

A QUESTION OF FAIRNESS

REGULATING GOVERNMENT COMMUNICATIONS
AND GOVERNMENT ADVERTISING DURING ELECTIONS
AND BY-ELECTIONS IN NOVA SCOTIA



DEDICATION

This report is dedicated to the memory of Dana Phillip Doiron, under whose leadership the panel was established. He served as a member of the panel, contributing his valuable expertise and knowledge to its work. Mr. Doiron was a fine public servant of Nova Scotia, a devoted official of Elections Nova Scotia and a strong believer in the Canadian tradition of free and fair elections.

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INTRODUCTION

Principle of Fairness

In his report on the conduct of the provincial general election held on October 8, 2013, the Chief Electoral Officer (CEO) of Nova Scotia discussed the problems raised by sections 271 and 272 of the province's *Elections Act*¹. These sections prohibit government election advertising during a general election, but not a by-election, and not during a predefined run-up period to such elections. The CEO stated that the lack of precision and clarity in the wording of these sections make it impossible for the intent of the legislation to be enforced.

The concerns thus raised by the CEO form the backdrop of the panel's work. It was established in September 2015 by Elections Nova Scotia (ENS) to explore the issues that arise out of government advertising alleged to be election advertising that is broadcast or published during a general election and by-elections and the run-up to these elections. ENS asked the panel to recommend appropriate policies to deal with these issues.

The panel was comprised of the following members:

Jennifer Smith, Dalhousie University (Chair)
Jonathan Rose, Queen's University
Leslie Seidle, Institute for Research on Public Policy
Tracey Taweel, Communications Nova Scotia
Dana Doiron, Elections Nova Scotia
Callee Luddington was the research assistant for the panel.

The terms of reference of the panel are set out below:

- Examine the various forms of government communications, including those involving advertising, signage and other paid media;
- Identify any form of government communications that provides the governing party or its candidates with an unfair advantage;
- Identify any form or subject of government communications that should be exempt from restriction during the election period;
- Categorize the differences and pragmatic adaptation of policy and guidelines for general elections to by-elections;
- Examine the need and, if desirable, recommend mechanisms for review, approval and rejection of proposed communications.

¹ An Act Respecting the Election of Members to the House of Assembly and Electoral Finance, Chapter 5 of the Acts of 2011, amended 2011, c.60, 2013, c.17

In its approach to the task, the panel based its recommendations and reasoning on the **principle of fairness**. This choice is rooted in the fact that Canadian governments and Canadian courts, consistent with the Canadian Charter of Rights and Freedoms, have adopted it in their approach to the many aspects of the regulation of elections. For example, in the Supreme Court decision, *Harper v Canada (Attorney General)*, 2004, the Court argued that fairness was important for three reasons:

- (1) to promote equality in the political discourse;**
- (2) to protect the integrity of the financing regime applicable to candidates and parties; and**
- (3) to ensure that voters have confidence in the electoral process.**

We believe that any government communications up to and during an election should be consistent with the principle of fairness as enunciated by the court.

An example of the use of the principle of fairness with which Canadians are familiar is the limits that are imposed on election spending by political parties and their candidates. The purpose is to establish fairness among the competitors or, if you will, a level playing field on which they can compete. Of course, no one expects to see a completely level playing field. That would be impossible to sustain. But something approximating it is an important objective as well as a practicable one in an effort to prevent the political parties and the candidates with the deepest pockets from running away with all of the electoral prizes.

In applying the general principle of fairness to the issue of government communications in the lead up to and during general elections and by-elections, the panel derived the following two more specific principles:

- (1) A political party, by virtue of being the governing party, should not possess an advantage over other parties.**
- (2) A candidate, by virtue of being a member of the governing party, should not possess an advantage over other candidates.**

How do these two principles translate into concrete practice? In order to pursue that question, it is essential first to define what we are referring to when we use the terms "government communications" and "government advertising."

1. GOVERNMENT COMMUNICATIONS AND GOVERNMENT ADVERTISING

The phrase government communications, broadly understood, refers to the efforts of governments to inform, persuade and educate citizens, residents, and visitors. Governments of all political stripes use communications to maintain legitimacy, ensure compliance with their policies and fulfill democratic ideals. As Walter Lippmann has written, “the health of society depends on the quality of information it receives.”²

Generally most communications by government are informational, and there are many recognizable forms. Traditional forms include announcements, news releases, public service announcements on radio, television and in print, out-of-home advertising (i.e. billboards), and events. Newer forms of communication, by contrast, encompass websites and digital platforms. Examples of these are Facebook, Twitter, Instagram and Snapchat, among others. For our purposes, an important point about these social media is the increase in their use, by everyone, governments included.

The potential abuse of government communication for partisan purposes is one reason why many jurisdictions impose some restrictions on it. The act that regulates it in Nova Scotia is the *Public Service Act, Respecting the Office of Communications Nova Scotia*, passed by the House of Assembly in 2013, which refers to “non-partisan communications from the Government of the Province.”³ This language underscores the point that government communications, paid for by taxpayers, should be non-partisan. In other words, they are expected to convey to people information about government activities, programs and policies that is accurate, objective and relevant to the issue at hand. They are not intended to promote, directly or indirectly, the partisan interests of the governing party.

Government Communications

Government advertising occurs when government pays or proposes to pay for placement of space or time in media—regardless of the platform used. Therefore it is a distinct component of government communications. Let us consider two types of government advertising. Under the heading of non-contentious communication are, say, notices about new regulations governing the location of moorings off coastal residential properties. Such notices convey information. The government is stipulating the rules to be followed by those who might want to secure a mooring. This information is useful and practical for property owners, who now are able to follow the correct procedures to secure moorings, should they choose to do so.

² Walter Lippmann, *Public Opinion* (New York: Macmillan, 1945) p. 16
³ Chapter 42 of the Acts of 2013

Government Advertising

On the other hand, government advertising may be about more than mere information conveyance. Often, it encourages a change in behaviour or attitudes toward an issue around which there is widespread agreement. For example, the government might develop an advertising campaign to encourage people to get flu shots every fall. Such a campaign could include basic health information. But in this instance, the government cares about the choices that members of the public make and therefore will seek to influence them to get the shots by explaining why such an action is good for them and the public generally, and possibly by making the choice an easy one to accomplish (providing free flu shots). Moreover, the control of the message is held to be important enough for the government agency involved to buy the space or the time. This category of advertising may seek to change or influence behaviour or attitudes but there is general agreement about its propriety: we do not object to being reminded to buckle our seat belts, not drink and drive, or get a flu shot.

Distinct from all of this is partisan government advertising, which can be defined as government advertising that is designed to enhance the electoral prospects of the governing party. Hatt describes it as communication that is “geared towards [the] political objectives of retaining power” using taxpayers money.⁴ As he points out, it is easy to see why governments might be tempted on occasion to engage in partisan advertising. First, they have access to hefty advertising budgets. Second, contemporary forms of mass advertising are powerful tools with which to influence public opinion.⁵ And finally, there are very few limits imposed on how or what governments can advertise.

It is not always easy to say when non-partisan government advertising ends and where partisan government advertising begins. Undoubtedly there are grey areas, that is, examples over which well-intentioned, informed observers might disagree. Nonetheless, when elections and by-elections are on the horizon, the principle of fairness dictates a measure of vigilance. Certainly during elections and by-elections, and sometimes even in the run up to them, there are real restrictions in place on the type of government communications that are considered permissible.

Later in the report we offer examples of such restrictions, including legislated restrictions in jurisdictions outside Nova Scotia, and non-legislative, conventional restrictions that are captured in the concept of the “caretaker convention.” In the next section, we look at the considerable body of policy on the subject that has been developed by Communications Nova Scotia (CNS). Their work supplies an admirable jumping off point for the panel’s considerations.

⁴ Kayle Hatt, “The Abuse of Government Advertising: Examining Partisan Advantage-Seeking and Parliamentary Innovations Designed to Eliminate Misuse” in *Public Policy and Governance Review*, Volume 6, Issue 1 (Winter 2014), 78-89, p. 82
⁵ *Ibid*, p. 81

2. CNS POLICY GUIDELINES

In the *Public Service Act, Respecting the Office of Communications Nova Scotia*, CNS is charged with the task of coordinating the delivery of communications across the government of Nova Scotia in accordance with a specified set of standards, among which is objectivity. Government communications are to be “objective and not directed at promoting partisan interests.”⁶

Guidelines in Government Advertising

CNS has produced Guidelines on Government Advertising, 2013, in which this standard is reflected in the third of the five principles developed to guide its work. We cite the third principle in full:

Principle 3: Advertising must be objective and not directed at promoting partisan interests.

A. Advertising must be presented in objective language and be free of partisan argument.

B. Advertising must not try to foster a positive impression of a particular political party or promote partisan interests by mentioning the party in Government by name, or by including partisan slogans or images.

C. Advertising must not:

- i. Directly attack or scorn the views, policies or actions of others such as the policies and opinions of opposition parties or groups;
- ii. Be designed to influence public support for a political party, a candidate for election, a Minister or a Member of the Legislative Assembly; or
- iii. Refer or link to the websites of politicians or political parties.

It is worth noting that in the prohibition against partisan government advertising, CNS examines both sides of the coin: government advertising that promotes the governing party; and government advertising that denigrates the opponents of the government. Both are prohibited partisan undertakings.

In its *Communications Policies and Procedures Manual*, revised in 2014, CNS again stresses the principle that government communications issued through its office ought not to be partisan in nature or tone. To that end, it offers guidelines designed to help public servants observe the principle. For example, government communications must not include the names of political parties or identify the government or government members by party affiliation. Or again, for the most part only members of Cabinet or others speaking on their behalf are permitted to make announcements or appear in photographs issued through CNS.

⁶ Chapter 376 of the Revised Statutes, 1989, S.251B [c(vi)]

⁷ Government of Nova Scotia, *Communications Nova Scotia*, December 2013

⁸ *Communications Policies and Procedures Manual*, p.33

Government Advertising During Elections

A section of the Manual entitled “Communications Guidelines and Protocols During an Election Campaign” is focused on the subject matter assigned to the panel. Logically, CNS points out that the principles and guidelines already established apply as much to the election period as they do outside it. Nevertheless, the circumstances of an election, itself a highly partisan event, necessitate additional watchfulness over government communications. CNS stipulates there ought to be no announcements of new funding and/or new programs during this period; and that any announcements that are made “should not suggest or give favour to a Minister, the government or any political party.”

Given that the work of government does not come to a grinding halt during election campaigns, it is not surprising to find that CNS lists some common-sense exemptions from the rule. First, the government need not forgo an announcement if there stands to be a material loss to the province - possibly a legal sanction - by not proceeding with it. Second is the case of tenders. If funding for a project or work has been announced publicly before the election begins, and the funding has been approved already in the current fiscal year budget, then the funding announcement can include a call for tenders. The third exemption concerns projects that are funded and announced on an annual basis, being routine government business.

It should be stressed that this section of the guidelines does not address government *advertising* more broadly. It is focused almost solely on ensuring that *announcements* during an election campaign do not favour the government, a minister or any political party or candidate. An announcement is a statement by a candidate or leader that may be disseminated by the media. An advertisement, as mentioned above, is a paid notice that is placed in the media. The panel takes the view that the guidelines should be expanded to allow only limited government advertising during election campaigns. In this respect, it recommends the policy followed by the federal government, which is discussed in the next section of the report.

Social Media

Finally, in a segment entitled “Social Media Policy,” CNS addresses the issue of government partisanship that may occur in social media. To this end, it asks that social media initiated by the government be moderated to ensure compliance with the non-partisan ethic. We note that CNS also warns government employees against using social media for partisan purposes in the course of their work or when identifying themselves as government employees.

Notably, by-elections are not mentioned in the CNS documents. It is the view of the panel that, following the principle of fairness, CNS policy on government communications in general, and in relation to elections, should apply to by-elections. Therefore, it recommends that the term, by-election, be included in the references to elections. That way, the same prohibitions and restrictions against government communications made during elections are applied to those made during by-elections.

In the next section the panel looks at the approaches used in other jurisdictions to maintain the principle of non-partisanship in government communications in the days *preceding* general elections and by-elections, and during the period of these elections.

⁹ *Ibid*, p. 61

¹⁰ *Ibid*, pp. 61-2

¹¹ Government of Nova Scotia, *Common Services Manual*, Treasury Board Office, 2010, p. 3

3. APPROACHES USED IN OTHER JURISDICTIONS

(I) CONVENTION

In many respects, the policy guidelines of CNS for the election period that have been reviewed above are consistent with the spirit of the caretaker convention followed in the Westminster-style systems of parliamentary government. To cite an example, the CNS guideline that discourages the governing party from using government offices, including CNS itself, to announce the funding of new programs during the election campaign aligns with the caretaker view that government should attend only to its core routines at such a time, and remain apart from electoral politics.

The need for and rationale of the caretaker convention flow from the principle of responsible government that lies at the heart of the Westminster system. In keeping with the principle, the government must enjoy the confidence of the House of Commons in order to maintain itself in office. However, once the House is dissolved preparatory to the calling of an election, there is no elected body that can hold the government to account for its actions. Thus there is a democratic void. Accordingly, the convention has developed that at such times it is appropriate for the government to retreat to “caretaker” mode, and to concentrate on its ordinary, ongoing business, while avoiding controversial or major public-policy decisions and actions. Of course, avoiding such decisions and actions is not always possible. In its discussion of the caretaker convention, the Privy Council Office (PCO) of Canada says that legitimate exceptions to the general rule are:

- *decisions on urgent matters that are in the public interest;*
- *decisions that can be reversed by a new government without undue transaction costs;*
- *decisions that have the support of the opposition parties as well as the governing party.*

These general guidelines supplement the more explicit rules used by the federal government, which are discussed below.

The PCO document on the caretaker convention highlights the importance of ensuring that during an election the offices and resources of government not be used for partisan purposes. The line between official government business and partisan political activities, it states, must be observed strictly.

(II) LEGISLATION AND REGULATION

An alternative approach to the regulation of government communication is legislation or regulation, which has the advantage of clearly codifying the rules. There are now three such examples in Canada: the federal government, Manitoba and Saskatchewan.

It must be stressed that each of these jurisdictions has laws that establish a fixed date on which elections are held, subject of course to the power reserved to the Governor General and Lieutenants Governor, on the advice of their respective first ministers, to decide on some other date. Nova Scotia has avoided fixed election dates, thereby making it impossible to know in advance the pre-election period and regulate government advertising within it. So it might be supposed that examples of fixed-date jurisdictions are

¹² <http://www.pcobcp.gc.ca/index.asp?lang=eng&page=convention&doc=convention-eng.htm>

inapplicable here. But that is true only in relation to the period leading up to elections, since such a period hardly exists in the absence of a known, fixed date. They are helpful guides in terms of the election period, itself, whether general elections or by-elections.

The government of Canada defines government advertising as “any message, conveyed in Canada or abroad, and paid for by the government for placement in media such as newspapers, television, radio, internet, cinema and out-of-home.”¹³ The government of Canada prohibits government institutions from using public funds to buy advertising in support of a political party. Further, it stipulates that government institutions suspend advertising altogether during general elections, although there is no mention of by-elections. Exceptions to this rule are permitted whenever the government is required by statute or regulation to issue a public notice for legal purposes; when it needs to address public health, safety or environmental concerns; and to post employment or staffing notices.¹⁴ These common-sense exceptions are similar to those enunciated under the caretaker convention and, to an extent, the CNS guidelines.

Because they have fixed election dates, Manitoba and Saskatchewan are able to regulate government advertising in a specified time frame before the election period and during the election period itself in a more detailed way. For example, Manitoba prohibits government departments and Crown agencies from publishing or advertising information about their programs and activities in the last 90 days before polling day and on polling day, itself, in the case of a fixed date election (that is, one that actually falls on the fixed date); and during the election period of any other general election (that is, one that does not fall on the fixed date) or by-election. An exception to the rule is made for government advertising that is required by law, that is related to ongoing programs or that arises out of unexpected public safety concerns.¹⁵

The rules in Saskatchewan are even more finely tuned to the rhythm of an election campaign. There, the election period is 27 days before polling day. During the election period and for 30 days before the election period, the province prohibits government ministries from advertising their activities in any manner whatsoever. In the 90 days prior to the election period, the province permits government advertising that is designed only to inform the public about government programs and services. In the 120 days before the election period, no government ministry is permitted to spend more on advertising than it did during the same time frame the year before. Clearly both Manitoba and Saskatchewan are concerned about prohibiting the use of government advertising for partisan purposes in the lead up to elections as well as during the election period. And that concern extends to by-elections as well. Both Manitoba and Saskatchewan also prohibit all but very limited advertising during by-elections.¹⁶ For example, in Saskatchewan the provincial government is prohibited from publishing “in any manner in the constituency any information with respect to the activities of the ministry.”¹⁷

¹³ Treasury Board Secretariat, Communications Policy of the Government of Canada, S. 23, “Advertising.” <http://www.tbs-sct.gc.ca/pol/doc-eng.aspx?id=12316sion=HTML>

¹⁴ Ibid

¹⁵ Government of Manitoba, The Election Financing Act, CCSM, c. E27, Part 13, “Restrictions on Government Advertising,” ss. 92-94

¹⁶ Bruce Owen, “Election Law Creates ‘Cone of Silence’”, Winnipeg Free Press, April 4, 2015. <http://www.winnipegfreepress.com/local/election-law-creates-cone-of-silence-298658011.html>

¹⁷ Government of Saskatchewan, The Election Act, 1996, Chapter E-6.01, S. 277(3).

4. REGULATORY GAPS IN NOVA SCOTIA'S SYSTEM

As we have seen, Nova Scotia retains a strong ethic of non-partisanship in government communications and advertising, both in general and specifically in relation to elections. This ethic is clear in the policy and guidelines of CNS and in the province's election law. Nevertheless, as implied by the preceding discussion, the panel has concluded that there are gaps in the system that need to be addressed. It has already been noted that, in the panel's opinion, the language of CNS guidelines specifically in relation to the election period needs to be broadened to include government advertising in addition to government communications. There are other gaps as well.

First, and most obvious, is the by-election, which has more or less fallen through the regulatory cracks. Second is that, under the province's election law, ENS has little flexibility to deal with complaints about government advertising during an election period in a timely manner. It is worth considering whether this lack of flexibility can be ameliorated. As well there is the very language of section 272 of the Nova Scotia Elections Act, which prohibits election advertising using a means of transmission of the government, language that is likely to strike the ordinary reader as somewhat opaque. It needs to be clarified. Third is the issue of new social media, the increasing use of which makes it worth a second look. Fourth is the run up to elections and by-elections, which remains unregulated, at least by comparison with the Manitoba and Saskatchewan models. Given the fact that there is no fixed election date in Nova Scotia, the ability to regulate communications in the run-up period seems to vanish into thin air, but again there is some value in discussing the issue anyway.

(I) BY-ELECTIONS

One way of dealing with the by-election issue is simply to add by-elections to the policy and legal language used in connection with existing prohibitions against partisan government advertising. Indeed, the panel recommends that this be done. The use of the principle of fairness elucidated at the beginning of this report suggests that the same rules around governing advertising in a general election be applied to by-elections. Accordingly, the panel recommends *that the term by-election be included in the references to elections throughout the relevant legislation, with the result that the same prohibitions and restrictions against government communications during elections are also applied to by-elections.*

In this regard, the panel recommends a prohibition, with certain exceptions, on all government advertising during the course of a by-election campaign. This is consistent with the CNS guidelines for general elections and with the caretaker convention used by the federal government during general elections. The panel therefore recommends *that the language of the CNS guidelines specifically in relation to the election and by-election periods be broadened to include government advertising in addition to government announcements.*

Some might object that a prohibition of government advertising during general elections is too severe for use during by-elections. But it is not. First, the recommendation flows from the principle of applying the same rules to similar electoral contests. Second, it takes account of the campaign dynamics that are unique to by-elections, such as the adjacent-district announcement (discussed below). Third is the precedent in the other jurisdictions mentioned above.

In the course of a by-election campaign, the government might make a policy or program announcement that is minor from the standpoint of the province as a whole, but important for the electoral district in which the by-election is held. True, the announcement might be made in an adjacent district rather than the by-election district itself. Nevertheless, media spillover practically guarantees coverage in the by-election district. The consequence is that the governing party's candidate may benefit from a government announcement that is paid with taxpayer dollars. This violates the fairness doctrine.

Another practice is the government-sponsored campaign event, again in an adjacent riding, at which the governing party's candidate is shown side by side with, say, a minister of the Crown. The media spillover effect is the same as it is in the preceding example, with the same effect, namely a potential advantage for one candidate over the others, and at public expense. The use of billboards in adjacent ridings to make government announcements or even reminders of existing policies that may be of interest in the by-election district is another practice that can be used to discriminate in favour of the governing party's candidate over rival candidates.

It is not practical to recommend that the government cease all announcements and communications during the period of a by-election outside of the constituency where the contest is occurring. Further, given the nature of media like television, and social media, it is not possible to carve out an area surrounding the by-election district and apply prohibitions within it.

Following the lead of other provincial governments such as Manitoba and Saskatchewan, we have concluded that paid government advertising should be explicitly prohibited in by-elections as well as general elections. The panel therefore recommends *that government advertising during elections and by-elections be prohibited, subject to the following exemptions:*

- ***a government institution is required by statute or regulation to issue a public notice for legal purposes;***
- ***an institution must inform the public of a danger to health, safety or the environment;***
- ***an institution must post an unemployment or staffing notice;***
- ***an institution needs to issue a call for tenders for a project or work that has been announced publicly before the election is called and that is funded in the current fiscal year budget.***

(II) ELECTIONS NOVA SCOTIA (ENS)

As noted above, section 272 of Nova Scotia's electoral law prohibits the use of government advertising during an election period. In other words, it prohibits government from "election advertising" – what we have called partisan advertising above. We cite the definition of election advertising under the law in its entirety:

[it] means the transmission to the public by any means during an election 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 but, for greater certainty, does not include (i) the transmission to the public of an editorial, a debate, a speech, an interview, a column, a letter, a commentary or news, (ii) the distribution of a book, or the promotion of the sale of a book for not 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, (iii) the transmission of a document directly by a person a group to their members, employees or shareholders, as the case may be, or (iv) the transmission by an individual, on a noncommercial basis.¹⁸

ENS is responsible for administering the law, which means enforcing the prohibition in section 272. During an election campaign ENS might receive a complaint or allegation that the government has engaged in government advertising. ENS is empowered under the law to investigate the complaint, at the conclusion of which it would make a determination as to its validity. If it found the complaint to be valid, then it could issue a sanction, say, in the form of a fine.

This procedure is problematic from the standpoint of timing. It is likely to take ENS a few weeks to conduct the investigation and make the determination; by that time the election might be over. Assuming the complaint to have been a valid one, this would mean the damage was done, so to speak, or that the government might have gained the advantage that it was seeking from the advertisement during the campaign. The obvious question is this: how can ENS mitigate such a problem during the election campaign without getting drawn into the campaign itself?

The complexity of the issue being raised here is compounded by the fact that the violation under consideration - breaking the rule against government advertising during election campaigns – also implies a violation of the guidelines established by CNS. In other words, it is the prospect of a partisan government advertisement that somehow got through the funnel of CNS.

¹⁸ Government of Nova Scotia, Elections Act, 2011, c.5, s.2(i), pp.10-11

The panel recommends that ENS be enabled to advise CNS of what ENS considers to be a serious complaint against the government under section 272 of the election law. For its part, CNS may or may not agree with ENS' judgment about the complaint. Either way, CNS would be able to brief the minister about the complaint, ideally before the complainant chooses to make the grievance public. Such a course of action would allow the government to be aware of the complaint and have the opportunity to retract the advertisement.

There remains the wording of the prohibition against government election advertising in section 272, which reads as follows: "No person shall knowingly conduct election advertising or cause it to be conducted using a means of transmission of the Government of the Province."¹⁹

For the average reader, there are a couple of problems with the way the prohibition is worded. First is that the phrase "election advertising" is defined elsewhere, with the result that it is not automatically evident what the term means. Second is that the phrase "means of transmission" does not effectively convey the array of instruments of government communication. By contrast, as we have noted above in Section 3 on the caretaker convention, the PCO guidelines on the conduct of ministers and public servants during an election begin with the simple admonition that the departmental communications and public affairs units of ministers must not be involved in partisan matters; indicate what the units can and cannot do; and refer to websites and social media as well as traditional media venues. Alternatively, there is the language employed by the Treasury Board Secretariat, which we have cited in full in the same section.

The panel recommends that section 272 in its current form be deleted and the following substituted:

The government and any person working for the government are prohibited from using public funds to buy advertising in any medium, in Nova Scotia, in other jurisdictions in Canada or abroad, in support of or against a political party or candidate during an election campaign.

(III) SOCIAL MEDIA

Social or digital media are growing exponentially in our personal lives as they are for the purposes of marketing in the private sector. It is hardly surprising that their use has also been embraced by government. As a result, in Nova Scotia they are covered by the regulatory framework that is in place to discourage partisan government advertising.

Two types of use of digital media are relevant here. One is their use by government agencies to communicate with the public, either through their own websites or by posting on platforms such as Facebook. Or they might use social media such as Twitter for communications purposes.

Undoubtedly, the prohibition against government election advertising in section 272 of the elections law is understood to include advertising in such venues, since they can be considered examples of “transmissions.” Nevertheless, social media need to be accounted for more explicitly in legislation. Moreover, it might be asked whether ENS should monitor digital communications during an election period.

In addition to their use by government departments, websites and social media are also used by individual public servants. CNS has developed guidelines to assist public servants in making appropriate decisions about the use of digital communications. For example, they ought not to use their personal social media accounts in the conduct of government business. Nor should they use government social media accounts in partisan fashion by making partisan political comments or by linking to the website of political parties or the social media accounts of politicians.²⁰ These guidelines apply as much during election periods as outside of them. That being so, again there remains the issue of whether this use of websites and social media ought to be addressed in the elections law. The panel takes the view that they should be so addressed. Therefore, the panel recommends ***that the province’s elections law explicitly prohibit government advertising on social media (such as Twitter and Instagram) and on the websites of other organizations (such as Facebook or search engines) during elections and by-elections.***

(IV) THE RUN-UP PHASE

Since there is no fixed election date in Nova Scotia, there is no defined run-up to the election period. Therefore it is impossible for the province specifically to regulate government communications and advertising during the run-up to an election.

The fixed election date is not a panacea from the standpoint of improving the conduct of parliamentary democracy. It has disadvantages, one of which, arguably, is to encourage the phenomenon known as the permanent campaign by giving the political parties a sure framework within which to plan their strategies and to build their financial war chests. They have an incentive to remain continually in campaign mode, as it were, and therefore on partisan alert at all times. The result is to intensify the already overly partisan rivalry between the political parties of which many Canadians despair.

On the other hand, the prominently advertised merit of the fixed election date is fairness in so far as it takes away the opportunity of the governing party to choose a date convenient to its partisan prospects. This opportunity was a longstanding feature of the parliamentary system. Often - although not always - it proved to be an advantage for the governing party over the rival opposition parties. The fixed date removes the advantage - unless of course the government decides to ignore it, or loses the confidence of the legislature and asks the Crown’s representative to set an election date.

²⁰ Government of Nova Scotia, Common Services Manual, Ch. 6: Communication Services, 6.9 Social Media Policy, pp. 3-4

Another merit of the fixed election date is to enable legislators to define the run-up to the election period, as we have seen in the cases of Manitoba and Saskatchewan. It can be argued that this so-called run-up period is taking on more importance with the passing years. Why? The answer lies in the amount of unregulated money that political parties and candidates can spend on advertising without having to declare this as an election expense. Moreover, political parties are increasingly reliant on advertising as a primary vehicle of persuasion in an electoral campaign. In the heightened partisan atmosphere of the weeks leading to an election period, governments can be expected to succumb to the understandable temptation to advertise their policies with considerable enthusiasm, to help prime their electoral platform. This prospect can be eliminated by strict regulation of government communications and advertising in the run-up period as well as the election period. It must be stressed that the panel is not making an argument in favour of the fixed date election, which issue is not part of its remit in any event. The panel is merely pointing out that the fixed date - not without its own peculiar disadvantages - does allow for regulation during the increasingly important run-up phase to an election period. And in its absence, regulating government advertising during it is virtually impossible.

5. OUR RECOMMENDATIONS

As referenced throughout the text, the panel has made several recommendations that, for ease of reference, are itemized below:

1. That the term “by-election” be included in the references to elections in section 272 of the Nova Scotia Elections Act, with the result that the same prohibitions and restrictions against government advertising during elections are applied as well to by-elections;
2. That the language of CNS guidelines in its Communications Policies and Procedures Manual in relation to the election and by-election periods be broadened to include paid government advertising in addition to government communications;
3. That government advertising during elections and by-elections be prohibited outright, subject to the following exemptions:
 - a government institution is required by statute or regulation to issue a public notice for legal purposes;
 - an institution must inform the public of a danger to health, safety or the environment;
 - an institution must post an unemployment or staffing notice;
 - an institution needs to issue a call for tenders for a project or work that has been announced publicly before the election is called and that is funded in the current fiscal year budget;
4. That section 272 of the Nova Scotia Elections Act in its current form be deleted and the following words be substituted:

The government and any person working for the government are prohibited from using public funds to buy or to place advertising in any medium, in Nova Scotia, in Canada or abroad, in support of or against a political party or candidate during an election campaign;
5. That the Nova Scotia Elections Act be revised to include a provision that enables ENS to advise CNS of what ENS takes to be a serious complaint against the government under section 272 of the Act;
6. That the province’s elections law explicitly prohibit paid government advertising on social media and on the websites of other organizations during a general election campaign and by-election campaigns.



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