



Interpretation Note: 2018-04

Pre-existing Web Content of Registered Parties in an Election

Comments made during formal consultation period of July 13 to 27, 2018

Comments received from the Liberal Party of Canada	Elections Canada response to the Liberal Party of Canada
<p>The OGI is well thought out and reflects the interim guidance provided in the February 2018 published <i>Political Financing Handbook for Registered Parties and Chief Agents</i>.</p> <p>Perhaps a couple of points of clarification could be added to the OGI.</p> <p>1. A definition of “web content” could be useful. While the examples on pages 8 and 9 broadly reference 200 videos across a party’s website and social media accounts and then specifically mention YouTube, Facebook, and Twitter, an upfront definition of web content early in the OGI would more accurately provide a framework to the reader.</p>	<p>The following definition of web content has been added upfront:</p> <p>“Web content is defined by the World Wide Web Consortium as ‘information and sensory experience to be communicated to the user’ In concrete terms, Elections Canada considers it to be the text, audio, visuals, videos and promotional applications on a website—whether on the registered party’s own website or a social media site on which it has created an account. It is separate from the website itself, which is the code and infrastructure that allows the web content to be experienced. Together, they make up a party’s web presence.”</p>
<p>2. On page 7 in the third paragraph, it states “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.” We believe it could be helpful for Elections Canada to state its position regarding the legal concept of “fair use” for content available in the public domain and how such material could be used at no cost for election reporting purposes. More specifically, what length of the material could be used at no reported cost?</p>	<p>The question of what constitutes fair dealing is outside of Elections Canada’s jurisdiction. Parties that use publicly available footage should seek legal assistance in applying the principles of copyright law to determine what length of material can be used for free and at no reported cost.</p>

Comments received from the Marxist-Leninist Party of Canada	Elections Canada response to the Marxist-Leninist Party of Canada
<p>The Marxist-Leninist Party has reviewed the Elections Canada Interpretation Note on election expenses related to web content already in existence at the time an election occurs. The 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.”</p> <p>The Interpretation Note is said to be needed because of the increasing use of on-line communications and new technologies by political parties and the need to ensure that expenditures in this field are properly accounted for to ensure an “even playing field.”</p> <p>Other than requesting clarification on the issue of volunteer labour and the definition of “coordinated promotion,” the Marxist-Leninist Party thinks that the Interpretation Note is clear enough:</p> <p>1. How to determine the cost of website design, hosting and maintenance:</p> <ul style="list-style-type: none"> • The commercial value of designing an equivalent website is determined and it is included as an election expense; • Costs related to pages for fundraising and/or on-line stores are excluded; • A pro-rated cost for the hosting and maintenance of the website during the election period is calculated and reported. <p>2. How to determine the cost of content production, distribution and promotion:</p> <ul style="list-style-type: none"> • The Party would assess what pre-existing content was produced for election purposes, including factors such as whether or not it mentions the election, how to vote, or if it addresses issues of particular interest in the given election, and how close to the election it was first posted. Any expenses incurred for content that can be reasonably described as election advertising (which directly promote or oppose a registered party, its leader or a candidate) would have to be reported. • If expenses were incurred to promote any pre-existing content produced for electoral purposes, those expenses would also have to be reported. 	<p>The party is correct in its understanding that an item of pre-existing content produced for the purpose of an election is an election expense. Please note that a second trigger is whether the content was promoted, even if it was not initially produced for the election. Please also note that parties have to look at all content, not only “election advertising” as defined by the CEA, since election advertising is only a message with a placement cost (e.g. a sponsored Facebook post). Content with no placement cost (e.g. a regular Facebook post) must also be considered.</p>

<p>We request clarification on the following matters:</p> <p>Labour and Commercial Value</p> <p>When a Party uses volunteer labour, as defined in the <i>Canada Elections Act</i>, the services provided by the volunteer count neither as a non-monetary contribution nor as an expense during an election. At the June 2018 ACP meeting, several of the small parties expressed concern about how they should evaluate the cost of their “pre-existing web site” produced in part or in entirety by volunteer labour. A definitive answer was not provided and the Interpretation Note seems geared towards political parties that primarily use paid labour, including professional writers, designers, graphic artists, videographers, and so on.</p> <p>Given that a Party is not required to report volunteer labour as an expense for the original production of a website, or a video, even if it occurs during an election campaign period, is it required to do so when it comes to working out the commercial value of the website vis-à-vis “pre-existing web content”?</p> <p>If the answer is yes, does it mean that political parties in this situation will have to obtain commercial quotes as to what it would cost to create an equivalent website?</p> <p>We think the answer is no. It would not be logical that something that is not treated as an election expense in one election would have to be artificially construed as an election expense in the next election. Could a section be included in the Interpretation Note to clarify this issue?</p>	<p>Elections Canada agrees that web services or content production provided entirely by eligible volunteers do not count as election expenses.</p> <p>The note has been clarified to explain that, in determining the election expense for a pre-existing website, the party may use the commercial value of an equivalent website or the actual expense incurred to produce the website, whichever is lower. If a website was created entirely using volunteer labour, is maintained by volunteers during the election period, and is hosted for free, there is no election expense to report.</p> <p>The note has also been clarified to explain that, if pre-existing content was produced entirely or in part using volunteer labour, only the actual expense incurred by the party is an election expense. This may include materials, equipment rental or paid labour.</p>
<p>“Coordinated Promotion”</p> <p>In regards to a Party having to include the cost of “promoting” pre-existing web content during an election campaign, the existing guidelines on internet and social media communications exclude those that do not require expenditures of either money or paid labour.</p> <p>In stating that a Party must report “promotion” of pre-existing website content, the Interpretation Note makes reference to “coordinated promotion.” The Interpretation Note states that “coordinated promotion includes any agreement, written or otherwise in 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.”</p>	<p>The party has to report pre-existing web content that it promotes during the election period as an election expense, even if the promotion itself is free.</p> <p>The concept of “coordinated promotion” is meant to stop parties from skirting the election expense rules by having other groups and entities promote the content for them. For example, let’s say a party has a pre-existing video on its website that cost \$5,000 to produce. If the party tweets a link to the video during the election period, the video has to be reported as an election expense. The party does not want the video to count, so it asks its candidates and supporters to tweet a link instead, hoping to avoid the election expense. This type of agreement is coordinated promotion. Under Elections Canada’s interpretation, the video will still have to be reported as an election expense.</p>

<p>If a Party asks its members and supporters to promote articles or videos from its website, this could be deemed to be “coordinated promotion” if the above statement is taken in itself.</p> <p>Could the Interpretation Note please clarify that this definition of “coordinated promotion” is clearly not meant to capture promotion of a Party’s program, positions, videos, etc. by its members and supporters?</p>	<p>As a normal practice, we expect that parties will ask candidates and supporters to promote the party’s program, positions and overall content. Much of this material will also be promoted by the party itself, and will be an election expense regardless of who else promoted it. The “promoted coordination” rule is meant to guard against a party wilfully circumventing the election expense regime by asking others to promote its pre-existing web content so that it does not have to.</p>
<p>MLPC Comment on the Incoherence of Election Expense Accounting</p> <p>The MLPC would like to note that the electoral financing regime and the concerns of the so-called major political parties about how it is interpreted and applied to their electoral expenditures increasingly expose how the law has nothing to do with enabling the electorate to participate in elections beyond casting a ballot. Political volunteerism and involving the people in political affairs, to the extent that it existed in the past, has been displaced by political parties supported by paid professionals in the form of advisors, marketing agencies, data management and analytic firms and other companies operating in the election business.</p> <p>In this respect, we raise for possible future reference, that the Interpretation Note regarding pre-existing web content underscores the significant election campaigning expenditures of certain political parties that are not brought forward and treated as election expenses that count towards the spending limits. Most glaring is the treatment of elector databases. They are treated as intellectual property assets excluded from election expenditures, the value of which would be far, far greater than pre-existing web content. The substantive amount of money involved both in acquiring database management systems and software, etc. and maintaining them are nowhere factored into how much is actually being spent on election campaigning. They are not captured by the election spending limits which are said to ensure an “even playing field.” This points to the self-serving nature of the election law that is largely the product of those who benefit from it—the political parties who use their privileged positions to legislate benefits and advantages for themselves.</p>	<p>Elections Canada notes your comment.</p>

Comments received from the Commissioner of Canada Elections	Elections Canada response to the Commissioner of Canada Elections
<p>We are in agreement with the content proposed in the interpretation note. With respect to the notion of “coordinated promotion” mentioned at pages 5 and 6 of the draft interpretation note, we believe that it is extremely important—perhaps in the context of a separate interpretation note—to expand further on this concept. It would be desirable, for the benefit of regulated entities, to identify and provide the main criteria that will be used to determine if there has been coordination or not, as well as examples of factual situations that may trigger a presumption of coordination. It would be useful to examine, in particular, the coordination that may occur between regulated political entities from the same political party as well as the coordination of expenditures between regulated political entities and third parties.</p> <p>This could build on examples from other electoral management bodies (like the <i>Federal Election Commission</i> in the United States) that have adopted similar guidelines. These identify criteria and factors to be considered in determining whether or not election expenses or communications have been coordinated between regulated political entities or between them and third parties.</p>	<p>Elections Canada agrees that it would be beneficial to expand upon the concept of “coordination” in the context of pre-existing web content and campaign activities of political entities. This subject will be dealt with in future guidance.</p>
<p>Furthermore, it seems important to limit, to the greatest extent possible, the coordination of activities that certain regulated political entities might be tempted to use. For this reason, the third bullet from the top of page 6 of the draft should be modified to make it very clear that coordinated promotion may flow from any agreement, written or otherwise, or any other form of coordination, express or implied, between the parties or entities involved.</p>	<p>The bullet has been modified as suggested.</p>

The following parties did not submit comments to Elections Canada regarding OGI 2018-04:

- Alliance of the North
- Animal Protection Party of Canada
- Bloc Québécois
- Christian Heritage Party of Canada
- Communist Party of Canada
- Conservative Party of Canada
- Green Party of Canada
- Libertarian Party of Canada
- Marijuana Party
- New Democratic Party
- Progressive Canadian Party
- Rhinoceros Party