



## 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: 2018-05 (October 2018)

## *Communication Expenses of Registered Parties in a By-election*

### Issue

As part of their everyday operations, registered parties may conduct activities such as web communications, national fundraising drives and advertising campaigns that sometimes overlap with a by-election period. This note clarifies how parties should determine which of their communications, and what portion of the production and distribution costs for those communications, are election expenses for a by-election.

This note does not cover the costing of a registered party's pre-existing web content during a by-election. Please see interpretation note 2018-04 to determine when pre-existing content on party websites and social media accounts are election expenses, and how to calculate the expenses for websites themselves.

### Interpretation

- (1) Expenses incurred by the registered party to produce a communication and distribute it during a by-election are election expenses only if the communication was distributed for the by-election. Otherwise, the associated costs are not election expenses.
- (2) The above interpretation applies only to registered parties in their capacity as ongoing entities, and only during by-elections.
- (3) If a communication is distributed during and for the by-election, 100% of the production cost (or the commercial value, if it was contributed or transferred) is an election expense. This is true even if the communication is distributed to a broader area than the by-election riding.
- (4) If the communication is distributed to a broader area than the by-election riding, the election expense for distribution is what it would actually cost to distribute to the smallest area that includes the by-election riding. If there is no smaller distribution area for the specific medium used, then 100% of the distribution cost is an election expense.

## 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. (s. 376(3))
- 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

### Issues for registered parties

Registered parties often plan their communications activities based on long-term strategies. When these activities coincide with a by-election period, Elections Canada has considered the associated costs in affected electoral districts to be election expenses because they promote or oppose a registered party or its leader during an election period. This has been the interpretation regardless of the registered party’s purpose for distributing the communication.

Some parties have raised practical concerns about altering or interrupting their ongoing communications any time a by-election is called in order to avoid incurring election expenses. For example, a party could not be reasonably expected to curtail its communications for a leadership contest because a by-election is called. As well, while parties may not be opposed to halting the distribution of fundraising material in by-election ridings, their distribution lists are not always mapped to the federal ridings. In addition, national or regional ads are often planned in advance of by-elections being called. While it may be possible to stop transmission entirely or in a specific region, the party will likely still have to pay the provider for the full cost of the original agreement.

The practical difficulties of parties are exacerbated by the unpredictability of by-elections in terms of number, location and timing. Seats can be vacated for a variety of reasons—there have been 15 vacancies since the 2015 general election—and the writs can be issued anywhere from 11 to 180 days after the notice of vacancy.

If by-elections are called separately, they can claim a significant portion of any given year. For example, in 2017, three sets of by-elections were held and their election periods spanned a total of 115 days. Registered parties running candidates in those by-elections had to be conscious of the relationship between their ongoing spending and their election expenses for almost a third of the year.

Another difficulty is that a party's election expenses limit may be low if only one by-election is held at a time and the population is small. For example, if a by-election is held only in Nunavut (with an estimated base election expenses limit of \$18,713 in 2017), mailing out pamphlets to the approximately 9,800 households there might claim a significant portion of a party's limit. The average estimated base limit across all electoral districts in 2017 was \$79,420.

Some parties have said that, as a possible consequence of Elections Canada's current position, a party might choose to not field a candidate in a by-election if its ongoing activities do not fit within the election expenses regime. This could result in a loss of electoral choice for voters. They have suggested that expenses for ongoing fundraising or advertising during by-elections should be exempted from election expenses or valued in a different way since the activities are not being conducted for the by-election.

These practical concerns have highlighted the disconnect between the current interpretation and the reality of parties as ongoing entities. This has led Elections Canada to reconsider whether its current interpretation meets the intention of Parliament in limiting by-election expenses of parties. It is unlikely that the law was meant to effectively shut down activities of parties for large portions of the year, if those activities would have proceeded regardless of the by-election.

Spending limits are meant to ensure a level playing field between participants in elections. In the case of a general election, almost every activity a party does is to promote itself or oppose its opponents, and is therefore an election expense. The by-election context is different. Parties may be dealing with other matters linked to their ongoing activities and unrelated to the by-election. It is therefore necessary to rethink the existing interpretation of certain party by-election expenses.

### **Determining which communications during a by-election are election expenses**

As ongoing political entities, registered parties conduct activities between elections for purposes other than their immediate election. They work to spread their policy messages, recruit volunteers, increase their base of supporters, and solicit donations to keep the party operating between and during elections. The ultimate goal is to have their candidates elected in the next general election, but the work parties do between elections also serves an important democratic function.

It is clear that, in some instances, registered parties conduct ongoing activities during a by-election without the purpose of promoting the party or opposing another party for that election. The activity may therefore not qualify as an election expense. Elections Canada's guidance on costing other pre-existing resources, such as a registered party's office, can serve as a model in determining when a communication activity during a by-election is an election expense.

When a registered party maintains an office year-round, the chief agent must determine whether costs 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>1</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 the party's communication activities during a by-election, such as web communications, fundraising and advertising, in order to determine whether the associated costs are election expenses. In determining if a party is using a particular communication for an election, both the registered party's intention in producing the content and its actions during the election with regard to the content would be considered.

Just as each aspect of ongoing office activity is to be examined during a by-election, so should each communication activity. The registered party should ask itself the following question to determine if the cost for a particular communication transmitted during the election period is an election expense:

- Did the party incur an expense to produce or distribute the communication for the by-election? The totality of circumstances should be considered, including whether the content mentions the by-election or an issue of particular interest in the electoral district, how many days into the election period it was transmitted, whether the communication was planned close to the 180-day limit for the by-election being called, and how the communication fits into the party's overall strategy.

If the answer to the question is **no**, there is no election expense for the communication.

If the answer to the question is **yes**, there is an election expense for the communication. The registered party will need to report both the production cost and distribution cost (or a portion of it) as an election expense.

This interpretation applies exclusively to registered parties during by-elections on the understanding that registered parties' communication activities during a by-election may be for a purpose other than that by-election.

The interpretation does not apply to parties during a general election or to candidates in any election. This includes incumbent members of Parliament running for re-election who choose to continue using their parliamentary resources, such as billboards and householders, during the election period. The costs of those communication activities remain election expenses.

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<sup>1</sup> *Political Financing Handbook for Parties and Chief Agents*, February 2018, p. 66.

## Calculating the election expense for new communications during a by-election

Once a registered party has established that a communication is an election expense for the by-election, it must determine the amount of that expense in terms of production and distribution. In subsections 376(2) and (3) of the CEA, production and distribution costs of advertising or promotional material are explicitly included as election expenses, even if they are related to a fundraising activity.

### *Distribution cost*

Elections Canada has previously required that, during a by-election, the election expense for distribution be reported as the actual cost to distribute in the smallest region that includes the by-election riding. In some cases, especially for television advertising, the smallest region of distribution for a specific medium may still be a much larger area than the by-election riding—it may be several provinces and territories, or the whole country.

In analyzing whether the CEA allows the distribution cost to be broken down any further, it is useful to consider what happens when a registered party transmits advertising outside a by-election riding: the associated cost is not an election expense because there is no promotion in relation to the election. By the same token, if a party transmits regional advertising during a by-election with the purpose of reaching the by-election riding, the party is promoting itself for the election to only a subset of people in the distribution area.

One could argue for taking a position that would allow registered parties, during a by-election, to prorate the election expense for distribution based on the population in the affected electoral district. However, this would result in an uneven playing field in terms of access to advertising space.

For example, if it costs \$30,000 to broadcast an ad nationally during a hockey game,<sup>2</sup> the prorated election expense for distribution in a single electoral district with an average population size would be \$250. That distribution cost would be affordable for many smaller parties, but they could not in fact access the ad space without spending to reach the rest of the country.

As a result, Elections Canada views the current interpretation of how to allocate distribution costs during a by-election as correct. If a communication is an election expense for the by-election, the applicable distribution cost is what it would actually cost to distribute to the smallest area that includes the by-election riding. If there is no smaller distribution area for the specific medium used (for example, a specific newspaper or TV network), then 100% of the distribution cost is an election expense.

### *Production cost*

Where a communication is found to be a by-election expense, the full cost to produce the communication must be accounted for.

Currently, Elections Canada makes an exception only for the production of pre-existing billboards, which may be reported at less than their commercial value. It is important to examine the details of this exception to see if it might apply to other communications, such as national fundraising or advertising, during a by-election.

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<sup>2</sup> Advertising rates in this note are estimates based on hypothetical scenarios.

When pre-existing billboards remain in place during an election period, the political entity may report as an election expense the commercial value of a temporary billboard that would be installed just for the election period—in other words, a billboard built to have a physical lifespan of weeks instead of years. The commercial value must still be reported for a billboard of the same size, with the same design, and installed at the same height.

For example, a member of Parliament with pre-existing billboards can report the commercial value of equivalent signs printed on corrugated plastic instead of aluminum or lumber, and installed at the same height using lumber instead of steel beams.

Can this exception be applied to other communications? Direct mail is already designed to have a short lifespan, and digital material has an indefinite lifespan no matter how it is produced. Therefore, the accepted rationale for reporting billboards at less than their actual production cost or commercial value does not apply to communications such as pamphlets, broadcast advertising and digital advertising.

The election expense for production is therefore 100% of the production cost or, if contributed or transferred, the commercial value.

As an example, the full cost to create, assemble and edit all parts of a video that is an election expense 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.

## **Practical Application**

This section provides examples of how the interpretation applies to various communication activities during a by-election.

### **TV advertising**

There is a by-election underway in Scarborough–Agincourt. The party runs an ad on XYZ News across Ontario, in part to influence voters in that by-election. An election expense must therefore be reported.

The party paid \$4,000 to produce the ad and \$2,000 to run the ad on XYZ Ontario. For this advertising, the smallest distribution area that includes Scarborough–Agincourt is XYZ Toronto. The actual cost to run the ad on XYZ Toronto would have been \$1,600.

The total election expense is therefore \$5,600 (\$4,000 production + \$1,600 distribution).

## Internet advertising

There are by-elections underway in Victoria and St. John's East. The registered party sponsors a Facebook post opposing a registered party, targeted to Canadian users aged 18 to 65 with an interest in politics, in part to influence voters in the by-election ridings. An election expense must therefore be reported.

The party paid \$500 to produce the post and \$8,000 to sponsor it for one week. Because sponsored posts can be targeted by postal code, and ridings can be linked to postal codes, the smallest distribution areas for this advertising are the postal codes linked to Victoria and St. John's East. In this case, prorating the cost based on targeted users in the two ridings is a reasonable way to arrive at the actual cost for distribution:

- Targeted Facebook users: Canada, 4,000,000; Victoria, 12,000; St. John's East, 7,000
- $\$8,000 / 4,000,000$  users in distribution area x 12,000 users in Victoria = \$24 election expense for distribution
- $\$8,000 / 4,000,000$  users in distribution area x 7,000 users in St. John's East = \$14 election expense for distribution

The production cost of \$500 is split evenly between the two electoral districts.

The total election expense for Victoria is therefore \$274 (\$250 production + \$24 distribution). The total election expense for St. John's East is \$264 (\$250 production + \$14 distribution).

## Fundraising

1. There is a by-election underway in Winnipeg Centre. As part of its national fundraising, the registered party emails its supporters with an embedded video that solicits contributions. The cost to produce and distribute the email, including the video, is \$2,000.

Because the registered party had planned this fundraising weeks before the by-election was called and did not send the email with the intention of influencing voters in the by-election, there is no election expense to report.

2. There is a by-election underway in Winnipeg Centre. Before the by-election was called, the registered party had planned to send a national fundraising email to its supporters with an embedded video that solicits contributions. After the by-election is called, the party adds content to the email about issues of particular interest in the by-election riding. The cost to produce the email, including the video, is \$2,000.

Because the registered party adjusted its content for the by-election, the production cost of \$2,000 is an election expense. The party used a free email service to send the message, so there is no election expense for distribution.