Commissioner of Canada Elections

Annual Report 2012–2013

Commissioner of Canada Elections – Annual Report 2012–2013

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Message from the Commissioner of Canada Elections

In only a very few words, the *Canada Elections Act* (CEA) sets out the mandate of the Commissioner, stating that his or her duty "is to ensure that this Act is complied with and enforced" (s. 509).

Even though the office has been in existence for over 40 years, it is apparent that not much is known about who we are, what we do, and how we do it.

Through this first annual report, my aim is to shed some light on these issues: What kind of work do we do? What kind of complaints do we get? What resources and what tools do we have to do our job?

I hope that the information contained in this report will be useful in that respect. I intend, through future annual reports, to continue in this direction.

I also want to highlight here some of the challenges we are facing. These are serious issues that deserve to be discussed and that demand to be addressed. (The last section of the report deals with challenges in a much more detailed way than is done below.)

Raising these challenges is perhaps particularly important at this time, when the government has said it plans to introduce significant amendments to the CEA.

The first challenge: It regularly happens, in the course of our investigations, that we approach individuals who we know will have information relevant to a file we are working on, only to be told that they do not wish to talk to us – they refuse to say anything.

In order to address this issue, we need to have some means of compelling the production of information. One example would be the power to apply to an independent judge for an order forcing reluctant witnesses to tell investigators what they know about a particular situation. Such orders would be accompanied by a number of safeguards, as described in the report.

At the federal level, the *Competition Act* allows the Commissioner of Competition to apply to a court for orders of this nature. Importantly, several provincial election laws grant the chief electoral officer (or commissioner) the power to compel persons to appear before them and provide information or produce records. (This includes Alberta, Manitoba, New Brunswick, Nova Scotia, Quebec, Ontario and Yukon.)

If there is a genuine intent to facilitate and expedite the conduct of investigations in the electoral field, then this proposal must be seriously examined.

As Commissioner, I strongly believe that this proposed change would do the most to improve the efficiency of our work, especially for investigations into particularly complicated matters. It would allow us to proceed much more quickly and would greatly strengthen our ability to get to the bottom of things.

The second challenge: There is a lack of flexibility to deal with offences under the CEA. This issue has been repeatedly raised by the current Chief Electoral Officer and by his predecessor.

The CEA contains over 400 different offences. Many of them are truly regulatory in nature – they do not involve high moral culpability and do not undermine in a fundamental way the core principles of the legislation.

For example, to ensure transparency, different reports have to be filed by various actors. It is important that these reports be filed, and that they be filed on time. However, they are often filed late or not filed at all. If the system worked as it should, sanctions would be imposed promptly for these violations. Yet the only way now to impose such sanctions is to launch a prosecution.

This is the proverbial case of a hammer being used to swat a fly. There is complete disproportion between the evil to be addressed in these cases and the means available to deal with it.

Prosecuting offenders requires a lot of time and effort. It is *extremely* expensive. Courts in Canada are struggling with ever-increasing workloads. If a charge is defended and goes to trial, a long time will elapse between the alleged commission of the offence and the court's decision. It should therefore come as no surprise that, in many such cases, the laying of charges is not an avenue pursued.

More flexibility must be built into the enforcement components of the CEA. The Chief Electoral Officer has indicated before that the enforcement regime should be amended to introduce various administrative sanctions (such as graduated fees for the late filing of reports). A number of federal enforcement schemes provide for the imposition of administrative penalties. That is, incidentally, one of the tools available to the Canadian Radio-television and Telecommunications Commission to deal with robocalls that are in violation of its *Unsolicited Telecommunications Rules*.

If real progress is made on those two fronts, the enforcement of the legislation would be more robust and more timely. This is particularly important in the electoral context, where sanctions can become largely meaningless if they come down after the election cycle in which the offences were committed.

As well, and crucially, the above amendments would contribute to reassure Canadians of two things: that the officials responsible for enforcing the CEA do have the tools they need to properly investigate alleged violations and uncover the facts; and that they have the flexibility to address violations in a manner that is proportionate to the seriousness of the misdeeds.

Finally, I would like to acknowledge that the Chief Electoral Officer has been extremely supportive of our efforts throughout my first year as Commissioner. In particular, and as noted in the report, he has provided us with additional resources to strengthen our investigative capacity. Given the volume of our work, this was most welcome.

Yves Côté, QC
Commissioner of Canada Elections

I. Mandate and Powers

As described in greater detail in the ***Information Bulletin on Enforcement of the* Canada Elections Act**, the Commissioner of Canada Elections (hereafter, Commissioner) is responsible for ensuring that the ***Canada Elections Act*** (CEA) and the ***Referendum Act*** are "complied with and enforced."

In the exercise of his duties, the Commissioner acts in a completely independent manner: he decides how complaints and referrals will be handled, what type of investigation will be carried out, which cases will be referred for possible prosecutions and what charges will be recommended.

The Commissioner is appointed by the Chief Electoral Officer (CEO) pursuant to section 509 of the CEA. The current Commissioner assumed his responsibilities on July 2, 2012.

The *Election Expenses Act* of 1974, a series of amendments to the CEA, created the position of Commissioner of Election Expenses, whose responsibilities were restricted to ensuring that the rules concerning election financing and expenses were enforced. In 1977, the Commissioner's responsibilities were extended to cover all provisions of the CEA.

A. Referrals and complaints

The Commissioner receives complaints from the public and political entities, as well as referrals from Elections Canada concerning potential offences under the legislation. The Commissioner may also launch an investigation on his own when, in his view, the facts and circumstances so warrant.

The referrals from Elections Canada come mainly from the Political Financing and Audit Directorate (PFAD), which is primarily responsible for administering the political financing provisions of the CEA. After an election, candidates have four months to provide their campaign's returns with all supporting documents to Elections Canada. Registered parties, electoral district associations, nomination contestants and leadership contestants are also subject to distinct reporting requirements. After they have been submitted, PFAD performs an audit of these returns. Where instances of non-compliance are identified, PFAD, guided by its **Administrative Compliance Policy for Political Financing**, may refer identified cases of non-compliance to the Commissioner. Usually, approximately nine months to a year after a general election, PFAD begins to forward referrals relating to alleged violations of the CEA. Typically, these referrals cover a wide range of potential violations. They include, for example, cases where PFAD, based on its audit, has come to the view that:

- there was a failure to file a report at all or in a timely way;
- a campaign incurred expenses beyond the maximum permitted;
- individuals exceeded their contribution limits, or contributions were received from corporate or other ineligible entities;
- ineligible contributions were not returned; or
- surplus electoral funds were not appropriately disposed of.

Referrals can continue for a long period following a general election, as the audit process may in some cases last for a considerable period of time. (It is not uncommon for auditors to engage in extended exchanges with the official agent of a campaign in an attempt to work out and clarify issues.)

The Commissioner also receives referrals from Elections Canada that are not related to the political financing regime. The number of these referrals is limited. For example, after each election, a number of referrals are made regarding individuals who may have requested more than one ballot.

Finally, anyone with reasons to believe that an offence under the CEA has been committed may file a complaint with the Commissioner. These complaints are acknowledged, and complainants are advised of the manner in which their complaint was resolved.

It is important to note that not all complaints or referrals result in an investigation. Once a file is opened, a preliminary assessment is conducted with a view to making a recommendation to the Commissioner as to whether further action is warranted. This may involve internal legal advice or external communications with the complainant. Where the Commissioner decides to conduct an investigation, the scope and duration will vary depending on the complexity of the matter.

B. Investigative tools

The Commissioner may review public information; information provided voluntarily by the complainants, the parties who are the subject of a complaint or any other person; as well as information held by Elections Canada.

The Commissioner's investigators may also interview witnesses or the persons who are the subject of the investigation on a voluntary basis in order to obtain their account of the facts. (The Commissioner does not have the power to compel testimony or the production of documents that may be relevant to his investigations. This matter is further detailed in Section V: Challenges, under C: Insufficiency of investigative tools.)

Investigators may also apply to a judge to obtain a search warrant or a production order if the requirements under the *Criminal Code* for such a warrant or order are met. The judge must be satisfied that there are reasonable grounds to believe that: an offence against the CEA has been committed; the information that is sought will afford evidence respecting the commission of the offence; and, in the case of a production order, that the person who would be the subject of the order has possession or control of the information (in the case of a search warrant, that there is in the place to be searched anything that will provide evidence of the offence). In order to obtain a search warrant or a production order, the investigator must submit an "Information to Obtain" (ITO), which is an affidavit outlining the basis for reasonable grounds. Once the information has been produced, or after a search warrant has been executed, a report is made to a justice in accordance with the provisions of the *Criminal Code*.

The Commissioner may seek production orders to obtain information from banks and other financial institutions (e.g. cancelled cheques, bank statements, etc.), and from telephone companies and Internet service providers. The evidence obtained by such orders may not be used against the person who provides the information.

C. Referral for prosecution

Following an investigation, and in accordance with section 511 of the CEA, the Commissioner may refer a matter to the Director of Public Prosecutions (DPP) if the Commissioner believes on reasonable grounds that an offence has been committed. The DPP decides whether charges should be instituted, and if charges are laid, conducts the prosecution. The role of the DPP is further explained in Section IV: Handling of Complaints and Referrals, under C: Prosecutions.

D. Penalties and compliance measures

If the accused is convicted of an offence by a court, the court can impose a sentence chosen from a range of penalties provided for each offence, including fines and prison terms.

There are over 400 offences listed in the CEA. The CEA sets out the maximum penalties for different types of offences. The maximum penalties for the offences at the lower end of the scale are a fine of not more than $1,000 or imprisonment for a term of not more than three months, or both.

A person who is found guilty of an offence belonging to a more serious category of offences (many of which require proof of intent) is liable, depending on the offence and the procedure, to a maximum fine of either $2,000 or $5,000, or to a maximum term of imprisonment of six months or five years, or to both.

A number of offences are identified in section 502 of the CEA as constituting practices that are either "illegal" (e.g. willfully exceeding election expenses limits for a candidate or an official agent) or "corrupt" (e.g. obstruction of an election officer by a candidate or an official agent). These are essentially acts of wrongdoing that are considered by Parliament as having the potential to seriously affect the integrity of the electoral process. An individual convicted of such an offence automatically loses certain entitlements – for the following five years in the case of an illegal practice, and seven years in the case of a corrupt practice – namely the right to be elected to or to sit in the House of Commons, and the right to "hold any office in the nomination of the Crown or of the Governor in Council" (paragraph 502(3)(*b*)).

Aside from recommending that charges be laid, the CEA also specifically allows the Commissioner to use "compliance agreements" as non-punitive corrective measures (see subsection 517(1)). More information about compliance agreements is found in Section IV: Handling of Complaints and Referrals, under B: Compliance agreements.

The CEA provides for two additional measures, which have yet to be used. During an election period, the Commissioner may apply under subsection 516(1) for a court injunction to bring an end to a breach of, or oblige an individual to comply with, the CEA, taking into consideration the "need to ensure fairness of the electoral process and the public interest." Secondly, under subsection 521.1(1), the Commissioner may apply to a court for an order to deregister a political party that "does not have as one of its fundamental purposes participating in public affairs by endorsing one or more of its members as candidates and supporting their election."

II. Managing the Organization

A. Resources

The Commissioner is supported by a core team of investigators, paralegals, an administrative assistant and lawyers, as well as additional resources hired on a contract or term basis to deal with fluctuating needs. The Commissioner may also, through a Memorandum of Understanding with the Royal Canadian Mounted Police, access technical assistance or other support for his investigations.

The Investigations Directorate, which carries out the investigative functions to support the Commissioner, was comprised of six full-time indeterminate employees in 2012–2013. These consisted of the Director of Investigations, three senior investigators, one paralegal and one administrative assistant. The expenses related to the salary of these indeterminate employees amounted to $541,125.

Under the CEA, certain expenses required to pursue the Commissioner's investigations and carry out his duties may be drawn from the Consolidated Revenue Fund. This can include adding non-permanent resources or contracting for additional resources, as required. In 2012–2013, the Commissioner called on term or contract resources, which varied in number over the year. As of March 31, 2013, this additional workforce represented seven investigators, one paralegal and two enquiries officers. The total expenses for these non-permanent resources drawn from the Consolidated Revenue Fund amounted to $841,552.

The Commissioner is also supported by a specialized team of legal advisers within the Legal Services, Compliance and Investigations Sector.

For the fiscal year starting April 1, 2013, the CEO allocated additional resources to fund three indeterminate investigators and a second indeterminate paralegal.

B. Other matters

Two points should be mentioned here.

- **Memorandum of Understanding with the Director of Public Prosecutions**

On March 5, 2013, a renewed Memorandum of Understanding between the CEO, the Commissioner and the DPP was signed in order to ensure effective enforcement of the CEA. It sets out roles and responsibilities both during and after an investigation, and in relation to a referral to the DPP and a prosecution under the CEA.

- **New complaint tracking system**

The former electronic filing system in use in the Commissioner's Office was created in the mid-1990s and had become obsolete. It was replaced in October 2012 by a new complaint tracking system (CTS). This new tool will allow the Commissioner to better track and report on the complaints and referrals received.

III. Complaints and Referrals Received in 2012–2013

Between April 1, 2012, and March 31, 2013, the Commissioner received 210 referrals from within Elections Canada, and recorded 37 complaints from the public and political entities. This last figure does not include the large number of complaints received in relation to live and automated deceptive phone calls, or "robocalls". Details about the investigations into these matters are discussed below under C: Investigations.

A. Referrals from within Elections Canada

It is worth noting that approximately 30% of the referrals received from PFAD include an allegation that the official agent failed to meet the bank account requirements set out in the legislation, and that approximately 15% of referrals have to do with a premature transfer of goods or funds to a candidate (i.e. the transfer was made before a candidate was formally confirmed). Even though the facts giving rise to these referrals can be (and in some cases are) serious, in the vast majority of cases, they are instances of minor regulatory non-compliance that the criminal justice system is ill-equipped to deal with.

B. Complaints from the public and political entities

Complaints can come from political parties or candidates as well as from any person, group or association. Over the 2012–2013 fiscal year,[1] the Commissioner recorded 29 complaints[2] from the public and 8 from individuals who were clearly identified with political entities. Most of the complaints from individuals clearly identified with political entities concerned political financing provisions of the CEA (e.g. a complaint that a party was in receipt of ineligible contributions).

C. Investigations

One of the major areas of investigative work that continued over the past year concerned alleged live and automated deceptive calls made in 2011 in the days leading to polling day and on polling day. This led to two distinct investigations.

The first investigation involves the robocalls made in the riding of Guelph on election day, which was May 2, 2011. These calls, which purported to be from Elections Canada, informed the recipients of the calls that the location of their polling station had been changed. This information was incorrect. Following a lengthy investigation, the Commissioner referred the file to the DPP and, near the end of the fiscal year, the DPP requested that a charge be laid against one individual for the misleading calls that occurred in Guelph. A charge was laid and the matter is pending before the Ontario Court of Justice. Additional information about what happened in Guelph is available in the Chief Electoral Officer's March 2013 report entitled ***Preventing Deceptive Communications with Electors***.

The second investigation has to do with complaints of inappropriate or misdirecting live or automated calls received by electors in various other parts of the country during the last general election. Most of the complaints related to this investigation were made after news reports concerning the events in Guelph broke in February 2012. Complaints from every province and from two territories alleged that calls misdirecting electors as well as calls of a hectoring or annoying nature (occurring frequently or at inopportune times) had been received from both automated and live callers.

The Commissioner is aiming to finalize this second investigation into deceptive calls before March 31, 2014.

IV. Handling of Complaints and Referrals

The following section summarizes the various tools at the Commissioner's disposal to ensure the CEA is complied with and enforced. The last section of this report provides more detail about the adequacy of these tools.

A. Caution letters

The Commissioner uses informal enforcement measures for inadvertent, less serious or technical violations of the CEA when he deems it is not in the public interest to use more formal enforcement action. This will often take the form of caution letters sent to the person or entity believed to be responsible for the violation. These letters are not made public.

[1] The number of complaints received from the public increases significantly in any year where a general election is held or when by-elections are held. For example, more than 1,000 complaints were received from the public with respect to the 2011 general election, excluding complaints related to deceptive calls.

[2] This does not reflect the various communications received from the public that do not actually constitute complaints (e.g. cases where people are looking for information or where they do not raise issues of compliance or enforcement), or where the issues fall outside the scope of the CEA.

Caution letters primarily serve an educational purpose. After setting out the available facts and the relevant provisions of the CEA, the letters contain a caution and request an acknowledgement of receipt.

If the conduct constituting a violation of the CEA appears widespread or involves several entities of the same political party, senior party officials may also be contacted and made aware of the problem. They may be requested to inform their organization and take measures to ensure the problem is corrected and does not recur.

In this way, the persons, entities and parties involved in the electoral process are encouraged to regulate minor and routine compliance problems, obviating the need to resort to formal enforcement measures.

Between April 1, 2012, and March 31, 2013, the Commissioner issued 47 caution letters, broken down as follows:

- 19 to official agents of candidates;
- 16 to electoral district associations;
- 6 to contributors;
- 2 to financial agents of nomination contestants;
- 2 to registered political parties;
- 1 to a candidate;
- 1 to a campaign worker.

The main issues raised in caution letters (a caution letter may raise more than one issue) are the following:

- Premature transfer of goods and services (subsections 404(1) and 404(2)): 17;
- Failure to satisfy bank account requirements (section 437): 16;
- Contributions in cash in an amount that exceeds $20 (section 405.31): 4.

B. Compliance agreements

Subsection 517(1) of the CEA provides that the Commissioner may enter into a compliance agreement with anyone who he believes on reasonable grounds has committed, is about to commit or is likely to commit an act or omission that could constitute an offence.

A compliance agreement is a voluntary agreement between the Commissioner and the person (the "contracting party") in which they agree to terms and conditions that the Commissioner considers necessary to ensure compliance with the CEA.

A compliance agreement typically includes a statement by the contracting party in which he or she admits responsibility for the act or omission that constitutes the offence. Once a compliance agreement has been entered into, the Commissioner may not refer the matter to the DPP for prosecution. However, if the contracting party fails to comply with the terms of the compliance agreement, the Commissioner may refer the matter to the DPP after having served a notice of default to the contracting party. The fact that a compliance agreement was entered into and any admission of responsibility made by the contracting party are not admissible in court in any civil or criminal proceedings against the contracting party. An admission of responsibility made by the contracting party in a compliance agreement does not amount to a criminal conviction by a court of law and, therefore, does not result in the creation of a criminal record for the contracting party.

In order to ensure transparency and deterrence, a notice that sets out the contracting party's name, the act or omission in question and a summary of the compliance agreement is published in the *Canada Gazette*. It is also posted on the Elections Canada **website**.

Between April 1, 2012, and March 31, 2013, the Commissioner entered into two compliance agreements:

- The **first** was with an elector who had requested a second ballot during the 2011 federal general election.
- The **second** was with a candidate, for having made a cash contribution to his own campaign over the maximum amount authorized for such contributions, and for having performed certain acts that, by law, only the official agent may perform.

C. Prosecutions

If the Commissioner believes on reasonable grounds that an offence under the CEA has been committed, the Commissioner may refer the matter to the DPP, who has sole authority to decide whether charges will be laid.

Since the creation of the Public Prosecution Service of Canada in 2006, when the *Director of Public Prosecutions Act* came into force, the DPP acts as an independent prosecution authority, with a mandate to prosecute cases under federal law and to provide legal advice to investigative agencies. The Office of the DPP conducts prosecutions on behalf of the Crown with respect to any offences under the CEA (and the *Referendum Act*), as well as any appeal or other proceeding related to such a prosecution. When the DPP determines, following a referral to him from the Commissioner, that a prosecution should be initiated, he requests the Commissioner to lay a sworn information in writing before a judge.

When a prosecution is initiated, a notice that sets out the accused's name and a summary of the charges is posted on the Elections Canada **website**. Once a case has been concluded, the decision of the court (including a summary of any sentence imposed) is also posted to the website.

Between April 1, 2012, and March 31, 2013, the following charges were laid:

Charges were filed on May 2, 2012, in the Court of Québec against a candidate for theft of a sum of money over $5,000.00; falsely taking an oath; and aiding, counseling or abetting the official agent to submit to the Chief Electoral Officer a *Candidate's Electoral Campaign Return* that he knew or should have known to contain information that was false or misleading.

Charges were filed on August 21, 2012, in the Provincial Court of British Columbia, against an official agent for willfully failing to dispose of a surplus of electoral funds in relation to the 39th (2006) general election within 60 days of receiving the notice of estimated surplus; failing to ensure all transactions of the candidate in relation to the 39th (2006) general election passed through the campaign bank account; submitting a false *Candidate's Electoral Campaign Return* for the 40th (2008) general election, and failing to open a separate bank account for the 40th (2008) general election.

Charges were filed on September 25, 2012, in the Ontario Court of Justice in Brampton against an official agent for failing to comply with a requirement of the Chief Electoral Officer to provide additional documents.

As of March 31, 2013, these matters were all pending before the courts.

As previously mentioned, as a result of a request received from the DPP prior to the end of the fiscal year, a **charge** was filed on April 2, 2013, in the Ontario Court of Justice in Guelph against an individual for having willfully prevented or endeavored to prevent an elector from voting at an election.

V. Challenges

This section describes some of the key challenges that the Commissioner faces in the execution of his mandate. This may provide answers to some of the questions that are raised from time to time regarding, for example, the duration of some investigations or the perceived lack of transparency regarding the progress of investigations. In some cases, it also highlights the need to consider amendments to the legislation.

Four issues are addressed in this section:

A. Transparency vs. privacy and the need to ensure the confidentiality of investigations

B. Increasing complexity of investigations

C. Insufficiency of investigative tools

D. Lack of flexibility when dealing with contraventions of the CEA

A. Transparency vs. privacy and the need to protect the confidentiality of investigations

From time to time, comments have been made that the Commissioner's investigations are conducted in secret and that there is not enough transparency.

Those who demand more transparency on behalf of the public have asked, for example, that information be communicated periodically on the progress of investigations. Others have suggested that individuals who are directly interested in or affected by an investigation be provided information on its status and progress (e.g. what stage the investigation is at, what the next steps are, and when it is expected to be concluded).

As understandable as these concerns are, they are difficult to address satisfactorily when one considers that an investigation may result in criminal charges being laid, with significant consequences for the subject of the investigation regardless of the outcome. Ensuring fairness is paramount.

It is also imperative that investigations be protected from factors that could negatively affect their integrity. Investigators must be able to keep their investigative strategy confidential. Potential witnesses must also, as much as possible, be protected from undue interference or influence.

Some potential witnesses, for example, shun the notoriety that comes from being mentioned in a news report, and have chosen not to cooperate with an investigation simply on that basis. Others may not wish their cooperation with authorities known for a number of reasons and will either decline to cooperate, or do so only on some understanding of confidentiality. Potential suspects will often be interviewed last because investigators typically want to collect as much relevant information as possible in a confidential fashion before they meet with them. With all, whether witnesses or suspects, investigators want to avoid as much as possible one individual being tainted by how another person recollects – or claims to recollect – the events.

In this regard, it should be noted that police forces and other investigative bodies also take great care to protect their investigations from the disclosure of information that could hamper or affect how they are carried out.

In addition, and fundamentally, the presumption of innocence and the reputations of individuals must be protected. That is always important, but perhaps even more so when the reputations of political actors or organizations are at stake.

The Commissioner's investigators must comply with the provisions of the *Canadian Charter of Rights and Freedoms* and the *Privacy Act*, both of which impose on state actors a duty not to unduly encroach on the privacy of individuals.

On the other hand, investigators must comply with the provisions of the *Criminal Code* that require that a report be made to a judge after the execution of a search warrant or the production of documents under a production order. When such a report is made, the public (and, of course, the media) may access the affidavit prepared by the investigators and used to obtain the warrant or the production order. Such an affidavit sets out the evidence collected by the investigators up to that point to satisfy the judge that there are reasonable grounds to justify the issuance of the warrant or the order. When investigators apply for a search warrant or a production order, they are legally required to make *full and frank* disclosure to the judge of the evidence that is relevant to the request for the order. As a result, the affidavits in support are generally quite detailed and contain a great deal of information.

The exception to full access to or disclosure of supporting materials for a production order or search warrant is where a "sealing" order has been obtained from the judge to prevent full or partial public access to or disclosure of the materials. The grounds on which a sealing order may be obtained are set out in the *Criminal Code* and are rather limited. The main ones are that the disclosure of information would:

- compromise the identity of a confidential informant;
- compromise the extent and nature of an ongoing investigation; or
- prejudice the interests of an innocent person.

The application for a sealing order must also satisfy the judge that the reasons or grounds cited for sealing are sufficient to outweigh in importance of the "open court principle", which carries a strong presumption in favour of granting the public access to information contained in court documents.

In short, when considering calls made for more information to be disclosed on the status and progress of investigations, one must consider the interests on the other side – i.e. the need to protect the investigative process itself and the need to protect the privacy and reputations of individuals. Often, the latter will carry a greater weight. However, the ability to maintain the confidentiality of investigations is subject to some factors that are beyond the investigator's control, including, for example: 1) the *Criminal Code* requirement that certain information be made public after the execution of a search warrant or once a production order has been complied with; and 2) what people may choose to say or to whom they may say it after they have been contacted or interviewed by an investigator for the purpose of an investigation.

B. Increasing complexity of investigations

In recent years, files brought to the Commissioner for investigation have grown increasingly complex. The complexity is both legal and technological.

In large part, this stems from changes to the rules on political financing. Since 2004, registered electoral district associations, nomination contestants and leadership contestants have been added to the list of regulated entities and must comply with intricate rules. New restrictions have been imposed on the source and amount of contributions, as well as on transfers between political entities. Layers of rules and restrictions have thus been added by Parliament in response to emerging issues, without necessarily aiming to also preserve or enhance the coherence and effectiveness of the enforcement regime. This is particularly significant in the electoral context, where many of the participants are volunteers or have little previous experience in these matters.[3] In addition, the tightening of rules on political financing has resulted, not surprisingly, in conduct or schemes, sometimes complex, that test the limits of what is permissible. Investigations into such matters raise difficult questions, often legal in nature, that are not easily resolved and may be controversial. Also, they often require gaining access to the financial documents and bank records of multiple entities, which can be difficult to achieve.

Other factors contribute to the increasing complexity of investigations. The recent robocalls investigation in Guelph required 10 judicially authorized production orders to compel the production of evidence that was otherwise protected because it affected the privacy interests of one or more persons. With three exceptions, these production orders had to be completed sequentially, as each built on the results of the orders that had been obtained before, with the inherent delays and attention to detail that this process entails. Each order must be extensively and progressively sourced and meet the full disclosure requirements for the issuing judge to act, all of which increases as the results of earlier orders become known. Each order may, of course, be subject to challenge in any future court proceeding – hence the need to proceed with care.

Because of the requirements under the *Criminal Code* (section 487.012) (the requirements are detailed in Section I: Mandate and Powers, under Investigative tools) an investigation must have made significant progress, and there must be solid evidence before a production order can be obtained.

Technological complexity is largely the result of digital record-keeping. Recent cases have highlighted the need to access by seizure, and to review and organize extensive electronic documentation and store it in a database. Investigators have also had to trace the source of increasingly diverse communication methods used in the commission of offences under the CEA. Matters dealing with tracing Voice over Internet Protocol (VoiP) calling and automated calls, e-mail sourcing and database integrity, often months after the fact, were never contemplated when the CEA was drafted.

The Chief Electoral Officer's March 2013 report entitled ***Preventing Deceptive Communications with Electors***, to which reference was made earlier, describes in greater detail many of the difficulties associated with the investigation of offences committed through the use various technological means of anonymity.

[3] This has been an important concern of the Chief Electoral Officer, who has stressed the need to simplify the rules and to reduce the regulatory burden on participants. His 2010 report to Parliament, *Responding to Changing Needs – Recommendations from the Chief Electoral Officer of Canada Following the 40th General Election*, proposes a number of changes in this regard.

C. Insufficiency of investigative tools

When investigating matters where the stakes are perceived as significant (and, in electoral matters, most investigations belong in this category), investigators often face reluctant witnesses. Frequently, key individuals will simply refuse to be interviewed[4] or they will initially accept, only to later decline. In some cases, they will participate in interviews but will provide only partial information and incomplete answers, often citing a faulty recollection of events or the inability to retrieve key documents. In other cases, a potential witness will profess a complete willingness to cooperate, but the process will take time – resulting in information being provided slowly and in an incomplete fashion.

Under the legislative regime as it currently exists, potential witnesses (e.g. candidates, official agents, representatives of political parties) do not have any obligation to cooperate with or assist investigators. Any assistance or information they provide is given voluntarily, except where a production order has been obtained.

This raises the question of whether in light of the difficulties frequently encountered in the course of investigations, consideration should be given to changing the legislation. Several provincial electoral statutes grant either the Chief Electoral Officer or the Commissioner, as the case may be, the power to compel persons to provide testimonial evidence or produce records.

In *Preventing Deceptive Communications with Electors*, the CEO recommended that changes be made to the CEA in order to give the Commissioner the power to apply to a judge for an order to compel any person to provide information relevant to an investigation. As noted by the CEO, these powers are similar to those found under section 11 of the federal *Competition Act* and also in several provinces.

Importantly, this recommendation comes with key safeguards. Among them are the following:

- a person could only be compelled to provide evidence after an order had been obtained from a court on the basis of affidavit evidence that an investigation is taking place and that the person to be examined has or is likely to have information that is directly relevant to the investigation;
- the evidence obtained from a person examined under such an order could never be used in support of a prosecution against the person who was required to provide the information;
- any person so examined would have the right to be represented by counsel; and
- examinations under such a court order would be conducted in private.

This proposed legislative change is one the Commissioner fully endorses. This new tool would allow investigators to proceed more quickly and would significantly enhance their ability to uncover the facts.

D. Lack of flexibility when dealing with contraventions of the CEA

Currently, the legislation provides the Commissioner with two formal tools to enforce the CEA: compliance agreements with offending parties, or recommendations that charges be laid. (Caution or warning letters, which are used to deal with less serious offences, have no formal existence legally and, though they do serve a useful educational role, they are clearly not an effective enforcement tool for serious or deliberate violations.)

[4] For example, in the case of the Guelph investigation into misleading robocalls, the publicly available court records show that at least three individuals who were believed to have key information refused to speak with investigators.

Compliance agreements have been and can be an effective tool for dealing with violation of the CEA. But they are limited in many ways. For one, they are "agreements", i.e. the contracting party must agree to their content, and in some cases, it can take a long time to arrive at an agreement with the contracting party. Also, the current legislative scheme does not provide for monetary penalties or other forms of sanctions, which could form part of a negotiated compliance agreement. For that reason, they are not usually well-suited to address more serious breaches of the legislation.

Prosecutions, on the other hand, certainly have an important role to play and can be very effective as powerful enforcement responses to violations. They are particularly useful for dealing with serious matters. They also play a strong deterrent role.

However, prosecutions also have drawbacks. Given that the various elements of an offence must be proven beyond a reasonable doubt in order for a prosecution to be successful, investigations are often lengthy (especially where complex or technological issues arise). Before any charges can be laid, the file must be referred to the DPP for examination and decision. Between the laying of a charge and the beginning of the trial, many months will usually elapse. Any final judgment by a court is subject to appeal. In short, to prosecute a case is an expensive and lengthy proposition – for the accused, for the Commissioner and for the justice system. For that reason, prosecutions are reserved for the most serious breaches and are ill-suited for the majority of situations where, as alluded to above, regulatory requirements under the CEA have not been fully complied with.

This strongly suggests that there is a need to complement the existing set of tools so that the legislation provides better and more flexible ways to deal with the breaches that are too serious to be settled through compliance agreements yet not serious enough to be dealt with through prosecutions. Examples of new tools are an enhanced compliance agreement regime that would make it possible to include broader terms and sanctions in the agreement, and the ability to impose administrative penalties for true regulatory offences, such as the premature transfer of goods or funds to a candidate, minor violations of the rules concerning bank accounts, or minor overcontributions by an individual. These are only two examples of possible changes. There are certainly others that could be considered.

In this regard, reference should be made to the recommendations contained in the report prepared by the CEO in June 2010 entitled ***Responding to Changing Needs – Recommendations from the Chief Electoral Officer of Canada Following the 40th General Election***.[5] As well, it should be mentioned that the CEO has indicated his intention to table, in the future, recommendations to improve and facilitate compliance and enforcement.

[5] See in particular recommendations II.2 and II.9. The first of the two recommendations proposed that candidates or political parties who exceed their authorized expense limits should see a dollar-for-dollar reduction in their election expenses reimbursement. The second proposed that when a candidate or political party fails to file a report by the applicable statutory date, they should forfeit up to 50% of their nomination deposit.