



## 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 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: 2018-04 – Draft (June 2018)

## *Pre-existing Web Content of Registered Parties in an Election*

### Issue

Registered parties commonly use their websites as a promotional tool during elections. This means some portion of the costs to design, host and maintain the websites are election expenses. Costs to produce and distribute web content are also usually election expenses when the content is first posted during an election period to promote or oppose a party or its leader. But what about a registered party's pre-existing web content, which may include material created for past electoral events or unrelated to an election?

This note seeks to clarify when costs to produce and distribute pre-existing web content are election expenses, and how to calculate the election expense for websites themselves.

### Interpretation

- (1) If a registered party's pre-existing website stays online during a general election or a by-election in which the party runs a candidate, the party must report an election expense for the website.
  - For a general election, the election expense is calculated by determining the commercial value of designing an equivalent website, and by adding the prorated cost to host and maintain the website.
  - For a by-election, the election expense is calculated by identifying the pages that contain by-election content and determining the commercial value of designing equivalent pages, then by adding the prorated cost to host and maintain those pages.
  - In both cases, the backend costs for contribution pages and online stores are excluded because non-promotional fundraising expenses are excluded from election expenses.
- (2) The cost to produce and distribute pre-existing web content that remains accessible during an election, whether on the registered party's website or social media pages, is an election expense if the party:
  - incurred the expense to produce the content for the election, or
  - promoted the content during the election period

- (3) Promotion, in the context of pre-existing web content, is to transmit or draw attention to an item of content through any means, such as advertising, mass emails, social media postings, re-posting of content, or coordinated promotion through another entity, person or group.
- (4) Despite the above, there will be no election expense if the party can show that the content was clearly promoted solely for an event or circumstance other than the election, such as a leadership or policy convention.
- (5) If pre-existing web content was not produced for the election and was hosted on the party's website or social media pages without being promoted during the election period, the production and distribution costs are not election expenses.

## Legal Framework

The most directly relevant provisions of the *Canada Elections Act* ("CEA") in the context of this interpretation note are as follows:

- An election expense is any of the following:
  - any cost incurred, or non-monetary contribution received, by a registered party or a candidate, to the extent that the property or service that the cost was incurred for or that was received as a non-monetary contribution is used to directly promote or oppose a registered party, its leader or a candidate during an election period; and
  - any acceptance by a registered party or a candidate of a provision of goods or services, to the extent that the goods or services are used to directly promote or oppose a registered party, its leader or a candidate during an election period. (s. 376(1))
- Expenses for a fundraising activity are not election expenses. (s. 376(2))
- There are two exceptions to the above. Expenses for producing advertising or promotional material related to the fundraising activity, and expenses for distributing, broadcasting or publishing such material during the election period, are election expenses. (ss. 376(3)(a) and (b))
- Commercial value, in relation to property or a service, means the lowest amount charged at the time that it was provided for the same kind and quantity of property or service or for the same usage of property or money, by:
  - the person who provided it, if the person is in the business of providing that property or service; or
  - another person who provides that property or service on a commercial basis in the area where it was provided, if the person who provided the property or service is not in that business. (s. 2(1))

## Analysis and Discussion

### History of Elections Canada's guidance

Elections Canada's guidance on expenses for websites and web content has expanded in the last few years as political entities' use of online communications has increased and diversified with new technology.

In 2013, the handbooks required parties and candidates to “report as election expenses all the expenses related to the design, development and distribution of ... a website used during an election. This includes all expenses, not merely any incidental costs incurred to modify an existing website for election purposes.”<sup>1</sup>

In preparation for the 2015 general election, guidance was added on how to cost the content that stays online. It said, “If online content such as a video, website or Facebook page stays online during the election period, it has to be reported as an election expense. Alternatively, the party may remove all online content before the election period.”<sup>2</sup>

In 2016, a detail was added to better align the costing of an existing website with the CEA's goal of providing a level playing field. It stated, “Elections Canada will accept the current commercial value of an equivalent website as the commercial value of a pre-existing website.”<sup>3</sup>

Finally, in late 2017, Elections Canada took the following interim position for by-elections while it began drafting this interpretation note:

Pre-existing web content that stays online during a by-election, such as a video featuring the party leader, is an election expense only if the registered party produced or promoted the content for the purpose of the by-election. Both the production and distribution costs are included in the election expense. (This guidance is under review and is subject to change in the next release of the handbook.)<sup>4</sup>

### Practical and legal implications of the full-costing position

In party returns for the 2016 fiscal year, which included one by-election, most parties that ran a candidate did not report any election expenses for their web content. This was the case even though their websites and social media pages stayed online during the election period. One party reported a limited number of expenses for its pre-existing web content.

Experience has shown the difficulties with Elections Canada's full-costing position. Given the lower expenses limit for a by-election,<sup>5</sup> a party with a long-established web presence that reported the cost to produce and distribute all content on its website and social media sites would easily exceed its election expenses limit at the issue of the writ, before any campaign activity had taken place. This is true to a lesser extent for general elections where, with every election cycle, a registered party's accumulated web content would claim more of its limit.

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<sup>1</sup> *Political Financing Handbook for Registered Parties and Chief Agents*, June 2013, p. 31.

<sup>2</sup> *Ibid.*, July 2015, p. 34.

<sup>3</sup> *Political Financing Handbook for Candidates and Official Agents*, June 2016, p. 60.

<sup>4</sup> *Political Financing Handbook for Parties and Chief Agents*, October 2017, p. 67.

<sup>5</sup> Based on estimated party expenses limits, calculated as of November 2017, the average base limit per electoral district is \$79,420. The lowest limit is \$18,713 (Nunavut) and the highest limit is \$112,797 (Edmonton–Wetaskiwin).

There are other difficulties with the position. On a practical level, while it is possible for a registered party to remove content from its own website and social media accounts, it would be impossible to remove the content from search engine caches and social media accounts or websites not under the party's control. On a public interest level, there is a concern with asking parties to temporarily remove their historical record when citizen and media scrutiny is highest; a related concern is that posts deleted from social media sites may be gone permanently.

More fundamentally, while easily understood, the full-costing position may not properly capture the amount of website expenses related to a particular election or achieve the objective of the law, which is primarily to ensure a level playing field in an election. It is possible that not all existing content was created for an upcoming election. For example, a party may have videos dating back to a previous election, of a former party leader, of a former stance on policy issues, relating to a party convention, and so on. If the pre-existing content was not created or used for the election, then, under section 376 of the CEA, the cost to produce the content is not an election expense.

### **Determining when pre-existing web content is an election expense**

As an ongoing entity, it is accepted that a party may be using property and services for purposes other than a particular election. The property and services may be in use during the election, but it does not necessarily follow that they are being used for the purpose of promoting the party or opposing another party in that election.

For example, when a registered party maintains an office year-round, the chief agent must determine whether costs related to the office qualify as election expenses in a particular election. The chief agent must consider the purpose of each activity carried out by the office in order to determine whether the costs incurred to carry out the activity qualify as election expenses.<sup>6</sup> This is in addition to reporting a reasonable allocation of rent or property tax, utility cost, etc., as election expenses.

In other words, the chief agent needs to consider whether particular activities in the office—making telephone calls, updating computer systems, preparing mailouts, etc.—are being used for the election. If they are, the associated costs need to be reported as election expenses.

A similar test can be applied to pre-existing content on the party's website and social media pages in order to determine whether the associated costs are election expenses in a particular election. In determining if a party is using particular content for an election, both the registered party's intention in producing the content and its actions during the election with regard to the content should be considered.

Just as each aspect of ongoing office activity is to be examined individually during an election, so should each item of pre-existing web content. The registered party should ask itself the following questions on an item-by-item basis to determine if the cost for pre-existing web content that remains accessible during the election is an election expense:

- Did the party incur the expense to produce the content for the election? The totality of circumstances should be considered, including whether the content mentions the election, voting, or an issue of particular interest in the election, and how close to the election it was first posted.
- Did the party promote the content during the election period through any means?

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<sup>6</sup> *Political Financing Handbook for Parties and Chief Agents*, February 2018, p. 66.

If the answer to **both** questions is no, there is no election expense for the content.

If the answer to **either** question is yes, the cost to produce and distribute the content is an election expense. This is the case unless the party can show that, on the second question, the content was clearly promoted solely for an event or circumstance other than the election, such as a leadership or policy convention.

Ultimately, if pre-existing web content was not produced for the election and was hosted on the party's website or social media pages without being promoted in the election, it is not being used to promote or oppose a party in the election, and its production and distribution cost is therefore not an election expense.

## Applying the test

### *What it means to “promote”*

To answer the second question above, a party needs a clear definition of what it means to “promote” in this context. The ordinary meaning of “promote” is to “encourage people to like, buy, use, do, or support something” or to “give publicity to (a product, organization, or venture) so as to increase sales or public awareness.”<sup>7</sup>

These definitions suggest that promotion is similar to advertising, but broader in scope because it does not necessarily involve a placement cost or transmission to the public.<sup>8</sup> The CEA, in subsection 376(3), also recognizes advertising and promotional material as distinct items.

Based on this analysis, promotion can be understood as transmitting or drawing attention to an item of content through any means, such as:

- advertising
- mass emails
- social media postings
- re-posting of content
- coordinated promotion through another entity, person or group

For greater certainty:

- If the party directs users to the home page of its website or social media accounts (for example, “Visit us online at party.ca or facebook.com/party”), only content produced for the election that is displayed on that page is an election expense.
- Despite the above, if the party directs users to a page of its website or the home page of its social media account that hosts only videos (for example, “Visit us online at party.ca/videos or youtube.com/party”), all the videos on the linked page are election expenses. By linking to its videos in this way, the party is in effect actively promoting them for the election. Video pages merit this special treatment because of the generally high cost to produce the content and the importance of being able to enforce the rules effectively.

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<sup>7</sup> Definitions of “promote” in the [Cambridge](#) and [Oxford](#) online dictionaries, accessed April 2018.

<sup>8</sup> Elections Canada considered the definition of advertising in OGI 2015-11, *Application of Election Advertising Rules to Telephone Calls*.

- To limit the number of videos that will count as election expenses, the party could set up a separate page for videos it intends to promote (for example, by creating a YouTube playlist or a party.ca/electionvideos page on its website) and direct users to that particular page.
- Social media icons that appear in a communication (for example, at the end of an email) are not in themselves a means of promotion, even if they contain a link to the related home page.
- Coordinated promotion includes any agreement, written or otherwise, under which another entity, person or group promotes the party's pre-existing web content that the party is not otherwise promoting (for example, by agreeing to post links to the content).

It is important to note that, unlike election advertising, promotion can be considered to have taken place even if there was no placement cost.

#### *Exception for content not related to an election*

As a general rule, if new content is added or pre-existing web content is promoted during the election, the content is presumed to be used for the election. However, some content may be added or promoted without regard to the election and may not be an election expense under section 376 of the CEA.

For the exception to apply, a party must be able to show that the content was clearly added or promoted solely for an event or circumstance other than the election. For example, the exception might apply if the party posts content about a job opening that is not specific to the election.

#### **Calculating expenses for pre-existing websites and web content**

For reporting purposes, registered parties might wish to cost their pre-existing website and web content in two broad categories: design, hosting and maintenance of the website; and content production and distribution for the website and social media pages.

##### *Website design, hosting and maintenance*

If a registered party's pre-existing website stays online during a general election or a by-election in which it runs a candidate, the party must report an election expense for the website.

For a general election, the election expense is calculated by:

- determining the commercial value of designing an equivalent website
- adding the cost to host and maintain the website, prorated for the length of the election period

For a by-election, the election expense is calculated by:

- identifying the pages that contain by-election content and determining the commercial value of designing equivalent pages
- adding the cost to host and maintain those pages, prorated for the length of the election period

Backend costs for contribution pages and online stores are excluded from election expenses under section 376 of the CEA because they are non-promotional fundraising expenses. This means the cost of web coding and payment processing fees for these pages are not election expenses.

### *Content production and distribution*

The production and distribution cost for each item of pre-existing web content must be included as an election expense if the content meets the test described above.

Content includes written material, audio, graphics and videos. This note focuses on calculating the expense for videos because they generally have a higher production cost and may claim a bigger share of the election expenses limit.

In terms of production, the full cost to create, assemble and edit all parts of a video must be reported, even if some segments are recycled. If a segment of one video is used in multiple videos in the same election, the production cost of that segment is counted only once. If footage is obtained at no cost and would be available for free to any other registered party, it is not included in the calculation.

In terms of distribution, the cost to post content on a website will generally be covered by overall maintenance and hosting. If other methods of distribution are used, such as mass emails through a service provider, the cost to distribute the content must be included in the election expense.

## **Practical Application**

This section provides examples of how the interpretation applies to pre-existing websites and content during a general election or a by-election.

### **Pre-existing website design, maintenance and hosting**

#### *General election*

The registered party keeps its website online during a general election. The website's design, maintenance and hosting cost must be reported as an election expense. The chief agent calculates the expense in three parts:

- He determines the commercial value of designing an equivalent website and includes it as an election expense.
- He excludes backend costs for the contributions page and online store.
- He adds the prorated cost to host and maintain the website for the length of the election period.

The chief agent determines separately the election expense for pre-existing content on the website and its social media pages.

#### *By-election*

The registered party keeps its website online during a by-election in which it runs a candidate. A portion of the website's design, maintenance and hosting cost must be reported as an election expense. The chief agent calculates the election expense in three parts:

- He identifies which web pages include content that was added or promoted for the by-election and determines the commercial value of designing equivalent pages.
- He excludes backend costs for the contributions page and online store.
- He adds the cost to host and maintain the pages that contain by-election content, pro-rated for the length of the election period.

The chief agent determines separately the election expense for pre-existing content on the website and its social media pages.

## Pre-existing web content: videos

### *General election*

At the end of a general election, the registered party has 200 videos across its website and social media accounts, of which 180 were posted before the election period. The chief agent must determine which of these pre-existing videos are election expenses.

First, she determines which of the 180 videos were promoted during the election. The party had linked to its pre-existing videos in the following ways:

- It posted links to its YouTube election playlist in emails and social media posts. The playlist contained 10 pre-existing videos.
- It embedded 5 other pre-existing videos in its Facebook and Twitter posts.
- It tweeted links to 6 other pre-existing videos on its website.
- It displayed social media icons at the bottom of its digital communications. This does not count as promotion of the pre-existing content.

This means that 21 of the 180 pre-existing videos were promoted during the election and are likely election expenses. The chief agent does not find any videos to exclude based on their being clearly promoted solely for an event or circumstance other than the election.

Next, by looking at the totality of circumstances, the chief agent determines which of the 159 remaining pre-existing videos were produced for the election:

- Among the 159 videos, 40 were posted in the 12 months before the general election, when the party began ramping up its election strategy.
- The chief agent looks at those 40 videos and finds that 30 were not produced for the election—they are speeches from a leadership contest, holiday messages from the previous year, etc.
- The chief agent determines that the other 10 videos are election expenses because they mention voting in the next election or are policy videos posted shortly before the election.

As a result, the chief agent reports the production and distribution costs incurred for the 31 pre-existing videos as election expenses.

### *By-election*

At the end of a by-election, the registered party has 200 videos across its website and social media accounts, of which 190 were posted before the election period. The chief agent must determine which of the pre-existing videos are election expenses.

First, she determines which of the 190 videos were promoted during the by-election. The party had linked to its pre-existing videos in the following ways:

- It sent a mass email to supporters with a link to 2 specific pre-existing videos.
- It embedded 3 other pre-existing videos in its Facebook and Twitter posts.
- It displayed social media icons at the bottom of its digital communications. This does not count as promotion of the pre-existing content.

This means that 5 of the 190 pre-existing videos were promoted during the by-election and could be election expenses. The chief agent excludes 3 of these videos from election expenses because they were promoted solely for events or circumstances other than the by-election, such as a leadership convention and a national advertising campaign planned two months before the by-election was called. As a result, only 2 of the videos are election expenses.

Next, by looking at the totality of circumstances, the chief agent determines which of the 185 remaining pre-existing videos were produced for the election:

- Among the 185 videos, 6 were posted in the month before the by-election, when the party began ramping up its by-election strategy.
- The chief agent looks at those 6 videos and finds that none were produced for the by-election—they are policy statements that are not of particular interest in the by-election riding, videos in a recurring series that do not mention by-elections or voting, annual holiday messages, etc.

As a result, the chief agent reports the production and distribution costs incurred for the 2 pre-existing videos as election expenses.