Gouvernement du Canada | Government of Canada
Commissaire aux élections fédérales | Commissioner of Canada Elections

March 13, 2018 File #: 2018-0053

Mr. Duff Conacher
Board Member, Democracy Watch
P.O. Box 821
Station B
Ottawa, Ontario
K1P 5P9

Dear Mr. Conacher:

We thank you for your letter to the Commissioner of Canada Elections dated February 22, 2017 [*sic*], which we received on March 8, 2018. In this letter, you allege that the Leader of the Liberal Party of Canada contravened paragraph 482(b) of the *Canada Elections Act* (the Act), by inducing electors to vote for that party by repeatedly making what you refer to as "a false electoral reform promise" at the 2015 general election. Your complaint included several references to instances where the statement of intention was made during the election campaign.

Paragraph 482(b) of the Act provides as follows:

482. Every person is guilty of an offence who

[…]

(b) by any pretence or contrivance, including by representing that the ballot or the manner of voting at an election is not secret, induces a person to vote or refrain from voting or to vote or refrain from voting for a particular candidate at an election.

482. Commet une infraction quiconque :

[…]

b) incite une autre personne à voter ou à s'abstenir de voter ou à voter ou à s'abstenir de voter pour un candidat donné par quelque prétexte ou ruse, notamment en tentant de lui faire croire que le scrutin à une élection n'est pas secret.

This provision of the Act is the modern Canadian federal iteration of a provision first adopted in the United Kingdom. Section V of the *Corrupt Practices Prevention Act*, 1854, c 102, s 5 (the UK Act) provided as follows:

> V. Every Person who shall, directly or indirectly, by himself, or by any other Person on his Behalf, make use of, or threaten to make use of, any Force, Violence, or Restraint, or inflict or threaten the Infliction, by himself or by or through any other Person, of any Injury, Damage, Harm, or Loss, or in any other Manner practise Intimidation upon or against any Person in

> order to induce or compel such Person to vote or refrain from voting, or on account of such Person having voted or refrained from voting, at any Election, or who shall, by Abduction, Duress, or **any fraudulent Device or Contrivance**, impede, prevent, or otherwise interfere with the free Exercise of the Franchise of any Voter, or shall thereby compel, induce, or prevail upon any Voter, either to give or to refrain from giving his Vote at any Election, shall be deemed to have committed the Offence of undue Influence, and shall be guilty of a Misdemeanor, and in Scotland of an Offence punishable by Fine or Imprisonment, and shall also be liable to forfeit the Sum of Fifty Pounds to any Person who shall sue for the same, together with full Costs of Suit. [Emphasis added]

This provision of the UK Act was re-enacted essentially verbatim in early Canadian federal and provincial election statutes, including in: *An Act for the more effectual prevention of corrupt practices at Elections*, S.C. 1860, c. 17 (section 4) and the subsequent *Dominion Elections Act*, S.C. 1874, c. 9 (section 95)—both at the federal level—and in the *Corrupt Practices Act, 1871*, in British Columbia.

We agree that knowingly making false statements of material facts could, in some instances, be captured by the scope of paragraph 482(b). Indeed, our Office entered into a compliance agreement recently with a registered party that had misrepresented to the public the results of opinion surveys they had commissioned, in an attempt to induce electors to vote for its candidate and avoid so-called "vote-splitting" (compliance agreements are available on our website at: www.cef-cce.gc.ca).

That said, for the reasons mentioned below, we are of the view that Parliament did not intend that statements of intention expressed as election promises would be captured by what is prohibited by paragraph 482(b).

In a democracy, political discourse and electioneering activities (including the making of election promises) constitute a highly protected form of expression. In their attempts to win elections, parties and candidates try to convince electors of the merits of their platform, and of their ability and determination to implement it, if elected. This has long been a key part of our democratic electoral process. The penalty for not fulfilling an election promise is essentially a political issue. Electors will assess whether a candidate or party merits re-election based on their performance after the election, considering, among other things, whether they have fulfilled their electoral promises.

Although this particular provision of the Act, as it relates to election promises, has never been interpreted in a court of justice, the equivalent provisions in other statutes that adopted the initial provision of the UK Act have been. In this jurisprudence, the issue of the applicability of the provision to the making of statements of intention such as election promises was, in our view, conclusively decided.

An important case in that regard is *Friesen* v. *Hammell* (1999) BCCA 23, where the modern enactment in British Columbia of the UK Act provision was interpreted. In this decision, a

unanimous bench of the Court of Appeal found that misrepresentations of material fact that were intended to lead electors to vote for a particular candidate or party could constitute the use of "fraudulent means", as prohibited by section 256 of the *Election Act* of that province. The Court of Appeal, however, cautioned that not every misrepresentation would give rise to an offence. Specifically, the Court of Appeal expressly mentioned three types of political expression that would not be captured:

> [76] **Statements of intention** or belief, and statements which any reasonable person would attribute to mere puffery **would not constitute fraudulent means within the meaning of this section**." [Emphasis added]

Indeed, when Justice Humphries of the British Columbia Supreme Court subsequently heard that particular case on its merits following the decision of the Court of Appeal on the preliminary motion, she only dealt with the allegations that the governing party had misrepresented the state of the province's finances in two budget exercises. An earlier further allegation that the governing party had made an allegedly false election promise concerning the creation of a capital development program to improve the province's infrastructure "was not covered in evidence or argument" (consistent with the Court of Appeal's decision), and Justice Humphries wrote that she would "not deal with it further" (see *Friesen* v. *Hammell* (2000) BCSC 1185, at paragraph 4).

Interestingly, even with respect to the allegations that the governing party's statements of facts concerning the state of the province's budget were fraudulently intended to influence electors, Justice Humpries, at paragraph 65 of the decision, found as follows:

> "If the voters in British Columbia accept the general characterization of the situation advanced by the Petitioners, that is a matter they can consider when they next come to vote, but the circumstances here do not give rise to a legal remedy."

In short, if the legislative intent had been that investigative bodies and judges should have a role to play in punishing or sanctioning parties or candidates who allegedly have failed to live up to their electoral promises, Parliament would have used much different and much clearer language than what currently appears in paragraph 482(b).

In light of the above, the Commissioner will not proceed further with this matter.

Thank you for bringing this matter to our attention and for your interest in the integrity of the electoral process.

Yours truly,

Eric Ferron
Senior Director of Investigations