2021 federal election: Election advertising rules

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Canada is now in the statutorily defined "election period" that ends on Election Day, Sept. 20. 2021. Throughout this 36-day period, communications by third parties are subject to the *Canada Elections Act* and the scrutiny of Elections Canada.[1]

In advance of the last federal election period, the Canada Elections Acts was significantly amended, which changed the election advertising landscape for third parties across Canada. Third parties will again be playing by these new rules during this election cycle. Throughout 2020 and 2021, Elections Canada has provided new guidance to assist third parties in understanding their obligations under the Act:

- Political Financing Handbook for Third Parties, Financial Agents, and Auditors (June 2021)
- Partisan and Elections Advertising on the Internet (November 2020)
- Participating in Third Party Campaign-Style Events During Pre-election and Election Periods (May 2021)

Generally, Elections Canada regulates three activities:

- "**Partisan activities**": activities that promote or oppose a political party, nomination contestant, potential candidate, candidate or party leader, other than by taking a position on an issue with which the political party or person is associated.
- "**Election surveys**": surveys about voting intentions or choices, or about an issue with which a registered party or candidate is associated, that a third party conducts or causes to be conducted during the election period.
- "**Election advertising**": advertising that promotes or opposes a registered party or candidate, including by taking a position on an issue with which the registered party or person is associated.

Keep reading for our primer on some of the election advertising rules that will impact third party communications during the 2021 federal election period.

Election advertising

According to Elections Canada, election advertising has four key elements:

1. Advertising.
2. Promoting or opposing a political entity, including promoting or opposing by taking a position on an issue with which the political entity is associated.
3. Transmission to the public.
4. Transmission during the election period.

Elections Canada considers advertising generally to be an unsolicited "public notice or announcement made to draw attention to the subject of the advertising, often but not necessarily linked to sales or promotion."

Pursuant to the Canada Elections Act, promoting or opposing includes in relation to a registered/eligible party in a federal election: naming it; identifying it (including use of a logo); and providing a link to an internet page that does any of the above. With respect to a candidate or a leader of a registered party or eligible party,[2] naming them; showing a photograph, cartoon or drawing of them; identifying them (including by political affiliation or by any logo); and providing a link to an internet page that does any of the above.

During the election period, advertising that takes a position on an issue that is clearly associated with a candidate or party, without referring to the party, candidate or other actor is also election advertising. Third parties should exercise caution during an election period and continually monitor candidate and party statements to understand whether an issue is "clearly associated" with a candidate or party.

There is no list of issues maintained by Elections Canada and there is no defined time period for determining when an issue becomes (or stops) being clearly associated with a candidate or party. Accordingly, the scope of issue advertising is broad. Elections Canada provides the following example of what may constitute issue advertising:

> *"We support the environment" or "We want a better economy" is unlikely to be associated with a particular party or candidate. It is generally a position of all parties, though their ideas for achieving the goal may differ. By contrast, an ad saying "We oppose building Highway X," when championing or opposing the highway has been central to one or more candidates' or parties' campaigns, is likely to be regulated.*

There are a number of statutory exceptions to "election advertising," including but not limited to, the transmission to the public of an editorial, a debate, a speech, an interview, a column, a letter, a commentary or news and the transmission of a document directly by a person or a group to their members, employees or shareholders. Third parties should seek guidance from legal counsel or Elections Canada on how these exceptions may apply to their communications during the election period.

With respect to internet advertising, messages communicated over the internet are considered election advertising if they meet the general criteria for election advertising and there is a cost charged to purchase advertising space, referred to as a placement cost. Note that if advertising is provided for free or at a reduced rate, the placement cost is the typical cost charged for the advertising space. Marketing strategies using internet influencers are also regulated activities that may be election advertising, if an influencer is paid.

According to Elections Canada, the following are not considered to be election advertising:

- Messages sent or posted for free on social media platforms;
- Messages sent by email or through other messaging services (including texts sent through a cellular or mobile network);
- Videos posted for free on social media platforms such as YouTube and Instagram; and
- Content posted on the third party's own website.

However, third parties must be careful to ensure that partaking in the above-noted activities are not partisan activities (and are therefore regulated) or that the expenses incurred in engaging in the above noted activities are not themselves regulated. Election advertising expenses include both placement costs and production costs (costs associated with creating/producing the advertisement).

For example, in its guidance on identifying expenses for regulated activities, Elections Canada defines organic social media as a scenario where "volunteers create their own content and publish it on the third party's social media accounts."

Although Elections Canada states that messages sent or posted for free on social media platforms are not considered election advertising, the underlying expenses attached to the posted content are regulated. Elections Canada states that expenses incurred by volunteers to create content, such as equipment rental (excludes use of personal computer or cell phone) are regulated expenses, which would count toward a third party's $500 registration threshold. See further examples from Elections Canada of expenses incurred for the production of election advertising communications that are transmitted during an election period.

Third parties releasing communications during an election period must be mindful of their statutory obligations and Elections Canada's guidance regarding same. Election advertising rules are a complex regulatory regime that includes many subjective elements. Third parties must scrutinize their communications during the federal election period to determine if they are regulated activities, and thus trigger registration requirements.

If you have questions about election advertising rules or want to better understand your registration and reporting obligations, please get in touch with a member of our Public Policy & Government Relations team.

1 Third parties are a person or a group that is not a registered party, registered electoral district association, unregistered electoral district association or a registered party, or a candidate).

2 Also includes a nomination contestant, or a potential candidate.

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