

COMMISSAIRE AUX ÉLECTIONS FÉDÉRALES



COMMISSIONER OF CANADA ELECTIONS

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VIA EMAIL: CSIS

February 3, 2021

CSIS

Dear [REDACTED]:

I am following up to our January 12, 2021, meeting during which we discussed correspondence from the Office of the Commissioner of Canada Elections (OCCE) providing information on our Office and identifying certain provisions pertaining to foreign influence, for the purposes of enforcing the *Canada Elections Act* (Act).

Office of the Commissioner of Canada Elections

The mandate of the Commissioner of Canada Elections (Commissioner) is to ensure that the Act is complied with and enforced. The Act contains more than 600 offences. In 2019, our office observed a significant increase in the overall number of complaints it received during the election period. Between September 11 and October 21, 2019, we received 2,698 complaints or enquiries related to the 43rd general election. Further, our office continues to receive complaints after the election period has drawn to a close. Legislative timelines, particularly those related to political financing also mean that referrals from Elections Canada may be received years after the election period.

Upon receipt of a complaint, or of his own initiative, the Commissioner can conduct a review or an investigation. The Commissioner exercises his mandate independently from the government, the Director of Public Prosecutions (DPP) or the Chief Electoral Officer. Highly sensitive information on political actors can be included in our investigative files.

Investigators for the Commissioner are “public officers” for obtaining search warrants or production orders under the *Criminal Code*, and the Investigations Directorate of the OCCE has investigative body status under the *Privacy Act*.

Investigators can receive and use information provided to them voluntarily by the complainants or any other person. The persons or entities that are the subject of an investigation can also voluntarily

provide information to the investigators. Further, there are other extrajudicial means to get legal access to information needed to carry out the Commissioner's mandate without the need to obtain a judge's prior authorization. These include public documents, election documents, information collected by Elections Canada during an Audit, information under the control of a government institution, and requests for documents evidencing a party's election expense. The Commissioner can also make use of judicial means to access information. This includes production orders and search warrants, as well as the ability to seek judicial authorization for an order to compel witness testimony or for a written return under oath.

In conducting its work, the Commissioner has access to informal and formal means to ensure compliance with the Act. The following formal means of ensuring compliance with and enforcement of the Act are spelled out in the Act and remain indispensable tools:

- the acceptance, by the Commissioner, of an undertaking;
- the issuance of a notice of violation requiring the payment of an administrative monetary penalty assessed by the Commissioner;
- the seeking of a court injunction;
- the seeking of a court order for the judicial deregistration of a political party;
- the power to enter into a compliance agreement; and
- the laying of charges leading to a prosecution by the DPP.

All employees of the OCCE have, at minimum, a secret level clearance, while some hold a valid top secret clearance. The OCCE maintains a separate environment for secret and top secret operations. The Office hosts and maintains a distinct server for covert online operations.

Foreign Influence - Overview

Some provisions under the Act can be relied upon to prevent foreign influence in federal elections. Following is a brief overview of these provisions.

Inducing Electors and Election Advertising

Section 282.4 of the Act contains provisions that prohibit foreigners from unduly influencing electors' vote. To demonstrate such an offence under the Act, evidence would be required to demonstrate that the foreign person or entity incurred an expense to directly promote or oppose a candidate, party leader or registered party, or that one of the things that they did to influence an elector is an offence under the laws of Canada or of a provincial legislature. Merely expressing an opinion or desire that electors support or oppose a particular candidate or party is not "undue influence" for the purposes of the Act, nor is the transmission of normal editorial content through broadcasting and/or electronic or print media, except if such communications are broadcast outside Canada.



It is also an offence to act in collusion with a person or entity to allow a foreigner to unduly influence elections.

It is an offence to sell advertising space to allow a foreign person or entity to transmit election advertising.

Section 349.02 of the Act also prohibits a third party¹ from using foreign funds for its regulated activities under the Act (i.e., during the pre-writ period, for its partisan activities, election surveys, and partisan advertising; during the election period, for its partisan activities, election surveys, and election advertising; and at any other time, for its other regulated political advertising).

The Act also prohibits a foreign third party from incurring regulated expenses under the Act (s. 349.4 and 351.1), i.e., expenses relating to:

- partisan activities expenses carried out during the pre-election or the election period;
- partisan advertising transmitted during the pre-election period;
- election advertising transmitted during the election period; and
- election surveys carried out during the pre-election or the election period.

Political Contributions

In accordance with subsection 363(1) of the Act, only individuals who are Canadian citizens or permanent residents can make political contributions to nomination contestants, candidates, registered parties, leadership contestants or registered electoral district associations. This applies to the making of monetary contributions as well as to non-monetary (in-kind) contributions.

¹ A third party is a person or group other than:

- a) during the pre-election period (in relation to partisan activities, partisan advertising and election surveys), a potential candidate, a nomination contestant, a registered or eligible party, a registered electoral district association of a registered party;
- b) during the election period (in relation to partisan activities, election advertising and election surveys), a candidate, a registered party or an electoral district association (registered or not) of a registered party;

For the purpose of the prohibition on use of foreign funds, a third party is a person or group other than:

- a) during the pre-election period (in relation to partisan activities, partisan advertising and election surveys), a potential candidate, a nomination contestant, a registered or eligible party, a registered electoral district association of a registered party;
- b) during the election period (in relation to partisan activities, election advertising and election surveys), a candidate, a registered party or an electoral district association (registered or not) of registered party; and
- c) at any other time outside of an election period (in relation to other regulated political advertising), a potential candidate, a nomination contestant, a registered or eligible party, a registered electoral district association of a registered party.

Upon reaching a certain spending threshold for expenses relating to regulated activities carried out during the pre-election or election period, as the case may be, third parties are required to register with Elections Canada.



The Act also contains prohibitions against circumventing or attempting to circumvent the restriction on the source of contributions, or to hide the identity of the source of a contribution (ss. 368(1) and (2))

Making a False Statement

Section 91 of the Act deals with publishing a false statement, to affect election results. Specifically, it makes it an offence for a person or entity, with the intention of affecting the results of an election, to make or publish, during the election period:

- a false statement that a candidate, a prospective candidate, the leader of a political party or a public figure associated with a political party has committed an offence, has been charged with an offence or is under investigation for such an offence; or
- a false statement about the citizenship, place of birth, education, professional qualifications or membership in a group or association of a candidate, a prospective candidate, the leader of a political party or a public figure associated with a political party.

Impersonation and misleading publications

Section 480.1 of the Act prohibits anyone who, with intent to mislead, falsely represents themselves to be: the Chief Electoral Officer or someone authorized to act on behalf of the Chief Electoral Officer; an election officer or someone authorized to act on behalf of the election officer; a candidate or a person authorized to act on behalf of the candidate; or, a person authorized to act on behalf of a registered party.

Section 481 of the Act further prohibits the distribution, transmission or publication during an election period of any material that falsely purports to have been made, distributed, transmitted or published under the authority of the Chief Electoral Officer or a returning officer, political party, or candidate or prospective candidate, if the intent is to mislead the public about the source of the communication. Use of a distinctive name, logo, social media account identifier, user-name or domain name of one of those individuals or of a political party, as the case may be, as well as the use of the name, voice, image or signature of one of those individuals are all factors that a court may consider in determining whether the offence was committed.

Foreign Broadcasting

Section 330(1) of the Act outlines a prohibition on foreign broadcasting. Specifically, it provides that no person shall—with intent to influence persons to vote or refrain from voting, or to vote or refrain from voting for a particular candidate or registered party at an election—use, aid, abet, counsel or procure the use of a broadcasting station outside Canada, during an election period, for the broadcasting of any matter having reference to an election. There is, however, an exception provided at subsection (1.1) in respect of broadcasting signals that originated in Canada. Subsection 330(2) further prohibits the broadcasting of election advertising outside Canada.



Unauthorized use of a computer

With amendments to the Act in December 2018, a new provision was created at section 482 for illegal use of a computer system. The new provision is modeled on section 342.1 of the *Criminal Code*, but requires proof of intention to affect the results of an election. This provides a mandate for the OCCE to deal with potential cases of (1) interceptions of any functions of a computer system, (2) use of or traffic in passwords to allow illegal access to computer data, or (3) use of a computer system to: destroy or alter computer data; render computer data meaningless or useless; obstruct, interrupt or interfere with the lawful use of computer data; or deny access to computer data to a person or entity that is entitled to access it.

Interference with an elector's vote

Section 282.6 of the Act prohibits any person from preventing or attempting to prevent an elector from voting at an election. The predecessor to this provision was used to prosecute an individual who purposefully misdirected electors to wrong polling stations at the 2011 general election.

Section 282.7 of the Act also prohibits offering a bribe. Specifically, it provides that no person shall, during an election period, directly or indirectly, offer a bribe to influence an elector to vote or refrain from voting, or to vote or refrain from voting for a particular candidate or registered party, at an election. Accepting, during the election period, a bribe intended to influence an elector's vote is also prohibited under subsection 282.7(2) of the Act.

Finally, section 282.8 of the Act prohibits:

- the use of intimidation or duress to compel a person to vote or refrain from voting, or to vote or refrain from voting for a particular candidate or registered party at an election; and,
- the use of a pretence or contrivance to influence or attempt to influence an elector's vote.

Collaboration

Technology and international borders, among others, give rise to challenges that will limit what the OCCE is reasonably able to accomplish in certain situations. In an effort to mitigate those risks, we believe it is important for our Office to have good knowledge of threats identified by the intelligence community. As such, we continue to encourage ongoing collaborative dialogue with various stakeholders, including the Canadian Security Intelligence Service, to ensure that our elections remain free and fair.



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We look forward to your continued collaboration in the form of sharing relevant and timely intelligence assessments and remain available to further discuss.

Sincerely,



Mylène Gigou
Director of Investigations

