

**INTERPRETATION
BULLETIN NO.** ESKIB-2019/03

EFFECTIVE DATE: JANUARY 1, 2020

SUBJECT ADVERTISING ON THE INTERNET

REFERENCE SECTION 2(1)(E), SECTION 243(4), SECTION 243(5) OF *THE ELECTION ACT, 1996*

Disclaimer

This interpretation bulletin sets out Election Saskatchewan’s current interpretation of provisions of *The Election Act, 1996* (the “Act”) and are issued to provide assistance and guidance in understanding and complying with the Act. The views expressed in interpretation bulletins are not law and are not intended to replace the official text of the Act. How the Act applies to any particular case will depend on the individual circumstances of that case. Elections Saskatchewan reserves the right to reconsider any interpretations expressed in interpretation bulletins, either generally or in light of the actual circumstances of any case, and in accordance with continuing legislative and judicial developments.

Introduction

This bulletin discusses the interpretation of subsections 243(4) and (5) of the Act with respect to the application of annual advertising expense limits to advertising on the Internet.

Context

Registered political parties are subject to an annual limit on “advertising expenses” as defined in sub-section 243(5) of the Act per fiscal year. This limit includes advertising expenses incurred by certain other persons or groups (described in sub-section 243(4) of the Act) using funds provided directly or indirectly by the registered political party. These provisions are as follows:



243(4) In addition to the election expenses limits imposed by subsection (1), the adjusted amount of \$195,407 is the maximum total advertising expenses that may be incurred during a fiscal year by a registered political party, including advertising expenses incurred by the following persons or groups using funds provided directly or indirectly by the registered political party:

- (a) a constituency organization of the registered political party;
- (b) a candidate endorsed by the registered political party;
- (c) a member of the Legislative Assembly who is a member of the registered political party.

243(5) In this section, “**advertising expenses**” means expenses for advertising in any newspaper or magazine published in Saskatchewan or for acquiring the right to use time on the facilities of any broadcasting undertaking.

Expenses for Internet-based advertising will constitute “advertising expenses” for purposes of subsections 243(4) and (5) of the Act if and to **the extent that they are considered to be expenses for acquiring the right to use time** on the facilities of a “broadcasting undertaking”.

“**Broadcasting undertaking**” is defined by the Act in section 2(1)(e) as:

2(1)(e) “**broadcasting undertaking**” means a broadcasting undertaking as defined in section 2 of the *Broadcasting Act* (Canada)

In order to determine what constitutes a “broadcasting undertaking”, it is necessary, by reason of clause 2(1)(e) of the Act, to refer to a set of inter-related definitions under the *Broadcasting Act* (Canada):

2(1) “broadcasting” means any transmission of programs, whether or not encrypted, by radio waves or other means of telecommunication for reception by the public by means of broadcasting receiving apparatus, but does not include any such transmission of programs that is made solely for performance or display in a public place;

“broadcasting receiving apparatus” means a device, or combination of devices, intended for or capable of being used for the reception of broadcasting;

“broadcasting undertaking” includes a distribution undertaking, a programming undertaking and a network;

“distribution undertaking” means an undertaking for the reception of broadcasting and the retransmission thereof by radio waves or other means of telecommunication to more than one permanent or temporary residence or dwelling unit or to another such undertaking;

“encrypted” means treated electronically or otherwise for the purpose of preventing intelligible reception;

“network” includes any operation where control over all or any part of the programs or program schedules of one or more broadcasting undertakings is delegated to another undertaking or person;

“program” means sounds or visual images, or a combination of sounds and visual images, that are intended to inform, enlighten or entertain, but does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text;

“programming undertaking” means an undertaking for the transmission of programs, either directly by radio waves or other means of telecommunication or indirectly through a distribution undertaking, for reception by the public by means of broadcasting receiving apparatus;

“radio waves” means electromagnetic waves of frequencies lower than 3 000 GHz that are propagated in space without artificial guide;

(2) For the purposes of this Act, **“other means of telecommunication”** means any wire, cable, radio, optical or other electromagnetic system, or any similar technical system.

Chief Electoral Officer's Interpretation

The inclusion of "other means of telecommunications" in the definition of "broadcasting" is broad enough to cover the Internet.

Devices including but not limited to personal computers, smart phones, tablets or televisions capable of connecting to the internet fall within the definition of "broadcasting receiving apparatus".

The delivery of content over the internet can qualify as a "transmission" as there is no requirement for scheduled or simultaneous transmission to members of the public, nor any exclusion due to the fact that an end user must activate the delivery of a program. However, the content being delivered must be a "program". The term "program" means sounds or visual images that are intended to inform, enlighten or entertain, "but does not include visual images, whether or not combined with sounds, that consist predominantly of alphanumeric text".

In general terms, subject to review in each specific case, most forms of political advertising on the internet (e.g. passive informational websites, email messaging, social networking) do not involve the acquisition of "the right to use time on the facilities of any broadcasting undertaking" within the meaning of subsections 243(5) and 2(1)(e) of *The Election Act, 1996*. The annual cap on "advertising expenses" will not apply in these cases.

However, where there is a purchase of time for the transmission of digital audio or video content over the Internet (similar to radio or television commercials) costs incurred for those purposes would constitute "advertising expenses" under these provisions. Consequently, the following policy decisions are a direct result of this interpretation:

1. Political advertising over the internet in the form of text ads on web pages or promotional emails to distribution lists, whether or not combined with pictures or graphics of some sort, would typically be considered to consist predominantly of alphanumeric text and would therefore be excluded from the definition of "program". Expenses incurred for advertising of this nature would not be within the scope of subsections 243(4) and (5) of the Act.
2. Political advertising in the form of digital audio services or audio/visual signals delivered over the internet and that consist predominately of sounds and/or visual images would be considered to fit the definition of a "program". Expenses incurred for the purchase of "time" for online ads resembling television commercials would be considered "advertising expenses" for purposes of subsections 243(5) and (5) of the Act.
3. Expenses incurred for political advertising that meets the definition of a "program" and delivered via paid advertising offered on social media platforms including Twitter, Facebook, Instagram, Pinterest, YouTube, Snapchat, LinkedIn, etc. would be considered "advertising expenses" for purposes of subsections 243(5) and (5) of the Act.



EXAMPLES:

A registered political party:

- a)** pays to have a video ad promoting the party run at the beginning of an online on-demand broadcast, television program, Facebook Live event, or other video content such as news clips, sports highlights or informational videos
- b)** pays to have emails promoting the party sent to a distribution list
- c)** pays to place a YouTube pre-roll ad promoting the party
- d)** posts a YouTube video of the promoting the party's platform on its YouTube channel
- e)** places text advertisements promoting the party on the party's official website or one of the party's social media platforms such as LinkedIn, Facebook, Twitter or Instagram
- f)** publishes a video of the party leader promoting the party on one of the party's social media platforms such as LinkedIn, Facebook, Twitter, Instagram or Vimeo
- g)** posts a photo ad promoting the party on the party's Pinterest, Twitter, Facebook and Instagram page and pays to have the post promoted

In example **a)**, the cost is incurred to acquire the right to use time on a website which transmits "programs". The website is engaged in "broadcasting" and the costs would be considered "advertising expenses" under subsections 243(4) and (5) of the Act.

In example **b)**, the cost is incurred for the purpose of distributing text ads (possibly combined with graphics and/or sounds). These do not qualify as "programs" and the costs would not be considered "advertising expenses" for the purpose of subsections 243(4) and (5) of the Act.

In example **c)**, the video advertisement is a combination of sounds and visual images that is intended to inform, enlighten or entertain, and does not consist predominantly of alphanumeric text. Therefore, it would be a "program" and its transmission could qualify as "broadcasting" and the costs would be considered "advertising expenses" under subsections 243(4) and (5) of the Act.

In example **d)**, there is no cost associated with acquiring the right to use time on the party's own YouTube channel and consequently no "advertising expenses" would be incurred within the meaning of subsections 243(4) and (5).

In example **e)**, the text advertisements consist predominantly of alphanumeric text and therefore are not "programs" and would not give rise to "advertising expenses" under subsections 243(4) and (5).

In example **f)**, there is no cost associated with acquiring the right to use time on the party's Twitter feed and consequently no "advertising expenses" would be incurred within the meaning of subsections 243(4) and (5).

In example (g), the photo ad does not meet the definition of a “program” and therefore the cost to promote a post containing the ad would not result in “advertising expenses” under subsections 243(4) and (5).

Impact

This Interpretation Bulletin has no application to other provisions of the Act including, for greater certainty, to provisions of the Act respecting an “advertisement” as defined by section 215(1)(a) and “election expenses” as defined by section 220(d).

Other References

Political parties and candidates should refer to Interpretation Bulletin ESK2019/01 Party vs. Candidate Expenses to determine if an advertisement expense is an expense for the party or the candidate and to ESKIB 2019/02 for further guidance on authorization of advertisements.



MICHAEL D. BODA, D. PHIL., PH.D.
CHIEF ELECTORAL OFFICER
PROVINCE OF SASKATCHEWAN

AUGUST 1, 2019