



## Written Opinions, Guidelines and Interpretation Notes

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

### Interpretation Note: 2015-11 – Draft (August 2015)

## *Application of election advertising rules to telephone calls*

### Issue

Whether the election advertising rules in the Canada Elections Act (“CEA”) apply to live voice calls (“live calls”) and calls made using an automatic dialing-announcing device (“ADAD” or “robocalls”).

### Interpretation

Telephone calls, whether live calls or robocalls, do not fall within the definition of “election advertising” in section 319 of the CEA regardless of their content or purpose.

#### **Practical implications for registered parties, candidates and third parties**

- (1) Telephone calls are not subject to any of the election advertising rules found in the CEA, such as the requirement for an authorization statement on election advertising, the prohibition on election day advertising, or the rules governing third party spending on election advertising.
- (2) However, while not considered advertising, telephone calls are included in the definition of “voter contact calling services” and are subject to Part 16.1 of the CEA.
- (3) Telephone calls may also be subject to the Unsolicited Telecommunications Rules of the Canadian Radio-television and Telecommunications Commission (“CRTC”).
- (4) Registered parties and candidates should keep in mind that expenses incurred to make telephone calls during an election still qualify as election expenses that must be accounted for and reported.

## Legal Framework

The definition of election advertising in section 319 of the CEA is key to understanding whether telephone calls are subject to the election advertising rules.

<p><b>319.</b> ... “election advertising” means the transmission to the public by any means during an election period of an advertising message that promotes or opposes a registered party or the election of a candidate, including one that takes a position on an issue with which a registered party or candidate is associated. For greater certainty, it does not include</p> <p>(a) the transmission to the public of an editorial, a debate, a speech, an interview, a column, a letter, a commentary or news;</p> <p>(b) the distribution of a book, or the promotion of the sale of a book, for no less than its commercial value, if the book was planned to be made available to the public regardless of whether there was to be an election;</p> <p>(c) the transmission of a document directly by a person or a group to their members, employees or shareholders, as the case may be;</p> <p>(d) the transmission by an individual, on a non-commercial basis on what is commonly known as the Internet, of his or her personal political views; or</p> <p>(e) the making of telephone calls to electors only to encourage them to vote.</p>	<p><b>319.</b> ... « publicité électorale » Diffusion, sur un support quelconque au cours de la période électorale, d’un message publicitaire favorisant ou contrecarrant un parti enregistré ou l’élection d’un candidat, notamment par une prise de position sur une question à laquelle est associé un parti enregistré ou un candidat. Il est entendu que ne sont pas considérés comme de la publicité électorale :</p> <p>a) la diffusion d’éditoriaux, de débats, de discours, de nouvelles, d’entrevues, de chroniques, de commentaires ou de lettres;</p> <p>b) la promotion ou la distribution, pour une valeur non inférieure à sa valeur commerciale, d’un ouvrage dont la mise en vente avait été planifiée sans égard à la tenue de l’élection;</p> <p>c) l’envoi d’un document par une personne ou un groupe directement à ses membres, ses actionnaires ou ses employés;</p> <p>d) la diffusion par un individu, sur une base non commerciale, de ses opinions politiques sur le réseau communément appelé Internet;</p> <p>e) les appels téléphoniques destinés uniquement à inciter les électeurs à voter.</p>
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Other relevant provisions of the CEA are sections 320 and 352, which require an authorization statement in or on election advertising (a tagline), as well as sections 323 and 324, which set an advertising blackout on election day and provide exceptions.

<p><b>320.</b> A candidate or registered party, or a person acting on their behalf, who causes</p>	<p><b>320.</b> Le candidat ou le parti enregistré, ou toute personne agissant en leur nom, qui</p>
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<p>election advertising to be conducted shall mention in or on the message that its transmission was authorized by the official agent of the candidate or by the registered agent of the party, as the case may be.</p>	<p>font faire de la publicité électorale doivent indiquer dans la publicité que sa diffusion est autorisée par l'agent officiel du candidat ou par l'agent enregistré du parti, selon le cas.</p>
<p><b>323.</b> (1) No person shall knowingly transmit election advertising to the public in an electoral district on polling day before the close of all of the polling stations in the electoral district.</p> <p>(2) The transmission to the public of a notice of an event that the leader of a registered party intends to attend or an invitation to meet or hear the leader of a registered party is not election advertising for the purpose of subsection (1).</p> <p>(3) For the purpose of subsection (1), a person includes a registered party and a group within the meaning of Part 17.</p>	<p><b>323.</b> (1) Il est interdit à toute personne de sciemment diffuser de la publicité électorale dans une circonscription le jour du scrutin, avant la fermeture de tous les bureaux de scrutin de celle-ci.</p> <p>(2) Pour l'application du paragraphe (1), la diffusion d'un avis d'événement auquel le chef d'un parti enregistré a l'intention de participer ou une invitation à rencontrer ou à entendre le chef d'un parti enregistré ne constituent pas de la publicité électorale.</p> <p>(3) Pour l'application du paragraphe (1), sont assimilés à des personnes les partis enregistrés et les groupes au sens de la partie 17.</p>
<p><b>324.</b> Subsection 323(1) does not apply in respect of</p> <p>(a) the transmission of a message that was transmitted to the public on what is commonly known as the Internet before the blackout period described in that subsection and that was not changed during that period; or</p> <p>(b) the distribution during that period of pamphlets or the posting of messages on signs, posters or banners.</p>	<p><b>324.</b> Le paragraphe 323(1) ne s'applique pas à :</p> <p>a) la publicité électorale diffusée sur le réseau communément appelé Internet avant le début de la période d'interdiction prévue à ce paragraphe et non modifiée durant celle-ci;</p> <p>b) la distribution de tracts et l'inscription de messages sur des panneaux-réclames, des affiches ou des bannières durant cette période.</p>
<p><b>352.</b> A third party shall identify itself in any election advertising placed by it and indicate that it has authorized the advertising.</p>	<p><b>352.</b> Les tiers doivent mentionner leur nom dans toute publicité électorale et signaler le fait que celle-ci a été autorisée par eux.</p>

## Background

### Legislative history

#### **Before 1993**

There was no definition of election advertising in the CEA before 1993. However, the CEA did include both a tagline provision and an advertising blackout provision.

The requirement for candidates and registered parties,<sup>1</sup> or those acting on their behalf, to include an authorization statement applied only to a “printed advertisement, handbill, placard or poster that promotes or opposes the election of a registered political party or candidate and that is displayed or distributed during an election”. The blackout on the transmission of election advertising covered a much longer period than today – from the issue of the writ until the 29th day before election day, the day before election day, and election day itself – but its application was limited to advertising “on the facilities of any broadcasting undertaking”, “in a periodical publication” or “in a government publication”.

Telephone calls were clearly not subject to either the tagline or advertising blackout provisions.

#### **1993**

The definition of “advertising” was added to the CEA in 1993.

“advertising” means any notice, article or illustration, which may include pictures or text published or shown in any media, including electronic media and periodical publications and includes notices, articles, illustrations, newspapers and like publications designed for mass distribution but does not include

(a) publishing or broadcasting editorials, news, interviews, columns, letters or commentaries in a periodical publication, radio or television program, or

(b) producing, promoting or distributing a book for no less than its commercial value, if the book was planned to be sold regardless of the election.

“publicité” Avis, article ou illustration qui peuvent inclure des illustrations ou un texte publiés ou montrés dans un media, notamment un média électronique et une publication périodique, et les avis, les articles, les illustrations, les journaux ainsi que toute autre publication semblable produite pour les envois collectifs; la présente définition ne vise toutefois pas :

a) la publication ou la diffusion d’éditoriaux, de nouvelles, d’entrevues, de chroniques, de commentaires ou de lettres dans une publication périodique ou une émission de radio ou de télévision;

b) la production, la promotion ou la distribution, pour une valeur non inférieure à sa valeur commerciale, d’un ouvrage dont la mise en vente a été planifiée sans égard à la tenue de l’élection.

<sup>1</sup> There was no mention of third parties because they could not incur election advertising expenses at the time.

While the first blackout provision remained essentially the same, another was added to make the prohibition apply to “any person”. The tagline requirement for material displayed or distributed by or on behalf of candidates or registered parties also remained the same. However, a new offence was added for “any person” “who sponsors or conducts advertising without identifying the name of the sponsor and indicating that it was authorized by that sponsor”. This imposed another tagline requirement with a broader application: it would cover any form of advertising as defined in the CEA and would apply to third parties.

Although the tagline and blackout provisions were broadened in 1993, none applied to telephone calls, which were clearly not included in the new definition of advertising.

**2000**

The definition of advertising was replaced with a new definition of “election advertising” in 2000. There was still no mention of “telephones” or “calls” in that definition (or anywhere else in the CEA). But by defining election advertising in broader terms as the “transmission to the public by any means during an election period of an advertising message ...”, there came the potential for including some types of telephone calls in this definition.

Just as the definition of election advertising had expanded, so did the first example of what does not constitute election advertising (i.e. an editorial, a debate, a speech, an interview, a column, a letter, a commentary or news). It was broadened by removing the reference to publishing and broadcasting these communications “in a periodical publication, radio or television program”. Two new elements were also added to the list of things that, “for greater certainty”, were not election advertising: “the transmission of a document directly by a person or a group to their members ...” and “the transmission by an individual, on a non-commercial basis on what is commonly known as the Internet, of his or personal political views”.

**2014**

Finally, Bill C-23 (S.C. 2014, c. 12) added paragraph (e) to the definition of “election advertising”. It clarified, “for greater certainty”, that election advertising did not include “the making of telephone calls to electors only to encourage them to vote”. Bill C-23 also added Part 16.1 to the CEA, creating a set of provisions to address the issue of “voter contact calling services”. This was the first time Parliament had dealt expressly with the regulation of telephone calls in the CEA, and it did so by introducing specific rules that applied only to telephone calls.<sup>2</sup>

Voter contact calling services are defined in section 348.01 of the CEA as follows:

<p>“voter contact calling services” means services involving the making of calls during an election period for any purpose related to</p>	<p>« services d’appels aux électeurs » Services d’appels faits, pendant une période électorale, à toute fin liée aux élections,</p>
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<sup>2</sup> Section 348.01 defines “calls” to include “any of the following types of calls that are made to telephone numbers: (a) live voice calls; (b) calls made by means of an automatic dialing-announcing device; (c) calls that consist of a combination of the types of calls referred to in paragraphs (a) and (b).”

<p>an election, including</p> <p>(a) promoting or opposing a registered party, its leader, a candidate or a nomination contestant or any position on an issue with which such a party or person is associated;</p> <p>(b) encouraging electors to vote or to refrain from voting;</p> <p>(c) providing information about the election, including information about voting hours and the location of polling stations;</p> <p>(d) gathering information about how electors voted in past elections or will vote in the election or their views on a registered party, its leader, a candidate or a nomination contestant or any issue with which such a party or person is associated; and</p> <p>(e) raising funds for a registered party, a registered association, a candidate or a nomination contestant.</p>	<p>notamment :</p> <p>a) mettre en valeur un parti enregistré, son chef, un candidat, un candidat à l'investiture ou un enjeu auquel l'un d'eux est associé, ou s'y opposer;</p> <p>b) encourager les électeurs à voter ou les dissuader de le faire;</p> <p>c) fournir de l'information concernant les élections, notamment les heures de vote et l'emplacement des bureaux de scrutin;</p> <p>d) recueillir de l'information concernant les habitudes et les intentions de vote des électeurs ou leurs opinions sur un parti enregistré, son chef, un candidat ou un candidat à l'investiture ou concernant un enjeu auquel l'un d'eux est associé;</p> <p>e) recueillir des fonds pour un parti enregistré, une association enregistrée, un candidat ou un candidat à l'investiture.</p>
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Under Part 16.1, there are detailed rules for how long scripts and recordings used in voter contact calling must be maintained and by whom. Persons or groups who engage in voter contact calling, as well as the calling service providers with whom they enter into agreements, are now required to register with the CRTC no later than 48 hours after making the first call. These new rules on voter contact calling services are administered by the CRTC, and enforced by the CRTC and the Commissioner of Canada Elections.

## Considerations

### Previous interpretation of the rules by Elections Canada

Elections Canada's position on telephone calls, expressed in communications with election stakeholders and in official reports, has not always been consistent. In 2000, in his report on the 37th general election, the former Chief Electoral Officer laid out his interpretation of election advertising and how it could be applied in the context of the Internet. He noted that an "advertising message" was:

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.<sup>3</sup>

Although not intended to address the issue of telephone calls as advertising, this statement implied that calls, if they met the other elements of the definition, could be election advertising.

Then, in 2006, the report on the 39th general election referred to Elections Canada's latest consideration of how the advertising blackout applied to communications on election day. It concluded that the prohibition "does not extend to messages, whether live or automated, **that are sent to a specific telephone** or e-mail address".<sup>4</sup> Elections Canada adopted this position after considering information from the former Commissioner of Canada Elections on a number of complaints about telephone calls. It was posted on the Elections Canada website at the time and has continued to be Elections Canada's official position when responding to questions from election stakeholders, including in the 2011 general election.

Nevertheless, Elections Canada has also in the past advised election stakeholders that the tagline requirement applies to telephone calls and that such calls, whether live calls or robocalls, require an authorization statement.

### **Role of the CRTC in regulating unsolicited telephone calls**

Although rules for telephone calls are new to the CEA, the CRTC has long had the authority, in the *Telecommunications Act*,<sup>5</sup> to regulate unsolicited telecommunications, including telemarketing. In the CRTC's Unsolicited Telecommunications Rules, telemarketing is defined as "the use of telecommunications facilities to make unsolicited telecommunications for the purpose of solicitation".<sup>6</sup> This includes, for example, live calls made by political parties and candidates to solicit campaign donations. It does not include live calls to learn about voter preferences or to conduct other types of surveys. The rules also regulate all calls made using an ADAD (i.e. robocalls).<sup>7</sup> For example, there are rules regarding the identification information that must be communicated at the beginning of the call, contact information for where the entity making the call can be reached, as well as limits on the hours when calls may be placed.

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

<sup>4</sup> Elections Canada, *Report of the Chief Electoral Officer of Canada on the 39th General Election of January 23, 2006* (Ottawa: 2006), 98. Emphasis added.

<sup>5</sup> S.C. 1993, c. 38, s. 41: "The Commission may, by order, prohibit or regulate the use by any person of the telecommunications facilities of a Canadian carrier for the provision of unsolicited telecommunications to the extent that the Commission considers it necessary to prevent undue inconvenience or nuisance, giving due regard to freedom of expression."

<sup>6</sup> See [www.crtc.gc.ca/eng/trules-reglest.htm](http://www.crtc.gc.ca/eng/trules-reglest.htm). Solicitation is defined as follows in the rules: "the selling or promoting of a product or service, or the soliciting of money or money's worth, whether directly or indirectly and whether on behalf of another person".

<sup>7</sup> The rules clearly state that political entities are not allowed to use an ADAD for solicitation, unless the person called has expressly agreed to receive that specific political entity's ADAD solicitation calls.

The CRTC is also responsible for creating the National Do Not Call List (DNCL).<sup>8</sup> However, the DNCL Rules do not apply to calls made by or on behalf of “exempt political entities”.<sup>9</sup> Nonetheless, as stated above, such entities are still subject to the remainder of the Unsolicited Telecommunications Rules and they are required to identify, at the beginning of the telecommunication, “the purpose of the telecommunication and the person or organization on whose behalf the telecommunication is made”, as well as to maintain their own internal do not call list.<sup>10</sup>

Finally, as part of the rules for voter contact calling services, the CRTC establishes and maintains a voter contact registry for federal elections. The following individuals or groups must file registration notices with the CRTC:

- anyone using an ADAD to contact voters during a federal election for any purpose related to an election
- anyone using a calling service provider to contact voters during a federal election for any purpose related to an election, whether by means of live calls or ADADs (both the client and the calling service provider must register)
- a corporation or group (but not a candidate, nomination contestant, registered political party, registered electoral district association, or individual) that uses their own internal services to make live calls to voters during a federal election for any purpose related to an election

The *Telecommunications Act* sets out administrative monetary penalties for individuals or corporations that contravene the Unsolicited Telecommunications Rules or the CEA’s voter contact calling services rules.<sup>11</sup>

## Analysis and Discussion

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

First, the list of communications that are specifically **not** election advertising are presented as illustrations of what the definition already “does not include”, rather than as exceptions to what would otherwise be caught by the definition. They are therefore useful to shed light on what is meant (or not meant) by the definition. This also means that the list is non-exhaustive: something that does not fit squarely in one of the paragraphs may still escape the definition.

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<sup>8</sup> The DNCL is a list of telephone numbers of consumers who want to reduce the number of telemarketing calls they receive. Organizations that make such calls are not allowed to call phone numbers registered on the DNCL.

<sup>9</sup> Exempt political entities would include registered political parties, electoral district associations, candidates, nomination contestants and leadership contestants.

<sup>10</sup> *Telecommunications Act*, s. 41.7(3), (4).

<sup>11</sup> Penalties may be up to \$1,500 (per day) for an individual and up to \$15,000 (per day) for a corporation (ss. 72.01–72.13).



Second, while the definition of what **is** election advertising uses the message's content as a key qualifier, the illustrations of what **is not** election advertising are mostly content neutral. This shows that content alone – that is, the existence of a promotional message – is an insufficient determinant of election advertising. Paragraph (e), which was added by Bill C-23, is the only exception: it refers to the object of the communication. The paragraph states that “the making of telephone calls to electors only to encourage them to vote” is not election advertising, which may be read to suggest that at least some other types of calls could be election advertising.

However, as stated above, paragraphs (a) to (e) are simply intended to provide, “for greater certainty”, examples of what is not caught by the definition. Therefore, paragraph (e) only provides one more example of what is clearly not captured by the definition of election advertising. As such, it should not be read in such a way as to broaden the scope of the definition of election advertising beyond what was originally intended by Parliament.

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

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

Two of the elements cannot help to explain the larger meaning of election advertising. Determining whether a particular message promotes or opposes a candidate or party, or an issue with which they are associated, is largely a fact-based exercise that must be done case by case. Meanwhile, “election period” is clearly defined in the CEA and its meaning is not subject to debate.<sup>12</sup> 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? Finally, in trying to ascertain what is contained within this definition, a purposive interpretation exercise must be undertaken in order to go beyond a simple textual analysis of the provision and ascertain the intention of Parliament with respect to the scope of application of the election advertising rules.

### **What is “advertising”?**

In order to be considered “election advertising”, a message must first be “advertising” (or in French, “message publicitaire”). The word “advertising” is not defined in the CEA. Dictionaries are therefore a useful starting point for interpreting its ordinary meaning.

For example, the Merriam-Webster online dictionary defines “advertising” as “the action of calling something to the attention of the public especially by paid announcements”.<sup>13</sup> The *Canadian Oxford Dictionary* defines the word “advertisement” as a “public notice or

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<sup>12</sup> CEA, section 2: “‘election period’ means the period beginning with the issue of the writ and ending on polling day or, if the writ is withdrawn under subsection 59(1) or is deemed to be withdrawn under subsection 31(3) of the *Parliament of Canada Act*, on the day that the writ is withdrawn or deemed to be withdrawn.”

<sup>13</sup> [www.merriam-webster.com/dictionary/advertising](http://www.merriam-webster.com/dictionary/advertising)

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".<sup>14</sup> 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",<sup>15</sup> 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".<sup>16</sup>

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

Equally important to the common understanding of advertising is the notion that it is generally unsolicited by the recipient, as the former Chief Electoral Officer noted in his report on the 37th general election.<sup>17</sup> 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.

Unsolicited telephone calls are, by their nature, highly intrusive. However, a call from a registered party would likely not be viewed as intrusive when received by a party member or supporter. Similar reasoning applies when a person has communicated, in some way, that they would like to be contacted by a registered party, candidate or third party during the election. Regardless of the purpose, the call would not be considered intrusive because it was solicited by the recipient.

Another issue to consider is that of hybrid calls – that is to say, calls that are a combination of a robocall and a live call. This type of call typically starts with an automated message, not necessarily promotional in nature, that invites the recipient to "press 1" if they wish to speak with someone about a party's platform for the election, for example. The promotional message comes during the live portion of the call, which can no longer be said to be unsolicited, given that the recipient has clearly indicated a desire to continue. In such a scenario, it is unclear whether any part of the call could be said to be 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".<sup>18</sup> What constitutes "the public" has been considered

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<sup>14</sup> *Canadian Oxford Dictionary* (Oxford: Oxford University Press, 2004).

<sup>15</sup> [www.larousse.fr/dictionnaires/francais/message/50766/locution?q=message+publicitaire#157247](http://www.larousse.fr/dictionnaires/francais/message/50766/locution?q=message+publicitaire#157247)

<sup>16</sup> *Le Petit Robert* (Paris: Dictionnaires Le Robert, 2014).

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

<sup>18</sup> [www.merriam-webster.com/dictionary/transmit](http://www.merriam-webster.com/dictionary/transmit)

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”.<sup>19</sup> 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.<sup>20</sup> Put another way, a communication may be made “to the public” if it is intended to reach a large number of individuals, even though the message is not transmitted in such a way as to reach “the public” all at once.

The French definition of “election advertising” (“publicité électorale”) under section 319 only refers to “diffusion”, which is defined in the Larousse online dictionary as “action de propager des connaissances, des idées ou des biens dans un large public”; “action de distribuer un tract, un texte dans le public”.<sup>21</sup> While the definition of “publicité électorale” does not contain a direct translation of the words “to the public”, the word “publicité” already has that connotation and the notion that “diffusion” is made “to the public” is also found in the definition of “diffusion”. Therefore, the analysis in the paragraph above is also relevant to the French definition.

In practice, determining whether or not a call is made “to the public” so as to qualify as election advertising is a difficult task, given the one-on-one nature of telephone calls (as opposed to advertising on television, for example). This will depend on factors such as the number of individual recipients of the call or the relationship between the caller and the recipient.

On the one hand, a call that is made by an individual to a few of his or her friends or family members, even if it is made to promote a party or candidate, would not be a call made “to the public”. A call that is made by an organization to its members would also not be made “to the public” at large (and would also probably be excluded from the definition of election advertising by virtue of paragraph (c) of the definition). Even calls made by a candidate to some of his or her constituents, if these calls are not made to a “significant portion” of said constituents, might not qualify as calls made “to the public”.

On the other hand, a robocall made to thousands of electors to promote a registered party would clearly be considered a call made “to the public”. For anything in between these scenarios, it is not possible to make a general pronouncement. Each call would have to be considered on a case-by-case basis.

## Interpretation

The analysis above suggests that telephone calls could, depending on the circumstances, be considered election advertising, as they could both be made to the public and be unsolicited or deemed intrusive by the recipients. However, this interpretation is far from conclusive. It is therefore necessary to look beyond the ordinary meaning of the words in the definition of

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<sup>19</sup> *Rogers Communications Inc. v. Society of Composers, Authors and Music Publishers of Canada*, 2012 SCC 35.

<sup>20</sup> *Canada (Commissioner of Competition) v. Premier Career Management Group Corp.*, 2009 FCA 295, para. 52.

<sup>21</sup> <http://www.larousse.fr/dictionnaires/francais/diffusion/25481?q=diffusion#25362>

“election advertising” in section 319 in order to determine whether telephone calls are election advertising.<sup>22</sup>

In the interpretation that follows, the election advertising provisions are considered in their larger context. Elections Canada’s conclusion is that Parliament never intended for telephone calls to be considered election advertising. In explaining how this conclusion was reached, it is first useful to look at live calls from three perspectives, before examining whether robocalls should be treated differently.

## **Live Calls**

### ***a) Legislative history and debates***

As explained in the legislative history section above, prior to 2000, the wording of the CEA made it very clear that the election advertising rules did not apply to telephone calls; they applied to print media and broadcasting only. Unlike in the case of the Internet, it cannot be argued that the failure to mention telephones in the legislation was because telephones were not used by registered parties, candidates or third parties to communicate with electors. On the contrary, telephone calls to electors have long been part of election campaigns, albeit more for registered parties and candidates than for third parties.

Moreover, although the election advertising provisions changed in 2000 to give a more general definition that did not rely on specific means of transmission, it is still not clear that there was an intent on the part of Parliament to broaden section 319 to include telephone calls. There is no question that, through the 2000 amendments, Parliament did expand the “types” of election advertising that could potentially be caught by the advertising provision. The question, therefore, is how far Parliament intended to go in broadening the definition of election advertising. Specifically, did Parliament intend to include live telephone calls and robocalls in its definition?

In the parliamentary debates on Bill C-2, which led to the 2000 amendments, there is nothing to indicate a clear intention to regulate or not regulate telephone calls. In fact, telephone calls do not appear to have been discussed at all (unlike the Internet, which received a few mentions in the debates and in the CEA). Given that regulating telephone calls would have been a significant change from the legislation prior to 2000, failure to discuss this topic would seem to indicate that Parliament did not intend to broaden the scope of the election advertising rules in this way.

Another indication that live calls were not intended to be captured as election advertising is the formality of the tagline requirement in section 320. An advertising message must include a mention that its transmission was “authorized by the official agent of the candidate or by the registered agent of the party”. This suggests a printed or recorded message.

### ***b) Comparison with other oral live communications***

<sup>22</sup> In interpreting statutory provisions, the Supreme Court of Canada endorses a “purposive interpretation”. Such an approach recognizes that 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”. See for example *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, para. 21.

Parliament may have failed to discuss telephone calls simply because communicating using a telephone – a medium for live communication over a distance – was considered analogous to other forms of oral live communication, such as debates or speeches. Both of the latter are promotional in nature, as they are intended to persuade voters to support a party or candidate, but neither is considered election advertising (paragraph 319(a)).

Another form of political speech implicitly authorized by the CEA is live person-to-person speech, such as a person standing on a street corner and interacting with passersby to promote or oppose a party. Section 165 of the CEA states: “No person shall use a loudspeaking device within hearing distance of a polling station on polling day for the purpose of promoting or opposing a political party that is listed on the ballot under the name of a candidate or the election of a candidate.” The only part of this form of speech that is regulated by the CEA is its loudness, or more accurately, the possibility of such speech being heard by electors at a polling station on polling day.

It could therefore be argued that, outside of the circumstances described in section 165, anyone is free to speak to electors to promote a particular party without being subject to any CEA-imposed limits, including by phoning them.

Live calls are also analogous to door-to-door canvassing during an election. Like door-to-door canvassing, live calls are one of the purer forms of political speech during an election: they raise the potential for an exchange of political ideas between a potential voter and someone speaking on behalf of a candidate, registered party or third party. While door-to-door canvassing is promotional in nature and may be viewed as somewhat intrusive by the recipient, it has never been considered election advertising within the meaning of section 319.

### ***c) Regulation under existing and new rules***

Finally, Parliament might not have used the election advertising rules to regulate calls to voters because other rules already addressed the issue, both inside and outside of elections. As explained above, there has long been a set of rules administered and enforced by the CRTC for certain types of unsolicited telecommunications, including live calls and robocalls. Although these rules do not refer to the notion of advertising, they still capture most types of telephone calls that could be made by registered parties, candidates and third parties during an election.

When Parliament did finally turn to regulating telephone calls in the CEA in 2014 (Bill C-23), it did so by creating separate rules (Part 16.1) that apply only to telephone calls. As part of these amendments, new offences related to scripts and recordings (Division 1) are enforced by the Commissioner of Canada Elections. However, the new administrative rules for voter contact calling services (Division 1.1) are administered and enforced by the CRTC, not by Elections Canada. This further supports the notion that telephone calls by registered parties, candidates and third parties are viewed by Parliament as part of the telecommunications regulatory regime, rather than the election advertising regime.

## **Robocalls**

There are practical differences between live calls and robocalls that raise the question of whether robocalls should be treated differently. For instance, the absence of live interaction makes it more difficult to treat robocalls in the same way as the one-on-one communication that occurs during door-to-door canvassing. Also, the tagline requirement is not problematic in a recorded message.

Nevertheless, as explained below, Elections Canada has concluded that it was not Parliament's intent to treat live calls and robocalls differently. This is based on a consideration of three key objectives that Parliament has pursued in regulating election advertising, namely: 1) encouraging transparency in advertising messages (through the tagline requirement), 2) preventing voters from relying on inaccurate information communicated on election day (through the election day advertising blackout), and 3) creating a level playing field for third parties (by imposing strict limits on election advertising expenses).

### ***a) Encouraging transparency***

Robocalls, even if they are not considered election advertising, are already subject to rules that meet the objective of transparency. The Unsolicited Telecommunications Rules of the CRTC require that both live calls and robocalls begin with a clear message identifying the person on whose behalf the call is made. Although there is no requirement to mention the official or registered agent, the CRTC rules serve the same purpose as the tagline for election advertising in sections 320 and 352 of the CEA.

### ***b) Preventing inaccurate information on election day***

The main purpose of the advertising blackout is to encourage informed voting by ensuring there is a period "within which misleading advertising may be assessed, criticized and possibly corrected".<sup>23</sup> But this purpose is not absolute, given that section 324 expressly allows the posting of messages on signs, posters or banners, and the distribution of pamphlets on election day. The people distributing those pamphlets are not prohibited from speaking to the people they interact with in order to promote their party or candidate. Moreover, accepting the premise that Parliament did not intend for the blackout to apply to live calls, it is unclear why robocalls should be subject to the blackout.

As noted above, the Chief Electoral Officer has, in the past, taken the position that the advertising blackout did not apply to calls, irrespective of whether the calls were live calls or robocalls.

### ***c) Creating a level playing field***

Finally, the aim of setting a level playing field for third parties would be undermined if

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<sup>23</sup> *Harper v. Canada (Attorney General)*, 2004 SCC 33 at para. 132-133: "The advertising blackout provision seeks to advance two objectives. First, it seeks to provide commentators and others with an opportunity to respond to any potentially misleading election advertising (Cairns J., at para. 303). To the extent that voters may be misled by third party advertising, this is a pressing and substantial objective. Berger J.A., in dissent, identified a second pressing and substantial objective (para. 283). The blackout rule ensures that electors in different parts of the country have access to the same information before they go to the polls."

robocalls were treated as election advertising when live calls were not. Whether or not something is captured by the definition of election advertising is crucial for applying the political financing rules to third parties.<sup>24</sup> This is because Part 17 of the CEA regulates only third parties that incur election advertising expenses totalling \$500 or more. It sets spending limits on their election advertising with the aim of preventing those third parties with more resources from dominating the electoral discourse at the expense of less wealthy third parties, registered parties or candidates.

The Supreme Court of Canada has held that the limits imposed on third parties under these rules serve three interconnected objectives:

... first, to favour equality, by preventing those with greater means from dominating electoral debate; second, to foster informed citizenship, by ensuring that some positions are not drowned out by others (this is related to the right to participate in the political process by casting an informed vote); third, to enhance public confidence by ensuring equality, a better informed citizenship and fostering the appearance and reality of fairness in the democratic process.<sup>25</sup>

Having rules in place that treat robocalls differently from live calls, with only the former being considered election advertising, would undermine this level playing field. It would favour wealthier third parties that could afford to hire voter contact calling companies to place live calls and therefore avoid the application of the election advertising rules. Third parties with limited resources, on the other hand, would have to rely on the less expensive robocalls, register with Elections Canada and report their election advertising expenses. Moreover, there is no practical reason to treat third parties that rely on robocalls to communicate their message differently from those that hire a calling service provider to make live calls on their behalf.

## Conclusion

Elections Canada is of the view that Parliament did not intend for telephone calls, whether live or automated, to be treated as election advertising and be subject to election advertising rules, such as the tagline requirement and the blackout on election day. This is not to say that Parliament did not intend to regulate telephone calls placed by registered parties, candidates or third parties during an election. It opted to regulate them through the *Telecommunications Act* and the rule-making authority of the CRTC for unsolicited calls, as well as through separate rules in the CEA for voter contact calling services, also administered and partially enforced by the CRTC.

Registered parties and candidates should keep in mind that expenses incurred to make telephone calls during an election still qualify as election expenses that must be accounted for and reported.

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<sup>24</sup> Third parties are defined to include any person or group “other than a candidate, registered party or electoral district association of a registered party” (s. 349).

<sup>25</sup> *Harper v. Canada (Attorney General)*, 2004 SCC 33 at para. 23.