Elections Canada	**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 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: 2020-05 (November 2020)

Partisan and Election Advertising on the Internet

Issue

This interpretation note clarifies whether and to what extent the partisan and election advertising rules in the *Canada Elections Act* ("CEA") apply to material communicated over the Internet, including on social media.

The note was first issued as OGI 2015-04 and dealt with election advertising only. It has been updated to cover the regulation of partisan advertising, the requirement for online platforms to keep a political ad registry, and other changes introduced by Bill C-76 (S.C. 2018, c. 31).[1] It also now covers social media influencers.

Interpretation

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

(1) Election messages communicated over the Internet are partisan or election advertising only if they have, or would normally have, a **placement cost** and meet the statutory criteria of promoting or opposing a relevant political entity during the pre-election or election period.

(2) A placement cost is the cost charged to purchase advertising space, such as in traditional media (e.g. newspapers, television, radio) or on websites or social media (e.g. web banners, content boosted through a platform's advertising options). 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.

(3) The ongoing costs of creating and maintaining a website, and the costs to send or manage organic social media content, are not placement costs.

(4) Partisan advertising by registered parties, electoral district associations and third parties, and all election advertising, must include a statement of authorization (usually a tagline) "in or on the message".

[1] The interpretation also applies in determining what messages are "advertising" under section 349.02, which prohibits a third party from using funds whose source is a foreign entity to conduct, at any time, advertising that promotes or opposes specified political entities (otherwise than by taking a position on an issue).

(5) 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, whether or not the content to which it leads is partisan or election advertising.

Practical implications for candidates, registered associations, registered parties and third parties

(1) The following are not partisan or election advertising and are not subject to advertising rules in the CEA (such as the rules requiring a tagline and prohibiting election advertising on election day):

- messages sent or posted for free over social media platforms such as Twitter or Facebook, whether done by humans or bots
- messages sent by email or through other messaging services, including texts sent through a cellular or mobile network, whether paid or free (see OGI 2019-11, *Application of Partisan and Election Advertising Rules to Telephone Calls,* for a related interpretation)
- videos posted for free on social media platforms such as YouTube
- content posted on a candidate's, registered association's, registered party's or third party's own website

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

(3) Influencer marketing also qualifies as partisan or election advertising, if the influencer is being paid by the political entity. As with any individual, if an influencer chooses to post their personal views about a political entity on the Internet on a non-commercial basis, the communication is not advertising.

(4) Where a message is partisan or election advertising, it will be subject to all applicable rules in the CEA, such as pre-election period spending limits for parties and third parties, tagline requirements and the prohibition on transmitting election advertising on election day.

(5) Partisan or election advertising expenses 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) When political entities buy partisan or election advertising from online platforms that meet certain criteria for monthly visitors or users, they must provide the platform with an electronic copy of the ad and the name of the relevant agent who authorized its distribution on the platform (with the exception of advertising conducted by a leadership contestant's campaign). For greater certainty, as an influencer's social media account is not an online platform and the social media platform itself is not being paid to display the advertising, influencer advertising does not have to be captured in a registry.

(7) Where a political entity has a spending limit, its communications are subject to that limit whether or not they are advertising. For example, in a pre-election period, the expense for a third party website that opposes a political party is subject to a limit, even though it is not partisan advertising. Likewise, in an election period, the expense for a candidate's, registered party's or third party's mass emails promoting a candidate or party is subject to a limit, even though they are not election advertising.

Background

The proliferation of Internet-based communications raises questions about the rules governing “partisan advertising” and “election advertising” as defined in section 2 of the CEA. For example, how do the rules apply to political entity websites, comments or links to other material posted on social media sites such as Facebook and Twitter, videos posted on YouTube, or social media influencers?

There is a great deal of online political discourse during pre-election and election periods. 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 partisan and election advertising in the context of Internet-based communications.

Legal Framework

Partisan advertising and election advertising are defined in section 2 of the CEA as follows:

“partisan advertising” means the transmission to the public by any means during a pre-election period of an advertising message that promotes or opposes a registered party or eligible party or the election of a potential candidate, nomination contestant or leader of a registered party or eligible party, otherwise than by taking a position on an issue with which any such party or person is associated. For greater certainty, it does not include	**« publicité partisane »** Diffusion, sur un support quelconque et pendant une période préélectorale, d’un message publicitaire qui favorise ou contrecarre un parti enregistré ou un parti admissible ou l’élection d’un candidat potentiel, d’un candidat à l’investiture ou d’un chef de parti enregistré ou de parti admissible autrement que par une prise de position sur une question à laquelle le parti ou la personne en cause est associé. Il est entendu que ne sont pas considérés comme de la publicité partisane :
(a) the transmission to the public of an editorial, a debate, a speech, an interview, a column, a letter, a commentary or news;	a) la diffusion d’éditoriaux, de débats, de discours, de nouvelles, d’entrevues, de chroniques, de commentaires ou de lettres;
(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;	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 d’une élection;
(c) the transmission of a document by a Senator or a member the expense of which is paid by the Senate or House of Commons;	c) l’envoi d’un document par un sénateur ou un député aux frais du Sénat ou de la Chambre des communes;
(d) the transmission of a document directly by a person or a group to their members, employees or shareholders, as the case may be;	d) l’envoi d’un document par une personne ou un groupe directement à ses membres, actionnaires ou employés;
(e) the transmission by an individual, on a non-commercial basis on the Internet, of his or her personal political views; or	e) la diffusion par un individu, sur une base non commerciale, de ses opinions politiques sur Internet;
(f) the making of telephone calls to electors only to encourage them to vote.	f) les appels téléphoniques destinés uniquement à inciter les électeurs à voter.

"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 by taking a position on an issue with which a registered party or candidate is associated. For greater certainty, it does not include (a) the transmission to the public of an editorial, a debate, a speech, an interview, a column, a letter, a commentary or news; (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; (c) the transmission of a document directly by a person or a group to their members, employees or shareholders, as the case may be; (d) the transmission by an individual, on a non-commercial basis on the Internet, of his or her personal political views; or (e) the making of telephone calls to electors only to encourage them to vote.	**« publicité électorale »** Diffusion, sur un support quelconque et pendant une période électorale, d'un message publicitaire qui favorise ou contrecarre 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 : a) la diffusion d'éditoriaux, de débats, de discours, de nouvelles, d'entrevues, de chroniques, de commentaires ou de lettres; 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; c) l'envoi d'un document par une personne ou un groupe directement à ses membres, actionnaires ou employés; d) la diffusion par un individu, sur une base non commerciale, de ses opinions politiques sur Internet; e) les appels téléphoniques destinés uniquement à inciter les électeurs à voter.

Political entities need to know whether a particular communication meets the definition of partisan or election advertising because other substantive rules in the CEA will apply, including the requirement for a statement of authorization (usually a tagline) and the prohibition on transmitting election advertising on election day (blackout period).

For the pre-election period, whether a message is partisan advertising is crucial for registered parties because only their partisan advertising is subject to spending limits in that period. It is important for electoral district associations because there are restrictions on partisan advertising they conduct outside their electoral district to promote or oppose a registered party. It is also of some importance to third parties,[2] though many of their communications and activities are subject to a spending limit in that period even if they are not advertising.

For the election period, whether a message is election advertising is important for applying the tagline and blackout rules. Most communications of candidates, registered parties and third parties are subject to a spending limit even if they are not election advertising.

It is also important to know if a message communicated over the Internet is advertising because it may be subject to registry requirements. When political entities buy partisan or election advertising from online platforms that meet certain criteria for monthly visitors or users, they must provide the platform with an electronic copy of the ad and the name of the relevant agent who authorized its distribution on the platform. The platform must publish the information in a registry from the day the ad runs until two years after election day.[3]

[2] For the definitions of a third party in the pre-election period and election period, see section 349 of the CEA.

[3] This requirement does not apply to advertising conducted by a leadership contestant's campaign.

Considerations

Previous Statements by Chief Electoral Officers

The regulation of partisan advertising in the pre-election period was introduced in 2019. But the election advertising regime on which it is based has existed for decades, and the question of how the regime applies to Internet communications had been considered by former chief electoral officers of Canada in past reports to Parliament. The focus at the time was on third parties, who were then subject to a spending limit only in terms of their election advertising. In his report on the 37th general election, former chief electoral officer Jean-Pierre Kingsley 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.
>
> 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.**[4] (emphasis added)

The issue was considered again in the report on the 40th general election, in which former chief electoral officer Marc Mayrand 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."[5] 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.[6]

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

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

[6] Ibid., 19.

In his report on the 41st general election, Mr. Mayrand 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.**
>
> **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.[7] (emphasis added)

Mr. Mayrand 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 had been asked at various times in the last decade 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 were considered election advertising. Generally, Elections Canada had suggested before 2015 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 2 of the CEA did 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.[8]

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

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

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.

That interpretation was superseded in 2015 by the original release of this OGI (then called OGI 2015-04, *Election Advertising on the Internet*). The analysis behind the still-valid interpretation from 2015 is outlined below, and the application of the analysis to partisan advertising is also considered.

Analysis and Proposed Interpretation

Meaning of "Partisan Advertising" and "Election Advertising"

The CEA recognizes that some electoral communications are expressions of views, opinions or information that do not qualify as advertising. Section 2 essentially defines partisan and election advertising as advertising messages that promote or oppose, directly or indirectly, an applicable political entity. It goes on to provide a list of examples of what **is not** advertising. Two elements are noteworthy.

First, the list of communications that are specifically **not** advertising are presented as illustrations of what each 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 one paragraph refers to a book, a documentary film may equally escape the definition. Similarly, while another paragraph 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** advertising uses the message's content as a key qualifier, the illustrations of what **is not** advertising are mostly content-neutral. The only exception is a paragraph about making telephone calls only to encourage electors to vote, 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 advertising. Partisan or election advertising must, first, be advertising and must, second, promote or oppose an applicable political entity. The fact that a message promotes or opposes the political entity is insufficient, as this could be true of an editorial, a debate or a book, etc., which are definitively not advertising.

Looking more closely at the definitions, partisan and election advertising include four essential elements:

1. They must be advertising.
2. They must promote or oppose an applicable political entity. During an election period, this includes promoting or opposing by taking a position on an issue with which the political entity is associated.
3. They must be transmitted to the public.
4. They must be transmitted during the pre-election period (partisan advertising) or election period (election advertising).

Two of the elements cannot help to explain the larger meaning of advertising. Determining whether a particular message promotes or opposes an applicable political entity, including by taking a position in an election period on an issue with which they are associated, is largely a fact-based exercise that must be done case by case. Meanwhile, "pre-election period" and "election period" are clearly defined in section 2 of the CEA, and their meaning is not subject to debate. 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”,[9] which implies action on the part of the person with whom the message originates (the sender) without any specific action needed on the part 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”.[10] 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.[11] This means that even if a communication is targeted to a specific demographic—for example, social media users in a particular age group and geographic region—it is still transmitted to “the public.”

The French definitions of “partisan advertising” and “election advertising” (“publicité partisane” and “publicité électorale”) under section 2 only refer 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”.[12] While the definitions in the CEA do not contain a direct translation of the words “to the public”, the word “publicité” already connotes it, 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 definitions.

As Mr. Kingsley 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 definitions of partisan and election advertising is, perhaps, the notion that the communication must first be “advertising” (or in French, “message publicitaire”). Advertising as a concept 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”.[13] 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”.[14] 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”,[15] 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”.[16]

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[9] www.merriam-webster.com/dictionary/transmit

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

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

[12] http://www.larousse.fr/dictionnaires/francais/diffusion/25481?q=diffusion#25362

[13] www.merriam-webster.com/dictionary/advertising

[14] *Canadian Oxford Dictionary* (Oxford: Oxford University Press, 2004).

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

[16] *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 Mr. Kingsley noted in his report on the 37th general election.[17] 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 political entity's website because they want to learn more about ideas the person or organization has put forth. During a pre-election or election period, this person would likely expect the website to communicate positions on relevant electoral issues 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 entity. They would do so to be informed or entertained, and would not typically consider the video, which they sought out, to be advertising.

Interpretation

Beyond looking at the ordinary meaning of the words in the definitions of partisan and 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".[18]

First, within the scheme of parts 16, 17 and 18 of the CEA, there is a strong link between the provisions on advertising and political financing. It might be concluded, therefore, that the law was drafted on the following assumption: that creating and distributing partisan or election advertising will have either a monetary cost or a donation value that can be easily converted to a dollar amount.

Moreover, advertising campaigns in the early 2000s were still primarily conducted using traditional media, such as television, radio and newspapers. 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. They can now rely on free social media platforms rather than traditional, and relatively expensive, media platforms to accomplish the same goals.

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

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

This reality is relevant to the broader objectives of the spending limits in the CEA, which reflect Parliament's intent to provide a level playing field. The spending limits aim to prevent those political entities with more resources from dominating the electoral discourse at the expense of less wealthy ones. As the Supreme Court of Canada indicated in the *Harper* decision, the limits imposed on third parties under the regime in 2000 served 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.[19]

In the context of Internet-based communications, it could be argued that the impact of money is somewhat lessened. All political entities have access to the same communication channels through which to disseminate their message at little or no cost. While financial wealth may remain a factor with respect to the ability of certain participants to produce promotional material of higher quality and to collect and analyze data for targeting messages, 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).

New: Application to influencers

Influencers have recently emerged as a popular marketing channel. An influencer is "a person or a group who has a strong online presence and is frequently targeted by marketing professionals to promote brands on social media."[20] In fact, an influencer can be any person with an online reach that others are willing to pay for.

Generally, the production and distribution of organic content on the political entity's social media accounts by paid workers is not advertising. Their remuneration is an election expense, but the content does not require a tagline. Paying an influencer to post on their own social media channel merits different treatment, however.

It is possible to view the remuneration of influencers in the same way as any other production cost for a non-advertising message, such as writing a script for a telephone call. But a key aspect of remunerating influencers has to do with their specific reach. The political entity is buying space on that influencer's social media channel to reach their particular followers, as it might pay Facebook to target an ad at a specific demographic. This can be seen as a type of placement cost. Paying influencers arguably fits the "intrusive" component of Elections Canada's interpretation of advertising because, while a person has chosen to follow an influencer (for example, an athlete), it is likely not with the expectation of hearing electoral messages.

While not directly labelling influencer posts as "advertising," the Competition Bureau of Canada calls influencers a "channel for marketing" that is used by advertisers. The *Competition Act*'s prohibition on misleading advertising and deceptive marketing practices applies equally to influencer marketing, and influencers are advised to disclose a material connection with a company from which they receive compensation to protect themselves from potential liability.[21] Ad Standards, Canada's advertising self-regulatory body, acknowledges the influencer marketing industry's disclosure obligations and provides

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[19] *Harper v. Canada (Attorney General)*, 2004 SCC 33 at para. 23.

[20] Canada. Translation Bureau, "Social Media Glossary," https://www.btb.termiumplus.gc.ca/publications/media-soc-eng.html#i.

[20] Canada. Translation Bureau, "Social Media Glossary," https://www.btb.termiumplus.gc.ca/publications/media-soc-eng.html#i.

[21] Canada. Competition Bureau, "Influencer Marketing: A Competition Bureau Perspective" in *The Deceptive Marketing Practices Digest*, Vol. 4 (June 2018).

guidelines for how a disclosure—similar to a tagline under the CEA—should be made.[22] In the United States, the Federal Trade Commission considers influencer marketing to be subject to its truth-in-advertising disclosure rules and has issued guidelines to that effect.[23]

Social media platforms have also begun reacting to expectations for transparency in influencer activities. After an American presidential candidate launched a significant influencer campaign, Facebook Inc. implemented a tool to track political sponsored content appearing on, but not purchased through, its platforms. In a statement, Facebook added that "'[o]n the broader topic of political branded content, we welcome clearer guidelines from regulators.'"[24]

Elections Canada acknowledges that there are arguments for interpreting paid influencers either as organic content or as advertising. In our view, the transparency objectives of the CEA and a level playing field during pre-election periods are better served by categorizing paid influencer posts as advertising and requiring the political entity's statement of authorization in or on the advertising message. Simply adding a hashtag such as #ad to the post would not meet the tagline requirement.

For greater certainty, while an influencer's paid post is advertising, there is no requirement for the ad to be captured in an online platform registry. An influencer's social media account is not an online platform as defined in the CEA, and the social media platform itself is not being paid to display the advertising.

An additional question is how to treat an influencer's post about a political entity for which they are not compensated. Influencers regularly create and post unpaid content to their social media accounts; their accounts therefore serve both personal and commercial purposes, with the commercial posts identified as such. It is Elections Canada's view that, as with any individual, if an influencer chooses to post their personal views about a political entity on the Internet on a non-commercial basis, the communication is excluded from the CEA's definition of advertising.

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" during a relevant period and that have, or would normally have, a placement cost are advertising. Others are not. This approach offers an efficient way to parse election messages, providing clarity for political entities in determining which messages communicated over the Internet are subject to the rules governing partisan and election advertising.

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.

[22] Notably, it should be "clear, conspicuous and broadly understood" and "in close proximity to the endorsement." Canada. Ad Standards. Influencer Marketing Steering Committee, *Disclosure Guidelines* (January 2019).

[23] United States. Federal Trade Commission, "Disclosures 101 for Social Media Influencers" (November 2019).

[24] Culliford, Elizabeth, "Facebook to publicly track political sponsored content after Bloomberg's paid memes," *Reuters*, February 27, 2020.