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Political Communications in the Digital Age

Discussion Paper 1: The Regulation of Political Communications under the *Canada Elections Act*

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Foreword

After each general election, the Chief Electoral Officer (CEO) is required to submit a report to Parliament outlining recommendations that, in his view, will improve the administration of the *Canada Elections Act*. In developing his recommendations report after the 2019 election, the CEO wishes to explore certain themes related to the way in which political actors communicate with electors in the digital age.

Over the last two decades, political communications have changed drastically. Communications around elections—and in general—are increasingly digital, taking place through text messages, on social media platforms, in online ads and in other formats. Many of these are enabled by big data and are highly targeted. There is every indication that this trend will continue into the future and that the significance of digital communications for electoral democracy will continue to grow.

The regulatory regime in place under the *Canada Elections Act*, however, dates originally from a time when broadcast television was the dominant advertising and communications medium. The Act is based on certain core values, such as transparency and fairness, that continue to underlie the way elections are delivered in Canada but legislative improvements may be needed.

With a view to soliciting input from a diverse audience of stakeholders and experts to inform the CEO's recommendations to Parliament, Elections Canada has prepared a suite of three discussion papers on interrelated topics that are central to this question.

- The first paper, *The Regulation of Political Communications under the Canada Elections Act*, aims to foster discussion about whether existing provisions in the Act meet the challenges that have arisen in recent years, largely due to new communications technology.
- The second paper, *The Impact of Social Media Platforms in Elections*, looks more closely at social media and digital advertising platforms and aims to promote discussion on the impacts that these platforms may have on elections and democracy.
- The third paper, *The Protection of Electors' Personal Information in the Federal Electoral Context*, aims to encourage discussion on how fair information principles could be applied to political parties, taking into account their unique role in Canada's democracy.

Introduction

Political communications lie at the heart of the electoral process. Parties and candidates communicate with electors in many ways, including by telephone, canvassing, signs, broadcasts and print advertisements. Increasingly, communications occur by messages targeted to individual electors, including via social media.

Some aspects of the political communications of electoral participants in a federal election are regulated by the *Canada Elections Act* (CEA or the Act). The regulation of political communications is closely intertwined with the regulation of political financing more generally, and the two aspects of the law support many of the same objectives. Nonetheless, certain elements of the law specifically relate to political communications: those elements are the focus of this paper.

The roots of the political financing and political communications provisions in the CEA can be found in concerns over the rising costs of broadcasting in the 1960s and 1970s and the threats those rising costs posed to democratic values.

Much of the current regulation reflects that the law evolved in an era when broadcast advertising, especially on television, was central to an election campaign. Indeed, the roots of the political financing and political communications provisions in the CEA can be found in concerns over the rising costs of broadcasting in the 1960s and 1970s and the threats those rising costs posed to democratic values. Over the years, as the nature and methods of communicating and campaigning have evolved, the CEA has been amended to respond to such changes. Recent experience, however, suggests that fundamental questions should be asked about whether the current structure of the CEA is sufficient to continue to achieve its goals or whether it needs to be overhauled. Alternatively, it may be that the structure is sound but certain fundamental aspects need to be modernized.

The first part of this paper briefly summarizes the political communications provisions found in the CEA and the objectives of the various elements of regulation. The second part of the paper sets out challenges that have emerged in recent years and during the 2019 general election. It describes apparent weaknesses or areas of uncertain benefit and asks questions to seek input and foster discussion on the law's future.

The Regulation of Political Communications in Federal Elections

The political communications part of the CEA has its genesis in the work of the Barbeau Committee, which reported in 1966, and the *Election Expenses Act*, passed by Parliament in 1974.¹ That committee and the legislation that followed were influenced by issues flowing from a steep rise in campaign costs that were brought about by the relatively new and powerful medium of television. The law as created in the 1970s and 1980s included spending limits and reporting requirements for parties and candidates. These provisions were aimed at ensuring fairness, reducing costs and providing transparency. They contained specific provisions targeted at communications, especially broadcast advertising. These included subsidies for purchasing advertising and a process for allocating broadcasting time among parties. At that time, the regulation of communications was applicable only during the election period (between the issue of the writ and polling day).²

Amendments over the years have built on and expanded on this framework. In 2000 the CEA was overhauled, and many of the provisions that had focused on particular types of communication, notably broadcasting, were broadened to take into account all “election advertising.” Furthermore, new rules applicable to third parties that limit and require reporting of election advertising expenses were implemented.³ Bill C-76 passed into law in 2018, built on existing requirements, notably expanding some regulation outside the writ period in the case of a fixed-date general election.⁴ But the basic elements seen in the law today reflect those enacted by Parliament several decades ago. Those elements can be separated into three general groups:

- those that contribute to transparency
- those that promote fairness
- those that prohibit certain communications with a goal of promoting a healthier democratic discussion

Transparency

Transparency can itself be broken down into three aspects:

- transparency regarding who is communicating
- transparency regarding who paid for the communication
- transparency regarding the nature and substance of the communication

Transparency has several benefits, including deterring corruption and illegal activity and promoting greater public confidence in the electoral process as a whole.⁵ Transparency also promotes a more informed electorate.⁶

Transparency Regarding Who Is Communicating

In terms of who is communicating, the CEA provides that advertisements distributed by parties and candidates must contain a statement that they are authorized by the relevant agent (“the tagline”).⁷ In the case of third parties, Bill C-76 added requirements that the tagline be “visible or otherwise accessible” and that it contain the name and Internet or civic address of the third party.⁸

The CEA also contains provisions governing transparency regarding election surveys, such as opinion polls. The law requires the first publisher of such a survey to provide names of those who sponsored and conducted the survey.

The CEA also contains provisions, administered by the Canadian Radio-television and Telecommunications Commission (CRTC), that require transparency in relation to communications by phone. Political entities, third parties, groups and individuals calling electors during and about a federal election must register with the CRTC within 48 hours of making the first call; the exception is political entities and individuals who use their internal services to make live calls. Calling service providers must also register with the CRTC if they are making calls on someone’s behalf.⁹

Bill C-76 added new transparency requirements with respect to certain online political advertisements. A registry maintained and published by the platform includes information about authorization.¹⁰

Transparency Regarding Who Paid for the Communication

The second aspect of transparency, knowing who paid for communications, is largely achieved through reporting by political entities about their contributors. Parties, candidates, electoral district associations, nomination contestants and leadership contestants are all required to make comprehensive reports of their contributors.¹¹ These are then published by Elections Canada and made available to the public for inspection. Third parties also report some of their contributions.¹² These contribution reports do not (for the most part) directly tie contributions to communications, but they provide information that can be used to understand who is supporting the activities of the political entities.

A closer tie between financing and the activity exists with respect to election surveys. The first publication of the survey must include the name of the sponsor of the survey.¹³

Transparency Regarding the Nature and Substance of the Communication

Most of the transparency provided for by the CEA relates to the above elements. However, in certain limited cases, the CEA requires additional information about the nature and substance of communications. Candidates, leadership contestants, nomination contestants and third parties are required to make a detailed report about the cost of specific expenses, including communications. Third parties are also required to report where the communication took place.¹⁴

Also, the first person who transmits an election survey, and anyone who transmits it within 24 hours thereafter, must include with the survey various types of methodological information that help an elector understand how reliable the survey is.¹⁵ The sponsor of the survey must also make available on a public website a further, more detailed report on the methodology.¹⁶ Finally, if an election survey is published that is not based on recognized statistical methods, that information must be indicated along with the survey results when they are published or if they are retransmitted within 24 hours.¹⁷

Furthermore, the online advertisement registry noted above includes not only who authorized the advertisement, but also copies of the advertisements themselves.¹⁸ This allows an additional level of transparency, as there is an ongoing reviewable record of the substance of the advertisement.¹⁹

In terms of voter contact calling, in addition to the record of who is responsible for calls (as discussed above), whoever makes or has contracted a provider to make calls must keep records of every telephone number called, copies of any scripts used for live calls, recordings of each message sent by an automatic-dialling announcing device and every date the script or message was used.²⁰ While such records must be preserved and may be used in a prosecution, they are not publicly available.

Fairness

A second goal of the political financing provisions of the CEA is fairness of the electoral process with respect to the financing of participants in that process. Fairness is meant to be achieved through “levelling the playing field,” promoting informed choices and ensuring public confidence in the electoral system by reducing the influence of money on elections.²¹ The CEA does this primarily through the imposing of spending limits during elections and the use of subsidies (notably election expenses reimbursements and tax credits for contributions) to better allow participants to get their message out to voters.²²

In addition to these more general political financing provisions, the CEA contains specific provisions directed at certain communications that aim to further level the playing field between political entities with respect to these communications. Again, the focus of these provisions is broadcasting, reflecting the specific concern of the time when they were drafted.²³

The CEA provides for a Broadcasting Arbitrator who is responsible for arbitrating decisions between broadcasters and parties concerning the booking of broadcasting time.²⁴ This ensures that those who own broadcasting outlets cannot provide favourable treatment to one or another party and thus suppress the messages of some or favour the messages of others.

The CEA also provides that it is an offence to charge a political party or candidate a rate for broadcasting or an advertisement in a periodical publication that exceeds the lowest amount charged for an equal amount of equivalent time or space.²⁵

Requirements on Communications to Promote Healthy Political Dialogue

Finally, the CEA also contains various provisions that restrict or prohibit communications that Parliament has determined to be problematic. The goal of these provisions is to improve democratic dialogue and facilitate the decision-making process for electors.

Notably, the CEA contains blackout provisions that state that new opinion polls and some election advertising are prohibited on polling day.²⁶ In the past, the CEA has contained other and lengthier blackouts, but over the years judicial decisions and amendments have reduced those provisions to the more narrowly focused blackouts of today.²⁷

The CEA also contains more targeted prohibitions on certain false communications relating to candidates or those associated with candidate or party campaigns.²⁸ There are also prohibitions on intentional attempts to mislead through impersonation of a political entity or election official.²⁹

Unsurprisingly, efforts to ban—as opposed to regulate or restrict—communications have attracted constitutional challenges, and governments have been required to articulate why particular communications are sufficiently problematic to warrant a ban. In *Thomson Newspapers Co. v. Canada*, where the court considered the constitutionality of the three-day opinion poll blackout then found in the CEA, it was argued that the poll ban was necessary to provide electors with a period of quiet repose to consider their voting options, and that the period allowed for an opportunity to respond to a misleading poll.³⁰

The Court found that the argument of a period of quiet repose had no merit. The Court suggested that Canadians are not in need of a ban on certain types of information to protect them from being distracted in their voting decision. However, the Court did find that the ability to respond to an “inaccurate” poll justified a blackout, but only on polling day itself, as candidates and parties would have time to respond to inaccurate polls that came out the day before polling day.³¹

When the constitutionality of the polling day advertising blackout was challenged in *Harper v. Canada*, the Court found that the infringement of freedom of expression caused was justified to promote the objective of an informed vote by giving an opportunity for misleading advertising to be “assessed, criticized and possibly corrected.”³² The Court also noted that blackouts may be justified by the objective of ensuring equality of information before voting in all parts of the country.³³

Challenges Related to the Political Communications Provisions

As the law related to political communications has grown and adapted to new realities over the decades, various challenges have arisen. The challenges dealt with below arise from several sources. In some cases, technological changes have made the application of the existing provisions difficult. In some cases, the specific wording that Parliament has used presents difficulties in the administration of, enforcement of, or compliance with the law. Often these difficulties have become apparent only over time and in some cases are related to the new technologies noted above. In considering the challenges, one should keep in mind the goals of the law and whether those goals are still being brought forward by the provision in question.

The Definition(s) of Advertising

The CEA includes specific requirements that apply to advertising and not to other communications. These requirements only apply during the election period, or, in the case of a fixed-date general election, during the pre-election period (from June 30 to the date of the writ).

There are three different definitions of advertising found in the CEA. The details of the different definitions vary somewhat, but essentially, they include “advertising messages” that promote or oppose a party or a candidate in a specified time frame.

Prior to Bill C-76, advertising conducted during the election period was the only activity of third parties that was regulated. Bill C-76 changed what is regulated and, in the case of a fixed-date general election, the period of regulation. Now, in addition to advertising, “partisan activities” (including many other forms of communication) of third parties are regulated during the election period.³⁴ In the pre-election period (i.e. between June 30 and the issue of the writ for a fixed-date general election), third parties’ “partisan activities” and some advertising are regulated. For parties and electoral district associations in the pre-election period, some advertising is regulated, while other communications are not. All regulated advertising messages attract the requirement for a tagline. The polling day blackout applies to advertising, but not to other communications.³⁵

In a previous era, the distinction between what was and was not “advertising” was clearer. However, in an era when mass communications can be produced by almost anyone at little to no cost, the distinction ceases to be as obvious.

In a previous era, the distinction between what was and was not “advertising” was clearer. However, in an era when mass communications can be produced by almost anyone at little to no cost, the distinction ceases to be as obvious.³⁶ For example, in the not-too-distant past, a video message endorsing a party could be sent out only as a television advertisement. Today, the same video can be hosted on a free video-sharing site such as YouTube and shared widely through social media and direct communications, but it may not be “advertising,” depending on the means by which it is shared. In the past, mass text messages were not a

common form of communication, but they have become increasingly so in recent elections. A social media influencer may, either for payment or for free, post material supporting a political entity to their followers. Whether such a post is “advertising” will not be immediately clear to the reader of the post.

In trying to clarify this matter and draw a clear line between what is and is not advertising, Elections Canada has produced two interpretation notes.

- In Interpretation Note 2015-11, *Application of Election Advertising Rules to Telephone Calls*, Elections Canada concluded that “telephone calls, whether live calls or robocalls, do not fall within the definition of ‘election advertising’ in ... the CEA regardless of their content or purpose.”³⁷
- In Interpretation Note 2015-04, *Election Advertising on the Internet*, Elections Canada addressed the question of when messages on the Internet are “advertising” for the purposes of the CEA. That note provides that it is only election messages that promote or oppose a party or candidate and have, or normally would have, a “placement cost” that constitute election advertising on the Internet.³⁸ The placement cost includes the cost to purchase advertising space or the cost to boost or promote a social media post. Notably, the interpretation confirmed that websites themselves are not “advertising” for the purposes of the CEA, nor are a plethora of unpaid communications such as emails or text messages, or messages and videos posted on Facebook, Twitter, YouTube or other social media sites.

The above interpretation notes provide a degree of clarity for regulated actors about which of their activities are regulated and how. However, while a framework can be developed and applied regarding what is “in” and what is “out” when it comes to advertising, there remains the issue of whether this is the right question to ask. The blurring of lines between something clearly delineated as “advertising” and other communications requires us to reflect on what Parliament was trying to achieve with its regulation of advertising.³⁹

In *Harper v. Canada*, the Supreme Court of Canada outlined the intertwined objectives of regulating “election advertising” of third parties:

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.⁴⁰

The regulation of advertising of third parties and other political participants attempts to do all of these things, but when one sees the distinctions outlined above, it is difficult to understand why the line of regulation is drawn where it is. Preventing those with greater means from dominating the discourse surely applies to the ability to purchase phone calls as much as it does radio ads. Ensuring an informed citizenry surely requires that they understand who paid for a mass text message in the same way as a billboard.

As noted, Bill C-76 expanded the scope of the third-party rules beyond simply advertising during the election period. “Partisan activities” (and certain election surveys) were added to the scope of the regulated activities of third parties. The definition of “partisan activity” is as follows:

an activity, including canvassing door-to-door, making telephone calls to electors and organizing rallies, that is carried out by a third party — a person or group other than a political party that is registered under an Act of a province — and that promotes or opposes a registered party or eligible party or the election of a potential candidate, nomination contestant, candidate 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. It does not include election advertising, partisan advertising or a fundraising activity.

This extended some, but not all, of the regulatory regime in the CEA to other forms of communications by third parties. For example, the requirement for taglines remains only on advertising.⁴¹

The complexity of the question of what is “advertising” for various purposes under the CEA should require us to ask why we care if a particular communication is advertising or not. To put it another way, are the goals of the CEA advanced by applying certain elements of regulation to “advertising” as opposed to all communication or a different subset of it such as all paid communication?

An additional issue that arises from the definition of advertising relates to the period of regulation. Although in the case of a fixed-date general election some regulation has been extended into the pre-election period commencing on June 30 of the election year, there remains a question of whether the rise of the “permanent campaign” suggests that some regulation should be present at all times to preserve the objectives of the law.⁴²

Questions to consider:

- ***Should a distinction between advertising and other communications be maintained? Or should all communications, or all paid communications, be subject to regulation (reporting, taglines and limits)?***
- ***Should regulation be limited to the election period and pre-election period?***
- ***Should regulation be instituted only when an entity has hit a certain threshold of spending? If yes, what should that threshold be?***

Issue Advertising

A further challenge arising from the definition of advertising is the scope of “issue advertising” that is regulated by the law. This is not a new question, but it frequently arose during the run-up to the 2019 general election, perhaps because the addition of the definition of partisan advertising (which specifically exempts issue advertising) highlighted the matter. If the scope of communications subject to regulation were to be expanded as discussed above, the same problem would apply to the expanded scope of regulated communications.

The existing definition of election advertising, relating to advertising during the election period, refers to promotion of, or opposition to, parties and candidates, “including by taking a position on an issue with which a registered party or candidate is associated.” The new definition of partisan advertising, added by Bill C-76 to apply to the pre-election period, refers in relevant part to promoting or opposing “otherwise than by taking a position on an issue with which any such party or person is associated.”

Issue ads have been included in the definition of election advertising since it was added to the CEA in 2000. The Royal Commission on Electoral Reform and Party Financing (the Lortie Commission), reporting in 1991, identified the importance of regulating advertisements on certain issues:

The 1988 election experience clearly demonstrated that advertisements promoting an issue but not explicitly exhorting voters to vote for a particular candidate or party could themselves be grossly unfair because they can constitute an endorsement of a particular party, if one party can be clearly distinguished from others on the basis of its stand on a central election issue.⁴³

There is no doubt that limits could be easily rendered meaningless if unlimited spending were allowed to promote an issue clearly associated with a particular party. A sign that says “Vote for the party that takes position X” can be clear in its meaning, even if it does not mention the particular party, if there is a sufficiently clear nexus between the position and the party.⁴⁴

However, while clear cases of issue advertising that promote a party or candidate can be identified, there remains a grey area that is frustrating to politically engaged third parties. Several third parties expressed concern in the period leading up to and after the 2019 general election that the definition of election advertising was too broad because of the inclusion of “issue advertising.”⁴⁵ It was argued that the uncertainty around what was an issue associated with a candidate or party created a chill on speech.⁴⁶

Elections Canada sought to provide clarification on the limited requirements on “issue based” communications in the CEA. The Chief Electoral Officer released a statement on August 20, 2019, emphasizing this point:

The only instance in which the Act covers the promotion of an issue, without mentioning a candidate or party, is when someone spends money on issue advertising during the election period. Also, in such cases, the issue must be clearly associated with a candidate or party. [...]

The rules in the Act on issue advertising that is clearly associated with a party do not cover other advocacy activities and communications, such as sending emails or text messages, having a website, canvassing door-to-door or giving media interviews.⁴⁷

The fact that the CEA regulates some issue advocacy does not mean such advocacy is banned. For most third parties, regulation would mean registration and reporting, not a curtailment of activities.

Ultimately, the question of whether an issue ad is so associated with a party or candidate that it promotes that party or candidate for the purposes of the CEA is a factual one. During the 2019 general election, Elections Canada stated that three essential elements in determining

the connection are the timing, content and context of an ad.⁴⁸ In many cases, the answer to whether an advertisement is regulated will be clear, but there will inevitably be cases where it is not.

What should be done? On the one hand, it remains clear that, as observed by the Lortie Commission, the CEA must remain open to regulate purely issue-based advertising if it is to effectively regulate the activities of third parties (and thus effectively regulate candidates and parties).⁴⁹ On the other hand, it would appear that, short of including a comprehensive list of regulated issues in law or another instrument, there will always remain a degree of uncertainty over whether a particular issue is captured.

Questions to consider:

- *Should the CEA cease to regulate issues-based communications and restrict its regulation to communications that specifically mention a party or candidate?*
- *Should elements indicating whether issue advertising promotes or opposes a party or candidate be included in the CEA? What would such elements be?*

Identifying the Communicator

The CEA has long required a tagline to identify the source of some communications. Prior to 2000, the CEA required a tagline identifying the agent of the party or candidate responsible on every “printed advertisement, handbill, placard, or poster” that promoted or opposed a party or candidate and was displayed during an election.⁵⁰ This requirement flowed from an even older requirement that such documents bear the name of the “printer or publisher” of the document.⁵¹

In 2000, the CEA was reorganized in part to make certain provisions, including the tagline requirement, applicable to all advertisements (and not just those enumerated, such as “placards”). Parties, candidates and third parties were required to include “on or in” an advertising message a statement that the ad was authorized by the appropriate agent.⁵² This extended the tagline requirement beyond printed materials to include broadcast and other advertising. But, again, this requirement does not apply to communications that do not meet the definition of advertising, such as telephone calls, texts, websites or unpaid (“organic”) content on social media.

As noted above, the CEA also contains specific requirements respecting information that must accompany the publication of election surveys such as opinion polls, including information about who sponsored the survey.

In 2013, Elections Canada released the report entitled, *Preventing Deceptive Communications with Electors*, in part in reaction to public concern related to well-publicized misleading telephone calls during the 2011 election.⁵³ Among the recommendations in that report were a call for greater transparency in who is making calls and the content of those calls, as well as increased reporting requirements.⁵⁴ In 2014, Parliament added provisions related to “voter contact calling” to the CEA.⁵⁵ As noted, political entities, third parties, groups and individuals calling electors during and about a federal election must register with the CRTC and must preserve information about the calls.

It should be noted, however, that the voter-contact calling provisions do not include the recommendation from Elections Canada that all calls start with the name of the sponsor and political affiliation; in this way, calls do not have a “tagline,” unlike advertising messages.⁵⁶ The provisions also do not apply to newer forms of communication, such as mass text messages.

As noted, certain online political advertisements during the pre-election and election periods are also now subject to additional transparency as a result of Bill C-76. The new provisions apply to websites or applications where partisan advertising or election advertising is displayed and that meet statutory thresholds for visitors or users in Canada. The website is responsible for maintaining a registry for political advertisements by keeping an electronic copy of the ad and the name of the person who authorized it. Each advertisement is to be kept in the registry for two years after the election. Following that period, platform operators or owners must keep the registry information related to that ad for an additional five years.⁵⁷ Although the goal of these provisions was clearly to provide added transparency, it is not clear that such a fragmented registry (across multiple websites and platforms) can fully achieve such transparency in practice.

Bill C-76 also increased the obligations on third parties related to taglines. Third-party advertisements must now include the name, telephone number and civic or Internet address of the third party and an indication that the third party has authorized the advertisement. Furthermore, third-party taglines must now be “clearly visible or otherwise accessible.”⁵⁸

Parliament is concerned with ensuring that Canadians understand who is providing them with political messages. To this end, Parliament has already amended the CEA to provide Canadians with more information about those responsible for communications. This concern has increased in recent years, with an increase in available information on those responsible for communications.

Overall, the above shows that Parliament is concerned with ensuring that Canadians understand who is providing them with political messages. To this end, Parliament has already amended the CEA to provide Canadians with more information about those responsible for communications. This concern has increased in recent years, with an increase in available information on those responsible for communications.

However, the regulation remains uneven. All advertisements must have a tagline, but the requirements vary between third parties on the one hand and candidates and parties on the other. Most phone calls during the election are registered with the CRTC and are subject to identification under that agency’s rules, but other, similar technology such as text messages and emails are not subject to similar regulation. While scripts of telephone calls are maintained, they are not made publicly available. The name of purchasers of online ads and copies of the ads must be maintained, but only by websites and platforms that meet the threshold. The onus of compliance is on the seller of such advertising space. Finally, only paid communications are targeted by the requirements noted in this section. In particular, organic media content on social media is not covered.

Questions to consider:

- *Which communications should be subject to a tagline or other identification requirement? During what period (election period or outside election period)?*
- *Should the tagline or identification requirement include certain specified information, such as the name of the agent, the address or the phone number? Or should it vary to take into account the size and technology of the message?*
- *Should electoral communications such as phone calls, text messages and advertisements be subject to record-keeping requirements? If yes, should the record keeping be with an agency such as Elections Canada, with the communications companies, or with political entities?*
- *Should the records be publicly available for inspection?*

Third-party Communications

Bill C-76 significantly expanded the scope of the third-party rules in the *Canada Elections Act*. Prior to the 2019 general election, only advertising by third parties during the election period was subject to regulation. Bill C-76 expanded that to include “partisan activities” as defined and certain election surveys. “Partisan activities” include methods of communication that do not fit within the definitions of advertising. Notably, partisan activities explicitly include telephone calls and canvassing door to door. Elections Canada reads the definition as including websites, text messages, emails and other forms of communication.⁵⁹ These changes sought to better achieve the goal of fairness by aligning third-party regulation more closely with that of parties and candidates.⁶⁰

However, transparency remains lacking with respect to third parties following the amendments of Bill C-76 when it comes to contributions.⁶¹ Whereas parties and candidates must record all funds that are used to purchase goods and services in relation to the election and such contributions are subject to limits, the same requirements do not apply to third parties. Third parties are required only to record contributions given to them for the purpose of purchasing goods and services for regulated activities.⁶² If money is used from the third party’s own funds, it is simply recorded as such. This has a certain logic, as a third party that is an ongoing entity may wish to use its own funds for election advertising. But it provides a gap in reporting, especially for third parties that rely on contributions. If contributions are made for “general purposes,” the details of the contributor do not need to be reported. This makes it more difficult for the public to see the link between third-party activities and who is ultimately paying for them.

It is also worth noting that in updating the provisions to add categories of regulation and to increase the spending ceiling, Parliament did not make any adjustments in the threshold for registration. That is, third parties are required to register and report once they have spent \$500 on regulated activities. This is the same threshold for regulation that existed when the law was first implemented in 2000. Unlike spending limits, which are tied to inflation, the threshold for registration is fixed.⁶³

Concerns were raised about two additional aspects of the scope of third-party regulation during the 2019 election.

First, whereas the definitions of advertising in the CEA contain a list of communications that are *not* advertising for the purposes of the definition, the definition of partisan activities contains no such list. Several groups in the 2019 election raised concerns that internal communications with their members or supporters—such as telephone calls or emails—may be subject to third-party regulations. Elections Canada is of the view that the definition of “partisan activities” should be read to include communications with members, especially since it explicitly includes “the making of telephone calls to electors.”⁶⁴

Second, concerns were raised about Elections Canada’s interpretation of the third-party rules with respect to its non-application to provincial governments. Some governments made clear early in the pre-election period that they intended to become involved in the election by spending provincial funds promoting or opposing certain parties. When asked about the applicability of the rules to provinces, Elections Canada reiterated the position it had taken when similar questions arose in the past: the third-party requirements in the CEA do not apply to provincial governments. Elections Canada remains of the view that if Parliament intended to restrict the advertising and other activities of provincial governments, it would have stated this explicitly in the CEA.⁶⁵

With respect to this last issue, Parliament did specifically exempt provincially registered political parties from the scope of regulation of third-party “partisan activities” and “election surveys,” although not “partisan advertising” or “election advertising.”

The issue of applying the third-party rules to provincial governments raises the question of their application to the federal government. At the present time, federal advertising and communications during the pre-election period and the election period are restricted by Treasury Board policy, which places a moratorium on such advertising unless the deputy head of a department has approved it.⁶⁶ A reasonable question is whether such a prohibition should be placed in law.

Questions to consider:

- ***Are the new categories of “advertising,” “activities” and “surveys” appropriate? Are they sufficient, or should third-party regulation more clearly apply to all activities that promote or oppose a party or candidate? Which third-party activities, if any, should be exempt from regulation?***
- ***Should third parties be required to fund regulated activities out of contributions subject to limits (as opposed to using general funds)? Should only individuals be allowed to contribute, as is the case for other regulated entities?***
- ***Should the threshold of \$500 in expenses, which triggers third party regulation, be changed?***
- ***Should communications with staff or members be exempted from regulation? How should “member” be defined?***

- *Should provincial governments be subject to regulation as third parties?*
- *Should limits on the federal government’s regulation for advertising or communications during an election be placed in law?*

Fairness in the Sale of Communications

The CEA contains provisions that seek to ensure fairness and equity in the sale of advertising space or time in media. These provisions are almost exclusively in the area of broadcasting. Again, these provisions are remnants of the initial focus on broadcasting of the current law. The concern of Parliament of that era was to ensure that the overwhelming costs of broadcasting did not skew the electoral landscape in an unfair way. Parliament recognized that this could happen with respect to costs, but that it could also happen because there were a limited number of broadcasters. Parliament sought to ensure that in performing their gatekeeping function, broadcasters allowed equal access on equal terms to all political parties.

The broadcasting provisions of the CEA state that all broadcasters are to make available 6.5 hours of prime-time advertising space for registered parties during the election period. All networks are required to provide free advertising time (not in prime time) to registered parties. The allocation of time is presided over by a Broadcasting Arbitrator who is also responsible for arbitrating disputes between parties and broadcasters over the application of the rules in particular cases.⁶⁷

The CEA seeks to ensure fair and equitable access for all regulated parties to get their message out during an election period. What needs consideration is whether restricting such a goal to limited types of media makes sense as we enter the third decade of the 21st century.

There are numerous problems with the current broadcasting provisions. These have been identified in reports of the Chief Electoral Officer, including that from 2016.⁶⁸ Generally, the difficulty with the provisions is that they contain a high level of complexity and are overly prescriptive when considering the decreasing substantive benefits they deliver. Notably, the reliance of the provisions on the distribution of time by “broadcasters” and “networks,” as those terms are defined in law, has weakened the provisions on their own terms, as broadcasters and networks take up an ever smaller portion of the television landscape.⁶⁹ The reports set out recommendations to make the current provisions better reflect technological changes that have occurred since the 1980s in the world of television. The concerns raised in these reports remain important, because broadcast advertising is still the most significant proportion of spending by parties in an election campaign.⁷⁰ However, it goes without saying that the technology of television continues to evolve and has changed significantly since those reports were published.

In addition to ensuring an adequate supply of broadcasting time, the CEA contains a provision ensuring that broadcasting and periodical advertisements are made available at the lowest amount charged for an equivalent advertisement.⁷¹ This provision is intended to ensure fairness so that all parties are charged the same amount, costs are kept down and the ability of political actors to get their message to Canadians is not impeded by unduly high prices.⁷²

As with the provisions reviewed above, the goals being pursued remain valid. The CEA seeks to ensure fair and equitable access for all regulated parties to get their message out during an election period. What needs consideration is whether restricting such a goal to limited types of media makes sense as we enter the third decade of the 21st century.

Questions to consider:

- ***Should the paid broadcasting provisions be maintained? If yes, should they be expanded (for example, beyond traditional broadcasters)?***
- ***Should the free broadcasting provisions be maintained? If yes, should they be expanded (for example, beyond “networks” or traditional broadcasters)?***
- ***Should the position of Broadcasting Arbitrator be maintained? Should a similar position be created with authority over social media or other types of paid communications?***
- ***Should the provision in s. 348 of the CEA, ensuring equitable and fair-priced advertisements on broadcast media and in print media, be expanded to all forms of media? If yes, please expand upon what such a provision might look like.***
- ***Should a provision relating to fair and equitable access be expanded to unpaid access to communications, such as Internet search engines? If yes, please expand upon what such a provision might look like.***

False Statements and Prohibited Communications

As noted above, the blackout provisions in the law have been reduced over the years so that there remains only a partial ban on advertising on polling day and a ban on new opinion polls on polling day. The advertising ban causes some confusion with respect to its scope, as it does not apply to all advertising (e.g., signs and pamphlets are exempted), and because of particularities of the definition of advertising (e.g., it does not include telephone calls). This confusion leads to frequent complaints on polling day that the law is being violated, when in fact it is not.

During an election period, there are also frequent calls for the Chief Electoral Officer or the Commissioner of Canada Elections to do something to stop false statements seen in the media and in various communications by electoral participants. It is clearly a dangerous situation to have any regulatory body police “truth” in political advertising or communications, especially during an election period. What is perceived as truthful, or sufficiently truthful, frequently varies with the political perspective of the complainant. It is sometimes suggested that the fact that some untruthful statements are not subject to legal sanction could threaten the perception of the integrity of the election. However, it should also be kept in mind that putting a non-partisan election administrator in the middle of deciding such battles in the heightened partisan atmosphere of an election campaign risks raising challenges to their evenhandedness, thus also potentially threatening the perception of the election’s integrity. Although one of the goals of the CEA is an informed electorate, having a government body—even an impartial and independent one—play a role in deciding which information should be heard and which information should be proscribed raises deep constitutional concerns.

That said, the CEA does include a number of provisions that prohibit certain false statements during the election period. Section 91 prohibits false statements about candidates, leaders or others associated with a party or campaign that relate to specified matters such as a criminal record, the existence of an investigation, a person’s citizenship, education, or their professional qualifications. To constitute an offence under this provision, the prohibited statement must be false and made with the intent to affect the result of the election.⁷³ The CEA does not prohibit false statements about a political opponent that go beyond the specific confines of this provision.

Sections 480.1 and 481 prohibit impersonating election officials or persons associated with a party or candidate by representation or in published material. Section 282.8(b) prohibits any person from influencing or attempting to influence a person’s vote “by any pretence or contrivance.”

Questions to consider:

- ***Should the opinion poll and advertising blackouts on polling day be maintained?***
- ***Should any changes be made to the existing prohibitions in the CEA regarding certain false communications?***
- ***Should the CEA contain additional content requirements? If yes, how and when should these be enforced?***

Endnotes

¹ Canada, *Report*, Committee on Election Expenses, Ottawa, 1966. *Election Expenses Act*, S.C. 1973-74, c. 51.

² W.T. Stanbury, *Money in Politics: Financing Federal Parties and Candidates in Canada* (Toronto: Dundurn, 1991), at 27–39. F. Leslie Seidle, “The Election Expenses Act, the House of Commons and the Parties,” in J.C. Courtney, ed., *The Canadian House of Commons: Essays in Honour of Norman Ward* (Calgary: University of Calgary Press, 1985), at 113.

³ *Canada Elections Act*, S.C. 2000, c. 9 (hereinafter “CEA”). See, generally, part 16.

⁴ *Elections Modernization Act*, S.C. 2018, c. 31. A “pre-election” period of a fixed-date general election was defined in ss. 2(1), which was then applied to certain activities of political entities, notably those of third parties.

⁵ See L. Young, “Toward Transparency: An Evaluation of Disclosure Arrangements in Canadian Political Finance,” in F. Leslie Seidle, ed., *Issues in Party and Election Finance in Canada* (Toronto: Dundurn, 1991), at 3. See also L. Turnbull, “Transparent and Level: Modernizing Political Financing in Canada” (Ottawa: Public Policy Forum, 2018), at 5.

⁶ *Harper v. Canada* 2004 SCC 33 at paras 23 and 91.

⁷ CEA, *infra*, s. 320 and 429.3.

⁸ CEA, *infra*, s. 349.5 and 352.

⁹ These requirements were added to the Act by S.C. 2014, c. 12.

¹⁰ CEA, *infra*, s. 325.1 and 325.2.

¹¹ CEA, *infra*, ss. 432(2), 475.4(2), 476.75(2), 477.59(2) and 478.8(2).

¹² CEA, *infra*, ss. 359(4).

¹³ CEA, *infra*, s. 326.

¹⁴ See ss. 476.75 (nomination contestants), 477.59 (candidates), 478.8 (leadership contestants) and 359 (third parties). While these entities are required to provide a detailed report of expenses and documents supporting those expenses, registered parties and registered electoral district associations are not required by law to provide similar details or documents.

¹⁵ CEA, *infra*, ss. 326(1) and (2).

¹⁶ CEA, *infra*, ss. 326(3).

¹⁷ CEA, *infra*, s. 327.

¹⁸ CEA, *infra*, para. 325.1(3)(a).

¹⁹ The ease of reference is limited by the fact that each platform creates and maintains its own registry.

²⁰ CEA, *infra*, part 16.1.

²¹ *Libman v. Quebec* [1997] 3 SCR 569 and *Harper, infra*, at para. 63. These cases reflected the Supreme Court’s acceptance that limits on spending during an election, while a limitation on freedom

of expression, may be justified under section 1 of the *Charter of Rights and Freedoms*. For a critical appraisal of the fairness objective, see L. Sirota, “‘Third Parties’ and Democracy 2.0” in (2016) 60 McGill L.J. 253.

²² Spending limits are found at CEA, *infra*, ss. 429.1 and 430 (parties), 477.5 (candidates), and 349.1 and 350 (third parties). Election expenses reimbursement provisions are found at s. 444 (parties) and 477.73 and 477.74 (candidates). The income tax reimbursement is found at *Income Tax Act*, R.S.C. 1985, 5th supp., c. 1, ss. 127(3).

²³ See, esp., CEA, *infra*, s. 335 and 345.

²⁴ CEA, *infra*, s. 332.

²⁵ CEA, *infra*, s. 348.

²⁶ CEA, *infra*, s. 323, 324 and 328.

²⁷ It should be noted that the increasing trend towards advance voting (making up 26% of all ballots cast at the 2019 general election) also raises questions about the continuing relevance of polling day blackouts. See Chief Electoral Officer, *Report on the 43rd General Election of October 21, 2019* (February 11, 2020), at s. 3.2.

²⁸ Section 91 is presently subject to a constitutional challenge in *Canadian Constitution Foundation v. Canada (Attorney General)*, Ontario Superior Court file number CV-1900-6273800000.

²⁹ CEA, *infra*, s. 480.1 and 481.

³⁰ *Thomson Newspapers Co. v. Canada* [1998] 1 SCR 877, at paras 96–99.

³¹ *Ibid.*, at paras 100–109.

³² *Harper v. Canada, infra*, at para. 133

³³ *Harper v. Canada, infra*, at para. 133. The objective of information equality as a reason to limit communications was also relied on by the Supreme Court in *R. v. Bryan* 2007 SCC 12, in upholding the (now repealed) blackout on disseminating results from parts of the country in other places where the polls had not yet closed.

³⁴ CEA, *infra*, s. 349 “partisan activity.” Some election surveys conducted by third parties are also regulated, but only those surveys conducted in service of regulated advertising or partisan activities (see s. 349 “election survey”).

³⁵ See CEA, *infra*, ss. 323 and 324.

³⁶ For more details on this issue, see Political Communications in the Digital Age, Discussion Paper 2: *The Impact of Social Media Platforms in Elections*, Elections Canada, May 2020.

³⁷ A technical update to take into account the new concept of “partisan advertising” was issued on December 31, 2019 (Interpretation Note 2019-11). <https://www.elections.ca/content.aspx?section=res&dir=gui/app/2019-11&document=index&lang=e> Although only formally issued in January 2016, the initial interpretation note was applied during the 2015 general election.

³⁸ <https://www.elections.ca/content.aspx?section=res&dir=gui/app/2015-04&document=index&lang=e>.

³⁹ M. Pal, *Social Media and Democracy: Challenges for Election Law and Administration in Canada* (2020) 19 Elect. L. J. 1.

⁴⁰ *Harper v. Canada, infra*, at para. 23.

⁴¹ The changes had the effect of bringing the third-party provisions closer to the scope of regulation applicable to the expenses of registered parties and candidates.

⁴² For a discussion of the “permanent campaign” and its challenges to the goals of the CEA, see M. Pal. “Is the Permanent Campaign the End of the Egalitarian Model for Elections” in R. Albert, P. Daly and V. MacDonnell eds., *The Canadian Constitution in Transition* (Toronto: University of Toronto Press, 2018).

⁴³ Royal Commission on Electoral Reform and Party Financing, Ottawa, 1991. *Reforming Electoral Democracy*, vol. 1, pp. 337–338.

⁴⁴ See M. Pal, “*B.C. Freedom of Information and Privacy Assn. v. British Columbia (Attorney General): Mandatory Registration Rules, and Limits on Third Party Political Expression under the Charter*” (2019) 88 S.C.L.R. (2d) 249 at 255–256.

⁴⁵ For example, “Environmental Groups Were Warned that Some Climate Change Ads Could Be Seen as Partisan During Election Period,” August 19, 2019, cbc.ca, available at <https://www.cbc.ca/news/politics/environment-groups-warned-climate-change-real-partisan-1.5251763>.

⁴⁶ The “chill” may have come not from the rules in the CEA but from the fear that a requirement to register under the CEA may have an impact on the charitable tax status of certain organizations under Canada Revenue Agency rules; <https://bccla.org/survey-regarding-organizations-freedom-of-expression-during-canadas-43rd-general-election/>

⁴⁷ “CEO Statement Regarding Third Party Requirements on Advertising,” August 20, 2019, available at <http://ispdevwww.elections.ca/content.aspx?section=res&dir=cons/dis/dis3&document=index&lang=e&lang=e>.

⁴⁸ See “What is issue advertising?” in *New Requirements for Third Parties: Corporations, Unions, Groups and Individuals*, available at <https://www.elections.ca/content.aspx?section=pol&dir=thi&document=backgrounder&lang=e>.

⁴⁹ M. Pal, *infra*, note 43, at 255–256.

⁵⁰ See CEA, R.S.C. 1985, c. E-2, s. 261.

⁵¹ See CEA, R.S.C. 1970, 1st supp., c. 14, s. 72.

⁵² CEA, *infra*, s. 320.

⁵³ <https://www.elections.ca/content.aspx?section=res&dir=rep/off/comm&document=index&lang=e>.

⁵⁴ Recommendations Report at *ibid.*, pp. 33–34.

⁵⁵ CEA, *infra*, part 16.1.

⁵⁶ That said, the CRTC *Unsolicited Telecommunications Rules* (made under Telecom Decision 2007-48) provide some obligations for certain callers to identify themselves.

⁵⁷ See CEA, *infra*, ss. 325.1 and 325.2.

⁵⁸ CEA, *infra*, ss. 349.5 and 352.

⁵⁹ *Political Financing Handbook for Third Parties, Financial Agents and Auditors*, August 2019, at <https://www.elections.ca/content.aspx?section=pol&document=index&dir=thi/ec20227&lang=e>.

⁶⁰ Party and candidate “election expenses” as defined in s. 376 of the CEA are limited during an election period. This includes any expenses incurred to promote the party or candidate. Prior to Bill C-76, only “election advertising” expenses of third parties were regulated. The addition of “partisan activities” and “election surveys” to the scope of regulation brought the regulated activities of third parties more in line with those of parties and candidates.

⁶¹ See Turnbull, *infra*, note 5, at 6–7.

⁶² See, e.g., CEA, *infra*, s. 359(4).

⁶³ If the inflation adjustment factor that has been applied to spending limits since 2000 had been applied to the threshold, the threshold for the 2019 general election would have been \$731.

⁶⁴ It should also be noted that some groups clearly read “member” to include “supporter” or “social media follower.” Elections Canada reads the definition of “member” in the definitions of “advertising” in a narrower way, in line with the legal definition of membership.

⁶⁵ For a discussion of the issue of federal laws binding the provincial Crown, see P. Hogg, *Constitutional Law of Canada*, vol. 1 (loose-leaf), pp. 10–22.

⁶⁶ See Treasury Board Secretariat, *Directive on the Management of Communications*, ss. 6.44 and 6.45, at <https://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=30682>.

⁶⁷ The constitutionality of the broadcasting provisions was judicially considered in *Canada v. Reform Party of Canada* 1995 ABCA 107.

⁶⁸ See Chief Electoral Officer, *An Electoral Framework for the 21st Century: Recommendations from the Chief Electoral Officer of Canada following the 42nd General Election* (2016), Recommendation A39; Chief Electoral Officer, *Modernizing the Electoral Process: Recommendations from the Chief Electoral Officer of Canada following the 37th General Election* (2001), part 4; and Chief Electoral Officer, *Completing the Cycle of Electoral Reforms: Recommendations from the Chief Electoral Officer of Canada on the 38th General Election* (2005), chapter 3. See also the report of the Broadcasting Arbitrator in Chief Electoral Officer, *Report of the Chief Electoral Officer of Canada on the 36th General Election* (1997), p. 87. All available at elections.ca under “Resource Centre – Reports”.

⁶⁹ This is not only because television is increasingly available over streaming services, but also because very few stations meet the definition of network anymore. For example, on English television, only the CBC must provide free time.

⁷⁰ For example, for the 2015 general election, the Conservative Party of Canada reported spending 31.4% of its election expenses on “Advertising: Radio/TV,” while the Liberal Party of Canada reported spending 34.4% on the same. See returns at elections.ca under “Political Financing – View Financial Returns”.

⁷¹ CEA, *infra*, s. 348.

⁷² See Pal, *infra* note 38, at 10.

⁷³ See CEA, *infra*, s. 91.