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Backgrounder on New Honesty Rules and Enforcement Measures Needed in Canada's Elections Law

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A. Summary

The Trudeau Liberal budget proposes to amend the rule in the *Canada Elections Act* (CEA) prohibiting some false claims during elections about candidates, party leaders and party associates that was struck down in a [recent court ruling](#).

In the [table of "Legislative Measures"](#) in the Budget, under the heading "Amendments to the *Canada Elections Act*" it says:

"Budget 2021 proposes to introduce amendments to the *Canada Elections Act* to specify that making or publishing a false statement in relation to a candidate, prospective candidate, or party leader would be an offence only if the person or entity knows that the statement is false."

Section 362 of [Budget Bill C-30](#) only proposes to add the word "knowingly" to the offence provisions in the CEA that relate to section 91.

Democracy Watch is calling for a broader false claims rule, and also for a rule prohibiting false claims by candidates, leaders and parties that bait voters to vote for them.

As set out below in section B, a broader rule is needed in [section 91](#) of the CEA to prohibit all false claims about candidates and parties during not only the election period, but also the pre-election period.

Also as set out below in section B, a rule is also needed to prohibit false claims by candidates, leaders and parties because, in a [March 2018 ruling](#) on Democracy Watch's [complaint about Trudeau's false promise](#) during the 2015 election that he would change the electoral system, the Commissioner of Canada Elections refused to enforce the rule in the CEA that prohibits using a false claim to bait a voter to vote for a candidate ([subsection 282.8\(b\)](#)) – formerly 482(b)).

As set out below in section C, Democracy Watch is also calling for the Commissioner to be appointed through a fully independent process; to be given

the resources needed to investigate and rule on false claims before election day; to be required to issue a public ruling on every complaint or situation reviewed by the Commissioner, and; to be given powers to require social media companies to remove posts that make false claims during the pre-election and election period.

Finally, as set out below in section D, Democracy Watch is also calling for mandatory minimum fines on a sliding scale based on ability to pay (as they need to be high enough to discourage election dishonesty by wealthy interests).

B. The New Honest Elections Rules

- 1. Democracy Watch proposes** the following new wording for the *Canada Elections Act (CEA)* [section 91](#) rule prohibiting false claims about candidates, leaders and party officials:

False statements about candidates etc.

91 (1) No person or entity shall knowingly make or publish, including online, during the election period or the pre-election period, a false statement about a candidate, a prospective candidate, the leader of a political party or a volunteer or staff person of a political party.

Clarification

(2) Subsection (1) applies regardless of the place where the election is held or the place where the false statement is made or published.

- 2. Democracy Watch proposes** the following addition of a clause (c) to [section 282.8](#) of the *CEA* to clearly prohibit false claims by anyone attempting to bait a voter to vote for a candidate or party (with a mandatory minimum fine of \$200,000 for violations):

Intimidation, etc.

282.8 No person or entity shall ... (c) Knowingly make or publish, including online, a false claim or false promise during a pre-election period or election period. The person or entity shall not be held liable for failing to keep a promise if the person or entity can prove beyond a reasonable doubt that conditions after the election change in a manner that was unforeseeable at the time the promise was made.

C. The New Honest Elections Enforcement System

Currently, the Commissioner of Canada Elections is chosen by the Chief Electoral Officer (CEO) of Elections Canada, after consultation with the Director of Public Prosecutions, under [subsection 509\(1\)](#) of the *CEA*. While this seems to safeguard the Commissioner from political interference, the problem is the CEO is selected by the ruling party Cabinet, without any input from opposition parties, and then approved by resolution of the House of Commons (which is a formality when there is a majority government), under [subsection 13\(1\)](#) of the *CEA*.

Elections Canada is a major source of complaints that are referred to the Commissioner and, as a result, it and the CEO can play a key role in preventing complaints from being referred to the Commissioner.

The Commissioner, as one individual, easily shelve the review of any complaint or situation in secret. The Commissioner and Elections Canada [have shelved thousands of complaints in the past](#) without a full investigation or public ruling.

For all these reasons, the Commissioner should instead be a three-person commission with the first step in the selection process handled by a fully independent appointments commission that does not include any members of any political party. The commission should be required to do a public, merit-based search for fully qualified candidates, and then submit a short list of 1-3 recommended candidates to a committee made up of representatives of all federal parties that have at least one MP in the House of Commons. It should be required that two-thirds of the committee members required to approve the choice of Commissioner. [Click here](#) to see more re: why an independent appointments process is needed.

The Commissioner (more specifically, the proposed new three-person commission) must be given the resources needed to investigate and rule on complaints and situations in real time, before election day. It will be difficult to estimate, especially for the first election after the honesty rules are enacted, exactly what resources will be needed to respond to and stop false claims in real time, and so the estimation should favour more resources than less in order to ensure that the resources are adequate to address all situations that arise.

While the Commissioner is allowed to seek injunctions to stop illegal actions during an election campaign period under [section 516](#) of the *CEA*, the Commissioner (or proposed new three-person commission) should also be empowered to seek an injunction during the pre-election period, with the power to require social media companies to remove posts that make false claims during the pre-election and election period.

As well, the Commissioner (more specifically, the proposed new three-person commission) should be required to issue a public ruling on every complaint or situation its office reviews.

D. The New Honest Elections Penalties

Currently, a violation of section 91 is an offence under the *CEA* [subsections 486\(3\)\(c\)](#) (re: individuals who violate the section) and 486(4)(a) (re: entities that violate the section).

Under [subsection 500\(5\)](#) of the *CEA*, the penalty for violating section 91 is either a fine of up to \$20,000 and/or a jail term of up to two years (on summary conviction, ss. 500(5)(a)) or a fine of up to \$50,000 and/or a jail term of up to five years (if indicted, ss. 500(5)(b)).

However, the [penalties usually imposed for convictions](#) under the *CEA* don't involve anywhere near the maximum fines, or jail terms.

If we want people and entities to comply with the *CEA*, the law that protects the fairness of federal elections, penalties must be increased, and mandatory minimum penalties imposed.

Mandatory minimum penalties are [generally not a good idea](#) for offences where mitigating factors should be taken into account by a judge.

However, given that prosecutors are required to prove that a person or entity “knowingly” violated section 91 and subsection 282.8(c) of the *CEA*, there is no excuse or mitigating factor that a person or entity can point to in an attempt to excuse their violation. Violators of section 91 knew they were making or publishing a lie, and violators of subsection 282.8(c) knew that they are lying to bait voters into voting for them.

Given how much it can affect the results of an election when a person or entity makes or publishes a lie about someone running for public office (or their party leader or party official), or when a candidate or someone lies in order to bait voters into voting for them or their party, and given how difficult it is to counter such lies after they are made (especially if a lie goes viral on social media), preventing the making or publishing of such lies is key to protecting the integrity of elections in Canada.

For these reasons, mandatory minimum penalties should be imposed for violations of section 91 and subsection 282.8(c). However, to be fair, the mandatory minimum penalties should be on a [sliding scale based on the income and wealth](#) of the person or entity that violates the rules.

Democracy Watch proposes that the mandatory minimum penalty be 10% of the combined income and wealth of the person or entity that violates the rules. A jail term should also continue to be part of the penalty for the most serious offences.