court jurisprudence on the amending formula – specifically the 2014 *Senate Reform Reference* and the 2014 *Supreme Court Act Reference* – while not specifically addressing electoral reform, outlined reasoning that strongly suggests the electoral system is part of the "constitutional architecture." The Supreme Court stated that the constitutional architecture includes aspects not included in the constitutional text. Given its status as an essential feature of the House of Commons, it would seem that the electoral system would be considered part of that basic structure.

3. The Court's reasoning in the *Supreme Court Act Reference* also suggests that parts of ordinary statutes (like the *Canada Elections Act*) might be, in effect, constitutionally entrenched. If this logic applies to the electoral system, then electoral reform should be considered a change of a constitutional nature requiring formal amendment. However, barring very specific changes (see the next paragraph), electoral reform is not a change that implicates provincial interests in the way that reform of the Senate does. Where the regional nature of Senate representation implicates provincial interests, the representational role of the House of Commons is intended to reflect the national will. I therefore conclude that even if electoral reform requires a constitutional amendment, it is one that Parliament is free to implement unilaterally under section 44 of the amending formula (notably, in the same manner it did when reapportioning seats in 1985 and 2011).

4. The constitutional text protects several features directly related to the electoral system. First, the guarantee of proportionate provincial representation of seats in the House of Commons under section 42(1)(a) of the Constitution Act, 1982, can only be changed under the general amending procedure (the "7/50 rule"). This provision does not require absolute proportionality, so a margin consistent with historical deviations from absolute proportionality is permitted before formal amendment would be required. Second, any change affecting the seat floor guarantee for provinces under section 41(b) would require the unanimous consent of the provinces. Finally, the constitutional text also explicitly contemplates the existence of electoral districts (ridings), which strongly suggests that any

extreme electoral reform option that completely eliminated electoral districts would require recourse to the general amending procedure.

5. Neither the existing electoral system nor any of the alternative systems typically considered in the Canadian context violate the Charter of Rights and Freedoms. The relevant Supreme Court jurisprudence on the Charter's democratic rights has suggested that Parliament should enjoy wide discretion in its choices regarding the electoral system. Further, challenges to the current First-Past-The-Post (FPTP) system on Charter of Rights grounds – the most recent of which was heard by the Quebec Court of Appeal in 2011 – have seen the system upheld as constitutional.

6. A full analysis of the constitutionality of electoral reform in Canada can be found in a paper that has been accepted for publication in an upcoming issue of the *Supreme Court Law Review*.

The Nature of Proportionality

7. The debate surrounding electoral reform and the various electoral systems is sometimes misleading. One area where this is true is in regards to proportional representation (PR). As Professor Peter Russell and others have noted, PR systems are designed to ensure that national vote shares are translated into seats in Parliament in a proportional manner.

8. Yet some of the discourse surrounding proportionality also speaks simplistically (and misleadingly) in terms of power. For example, we often hear that FPTP "frequently gives one party 100% of the power after it gains only [36% or 40% etc] of the vote." It is important to recognize that PR systems do not allocate power on a proportional basis either, and in fact often produce scenarios where parties exercise far more *disproportionate* power than under majoritarian systems like FPTP. Under PR, a party that secures 15% of the vote can enter into a coalition government or support a government in return for the implementation of particular policies it favours. While this scenario is both possible (and legitimate) under FPTP, it is more common under PR systems, and it permits parties that have been nominally rejected by 85% of the electorate to exercise significant power. Because this exercise of power is a function of post-election compromise by political parties to secure the confidence of the legislature, it is facile to pretend that it is somehow a direct reflection of the wishes of voters, let alone on a proportionate basis. Nothing about this process is inherently illegitimate, especially in the context of a system of responsible government, but it is important to understand why discussions of "proportionality" in electoral systems should distinguish between representation and the exercise of power.

Social Science Evidence, Values, and Conclusions about Democracy

9. As the committee has already learned, political science can provide important insights about the operation, impact, and comparative evidence regarding various electoral systems. However, there is no social scientific evidence that one can apply to reasonably assert that

any particular system Canada might seriously consider adopting is more "democratic" than another. This includes the current FPTP system.

10. Choosing between alternative electoral systems is a question of values and trade-offs. Those who advocate for PR systems privilege proportionality and vote equity. Those who advocate for the status quo privilege efficiency, vote aggregation, and more direct/clearer lines of accountability. These values are all consistent with democratic norms, but are emphasized by varying degrees by different electoral systems. There is nothing "less democratic" about a system that privileges parties capable of obtaining deep enough support to win single-member geographic ridings. On the other hand, nor is there anything less democratic about a system that seeks to ensure that seats allocated in a legislature reflect popular vote shares.

11. Misleading rhetoric about the various electoral systems may cloud our ability to properly identify the trade-offs associated with each. Accusations that FPTP produces "false majorities," for example, risk misrepresenting that system entirely. It certainly looks like a false majority is produced if one frames the system entirely on the basis of the national vote share. But that's not what the existing system is meant to do. In FPTP, the system effectively consists of 338 separate electoral contests, with a seat at stake in each one. A party that wins a majority of those contests is not winning a "false" majority. Canadians might reasonably prefer this simple geographic form of representation. Similarly, accusations that PR systems bring inherent "instability" are not supported by the comparative evidence. Nor is there any evidence that Canadian political parties, or the political culture within Canada or its Parliament, are somehow incapable of adjusting to a system that more readily produces minority or coalition governments.

Political Legitimacy and a Referendum

12. There is no legal requirement to hold a referendum before implementing electoral reform. The question of whether a convention has formed is an open one, but despite precedents at the provincial level (British Columbia [twice], Ontario, and PEI), I do not think there exists sufficient consensus among relevant political actors to conclude that one exists.

13. Instead, the argument in favour of a referendum is rooted in political legitimacy. A referendum is not a substitute for the process the government initiated and which this committee is engaged in: investigating various alternatives and, potentially, selecting one to bring to Canadians. But once an alternative is selected, given the very arguments in favour of reform, it would be inconsistent with democratic norms to implement a new system without first ensuring that a majority of Canadians support the change.

14. There are several reasons for this. First, electoral reform is not like ordinary legislation or policy change. The electoral system is the fundamental link between society and the state. In addition to its potential constitutional significance, major electoral reform would alter the composition of the House of Commons, thereby altering all other legislation passed by Parliament.

15. Second, it is of questionable political legitimacy to leave this change to the purview of the government of the day or the political parties that comprise Parliament. Political parties have inherent self-interest in the process and outcome. A perception that a party or parties are using electoral reform to their own advantage, for example, would only raise further issues for the public's general trust of the system (although I am not one of those who believes particular changes necessarily benefit particular parties – for one thing, parties will adjust their behaviour depending on which system is in place).

16. A third reason is precedent. In addition to several Canadian provinces, other Westminster jurisdictions, including the United Kingdom and New Zealand held referenda on electoral reform.

17. In some ways the most persuasive arguments in favour of a referendum are derived from an assessment of the arguments against. Critics have argued that the 2015 election provides the government with a clear mandate for reform. This is not quite accurate, in my view. The government clearly has a mandate to investigate and pursue reform, but the campaign does not provide the government with a mandate to enact any particular system. Indeed, given the very arguments critics of first-past-the-post make about governments in Canada gaining power after receiving only 36-40 percent of the national vote, it would seem deeply problematic for the government to change the electoral system without first making sure that a majority of Canadians did not prefer the status quo. Some commentators point out that other parties also supported electoral reform, and while this is true, nothing about the 2015 election can be taken to presume support of any *particular* electoral system by the general public.

18. Another argument critics make is that Canadians are either too apathetic or too uninformed for a referendum to be meaningful. More recently they point to the Brexit referendum of the United Kingdom to support this argument. Brexit does not serve as a useful example – for one thing, given its unprecedented nature, the medium-to-long term impact of Brexit is much less clear compared to the impact of changing FPTP to another electoral system. The more relevant comparative example of New Zealand's referenda on electoral reform refutes the critique that voters are too ignorant to assess alternatives. New Zealand's electoral reform process is particularly illustrative, as it required multi-stage votes, arguably structured in a way to make reform even *less* likely than a single majoritarian vote. Despite this hurdle, the public overwhelmingly supported reform in the form of a mixed-member proportional (MMP) system. Critics would have us believe that New Zealanders are capable of examining alternatives but Canadians are not.

19. A related argument is that a referendum outcome would fall prey to a "status quo bias," wherein people generally have an inclination towards favouring existing processes or institutions, thus reducing the odds that they would support change. It does not seem to occur to reform advocates that their arguments ought to be compelling enough to overcome this hurdle.

20. It becomes apparent that underneath every objection to a referendum there lurks a basic concern that Canadians simply won't vote the way reform advocates want. This speaks much more clearly to why a referendum is needed rather than the opposite. With a clear question and a proper information campaign, Canadians should be trusted to pass judgment on the most fundamental process linking them to the state.

Mandatory Voting

21. The committee needs to consider what precisely mandatory voting would be intended to achieve. The evidence is clear enough that mandatory voting will accomplish one thing: it will increase voter turnout.

22. However, it is not apparent that voter turnout is the problem rather than a symptom of a set of problems: alienation from the political process or politics generally, and apathy. There is not much compelling evidence that mandatory voting increases voter knowledge, or addresses the root problems that contribute to low voter turnout. As a result, instituting mandatory voting would be treating a symptom of a problem (or set of problems) rather than the disease.

23. Mandatory voting also has rights implications, in that it would clearly infringe freedom of conscience, freedom of expression, and possibly the Charter's democratic rights. It is possible a mandatory voting law might be upheld as a reasonable limitation on those rights, but the committee should seriously consider whether the largely symbolic benefits outweigh those costs.