Robocalls Raise Concern Over Charter Right to Vote and Inspire Changes to Election Laws

Introduction

On May 23, 2013 the Federal Court found in *McEwing v Canada (AG)*[1] that fraud was committed in six ridings during the May 2, 2011 federal election. During the federal election, automated phone calls, known as robocalls, were made to citizens. The robocalls told citizens that their polling stations had changed. Despite the misleading robocalls, the Court ruled that they did not change the outcome of the election, and, as a result, the elected Members of Parliament (MPs) from the six ridings could keep their seats. The following article reviews the Federal Court case and the Chief Electoral Office of Canada's recommendations to prevent fraudulent calls from happening in the future. Furthermore, this article examines how robocalls affected Canadians' democratic right to vote.[2]

Ruling from the Federal Court

McEwing v Canada (AG) dealt with eight applicants, residing in six electoral districts.[3] They argued that there was an active effort to suppress votes in their ridings during the 2011 federal election.[4] According to the applicants, someone alleging to call from Elections Canada wrongly told them that their voting stations had changed.[5] As a result of this misrepresentation, the applicants believed that the results of the election should be annulled under part 20 of the *Canada Elections Act*.[6] In this case, the Federal Court judge found that the calls did not prevent the applicants, those who brought the case to court, from voting. However, if the phone calls had prevented a citizen from voting, the calls would have violated democratic rights protected under section 3 of the Charter.[7]

Annulment of election results under the *Canada Elections Act* requires a series of steps. First, the applicants must prove irregularities, fraud, corrupt practices or illegal practices influenced election results.[8] Second, the applicant must prove that at least one person did not vote due to one of the four factors listed above.[9] Third, annulment requires the Court to undertake the "magic number" test or another appropriate test.[10] The "magic number" test requires the election to be annulled if the rejected number of votes are equal to or outnumber those of the winner. Following these steps, the Court found that the first step had been satisfied because fraud was committed. The second and third steps, however, were not met. The Court found no proof that the fraud prevented people from voting, and therefore, the outcome of the election would not have been different even if the robocalls were not made. Because the claimants were unable to prove all three steps, the election results were not annulled.[11]

The Federal Court spent limited time considering section 3 of the *Charter* because the claimants were not denied the right vote. Section 3 of the *Charter* states:

> "Every citizen of Canada has the right to vote in an election of members of the House of Commons or of a legislative assembly and to be qualified for membership therein."[12]

Section 3 is significant as it gives Canadian citizens the vote and protects the integrity of Canada's electoral process.[13] In the future, if there is sufficient evidence that a fraudulent phone call prevented a Canadian citizen from exercising his or her constitutional right to vote, a court may conclude that a claimant's section 3 Charter right was violated.[14]

Recommendations from Elections Canada

In response to the robocall case, in March 2013, the Chief Electoral Officer of Canada, Marc Mayrand, submitted a report to the Speaker of the House of Commons, Andrew Scheer. The report outlined measures to prevent and manage deceptive communications.[15]

Mayrand's report found that electors do not have very much confidence (46%) or no confidence (10%) in federal political parties.[16] Electors' lack of confidence in political parties, combined with the fraudulent robocalls, prompted Mayrand to look for a solution to increase the integrity of the electoral process. To demonstrate that wrongdoing will not be tolerated, Mayrand created a series of rules, penalties, and helpful tools that apply to political entities and the general public. Certain recommendations are not currently in effect because they require approval from the House of Commons. His recommendations are explained more fully below.

Inform the Public on Election

Mayrand stated that Elections Canada would ensure appropriate notification of changes to polling station locations. Notifications will take the form of mailing new voter cards, public announcements through local media, and posting Elections Canada staff at the entrance of old polling sites to redirect voters to the new polling stations.[17]

Elections Canada will also collaborate with the Canadian Radio-television and Telecommunications Commission to ensure members of the Advisory Committee of Political Parties are aware of telecommunications regulations during election periods.[18] The Committee, comprised of representatives from various political parties as well as Elections Canada staff, is tasked with resolving issues that impact political parties.

Creation of a Code of Conduct

The Mayrand report recommended that political parties should create codes of conduct that outline the expected behavior, practices, and standards of the party. The codes of conduct would be created either voluntarily or forced by legislation, and they would apply to the party, the candidates, party officials, and active party members.[19] Creating codes would force parties to consider ethical questions as well as ensure individuals abide by the rules.

Amendments to the Canada Elections Act

According to Mayrand, a series of changes should be made to the *Canada Elections Act*. The changes would help investigate wrongdoings and punish those responsible.

- The *Act* should be amended to require that political parties use good judgment when giving party members or volunteers access to their voter databases.[20]
- The *Act* should include rules for the party regarding telecommunications with electors. This would include displaying the sponsor's phone number, name, and party affiliation. Rules should also be added explaining the time of day during which calls can be made.[21]
- The *Act* should be amended to require political entities to provide information on telemarketing services they use, such as the dates calls were made, the phone numbers of the electors who were called, and the text of the calls.[22]
- The *Act* should be amended to force political parties to provide documents that would help in an investigation upon request of the Chief Electoral Officer in order to comply with the *Canada Elections Act*.[23]
- The *Act* should be amended to prohibit the impersonation of an election officer or an employee or agent of the Chief Electoral Officer as well as falsely impersonating a candidate. The punishment for a lesser offence would result in a maximum fine of $50,000 or imprisonment for a maximum of two years or both. More serious offence would result in a maximum fine of $250,000 or imprisonment for up to five years or both.[24]
- Regulatory power should be given to the Commissioner of Canada Elections to apply to a judge for an order to force any person to provide information that is relevant to an investigation.[25]
- The *Act* should require telemarketing companies to keep all communications made in Canada during an election campaign for one year after the election. The Commissioner of Canada Elections would need a warrant to access these records.[26]

Provincial Initiatives

Various provincial governments have adopted practices to prevent election wrongdoings prior to Mayrand's report. Ontario adopted legislation in 2011 that makes it an offence to impersonate "an employee or agent of the Ontario Office of the Chief Electoral Officer, a person appointed under the *Election Act*, a candidate or candidate's representative or an

authorized representative of a registered party or registered constituency association."[27] Punishment for this offence is a fine of a maximum of $25,000 and/or imprisonment for a maximum of two years less a day.[28] New Brunswick, Nova Scotia, Quebec, Ontario, Manitoba, Alberta, and the Yukon have provincial legislation granting the Chief Electoral Officer or commissioner the power to force persons to provide testimonial evidence or produce records.[29] Saskatchewan, Manitoba, Nova Scotia, Prince Edward Island, and Newfoundland and Labrador have provincial legislation that makes it an offence to provide false information to the Commissioner during an investigation.[30]

Importantly, provincial legislation only applies to provincial elections because each province has its own non-partisan agency responsible for overseeing provincial elections. Therefore, federal legislation is necessary to oversee Elections Canada, which is the non-partisan agency that manages federal elections.

Federal Initiatives

At the federal level, numerous bills have been tabled to amend the *Canada Elections Act*. Bill C-524 and C-453 follow recommendations outlined by the Chief Electoral Officer of Canada. If passed, Bill C-524, *Act to amend the Canada Elections Act (election advertising)*, would require candidates, political parties or third parties to approve the content of advertisements.[31] This would ensure that the public is aware of the source of the message and make party leaders responsible for the content. Bill C-453, *Act to amend the Canada Elections Act (preventing and prosecuting fraudulent voice messages during election periods)*, would make it an offence for anyone to transmit fake information about their identity by falsely representing themselves as candidates or an elections officer. Bill C-453 would also require registered parties, candidates, and third parties responsible for advertisement or electoral district associations to provide information on voice messaging to the Chief Electoral Officer of the Commissioner of Canada Elections upon request.[32]

While the Federal Government introduced bills to deal with some recommendations laid out in Mayrand's report, these have yet to be passed. Moreover, not all the recommendations have been adopted. A significant recommendation that has not been acted upon is the ability for the Commissioner of Elections Canada to access documentation from telecommunications companies hired by parties in order to contact voters. The failure to act on this recommendation would limit the amount of information that could be used in future cases of election wrongdoings and make it difficult to identify parties responsible for fraud.

Conclusion

The robocalls case raises important questions with respect to Canadians' right to vote under section 3 of the *Charter*.[33] This is a fundamental principle of democracy. It raises concerns about whether the current regulations in the *Canada Elections Act* are strict enough, following the Federal Court ruling. The current *Act* was not strong enough to deal with voter suppression in the 2011 election. This led to the series of recommendations by the Chief Electoral Officer, which aim to place greater penalties for breaking the *Canada Elections Act* in addition to making it easier to obtain documents needed in the investigation

of wrongdoings.

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[1] *McEwing v Canada (AG)*, 2013 FC 525 .

[2] *Canadian Charter of Rights and Freedoms*, s 3, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 < http://laws-lois.justice.gc.ca/eng/Const/page-15.html>.

[3] The six districts are Elmwood-Transcona, Nipissing-Timiskaming, Saskatoon-Rosetown-Biggar, Vancouver Island North, Winnipeg South Centre, and Yukon.

[4] *McEwing*, *supra* note 1 at para 2.

[5] *Ibid*.

[6] *Canada Elections Act*, SC 2000, c 9 part 20 < http://laws-lois.justice.gc.ca/eng/acts/E-2.01/>.

[7] *Charter*, *supra* note 2.

[8] *Canada Elections Act*, *supra* note 6, s 524(1)(b).

[9] *Ibid*, ss 531(2), 524(1) (Section 531(2) of the *Canada Elections Act* notes that the court may dismiss the application if the grounds in paragraph 524(1)(a) or (b), are not established and, shall declare the election null and void or may annul the election, if they are met.).

[10] *McEwing*, *supra* note 1 at para 83.

[11] *Ibid* at para 6.

[12] *Charter*, *supra* note 2.

[13] *McEwing*, *supra* note 1 at para 34.

[14] *Charter*, *supra* note 2.

[15] Elections Canada, *Preventing Deceptive Communications with Electors: Recommendations from the Chief Electoral Officer of Canada Following the 41st General Election*, (Ottawa: Elections Canada, 2013) at 7, online.

[16] *Ibid* at 8.

[17] *Ibid* at 29.

[18] *Ibid* at 30.

[19] *Ibid*.

[20] *Ibid* at 32.

[21] *Ibid* at 33.

[22] *Ibid* at 34.

[23] *Ibid* at 35.

[24] *Ibid*.

[25] *Ibid* at 37.

[26] *Ibid* at 38.

[27] *Ibid* at 36.

[28] *Ibid*.

[29] *Ibid* at 37.

[30] *Ibid* at 38.

[31] Bill C-524, *An Act to amend the Canada Elections Act (election advertising)*, 1st Sess, 41st Parl, 2013 (first reading 4 June 2013) <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=6202234&File=4>.

[32] Bill C-453, *An Act to amend the Canada Elections Act (preventing and prosecuting fraudulent voice messages during election periods)*, 1st Sess, 41st Parl, 2012 (first reading 17 October 2012) <http://www.parl.gc.ca/HousePublications/Publication.aspx?Language=E&Mode=1&DocId=5760455&File=4>.

[33] *Charter*, *supra* note 2.