

Deception in Politics: An Ethical Offence

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In the wake of the 1996 provincial election campaign in British Columbia, the New Democratic government was accused of election fraud. A project group called HELP BC led the charge, with the National Citizens' Coalition (NCC) as its sponsor. The NCC provided the financial support for three citizens to bring charges against each of their NDP MLAs. The plaintiffs argued that the NDP had tricked voters with lies during the campaign and then failed to keep promises once in office. Paradoxically, none of the three plaintiffs who filed the charges against MLAs Ed Convoy, Graeme Bowbrick, and Sue Hammell alleged any personal wrongdoing on the respondents' parts. The MLAs were mere proxies for the real targets, Premier Glen Clark and Finance Minister Elizabeth Cull. All three plaintiffs said that they had cast their votes for the NDP primarily because it boasted a record of fiscal responsibility. The plaintiffs recalled that Clark and Cull had told voters that the NDP government had balanced the budget in 1995-96 and would do the same the following year if elected. Upon exposure to media reports released in the months following the election, the plaintiffs concluded that the first of these statements was a lie, the second an empty promise. In their statements to the British Columbia Supreme Court, the petitioners reported feeling betrayed, cheated and robbed of the chance to cast their votes in accordance with their true preferences and interests.

The election fraud case ended in acquittal, but the questions that provoked it in the first place still linger. For instance, ought politicians be held to account when they break promises or are otherwise deceptive? If so, how? When, if ever, is it justifiable for a politician to break a promise? Are campaign promises really *promises*, or are they just musings about the things that candidates and parties might like to do if given the chance? This last

question is a pivotal one. Those who subscribe to the second view might contend that campaigns are about promoting grandiose visions and ambitions. They are a time for candidates to get voters charged up with exciting plans for positive change. Candidates' statements are to be taken as aspirations, not as contractual obligations. And once some politicians start promising big, the others have an incentive to follow suit, as voters might be wary of the candidate taking the sober, stoic approach while his competitors are promising the moon. After the candidates present their best-case scenarios, it is up to the voters to decide which candidate's platform appeals the most, based on the values and ideologies that guide it. Election campaigns are meant to communicate the candidates' beliefs and goals in a *general* sense, not to make guarantees of policy changes that they will be obliged to follow through on if elected. This interpretation of election campaigns does not lend itself easily to the concept of a broken promise because it does not interpret politicians' offerings during campaigns as *promises*. The judge's decision to exonerate the MLAs charged with election fraud is not incongruous with this view. She refused to submit to the argument that a budget projection, the "promise" in question, could amount to fraud, even if it turned out to be wrong.

The plaintiffs in the case saw things differently. The assumption underlying their position was that the statements that politicians make along the campaign trail are supposed to be substantive, concrete, and reliable. The primary purpose of an election campaign in a democratic country is to give the voters the information they need to make reasoned, rational choices between competitors. We know that party identification in Canada has declined over the years, which means that a growing number of voters are approaching campaigns with open minds.¹ The information that these individuals receive in the weeks leading up to the election could have a defining effect on their ultimate decisions. If political parties' and candidates' appeals are more akin to puffery than to genuine statements of intent, voters cannot put their trust in them. Those who sympathize with this view interpret at least some broken

¹ Scott Proudfoot, "Political Parties Lose Ground Steadily." (Available Online) Hillwatch.com (2000); Available from <http://www.hillwatch.com/Publications/Bulletins/Political_Parties_Lose_Ground_Steadily.aspx>.

campaign promises as intentional lies meant to manipulate voters.

Those who hold the first view, that campaigns are about visions and best intentions rather than concrete promises, might still feel frustrated when politicians deliver something less than or different from what their campaign material suggested. The appropriate course of action for these voters would likely be to support someone else the next time around. For the plaintiffs in the B.C. case, this was not enough. Un-kept promises are an affront to the integrity of electoral democracy and must be dealt with directly, not just at the ballot box where a voter is forced to condense all of her judgments and preferences into a single choice between local candidates. The ballot does not allow voters to articulate their opinions on any specific action or inaction, which means that dishonest politicians might be able to duck responsibility.

The thesis of this paper is that citizens ought to have meaningful recourse against politicians who are deceptive. Elections alone provide insufficient political accountability. Broken promises are but one manifestation of deception in politics; other forms include withholding information and intentionally misleading the House of Commons and the voters. Survey data in Canada and elsewhere verify that a majority of citizens view politicians' deception as a serious ethical transgression. The question is: how ought politicians be held to account for it? During a review of the code of conduct for the British Parliament, MPs considered whether to enumerate certain types of deception, such as misleading the House, as ethical breaches punishable under the code. They decided against it, but the UK Committee on Standards in Public Life, a non-partisan advisory committee on public ethics, warned that the issue is a serious one that will continue to percolate. I argue that the Canadian federal ethics regime ought to follow the advice of the advisory committee and make it an offense under the code of conduct for MPs to deceive voters - either with empty promises, evasions, or other manipulations of the truth. MPs accused of doing so would face investigation by the Conflict of Interest and Ethics Commissioner and, depending on her findings, could be subject to disciplinary action. Further, citizens ought to be able to bring complaints to the Ethics Commissioner when they feel that the ethics code has been breached. This would give citizens a key role in the accountability

process, as they would be able to take action when elected representatives did not live up to their ethical standards and expectations. The legal route pursued by the plaintiffs in British Columbia was not an effective strategy because the courtroom is an inappropriate forum for answering political ethics questions.

The paper has four parts. First, I explain why the Conflict of Interest and Ethics Commissioner is the appropriate official to respond to concerns about deception in politics. Second, I explore the parameters of the concept of political deception, paying specific attention to Canadians' attitudes and expectations as reported in survey data. Third, to demonstrate how my proposal would work in practice, I consider how and why the Conservative government reversed its pledge not to tax income trusts. This promise was considered to be a relatively important one in the Conservative Party's election platform, so the change in plans prompted sustained public criticism. This is the sort of thing that the Ethics Commissioner would weigh in on if deception were prohibited in the code of conduct. Without a doubt, members of the public would have brought the issue forward if they had had the opportunity. Finally, I contemplate the implications of relying on the legal system as mechanism to hold politicians to account for misleading statements.

Deception in Politics: An ethical offence?

There are at least three reasons to formally acknowledge deception in politics as an ethical offense. First, politicians might campaign more responsibly, and choose their words more carefully in general, if they knew they might have to explain any discrepancies and inconsistencies at some later date. No MP would want to be the subject of an ethics investigation. Second, if politicians were to explain to the Conflict of Interest and Ethics Commissioner why they broke promises or withheld information, the exercise would have significant educational value for the public. Not all broken promises start out as lies and not all modifications of the truth are malicious. Sometimes, politicians make promises with genuine intent to see them through, only to learn later that circumstances prevent their fulfillment. In these cases, the public would benefit from knowing the reasons

for the change of plan. It would force citizens to acknowledge the complexity and unpredictability of the policy process and the very real constraints that politicians face when allocating resources. Third, in those instances where a broken promise was always an empty one, or when a lie was deliberate and ill-intended, the Commissioner's investigation would provide citizens an avenue of recourse. Although voters always have the next election as a chance to remove an MP who fails to meet expectations, accountability between elections is weak. Politicians can avoid giving answer and defense until the next campaign. This would change if politicians were forced to answer for broken promises and other variations on deception.

In order for the benefits of the proposal to be realized, it is essential that the Commissioner's mandate be expanded so that she is able to respond to citizens' complaints of ethics code violations. At the time of writing, only MPs can forward allegations of wrongdoing to the Commissioner. This modification is certainly within the realm of possibility; the *Conflict of Interest Act*, the ethics code for ministers and public office holders, already permits the Commissioner to accept public complaints. If the Commissioner was permitted to respond to citizens' complaints of deception, she could act as a voice for those whose sense of propriety has been offended. Her interpretation of the code would be informed by citizens' input, which would guarantee at least some degree of congruity between the code's standard of ethics and the public's. It is unlikely that the Commissioner would be bombarded with requests for investigation; that has not happened with the *Conflict of Interest Act* despite its openness to public complaints. However, there is reason to believe that when an issue of significant importance was to arise, at least some citizens would take up the cause. The citizens' group Democracy Watch is an obvious example, as its members have long been campaigning for more honesty, accountability, and transparency in Canadian governance. In fact, the group proposes "honesty in politics" legislation, which would require politicians to resign if they broke promises. This group would likely be among the first to invite the Commissioner to probe the circumstances surrounding politicians' deceit. Under the leadership of Duff Conacher, Democracy Watch has already demonstrated its willingness to be proactive on this matter. In December of 2007, the group filed a complaint with Conflict of Interest

and Ethics Commissioner Mary Dawson. They alleged that Prime Minister Stephen Harper's partisan connection to former Prime Minister Brian Mulroney would place him in a conflict-of-interest should he get involved in the investigation into the business relationship between Mulroney and lobbyist Karlheinz Schreiber. Schreiber had named Harper in an affidavit, implying a link between he and Mulroney. Democracy Watch insisted that the Harper government could not take an objective approach to the investigation and therefore should abstain from interfering with it in any way. Specifically, the government should not be charged with setting the terms of the public inquiry into the relationship because Harper had a strong incentive to restrict the scope of its mandate. His own and his party's reputation were on the line. In the end, Dawson exonerated Harper and explained that in the *Conflict of Interest Act*, the notion of a minister's "private interest" is limited to interests that are "financial in nature or related to a professional or business status."² Personal reputation falls outside the boundaries of "private interest," at least as far as the *Conflict of Interest Act* is concerned. This example suggests that the legislation's standard of political ethics as interpreted by the Commissioner falls short of public expectations, at least in some cases.

There is a risk that a deception-prohibition clause would fall victim to partisan politics at its worst. One can imagine opposition parties using the clause as a tool to embarrass the government. Fortunately, the code of conduct for MPs already protects the Commissioner's "right of refusal;" she does not have to act on any request that she interprets as "frivolous or vexatious or (that) was not made in good faith."³ The trouble is, it might not always be easy to determine a "bad faith" complaint from a legitimate one. For instance, if an opposition MP complained that the government broke a promise to get tough on crime, and the Commissioner refused to investigate it on the grounds that it was partisan-driven rather than genuine, she would risk being tarred by the complainant as a government pawn. On the other hand, if she responded to

² Jack Aubry, "Ethics commissioner clears PM of conflict of interest in Schreiber affair." (Available Online) CanWest News Service (January 9, 2008); Available from www.canada.com.

³ Conflict of Interest Code for Members of the House of Commons." (Available Online) Office of the Conflict of Interest and Ethics Commissioner (2004); Available from <www.parl.gc.ca/ciec-ccie/en/members/conflict_of_interest/>.

every request that came in, she could become the pawn of every political party. The office of the Conflict of Interest and Ethics Commissioner would be hijacked by political battle and would lose credibility as an independent, objective ethics watchdog. To avoid this, only members of the public - whether as individuals or as organizations such as Democracy Watch - ought to be able to bring complaints of deception to the Commissioner. After all, politicians make promises to citizens - not to each other. If MPs withhold information or somehow distort the truth, they violate the relationship of trust that voters have no choice but to place in them. The citizens are the ones entitled to seek redress when this happens.

The code of conduct grants the Commissioner the authority to recommend a sanction if she finds that an MP has breached it. This is a non-binding recommendation; only the House of Commons can punish one of its members for misconduct. Even if the Commissioner were to decide that an MP had committed an act of deception, the House could ignore her recommendation for reprimand. The House's treatment of the issue would undoubtedly reflect its partisan complexion, which means that at least some offences would go unpunished. However, even if the House ignored it, the Commissioner's report would remain a matter of public record. Citizens would have access to the information gathered during the investigation and would be able to judge for themselves whether an offence had occurred. Also, even if an MP's ethical transgression were to escape "official" sanction, the investigation itself is where the accountability would come in, as long as the MP cooperated by answering the Commissioner's questions. The code of conduct requires that MPs "cooperate with the Commissioner with respect to any inquiry."⁴ This implies that if the Commissioner asks an MP for information or explanation, the MP is expected to provide it. However, there is no explicit requirement that MPs must give testimony if asked and ultimately no way that the Commissioner can force Members to be forthcoming. Despite making numerous requests for an interview with Prime Minister Harper regarding an investigation into his conduct in 2006, Ethics Commissioner Bernard Shapiro was told that Harper's schedule would not permit it. Sandra Buckler, the Prime Minister's director of communications, told the press that her boss was "loathe to cooperate" with Shapiro,

⁴ Ibid.

citing his questionable decision-making powers as justification.⁵ However, Harper eventually issued a written response to Shapiro's inquiry, which suggests that he acknowledged some obligation to respect the process. The Commissioner has no power to force MPs to explain themselves; she must rely on the power of persuasion. This is why an attentive public is indispensable to an effective ethics regime. The Commissioner's requests for information and cooperation would have more clout if backed by public pressure. Citizens must accept their share of responsibility for holding politicians to account for deception and dishonesty.

In the following section, I consider the findings from a study in which Canadians were asked about their attitudes and expectations with respect to public ethics. The majority of respondents expressed very little tolerance for deception in politics. This suggests that there would be substantial public support for enumerating deception as an offence under the code of conduct.

Deception in Politics: What does it mean?

The Conflict of Interest Code for Members of the House of Commons prohibits conflicts-of-interest, undue influence, and the misuse of sensitive information, and requires that MPs (and their dependents) disclose the nature of any financial holdings that might give rise to a conflict-of-interest situation. The focus is on rules as opposed to principles, and on concrete concepts instead of generalizations or categories. "Deception" would be an anomaly on its list of prohibited behaviours. Its inclusion would help to re-direct the code's attention from "regulatory" ethics to "principled" ethics. Although the imbalance between rules and principles is the code's central weakness, it is easy to understand why the federal ethics regime has evolved as it has. Simply put, it is much less complicated to regulate financial conflicts-of-interest than it is to monitor compliance with ethical principles that are harder to define in precise terms. This is not to say that the issues that the ethics code grapples with in its current form are not open to

⁵ "Harper 'loathe' to cooperate with ethics commissioner." (Available online) CBCNews.ca (March 3, 2006); Available from http://www.cbc.ca/canada/story/2006/03/03/emerson_060303.html.

interpretation. For instance, suppose a constituent sends an MP an expensive bottle of wine in exchange for help with a job application. There could be a wide range of opinions on whether this is appropriate. Some might defend it as a gesture of thanks, while others might think it improper for an MP to accept additional payment for doing her job. The ethics code attempts to simplify this matter by stating clearly that MPs are to inform the Commissioner if they receive, from a single source, gifts worth more than a total of \$500 in one year. The federal ethics code has played it safe so far, but would be forced out of its comfort zone if it were expanded to prohibit deception.

The parameters of "deception" as a concept are not immediately obvious. The words "deception" and "dishonest" have distinctly negative connotations. They imply malicious intent. If one were to withhold information or conceal some part of the truth with good reason, the label would not apply as readily. Survey research shows that while Canadians are willing to make some concessions in order to protect politicians' right to privacy, on the whole they want the truth, straight up and unadulterated. Mancuso, Atkinson, Blais, Greene and Nevitte ran a survey in 1996 aimed at probing Canadians' attitudes about political ethics. Approximately 1400 people participated. Fifty-eight percent of them chose "honesty" as the most important value, over freedom, tolerance, equality, and compassion.⁶ Fifty-six percent said that was never acceptable for politicians to break promises.⁷ The survey found virtually no patience for lying to Parliament; 78% of respondents found it unacceptable for a minister to lie to protect a deputy minister's reputation. When it comes to public affairs, Canadians expect their representatives to be forthcoming, even if it causes embarrassment. Although a substantial majority of participants (87%) felt that politicians ought to expect less privacy than ordinary people, a significant number of them acknowledged that politicians are entitled to some breathing space. A slim majority of respondents felt that it was acceptable for a politician to refuse to answer a journalist who asked if he was seeing a marriage counselor.⁸ Even though over 80% of

⁶ Maureen Mancuso, Michael M. Atkinson, Andre Blais, Ian Greene, and Neil Nevitte, *A Question of Ethics: Canadians Speak Out Revised Edition* (Don Mills, Ontario: Oxford University Press, 2006): 44.

⁷ Ibid 170.

⁸ Ibid 173.

respondents reported feeling that journalists are too nosy at times, prying too far into politicians' private lives, 59% said that cabinet ministers' personal conduct is relevant to their abilities in the public sphere.⁹

The results of this survey help us to understand how Canadians define "deception" in politics. Therefore, they give us a preview of how citizens might interpret a prohibition against deception in the code of conduct. The Commissioner could bet on requests to investigate broken promises, half-truths, and cover-ups. Given the large number of respondents who view personal conduct as relevant to a politician's public competence, the Commissioner might also be asked to investigate breaches of honesty that occur in politicians' private lives. For instance, if the option had been available in Nova Scotia in 2007, some citizens might have complained to the Conflict of Interest Commissioner about the conduct of cabinet minister Ernie Fage. He was charged with leaving the scene of an accident. At least one bystander reported that Fage had alcohol on his breath at the time of the minor crash but there were no alcohol-related charges brought against him. One could interpret Fage's actions as a breach of honesty, as he tried to avoid getting caught by fleeing the scene before the police showed up. Whether such a transgression has relevance to the public is open to debate. On the one hand, the Fage incident had no direct consequences for the public because it had nothing to do with governance. The logical extension of this perspective is that Fage ought not be expected to answer to the public for private indiscretions that occurred after hours. On the other hand, one could argue that a person who leaves the scene of an accident is a poor decision maker who is unwilling to accept responsibility for his actions. To the extent that a politician's private-life decisions are an indication of his overall character and integrity, they become relevant to the public. One could argue that an individual who evades responsibility at home is likely to do the same at work. If so, a cabinet minister's personal conduct provides incite into his capacity to perform his public duties. This line of reasoning would suggest that the Commissioner should investigate all (alleged) acts of deception, even those in which politicians engage as private citizens. This would be unwise. Even if the line drawn between a politician's private persona and his public

⁹ Ibid 167.

one is superficial, and even if the public finds politicians' personal lives *relevant*, none of this gives the public the right to penetrate politicians' privacy. The thought of answering to the public for one's private actions would be enough to deter many people from contesting office. Further, if the Commissioner had the authority to investigate allegations of private misconduct, such as an MP's gambling addiction or involvement with a prostitute, it would encourage the media to dig even deeper into politician's personal lives rather than focusing on policy.

If "deception" were enumerated in the ethics code as a punishable offence, its scope would be open to the Commissioner's interpretation. The integrity of the clause would depend in her willingness to enforce it. If a Commissioner took a narrow, minimalist approach to interpreting the meaning of deception in politics, at least some of the incidents that citizens found offensive would escape investigation. This is one reason why the Commissioner's independence from government is fundamentally important. The Commissioner is appointed on the approval of the House of Commons for a fixed period. The Prime Minister is not authorized to dismiss her unilaterally. This institutional protection ought to give her the freedom to conduct investigations without fear of being "gagged." Admittedly, the Harper government's attitude towards officers of Parliament is a cause for concern, specifically with regard to their long-term survival as independent watchdogs. In May of 2008, Auditor General Sheila Fraser went public with her unequivocal opposition to the government's alleged plan for the Privy Council Office to pre-vet her office's media releases.¹⁰ The government hastened to give assurance that this was not in the cards and that there must have been a miscommunication. The lesson to be learned perhaps is that officers of Parliament must be prepared to go on the defensive.

If citizens had been able to lodge complaints about deception in politics in 2006, surely they would have gone to the Commissioner in droves about the income trust scandal. The Conservative government had promised not to tax income trusts, only to reverse their position on this

¹⁰ Lawrence Martin, "Info control spinning out of control," *The Globe and Mail* (May 5, 2008): A13.

within a year of assuming office. In the following section, I consider this case as an example of a high-profile broken promise and speculate on how a Commissioner might have handled it.

Broken Promises: A Case Study

"He gave his word, Canadians acted on his word, and he broke his word."

- Interim Liberal leader Bill Graham

On Halloween in 2006, Finance Minister Jim Flaherty had bad news for investors in income trusts: their tax-free status was about to end. Up until then, these companies had been protected by a legal structure that allowed them to pass profits to owners without having to pay corporate taxes. This made it possible for a company to transfer more money its owners, thus creating a strong incentive to invest. Income trusts' popularity had grown exponentially since the mid 1990s; all sorts of companies, everything from food chains to furniture stores, opted for trust rather than corporate status. Investors went along, including many of Canada's senior citizens who were trying to get as much as they could from their fixed incomes. Investments in income trusts seemed to guarantee greater returns.

When Flaherty broke the news, affected companies and investors went wild. Economists warned that the value of shares in income trusts would drop, creating market instability. Opposition parties went for the jugular, insisting that the government had gone back on a promise it had made to voters not long ago. During the campaign leading up to the general election in January of 2006, the Conservatives promised to protect income trusts by not applying any new taxes to them. When they changed their minds only nine months after winning a minority government, Prime Minister Stephen Harper denied that any promises had been broken. He explained that his party's commitment to protecting income trusts was just one part of a general pledge to "protect the income of seniors."¹¹ The

¹¹ "Flaherty plans changes to curb income trusts." (Available Online) CTV.ca (October 31, 2006); Available from

government kept this promise, he claimed, by allowing pension splitting and an age credit. Opposition parties were not persuaded by his clever reconstruction of the Conservative Party's promise. It is safe to assume that the millions of Canadians who had invested in income trusts were not impressed either. The Canadian Retired and Income Investors' Association issued a special report on the government's "Attack on Income Trusts," which shames the government for costing many seniors their savings. The Association's website has a link to a Global news video clip that features Steven Harper out on the campaign trail, criticizing the Liberals for having considered a tax on income trusts. Harper remarks that taxing income trusts would constitute "raiding seniors' hard-earned assets." At the end of the clip, the camera focuses on page 32 of the policy document that the Conservative Party distributed during the campaign. It was written that if elected, the Conservatives would "preserve income trusts by not imposing any new taxes on them."¹²

Although this might seem like a straight-forward case of a broken promise, there is more to the issue than that. There is no question that the Conservatives reversed their position on income trusts, but they had their reasons. Companies that switched to income status stopped paying corporate taxes, which reduced the government's revenue by a substantial margin. And things were about to get worse, as heavyweights Telus and BCE had indicated that they planned to convert as well. In 2006 alone, the value of conversions from corporate to income status was \$70 million. At the fateful press conference, Minister Flaherty reasoned that the tax loophole that income trusts had enjoyed was "unfair." He went on to explain that the government needed its money and if it did not come from corporations, it would have to come from individual taxpayers.¹³ The Liberals and the New Democrats pounced on the broken promise, but could hardly take issue with the substance of the new tax policy. After all, the previous Liberal government had considered doing something similar but halted when public pressure mounted in favour of the status quo. If charged with defending the Conservative

<http://www.ctv.ca/servlet/ArticleNews/story/CTVNews/20061031/income_trusts_061031?s_name=&no_ads=>.

¹² "Special Report: Attack on Income Trusts," Canadian Retired and Income Investors' Association www.criia.ca/Trusts.html.

¹³ CTV.ca

government's decision, one could argue that taxing income trusts was a painful but necessary step. It took leadership and courage, which the previous government lacked when it crumbled in the face of corporate opposition. If this argument holds any weight, then the ethics of the situation are not easy to sort out. Is it always the "right" thing to keep a promise, even if doing so would leave the government with insufficient revenue?

Had "deception" been enumerated as an ethical transgression, the income trust issue would very likely have found its way to the Conflict of Interest and Ethics Commissioner in the form of a complaint against the finance minister. The investigation would have shown that there was no obvious or easy resolution to the problem. In all likelihood, the Commissioner would have asked for input from Minister Flaherty, who would have defended his decision just as he did when questioned by journalists and opposition MPs. The Commissioner would review relevant facts and information, such as campaign publications, and would consider the arguments put forward by the complainant(s). In reaching a conclusion on whether the original promise counted as deception, she would attempt to determine whether the Conservatives had been genuine when making it in the first place. If they had been sincere, and only later came to realize that the costs of keeping the promise were too great, then it would be unfair to accuse them of dishonesty. However, if the Conservatives had known, or *ought* to have known, from the beginning that the promise was really wishful thinking, they could rightly be accused of deliberately manipulating voters.

If the Commissioner was to conclude that the Conservatives had been deceptive, she might think it appropriate to recommend a sanction. Again, the current arrangement is that the Commissioner may suggest a sanction but the House must decide collectively whether to take her advice. It is hard to imagine, in a minority Parliament, that the House would do anything but leap at the chance to punish the government for a broken promise. In a majority Parliament, the government would have the numbers to shield itself. It is important that the value of the Commissioner's inquiry and findings not be lost in the throes of partisan politics. The American committee system offers a solution to this problem. The House of Representatives holds the authority to punish a Member's behaviour, which means the House decides whether to adopt

the committee's recommendations for sanctions. However, even if the House does nothing, the committee has the authority to issue a letter of reprimand against the offending member. A letter from the Commissioner would be a matter of public record, which would be embarrassing for the recipient and would give citizens the information they need to hold the Member to account. It would not be as serious or as "tangible" as removing an MP from the House or imposing a fine, but it would be enough to acknowledge that an ethical standard had been breached.

For the educative potential of the Commissioner's work to be realized, an attentive public is essential. The media would give sufficient coverage to ethics probes and their outcomes, if previous investigations provide any indication. Commissioner Shapiro's explorations into the conduct of MPs David Emerson, Stephen Harper, Judy Sgro, and Gurmant Grewal made headlines easily. Although the media would play a significant role in ensuring that the results of inquiries became the subject of public discussion, the Commissioner herself has a mandate to "educate the public" on matters of political ethics. The code of conduct acknowledges this responsibility, but neither Commissioner has taken full advantage of it.

The Conflict of Interest and Ethics Commissioner is an independent, non-partisan officer of Parliament, which means that her inquiries into alleged breaches of ethics would not be tainted by a political agenda. Her reports would reference all of the evidence that contributed to her decisions, which would help citizens to understand the dimensions of the issues more clearly. People might think twice before accusing politicians of deception if they were forced to acknowledge the whole story. Politicians must always be cautious not to promise what they cannot deliver, but the public must accept that un-kept promises do not always involve lies or deception.

In the final section, I evaluate briefly the strategy used by the plaintiffs in British Columbia to avenge the NDP government's broken promise. For a number of reasons, the courtroom proved an unsuitable environment in which to resolve a political dispute.

Assessing the Alternative: Why not go to court?

The case against the three MLAs in British Columbia was driven by an innovative interpretation of what it means to commit "election fraud." The New Democrats were not the first politicians to break campaign promises, but they were the first in Canada to end up in court over it. British Columbia's *Elections Act* made this possible by making it illegal for politicians to obtain votes through fraudulent means. Section 256 of the B.C. *Election Act* prohibits the use of "intimidation" to compel voters' support for a candidate. In building their case against their MLAs, the petitioners relied on a subsection of the clause, which reads:

An individual or organization must not, by abduction, duress or fraudulent means ... compel, persuade or otherwise cause an individual to vote or refrain from voting for a particular candidate or for a candidate of a particular party.¹⁴

The key word for the plaintiffs is "fraudulent." For the MLAs to be convicted, the first step would have been for the plaintiffs to convince the judge that the NDP's erroneous predictions of a balanced budget were tantamount to lies. Madam Justice M.A. Humphries found herself unable to draw this conclusion. She explained that the statements that politicians make about future budgets are and can only be "statements of intention and belief." In other words, they are not promises - at least, not the kind that are binding or enforceable. Perhaps the case would have gone differently if another judge had heard it, specifically one who understood campaign promises as potential contracts to be honoured should the offering party be elected. However, Justice Humphries was not willing to make that leap in the context of the facts before her.

This case uncovered a number of logistical problems with using the courts to enhance political accountability. For starters, this option would be possible only in jurisdictions with legislation that could be interpreted to prohibit politicians from deceiving voters during campaigns. Because of the wording of section 256 of British Columbia's *Election Act*, and specifically the inclusion of the word "fraudulent," HELP BC was able to pursue their case in the courtroom. However, as was learned in that case, the legislation alone is not enough;

¹⁴ *Election Act*. British Columbia. (RSBC 1996) Chapter 106.

just as essential is a judiciary willing to interpret un-kept campaign promises as deliberate attempts to manipulate voters, at least in some situations. The case's downfall was practically inevitable from the get-go because the plaintiffs could not charge their real "targets," the Premier and Minister of Finance, directly; they had to go after their own MLAs, who the plaintiffs admitted to the court were honourable people of integrity. Unfortunately for the plaintiffs, a charge of election fraud makes sense only when brought against the candidate for whom a person actually voted. Even though the plaintiffs felt manipulated by members of the executive, they had to use to their own MLAs as stand-ins. Naturally, the judge could not find the accused parties guilty because, as she stated in her conclusion, they did not "personally contravene" the *Elections Act*.¹⁵ This proves that even if the judge had been persuaded that broken promises constitute election fraud, the result in this case would still have been an acquittal.

That the legal process is time-consuming and costly goes without saying; these factors alone would be enough to deter some people from getting past the initial stages. Perhaps the most compelling reason not to use the courts to avenge politicians' deception is that a finding of guilt in a case like this would set a dangerous precedent. It would open the door to a significant and intrusive presence for the judicial branch in electoral politics. If election fraud were interpreted to include broken campaign promises in particular, and deception in politics in general, this case could have been the first of many of its kind. Voters, particularly well-organized ones, might feel compelled to seize opportunities to hold politicians to account when they felt betrayed. For their part, politicians would be on pins and needles whenever they opened their mouths out of fear of a lawsuit somewhere down the road. This would bring a new layer of adversity to an already combative political environment by emphasizing revenge rather than resolution.

Conclusion

The central argument being advanced here is that general elections by themselves are unsatisfactory instruments by which to hold politicians answerable and accountable. Approximately once every four years, the voter is asked to choose between the candidates who have offered to serve as the local representative. There is no room for nuance; she cannot qualify her response in a way that would communicate her opinion on any specific aspect of the previous office-holder's track record, nor can she state explicitly any general or specific views on how the government operated. It is not possible, or even desirable, to gather public comment on each and every aspect of an incumbent's performance, but broken promises are an especially egregious offense for a politician - particularly if the promises were made irresponsibly or without sincerity. To the extent that deception has come to be the expectation for many people rather than the exception, it undermines the essential bond of trust between politicians and constituents. When candidates and parties campaign on promises, and voters support them on the basis of these promises, the two parties enter into something akin to a contract. If a politician does not fulfill her pledges, there ought to be consequences - just as there are in the private sector when contractual obligations are not honoured. What is being proposed here is a strategy for enhancing political accountability between elections.

When an individual or group of citizens feels sufficiently slighted by a politician's deception, the offender ought to answer for it. When Vancouver Kingsway MP David Emerson left the Liberal caucus abruptly after the 2006 general election to take a seat in the Conservative cabinet, people were fuming across the country. Many of them put calls in to Ethics Commissioner Bernard Shapiro in the hopes that he could take action, but his mandate would not permit him to. He acknowledged that the public's frustration was palpable and hinted not too subtly that there ought to be an immediate avenue of recourse available so that Emerson would have to explain himself. By switching political parties, and abandoning the policy platform of the Liberal banner under which he was elected, Emerson ostensibly broke every campaign promise he had made. His commitment to the Liberal Party had been shallow, to put it mildly. The fact that so many people called the Ethics Commissioner to complain about Emerson indicates that there is a significant ethical

dimension to politicians' deceptive behaviour. A politician who says one thing and does another does not meet the ethical standards that ought to be expected of a trustee of the public interest. The central argument of this paper is that the political ethics regime ought to be re-conceptualized so as to recognize deception as an ethical breach.