

**Compliance Agreements as an Alternative Enforcement Mechanism  
in Canada's Federal Election Law**

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## **Introduction**

In 2000, the Parliament of Canada enacted a new *Canada Elections Act* from which several new methods of election law enforcement became available to the Commissioner of Canada Elections - the agent responsible for federal election law enforcement. Included in these new methods is the ability to negotiate voluntary compliance agreements with accused offenders. A voluntary compliance agreement allows the accused offender to avoid criminal prosecution, by admitting wrong doing in a negotiated settlement that includes a lesser form of restitution. Compliance agreements have been widely used in other areas of law for some time, but represent a notable shift in election law enforcement. This paper explores that legal-administrative transition by examining the origin, implementation and effect of voluntary compliance agreements in federal election law enforcement.

The primary reason for enacting this new method of enforcement was to provide an alternative to prosecution, and thus deal more effectively with so-called 'minor' infractions of the *Canada Elections Act*. Prior to this amendment, it was argued that criminal proceedings were too harsh and too cumbersome for enforcing minor offences. Five years after the introduction of voluntary compliance in federal election law, this paper asks if, indeed, compliance agreements have been used as intended - to enforce minor contraventions of the *Canada Elections Act*? I argue that, although compliance

agreements have been successful in enforcing minor contraventions of the *Act*, the use of voluntary compliance has - in a few cases - extended beyond the original intent of this mechanism in order to also enforce more serious violations.

### **Commissioner of Canada Elections**

The Commissioner of Canada Elections is a civil servant employed by Elections Canada, appointed by and responsible to the Chief Electoral Officer (CEO).<sup>1</sup> The position of Commissioner was first created in 1974 as the official responsible for enforcing the election expense provisions of the *Canada Elections Act*;<sup>2</sup> in 1977 that role was expanded to cover all enforcement provisions under the *Act*. Similar to a judge or officer-of-parliament, it is essential that the Commissioner be perceived as intelligent, impartial and fair.<sup>3</sup> The current Commissioner fits this characteristic: Commissioner Raymond Landry is a former Dean of Law, and is professor emeritus, at the University of Ottawa; he is also a member of the Order of Canada.<sup>4</sup> The Commissioner is responsible for enforcing a law, which, one may argue, protects the most basic democratic right of Canadian citizens – the right to vote.

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<sup>1</sup> The Chief Electoral Officer is an independent officer of the Parliament of Canada. For general information see [www.elections.ca](http://www.elections.ca).

<sup>2</sup> From 1974-1977 the position was named Commissioner of Election Expenses.

<sup>3</sup> Previous Commissioners were John P. Dewis (1974-1976), Joseph Gorman (1976-1987), and George M. Allen (1988-1991).

<sup>4</sup> Raymond A. Landry, "Curriculum Vitae," provided to author during Interview, Elections Canada, 18 July 2001.

A brief international comparison is instructive. Countries such as the United Kingdom, India, South Africa and Australia have assigned election law enforcement to all-party election commissions. Other countries, like the United States, have bi-partisan adjudicative bodies as well as professional prosecutorial services.<sup>5</sup> A statement about election law enforcement by the Supreme Court of India further accentuates the uniqueness of the Canadian structure: “It is both necessary and desirable that the powers are not exercised by one individual, however all-wise he may be it ill-conforms the tenets of democratic rule”[sic].<sup>6</sup> The authority and independence of the Commissioner of Canada Elections may be indicative of the high level of trust that Canadians are willing to place in unelected officials. (Or, maybe it speaks to the distrust that Canadians hold for elected officials.)<sup>7</sup>

Since 1977 the Commissioner of Canada Elections has had the authority to prosecute individuals, organizations and political parties accused of violating Canada’s election laws. Prosecution remains the most serious enforcement method available to the Commissioner. The Commissioner’s authority to initiate prosecution is derived from the

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<sup>5</sup> For official websites see: United Kingdom <[www.electoralcommission.gov.uk](http://www.electoralcommission.gov.uk)>, India <[www.eci.gov.in](http://www.eci.gov.in)>, South Africa <[www.elections.org.za](http://www.elections.org.za)>, Australia <[www.aec.gov.au](http://www.aec.gov.au)>, United States <[www.fec.gov](http://www.fec.gov)> and <[www.usdoj.gov/criminal/pin.html](http://www.usdoj.gov/criminal/pin.html)> (Retrieved 12 February 2005).

<sup>6</sup> K.C. Sunny “Electoral Law,” in ed. Verma Kusum, *Fifty Years of the Supreme Court of India*, (New Delhi: Oxford University, 2000), 225.

<sup>7</sup> Canadians are often polled about whom in society they trust: politicians always score low. Here are a couple of examples: <[http://www.cric.ca/en\\_html/opinion/opv3n23.html](http://www.cric.ca/en_html/opinion/opv3n23.html)>, <[http://www.rnantnu.ca/news/trusted\\_pros.pdf](http://www.rnantnu.ca/news/trusted_pros.pdf)> (Retrieved 19 February 2005).

*Canada Elections Act*.<sup>8</sup> The Commissioner's discretionary authority is checked by Elections Canada enforcement policy, under the authority of the CEO. Still, the Commissioner holds sole legal authority for launching investigations and initiating prosecutions.

The decision by any government agency to prosecute is a serious one. Trials are often expensive and lengthy; moreover, prosecution places the state in an adversarial role with respect to accused citizens. It has been argued that, since enactment of the *Canadian Charter of Rights and Freedoms* in 1982, "obligations on agents of the state have increased dramatically as our justice system has focused on increasing safeguards for accused persons."<sup>9</sup> The decision by the state to prosecute requires the consideration of several key variables. For the Commissioner's office, these variables are detailed in the institution's *Special Investigators' Manual*. Most of the variables found in this manual resemble criteria assessed by prosecutors in other legal sectors: the basic test applied is to ask whether or not there is enough merit in a case to provide a "reasonable prospect for conviction."<sup>10</sup>

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<sup>8</sup> *Canada Elections Act* (2000, c.9), s. 511-512.

<sup>9</sup> André Marin, *The Guide to Investigations and Prosecutions* (Aurora, ON: Canada Law Book, 1995), 91.

<sup>10</sup> Elections Canada, *Special Investigators' Manual* (Ottawa: Elections Canada, 2000), chpt. 17, s. 5.; also see Marin, 101-104.

## New Enforcement Provisions

The establishment of the voluntary compliance agreement as an alternative to prosecution in federal election law can foremost be attributed to the research Cecile Boucher carried out for the Royal Commission on Electoral Reform and Party Financing (Lortie Commission). At the time of study (1991), the only formal enforcement option available to the Commissioner was prosecution. Boucher found that the criminal nature of prosecution, coupled with “the fact that courts of law have little interest in election cases,”<sup>11</sup> resulted in an enforcement structure where few complaints ended with court action.<sup>12</sup> Further, Boucher argued that the prohibitions and penalties of the *Act* reflected an outdated perspective relative to contemporary electioneering:

Offences related to allowing employees time off work to vote and the sale of alcohol are not, in our view, reason to question the integrity of the system. Fraud and corruption are no longer common practice in the election of candidates and parties.<sup>13</sup>

As a result, Boucher made several recommendations for reform. Most important, for the purposes of this paper, was the proposal to enforce some offences through

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<sup>11</sup> Cecile Boucher, “Administration and Enforcement of Electoral Legislation in Canada,” in ed. Michael Cassidy, Democratic Rights and Electoral Reform in Canada, vol.10 of the Research Studies for the Royal Commission on Electoral Reform and Party Financing (Toronto: Dundern Press, 1991), 505.

<sup>12</sup> Boucher, 463,464,469,498.

<sup>13</sup> Boucher, 498. Testimony at the 2005 Gomery Inquiry into sponsorship financing may contradict this theory.

negotiated settlements.<sup>14</sup> The offences to be dealt with in this manner would be those in the nature of “minor” offences.<sup>15</sup> Boucher does not provide a definition of ‘minor offences’, but does offer a full analysis of regulatory offences, to which she equates equal stature. Her argument is thus:

Penalties for regulatory offences are intended to correct a situation and redress wrongs; they are also intended to encourage compliance with the provisions. The criminal model seems increasingly inappropriate for non-criminal offences because of the rigidity of the procedure, the virtual absence of negotiation and the costs involved. Authorities are reluctant to punish minor offences and those where intent cannot be proven beyond a reasonable doubt because of the high cost in human and material resources.<sup>16</sup>

The Lortie Commission agreed with this logic, and stated that a voluntary compliance procedure should thus be instituted.<sup>17</sup> Specifically, they recommended that: “for election infractions, the director of enforcement have the authority to negotiate an agreement in the form of a voluntary compliance agreement.”<sup>18</sup> Elections Canada later adopted this recommendation. In his Annex to the 1996 general election report, CEO Jean-Pierre Kingsley wrote:

While the criminal justice process may be necessary for violations that can influence the outcome of an election or undermine the integrity of the electoral

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<sup>14</sup> Boucher, 238.

<sup>15</sup> Boucher, 468, 498, 512, 538.

<sup>16</sup> Boucher, 512.

<sup>17</sup> Pierre Lortie, “Recommendations,” Reforming Electoral Democracy: Final Report of the Royal Commission on Electoral Reform and Party Financing, vol.2 (Ottawa: Minister of Supply and Services, 1991), 498.

<sup>18</sup> *Ibid*, 2.8.6(a), 335.

process, it is inappropriate for dealing with offences of an administrative or regulatory nature.<sup>19</sup>

As additional reasoning, Kingsley also observed: “courts appear reluctant to treat all infringements of the Act as criminal offences.”<sup>20</sup>

Today, this analysis is reflected in Elections Canada policy, which instructs the Commissioner to keep in mind “that the contemporary view favours resolving, in appropriate cases, contraventions through remedial rather than punitive measures.”<sup>21</sup> As has been suggested elsewhere:

[w]ith a large volume of cases consisting of minor crimes which were not seen by either the perpetrators or society at large as ‘real’ crime there was a fear that respect for judicial proceedings at the more serious end might be eroded were such crimes to continue to be prosecuted.<sup>22</sup>

Informal justice mechanisms are often lauded for their ability to “reduce the level of stigmatization and prevent minor offenders from being drawn into the mainstream of the criminal justice process.”<sup>23</sup> Following this reasoning, an alternative to prosecution was enacted in the 2000 *Canada Elections Act*.

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<sup>19</sup> Jean-Pierre Kingsley, Canada’s Electoral System: Strengthening the Foundation, Annex to the Report of the Chief Electoral Officer of Canada on the 35<sup>th</sup> General Election, (Ottawa: Elections Canada, 1996), 71.

<sup>20</sup> *Ibid*, 71.

<sup>21</sup> Elections Canada, Special Investigators’ Manual, chpt. 17, s. 3.

<sup>22</sup> Jacqueline Tombs and Susan Moody, “Alternatives to Prosecution: The Public Interest Redefined,” Criminal Law Review (May 1993), 360.

<sup>23</sup> Roger Matthews, “Reassessing Informal Justice,” in Informal Justice? ed. Roger Matthews (London: Sage, 1988), 6; also see: John Braithwaite, Crime, Shame and Reintegration (Melbourne: Cambridge University, 1989).



## Compliance Agreements

In 2000, sections 517-521 of the *Canada Elections Act* established compliance agreements as an enforcement mechanism available to the Commissioner. Only one other jurisdiction in Canada – Nunavut - has enacted a similar voluntary compliance mechanism.<sup>24</sup> Compliance agreements are negotiated between the Commissioner and a person or organization known as the ‘contracting party’. Contracts may be signed with a variety of parties, including individual citizens, election agents or partisan organizations. In all cases, the contracting party has the right to be represented by legal counsel during negotiation.

In a compliance agreement, the contracting party admits responsibility for an offence under the *Canada Elections Act*. An admission of responsibility does not amount to an admission of guilt: the agreement cannot be used as evidence in future court proceedings should prosecution for some reason result at a later date.<sup>25</sup> At the same time, the agreement does not waive the right to future prosecution on the part of the Commissioner. An example of a compliance agreement is shown below in Figure 1.

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<sup>24</sup> *Nunavut Elections Act* (2002), s. 231.

<sup>25</sup> Elections Canada, *Special Investigators’ Manual*, chpt. 15, s. 4; this fact is governed by the *Criminal Code of Canada* s. 717(3): “Admissions not admissible in evidence.” *Tremeeear’s Annotated Criminal Code*, eds. David Watt and Michelle Fuerst (Toronto: Carswell, 2003), 11244.

*Figure 1*

CANADA ELECTIONS ACT

Compliance agreement

This notice is published by the Commissioner of Canada Elections, pursuant to section 521 of the Canada Elections Act, S.C. 2000, c. 9.

On October 27, 2004, the Commissioner of Canada Elections entered into a compliance agreement with Sylvain Trépanier, contracting party of the City of Pickering, Ontario, Canada, pursuant to section 517 of the Canada Elections Act.

In this agreement, Sylvain Trépanier, official agent for candidate Mark Holland in the electoral district of Ajax–Pickering, recognizes having breached paragraph 495(1)(a) of the Canada Elections Act by publishing three election advertisements in the newspaper Ajax News Advertiser and distributing election advertising pamphlets in the electoral district without mention of the authorization of the official agent, contrary to section 320 of the Act.

Prior to the conclusion of the agreement, the Commissioner of Canada Elections took into account that Sylvain Trépanier published a correction notice in the local newspaper Ajax News Advertiser.

In summary the Agreement required Sylvain Trepanier to

- acknowledge the requirement to indicate to official agent’s authorization in all election advertising;
- admit to the truthfulness of the facts and admit responsibility for the acts that constitute the offence; and
- undertake to observe the requirements of the Act and to henceforth respect them.

Ottawa, November 2, 2004

Source: [www.elections.ca](http://www.elections.ca) Electoral Law & Policy: Compliance Agreements: 2 November 2004: Sylvain Trepanier.

When asked how many parties had rejected compliance agreements when offered, officials with the Commissioner's Office stated they could not reveal a number but claimed their acceptance rate was "very good."<sup>26</sup>

The other important aspect of the Elections Canada compliance mechanism is the publication of agreements. Section 521 of the *Canada Elections Act* reads:

The Commissioner shall publish, in the manner and form that he or she considers appropriate, a notice that sets out the contracting party's name, the act or omission in question and a summary of the compliance agreement.<sup>27</sup>

Currently compliance agreements are published in the official government record, the *Canada Gazette*, and on the Elections Canada web site. There is one curious inconsistency in publication. Those who admit wrong doing, voluntarily comply with the authorities, and negotiate and sign a compliance agreement, are publicly shamed by having their name displayed on the Internet; meanwhile, the Elections Canada sentencing digest (also online) lists cases of successful federal election law prosecution, but, in contrast, the names of those convicted are not published.<sup>28</sup> This may demonstrate the degree to which Elections Canada is intent on minimizing the criminal stigma associated with election law offences.

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<sup>26</sup> Interview, Elections Canada, 7 October 2002.

<sup>27</sup> *Canada Elections Act* (2000), s. 521.

<sup>28</sup> This was not always the case. When I presented some of this research in 2003 as part of a M.A. thesis, the names of individuals successfully prosecuted by Elections Canada appeared on the website. Now, in place of the name of the person or organization, it simply says "the accused."

## Voluntary Compliance in Comparative Perspective

Compliance agreements are not an enforcement innovation restricted to election law. Voluntary compliance agreements are found in other areas of law, for example in areas such as competition, the environment and food inspection. In *Strengthening the Foundation*, CEO Jean-Pierre Kingsley cites the *Agriculture and Agri-Food Administration Monetary Penalties Act* as the template on which election compliance agreements were modeled.<sup>29</sup> This agricultural legislation establishes enforcement alternatives under various related acts, such as the *Feeds Act*<sup>30</sup> and the *Meat Inspection Act*.<sup>31</sup> In comparison to federal election law, the agricultural compliance model exhibits some differences, including a deeming provision where agreement amounts to an admission of guilt.<sup>32</sup>

The publication of offences finds its genesis in business law. In a review of the *Combines Investigations Act* of 1910, W.T. Stanbury writes: "...there is one informal penalty / remedy in which the early framers of the combines legislation placed great faith – publicity."<sup>33</sup> Stanbury's study of the *Combines Investigation Act* emphasized how the

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<sup>29</sup> Jean-Pierre Kingsley, *Strengthening the Foundation*, 72.

<sup>30</sup> *Feeds Act* (R.S. 1985, c. F-9).

<sup>31</sup> *Meat Inspection Act* (R.S. 1985, c.25 (1<sup>st</sup> Supp.))

<sup>32</sup> *Agriculture and Agri-Food Administration Monetary Penalties Act* (1995); for 'Purpose' see section 2 and for 'Compliance Agreements' see sections 10-16 of the *Act*.

<sup>33</sup> W.T. Stanbury, "The 1975 Amendments to the Combines Investigation Act: Analysis of the provisions relating to virtual monopoly, bid-rigging, and new penalties" in ed. W.T. Stanbury, *Papers on the 1975 Amendments to the Combines Investigation Act*, (Vancouver: UBC Press, 1976), 65.

then Minister of Labour – future prime minister W.L. Mackenzie King – argued that moral suasion and public shame represented a stronger deterrent against collusion than any written law.

The Commissioner’s Office has been signing compliance agreements since March, 2001. Since that time, one national newspaper article has been written on the subject, and at least one more national article has reported on the signing of compliance agreements.<sup>34</sup> Because neither the *Canada Gazette* nor the Elections Canada website are popular reading for most Canadians, few are likely aware of the existence of election law compliance agreements, let alone what offences have been enforced using this mechanism. With that in mind, consider Stanbury’s evaluation of the practice of publication in competition law: “When published, the reports are given little priority....Publicity as a weapon of deterrence and certainly as a remedy has been almost entirely without effect.”<sup>35</sup>

More generally though, Stanbury concluded that the purpose of such alternative enforcement systems is “to deter harmful activities without resort to prosecution.”<sup>36</sup>

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<sup>34</sup> Heather Sokoloff, “Canadians who voted twice choose humiliation,” *National Post*, 23 May 2002, A7; for reporting see: Adrian Humphreys, “Radio station, 2 candidates reprimanded for election violations ” *National Post* 21 July 2001, < [www.nationalpost.com/home/story.html?f=/stories/20010721/625181.html](http://www.nationalpost.com/home/story.html?f=/stories/20010721/625181.html) > (Retrieved 10 April 2005).

<sup>35</sup> Stanbury, “The 1975 Amendments...,” 67.

<sup>36</sup> Stanbury, “The 1975 Amendments...,” 66; for additional reading see: eds. R.S. Khemani and W.T. Stanbury, *Canadian Competition Law and Policy at the Centenary*, (Halifax: Institute for Research on Public Policy, 1991).

Today, it seems, compliance agreements have become an established method of accomplishing this. As another analyst explains:

Assurances of Voluntary Compliance are essentially settlement agreements between the enforcement authority and the supplier, individual or company, by which the latter undertakes to refrain from engaging in deceptive or unfair conduct and frequently to reimburse designated consumers, to complete contracts...<sup>37</sup>

Today, much more emphasis is being placed on "...achieving compliance with the law by voluntary means rather than traditional (coercive) method of enforcement which focuses on general and specific deterrence."<sup>38</sup>

This trend towards voluntary compliance is evident across the federal government. For example, in 1999 Parliament enacted the *Canadian Environmental Protection Act*, and included a similar kind of enforcement instrument called the Environmental Protection Alternative Measures (EPAMs):

An EPAM is an agreement negotiated with the accused by the Attorney General of Canada, in consultation with the Minister of the Environment. The EPAM will contain measures that the accused must take in order to restore compliance.<sup>39</sup>

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<sup>37</sup> William A.W. Neilson, "Alternative Remedies: The Canadian Experience with Assurances of Voluntary Compliance in Provincial Trade Practices Legislation," *Osgoode Hall Law Journal* vol.19, no.2, (1981), 154.

<sup>38</sup> W.T. Stanbury, "Competition Policy in Canada: Evolution, Effectiveness and the Changing context of competition" *Policy Options* (October 1997), 4.

<sup>39</sup> See [www.ec.gc.ca/CEPAREgistry/enforcement/EPAMs.cfm](http://www.ec.gc.ca/CEPAREgistry/enforcement/EPAMs.cfm) (Retrieved 12 March 2005); also see *Canadian Environmental Protection Act (1999, c.33)* sect.296. For further reading see: Kernaghan R. Webb, "Sustainable Governance in the 21<sup>st</sup> Century: Moving Beyond Instrument Choice," in eds. P Eliadis, M. Hill and M. Howlett, *Designing Government: From Instruments to Governance*, (Montreal-Kingston: McGill-Queens Press, 2005).

Similar enforcement arrangements are found with the Voluntary Compliance Undertakings (VCU) of the Patented Medicine Prices Review Board, and the Labour Code Compliance Policy of Human Resources Development Canada.<sup>40</sup>

Not everyone, though, champions the philosophy behind voluntary compliance. When alternatives to prosecution became increasingly popular in U.S. administrative law, the American Bar Association defensively concluded “that the de-emphasis of formal enforcement has gone too far.”<sup>41</sup> With respect to election law, U.S. Elections Crime Branch Director Craig Donsanto writes: “As with all election matters” emphasis is on “detection, evaluation and prosecution of crimes - not their prevention.”<sup>42</sup> Canadians, on the other hand, appear to prefer non-litigious solutions to ensure compliance.<sup>43</sup>

American perspectives regarding alternatives to prosecution may be undergoing a period of transition, at least with respect to electoral matters. In 2000, the United States Federal Election Commission initiated an Administrative Fines Program (AFP) and

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<sup>40</sup> See <http://www.pmprb-cepmb.gc.ca/english/view.asp?x=272>; and <http://www.hrsdc.gc.ca/asp/gateway.asp?hr=en/lp/lo/compliance-policy/index-compliance-policy.shtml&hs=oxs> (Retrieved 12 February 2005).

<sup>41</sup> Neilson, “Alternative Remedies”, 158; Neilson is quoting Report of the American Bar Association Commission to Study the Federal Trade Commission (Chicago: ABA, 1969) 22-23.

<sup>42</sup> Donsanto and Stewart, 87.

<sup>43</sup> The Canadian-American contrast in electoral administration is captured in Registering Voters: Comparative Perspectives, ed. John C. Courtney, The Report of the Round Table on Voter Registration held at the Center for International Affairs, Harvard University, 9-10 May 1991; in particular see comments by discussant Duff Spafford. For a comparative approach to law in general, see: Seymour Martin Lipset, Continental Divide: The Values and Institutions of the United States and Canada (New York: Routledge, 1990), in particular chapter 6 “Law and Deviance.” The contrast in societal values is depicted in: Michael Adams, Fire and Ice: the United States, Canada and the Myth of Converging Values (Toronto: Penguin, 2003).

began a pilot project (now permanent) in Alternative Dispute Resolution (ADR).<sup>44</sup> The AFP is used to enforce late filing or non-filing of required campaign finance reports; fines are levied according to a schedule based on when the report is filed. One study of this program found 297 cases processed, resulting in levied fines totalling approximately \$400,000, and a “significant drop in both late filings and nonfilings.”<sup>45</sup> Arguments made in favour of the American program are reflective of those made earlier by Boucher:

The program was created in an effort to move certain cases, mainly those involving relatively minor and inadvertent violations, away from the full prosecutorial process within the General Counsel’s office, where resources are scarce, precedents are set, and the adversarial process is at its most contentious.<sup>46</sup>

The adoption of two federal programs in the United States that act as an alternative to prosecution may be indicative of a North American trend. At the very least, even a highly litigious society like the United States is beginning to endorse alternative systems of election law enforcement.

### **Typology of Compliance Agreements in Federal Election Law**

Less than half a decade of Canadian compliance agreement data does not necessarily allow for conclusive trends or patterns to be discerned, but it does offer

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<sup>44</sup> See Rhonda J. Vosdingh and Lawrence L. Calvert Jr., “Campaign Finance Enforcement in the United States,” *Electoral Insight* vol.5, no.1 (2003), 23; also see Bradley A. Smith and Stephen M. Hoersting, “A Toothless Anaconda: Innovation, Impotence and Overenforcement at the Federal Election Commission,” *Election Law Journal* vol.1, no.2 (2002); Todd Lochner, “Overdeterrence, Underdeterrence, and a (Half-Hearted) Call for a Scarlet Letter Approach to Deterring Campaign Finance Violations,” *Election Law Journal* vol.2, no.1 (2003).

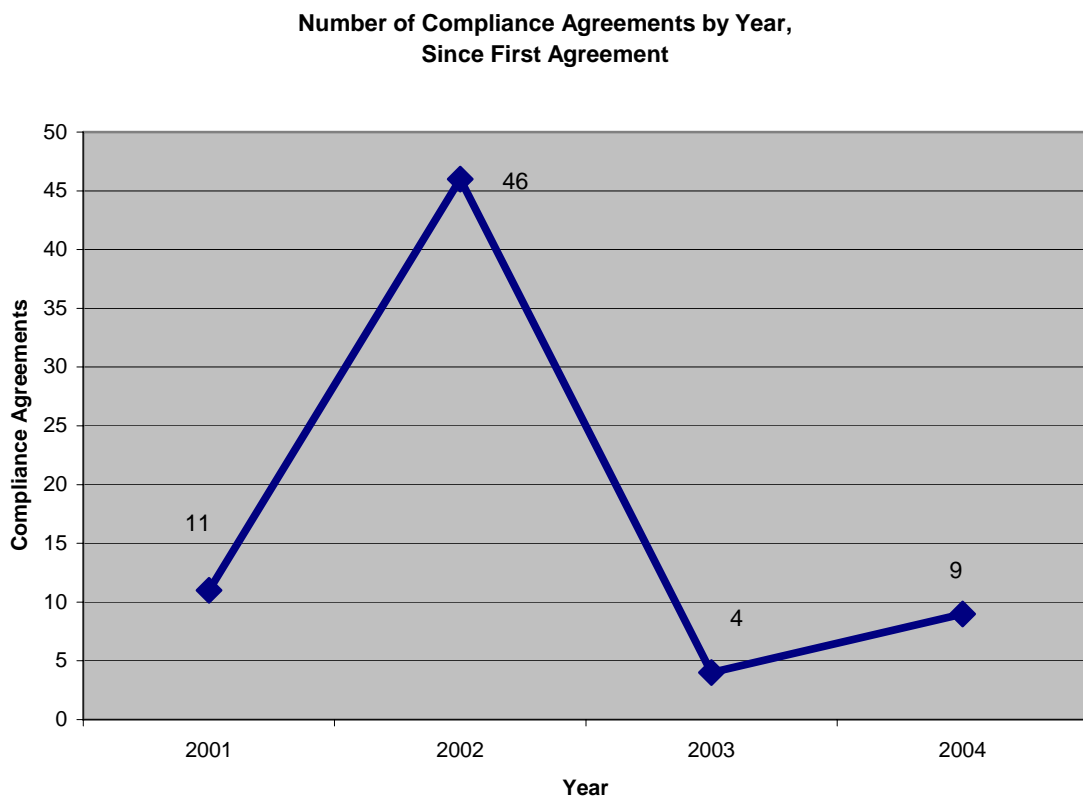
<sup>45</sup> Lochner, 28

<sup>46</sup> Smith and Hoersting, 149



insight into the types of offences being enforced using compliance agreements. For four years, since the first compliance agreement was signed in March of 2001, the number of compliance agreements signed has remained relatively constant at less than a dozen each year. The anomaly in this data set is the year 2002, when forty-six compliance agreements were signed by the Commissioner.

*Figure 2*



Source: [www.elections.ca](http://www.elections.ca) Electoral Law & Policy: Compliance Agreements 2001-2004 inclusive; data compiled by author on 12 March 2005.

Based upon available information it is impossible to conclude – and even difficult to speculate – as to why so many compliance agreements were negotiated in 2002. We do know that well over fifty per cent of those 2002 compliance agreements were attributed to violations of section 7 of the *Act*. This section prohibits electors from voting twice in the same election. It is interesting to note that of the thirty people who were caught double voting during the 2000 Canadian general election (and signed compliance agreements in 2002), eighteen of those offenders were from Ontario - and the majority of these offenders resided in the Greater Toronto Area. The reason for this will come as no surprise to anyone who has lived in or visited the Muskoka or Haliburton regions of Ontario. “Many of the offenders claimed to have mistakenly believed owning two properties in two different ridings entitled them to two votes,” explained the *National Post*.<sup>47</sup> Torontonians who own cottages north of the city voted once in each riding - twice in the same election. Based on comments made by those interviewed for the newspaper article, it is clear that in most cases offenders did not intentionally or knowingly break the law. This fits with Boucher’s description of minor or regulatory offences. One offender interviewed by the *National Post* was Richard Joho; he could not

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<sup>47</sup> Sokoloff, A7.

recall who he voted for in either of the ridings, and exclaimed: “I’m no political animal, good heavens.”<sup>48</sup> In the compliance agreement he signed, Mr. Joho:

...acknowledged having breached section 7 of the Canada Elections Act by requesting a second ballot...with the mistaken belief that an elector owning two properties in distinct electoral districts could vote twice. Prior to the conclusion of the agreement, the Commissioner of Canada Elections has taken into account that Richard Joho has contributed to the works of a registered non-partisan charitable organization, the Canadian Cancer Society, located in Central Toronto, in the province of Ontario, as a recognition of the seriousness of the offence.

In summary, the agreement required Richard Joho to:

- admit to the truthfulness of the facts and admit responsibility for the acts that constitute the offence;
- recognize that requesting a second ballot at the same federal election is prohibited by the Act regardless of whether one owns more than one property in one or more electoral districts;
- appreciate the gravity of his actions in the electoral process;
- undertake to comply with the provisions of the *Canada Elections Act* and to cast a vote only once in accordance with the provisions of the Act where he decides to exercise his right to vote at a future election.<sup>49</sup>

For comparative purposes, if prosecuted, the maximum penalty for this offence would be a \$2000 fine or one year imprisonment upon summary conviction, or a \$5000 fine or five year imprisonment on conviction of indictment.<sup>50</sup> This leads one to understand why, with

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<sup>48</sup> Sokoloff, A7.

<sup>49</sup> <[www.elections.ca](http://www.elections.ca)> Electoral Law & Policy: Compliance Agreements: 16 April 2002: Richard Joho.

<sup>50</sup> *Canada Elections Act* (2000), s. 500(5) and s. 483.

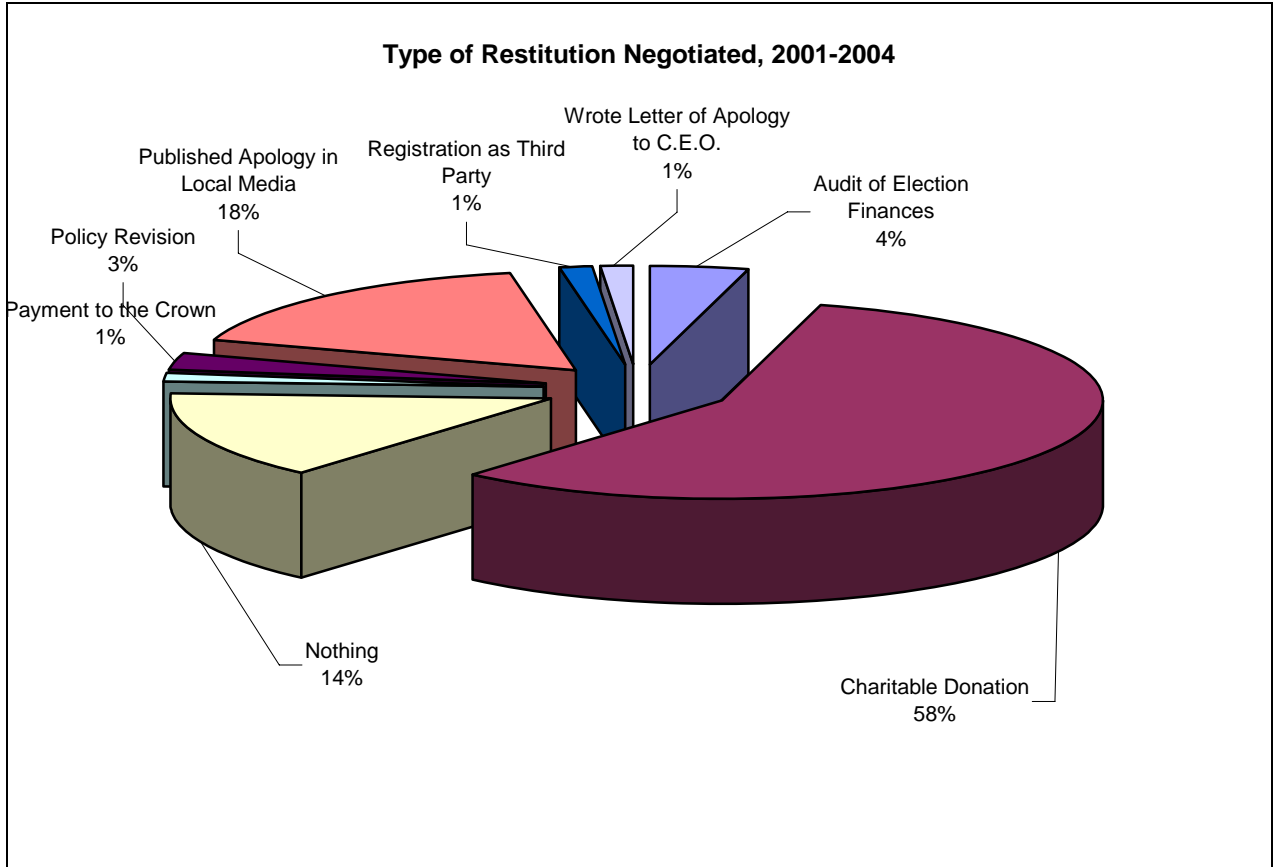
a defendant such as Mr. Joho, courts might be reluctant to convict minor offenders and apply such harsh penalties, and Elections Canada would be reluctant to prosecute.

If thousands of dollars are not being paid in fines, what type of restitution is being requested through compliance agreements? As stated earlier, each compliance agreement is negotiated separately. There is not an established schedule to mandate the degree of restitution. As with all legal cases, the outcome will depend on several factors, including: the offence in question, the attitude of the accused, and the negotiating talent of the defendant's lawyer. As shown below in Figure 3, the most common form of restitution is a donation to a charitable organization. Compliance agreements enable the opportunity for an apology (published contrition), a contribution to the public good (charitable donation), and corrective action (revised policy). This outcome fits very well with the theoretical purpose of regulatory law enforcement, in that the emphasis is on restitution, not deterrence.<sup>51</sup>

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<sup>51</sup> Kernaghan R. Webb, "Regulatory Offences, the mental element and the Charter: Rough Road Ahead," Ottawa Law Review (21) 1989, 471.

Figure 3



Source: [www.elections.ca](http://www.elections.ca) Electoral Law & Policy: Compliance Agreements 2001 - 2004 inclusive; data compiled by author on 12 March 2005.

The outstanding question is then: what federal election law violations are being enforced using compliance agreements?

Figure 4

**Type of Offences Enforced using Compliance Agreements, 2001-2004**

<b>Canada Elections Act, sect</b>	<b>Type of Offence</b>	<b>Number of Agreements</b>
5	Vote from unqualified voter	1
7	Voting twice	34
43	Interference with election officer	1
132	Not allowing time off work to vote	3
281	False declaration of a ballot	2
320	Unauthorized advertising by candidate	13
323	Advertising during black-out period	1
326/7	Opinion survey methodology	2
359	Unregistered third party	7
443	Exceeding maximum expenses	1
451	Late or non-filing of financial returns	4
473	Disposal of surplus election funds	1

Source: [www.elections.ca](http://www.elections.ca) Electoral Law & Policy: Compliance Agreements 2001- 2004 inclusive; data compiled by author on 12 March 2005.

The types of offences being enforced using compliance agreements vary considerably. Despite this variation, several of the offences shown in Figure 4 have been singular or nominal infractions. As I have discussed above, nearly half of all compliance agreements have been signed as a result of section 7 (voting twice) violations. Thus, two categories – unauthorized advertising and third party restrictions - warrant deeper analysis at this time.

In all thirteen cases, those who signed compliance agreements as a result of section 320 violations, failed to note the authority of the candidate’s official agent on election advertising. The case of Sylvain Trepanier (see Figure 1) exemplifies cases

where unauthorized advertising violations that have resulted in compliance agreements. This can reasonably be regarded as an administrative error: one that does not resemble fraud nor call into question the integrity of the Canadian electoral system. Unauthorized advertising, in these cases, reflect Boucher's description of a minor or regulatory offence, and thus a negotiated settlement appears to be the most efficient and effective manner for enforcing the law.

The enforcement of third party offences, on the other hand, evokes a larger issue in Canadian politics. Third party election spending on advertising has been a controversial topic for Elections Canada for the past two decades. The National Citizens Coalition and its former president Stephen Harper (now Leader of the Official Opposition in the Canadian House of Commons) has, through litigation, challenged the spending limitations and reporting requirements placed on third parties during elections. In 2002, the Alberta Court of Appeal struck down several provisions of the *Canada Elections Act* related to third party spending.<sup>52</sup> In 2004, the Supreme Court of Canada overturned this ruling and upheld those provisions by ruling that third party restrictions are constitutional.<sup>53</sup> One is left to wonder how successful state prosecution might have been given the constitutional uncertainty regarding third party restrictions up until May, 2004.

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<sup>52</sup> *Harper v. Canada (Attorney General)* [2002] 2 SCR 764. Also see *Commissioner of Canada Elections v. National Citizens Coalition* [2003], ON C.J.: Bentley J. ruled that *Canada Elections Act* s.353 (registration of third parties) is a violation of the *Charter of Rights and Freedoms* s.2 (freedom of speech) and thus dismissed charges against the NCC.

<sup>53</sup> *Harper v. Canada (Attorney General)* [2004] SCC 33.

Even so, seven contracting parties violated third party restrictions and chose to sign compliance agreements rather than challenge the law or risk prosecution. Given the national profile and constitutional implications of third party restrictions, it is not clear that one could characterize these violations as minor offences. Yet, they were still resolved using the voluntary compliance mechanism.

### **Minor Offences?**

Most of the offences shown in Figure 4 are consistent with the minor or regulatory distinction that Cecile Boucher drew in 1991. These are offences where fraud was not evident and the integrity of the system was not jeopardized as a result of the offence; often these offences were caused by administrative errors, likely due to capacity issues or ignorance. However, not all compliance agreements fit this description. There are three specific cases where the distinction of ‘minor offence’ is questionable.

Case 1 occurred in Montreal during the 2000 Canadian general election. In this case, radio station CJRC 1150 was broadcasting election advertising on polling day, during the blackout period.<sup>54</sup> This is neither a shock-jock nor all-sports radio station that can feasibly claim ignorance to the law. In fact, the sophistication of the station is exemplified by the fact that the Member of Parliament who seconded the Prime Minister’s reply to the October 2004 Speech from the Throne – Francoise Boivin – was a

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<sup>54</sup> <[www.elections.ca](http://www.elections.ca)> Electoral Law & Policy: Compliance Agreements: 5 July 2001: CJRC.



public affairs commentator and administrator with the station up until 2000 when she returned to legal practice.<sup>55</sup> In this case, no restitution was required of the radio station beyond an admission of the facts and a promise never to do it again.

Case 2 was a complicated incident involving Nasir Hasan, the official agent for independent candidate John Nunziata during the 2000 general election. Mr Hasan “failed to remit to the Receiver General of Canada the surplus electoral funds...within sixty days of having received notice...”<sup>56</sup> A compliance agreement was not signed with the accused until four years after the election from which the infraction relates. Further, no restitution, beyond an acknowledgement of law and its breach, was required. The compliance agreement explains that Mr Hasan did make payments during October 2004, but further goes on to say that the Commissioner factored into account “the fact that Nasir Hasan did not personally benefit by transferring the surplus from the campaign account to the candidate, John Nunziata.”<sup>57</sup> Although that may be the case, the time lapse between contravention and compliance, as well as the involvement of a former politician of national profile, arguably leads to an unethical perception. However untrue that

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<sup>55</sup> See “Prime Minister Announces Mover and Seconder to Reply from Speech from the Throne,” 4 October 2004 at <<http://pm.gc.ca/eng/news.asp?id=276>> (Retrieved 10 April 2005).

<sup>56</sup> <[www.elections.ca](http://www.elections.ca)> Electoral Law & Policy: Compliance Agreements: 26 November 2004, Nasir Hasan.

<sup>57</sup> Ibid, Nasir Hasan.

perception may be, the “essential goal is to maintain public trust in the integrity of the process.”<sup>58</sup> In this case, trust is on thin ice.

Finally, case 3 provides the most questionable compliance agreement to date. Curiously, it is the only compliance agreement where the name of the contracting party is not given. During the 2000 general election, an individual in the electoral district of Louis-Hebert “caused, for about thirty minutes, the suspension of the vote and electoral activities that were being conducted.”<sup>59</sup> In this case, the contracting party clearly said ‘I’m sorry’; the party published an apology in the local newspaper and made a charitable donation. If the seriousness of the individual’s actions are not already evident, consider that up until April 10<sup>th</sup> 2002 the offender was being prosecuted. Now consider the summary of the agreement.

In summary, the agreement required the contracting party:

- to admit the truthfulness of the facts and admit responsibility for the act that constituted an offence;
- to recognize that he should have brought his complaint to the returning officer or Elections Canada headquarters;
- to admit that his conduct, which may have compromised the free exercise of democratic rights, cannot be tolerated in a free democratic society;
- to be conscious that his actions have contributed, to a certain extent, to bring discredit to the electoral process;

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<sup>58</sup> Jean Pierre Kingsley, “Chief Electoral Officer’s Message,” Electoral Insight vol.5 no.1 (2003), 1.

<sup>59</sup> <[www.elections.ca](http://www.elections.ca)> Electoral Law & Policy: Compliance Agreements: 25 April 2002.

- to appreciate the importance of not obstructing election officers in the performance of their duties; and
- to undertake to henceforth respect this requirement.<sup>60</sup>

This case, above all others, does not meet Boucher's criteria of a minor or regulatory offence. There was no administrative error here. This was a deliberate attempt to disrupt a polling station and undermine the integrity of the electoral process. In this case, the negotiation of a compliance agreement occurred, not because of the nature of the offence, but because the offender was willing to apologize.

### **Conclusion**

It is not the intention of this paper to make a normative judgment as to whether compliance agreements are beneficial or detrimental to the enforcement of federal election law. Nor is this paper an examination of whether the broader goal of enhancing trust in the Canadian electoral system is well served by compliance agreements. After discussing the origin and typology of compliance agreements in Canada's federal election law, this paper tests whether the implementation of the compliance agreement mechanism meets the system's original purpose. An examination of the seventy compliance agreements negotiated and signed between 2001 and 2004 (inclusive) demonstrates that, in the majority of cases, Cecile Boucher's notion that the best way to enforce minor or

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<sup>60</sup> Ibid, 25 April 2002.

regulatory violations of the *Canada Elections Act* in a non-criminal manner, has been met. However, as a few cases demonstrate, it is not clear whether the voluntary compliance agreement is an enforcement tool that simply provides an alternative to prosecution for minor offences, or is a relief from prosecution for those who are sorry for their actions. At any rate, compliance agreements were not intended to embrace public apology.<sup>61</sup>

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<sup>61</sup> Marian Warner, "Who's Sorry Now?: What Apology Means in the Modern World," Times Literary Supplement 1 August 2003, 10-13.

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