

**August 22, 2019**

Stéphane Perrault  
Chief Electoral Officer of Canada  
Elections Canada  
30 Victoria Street  
Gatineau, Quebec  
K1A 0M6



Dear Mr. Perrault:

*Canada Elections Act* interpretation – climate change

As Executive Director of Climate Action Network - Réseau action climat (CAN-Rac) Canada, I am writing on behalf of our 105 member organizations from across Canada to request that you issue a clarification of Elections Canada’s interpretation of the *Canada Elections Act* with regard to advertising on climate change issues during the current election period. Specifically, we propose that you clarify that not all paid communications (advertising) about climate change would be considered by your office to constitute “election advertising” pursuant to s. 2(1) of the *Act*, and that for such advertising to be considered to be “election advertising”, it would have to be tied to efforts to “promote or oppose” a particular political party or candidate.

As you will be aware, reports in the news media have indicated that your office believes any paid communication related to climate science or the climate emergency may be deemed partisan advertising and/or election advertising under the *Canada Elections Act*. Your office subsequently indicated it would not consider such communications inherently partisan, but may still deem them to be election advertising.

Section 2 of the *Canada Elections Act* defines election advertising as:

the transmission to the public by any means during an election period of an advertising message **that promotes or opposes a registered party or the election of a candidate**, including by **taking a position on an issue with which a registered party or candidate is associated**. [Emphasis added]

Your office appears to believe that any public transmission on climate change will take a position on an issue with which Mr. Maxime Bernier and the People’s Party of Canada are “associated” simply because of that party and its leader’s assertion that climate change is not caused by human activity. We suggest that this interpretation of the definition of election advertising is overly broad, and inappropriately silences the freedom of speech of Canadians.

While we generally respect the principle of issue advertising during the election period being subject to the *Canada Elections Act*, we believe that the focus of the definition of “election advertising” is clearly the transmission of an advertising message that “promotes or opposes a registered party.” Thus the phrase “taking a position on an issue with which a registered party or candidate is associated” is not a stand-alone requirement, but a clarification or refinement of that general requirement.

In rejecting the argument that the definition of election advertising is unconstitutionally vague, the Alberta Court of Appeal in *Harper v. Canada* wrote:

While ‘association’ cannot be defined *a priori* with precision, it is possible to determine when third party messages bear **sufficient resemblance to political party and candidate policies** that they come under the administration of the *Elections Act 2000*.<sup>1</sup>

The focus of the *Canada Elections Act* is on the specific policies and public debate associated with the election. The election advertising requirements overreach if they are applied to communications related to broad public values, such as public and environmental health and safety, without reference to the circumstances of that communication or its relationship to specific measures or policy proposals discussed in the election.

The specific steps which should (or should not) be taken to address climate change have been political “issues” in Canada for over a third of a century. During this time, many people and institutions have expressed opinions about climate change and its effects, and the specific policies that should be adopted to mitigate it. Based on the language of the *Canada Elections Act*, it is communications that indicate a connection to the policies and measures advanced by the parties that constitute an “issue associated with” a particular party or individual.

On CBC Radio’s Front Burner podcast, Elections Canada spokesperson Nathasha Gauthier explored the hypothetical example of a pro-smoking party campaigning in the 2015 general election. She described the “Lung Cancer Party” saying, “no, we think smoking is super good for you, we think it has all these health benefits, and we actually want to get rid of the Health Canada regulations around smoking and prohibition and the labelling on the cartons.”<sup>2</sup>

According to Ms. Gauthier, if the Canadian Medical Association (CMA) had at the time been running an “advertising campaign saying smoking is bad for you ... they would have become a third party advertiser in 2015.”

This example is illustrative, because it shows a party making both ideological claims (smoking is good for you) and policy proposals (the rollback of Health Canada regulations). Ms. Gauthier conflates the two, suggesting that **a public health campaign** – not obviously intended to influence the election – would become election advertising. In our view, the CMA campaign might become election advertising, but only if it discussed Health Canada regulations, or encouraged citizens to consider the risks of tobacco in their voting decisions.

Like the universally understood connection between tobacco smoking and cancer, the reality and causes of climate change are no longer in serious dispute. As Chief Justice Strathy of the Ontario Court of Appeal recently stated: “There is no dispute that global climate change is taking place and that human activities are the primary cause.”<sup>3</sup> It cannot be the intention of the *Canada Elections Act* to render basic claims about science and reality “election advertising,” simply because one candidate or party has expressed some doubt about the science, when the communications in question make no specific reference to policy proposals contained in that party’s platform.

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<sup>1</sup> *Harper v. Canada (Attorney General)*, 2002 ABCA 301, para. 60, affirmed at 2004 SCC 33; Both courts relied heavily on the Royal Commission on Electoral Reform and Party Financing which gave rise to third party election advertising requirements in Canada. The relevant recommendation, at p. 341, also emphasizes advertising which approves or disapproves “**a course of action** advocated or opposed by a candidate, registered party or leader of a registered party...” [emphasis added].

<sup>2</sup> <https://www.cbc.ca/radio/frontburner/climate-change-at-centre-of-elections-canada-partisan-ad-controversy-1.5252828>, at 11:25, last accessed 21 August 2019.

<sup>3</sup> *Reference re Greenhouse Gas Pollution Pricing Act*, 2019 ONCA 544.

This is not to say that a campaign that purports to be about public values or factual issues may not in fact be intended to promote or oppose a political party or candidate. Where the timing of advertising spending or other evidence would cause a reasonable person to infer that the campaign is attempting to influence the election, that communication might well be deemed election advertising. However, it would be an absurdity, and in our opinion a monumental suppression of Canadians' free expression, if Mr. Bernier, by expressing his own opinion, were to render any and all paid communications related to climate change election advertising. This result cannot be what Parliament intended in passing the *Act*, and the "golden rule" of statutory interpretation<sup>4</sup> would demand that any interpretation that would lead to that result must be rejected.

We suggest that a correct interpretation of the *Act* would lead to the following conclusions:

- Not all paid public communications about climate change during the current election period will constitute "election advertising".
- Advertising which asserts that climate change is a real, human-caused phenomenon which constitutes a serious threat to human civilization and life on Earth will not, on that basis alone, constitute "election advertising".
- For advertising about climate change to constitute "election advertising", it must generally connect the issue of climate change to the current election in some way. For issue advertising, this might be by criticizing, endorsing, or otherwise discussing specific policy proposals or measures that are similar to those discussed by the parties or candidates.

We respectfully request that your office release a public statement essentially adopting these points. Doing so would allow ongoing public debate about climate change and other important matters to continue unimpeded during the election period, thereby promoting the goal of an informed electorate<sup>5</sup> that is inherent in the provisions of the *Canada Elections Act* and avoiding the expense that would result if the correct meaning of the statutory provisions had to be judicially determined.

Sincerely,



**Catherine Abreu**  
Executive Director

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<sup>4</sup> See, for example, *The Canadian Northern Railway Co. v. The King*, 64 SCR 264, 269.

<sup>5</sup> See, for example, *Harper v. Canada (Attorney General)*, [2004] 1 SCR 827, 2004 SCC 33 [72].