



Controlling **FOREIGN INFLUENCE** **in Canadian Elections**



**Report of the Standing Senate Committee
on Legal and Constitutional Affairs**

The Honourable Bob Runciman, Chair

The Honourable George Baker, P.C., Deputy Chair

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Table of Contents

Introduction 1

Foreign interference 2

The Regulation of Third Parties During an Election Period 4

Conclusion 7

APPENDIX A - List of Witnesses..... 9

APPENDIX B – Order of Reference 9

APPENDIX C – Members..... 9

ENDNOTES..... 10

The Standing Senate Committee on Legal and Constitutional Affairs (the committee) recommends that the Government of Canada take action to amend the *Canada Elections Act* (CEA).¹

The CEA does not sufficiently protect Canadian elections from improper foreign interference, and the existing regime that regulates third-party advertising requires modernization in order to better ensure transparency and electoral fairness. The current rules allow foreign entities to make unlimited and unreported contributions to third parties, as long as they are made outside an election period and are not used directly for election advertising. However, these contributions can be used in a number of ways to impact Canadian elections.

Introduction

On 1 November 2016, the committee was authorized to examine and report on the reports of the Chief Electoral Officer on the 42nd General Election of October 19, 2015 and associated matters dealing with Elections Canada's conduct of the election.² The committee met with then Chief Electoral Officer (the CEO) Marc Mayrand on 23 November 2016 and with the Commissioner of Canada Elections, Yves Côté (the Commissioner) and General Counsel and Senior Director of Legal Services from the Commissioner's office, Marc Chénier, on 13 April 2017.³ In their annual reports and in the September 2016 report: *An Electoral Framework for the 21st Century: Recommendations from the Chief Electoral Officer of Canada Following the 42nd General Election*, the CEO and the Commissioner made many recommendations for the Government of Canada concerning ways the CEA can be updated to address contemporary concerns, including those highlighted by the committee below.⁴

The committee has reviewed these matters and recommends that the Government of Canada review and revise the *Canada Elections Act* in order to:

- **ensure that foreign funding does not play a direct or indirect role in Canadian elections;**
- **prohibit interference by foreign entities in Canada's elections by increasing criminal penalties, including by replacing section 331 with a provision that more clearly states that any attempt made by foreign entities to induce Canadian electors to vote in a particular way is prohibited;**
- **modernize the regulation of third parties' involvement in elections to address present-day realities, particularly concerning election advertising made through Internet-based communications and social media;**
- **remove the six month limitation on the requirement to report contributions made to third parties for the purposes of election advertising in order that all relevant contributions for this purpose are reported; and**
- **require that Elections Canada perform random audits of third parties' election advertising expenses and any contributions they have received that may be used during an election period.**

Foreign interference

In recent years, concern has grown among democratic countries about election interference by foreign entities, in particular when this is done through the use of the Internet and other computer-based systems.⁵ While much of the recent commentary on this issue pertains to elections outside Canada, there is growing concern that Canada's own electoral process is vulnerable to foreign interference.⁶ The committee feels that provisions in the CEA that address foreign interference need to be strengthened to ensure Canada does not see similar issues in the next federal election.

The CEA currently limits who is able to participate in certain aspects of the electoral process, thereby restricting foreign involvement. A broad and general restriction is found in section 331, which sets out who is permitted to "induce" electors to vote a particular way. It states:

No person who does not reside in Canada shall, during an election period, in any way induce electors to vote or refrain from voting or vote or refrain from voting for a particular candidate unless the person is

- **(a)** a Canadian citizen; or
- **(b)** a permanent resident within the meaning of subsection 2(1) of the *Immigration and Refugee Protection Act*.

Several concerns were discussed with witnesses regarding this provision. In *An Electoral Framework for the 21st Century*, the CEO recommends that section 331 be repealed, while the Commissioner recommends that "Parliament may wish to modernize this provision or repeal" it. The report notes that:

This section's breadth has caused difficulties for Elections Canada and the Commissioner in recent elections. Elections Canada receives frequent complaints that media statements (such as tweets or interview comments) made by non-Canadians violate this provision. It also receives questions about whether goods and services supplied by a foreign provider violate the Act. The overly broad wording of this provision diminishes public trust in how well the rules can be enforced. It also leads to criticism of both Elections Canada and the Commissioner for not properly enforcing a law that was likely never intended to limit all speech and actions by foreigners.⁷

The committee agrees with the Commissioner's view that section 331 is "very vague" and the emphasis placed by the CEO on the importance of ensuring public trust and clarity in the law. The Commissioner informed the committee of several scenarios that demonstrate how the application of this section is not always clear to Canadians. These included examples of incidents where people thought there were violations of the Act due to comments made during interviews on American television, foreigners working on electoral campaigns, and experts providing campaign advice to federal registered parties (he specifically noted the latter did not fall within the ambit of section 331).

The CEO and the Commissioner have also noted other problems with this section. For instance, the Commissioner pointed out a discrepancy between the English and French versions of the law that has created an “unclear” situation. As explained in *An Electoral Framework for the 21st Century*, the English version uses the word “induce,” which could imply that “for the offence to be committed, the desired outcome of the inducing or influencing must occur—that is, the other person must actually do what the first person wanted him or her to do.” The Commissioner added that the word “*inciter*” in the French version “generally does not imply the need to prove a successful outcome and is likely a better reflection of Parliament’s intent.”⁸ The Commissioner added before the committee that: “[I]f the intent of Parliament is to ensure that foreigners do not play that kind of role, then the wording must address the situation clearly.”

While the committee agrees that the lack of clarity in section 331 is cause for significant concern and reason enough to merit amending the CEA, legislative changes must go further to ensure that any interference or mischief by foreign entities regarding Canada’s elections is also an offence. New provisions are needed to address the many ways foreign entities can interfere with elections, including by spreading false or misleading information and by the theft and dissemination of confidential emails and other computer data. The committee concurs with the recommendation included in *An Electoral Framework for the 21st Century* that a “new provision should be added to establish a specific offence for the creation and distribution of false candidate or party campaign communication material, including false websites or other online or social media content, with the intent to mislead electors.”⁹ The committee would add that this offence should also explicitly prohibit foreign entities from engaging in such activities.

Amendments should also be made to the CEA in order to strengthen its enforcement regime. Prosecuting crimes that are committed outside Canada is an inherent challenge in all aspects of criminal law. As the Commissioner acknowledged, if someone in a foreign country was illegally involved in our election, “then conducting an investigation and bringing the people responsible for this before justice can pose very significant problems and in some cases perhaps insurmountable problems.” He noted that where countries have extradition treaties, prosecuting an accused party of any criminal wrongdoing (whether the CEA or other criminal law violation) may be possible, but where no such treaties exist, then it would be very difficult to perform an investigation and enforce the law.

Despite the challenges in countering foreign interference, Canada’s electoral laws must include strong prohibitions and sufficient penal consequences to deter and denounce any violations. Amendments could be considered that would allow for the seizure and forfeiture of assets of foreign entities that attempt to interfere in our elections. The Commissioner and CEO have raised concerns about other aspects of the enforcement provisions in the CEA, in particular that the existing criminal offences are ill-suited to the regulatory regime included in parts of the Act.¹⁰ The committee notes that the CEA may therefore benefit from a more thorough review to ensure it includes the most appropriate enforcement regime to address present-day realities.

The committee agrees with the CEO that the intention of the Act is not to silence any foreign commentary on our elections. Individuals must be free to express their opinions on political matters throughout the world. This being said, foreign funding should not be allowed to play a role in Canadian elections, whether directly or indirectly. Under the current CEA, foreign entities are able to provide unlimited contributions to third parties outside of an election period without any reporting requirements.¹¹ As long as such contributions are not used directly for election advertising expenses, then they can be used for all sorts of activities that could nonetheless impact our elections.

The Regulation of Third Parties During an Election Period

The committee is also concerned that Canada's legislative framework is not sufficient to oversee the evolving role and impact that third parties can have in our elections. In particular, the limited definition of advertising in the CEA fails to address the ways in which websites, social media, polling, and event organizations can be used as part of advertising campaigns. It is clear from the committee's discussions with witnesses and their reports that there are many complaints being made about third-party activity, but also that many are made without a clear understanding of what is prohibited by the CEA. The CEA should be updated to ensure that it contains clear rules and to protect our democratic process from activity that could undermine electoral fairness. A comment by the Commissioner points to the urgency of addressing these matters:

I would suggest that third-party engagement in Canada's electoral process will likely continue to grow. For that reason, it may be time for Parliament to re-examine the third-party regime that was put in place 17 years ago with a view to ensuring a level playing field is maintained for all participants.

Both the 2015 mandate letter sent by Prime Minister Trudeau to the then Minister of Democratic Institutions Maryam Monsef and the 2017 mandate letter to Minister Karina Gould call for a review of "the limits on the amounts political parties and third parties can spend during elections" and for a proposal of "measures to ensure that spending between elections is subject to reasonable limits as well."¹² No bill has been introduced to address these matters. Bill C-33, An Act to amend the Canada Elections Act and to make consequential amendments to other Acts¹³ was introduced by former Minister of Democratic Institutions, Maryam Monsef, on 24 November 2016 and includes many amendments to the CEA, but does not address the third-party regime.

"Third party" is a defined term under section 349 of the CEA that includes a person or a group, other than candidate, registered party or electoral district association of a registered party. The CEA sets various reporting requirements and spending limits for third parties with regard to election advertising expenses. A full review of the third-party regime is beyond the scope of this report, but Elections Canada has published materials that effectively summarize the legal obligations for third parties.¹⁴ It is important to note that only individuals who are Canadian citizens, permanent residents or residents in Canada can register as third parties. Corporations that carry on business in Canada can

also register, as can other groups, including groups abroad, if the person responsible for the group is a Canadian citizen, permanent resident or resides in Canada.¹⁵ Corporations, associations, unions and other groups are not permitted to make contributions to candidates, parties and registered associations; the CEA only allows individuals to do so.¹⁶ The election advertising spending limit during an election period is prescribed in the CEA. The global limit prescribed is \$150,000 per election, of which no more than \$3,000 may be spent per electoral district to promote or oppose particular candidates.¹⁷ These amounts are adjusted annually to take account of inflation. The current inflation-adjusted limits for a 37 day election period are: \$211,200 and \$4,224.¹⁸

Concerns with the adequacy of the third-party regime to meet present-day realities extend beyond foreign contributions. The Commissioner informed the committee that his office had received “a significant number of complaints about the involvement of third parties in connection with the 2015 general election,” and that this number was much higher than the previous election in 2011. He also added that: “Common to many of these complaints was the perception that third parties, in some ridings, were so significantly involved in the electoral contest that this resulted in unfair electoral outcomes.” As the CEA is currently written, this significant involvement is only illegal if the third party does not meet the requirements for registering as a third party,¹⁹ if advertising expense limits are exceeded,²⁰ or if there was collusion among groups or individuals to circumvent a requirement or a constraint (particularly a spending limit) in the CEA.²¹ Mr. Chenier clarified that for such collusion to be found to be illegal, “[t]he coordination would have to be such that there was the offer of monetary contributions and the acceptance by the campaign.” The committee also discussed the various contribution limits under the CEA and the potential for third parties and/or foreign entities to make non-monetary contributions to candidates or parties that would assist them in the election period, such as providing the results of a poll that had been conducted at a cost, robocalling and door-to-door canvassing. To deter attempts to circumvent the rules and to promote greater compliance, the committee recommends that the Act be amended to allow Elections Canada to conduct random audits of third parties.

The modernization of the regime for regulating third-party activity in the CEA must address three primary concerns. The first is to address how foreign entities can contribute to third parties, financially or through other services or products of value (particularly concerning any means by which contributions may be made for election-related purposes). In his annual report, the Commissioner notes that the financing of the activities of third parties is only regulated under the CEA “to the extent that the financing is used to fund election advertising”:

As such, a third party can use foreign contributions to fund activities that do not include the transmission of election advertising messages. This includes carrying out election surveys, setting up election-related websites and using calling services to communicate with electors.²²

The CEO also confirmed for the committee that a third party can use any funding they received from foreign entities to carry out election surveys, set up election websites, make telephone campaigns or

pay for individuals to do canvassing, so long as these do not constitute advertising expenses. The Commissioner's recent annual report also noted that: "A number of complaints were received about third parties allegedly using foreign contributions to fund activities during the election period."

The CEA should allow for increased oversight of and impose reasonable limits on the funding that third parties can accept from foreign entities that could be used for elections purposes. Presently the reporting of contributions to third parties is limited to a period of six months before the issue of the writ and ending on polling day. As the Commissioner clarified while discussing this with the Committee:

If the money was received before the six months, it becomes mingled into the funds of the third party and the third party, under the regime that we have now, is free to use that money.

The committee's second primary concern regarding the third-party regime pertains to this six month period for which contributions must be reported. Given the legislative election schedule established in 2006 under the CEA (the so-called flexible fixed-date election regime),²³ third parties could knowingly receive contributions six months plus a day prior to an election and these do not need to be reported.

During our hearings Senator Linda Frum asked the Commissioner the following question on this matter:

Do you not think Canadians would be alarmed by what you just said, namely that, except for the technicalities, you have to take the money six months before the election? We have fixed election dates now, so that's not hard to figure out. As long as you receive that money six months plus a day before the election, you can receive unlimited amounts of foreign money from any source around the world to use in an election.

The Commissioner replied to this question by noting that "issues of significance have been raised." He was not able to elaborate on any complaints received by his office, because these are confidential.²⁴ However, he did add that:

The [issue] that you raise is one of those which, in my view, deserves Parliament taking the time to look at the situation and to try to understand what has happened and what is likely to happen and then taking measures ... that would ensure there is compliance with the Charter and other values.

This matter was also addressed in a recommendation in *An Electoral Framework for the 21st Century*, which states that:

Restricting the period in which such contributions must be reported is not warranted and is not well suited to fixed-date elections. The timing restriction in paragraph 359(4)(a) should be

removed so that all relevant contributions must be reported, regardless of when they are received.²⁵

The committee concurs with this recommendation.

The committee's third concern with the third-party regime pertains to the need to expand the scope of the types of third-party activities that are monitored and regulated during Canada's elections in order to ensure electoral fairness. This includes ensuring that the rules concerning the use of modern telecommunications, social media platforms and various uses of the Internet are clear and relevant.

Past reports from the CEO have already noted that the "confusion around the nature of such communications results in uncertainty and inconsistent behaviour, perceptions of illegality and a tendency to discourage participation."²⁶ This lack of clarity was explained further:

For example, humorous video clips posted on YouTube or Facebook may be considered to be commentary, programming, art or advertising. Messages shared on Twitter can be perceived as public discussion or advertisements. Even Internet sites or pages are not easily categorized.²⁷

Elections Canada has written a thorough Interpretation Note on *Election advertising on the Internet*, which explains how election advertising rules are applied concerning material and information communicated over the Internet.²⁸ The committee urges the Government of Canada to address this matter and amend the CEA to include clear principles and rules concerning the regulation of Internet activity with regard to advertising expenses during an election.

As technology develops and third parties find new ways to engage in and influence our political process, there are other activities that should be considered for possible regulation when modernizing the third-party regime in the CEA, such as: conducting polls, organizing and promoting of certain types of rallies and events, preparing research and assembling data prior to the election period with the intention of using the research and data in an election campaign, among other activities. The committee wishes to draw attention to the fact that in order to ensure electoral fairness, there must be transparency and clarity in the rules and reporting with regards to a broader range of promotional activities that third parties engage in during elections.

Conclusion

In moving forward with these reforms, the committee is aware that political campaign financing has been at the core of many important debates about how to best maintain a healthy democracy in Canada for many decades. In *Harper v. Canada*,²⁹ the Supreme Court upheld the constitutionality of the third-party regime, noting that its objective is to "create a level playing field" and "promote electoral fairness by creating equality in the political discourse." This permits voters to be "better informed" and ensures that "no voice is overwhelmed by another." Amendments to the CEA must maintain respect for these principles and balance the electors' rights as guaranteed by the *Canadian Charter of Rights and Freedoms*³⁰ in order to ensure a fair and transparent electoral process that is also free from foreign

interference. Amendments must also be made urgently in order to ensure that the rules regarding foreign interference and third-party activities are properly and openly addressed before the 43rd general election.

APPENDIX A - List of Witnesses

Wednesday, November 23, 2016

Elections Canada

Marc Mayrand, Chief Electoral Officer

Thursday, April 13, 2017

Office of the Commissioner of Canada Elections

Yves Côté, Commissioner of Canada Elections

Marc Chénier, General Counsel and Senior Director, Legal Services

APPENDIX B – Order of Reference

Extract from the Journals of the Senate of Tuesday, November 1, 2016:

The Honourable Senator Runciman moved, seconded by the Honourable Senator Patterson:

That the Standing Senate Committee on Legal and Constitutional Affairs be authorized to examine and report on the reports of the Chief Electoral Officer on the 42nd General Election of October 19, 2015 and associated matters dealing with Elections Canada's conduct of the election; and,

That the committee submit its final report no later than December 31, 2016, and that the committee retain all powers necessary to publicize its findings until 180 days after the tabling of the final report.

After debate,

The question being put on the motion, it was adopted.

Extract from the *Journals of the Senate* of Thursday, March 2, 2017.

The Honourable George Baker, pursuant to notice of February 28, 2017 moved,

That, notwithstanding the order of the Senate adopted on Tuesday, December 13, 2016, the date for the final report of the Standing Senate Committee on Legal and Constitutional Affairs in relation to its study on the reports of the Chief Electoral Officer on the 42nd General Election of October 19, 2015 and associated matters dealing with Elections Canada's conduct of the election be extended from March 31, 2017 to June 30, 2017.

After debate,

The question being put on the motion, it was adopted.

Charles Robert
Clerk of the Senate

APPENDIX C – Members

The Honourable Bob Runciman, Chair
The Honourable George Baker, P.C., Deputy Chair

The Honourable Senators:

Denise Batters
Pierre-Hugues Boisvenu
Gwen Boniface
Jean-Guy Dagenais
Renée Dupuis
Mobina Jaffer
Serge Joyal, P.C.
Ratna Omidvar
Kim Pate
André Pratte
Murray Sinclair
Vernon White

Ex Officio Members:

The Honourable Senators Larry W. Smith (or Yonah Martin) and Peter Harder, P.C. (or Diane Bellemare).

Other Senators who have participated from time to time in the study:

The Honourable Senators Frum, Lang, Meredith, Plett.

Parliamentary Information and Research Services, Library of Parliament:

Julian Walker, Maxime Charron-Tousignant and Robin MacKay, Analysts.

Clerk of the Committee:

Jessica Richardson.

Senate Committees Directorate:

Diane McMartin, Administrative Assistant.

ENDNOTES

- ¹ *Canada Elections Act*, S.C. 2000, c. 9, s. 331. The responsible minister for the Canada Elections Act is the President of the Queen's Privy Council for Canada. See Government of Canada, *Public Statutes and Responsible Ministers*. The Minister responsible is the Minister of Democratic Institutions, Karina Gould (since 2017). See Governor in Council Appointments, *President of the Queen's Privy Council for Canada*. For most of the timeframe this report discusses, the Minister of Democratic Institutions was Maryam Monsef.
- ² Senate, Motion, *Journals*, n° 68, 1st Session, 42nd Parliament, 1 November 2016, p. 912; Senate, Motion, *Journals*, n° 101, 1st Session, 42nd Parliament, 2 March 2017, p. 1320.
- ³ Unless otherwise noted, all references to testimony by the witnesses are from the following hearings: Marc Mayrand, then Chief Electoral Officer, Elections Canada (23 November 2016) and the testimonies of Yves Côté, Commissioner of Canada Elections, and Marc Chénier, General Counsel and Senior Director, Legal Services, Office of the Commissioner of Canada Elections (13 April 2017).
- ⁴ Office of the Chief Electoral Officer of Canada, *An Electoral Framework for the 21st Century: Recommendations from the Chief Electoral Officer of Canada Following the 42nd General Election*, September 2016, Recommendations B27, B30, and C30. Note that this report is from the Office of the Chief Electoral Officer of Canada, but the Commissioner's concurrence with or modification of certain recommendations is noted throughout.
- ⁵ See for example: United Kingdom, House of Commons, Public Administration and Constitutional Affairs Committee, *Lessons learned from the EU Referendum*, Twelfth Report of Session 2016-17, 12 April 2017; United States, Office of the Director of National Intelligence, *Background to "Assessing Russian Activities and Intentions in Recent US Elections": The Analytic Process and Cyber Incident Attribution*, 6 January 2017; Ryan Atkinson "The threat of cyber attacks on Canadian civil society", *NATO Association of Canada*, 12 March 2017; Rajeev Syal, "Brexit: Foreign states may have interfered in vote, report says", *The Guardian*, 12 April 2017; and Uri Friedman, "Russia's Interference in the U.S. Election Was Just the Beginning", *The Atlantic*, 26 April 2017.
- ⁶ See for example Josh Dehaas, "Foreigners likely tried to influence Canada's election: ex-CSIS head", *CTV News*, 15 January 2017.
- ⁷ *An Electoral Framework for the 21st Century*, Recommendation B27.
- ⁸ *Ibid*, Recommendation C49.
- ⁹ *Ibid*, Recommendation B40. This recommendation is attributed in the report to both the CEO and the Commissioner.
- ¹⁰ *An Electoral Framework for the 21st Century* calls for the introduction of administrative monetary penalties in recommendation A28.
- ¹¹ *Canada Elections Act*, s. 358.
- ¹² Office of the Prime Minister of Canada, *Minister of Democratic Institutions Mandate Letter*. David McKie website (CBC News journalist), *Mandate Letters from the Prime Minister to Ministers on Expectations and Deliverables*, 2015, pp. 7-8 (The original posted letter is no longer available from the website of the Office of the Prime Minister of Canada); Office of the Prime Minister of Canada, *Minister of Democratic Institutions Mandate Letter, 2017*.
- ¹³ Bill C-33, An Act to amend the Canada Elections Act and to make consequential amendments to other Acts, *LEGISinfo*, 42nd Parliament, 1st Session.
- ¹⁴ Elections Canada, *Election Advertising Handbook for Third Parties, Financial Agents and Auditors* (EC 20227), April 2017.
- ¹⁵ Section 351.1 was added by Bill C-23 to require third parties to establish a sufficient connection to Canada in order to incur election advertising expenses. Bill C-23, An Act to amend the Canada Elections Act and other Acts and to make consequential amendments to certain Acts, *LEGISinfo*, 41st Parliament, 2nd Session.
- ¹⁶ *Ibid*, s. 363.
- ¹⁷ *Ibid*, s. 350.
- ¹⁸ Elections Canada, *Third Party Election Advertising Expense Limits*, 5 April 2017,
- ¹⁹ *Canada Elections Act*, s. 351.1.
- ²⁰ *Ibid*, ss. 350 – 351.
- ²¹ *Ibid*, s. 351.
- ²² Commissioner of Canada Elections, *2015-2016 Annual Report*, May 2016, p. 41.
- ²³ *Canada Elections Act*, s. 56.1.
- ²⁴ *Ibid*, s. 510.1.

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- ²⁵ *An Electoral Framework for the 21st Century*, Recommendation C-30. This recommendation is attributed in the report to both the CEO and the Commissioner.
- ²⁶ Chief Electoral Officer of Canada, *Report of the Chief Electoral Officer of Canada on the 41st general election of May 2, 2011*, 2011.
- ²⁷ Ibid.
- ²⁸ Elections Canada, *Election advertising on the Internet*, Interpretation note: 2015-04, Comments made during formal consultation period June 18 – July 3, 2015.
- ²⁹ *Harper v. Canada (Attorney General)*, [2004] 1 S.C.R. 827.
- ³⁰ *The Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the Canada Act 1982 (U.K.), 1982, c.11. In particular, see ss. 2(b) and 3.