

Review of Government Advertising

Significant Changes made to the *Government Advertising Act, 2004*

The Ontario government made significant changes to the *Government Advertising Act, 2004* (Act) this year, and in the process it significantly weakened the Auditor General's ability to ensure that no public money is spent on advertising that is partisan.

In its original form, the Act required our Office to review most government advertising and, in cases where we deemed it not partisan, to issue a formal approval before an item could be used. It also set out standards to guide this work, and gave the Auditor General discretionary authority to determine what is partisan.

The amendments, contained in the *Budget Measures Act, 2015*, did away with this discretionary authority. Instead, they provide a specific and narrow definition of what is partisan, and only this definition may be used in our reviews.

While an approval from the Auditor General is still required before an advertisement can run, this approval is essentially a foregone conclusion as long as the item does not use the name, voice, or image of an MPP, does not "directly" identify or criticize a member or recognized political party in the Assembly, and does not use the name or logo of a recognized political party. For example,

a television commercial saying that "this government is the best in a generation" would, under the amended Act, receive approval so long as it avoided using the likeness, voice or name of an MPP, or a political party name or logo.

In effect, the amended Act now requires our Office to "rubber-stamp" all advertising submitted to us, including some items this year that we believe would have been considered partisan under the original Act.

The process by which the Act was amended is also worth noting. Our Office never received a copy of the draft amendments for review in advance of their introduction, and we were not consulted about the proposed changes.

After the proposed amendments were made public, we urged the government to reconsider. On May 12, 2015, we issued a Special Report (www.auditor.on.ca/en/reports_en/GAA_en.pdf) outlining our concerns. We highlighted that the proposed amendments could lead to government advertising that would meet the requirements of the Act, but still be considered partisan by any reasonable measure. This type of advertising, we wrote, would be of little value to the taxpayers who paid for it.

It would also negatively impact the credibility of the Auditor General as an independent Legislative Officer working at arm's length from the government.

The *Budget Measures Act, 2015*, including the amendments, was passed in the Legislature on

June 3, 2015, and received Royal Assent the following day. Regulations arising from the amendments took effect on June 16, 2015.

Partisan Advertising Defined Narrowly

The amendments repealed two critical subsections of the Act that allowed the Auditor General to consider additional factors beyond the specific ones in the amended Act when assessing whether a primary objective of an item is to promote the partisan interests of the governing party.

As amended, the Act now says an advertisement can be deemed partisan only if:

- “it includes the name, voice or image of a member of the Executive Council or a member of the Assembly, unless the item’s primary target audience is located outside of Ontario;
- “it includes the name or logo of a recognized [political] party ...;
- “it directly identifies and criticizes a recognized party or a member of the Assembly; or
- “it includes, to a significant degree, a colour associated with the governing party ...”

It is worth contrasting the government’s limited definition of partisan with the one offered in the second edition of the *Canadian Oxford Dictionary*; it defines the adjective “partisan” much more broadly as “loyal to a particular cause; biased.” A great number of elements beyond the government’s narrow definition could be built into an advertisement to make it partisan under the dictionary definition, but still conform to the amended Act.

Figure 1 provides a comparison of the original and amended standards in the Act for determining whether an item is partisan. Under the amendments, the Auditor General no longer has the authority to consider any additional factors beyond the ones above.

When the Act was first proclaimed in 2005, our Office established a set of criteria designed to identify the characteristics of partisan messaging based on research and input from experts in the field, including Advertising Standards Canada. We

applied these criteria to help us determine whether a primary objective of a proposed advertisement was to foster a positive impression of the governing party. The criteria included questions such as: Is the message fair, balanced and objectively presented? Is the tone of the item self-congratulatory to the government? Is the advertisement’s timing likely to bring the government significant political gains?

Without the authority to ask these questions, our Office now is in the position of approving advertisements as non-partisan because they conform to the narrow definition of the amended Act, even though they could be seen as partisan. We provide an example of this further in this chapter in the section entitled **Issues Under Amended Act**.

Other Advertising Standards Repealed

The government also repealed standards in the original Act that helped ensure government advertisements served a legitimate purpose. The original requirements stipulated that each item submitted to my Office had to be a reasonable means of:

- informing people about government programs, policies and services;
- informing people about their rights and responsibilities;
- changing social behaviour in the public interest; or
- promoting Ontario as a good place in which to live, work, invest, study or visit.

These standards were replaced with non-binding examples of reasons why the government may choose to advertise. We found the old standards useful and effective in our review process to promote transparency and accountability in government advertising. These standards also helped ensure that items provided useful information and did not unduly promote the governing party or criticize its opponents.

We were also concerned with the new powers the government gave itself to draft specific regulations regarding important aspects of the advertising review process; legislation is debated openly in the

Figure 1: Section 6 of the *Government Advertising Act, 2004*, Original and AmendedSource of data: *Government Advertising Act, 2004*

Original

Required standards

6. (1) The following are the standards that an item is required to meet:
1. It must be a reasonable means of achieving one or more of the following purposes:
 - i. To inform the public of current or proposed government policies, programs or services available to them.
 - ii. To inform the public of their rights and responsibilities under the law.
 - iii. To encourage or discourage specific social behaviour, in the public interest.
 - iv. To promote Ontario or any part of Ontario as a good place to live, work, invest, study or visit or to promote any economic activity or sector of Ontario's economy.
 2. It must include a statement that the item is paid for by the Government of Ontario.
 3. It must not include the name, voice or image of a member of the Executive Council or a member of the Assembly.
 4. It must not be partisan.
 5. It must not be a primary objective of the item to foster a positive impression of the governing party or a negative impression of a person or entity who is critical of the government.
 6. It must meet such additional standards as may be prescribed. 2004, c. 20, s. 6 (1).

Advertising outside Ontario

(2) Paragraph 3 of subsection (1) does not apply with respect to an item for which the primary target audience is located outside of Ontario. 2004, c. 20, s. 6 (2).

Partisan advertising

(3) An item is partisan if, in the opinion of the Auditor General, a primary objective of the item is to promote the partisan political interests of the governing party. 2004, c. 20, s. 6 (3).

Same

(4) The Auditor General shall consider such factors as may be prescribed, and may consider such additional factors as he or she considers appropriate, in deciding whether a primary objective of an item is to promote the partisan political interests of the governing party. 2004, c. 20, s. 6 (4).

Amended

Standards

6. (1) The following are the standards that an item is required to meet:
1. It must include a statement that the item is paid for by the Government of Ontario.
 2. It must not be partisan as determined under subsection (2).
 3. It must meet any additional standards that may be prescribed.

Partisan advertising

- (2) An item is partisan if,
- (a) it includes the name, voice or image of a member of the Executive Council or of a member of the Assembly, unless the item's primary target audience is located outside of Ontario;
 - (b) it includes the name or logo of a recognized party, within the meaning of subsection 62 (5) of the *Legislative Assembly Act*;
 - (c) it directly identifies and criticizes a recognized party or a member of the Assembly; or
 - (d) it includes, to a significant degree, a colour associated with the governing party, subject to subsection (4).

Reference to title

(3) Clause (2)(a) does not prevent the use of a member's title.

Exception, colour

(4) Clause (2)(d) does not apply to the depiction of a thing that is commonly depicted in a colour associated with the governing party.

 repealed text

 new text

Legislature, but regulations are drafted with no debate, which makes the process less transparent. The new regulations took effect on June 16, less than two weeks after the amended Act received Royal Assent. They included the revised timing under which our Office must notify the head of a government office of the results of our reviews.

In our Special Report last May, I asked the government to relieve my Office of its advertising-review duties and assign them to a government ministry or agency if it decided to proceed with the amendments. The government declined my request, and our Office is complying with the requirements of the amended Act.

Limited Definition of Digital Advertising

Digital advertising—for example, advertising on the Internet or in social media—was not subject to the Auditor General’s review in the original Act. Since 2011, our Office has called on the government to close this loophole, noting that this form of advertising accounted for a growing share of the province’s advertising budget.

The government included digital media in the amended Act this year, and defined it in a regulation as “an advertisement consisting of video, text, images or any combination of these that a government proposes to pay to have displayed on a website.”

However, this regulation exempts social media websites, including Facebook and Twitter, and digital advertisements displayed on a website by search-marketing services such as Google AdWords. In 2013/14, the government spent more than \$2 million on search-marketing services. This past fiscal year, it spent \$1.3 million. Our Office has no authority to ensure this spending is for non-partisan purposes.

In any case, the addition of digital media as reviewable is not meaningful in light of the limits on our ability to determine what constitutes a partisan advertisement.

Changes to Review Process

The original Act gave our Office seven business days in which to determine whether an advertisement met the standards of the Act. The amended Act shortens that to five business days—and adds digital advertising to our list of responsibilities.

Previously, we offered an optional pre-review service to government offices in which they could first secure an opinion on a proposed advertisement before spending significantly on production. This pre-review was outside the Act, and we offered it on a voluntary basis without a set deadline.

The amended Act now includes a formal requirement for reviews of preliminary versions of television and cinema advertisements, and requires us to complete them in nine business days.

Issues Under the Amended Act

Within a month of proclamation of the new Act, we approved a radio and digital advertising campaign from the Ministry of Finance on the Ontario Retirement Pension Plan (ORPP), a signature policy of the current government contained in the 2015 Budget. A few weeks later, while these ads were still running, the Ontario Liberal Party launched a television advertisement called *Never Slow Down*, in which the Premier speaks about ensuring that Ontarians have a decent pension to retire on.

Under the original Act, we could have expressed concerns about the overlap between the publicly funded advertisement and the political-party commercials, and the fact that the taxpayer-funded items effectively reinforced the partisan messaging of the Ontario Liberal Party. We would also have had the authority to withdraw our approval for the Ministry of Finance item, or even disallow it entirely in the first place on grounds that it claimed the ORPP was “here” when, in fact, it is at this point planned to begin operating in 2017.

Under the amended Act, however, the ORPP advertisement met all required standards and continued to air at the same time as the Ontario Liberal Party spot.

In August 2015, the government submitted two TV spots for approval about the ORPP. As with the previous submission in this campaign, we had to approve these ads under the amended legislation. However, we did note that we had significant concerns about the content of the ads and the timing in which they were to run.

We found the voiceover in one of the TV spots called *River* that states: “But there’s a huge gap because, if you don’t have a workplace pension, you won’t have nearly enough,” may not be factual. As well, both TV spots (and other advertisements in this campaign) said the ORPP was created “to help shrink the retirement savings gap.” We noted our concern that the visual, in which a person jumps clear of the gap, could leave the impression that the ORPP will in fact close the retirement savings gap. This could be misleading.

We also had concerns that, in the context of the federal election campaign and verbal exchanges between the Premier and the Prime Minister over the ORPP, these advertisements could have been perceived as having a partisan objective, especially since the advertising campaign was set to run right up to federal election voting day.

Results of Our 2014/15 Advertising Reviews

In the fiscal year ending March 31, 2015 (prior to the changes in the Act), we reviewed 653 individual advertising items in 182 submissions, with a total value of nearly \$20.85 million. This value excludes \$9.16 million in digital advertising, as it was not then reviewable. See **Figure 2** for a breakdown of spending by medium in the past year, and **Figure 3** for total annual spending over the last nine years.

A breakdown of expenditures this past year by each government ministry is provided in **Figure 4**.

Figure 5 shows the top 10 advertising campaigns in 2014/15 by expenditure. These 10 campaigns accounted for almost 82% of the total reviewable expenditure on advertisements that our Office reviewed in the past year.

In all cases, we gave our decision within the seven business days required under the original Act then in effect. Although the time required for a decision varies with the complexity of the submission and other work priorities, the average turnaround time during the past fiscal year was about four business days. In addition, we examined five pre-review submissions comprising 18 advertisements at a preliminary stage of development. The average turnaround time last fiscal year for pre-review submissions was about 10 business days. (The new limit is nine business days.)

Figure 2: Advertising Expenditure by Medium, 2014/15

Source of data: Ontario government ministries/Advertising Review Board

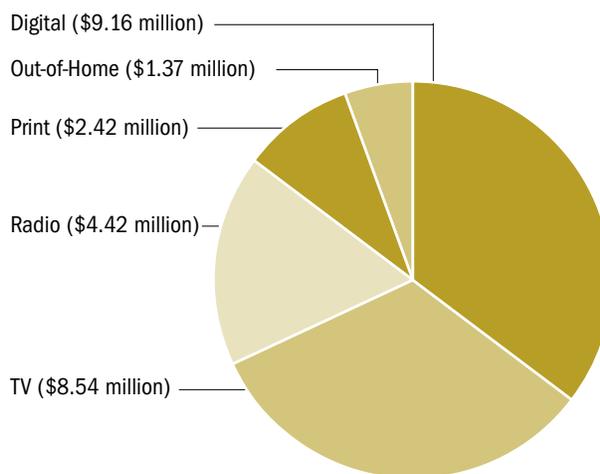


Figure 3: Advertising Expenditures, 2007–2015 (\$ million)

Source of data: Office of the Auditor General of Ontario/Advertising Review Board

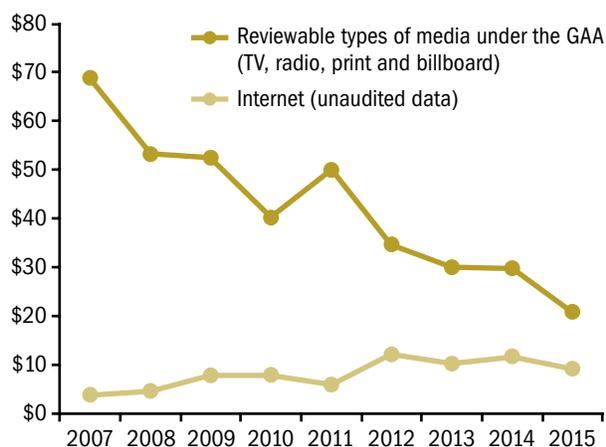


Figure 4: Expenditures for Reviewable Advertisements and Printed Matter under the Government Advertising Act, 2004, April 1, 2014 – March 31, 2015*

Source of data: Ontario government ministries/Advertising Review Board

Ministry	# of		Agency Fees (\$)	Production Costs (\$)	Media Costs (\$)				Total (\$)
	Submissions	Items			TV	Radio	Print	Out-of-Home ¹	
Agriculture, Food and Rural Affairs	7	55	96,421	177,243	2,313,164	1,049,648	62,167	376,225	4,074,868
Attorney General ²	4	7	–	49	–	–	14,436	–	14,485
Citizenship, Immigration and International Trade	7	55	104,405	1,235,906	1,797,854	–	239,912	–	3,378,077
Community Safety	2	2	–	18,000	46,820	–	1,870	–	66,690
Economic Development, Employment and Infrastructure	9	14	55,773	62,771	24,858	346,357	(26,460) ³	(36,015) ³	427,284
Education	4	34	65,034	46,227	–	633,742	109,222	–	854,225
Environment and Climate Change	1	2	–	–	–	–	27,174	–	27,174
Finance	3	34	61,000	27,000	(8,611) ³	157,030	704,880 ⁴	–	941,299
Government and Consumer Services	20	43	124,343	468,273	1,475,938	–	26,559	177,068	2,272,181
Health and Long-Term Care	10	22	264,667	463,596	492,477	1,110,348	322,503	462,586	3,116,177
Labour	4	50	–	900	(1,802) ³	578,631	49,917	–	627,646
Municipal Affairs and Housing	1	1	–	2,213	–	–	6,907	–	9,120
Natural Resources and Forestry	33	127	–	5,233	–	29,070	186,819	10,000	231,122
Tourism, Culture and Sport (Pan/Parapan American Games)	70	99	2,107	13,028	44,604	70,275	247,753	43,548	421,315
Training, Colleges and Universities	3	61	105,931	359,293	2,352,735	337,250	255,305	198,883	3,609,397
Transportation	4	47	150,075	202,490	(3,292) ³	102,683	193,032	137,181	782,169
Total	182	653	1,029,756	3,082,222	8,534,745	4,415,034	2,421,996	1,369,476	20,853,229

* The Auditor General/Act requires our Office to report annually on expenditures for advertising and printed matter reviewable under the GAA. In order to verify completeness and accuracy, we reviewed selected payments and supporting documentation. We also examined compliance relating to the sections of the Act dealing with submission requirements and use of ads during the Auditor General's review.

1. Includes billboards, transit posters, digital screens, etc.

2. Includes one ad that was published without being sent to our office for review as required.

3. Negative total due to media credits being applied.

4. Includes a print credit of \$8,650 from the previous fiscal year.

Note: The ministries of Aboriginal Affairs, Children and Youth Services, Community and Social Services, Correctional Services, Energy, and Northern Development and Mines did not incur any reviewable advertising costs under the GAA.

Figure 5: Top Ten Advertising Campaign Expenditures for 2014/15* (\$ million)

Source of data: Ontario government ministries/Advertising Review Board

Campaign	Ministry	Expenditure
Foodland Ontario	Agriculture, Food and Rural Affairs	4.06
Sexual Violence and Harassment	Citizenship, Immigration and International Trade	2.23
Consumer Protection	Government and Consumer Services	2.23
30% Off Tuition	Training, Colleges and Universities	1.83
Ontario Student Assistance Program	Training, Colleges and Universities	1.79
Health Care Options	Health and Long-Term Care	1.12
Remembrance Day	Citizenship, Immigration and International Trade	0.96
Ontario Savings Bonds	Finance	0.95
Seasonal Influenza	Health and Long-Term Care	0.93
Child Care – All Kinds of Questions	Education	0.85
Total		16.95

* Campaign expenditures exclude digital advertising costs.

No Violations; one Contravention of the Act

We found all advertising submitted to our Office in the 2014/15 fiscal year complied with the Act. However, we learned that the Ministry of the Attorney General published an advertisement about jury duty awareness in a newspaper without first submitting it to our Office for approval, as required by the Act. Had this advertisement been submitted to us for review, we would have approved it with the addition of a statement that it was paid for by the government of Ontario.

Overview of our New Compliance Function

What Falls Under the Act

The Act applies to advertisements that government offices—specifically, government ministries, Cabinet Office and the Office of the Premier—propose to pay to have published in a newspaper or magazine, displayed on a billboard, displayed digitally in a prescribed form or manner, or broadcast on radio or television, or in a cinema. It also applies to printed matter that a government office proposes

to pay to have distributed to households in Ontario by bulk mail or another method of bulk delivery. Advertisements meeting any of these definitions are known as “reviewable” items and must be submitted to my Office for review and approval for compliance with the amended Act before they can run.

The Act excludes from our review advertisements for specific government jobs (but not generic recruitment campaigns) and notices to the public required by law. Also exempt are advertisements on the provision of goods and services to a government office, and those regarding urgent matters affecting public health or safety.

The Act requires government offices to submit reviewable items to our Office. They cannot publish, display, broadcast, or distribute the submitted item until the head of that office (usually the deputy minister) receives notice, or is deemed to have received notice, that the advertisement has been approved.

If the Auditor General’s Office does not render a compliance decision within the five business days set out in regulation, then the government office is deemed to have received notice that the item is in compliance with the Act, and may run it.

If my Office notifies the government office that the item is not in compliance with the Act, the item may not be used. However, the government office

may submit a revised version of the rejected item for another review. Compliance approvals are valid for one year.

Revised Compliance Criteria for Proposed Advertisements

In conducting its review, the Auditor General's Office now only determines whether the proposed advertisement is in compliance with the amended Act. The following are the areas that the advertisement must be in compliance with:

1. It must include a statement that it is paid for by the government of Ontario.
2. It must not include the name, voice or image of a member of the Executive Council or of a member of the Assembly, unless the item's primary target audience is located outside of Ontario.
3. It must not include the name or logo of a recognized party.
4. It must not directly identify and criticize a recognized party or a member of the Assembly.
5. It must not include, to a significant degree, a colour associated with the governing party.

We have no authority to consider any other factors to determine whether an item is partisan.

Other Review Protocols

Since assuming responsibility for the review of government advertising in 2005, our Office has worked with the government to clarify procedures to cover areas where the Act is silent. What follows is a brief description of the significant areas that have required such clarification over the years. Our current protocols are noted below.

Websites

Although websites were not specifically reviewable in the original Act, we took the position that a website or similar linkage used in an advertisement is an extension of the advertisement. Following past

discussions with the government, our Office came to an agreement soon after the legislation was first passed that the first page, or "click," of a website cited in a reviewable item would be included in our review. We consider the content only of the first click, unless it is a gateway page or lacks meaningful content, in which case we review the next page. We examine this page for any content that may not meet the standards of the amended Act. For example, the page must not include a minister's name or photo.

Social Media

Over the years, the government has increased its presence on social-media sites. Our Office often receives advertisements for approval that use icons pointing to various social-media sites. Although the original Act was silent on this, we reached an agreement with the government that we would perform an initial scan of any social-media channel cited in an advertisement to ensure that the standards of the Act are being followed. However, we recognize that content on these networks changes frequently and can at times be beyond the control of the government office. Our review is therefore focused only on the content that the government controls.

The amended Act specifically excludes digital advertisements on social media websites from our review.

Third-party Advertising

Government funds provided to third parties are sometimes used for advertising. The government and my Office have agreed that third-party advertising must be submitted for review if it meets all three of the following criteria:

- A government office provided the third party with funds intended to pay part or all of the cost of publishing, displaying, broadcasting or distributing the item.

- The government granted the third party permission to use the Ontario logo or another official provincial visual identifier in the item.
- The government office approved the content of the item.

This agreement currently remains in place.

External Advisers

The *Auditor General Act* gives the Auditor General the power to appoint an Advertising Commissioner to help fulfill the requirements of the *Government Advertising Act, 2004*. However, we have chosen instead to engage external advisers to assist in the review of selected submissions as needed. The following advisers have provided us with valuable assistance in the past year and over the past decade:

- Rafe Engle (J.D., L.L.M.) is a Toronto lawyer specializing in advertising, marketing, communications and entertainment law for a

diverse group of clients in the for-profit and not-for-profit sectors. He also acts as outside legal counsel for Advertising Standards Canada, and as Chair of its Advertising Standards Council.

- Jonathan Rose is Associate Professor of Political Studies at Queen's University. He is a leading Canadian academic with interests in political advertising and Canadian politics. Professor Rose has written a book on government advertising in Canada and a number of articles on the way in which political parties and governments use advertising.
- Joel Ruimy is a communications consultant with three decades of experience as a journalist, editor and producer covering Ontario and national politics in print and television.
- John Sciarra is the former director of operations in our Office. He was instrumental in implementing our advertising-review function and overseeing it until his retirement in 2010.