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VIA E-MAIL - doirondp@gov.ns.ca

Mr. Dana Doiron
Elections Nova Scotia
7037 Mumford Road, Suite 6
PO Box 2246
Halifax, NS B3J 3C8

Dear Mr. Doiron:

Re: Parker Donham - Section 95.4 and Section 301 of the *Elections Act*

I have now had the opportunity to review this matter and provide you with our response to your proposal that Parker Donham enter into a "compliance agreement" with the Chief Elections Officer.

I understand you denied Mr. Donham's request to see a draft of the proposed agreement, but even without seeing it, we do not believe this is an appropriate circumstance for a compliance agreement. For reasons set out below, we believe Mr. Donham's actions did not violate the *Elections Act*.

- The cited sections of the *Elections Act* contravene s.2(b) of the *Canadian Charter of Rights and Freedoms* and are not saved by s.1.
- Based on the plain meaning of s.95(4) and s.301, Mr. Donham did not violate either provision.

Before detailing our reasons for these conclusions, we wish to raise two preliminary points.

First, we do not expect there to be any dispute on material facts. On October 5, 2013, Mr. Donham voted in an advanced poll in his riding of District 49, Victoria-The Lakes. While in the polling booth, Mr. Donham took a digital photograph of his ballot. After leaving the

polling station, he used an iPhone application to tidy up the image by straightening it, increasing the contrast, and improving the resolution, etc. He then posted the cleaned-up image to his Twitter account, which precipitated an exchange between you and Mr. Donham about whether his actions violated the *Elections Act*.

We presume Elections Nova Scotia accepts that Mr. Donham cast his ballot freely, of his own volition, and that he was not engaged in any corrupt practice such as selling his vote or having his vote extorted in any manner. Certainly you have not indicated you have any evidence whatsoever of such behavior on his part.

Second, Mr. Donham does not challenge Elections Nova Scotia's role in insuring the protection of democratic voting rights, including the right to a secret ballot. Mr. Donham recognizes and agrees with the importance of insuring a fair and democratic electoral process.

Having said that, it is also important for Elections Nova Scotia to recognize that voting rights, important as they are, exist alongside other equally fundamental rights, notably freedom of expression.

Section 2(b) of the *Charter* states:

2. Everyone has the following fundamental freedoms:
 - (b) freedom of thought, belief, opinion and expression, including freedom of the press and other media of communication.

It is noteworthy that this section appears in the part of the *Charter* identified as "Fundamental Freedoms".

On a plain reading of s.95(4) and s.301 of the *Elections Act*, both sections impose a *prima facie* infringement on an individual's freedom of expression. The fact that the infringed expression in this case was an act of political speech places it at the very heart of freedom of expression.

Because each section is a *prima facie* infringement of s.2(b) of the *Charter*, the government will bear the burden of proving that the provisions, as they relate to Mr. Donham's actions, should be permitted pursuant to s.1.

To do so, the Crown will need to establish that it is "proportional" to forbid Mr. Donham from taking a photo of his own ballot and then subsequently tweeting a graphically altered image of that photo after leaving the polling station.

To that end, the Crown will bear the burden of establishing that the impugned provisions of the *Act* minimally impair Mr. Donham's freedom of expression. Since electors are free to communicate for whom they voted outside of the polling station, it is difficult to see how prohibiting an elector from taking a photograph of his own ballot without in any way interfering with or intimidating others participating in the election could be regarded as a minimal impairment on freedom of expression.

I expect the Crown would say the objective of the *Elections Act* is to ensure free and fair elections and to preserve procedures central to that goal, such as the secret ballot.

The ability to keep one's ballot secret is an individual right. An elector has the right to keep their choice secret and confidential if they choose, but an elector is equally free to express their voting intention outside the polling station, by any medium of expression, whether orally or in writing, and whether by telephone, internet, or in person. In this case, the photograph was simply Mr. Donham's vivid way of expressing to those interested how he in fact voted.

His strategy worked. One immediate result of Mr. Donham's tweeted photograph was that a prominent Nova Scotia political journalist, Tim Bousquet of *The Coast* magazine, who follows Mr. Donham on Twitter, responded with a tweet asking Mr. Donham to explain his reasons for voting as he did. This led to a broader public conversation about the issues and the election on the Twitter platform.

We expect a court would find that, to the degree the provisions actually prohibited Mr. Donham from doing what he did, they are inconsistent with the *Charter*. Such a finding would be consistent with jurisprudence. The leading case on the importance of freedom of expression in the electoral process is *Thomson Newspapers v. Canada (A.G.)*, [1998] 1 S.C.R. 877. In that decision, the Supreme Court of Canada struck provisions prohibiting the publishing of opinion polls immediately before an election as an infringement of unjustifiable freedom of expression.

The importance of protecting freedom of expression in the political process was recognized by the Supreme Court at paragraph 92:

The connection between freedom of expression and the political process is perhaps the linchpin of the s. 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy. Freedom of expression is a crucial aspect of the democratic commitment, not merely because it permits the best policies to be chosen from among a wide array of proffered options, but additionally because it helps to ensure that participation in the political process is open to all persons.

However, even if we put aside any *Charter* considerations, Mr. Donham is not guilty of violating either of the identified provisions. I will discuss each in turn.

Section 95(4) of the *Elections Act* reads:

With the exception of election officers as prescribed by the Chief Electoral Officer, none of the persons present in a polling location during voting hours shall use a recording or communication device.

When looking at provisions that create offences, a court will apply a “strict construction approach.” Unless an activity is expressly and clearly prohibited, it will not be found to be a violation of the statutory provision. In this case, if the legislature had intended to prohibit taking a photograph, it would have expressly stated so.

The section’s reference to “a recording” should be strictly constructed to mean only video or audio recording, which reflects the ordinary meaning of the word. When referring to a camera, people say a person has taken a photo or a picture, not a recording. When legislative bodies intended other statutes, such as the *Criminal Code* or the federal *Copyright Act*, to encompass photographs, they specifically stipulated a photograph (see for example s.2 of the *Copyright Act* or s.162(2) of the *Criminal Code*). The fact that the legislature did not do so in the *Elections Act* suggests that the provision does not capture Mr. Donham’s actions.

Likewise, it is clear that Mr. Donham is not in breach of s.301, which reads:

Subject to Sections 108 and 115, every person is guilty of an offence who

- (a) openly declares in a polling station for whom the person intends to vote or has voted; or
- (b) shows the person’s ballot to permit the name of the candidate, for whom the person has voted, to be known.

It is explicit in s.301(a) and implicit in s.301(b) that this offence relates to a polling station. Regarding s.301(b), it is not anticipated that a person would take their ballot out of a station. Mr. Donham did not take his ballot out of the polling station.

This section is awkwardly worded, and it is difficult to be certain exactly what mischief the legislature intended to prevent. Mr. Donham did not show his marked ballot to anyone. Rather, he folded his marked ballot so that his choice was not visible, and returned it to the deputy returning officer. The DRO checked and removed the serial number in the

prescribed manner, and handed the still-folded ballot back to Mr. Donham, who deposited it in the ballot box in the normal manner. His behavior conformed perfectly to the *Elections Act*. At no time while in the polling station did Mr. Donham declare his voting intention.

After leaving the polling station, Mr. Donham posted a digitally modified photograph of his ballot to Twitter, as a vivid expression of how he individually voted.

Section 301 is simply not applicable to the facts at hand.

As a final point, it is important to keep in mind the context in which events occurred. Mr. Donham is a well-known commentator and blogger who, during the 2013 election, expressed his views on issues at play in the election, including his reasons for voting as he did in the riding of Victoria-The Lakes. This is exactly the type of discourse that should be encouraged in a democratic society, the very core of the expression the *Charter* is intended to protect. Tweeting an altered photograph was simply a way of visually expressing his choice in a clear and unambiguous matter. Visual representations of ballots abound, particularly during an election campaign. One can find many examples of representations of ballots in advertisements and editorial cartoons, and even on candidates' signs during election campaigns.

This is not a case where someone tried to unfairly interfere with or manipulate the electoral process. This is simply one person exercising his freedom of expression to let the twitterverse and others know in the clearest terms how and why he exercised his democratic right to vote, and to encourage broader public discussion of those reasons. With respect, you are confusing a real offence, such as selling one's vote, with one means that might facilitate such an offence, such as a photograph. In a free society, we punish the offence, not every possible means by which the offence might be carried out.

For all these reasons, it would not be in the public interest to proceed against Mr. Donham. I look forward to hearing from you about this.

Yours very truly,

BURCHELLS LLP



Jason T. Cooke

JTC/dad
cc:client