

May 6, 2014

**AN ANALYSIS OF THE
SUMMARY INVESTIGATION REPORT ON ROBOCALLS
OF THE COMMISSIONER OF CANADA ELECTIONS**

By: Steven Shrybman

The following analysis offers a critical assessment of a report issued on April 24, 2014 by the Commissioner of Canada Elections, Mr. Yves Côté (the “Commissioner”), concerning his investigation into voter suppression activity during the 41st General Election in May 2011 (the “Election”).¹ I have reviewed the Report, having served as Counsel for several electors (the “Applicants”) who, in March 2012, brought applications to annul the results of the Election in 6 ridings across the country.

In my view, the Commissioner failed to properly carry out his mandate. As set out below, I believe the Commissioner adopted a seriously flawed and unnecessarily limited approach to his investigation that caused him to ignore relevant evidence and neglect obvious routes of inquiry. I am also of the view that he adopted ineffective methods for his investigation. As a result of these failures, the Commissioner was not able to answer the questions that were central to his mandate, namely to determine the extent of, and responsibility for, voter suppression during the Election.

The Commissioner explains the purpose of his investigation this way:

The purpose of the investigation was to determine one thing: whether there was enough evidence to recommend to the Director of Public Prosecutions that charges be laid for violations of the *Canada Elections Act* in relation to nuisance calls or calls providing incorrect poll location information outside the electoral district of Guelph.²

However, as set out in s. 509 of the *Canada Elections Act* (the “Act”),³ the Commissioner’s mandate is actually much broader than this – He is charged with the duty “to ensure that [the] Act is complied with and enforced.”⁴

¹ Commissioner of Canada Elections, “Summary Investigation Report on Robocalls: An Investigation into Complaints of Nuisance Telephone Calls and of Telephone Calls Providing Incorrect Poll Location Information in Electoral Districts Other than Guelph During the 41st General Election of May 2011” (April 2014), online: Elections Canada http://www.elections.ca/com/rep/rep2/roboinv_e.pdf (“Report”).

² Report, p. 2.

³ *Canada Elections Act*, S.C. 2000, c. 9.

⁴ *Canada Elections Act*, s. 509.

Notwithstanding the breadth of his mandate and purpose, the Commissioner adopted an exceedingly narrow approach to his investigation, essentially reducing it to an unsuccessful effort to trace the source and verify the content of calls made to 126 of the 1726 individuals who filed formal complaints with Elections Canada alleging that they had been the victims of electoral fraud during the Election. Yet, as discussed below, the Commissioner was aware that electors who filed formal complaints of fraudulent calls represented only a small fraction of those who had actually received those calls. Moreover, there was extensive relevant evidence of voter fraud that the Commissioner chose to ignore.

On the basis of this narrow investigation, the Commissioner concluded:

... [T]he evidence uncovered in the investigation is not sufficient to give me reasonable grounds to believe that an offence was committed. As a result, I will not refer the matter to the Director of Public Prosecutions, the legal test for such a referral under subsection 511(1) of the Act not having been met.⁵

Thus, in spite of having narrowly confined his inquiry, the Commissioner draws an aggressive and overly broad conclusion that goes well beyond an acknowledgement that he was simply unable to identify the culprit or culprits behind the voter suppression calls that were widely reported, and found by the Federal Court to have been made during the Election.⁶

Towards the end of his Report, the Commissioner also dismisses the possibility of a conspiracy to defraud voters during the Election, despite considerable evidence to the contrary. On this key question however, not only did the Commissioner fail to seek out key evidence, but he repeatedly ignored or discounted facts and evidence that undermined his conclusion.

Consistent with these dubious and unfounded conclusions, the Commissioner announced that he would abandon any further investigation into voter fraud during the Election.

The following describes the principal deficiencies of the Commissioner's investigation.

The Commissioner Failed to Consider the Evidence Before, and/or the Findings of, the Federal Court in McEwing v. Canada

Among the more glaring deficiencies of the Commissioner's investigation was his failure to consider the substantial body of evidence adduced before the Federal Court in proceedings concerning the very same voter suppression activity he had responsibility to investigate.

In May 2013, the Federal Court released its judgment in respect to applications that had been brought pursuant to s. 524 of the Act, seeking the annulment of elections in 6 ridings across Canada. Section 524(1)(b) provides:

⁵ *Report*, p. 2.

⁶ *McEwing v. Canada (Attorney General)*, 2013 FC 525 (CanLII) ("Judgment").

524. (1) Any elector who was eligible to vote in an electoral district, and any candidate in an electoral district, may, by application to a competent court, contest the election in that electoral district on the grounds that

...

(b) there were irregularities, fraud or corrupt or illegal practices that affected the result of the election.

Extensive evidence was called in the case. For instance, in addition to having before it the ITO reports arising from the Commissioner's investigation, the Court also heard evidence from several expert and other witnesses. Furthermore, unlike the interviews conducted by the Commissioner's office, the evidence adduced before the Federal Court was given under oath and subject to cross examination. That evidence included:

- the sworn evidence of electors who received voter suppression calls during the May 2011 election;
- the sworn evidence of the principals of RMG and Strategic Communications - two companies that provide voter outreach services and which are referenced in the Commissioner's report.

Most importantly, the Court also had the benefit of a survey by EKOS of 4,387 people who were anonymously canvassed to determine whether they had received and been affected by a voter suppression or harassing call during the Election, and their voting preferences.⁷ Having information about voter preferences is key to ascertaining whether voter suppression activity targeted supporters of a particular party or parties. The EKOS survey was the subject of testimony by no less than five expert witnesses, each with considerable experience in their fields. Four of these experts appeared for the Applicants, and were:

- Mr. Frank Graves, the founder and President of EKOS Research Associates Inc., one of Canada's largest and most successful polling firms. EKOS carried out the survey that demonstrated the extent to which an organized effort to suppress the vote of non-CPC members was carried out in the six ridings at issue.⁸
- Dr. Neil Nevitte, Professor of Political Science at the University of Toronto, cross-appointed to the School of Public Policy and Governance and the School of Global Affairs. Dr. Nevitte was a co-investigator of the Canadian Election Studies (1993-2009) and serves as a senior election advisor with the National Democratic Institute for International Affairs. He is also a technical advisor to many international non-governmental organizations on the prevention and detection of election fraud and on the conditions for free and fair elections.⁹ Dr. Nevitte was retained to comment on

⁷ Judgment, paras. 128, 196 – 217.

⁸ Affidavit of Frank L. Graves, sworn April 23, 2012, paras. 1-3, Application Record, Vol. 2, Tab 10, pp. 349-350.

⁹ Affidavit of Dr. Neil Nevitte, para. 2, Application Record, Vol. 1, Tab 6, p. 205.

the methodology and reliability of the EKOS report and of the criticism made of that report by Dr. Ruth Corbin, who had been retained by the Conservative MPs who were respondents in the Court proceedings.¹⁰

- Mr. Michael Adams, President since 1970 of the Environics Group of research and communications consulting companies. The Environics Group is one of the largest and most respected of its kind in Canada. Mr. Adams gave evidence attesting to the professionalism and integrity with which Mr. Graves consistently carried out his work.¹¹
- Dr. Maria Barrados, former president of the Public Service Commission of Canada, and previous Assistant Auditor General of the Office of the Auditor General of Canada. Dr. Barrados also gave evidence in response to the *ad hominem* attack by the Conservative MPs on Mr. Graves.¹²

Having reviewed and considered all of the evidence, the Federal Court made the following findings in respect to whether voter suppression and fraud had taken place during the Election:

The ITO evidence confirms that there was a deliberate attempt at voter suppression during the 2011 election.”¹³

...

I am satisfied that [it] has been established that misleading calls about the locations of polling stations were made to electors in ridings across the country, including the subject ridings, and that the purpose of those calls was to suppress the votes of electors who had indicated their voting preference in response to earlier voter identification calls.¹⁴

...

I find that the threshold to establish that fraud occurred has been met ...¹⁵

The Commissioner’s task was to determine whether offenses had been committed under the Act, and by whom. The fraudulent practices of voter suppression found by the Federal Court to have taken place during the Election would certainly offend those provisions of the Act that make it an offense to engage in such activity.¹⁶ As the Federal Court held:

¹⁰ Nevitte Affidavit, Application Record, Vol. 1, Tab 6, pp. 204-215.

¹¹ Affidavit of Mr. Michael Adams, Applicants’ (Respondents’) Record and Brief of Authorities on Motion to Strike Evidence of Frank L. Graves, Vol. 1, Tab 1, at p. 4.

¹² Affidavit of Dr. Maria Barrados, Applicants’ (Respondents’) Record and Brief of Authorities on Motion to Strike Evidence of Frank L. Graves, Vol. 1, Tab 2, at “Exhibit A”.

¹³ Judgment, para. 177 [emphasis added].

¹⁴ Judgment, para. 244 [emphasis added].

¹⁵ Judgment, para. 246 [emphasis added].

¹⁶ The Commissioner cites two such provisions of the Act, ss. 281(g) and 482(b): Report, para. 46.

In the context of the Act as a whole, the object of the Act and the ordinary and grammatical meaning of fraud, it is sufficient to show that a false representation has been made in an attempt to prevent electors from exercising their right to vote for the candidate of their choice ...¹⁷

While the Commissioner stressed the importance of finding intent as a constituent element of the offenses he was investigating, the Federal Court clearly found that the misdirecting calls received by electors in the ridings at issue were the result of a deliberate and intended effort to prevent them from voting.

Although the question of fraud was central to the Federal Court's judgment, the Commissioner's Report inexplicably makes no reference whatsoever to that decision, or to the evidence of voter fraud upon which the Court based its decision. His decision to ignore the evidence and findings in the Federal Court proceeding is even more problematic in light of the far more rigorous and expansive inquiry into voter fraud conducted by the Federal Court, compared to that carried out by the Commissioner.

In sum, notwithstanding the findings of the Federal Court that a widespread and deliberate attempt to suppress the vote of Canadians occurred during the 2011 Election, the Commissioner, having conducted a far more limited inquiry into the matter, ignored that evidence and that decision and came to an entirely contrary conclusion.

The Commissioner Failed to Investigate CIMS as the Most Likely Source of Voter Suppression Calls

Even more problematic is the Commissioner's apparent failure to properly investigate the Conservative Party of Canada's (CPC) voter information data base, "CIMS", as the likely source of the voter suppression he was investigating.

We know from the ITO filed in the Guelph investigation that the list used by 'Pierre Poutine' was downloaded from CIMS – a fact that the Commissioner fails to note in his report. The judgment of the Federal Court similarly pointed directly to CIMS as the source of voter information. It found that:

...[the voter suppression efforts] appear to have been targeted towards voters who had previously expressed a preference for an opposition party (or anyone other than the government party);¹⁸

...

¹⁷ Judgment, para. 65 [emphasis added].

¹⁸ Judgment, para. 256 [emphasis added].

I am satisfied ... that the most likely source of the information used to make the misleading calls was the CIMS database maintained and controlled by the CPC, accessed for that purpose by a person or persons currently unknown to this Court. ... [T]he evidence points to elaborate efforts to conceal the identity of those accessing the database and arranging for the calls to be made.¹⁹

If the Commissioner needed any other reason to be curious about the use of CIMS, he could have found one in the extraordinary lengths to which the CPC went to derail the Federal Court proceedings. As the Court found:

... [I]t has seemed to me that the applicants [supported by the Council of Canadians] sought to achieve and hold the high ground of promoting the integrity of the electoral process while the respondent MPs engaged in trench warfare in an effort to prevent this case from coming to a hearing on the merits.

Despite the obvious public interest in getting to the bottom of the allegations, the CPC made little effort to assist with the investigation at the outset despite early requests. I note that counsel for the CPC was informed while the election was taking place that the calls about polling station changes were improper. While it was begrudgingly conceded during oral argument that what occurred was “absolutely outrageous”, the record indicates that the stance taken by the respondent MPs from the outset was to block these proceedings by any means.²⁰

The singular and central question to emerge from the evidence and judgment of the Federal Court is this:

Who, in addition to Pierre Poutine, downloaded lists of non-party supporters from CIMS in the days leading up to the Election, and for which electoral districts?

As there is no reason for such lists to be downloaded other than for nefarious purposes, the answer to that question would resolve the two key issues at the very centre of the Commissioner’s investigation: i) To what extent did voter suppression occur during the Election? and ii) Who was responsible?

Remarkably, there is no indication that the Commissioner asked the CPC to produce the record of CIMS database use in the days leading to the Election to determine how often, and by whom, lists of non-CPC supporters were downloaded.

The Commissioner’s apparent failure to pursue the central question to emerge about voter fraud during the Election is entirely unexplained.

¹⁹ Judgment, para. 245 [emphasis added].

²⁰ Judgment, paras. 261-262 [emphasis added].

The Commissioner Failed to Adopt Reasonable and Available Means for Investigating Electoral Fraud

As noted, there is nothing in the Commissioner's legislated mandate that required him to narrow his inquiry to only those electors who filed formal complaints with Elections Canada. To the contrary, the Commissioner has broad authority to carry out an investigation by any means necessary. Section 513 of the Act provides:

The Commissioner, where he or she considers it to be in the public interest, may take any measures, including incurring any expenses, in relation to an inquiry, injunction or compliance agreement under this Act.

We know from the investigation into electoral fraud in Guelph that only a small fraction of those who receive improper calls actually file formal complaints, even when the events are subject to ongoing and prominent media coverage. Yet, the Commissioner's investigation was comprised entirely of attempts to trace the source of the voter suppression calls that were the subject of formal complaints. Even then, he attempted to trace only a fraction of those calls.

As the Commissioner himself describes, his approach was fraught with many difficulties including the passage of time since the calls were made. While the Commissioner underscores the importance of timely reporting by electors of such incidents, he does not explain why his investigation into voter fraud outside Guelph apparently did not begin until September 2012, in spite of reports of such incidents being made at the time of the election (see discussion below). While the number of such complaints was not large, as the Chief Electoral Officer stated when he appeared before the House of Commons Standing Committee on Procedure and House Affairs on March 29, 2012, any attempt to disenfranchise electors is "absolutely outrageous" and "totally unacceptable in a modern democracy".

In addition to the problem of delay, the Commissioner describes his investigation as being hampered by the lack of records concerning calls made to complainants, the refusal or inability of telephone service providers to provide their records, and, in at least one instance, the refusal of "a person who investigators believed could have provided very relevant information" to be interviewed (whose identity is not revealed).²¹ We also know from the Guelph investigation and the decision of the Federal Court that the perpetrators of voter fraud go to great lengths to prevent their actions from being discovered or traced.²²

Despite being confronted by these serious limitations, the Commissioner does not appear to have considered any other way of carrying out his investigation. Of course the most obvious and immediate way for him to have done so would have been to investigate the most likely source of data used for voter suppression purposes: the CIMS database. But that he did not do.

²¹ Report, para. 82.

²² See, for example, Judgment, para. 261.

Beyond that, the Commissioner might also have commissioned the type of survey that was in evidence before the Federal Court. One virtue of survey evidence is that it provides a means for investigating voter fraud while preserving the privacy of those surveyed. In this regard, as the Supreme Court of Canada held in *Opitz*, such investigations cannot compromise the secrecy of the ballot.²³

Moreover, the reliability of such a survey can be tested. Commenting on the survey conducted by EKOS, Justice Mosley made these findings:

In my view, there was no question that the survey evidence was relevant. I concluded that it was admissible in support of Mr. Graves' opinion subject to the principles set out in *Mattel* ... that it was properly designed and conducted in an impartial manner. I found that the survey was "both reliable (in the sense that if the survey were repeated it would likely produce the same results) and valid (in the sense that the right questions have been put to the right pool of respondents in the right way, in the right circumstances to provide the information sought)"...²⁴

If the Commissioner considered any other means for carrying out his investigation in light of the investigative challenges he confronted in attempting to trace the source of calls made to 126 complainants, he does not tell us.²⁵

The Commissioner Failed to Draw Obvious Conclusions from the Results of His Investigation

In their effort to trace the source of the calls made to the small number of formal complainants, the Commissioner's investigators examined the calling records of the Responsive Marketing Group (RMG), one of the voter contact companies (telemarketers) retained by the CPC.²⁶

The Report tells us that, during the Election, RMG had called or attempted call 289 of the persons who subsequently filed complainants with Elections Canada. It successfully made contact with 126 of these individuals.²⁷ The contact information for those calls had been provided to RMG by the CPC.

The first thing to note is that the Commissioner seemingly failed to consider whether these 126 complainants were from ridings where relatively high numbers of complaints originated. This is relevant because of evidence (including that adduced in the Federal Court) that only certain ridings were targeted.

²³ *Opitz v. Wrzesnewskyj*, 2012 SCC 55, [2012] 3 SCR 76, at paras. 23, 72.

²⁴ Judgment, para. 201.

²⁵ See, *inter alia*, paras. 50 to 55 of the Commissioner's Report.

²⁶ Report, paras. 89-102.

²⁷ Report, paras. 91-92. The balance of calls were unsuccessful in that they were not fully completed.

More surprising still, the Commissioner apparently made no effort to identify the political preferences of the 126 complainants, although that information would have been recorded in the CIMS database which the Report describes as the source of voter contact information provided by the CPC to RMG. Of course, in the circumstances, it is reasonable to assume that the majority of complaints were made by non-CPC supporters, especially in light of the evidence of targeting non-CPC supporters in Guelph and the conclusions of the Federal Court that the same thing took place in ridings across the country.

The investigation compared calls made by RMG to these 126 complainants with calls made by RMG to a random sample of 1000 non-complainants. The investigators found that RMG provided incorrect information about the location of polling stations to 27% of the 126 complainants, “usually directing electors to a location farther away than their assigned poll.”²⁸ By contrast, RMG provided incorrect information about the location of polling stations to only 1% of the random sample.

In other words, the complainants were 27 times more likely to get a misdirecting call than were the typical recipients of RMG calls.²⁹ It is, of course, possible that some complainants may have been mistaken about the calls they received, or may have been the victims of calls made by other companies including companies that declined to cooperate with the investigation or kept no records. But the disproportionate frequency of misdirecting calls made to the complainants provides strong confirmation of the kind of targeting described in the EKOS report, which found that the incidence of polling station change calls ranged between 15% and 36% depending on the riding in question,³⁰ and that misdirection occurred in 29.5 % of ‘poll station change’ calls to Liberal Party supporters and to 18.4% in the case of the NDP.³¹

Moreover, RMG’s Chief Operating Officer acknowledged during the Federal Court proceedings that his company had been directed by the CPC to tell electors that "Elections Canada has changed some voting locations at the last minute", even in ridings where there had been no polling station changes (including 5 of the ridings in issue in the Federal Court proceedings).³²

Nevertheless, the Commissioner draws no conclusions or inferences from having found that 27% of the complainants received misdirecting calls from RMG at the direction of the CPC.

This willingness to dismiss evidence that implicates the CPC can also be seen in the Commissioner’s explanation of why he doesn’t make much of the fact that complainants describe the misdirecting calls as coming after they received calls from the CPC in which they expressed their intention to vote for another party. He tells us that no link was found between the two calls and that “for the purpose of an investigation of a criminal nature, more than a close

²⁸ Report, para. 93.

²⁹ *Ibid.*, at p. 23, Figure 4 and para. 96

³⁰ EKOS Report 2, p. 12, Table 3.2, Application Record, Vol. 4, Tab 13-A, p. 1063.

³¹ EKOS Report 2, p. 11-12, Application Record, Vol. 4, Tab 13-A, p. 1059.

³² See Judgment, para. 210.

juxtaposition in time is required. There needs to be other evidence that links the two together. Investigators did not find any such evidence.”³³

The Commissioner doesn’t note that the results of voter-preference identification calls made by a company like RMG are uploaded to the CIMS database,³⁴ which would appear to be an obvious connection. Apparently the Commissioner made nothing of this, or of the fact that the misdirecting calls were reported to follow voter ID calls made by the CPC, not by the other parties.

Moreover, the Commissioner never questions why lists of non-CPC supporters were provided by the CPC to RMG during the final days of the Election in light of RMG’s repeated assertions in evidence before the Federal Court that “get-out-the-vote” calls were only to be made to CPC supporters.³⁵ But as Mr. Langhorne (RMG’s witness) acknowledged, RMG had no knowledge of the persons to whom GOTV calls were made, and simply called the numbers provided by the CPC.

The Commissioner’s Dubious Grounds For Discounting Complaints of Voter Suppression Outside Guelph

At paragraphs 100 to 102 of his Report, the Commissioner tells us why he discounts complaints of voter suppression calls in ridings other than Guelph. Remarkably, his conclusion appears to be primarily based on a single email from an unnamed CPC official. The Commissioner tells us this:

In one e-mail response, the party’s Coordinator of Direct Voter Contact noted that the incorrect information arose from CIMS placing electors in the wrong polling division. He concluded that “[t]his is a very small group of people, but there will be a handful in every riding.” This statement is consistent with the number and distribution of complaints of calls providing incorrect poll locations outside the electoral district of Guelph.

Of course, the explanation offered by the CPC doesn’t explain why complaints about such calls emanated almost entirely from non-CPC supporters, or why the CPC directed RMG to call

³³ Report, para. 113.

³⁴ It was common ground between the CEO of RMG and the President and CEO of Strategic Communications, both of whom gave evidence during the Federal Court proceedings, that information acquired during the voter identification phase of a campaign is used subsequently for “get out the vote” calls to party supporters on the eve of an election, but that information about non-supporters is also incorporated to a party’s database. See Penner Affidavit, Application Record, Vol. 1, Tab 5, p. 144, at para. 18; Affidavit of Andrew Langhorne, Application Record, Vol. 1, Tab 9.

At para. 192 of the Judgment, *supra*, the Federal Court noted : “The data for Voter ID calls was provided by the CPC and returned to the CPC following the election with the additional inputs regarding supporters and non-supporters recorded by the callers.” At para. 195, the Court stated: “Mr. Langhorne’s evidence is supported by the RMG records and is consistent with the industry practices described by both himself and Mr. Penner.”

³⁵ Langhorne cross-examination, Sept. 11, 2012, Q. 804, Application Record, Vol. 5, Tabs 16-17.

electors in ridings where no polling station changes had occurred. Nevertheless the Commissioner takes this dubious explanation, from someone he does not appear to have interviewed, as a valid reason to regard the misdirecting calls made by RMG as innocent mistakes.

Equally problematic is the Commissioner's account of exchanges between Elections Canada officials and the CPC in the days immediately before the Election. At paragraph 102 of his report, the Commissioner, referring to these events, states:

... [R]eturning officers in 11 electoral districts reported elector complaints of incorrect poll location information coming from Conservative Party callers. When contacted by returning officers, local Conservative Party campaigns advised that the calls were from the national campaign of the party, and that the campaigns could not stop them. Through established channels, Elections Canada raised the issue twice with the Conservative Party. The party twice assured Elections Canada that they understood that some poll locations had been changed by returning officers and that, in consequence, candidates were confirming the proper poll location in calls to a number of supporters.

Unlike several other aspects of the Commissioner's investigation, we have a record of the exchanges to which he refers in this paragraph. In June 2012, in response to an "Access to Information and Privacy ("ATIP") request,³⁶ Elections Canada released redacted versions of dozens of internal emails among its staff raising concerns about poll station change calls misdirecting electors, under the re line: "*Conservative campaign office communications with electors.*" In addition, Elections Canada provided the email correspondence between Elections Canada and someone at Cassels Brock, the law firm representing the CPC, which the Commissioner describes in the Report.

As revealed by this correspondence, the concern about whether the CPC, or a company on its behalf, was making misdirecting calls was first communicated to Cassels Brock on April 29, 2011 (three days before the Election). No response from the CPC was provided until the morning of May 1, 2011 (the day before the Election) at which time the CPC claimed:

I understand that polling locations have been changed by either Elections Canada or the individual ROs in a number of electoral districts. This has occurred in respect of both the advanced and election day polls. As a consequence, a number of our candidates have had to confirm the proper location of polling stations to a number of supporters during their respective get out the vote efforts.

³⁶ See Affidavit of Michèle Babin, sworn November 29, 2012, filed by Chief Electoral Officer Marc Mayrand, leave to file granted upon consent of parties, at Exhibit A. The particular ATIP responses referred to here were made available by Elections Canada and introduced into evidence before the Federal Court. For a list of ATIP responses provided by Elections Canada, see:

<http://www.elections.ca/content.aspx?section=abo&dir=atip/summary&document=sum12&lang=e#may>.

However, as the frequency of complaints of misdirecting poll station calls continued to mount, legal services at Elections Canada wrote to CPC counsel later that same day to reiterate its concerns about this spreading problem. Far from assuring Elections Canada that candidates were confirming the proper poll location in calls to a number of supporters, as the Commissioner suggests, the CPC's second response was perfunctory and simply attached its earlier email.

More importantly, however, the CPC's response to Elections Canada is entirely incompatible with the one offered by RMG (which referred to ubiquitous, not targeted, calling) because there were no polling station changes in many ridings, including 5 of the 6 ridings that were contested in the Federal Court. Furthermore, as the Commissioner's Report describes, the misdirecting calls at issue were not made by "a number of candidates" as the email from Cassels Brock claimed, but by the CPC national campaign, through one or more of the companies it retained to contact electors. .

The Commissioner also fails to note that Elections Canada specifically asked all of the political parties *not* to call electors about changes to their polling stations, let alone to imply that the call was being made on its behalf³⁷ While Elections Canada provided a list of polling station changes to all parties, it did so in response to a request for that list made only by the Conservatives.³⁸

Nevertheless, ignoring these inconvenient facts, the Commissioner presents the CPC's email as providing a credible explanation for complaints of voter suppression calls outside Guelph

Of course what confounds common sense is that, if there was an innocent explanation for misdirecting calls to have emanated from CPC sources, why didn't the Party present that evidence to the Federal Court, instead of engaging in "trench warfare" to prevent the case from coming to trial? Having entirely ignored the proceedings before the Federal Court, that question simply doesn't arise for the Commissioner.

The Commissioner's Comparison of Voter Suppression Efforts in Guelph with Voter Suppression Efforts in Other Ridings is Misleading

Another reason offered by the Commissioner for discounting complaints about voter suppression calls from electors outside Guelph is the disproportionately large number of complaints made about voter suppression in Guelph. But there are several apparent reasons for this difference in the reported incidence of voter suppression.

The first explanation is the role of media coverage, which the Commissioner acknowledges inspired many electors to lodge complaints following the revelations of an investigation in voter

³⁷ The Commissioner's only reference to the request is the oblique and passive reference to the views of the Conservative Party on the matter. See para. 99 of the Report.

³⁸ Report of the Chief Electoral Officer of Canada on the 41st General Election of May 2, 2011, Statutory Report published 17 August 2011, Elections Canada, online : http://www.elections.ca/res/rep/off/sta_2011/stat_report2011_e.pdf, at p. 22.

fraud in Guelph in February 2012. That media coverage was almost entirely focused on Guelph and that remains true to this day. During or in the immediate aftermath of the Election, there were only about 70 complaints to Elections Canada of improper telephone calls.³⁹ From the email correspondence noted above, a number of these appear to have been from ridings other than Guelph.

Second, the evidence clearly indicates the profile of voter suppression activity in Guelph was quite different from that alleged in other ridings. For example, while the misdirecting calls to Guelph were all automated (robocalls), many complaints from people outside Guelph were of live calls. Robocalls cost pennies, and live calls many times that, which means live calls would have been used more sparingly. Indeed as the EKOS report indicated, the incidence of live voter suppression calls, while considerable, was not at the level of incidence of robocalls that occurred in Guelph.

Third, as the Commissioner should know, the information stored in a sophisticated database such as CIMS enables the micro-targeting of certain electors – for example, those most likely to be deterred by misinformation about the location of their polling station. The Commissioner fails to tell us whether any of these factors were considered as part of the scope of his investigation.

Nevertheless, he finds that the thinly scattered nature of complaints “does not lend support to the existence of a conspiracy or conspiracies to interfere with the voting process.”⁴⁰ In fact, complaints tended to be concentrated in particular ridings, with between 16 and 34 complaints having been made in 13 ridings. Once again, it would have been instructive for the Commissioner to have considered the probative inquiry by the Federal Court into the manner in which voter suppression activities were likely carried out.

For instance, one of the experts who gave evidence in the Federal Court proceedings was Robert Penner, President and Chief Executive Officer of Strategic Communications Inc., a political consultant with substantial experience in developing and implementing voter contact programs. The Federal Court recounted some of the evidence of Mr. Penner in its decision as follows:

The calls at issue in these proceedings are most likely to have been organized by a person or persons with: i) access to the central information system of a political party that included contact information about non-supporters; ii) the financial resources to contract voice and automated service providers to make such calls; and iii) the authority to make such decisions.

I found the evidence of Mr. Penner helpful in that it was consistent with the picture that has emerged from the evidence as a whole; that there was an

³⁹ Evidence of Chief Electoral Officer Marc Mayrand, Standing Committee on Procedure and House Affairs, 29 March 2012, 41st Parl, 1st Sess.

⁴⁰ Report, para. 120.

orchestrated effort to suppress votes during the 2011 election campaign by a person or persons with access to the CIMS database.⁴¹

Having decided to ignore the Federal Court proceedings, and having decided as well not to seek production of the CIMS data base, it is difficult to imagine what could have persuaded the Commissioner that he had reasonable grounds for at least referring a case to the Director of Public Prosecutions.

The Role of the Honourable Louise Charron

Anticipating criticism of his report, the Commissioner took the extraordinary step of asking The Honourable Louise Charron, a former justice of the Supreme Court of Canada, to report on the “quality and thoroughness of the investigation, and on the validity of the conclusions reached.”⁴² Ms. Charron’s four-page report is appended to that of the Commissioner.⁴³ It endorses the essential finding of the Commissioner and finds no fault with his investigation.

While I have no doubt about Ms. Charron’s professionalism and integrity, the decision to retain the former Justice was ill-conceived and inappropriate for several reasons.

First, the Commissioner describes Ms. Charron as well qualified to her task because of her former experience as a Crown prosecutor and her knowledge of criminal law.⁴⁴ While such qualifications would assist with the ultimate decision of whether reasonable grounds exist to proceed with a prosecution, they provide little assistance to the task of assessing the means for investigating a clandestine and unprecedented effort to defraud Canadian voters using leading edge communications technology.

Indeed, Ms. Charron’s brief report betrays that lack of experience and knowledge. For example, she concludes her assessment by offering this comment:

... [H]ad there been an effort to purposely mislead electors outside the electoral district of Guelph, one would have anticipated seeing a single predominant calling number, a constellation of calling numbers, or a pattern with multiple calls into a single electoral district from the same number. There was no such evidence.⁴⁵

However, as we know from the investigation into the robocalls made in Guelph, the call-back number used to identify the source of a call may be entirely fictitious, and nothing prevents such a number from being altered for every call. For those with experience in the area, it is well known that persons involved in voter fraud use elaborate techniques to avoid detection.

⁴¹ Judgment, paras. 183-84 [emphasis added].

⁴² Report, p. 3.

⁴³ Report, “Appendix”, pp. 29 – 32.

⁴⁴ Report, p. 3.

⁴⁵ Report, “Appendix”, at p. 32.

Second, the imprimatur of a third party is no substitute for a full and candid account of an investigation so that others can determine whether it was thoroughly and properly carried out. The very serious deficiencies of the Commissioner's investigation, which are described above, are not beyond the ken of the average elector concerned about the integrity of the electoral process.

Third, instead of retaining someone after the fact to assess his investigation, the Commissioner should have hired persons with expertise and experience with voter fraud, such as Professor Nevitte, and the appropriate research skills, such as Mr. Graves or Mr. Adams, to assist with his inquiry.⁴⁶

Finally, if the Commissioner believed that an independent review of his report was needed, he might have arranged for the third party to be retained by someone other than himself - in this case, the obvious choice would have been the Chief Electoral Officer.

Conclusion

While I do not suggest that the Commissioner failed to carry out his mandate in good faith,⁴⁷ in my view, and as this assessment demonstrates, his investigation was so fatally flawed as to belie any confidence one might have in its conclusions.

Unfortunately, the Report leaves us with more questions than it answers and, as noted, the most important question is this: *In the days leading to the May 2011 Federal Election, on how many occasions were lists of non-CPC supporters downloaded from the CIMS database, by whom, and in respect of which electoral districts?*

Finally, it should be noted that the proposed reforms to the *Canada Elections Act* presently being debated in Parliament will do nothing to empower the Commissioner to compel the CPC or any other party to answer this question, either with respect to the 2011 Election or any future election in which voter fraud once again rears its ugly head. This means that political parties will remain unaccountable for the misuse of their databases, whether they condone that abuse or simply look the other way.

⁴⁶ The Commissioner's reliance on expert assistance was limited to technical experts to analyse the data provided by RMG and telecommunications services providers. While that expertise was necessary, entirely different skills were required to determine the nature, extent and persons responsible for voter suppression given the elaborate steps taken to conceal their conduct, and the formidable challenges that he admits his investigation encountered.

⁴⁷ Having reviewed several of the ITOs filed by the investigators hired by the Commissioner, I can find no fault with the way in which they went about their assigned tasks. Rather, the problem is with the flawed manner in which the Commissioner decided to carry out the investigation and, most importantly, with his willingness to draw unwarranted and overstated conclusions that he then presents as justification for abandoning the investigation.