

Local Government Elections Task Force Third Party Advertising Discussion Paper

April 2010



Third-Party Advertising

Issue Summary

The regulation of third-party advertisers¹ during election campaigns generally involves placing limits on the amounts that third-parties can spend on advertising during an election campaign and/or requiring third-party advertisers to comply with rules designed to make such advertising more transparent (e.g. requiring sponsorship information be included in election advertising and filing financial disclosure statements). In British Columbia provincial elections, there are rules in place that make third-party and other election advertising more transparent including restricting who can undertake election advertising and requiring that sponsorship information be included in all advertisements. Third-party advertisers in provincial elections are also subject to third-party advertising expense limits and must file disclosure reports after the election.

In British Columbia local government elections, third-party advertisers are not specifically regulated but most third-party advertisers fall within the definition of “campaign organizer”². Campaign organizers (including any third-party advertisers that fall within the definition) are required to comply with the same campaign finance rules as candidates and elector organizations³ (i.e., they must have a financial agent and a campaign account and they must record and disclose expenses and contributions). Unlike the provincial system however, there are no restrictions in local elections on who can sponsor election advertising or how much may be spent on election advertising by third-parties. Furthermore, sponsorship information does not have to be indicated in election advertising in local government elections.

Following the 2008 local government elections, several issues emerged with respect to third-party advertisers in local government elections. For example, in some cases, it appears that rules were not fully understood by some individuals and organizations. The lack of understanding may have contributed to a lack of compliance with the rules (i.e. it is possible that some organizations that should have disclosed third-party advertising activity as campaign organizers, did not). Compliance was also

¹ Third-party advertisers are individuals or groups who are not candidates or elector organizations (i.e. political parties) but who conduct or sponsor election advertising.

² Campaign organizers are groups or individuals that create and implement local government election campaigns that augment the election campaign of one or more candidates or elector organizations. A campaign organizer may do this by promoting or opposing a candidate or an elector organization, or a course of action advocated by a candidate or elector organization. A campaign organizer need not identify itself to the chief election officer unless it incurs campaign contributions or election expenses greater than \$500.

³ Elector organizations are formed for the purposes of directly promoting a candidate or a point of view in a local government election. Elector organizations are occasionally referred to as civic political parties. The endorsement of the elector organization may appear on the ballot beside the names of candidates that the organization has endorsed.

difficult to monitor in some cases and some suggest that the absence of disclosure requirements for sponsorship information exacerbated the problem.

This paper provides an overview of the current regulatory environment applicable to third-party advertisers in both provincial and local government elections in British Columbia and identifies some of the key considerations related to any proposal to change the existing third-party advertising rules applicable in local government elections. The paper ultimately asks the Local Government Elections Task Force for directional guidance on whether further work related to third-party advertisers is required.

Background

Local government elections in British Columbia

Local government elections in British Columbia are governed by the *Local Government Act* and parallel provisions in the *Vancouver Charter*. Under the *School Act*, these rules also apply to board of education elections. The local government campaign finance system regulates the campaign activities of three types of entities: candidates, elector organizations (or civic political parties) and campaign organizers. All three types must comply with essentially the same campaign finance rules⁴ including appointing a financial agent, opening a campaign account, recording and disclosing expenses and contributions. It is important to note that the local government campaign finance rules do not require candidates, elector organizations or campaign organizers to indicate sponsorship on election advertising.

While third-party advertisers are not specifically regulated in the local government campaign finance system, most third-party advertisers fall within the definition of “campaign organizer” and therefore must comply with the campaign finance rules. The category of “campaign organizer” was added to the *Local Government Act* in 2008 but was not specifically intended to address third-party advertising. The 2008 amendments were intended to address a gap in the legislation that made it possible for individuals and organizations to finance an election campaign without being subject to the campaign finance rules. For example, organizations that failed to meet the requirements for becoming an elector organization (e.g. did not have 50 members), but still wished to support a candidate, were free to do so but were not subject to the campaign finance rules since prior to the 2008 amendments, the campaign finance rules only applied to candidates and elector organizations. It is important to note that while the definition of campaign organizer is broad, it may not capture *individuals* that undertake third-party advertising *unless* they accept campaign contributions in relation to the campaign⁵.

⁴ Although only campaign organizers that incur election expenses or receive contributions totaling more than \$500 are required to make themselves known to the chief election officer and to file a disclosure statement following the election.

⁵ Groups that are campaign organizers are captured by the definition, even if they do not accept donations from others.

Provincial government elections in British Columbia

Provincial elections are governed by the *Election Act*. Election advertising⁶ in provincial elections can only be sponsored by candidates, registered political parties, registered constituency associations or individuals and organizations that are registered as advertising sponsors (i.e., third-party advertisers) with Elections BC. Registered advertising sponsors must be independent of candidates, registered constituency associations and registered political parties.

There are also several rules that apply to third-party advertisers in provincial elections that increase transparency. For example, election advertising must not be conducted (or published) unless it identifies the name of the sponsor, indicates that the sponsor is registered under the *Election Act* and indicates that it was authorized by the sponsor. Also, the advertising must give a British Columbia mailing address or telephone number at which the sponsor may be contacted. In addition, registered advertising sponsors must record information about each contribution⁷ received and file an election advertising disclosure report if election advertising with a value of \$500 or more was sponsored during the 60-day pre-campaign period or campaign period⁸. The election advertising disclosure report must indicate the total value of election advertising that was sponsored, the amount of any contributions accepted, and the amount received from specified classes of contributors (e.g.: individuals, corporations unions and anonymous). There are additional disclosure requirements in relation to any contributor that contributes more than \$250⁹. All disclosure reports are available to the public through Elections BC's website.

The provincial government campaign finance rules also limit the spending of third-party advertisers during the campaign period¹⁰. The *Election Act* was amended in May 2008, limiting third-party election advertising from the start of the 60 day pre-campaign period to the end of voting on general voting day. On March 30, 2009, the British Columbia Supreme Court found that spending limits on third-party election advertisers during the 60 day pre-campaign period were an unjustified infringement on the right to freedom of expression guaranteed by the Canadian Charter of Rights and Freedoms. As a result of this decision, there is no longer a limit on the value of election advertising sponsored during the 60 day pre-campaign period by a registered election advertising sponsor. The limit is still applicable during the 28-day campaign period.

⁶ Election advertising is the transmission, by any means, of an advertising message to the public that is transmitted during the period that begins 60 days before a campaign period and ends at the close of general voting for the election, and promotes or opposes, directly or indirectly, a registered political party or the election of a candidate. This includes taking a position on an issue with which a candidate or registered political party is associated

⁷ For example, the date and value of each contribution must be recorded as well as the name and class of each contributor.

⁸ Candidates, registered political parties and registered constituency associations do not need to file separate elections advertising disclosure reports since their advertising expenses are included in their election financing reports.

⁹ For example, the contributor's full name (or if a corporation, the names of two of its directors or officers) must be reported.

¹⁰ The total value of election advertising sponsored during the campaign period by a third-party advertiser cannot be more than \$3,000 in relation to one electoral district, and \$150,000 in the province overall.

Other Canadian jurisdictions

Only Quebec limits third-party advertising in local government elections¹¹. Only electors and unincorporated groups (groups that are “not endowed with legal personality”) may sponsor election advertising if they are “authorized” as a private intervenor. Private intervenors are only permitted to incur “publicity expenses” up to \$300 during the election period. To be authorized as a private intervenor, electors or unincorporated groups must apply to the municipality and declare that they are not a member of any party, not acting directly or indirectly on behalf of any candidate or party and do not intend to directly promote or oppose any candidate or party. Private intervenors may only incur advertising expenses with their own funds and all expenses must be paid by cheque or money order drawn on the private intervenor's account. All expenses over \$25 must have an invoice. An expense report must be filed with the municipality within 30 days after voting day and must be accompanied by all invoices, receipts, etc. The law also requires that all advertisements made by private intervenors be identified with the name of the intervenor and an assigned authorization number.

Saskatchewan's *Local Government Election Act* does not include third-party advertising expense limits however it does contain rules that make election advertising by third-parties more transparent. For example, all election advertising must include the name of the person that authorized its printing, display and distribution. Election advertising must also include the name and address of its printer and publisher.

Union of British Columbia Municipalities

In 2000, the District of North Vancouver put forward a resolution requesting that the Ministry review the relevant legislation to address the issue of anonymous election advertising. The resolution noted that anonymous advertisements were sponsored in some communities and that without the identity of the sponsors in such advertisements, the electors may have been unable to obtain additional relevant information. The resolution was endorsed by UBCM members and the Province indicated its commitment to examine election issues to determine if any changes to the elections legislation were needed.

In 2009, the City of Vancouver put forward a resolution calling for expense limits (along with contribution source restrictions and contribution amount limits) to be imposed on elector organizations, campaign organizers and candidates. Expense limits on campaign organizers would apply to most third-party advertisers. The City of Vancouver resolution was not debated or considered by UBCM members due to time constraints. The UBCM executive has referred the resolution to the Local Government Elections Task Force for consideration.

¹¹ These rules only apply to communities with a population of 5,000 or more.

Submissions to the Local Government Elections Task Force

In a submission to the Local Government Elections Task Force, political science Professors Patrick Smith and Kennedy Stewart, both from Simon Fraser University, recommend that third-party advertisers be prohibited from naming specific candidates in election advertising (that thought is echoed in at least one other submission from an individual) and that third-party advertising include sponsorship information.

Other submissions to the Local Government Elections Task Force raise the issue of lack of transparency with respect to third-party advertising. For example, anonymously funded television or radio advertisements and anonymously printed and distributed brochures are cited as reasons to require sponsorship information in all election advertising. Other submissions include suggestions that third-party advertising: (1) only be sponsored by electors in the municipality, (2) be subject to expense limits and (3) only be sponsored by those registered with the chief electoral officer.

Discussion

Principles

Campaign financing systems reflect the relative importance of certain core principles in a jurisdiction. Emphasizing or favouring one principle may require de-emphasizing another and so deciding which rules to implement requires consideration of the complex interplay between and among different principles. For example, complex recording and reporting provisions aimed at promoting the principles of transparency and accountability may lessen general accessibility for the average citizen.

Third-party advertising expense limits are seen by some as enhancing or emphasizing fairness by ensuring that all third-party advertisers have a reasonable opportunity to express their ideas. They assert that election discourse should not be dominated by those who have resources sufficient to overwhelm the ability of others to present their ideas to the electorate. However, it is important to keep in mind that while such limits, in the views of some, may serve the principle of fairness, they are seen by others as restricting freedom of expression by limiting the amount one can spend to advertise or communicate their ideas.

Rules that require third-parties to disclose advertising expenses and indicate their sponsorship on election advertising are seen by some as enhancing transparency. Others argue that such requirements, while increasing transparency, may also reduce accessibility and efficiency by making participation in local government elections more complex than it needs to be.

The “case for” enhanced third-party advertising rules and the “case against”

The following “case for” and “case against” section considers some arguments for and against enhanced third-party advertising rules in local government elections. Generally speaking, those in favour of enhanced rules argue that the existing rules applicable to third-parties are not fully understood and that

there is a lack of transparency in relation to election advertising in local elections. Those against enhanced rules argue that such changes could create additional administrative burden, enforcement issues and ultimately be challenged in court.

The “case for” enhanced third-party advertising rules

The rules are not fully understood

The *Local Government Act* provides that any individual or organization that undertakes an election campaign¹² that supplements or acts in place of a campaign of a candidate or elector organization, is a campaign organizer. All campaign organizers must comply with certain campaign finance rules (i.e. appoint a financial agent, open a campaign account, record expenses and contributions). However, only those that receive contributions or incur expenses of more than \$500 are required to identify themselves to the chief election officer and to file a disclosure statement following the election. In several British Columbia communities, it appears to some that these legislative requirements were not fully understood or complied with.

For example, in Summerland during the 2008 local government elections, several advertisements that endorsed a group of candidates were placed in local newspapers. It was not clear who sponsored the advertisements but some were identified as being sponsored by “Citizens for Smart Governance”. Even though the candidates that were endorsed in the advertisements did not sponsor the advertisements, many of them reported a proportion of the total estimated value of the advertisements as anonymous contributions of approximately \$200 to each of their respective campaigns. Ultimately, a local business person claimed sole responsibility for placing the advertisements using only personal funds. Individuals that use only personal funds (i.e. do not accept or intend to accept contributions) do not fall within the definition of “campaign organizer” and accordingly are not subject to the campaign finance rules. Following the election, some argued that the candidates improperly accepted anonymous contributions because the amounts reported by each (\$200) exceeded the \$50 maximum allowable anonymous contribution. Others suggested “Citizens for Smart Governance” was a campaign organizer that, because more than \$500 was spent, should have provided the required information to the chief election officer and complied with the campaign finance rules.

There were also issues in Central Saanich, West Vancouver and Langley with respect to third-party campaigning and advertising. In each of these communities, there were allegations that certain organizations undertook election campaigns in support of candidates and spent more than \$500 but did not file campaign finance disclosure statements, as required under the *Local Government Act*.

¹² In relation to a campaign organizer, an election campaign is promoting or opposing the election of a candidate; approving or disapproving of a course of action advocated by a candidate; promoting or opposing an elector organization or campaign organizer or its program

Lack of election advertising transparency

Under the current rules, election advertising in local government elections does not need to indicate who sponsored or approved the advertisement regardless of whether it is sponsored by a candidate, an elector organization or a campaign organizer. Some argue that the lack of sponsorship information on election advertising leads to confusion and can make enforcement of the campaign finance provisions more challenging since it can be difficult to ascertain who sponsored advertisements and media outlets (publishers) are not obliged to disclose such information. Proponents of requiring sponsorship information in election advertising point to British Columbia's provincial election campaign finance rules that require election advertising to include sponsorship information and indicate that the advertising was authorized by the sponsor or financial agent¹³. Provincial election advertising must also include a telephone number or mailing address where the sponsor or financial agent can be contacted. Provincial rules also prohibit the publishing of election advertisements without the required sponsorship information included. In the case of third-party advertisers in provincial elections, election advertising must indicate that they are registered under the *Election Act*. Some suggest that similar rules should be implemented for local government elections in British Columbia because doing so would enhance transparency and enforcement. The provincial system also provides that non-compliant advertising may be removed and destroyed by the Chief Electoral Officer.

Lack of control over who can sponsor advertisements

Those in favour of requiring that sponsorship information be included on election advertising argue that it is even more important in local government elections since in local elections, anyone can sponsor election advertising. It is undertaking campaign activity (e.g. sponsoring election advertising) that may bring an individual or organization within the definition of "campaign organizer". This, some argue, creates confusion because organizations or individuals may lawfully sponsor election advertising without knowing that doing so makes them campaign organizers and therefore subject to campaign finance rules. The approach in the provincial election system is different. Under the *Election Act*, only *registered* third-party advertisers are permitted to sponsor election advertising (along with candidates, registered political parties and registered constituency associations) and media outlets must not publish election advertising by unregistered sponsors. Some suggest that this approach should be implemented for local government elections in British Columbia because it enhances compliance and aids enforcement.

No third-party advertising expense limits

Some argue that third-party advertisers should be subject to an expense limit to ensure all third-party advertisers have a reasonable opportunity to have their message heard. Proponents of third-party

¹³ Under the *Election Act*, election advertising must identify the name of the sponsor. In the case of a candidate, the election advertising must identify the name of the financial agent of the candidate or the financial agent of his or her registered political party. In the case of a corporation, a principal officer must be indicated.

advertising expense limits assert that such limits prevent some third party advertisers from overwhelming or dominating election advertising to the exclusion of other third party advertisers.

The “case against” enhanced third-party advertising rules

Possible court challenges associated with third-party advertising restrictions

On March 30, 2009¹⁴, the British Columbia Supreme Court found that spending limits in provincial elections on third-party election advertisers during the 60 day pre-campaign period were an unjustified infringement on the right to freedom of expression guaranteed by the Canadian Charter of Rights and Freedoms. The limits were upheld during the 28-day campaign period.

In local government elections, there is currently no “pre-campaign” period. The regulated campaign period is the calendar year in which the election takes place and since local government elections occur in late November, the campaign period is much longer than in provincial elections. Some suggest that this could complicate the imposition of a third-party advertising expense limit and ultimately make it subject to a court challenge. In order to avoid a challenge, or make one less likely, the current local government campaign period may need to be modified in the legislation to provide for a shorter period during which third-party advertising expenses could be limited.

While the idea of restricting the content of third-party advertising (e.g. prohibiting names of candidates from being included) has been raised in submissions to the Local Government Elections Task Force, such a restriction may also give rise to a court challenge. Such restrictions may be difficult to justify. While Canadian courts have upheld third-party advertising expense limits and restrictions related to *how* such advertising takes place (i.e. during certain periods and only by registered entities), the cases generally establish limits in relation to how restrictive the rules can be. Actually prohibiting *content* (such as the name of a candidate) may be seen as increasing the potential of finding an unjustifiable infringement of freedom of expression. Careful consideration would be required if this approach were to be pursued.

Additional rules to increase transparency are unnecessary

Some argue that because local elections are community based and generally do not involve large third-party advertising campaigns, there is no need for additional rules aimed at enhancing transparency. Some believe that a local person putting up a few signs in support of a candidate is what local democracy is about and requiring registration and disclosure of financial information is simply not necessary. They assert that doing so would subject election administrators to additional administrative and enforcement burdens. Furthermore, they argue that in the end, such measures could discourage citizens from participating in the local elections process.

¹⁴ *British Columbia Teachers' Federation et al v. British Columbia (A.G.)* 2009 BCSC 436. Currently under appeal filed by A.G.

Addressing the current issues

Making the rules more understandable

The 2008 amendments to the *Local Government Act* added the category of campaign organizer to the local government elections scheme. While third-party advertisers generally fall within the category of campaign organizer, the amendments were not specifically intended to address third-party advertisers. It is important to note that it was not a unique function (e.g., campaign advertising) that gave rise to the separate category of campaign organizer since campaign organizers do essentially the same things that elector organizations do in the local election system. The addition of the category of campaign organizer was primarily about addressing a gap that allowed an organization that failed to meet the elector organization requirements to operate as an elector organization (without ballot endorsement power) without being subject to the campaign finance rules.

One approach to clarifying the confusion could involve rethinking the categories of regulated participants in local government elections with the intention of making the roles and responsibilities of third-party advertisers more clear. Doing so could resemble the provincial model which clearly identifies third-party advertisers and the rules that apply to them.

Addressing third-party advertising gaps

Because the 2008 amendments were not specifically meant to address third-party advertising, some believe there are gaps in relation to the regulation of third-party advertising and advertisers. For example, election advertising in local government elections is not restricted - meaning that anyone can undertake or sponsor election advertising. In the provincial system, only candidates, parties, constituency associations and those registered with Elections BC can sponsor election advertising. Furthermore, sponsorship does not have to be indicated on election advertising in local government elections which some suggest reduces transparency and makes compliance more difficult to monitor.

There are also no third-party advertising expense limits in British Columbia local government elections. However, third-party advertising expense limits are generally only imposed in campaign finance systems that impose expense limits on candidates and parties - the rationale being that the effectiveness of expense limits on candidates and parties would be nullified if advertising dollars could simply flow to third-parties that were not subject to the limits. Some possible approaches to addressing specific third-party advertising gaps are discussed below.

Requiring sponsorship information in election advertising

The current local government elections system does not require sponsorship information to be included on election advertising. Some suggest that this reduces transparency and makes ensuring compliance challenging. Requiring sponsorship information on all election advertising could address this gap and mirror the provincial system. A corresponding requirement that publishers not publish election

advertising unless it bears sponsorship information could also be considered. Such a requirement exists in the provincial *Election Act*.

Restricting who can undertake election advertising

The provincial system requires that anyone that wishes to sponsor election advertising must register as an advertising sponsor with Elections BC. Only candidates, registered political parties, registered constituency associations and registered advertising sponsors (i.e. third-party advertisers) are permitted to sponsor election advertising. Such a restriction could be implemented in local government elections in British Columbia. Requiring any person or organization to register before undertaking election advertising may be seen as enhancing transparency and also addressing a possible gap in the existing local government rules. Currently, individuals that sponsor election advertising to support a candidate may not fall within the definition of campaign organizer *unless* they accept or intend to accept contributions from others in relation to the campaign.

Imposing a third-party advertising expense limit

The provincial campaign finance rules limit the amount that third-party advertisers can spend during the campaign period. It may be difficult to justify third-party advertising expense limits in the current local government system because the current local government system does not impose expense limits on candidates or elector organizations. If the Local Government Elections Task Force wishes to further consider expense limits on candidates, elector organizations or campaign organizers, third-party advertising expense limits would also need to be considered.

Possible Directions

1. Should sponsorship information be required on all election advertising in local government elections similar to the requirements at the provincial level (i.e., including requirements for publishers, offences, etc.)?
2. Should any organization or individual that wishes to undertake election advertising be registered similar to the election advertising sponsorship requirements at the provincial level?
3. Should any organization or individual that sponsors election advertising be required to file a disclosure statement?
4. Should the legislation continue to require that organizations and individuals that act like elector organizations meet campaign financing requirements similar to those applicable to elector organizations?
5. If province-wide election expense limits are introduced for candidates and elector organizations, should third-party advertising expense limits be examined?
6. Are there other directions related to third-party advertising that should be considered?