Presentation on

"Resolution of Election Disputes"

by

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Introduction

Thank you very much for this opportunity to address you today. The theme of this year's Global Electoral Organization conference—Every Vote Counts—speaks to trust in the electoral process.

As most electoral management bodies have experienced, it is no longer sufficient to put in place good plans to administer elections. We have now been tasked with the job of safeguarding the electoral process and the values underlying it. The fair and transparent resolution of disputes that arise in the course of the electoral process is an integral element of ensuring the public's trust.

In Canada, disputes over the outcome of an election—on the basis that the votes were counted incorrectly, or that fraud or irregularities led to an improper result—are dealt with through the ordinary courts. The *Canada Elections Act* sets out comprehensive and clear rules for the resolution of these disputes, either through judicially supervised recounts, or applications to a court to contest an election.

Following the last general election in 2006, there were two judicial recounts. In neither of these cases did the recount change the winner of the election. Judicial recounts are fairly common and generally occur in districts after each general election, although they rarely change the result; in fact, in the 63 judicial recounts of federal elections heard since 1972, only two—both in 1972—have changed the result of the polling day count.

The other method of disputing election results is a contested election application, where a person argues that the result of the election was compromised by fraud or irregularities. These applications are very rare in Canada in this day and age. Although such applications were common in the 19th Century, the most recent example at the federal level occurred almost two decades ago, following the 1988 general election.

In that case, a series of mostly technical errors by poll workers incorrectly allowed people to register and vote. The court found that 121 votes should not have been cast. As the winner's margin was 77 votes, the court ordered a new election to be held. It may be of interest to note that the same candidate won the subsequent by-election by 7,000 votes.

Although important, the procedures to resolve judicial recounts and contested elections are not the focus of my talk today. These procedures are governed through the courts using court-like processes. Canadians have a very high trust in the impartiality and integrity of the judicial system and, therefore, they trust in how these kinds of disputes are resolved.

Of greater interest in the Canadian context, I believe, are the many disputes and complaints that are resolved and prevented on a daily basis through the actions of electoral administrators. It is in the resolution and prevention of these day-to-day complaints and disputes that Elections Canada has earned and maintained the trust of the public in the electoral system.

I mention both the resolution *and* the prevention of disputes. This is because, as administrators, we can concern ourselves with the future as much as with the past. The best dispute is the dispute that never occurs, and public trust over time will be enforced and maintained by a reduction of problematic or illegal behaviour.

Elections Canada has two related, but separate arms: the electoral management arm of the office of the Chief Electoral Officer, and the enforcement arm of the Commissioner of Canada Elections.

Both arms are guided by the four principles that lie at the heart of the system of electoral dispute resolution: independence, transparency, fairness and effectiveness.

First, the need for those involved in the resolution of electoral disputes to be independent of improper influence is clear and well-known to this audience. Any actual or apparent influence by the governing party—or indeed any party—in the resolution of electoral disputes can erode the trust of the public and bring the entire electoral system into disrepute.

Elections Canada's independence from the government and other political actors is maintained through several means. The Chief Electoral Officer is appointed by resolution of the House of Commons, as opposed to the government, and may only be removed for cause on address of both houses of Parliament. The Chief Electoral Officer reports to Parliament, and the budgetary authority for Elections Canada is primarily reviewed directly by Parliament as opposed to by the government.

The Commissioner of Canada Elections is appointed by the Chief Electoral Officer and, therefore, maintains his independence from the government through being a part of Elections Canada.

However, even within Elections Canada, the Commissioner operates independently of the rest of the office of the Chief Electoral Officer. The Commissioner decides whether enforcement action short of prosecution is necessary.

The second principle of an effective dispute resolution regime is transparency. One way that this can be achieved is through allowing those most affected by the law—especially political parties and candidates—to provide input into the application of the law. This has been formalized at Elections Canada through the participation of all registered political parties in a Political Parties Advisory Committee, which meets four times a year. This provides us with a way to gather knowledge of how political parties actually function and enables, in the end, establishment of smarter rules affecting parties and candidates.

Transparency is also achieved by ensuring that offences and penalties are clearly defined in statute, and that interpretations of the Act are made available to the public through the use of handbooks and information sheets provided to registered entities and through the Internet on our Web site.

Information about the Commissioner's office is also publicly available. The Elections Canada Web site includes a sentencing digest and a summary of other enforcement actions taken by the Commissioner. The Commissioner's *Investigator's Manual* is on-line so that the investigative process used is available to all.

The final two principles that guide an electoral dispute resolution system—fairness and effectiveness—are much more difficult to achieve.

The best way to achieve the flexibility necessary to respect fairness and effectiveness in every case is to have an adequate mixture of enforcement tools.

In certain cases, the use of criminal sanctions, including fines or imprisonment, may be the appropriate response to non-compliance. When a candidate exceeds the expense limits, the *Canada Elections Act* contains the possibility of such penalties following a prosecution. For certain serious offences a convicted person loses the right to run for election for the next five or seven years. It should be noted, however, that since the creation of the office of the Commissioner in 1974, no jail sentence has been imposed for an electoral offence at the federal level in Canada.

Enforcement through a criminal process may sometimes be necessary, but such an approach is not always desirable; nor is it necessarily the most effective means to ensure public trust. It is incumbent upon the electoral administration to do more than catch and prosecute. The administration must attempt, wherever possible, to reduce instances of non-compliance.

This can be achieved during the campaign by using effective communication tools which can include writing to a political party, issuing press releases and sending investigators to stop alleged misconduct where there exist risks of systematic misconduct that could cause serious damage to the electoral process.

In Canada, both the Chief Electoral Officer and the Commissioner have a role in ensuring compliance with the law using methods short of criminal prosecution. The Chief Electoral Officer plays the primary role in educating the public and political participants concerning the law.

The Act provides for a number of administrative enforcement measures to the Chief Electoral Officer. These measures are useful in dealing with non-compliance, especially in the realm of election financing. My colleague, Janice Vézina, will give more detail on those measures in the next panel.

The Chief Electoral Officer has also ensured that the necessary mechanisms are in place to allow parties and candidates to self-regulate during the electoral period. He will put at the disposal of political parties and candidates dedicated information services and hotlines to answer questions about legal requirements in order to prevent irregularities from occurring during the process. A dedicated hotline has also been established with the chief legal counsel of all political parties and our Legal Services branch to communicate concerns and resolve issues before they actually occur.

Nevertheless, in cases where the Chief Electoral Officer has a reasonable basis to believe an offence has already been committed, he will refer the matter to the Commissioner.

The Commissioner will investigate any matter referred to him by the Chief Electoral Officer or any other person, and make his own determination of how to deal with the allegations.

He has a number of choices. He may refer the matter to the Director of Public Prosecutions for prosecution. Those proceedings take place within the regular court system, rather than in a special electoral tribunal, as is the case in Mexico, for example.

The Commissioner has a number of other tools as well. He may enter into compliance agreements, resolving some contraventions of the Act by remedial rather than punitive measures. A compliance agreement is completely voluntary and contains terms and conditions that are mutually acceptable.

Unlike a guilty plea in court, an acknowledgement of responsibility in a compliance agreement doesn't result in a criminal record. In short, compliance agreements provide an alternative method of resolving a matter where there is no overriding public interest to be served by prosecution. All compliance agreements are made public.

A further tool that the Commissioner possesses is the authority to seek an injunction from a court to stop a contravention or force a person to comply with the Act where fairness and the public interest warrant action.

Though it has never been used since the power was given to the Commissioner in 2000, it remains a powerful tool that could be used to ensure the fairness of the electoral process in a way that could not be achieved through an inherently retroactive criminal sanction.

Finally, another tool that has been recently introduced by the Commissioner is the use of "caution letters." Caution letters are used in cases where an offence has apparently been committed but, due to the minor or technical nature of the apparent breach, the cost and sanction associated with a prosecution do not warrant criminal charges.

A caution letter states the facts of the situation and sets out the applicable law, including the relevant offence and potential penalties. The letter invites the recipient to contact the Commissioner if the facts are incorrect, and asks the recipient to acknowledge receipt by sending back a signed copy of the letter to be kept on file.

Future Directions

I would like to end my remarks by discussing some areas that may require legislative reform in Canada.

In his most recent report to Parliament on desirable amendments to the *Canada Elections Act*, the Chief Electoral Officer highlighted the fact that his role in ensuring the accuracy of political financing reports filed with him is limited by his lack of auditing powers. He

proposed that his office be provided with the power to further examine and inquire into the accuracy and completeness of returns filed under the Act. These powers would only be exercised with the consent of the political party, or with advance judicial approval.

A second area for future consideration may be the appropriateness of the mixture of penalties available in the Act. Administrative measures, especially those that allow public funding to be withheld as a method of ensuring compliance, may be the most effective avenue to enforce the Act. Consideration should be given to increasing the use of such administrative measures.

On the other hand, thought must be given as to whether the penalties in the Act are sufficiently severe to deter serious illegal activity that could sway an election.

Conclusion

At the end of the day, to ensure that “every vote counts,” people must have faith that the system is equitable, fair and effective. Canada’s system has evolved over time, and reflects our values, needs and political environment. Knowing that every electoral context is unique, as are the enforcement mechanisms that support it, I hope that my overview provided interesting insights.