

Jonathan Rose, Queen's University
Further Thoughts to Standing committee on Government Operations and
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As someone who has been working in this area for some time, I have to say that on the whole these are welcome amendments. What they do is attempt to curtail the impulse of governments of all political stripe to use taxpayers' money to buy voters' favour. They also place adjudication of advertising in a third party, which as an independent body, helps ensure legitimacy of its decisions. Having said that, I do think that there are some areas that could be improved.

There are three areas that need to be re-considered. First, the definition of partisanship; second, the narrow definition of advertising; third, issues around the 90 day ban prior to the writ and finally the appropriate body to review government advertising.

It should be the goal of all governments to limit or prohibit partisan government communications and the government of Canada has come a long way since Clifford Sifton, the Minister of Immigration in Laurier's government used advertising to euphemistically describe Canada's winter climate as 'bracing' and 'invigorating'. Or prior to the 1980 Quebec Referendum the federal government through its Canadian Unity Information Office extolled the virtues of a strong federalism in massive ad campaigns in Quebec. The ads from the Department of Health and Welfare that succinctly urged readers to "Say no to smoking" were a not so subtle substitute for the federal position in that referendum.

It's not a surprise that for years the government of Canada was one of the top ten advertisers in the country and spent more per capita than almost all other democratic governments. Thankfully, that has changed.

How to define partisanship?

The most significant change in the new policy is largely around banning partisanship in government communications. In the policy, non-partisan communication is defined as information which is "objective, factual and explanatory"; "free from political party slogans, images, identifiers; bias; designation; or affiliation"; does not use a colour associated with the governing party and; which must not include the voice, name or face of a minister or MP. These are all things that reasonable people can agree on. What is noteworthy is that with one exception (objective, factual and explanatory) partisanship is defined in the absence of things (can't have party slogans, colours or MPs).

Perhaps this negative definition is a result of the inability to clearly define what is partisan. This is most famously stated in US Supreme Court Justice Potter Stewart famous quote about pornography 'I know it when I see it'.

What would have strengthened the policy is a definition that states positive standards to which government advertising must adhere and to give greater latitude for the independent review body, the Advertising Standards Council, to exercise discretion in applying the partisanship test.

The gold standard, in my opinion, is the government of Ontario's *Government Advertising Act of 2004*. In its original version prior to being amended in 2015, the GAA placed the burden on the part of the government to defend its use advertising. In other words, ads had to

- inform the public of policies or services;
- inform the public of rights;
- encourage or discourage social behaviour in the public interest

These explicit goals placed the obligation on the part of the government to demonstrate the need for an ad campaign in addition to demonstrating that it wasn't partisan.

Most crucially, a required standard was that "it must not be a primary objective of the [ad] to foster a positive impression of the governing party or a negative impression of a person or entity who is critical of the government."

Feel good ads that serve no obvious public policy purpose – arguably such as the Canada 150 ads or the Economic Action Plan ads might fall under this category.

The determination of whether an ad was partisan fell to the Advertising Review Group of the provincial Auditor General, a group of which I was part.

The *Act*, prior to being amended in 2015, also allowed the provincial auditor general's office to determine the context of the ad or advertising campaign. Context matters as sometimes a perfectly appropriate government ad could be supplemented by a party ad that communicates the same thing. In these cases the government ad is a thinly disguised attempt to leverage party advertising through government advertising.

This was the case with the Ontario Retirement Pension Plan government ad campaign in 2015 that met the standards and was broadcast followed by a very similar campaign funded by the Liberal party. Unfortunately, changes to the *Act* in 2015 allowed this and assessment based on context was no longer permitted.

This would also be permitted under the new federal regulations. And that is something that the committee may want to recognize.

What is the scope of advertising?

A second concern is around defining what is advertising. According to Louise Baird who testified before this committee on June 15, “a video that is produced and put on our departmental website ... [is] not considered advertising under the policy”. The issue is made clear by the Policy on Communications and Federal Identity which states that government advertising “is defined as any message ... paid for by the government for placement in media”.

Without being able to scrutinize government websites, there is potential for content that is laudatory but provides no information, not unlike 24 Seven campaign from a previous PMO. The principle here is simple: there needs to be rules in place so that if and when a government’s good judgment lapses, they can be held to account.

Internet advertising by government has grown 126% from 2012 to 2015-16¹, the last year that data are available. Virtually all ads in traditional media of radio, television and print feature links to government websites.

If those websites are not covered under the changes, the reviewed ad could serve simply as a way to drive traffic to a government website that did not adhere to the criteria of ASC. In Ontario, the Auditor General reached an agreement with the provincial government that recognized the link was an extension of the ad. As such the website or first click (if it was a landing page) was also reviewable to prevent innocuous government ads being a teaser for non-reviewable partisan ads.

On the 90 Day Advertising Ban:

This is an improvement on past practice but a study I understood demonstrated that governments spend more money in the year before an election on advertising than in previous years so the 90 day ban may not have a large effect.

Moreover, the 90 day ban prior to the general election would not stop governments from advertising during by-elections. If we follow the principle that advertising is undue influence during an election, surely that same logic must hold true in a by-election? Due to the nature of digital communications, prohibiting advertising in the electoral district where the by-election is held

¹ *Annual Report on Government of Canada Advertising Expenditures, 2012-13 and 2015-16* when internet advertising grew from 15% of overall advertising to 34%

would do nothing to prevent the obvious spillover from advertising in neighboring electoral districts. Governments recognize that severely curtailing advertising during elections to emergency health ads and employment ads have little debilitating effect on the functioning of the state, the same logic would hold true in by-elections. In the 41st parliament (2011-2015), while there were fifteen by-elections, they were clustered around four dates over four years – which is hardly an imposition to advertising.

There are two provinces which also have legislation around limiting government advertising and their practice might be instructive for this committee.

Manitoba also has a 90 day rule but also prohibition during by-elections

Saskatchewan is more nuanced. Advertising is banned during the election period (27 days) 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. Like Manitoba, advertising is banned during by-elections.

I would urge the committee to think about banning advertising during by-elections. In Canada, the average campaign is 50 days (from 1872 to 2015) but 45 days if we exclude the unusually long campaign of 78 days in 2015. This means that the present ban is only 40 days on average before an election date and if the next campaign was as long as the last, the government could advertise up to 2 weeks prior to the election being called. That gives a lot of lee way to prime the electorate with government ads.

Advertising Commissioner:

In addition while the Advertising Standards Commission is well-respected organization that has expertise on the subject, it does not have the same legitimacy as a Officer of Parliament who would serve parliament as a whole. Having a small office of the Advertising Commissioner would ensure that both the body has independence but also that it has clout and means of enforcement. It could also be used to adjudicate other issues relating to advertising such as expenditures or timing of ad campaigns. At present, Public Services and Procurement Canada produces an Annual Report of government advertising. It is often published much later than the government's fiscal year

making accountability more difficult. For example, the 2016-17 Annual Report on Government Advertising comes out in January 2018 which is 10 months after the year on which it reports. An Advertising Commissioner could also ensure more expeditious reporting of government advertising.