



Written Opinions, Guidelines and Interpretation Notes

The Chief Electoral Officer issues guidelines and interpretation notes on the application of the *Canada Elections Act* to registered parties, registered associations, nomination contestants, candidates and leadership contestants, in accordance with section 16.1 of the *Canada Elections Act*. Before the issuance of any guideline or interpretation note, registered federal political parties and the Commissioner of Canada Elections are consulted and invited to provide comments on a draft version. Guidelines and interpretation notes provide guidance and promote consistency in the interpretation and application of the Act. However, they are for information only and do not displace the provisions of the Act.

Interpretation Note: 2015-04 – Draft (June 2015)

Election advertising on the Internet

Issue

Whether and to what extent the election advertising rules in the *Canada Elections Act* (“CEA”) apply to material communicated over the Internet, including on social media.

Interpretation

The interpretation and approach of Elections Canada for applying the election advertising rules to material communicated over the Internet are as follows:

- (1) Election messages communicated over the Internet are election advertising only if they have, or would normally have, a **placement cost**¹ and meet the statutory criteria of promoting or opposing a registered party or candidate.
- (2) Election advertising must include a statement of authorization (usually a tagline) “in or on the message”. Where the statement cannot be included on the advertising message itself (i.e. the message for which there is a placement cost) because of its size, the requirement will be considered to have been met if the statement is made immediately apparent to the viewer by following the link in the advertising message.

¹ A placement cost is the cost charged to purchase advertising space (e.g. the cost of placing an advertisement in a newspaper or on a social media site, or the cost of running an advertisement on television or radio). Where advertising space is provided for free or at a reduced rate, the placement cost is the cost that would normally be charged by the provider for such advertising space.

Practical implications for candidates, registered parties and third parties

(1) The following do not fall under the election advertising regime:

- Messages sent for free over social media networks such as Twitter or Facebook
- Messages communicated through a candidate's, registered party's or third party's own website
- Videos posted on those websites or on free websites such as YouTube

(2) Messages for which there is a placement cost, including sponsored stories, banner-style advertisements on a home page or pre-roll advertisements that play before a video chosen by the viewer, qualify as election advertising.

(3) Where a message is election advertising, it will be subject to all the election advertising rules in the CEA, such as the rule requiring a tagline on election advertising and the rule prohibiting the transmission of election advertising on election day.

(4) Where a message is election advertising, it will also be subject to all the political financing rules that apply to such spending (including the rules for third party spending on election advertising in Part 17 of the CEA).

(5) The election advertising expenses in such cases include the placement cost for the paid advertisement (i.e. the cost associated with purchasing the advertising space), as well as the production cost for the advertisement itself (e.g. the payment to the advertising agency that designed the banner ad placed on a newspaper's website).

(6) For registered parties and candidates, the impact of this interpretation is limited, as all election expenses continue to be subject to the spending limits and financial reporting rules. A message that is not election advertising may nonetheless qualify as an election expense that must be accounted for and reported.

As a result of this interpretation, the 2015 *Political Financing Handbook for Candidates and Official Agents* and the 2015 *Political Financing Handbook for Registered Parties and Chief Agents* will be modified to clarify that candidate and party websites are not election advertising for the purposes of the CEA.

Background

The proliferation of Internet-based communications, including on social media, raises questions about the rules governing "election advertising" as defined in section 319 of the CEA. Elections Canada has received multiple enquiries in recent years on how the rules apply to material communicated over the Internet – for example, member of Parliament or third party websites, comments or links to other material posted on social media sites such as Facebook and Twitter, or videos posted on YouTube.

There is already a great deal of online political discourse during an election period, and this will no doubt continue to grow. It is important that all participants in the electoral debate

have clear guidance on what does and does not fall under the existing rules on election advertising in the context of Internet-based communications.

Legal Framework

Election advertising is defined in section 319 of the CEA as follows:

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| <p>319. ...</p> <p>“election advertising” means the transmission to the public by any means during an election period of an advertising message that promotes or opposes a registered party or the election of a candidate, including one that takes a position on an issue with which a registered party or candidate is associated. For greater certainty, it does not include</p> <p>(a) the transmission to the public of an editorial, a debate, a speech, an interview, a column, a letter, a commentary or news;</p> <p>(b) the distribution of a book, or the promotion of the sale of a book, for no less than its commercial value, if the book was planned to be made available to the public regardless of whether there was to be an election;</p> <p>(c) the transmission of a document directly by a person or a group to their members, employees or shareholders, as the case may be;</p> <p>(d) the transmission by an individual, on a non-commercial basis on what is commonly known as the Internet, of his or her personal political views; or</p> <p>(e) the making of telephone calls to electors only to encourage them to vote.</p> | <p>319. ...</p> <p>« publicité électorale » Diffusion, sur un support quelconque au cours de la période électorale, d’un message publicitaire favorisant ou contrecarrant un parti enregistré ou l’élection d’un candidat, notamment par une prise de position sur une question à laquelle est associé un parti enregistré ou un candidat. Il est entendu que ne sont pas considérés comme de la publicité électorale :</p> <p>a) la diffusion d’éditoriaux, de débats, de discours, de nouvelles, d’entrevues, de chroniques, de commentaires ou de lettres;</p> <p>b) la promotion ou la distribution, pour une valeur non inférieure à sa valeur commerciale, d’un ouvrage dont la mise en vente avait été planifiée sans égard à la tenue de l’élection;</p> <p>c) l’envoi d’un document par une personne ou un groupe directement à ses membres, ses actionnaires ou ses employés;</p> <p>d) la diffusion par un individu, sur une base non commerciale, de ses opinions politiques sur le réseau communément appelé Internet;</p> <p>e) les appels téléphoniques destinés uniquement à inciter les électeurs à voter.</p> |
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Whether a particular communication meets the definition of election advertising matters to candidates, registered parties and third parties. It triggers the application of other substantive rules in the CEA, such as the rule requiring a statement of authorization (usually a tagline) on election advertising and the rule prohibiting the transmission of election advertising on election day.

For registered parties and candidates, however, the impact of this interpretation is limited. Their election expenses will continue to be subject to the spending limits and financial reporting rules, regardless of whether a given expense is classified as election advertising.

On the other hand, whether or not something is captured by the definition of election advertising is crucial for the application of the political financing rules to third parties.² This is because the CEA only regulates third parties that incur election advertising expenses totalling \$500 or more. Part 17 of the CEA sets spending limits on third party election advertising in order to promote electoral fairness. A third party “election advertising expense” is defined in section 349 of the CEA. It means an expense incurred in relation to “the production of an election advertising message” and “the acquisition of the means of transmission” of that message to the public (e.g. distribution and publication costs).

Considerations

Previous Statements by Chief Electoral Officers

The present and former chief electoral officers of Canada have considered how to apply the election advertising regime to material communicated over the Internet in a number of past reports to Parliament. In his report on the 37th general election, the former Chief Electoral Officer stated:

To decide whether a message being sent by a third party can be defined as election advertising, four questions have to be asked: Is an election underway? Is the message transmitted to the public? Is the message an advertising message? And is the message one that a reasonable person would understand as promoting or opposing the election of a candidate or political party, or as taking a position on an issue with which a candidate or party is associated? If the answer to all four questions is Yes, the message would be considered election advertising.

The question of whether an election is underway is straightforward. **In our view, posting a message on a Web page that is available to the public is a transmission to the public. This brings us to a more difficult part of the test: when is a message on the Internet an advertising message and when is it not an advertising message?**

An advertising message **is an advertisement purchased**, for example, on television, on radio, in a newspaper or magazine, or on a billboard; included in flyers or direct mail **sent to households that did not request them**, or in telephone calls to phone numbers at which no one requested the calls; **or placed as a banner ad on someone else’s Web site.**

By this reasoning, letters to the editor, editorials, interviews, columns, commentaries, news items, speeches, debates, or meetings are not advertisements as such, unless they are included in an advertisement that meets the criteria of the four questions. A book that was intended to be made available to the public regardless of whether an election were called, and is sold for no less than its commercial value (including production and distribution costs), is not an advertising message.

² Third parties are defined to include any person or group “other than a candidate, registered party or electoral district association of a registered party” (s. 349).

A statement of an individual's personal political views on the Internet, whether on the person's own Web page or in a discussion group, is not an advertising message. **Nor, in the interpretation of the Chief Electoral Officer, is a third party's expression of its political views on its own Web page an advertising message.** However, **a newspaper advertisement promoting the Web page of a third party would be considered election advertising**, if the advertisement meets the criteria of the four questions. Similarly, **examples of advertising messages include unsolicited e-mail sent out by a third party, or banner ads placed on other Web sites by the third party.**³ (emphasis added)

The issue was considered again in the report on the 40th general election, in which the present Chief Electoral Officer noted that "new technological means of transmission raise new questions with regard to election advertising" and wondered "whether the Internet has changed traditional distinctions between advertising and programming or news."⁴ He also raised the issue of enforcement as being potentially problematic, noting:

Future discussions on these matters should take into account other issues related to compliance and enforcement of the *Canada Elections Act* over the Internet. Is enforcement necessary or even desirable, and does Elections Canada have the mandate and resources to enforce the Act on the Web? Elections Canada looks forward to discussing these issues with political parties and members of Parliament.⁵

Finally, in his report on the 41st general election, the Chief Electoral Officer recognized the challenges posed by the expansion of Internet-based communication technologies and dedicated a section of his report to it. The report states:

The expansion of Web-based communications technology – particularly social media such as YouTube, Facebook and Twitter – is transforming communications both outside and during elections. **In this rapidly evolving context, the relevance of the existing legal framework must be reconsidered.** The 41st general election showed the need for re-examination, especially of two aspects of the regime: the premature transmission of election results, prohibited under section 329 of the *Canada Elections Act*, and the regulation of third party election advertising.

...

The distinction between advertising and non-advertising messages was relatively straightforward with television, radio and print media, but this is not the case with newer technologies. For example, humorous video clips posted on YouTube or Facebook may be considered to be commentary, programming, art or advertising. Messages shared on Twitter can be perceived as public discussion or advertisements. Even Internet sites or pages are not easily categorized. **The confusion around the nature of such communications results in uncertainty and inconsistent behaviour, perceptions of illegality and a tendency to discourage participation.**

³ Elections Canada, *Report of the Chief Electoral Officer of Canada on the 37th General Election Held on November 27, 2000* (Ottawa: 2001), 70.

⁴ Elections Canada, *Report of the Chief Electoral Officer of Canada on the 40th General Election of October 14, 2008* (Ottawa: 2009), 46.

⁵ *Ibid.*, 19.

The third party regime reflects a concern for creating a level playing field between opponents with differing financial resources. The regime regulates advertising expenses, but its purpose is not to reduce the information available to electors or prevent individuals from participating in the electoral debate. **Social media and the Internet are conducive to political participation by allowing a broad dissemination of messages at a very low cost.** The use of new technologies can improve the federal electoral process by enhancing both equality and freedom of expression.⁶ (emphasis added)

Finally, the Chief Electoral Officer concluded this portion of his report by inviting Parliament to consider excluding from the definition of election advertising all Internet-based communications by third parties, with the possible exception of communications placed for a fee by the originator on another site.

Previous Interpretation of the Rules by Elections Canada

Elections Canada has, in the past, been asked to provide guidance to candidates, registered parties and third parties on the use of websites and social media during an election, and on whether these are considered election advertising. Generally, Elections Canada has suggested that the election advertising rules would be applied to communications over the Internet in the same way as they would be to other types of communications, given that section 319 of the CEA does not differentiate between the various means of transmitting an advertising message to the public.

For instance, the election handbook for third parties that was applicable to elections called before December 2014 stated the following about websites:

The expenses for producing and developing a Web site used during an election must be reported as election advertising expenses. Expenses incurred for domain name registration and web hosting fees must also be reported but may be prorated over the duration of the election, meaning only the portion of the expense that relates to the election period would be an election advertising expense.⁷

For candidates and registered parties, their respective political financing handbooks provided similar statements to the effect that rules governing the use of the Internet for advertising are the same as for other forms of advertising.

History of the Third Party Regime

The regulation of third party spending in a federal election was first introduced in 1974, prohibiting any individual or group other than a candidate or political party from spending money to promote or oppose candidates or parties. Following the report of the Royal Commission on Electoral Reform and Party Financing (the Lortie Commission), a new third party regime was introduced in 1993. It prohibited third parties from incurring election advertising expenses in excess of \$1,000. This new regime was challenged in *Somerville v.*

⁶ Elections Canada, *Report of the Chief Electoral Officer of Canada on the 41st General Election of May 2, 2011* (Ottawa: 2011), 49–50.

⁷ Elections Canada, *Election Handbook for Third Parties, Their Financial Agents and Auditors* (EC 20227), 13.

Canada (Attorney General) and was found to be unconstitutional by both the Alberta Court of Queen's Bench and the Alberta Court of Appeal.

The current third party regime, found in Part 17 of the CEA (ss. 349–362), was introduced in 2000. It limits the advertising expenses of individuals or groups other than candidates, political parties and electoral district associations. The spending limit on third party election advertising is set at \$150,000 nationwide, of which no more than \$3,000 may be spent in a given electoral district. These amounts are then multiplied by the inflation adjustment factor, referred to in section 384, that is in effect on the issue of the writs. The regime includes requirements for registration, reporting and statements of authorization on election advertising. It was challenged before the courts but was upheld as constitutional by the Supreme Court of Canada in *Harper v. Canada (Attorney General)*.

As noted by the Supreme Court of Canada in the *Harper* decision, the overarching objective of the third party regime is to “promote electoral fairness by creating equality in the political discourse” and is consistent with the egalitarian model of elections adopted by Parliament.⁸ As explained by the majority in *Harper*:

... This model is premised on the notion that individuals should have an equal opportunity to participate in the electoral process. Under this model, wealth is the main obstacle to equal participation Thus, the egalitarian model promotes an electoral process that requires the wealthy to be prevented from controlling the electoral process to the detriment of others with less economic power. ... In Canada, electoral regulation has focussed on the latter by regulating electoral spending through comprehensive election finance provisions. These provisions seek to create a level playing field for those who wish to engage in the electoral discourse. This, in turn, enables voters to be better informed; no one voice is overwhelmed by another.⁹

A final point is that Parliament has chosen to only regulate election “advertising” by third parties. The third party regime has never captured the entire field of their activities, irrespective of the costs associated with them.

Analysis and Proposed Interpretation

Meaning of “Election Advertising”

The CEA recognizes that some electoral communications are expressions of views, opinions or information that do not qualify as election advertising. Section 319 essentially defines election advertising as an advertising message that promotes or opposes, directly or indirectly, a registered party or candidate. It goes on to provide a list of examples of what **is not** election advertising in paragraphs (a) to (e). Two elements of this definition are noteworthy.

⁸ *Harper v. Canada (Attorney General)*, 2004 SCC 33 at para. 63.

⁹ *Ibid.* at para. 62.

First, the list of communications that are specifically **not** election advertising are presented as illustrations of what the definition already “does not include”, rather than as exceptions to what would otherwise be caught by the definition. They are therefore useful to shed light on what is meant (or not meant) by the definition. This also means that the list is non-exhaustive; something that does not fit squarely in one of the paragraphs may still escape the definition. For example, while paragraph (b) refers to a book, a documentary film may equally escape the definition. Similarly, while paragraph (d) refers to the transmission of personal views by an individual on the Internet, opinions published by a group on the Internet may also escape the definition.

Second, while the definition of what **is** election advertising uses the message’s content as a key qualifier, the illustrations of what **is not** election advertising are mostly content neutral. The only exception is paragraph (e), which was added by Bill C-23 (S.C. 2014, c. 12). This point is critical as it reinforces the fact that content alone cannot determine election advertising. Election advertising must, first, be advertising and must, second, promote or oppose a party or candidate. The fact that a message promotes or opposes a party or candidate is insufficient, as this could be true of an editorial, a debate or a book, etc., which are definitively not election advertising.

Looking more closely, the definition of “election advertising” includes four essential elements:

1. It must be advertising.
2. It must promote or oppose, directly or indirectly, a candidate or a political party, or an issue with which they are associated.
3. It must be transmitted to the public.
4. It must be transmitted during the election period.

Two of the elements cannot help to explain the larger meaning of election advertising. Determining whether a particular message promotes or opposes a candidate or party, or an issue with which they are associated, is largely a fact-based exercise that must be done case by case. Meanwhile, “election period” is clearly defined in the Act and its meaning is not subject to debate.¹⁰ Therefore, the following analysis focuses on the first and third elements to ascertain two things: what does it mean to transmit a message to “the public”, and what exactly is advertising?

What is “transmission to the public” (English definition) or “diffusion” (French definition)?

To “transmit” is defined in the Merriam-Webster online dictionary as “to send or convey from one person or place to another”,¹¹ which implies action on the part of the person with whom the message originates (the sender), without any specific action needed on the part

¹⁰ CEA, section 2: “‘election period’ means the period beginning with the issue of the writ and ending on polling day or, if the writ is withdrawn under subsection 59(1) or is deemed to be withdrawn under subsection 31(3) of the *Parliament of Canada Act*, on the day that the writ is withdrawn or deemed to be withdrawn.”

¹¹ www.merriam-webster.com/dictionary/transmit

of the recipient. What constitutes “the public” has been considered by the Supreme Court of Canada, for instance, in the context of copyright protection and distribution of content over the Internet. It determined that a party of one is not the public, but that in some instances, multiple parties of one are. In other words, a subset of the public may still be “the public”.¹² In the same vein, what constitutes “the public” was also considered by the Federal Court of Appeal. It concluded that if communications reach a significant portion of the public, they are made to the public.¹³

The French definition of “election advertising” (“publicité électorale”) under section 319 only refers to “diffusion”, which is defined in the Larousse online dictionary as “action de propager des connaissances, des idées ou des biens dans un large public”; “action de distribuer un tract, un texte dans le public”.¹⁴ While the definition of “publicité électorale” does not contain a direct translation of the words “to the public”, the word “publicité” already has that connotation and the notion that “diffusion” is made “to the public” is also found in the definition of “diffusion”. Therefore, the analysis in the paragraph above is also relevant to the French definition.

As the Chief Electoral Officer noted in his report on the 37th general election, having a message on a web page that is available to the public may therefore be sufficient to meet the requirement of a “transmission to the public”.

What is “advertising”?

Most important to the definition of “election advertising” is, perhaps, the notion that the communication must first be “advertising” (or in French, “message publicitaire”). The word “advertising” is not defined in the CEA. Dictionaries are therefore a useful starting point for interpreting its ordinary meaning.

For example, the Merriam-Webster online dictionary defines “advertising” as “the action of calling something to the attention of the public especially by paid announcements”.¹⁵ The *Canadian Oxford Dictionary* defines the word “advertisement” as a “public notice or announcement, esp. one advertising goods or services in newspapers etc., on posters, or in broadcasts”. It also defines the verb “advertise” as to “draw attention to or describe favourably (goods or services) in a public medium to promote sales”; to “make generally or publicly known”; or to “notify”.¹⁶ In French, the Larousse online dictionary defines “message publicitaire” as “information promotionnelle de courte durée sur un produit, un service, une société, diffusée sur un support audiovisuel”,¹⁷ while *Le Petit Robert* defines “message publicitaire” as “tout ensemble d’informations transmises au public dans l’intention de diffuser et faire vendre un produit, quel que soit le support utilisé”.¹⁸

¹² *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35.

¹³ *Canada (Commissioner of Competition) v. Premier Career Management Group Corp.*, 2009 FCA 295, para. 52.

¹⁴ <http://www.larousse.fr/dictionnaires/francais/diffusion/25481?q=diffusion#25362>

¹⁵ www.merriam-webster.com/dictionary/advertising

¹⁶ *Canadian Oxford Dictionary* (Oxford: Oxford University Press, 2004).

¹⁷ www.larousse.fr/dictionnaires/francais/message/50766/locution?q=message+publicitaire#157247

¹⁸ *Le Petit Robert* (Paris: Dictionnaires Le Robert, 2014).

These definitions contain the concept of a public notice or announcement made to draw attention to the subject of the advertising, often but not necessarily linked to sales or promotion. Factors such as the form, content and timing can help to identify something as advertising.

Equally important to the common understanding of advertising is the notion that it is generally unsolicited by the recipient, as the Chief Electoral Officer noted in his report on the 37th general election.¹⁹ Put another way, advertising is something that, in the normal course of events, the recipient may consider intrusive. It is not usually something the recipient has sought out. Rather, it is a message the recipient was subjected to while in the process of doing something else. In such situations, the cost paid to advertise can be viewed as a proxy for intrusiveness – the advertiser has to pay for the privilege of intruding on the recipient’s normal activities to communicate their message.

To provide some concrete examples, a person watching television does so in order to watch a particular program, not the commercials that accompany the program. A person reading a newspaper does so to obtain information about current events, as opposed to information about the sale taking place at their local mall, which happens to be advertised next to the news story. Someone who drives on the highway does so to get to a particular destination, not for the opportunity to read announcements on giant billboards.

This can be contrasted with a person who chooses to visit a third party website because they want to learn more about ideas the organization has put forth. During an election period, this person would likely expect the organization’s website to communicate positions on electoral issues relevant to its cause and would not consider such messages as advertising. An even clearer example would be a person who chooses to go on YouTube for the express purpose of finding a video produced by a political party or a third party. They would do so to be informed or entertained, and would not typically consider the video, which they sought out, to be advertising.

Purposive interpretation

Beyond looking at the ordinary meaning of the words in the definition of election advertising, a “purposive approach” to statutory interpretation is needed to handle the complexities involved with Internet-based communications. The words of the provision must be considered in light of their larger context, namely “the scheme of the Act, the object of the Act, and the intention of Parliament”.²⁰

First, within the scheme of parts 16 and 17 of the CEA, there is a strong link between the provisions on election advertising and political financing, particularly as they relate to third parties. It might be concluded, therefore, that the law was drafted on the following

¹⁹ Elections Canada, *Report of the Chief Electoral Officer of Canada on the 37th General Election Held on November 27, 2000* (Ottawa: 2001), 70.

²⁰ *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, para. 21.

assumption: that creating and distributing election advertising will have either a monetary cost or a donation value that can be easily converted to a dollar amount.

Moreover, Part 17 was enacted at a time when the Internet was still emerging as a means of communication. In 2000, advertising campaigns were still primarily conducted using traditional media, such as television, radio and newspapers. Part 17 dealt with concerns largely related to the cost of accessing broad audiences through traditional means. The emergence of Internet-based communications has had a deep impact on the cost for third parties, candidates and political parties to reach broad audiences (as well as targeted ones). They can now rely on free social media platforms rather than traditional, and relatively expensive, media platforms to accomplish the same goals.

This new reality is relevant to the broader objectives of the third party election advertising regime, which reflects Parliament's intent to provide a level playing field. The spending limits aim to prevent those third parties with more resources from dominating the electoral discourse at the expense of less wealthy third parties or registered parties and candidates. As the Supreme Court of Canada indicated in the *Harper* decision, the limits imposed on third parties under this regime serve three interconnected objectives:

... first, to favour equality, by preventing those with greater means from dominating electoral debate; second, to foster informed citizenship, by ensuring that some positions are not drowned out by others (this is related to the right to participate in the political process by casting an informed vote); third, to enhance public confidence by ensuring equality, a better informed citizenship and fostering the appearance and reality of fairness in the democratic process.²¹

In the context of Internet-based communications, it could be argued that the impact of money is lessened. All third parties, regardless of their financial means, have access to the same communication channels through which to disseminate their message at little or no cost. In other words, while financial wealth may remain a factor with respect to the ability of certain parties to produce promotional material of higher quality, it remains that the Internet provides equal access to free channels for disseminating ideas. The only exception is when payment is required to place a message on a particular web-based platform (i.e. where there is a placement cost).

Conclusion

In light of the above, Elections Canada has proposed the interpretation detailed at the start of this note. Election messages on the Internet that meet the statutory criteria of "promoting or opposing" and have a placement cost are advertising. Others are not. This approach offers an efficient and simple way to parse election messages, providing much needed clarity for third parties, as well as for candidates and registered parties, in determining which election messages communicated over the Internet are subject to the rules governing election advertising.

²¹ *Harper, supra*, at para. 23.

Finally, it should be noted that the part of the interpretation dealing with the statement of authorization (or tagline) was developed in consultation with the Commissioner of Canada Elections.