REPORT ON PROPOSED LEGISLATION CONCERNING GOVERNMENT ADVERTISING

MICHAEL T. GREEN

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INTRODUCTION

In June of 2015 then leader of the Official Opposition Brian Pallister expressed displeasure with the provincial government's Steady Growth, Good Jobs campaign complaining that the advertising relating to that infrastructure plan was a misuse of taxpayer money because it promoted the governing party. He was quoted as saying that if elected premier his party would permanently give the provincial Auditor General the power to review all government advertising and block ads that were felt to be overly partisan.

Mr. Pallister had earlier written to the Auditor General asking that a review of the Steady Growth campaign be conducted. The Auditor General replied saying that he had no authority to investigate because Manitoba has no standards respecting government advertising.

Subsequent to the 2016 general election Premier Pallister wrote to the Minister of Justice and Attorney-General in relation to, among other things, her leadership role in "delivering on the following platform commitments" including to "empower the Auditor General to review all government advertising to ensure that it is non-partisan and information-based only".

The government is now considering the introduction of new legislation in Manitoba dealing with government advertising. The intention is to have a law dealing with all paid government advertising as opposed to the current legislation which applies only to government and government agency advertising during and immediately prior to elections. The existing legislation is found in Part 13 of *The Election Financing Act* (usually referred to as ("the EFA").

A bill has been drafted and I was asked to canvas "key stakeholders" for their impressions and observations concerning the proposed legislation and thereafter submit a report on my findings and recommendations to the Deputy Minister of Justice. A copy of the proposed legislation is attached as Appendix "A" to this report.

A non-exhaustive list of stakeholders included the Auditor General of Manitoba, the Chief Electoral Officer of Manitoba, the Commissioner for Elections of Manitoba, the non-governmental political parties, and the Auditor General of Ontario.

Neither the Manitoba NDP party nor the Auditor General of Ontario responded to my request for input from them.

I have completed my discussions with the rest of the identified stakeholders, as well as others, and my report follows.

OVERVIEW

There are two related but distinct issues which will be addressed in this report.

First is the question of government advertising in general with particular emphasis on the best way to achieve the stated purpose of avoiding partisanship in such advertising. The government's intention is to proceed by way of legislation and a bill has been drafted, which will hereinafter usually be referred to as "the Proposed Act".

After consulting with the stakeholders, and examining how the problem of dealing with government advertising in other Canadian jurisdictions is being handled, I am of the view that there are alternative approaches which the provincial government may wish to consider. I have also reviewed the experience and outcomes of the one Canadian province which did pass legislation dealing with government advertising generally. It is, of course, entirely the government's decision as to whether legislation will be passed but I feel that it is necessary to point out some of the potential pitfalls.

Second is the question of government advertising/communications in the periods leading up to elections. As will be seen from my discussions with some of the stakeholders there is concern that limiting the legislation to paid advertising while at the same time repealing the law surrounding government recommendations during election periods may result in an opportunity for abuse by the party in power. The potential abuse is that government resources may be used to further the political interest of the incumbent party.

I will deal with these two areas in sequence in this report.

I will initially deal with the question of whether legislation is the best way to proceed, including the results of my discussions with some of the stakeholders as well as other considerations. I will then move on to a discussion about the law which is in place and the wisdom of repealing it.

My consultations with some of the stakeholders involved discussions which related to both topics, that is commentary and observations regarding both the Proposed Act as well as possible repeal of the existing legislation. When summarizing the consultations I will divide the comments received into those two broad areas.

PART I – THE PROPOSED ACT

SUMMARY OF THE PROPOSED ACT

The main features of the Proposed Act are as follows.

It deals only with "paid advertising" which is defined as advertising pursuant to a commercial agreement or arrangement and which is:

- Published in newspapers, magazines or other periodicals;
- Broadcast on radio, television or in movie theaters;
- Posted or distributed on "the Internet or through the use of social media";
- Posted on property normally used for commercial advertising such as billboards;
- Printed material which is distributed on an unsolicited basis.

The Proposed Act allows the government or a government agency (as defined in *The Financial Administration Act*) to engage in paid advertising if the advertising is for one of the following purposes:

- To inform the public about existing, new or proposed programs, plans, services, development or policies, or about changes or proposed changes to existing ones;
- To inform the public as to its legal rights;
- To keep the public informed during times of emergencies;
- To promote Manitoba or a part of Manitoba as a good place to live, work, invest, study or visit, with the caveat that the advertisement's primary target audience must be outside Manitoba.

Certain standards are specified, namely that the government or government agency must ensure that the paid advertising is:

- Objective and factual;
- Non-partisan, and
- Contains an acknowledgment that the advertising was paid for by the government or government agency.

Paid advertising is deemed to be partisan if:

- It contains the name or logo of a political party;
- It includes slogans or is designed to promote the government, or the interests of a political party as opposed to communicating a factual message;
- It criticizes the views, policies or actions of others, including a political party;
- It includes the name, voice or image of a member of the Executive Council or a member of the Legislative Assembly, unless the primary target audience of the advertisement is outside Manitoba;

- It includes the achievements of the government or government agency.

There is a separate provision in the Proposed Act requiring signage at construction sites to be non-partisan.

A section of the Proposed Act provides that the Auditor General of the province must, at least once during the four-year period between fixed date elections, examine a government department or government agency which engages in paid advertising and determine whether adequate administrative and compliance procedures are in place and are being applied to ensure that paid advertising is achieving its permitted usages and requirements. The Auditor General is required to report on the compliance review a least 90 days before a fixed date election and the report is to be made public.

The Proposed Act prohibits the government or a government agency from engaging in paid advertising or posting new information on the Internet or through other digital means during the election period of a general election or a by-election. There are specified exceptions to these prohibitions, being:

- A notice to the public which is required by law;
- A matter affecting public health or safety, employment opportunities with the government or government agencies or the provision of goods or services to the government or government agencies;
- Infrastructure signage as described earlier in the Proposed Act; and
- During a by-election period, other paid advertising or distribution of information of a routine nature in relation to the usual operational activities of the government or a government agency.

The Proposed Act provides that the Lieutenant Governor in Council may make regulations prescribing an Internet site, or a digital means of distributing a message, to be included in the definition of "social media" as set out in the Proposed Act.

The Proposed Act allows a person who believes there to have been a violation of the advertising provisions during an election period to bring an application to the Court of Queen's Bench for a declaration that such a violation has occurred. The decision of the Court cannot be appealed.

And finally, the Proposed Act provides for the repeal of Part 13 of The EFA. As mentioned previously, Part 13 contains the current legislation dealing with advertising or publications during elections and by-elections.

THE ROLE OF THE AUDITOR GENERAL OF MANITOBA

When Mr. Brian Pallister, then the Leader of the Opposition, expressed his concerns with what he considered to be inappropriate advertising surrounding the Steady Growth, Good Jobs Campaign he announced that, if elected, his party would empower the Auditor General to review all government advertising and reject advertisements which the Auditor General felt were overly partisan.

Under the Proposed Act the Auditor General plays no such role. His mandate is much more limited.

In fairness to Premier Pallister, however, he may have had the existing legislation in Ontario in mind when making the announcement in 2015 and may have been unaware that the Ontario government had become unhappy with the Ontario Act and how it was being administered. As set out later in this report the Ontario Act eventually underwent significant amendments which some believe has entirely eliminated its original purpose.

I met with Mr. Norm Ricard, the present Auditor General of Manitoba, and it was obvious to me that he had reviewed and considered the Proposed Act carefully in preparation for our meeting.

He has concern with some of the wording in the draft and made a few comments which I took to be in the nature of conceptual reservations.

There were certainly parts of the Proposed Act with which he finds favour. For instance, Mr. Ricard feels that Sections 2 is well worded and comprehensive.

Section 2 allows the government or a government agency to engage in paid advertising if the purpose is:

(a) to inform the public about new or proposed programs, plans, services or policies or about changes to existing ones;

(b) to inform members of the public of their rights;

(c) to encourage or discourage specific types of social behaviour;

(d) to keep the public informed in times of emergency; or

(e) to enhance the reputation of Manitoba in the eyes of non-residents of this province.

Section 3(1)(a) of the Proposed Act requires the government or a government agency to ensure that its paid advertising is **objective** and **factual**. The Auditor General makes the point that whether advertising is objective will be one of the assessment criteria which his office will have to deal with and he cautions that the meaning of the word should be reasonably clear. For example, he wonders whether the word "objective" means that advertising must be devoid of accolades or superlatives such as "great", "wonderful", "huge" etc.

Section 3(2) (b) of the Proposed Act, which deals with the avoidance of partisan advertising, provides that "slogans" are forbidden. The Auditor General correctly points out that slogans are often used in government programs and yet do not result in partisanship accusations.

The area of greatest concern to the Auditor General is section 5 of the Proposed Act.

This section reads:

> **"Compliance reviews by Auditor General**
>
> **5(1)** The Auditor General must, at least once during the four-year period between fixed date elections, examine a government department or agency that engages in paid advertising to determine if it has adequate administrative and compliance procedures in place, and is adequately applying those procedures, to ensure that its paid advertising
>
> (a) reasonably achieves one or more of the purposes in section 2; and
>
> (b) adheres to the requirements of section 3 and 4.
>
> Reporting
>
> **5(2)** The Auditor General must make public his or her report on the compliance review at least 90 days before a fixed date election.
>
> Powers
>
> **5(3)** Section 18 of *The Auditor General Act* applies to a compliance audit."

The Auditor General's interpretation of Section 5(1) is that his office would be required to audit each government department or crown agency that engages in paid advertising at least once every four years. I must say that my initial interpretation of the provision was that the Auditor General would be required to audit only one government department or alternatively a government agency every four years, although presumably he would have the implied power to audit more.

After my meeting with the Auditor General I spoke again with Legislative counsel who were involved in drafting the Proposed Act. I was informed that the intention was to require only one audit.

The upshot is that an audit of one department or one agency every four years is, in the opinion of the Auditor General, completely inadequate from an auditing perspective.

In fact, it is the Auditor General's opinion that even if his interpretation were correct (that each government department or government agency is to be reviewed at least once in four years), that would be insufficient. He commented that technically his office could comply with the Proposed Act by looking at all organizations in year one and then do nothing for the next three years.

The Auditor General is of the view that examining and reporting only once in a four- year period will likely not change any offending behavior, and certainly won't prevent it. If the purpose of the Act is to prevent partisan advertising, which the Auditor General assumes to be the case based upon statements of Mr. Pallister during the last general election campaign, Mr. Ricard does not believe that his Office's required involvement, as envisioned in the Proposed Act, would contribute in a meaningful way to preventing or even detecting non-compliant advertisements.

The Auditor General also has a concern that the Proposed Act requires the examination only of *systems.* He feels that from an auditing perspective that may be insufficient. The goal should be to determine whether the system is generating the desired result. In his view the audits should focus *first* on outcomes or compliance and *then*, if needed, on the systems and procedures in place.

The Auditor General provided possible legislative wording in the following terms:

"The Auditor General must, on an annual basis, and using a risk-based approach, conduct compliance audits on whether government departments and agencies that engage in advertising are complying with provisions 2, 3, and 4 of this Act."

The reference to a "risk-based" approach entails a focus on entities with significant advertising activity and which have a history of non-compliance. Such non-compliance could only be determined over time. Random sampling of all other government departments and government agencies which advertise would also be necessary.

The Auditor General also has concerns that the Proposed Act seems to contemplate only one report on advertising audits during the four-year period.

He also notes the requirement "to make public" his report which is a marked departure from the requirements under *The Auditor General Act* which require the tabling of reports in the Legislative Assembly.

The Auditor General has again suggested possible legislative wording to address some of his concerns as follows:

> "At least once a year, the Auditor General must submit a report to the Assembly on the results of the compliance audits undertaken under this Act."

The Auditor General also commented upon Section 5(3) of the Proposed Act which states that Section 18 of *The Auditor General Act* applies to a compliance audit. He is perplexed as to why Section 18 has been specifically cited as Sections 24, 25, 28 and 29 apply to any audit which his office conducts.

The Auditor General is of the opinion that the Proposed Act is wanting in certain other respects and would recommend that the following be considered:

- The Act should impose obligations on entities to have adequate systems and procedures in place to ensure compliance with Sections 2,3 and 4;
- The Act should require a central agency, perhaps the Department of Finance, to provide guidance on what would be "adequate administrative and compliance procedures" as mentioned in Section 5(1) of the draft Act;
- The Act should require that all entities which engage in paid advertising report this activity, say every 6 months, in a format to be determined by the Auditor General.

The Auditor General is unclear as to the purport of Section 6 of the Proposed Act which states:

> **"Restrictions during election period**
>
> **6(1)** The government or a government agency must not, during the election period of a general election or a by-election period,
>
> (a) engage in paid advertising; or
>
> (b) post or distribute new information on the Internet or through other digital means."

Exceptions

6(2) Subsection (1) does not apply to

(a) a notice to the public that is required by law;

(b) a matter affecting public health or safety, employment opportunities with the government or a government agency or the provision of goods or services to the government or a government agency;

(c) infrastructure signage described in section 4; or

(d) in the case of the election period of a by-election, other paid advertising or the distribution of information that is of a routine nature in relation to the usual operational activities of the government or of a government agency.

Specifically, the Auditor General raises the question as to how this section relates to Section 2 which defines the purpose of government advertising. The Auditor General asked what in Section 2 would be considered "routine" in relation to "usual operational activities"? I will include reference to this concern in a later part of this report when dealing with the wisdom of repealing the existing legislation, that is Part 13 of the EFA.

In my meeting with the Auditor General I gained the distinct impression that in his view there will be significant costs for his office to do a proper job. In correspondence the Auditor General cautioned that conducting compliance audits of government entities which advertise, even when employing a risk-based approach, would involve a "a significant effort" and that "the impact of any imposed audit requirements on my Office's resources must also not be overlooked".

From the foregoing it can be seen that the Auditor General has serious concerns about both the content and scope of the Proposed Act.

If the government is intent on pressing forward with legislation along the lines of the Proposed Act the Auditor General is clearly of the view that significant changes should be considered. Moreover, if the Auditor General is to be involved in the administration of the law respecting government advertising there should be input from his office as to the content of the governing Act.

CONSULTATIONS WITH ELECTIONS MANITOBA

I met with the Chief Electoral Officer, Ms. Shipra Verma, as well as Deputy Chief Electoral Officer, Ms. Debbie MacKenzie.

Mr. Blair Graham Q.C. was also present. Mr. Graham has been counsel to Elections Manitoba for many years. He probably has no peer as far knowledge and experience with election laws in Manitoba is concerned and his presence at the meeting was most welcome.

At our meeting it was agreed that the observations being made were not to be taken as official positions on the part of Elections Manitoba nor approval or disapproval of any provisions in the Proposed Act. Rather, the input from Elections Manitoba was being offered as a series of observations based on experience with existing legislation which might be helpful when dealing with the relevant issues.

As was noted in the Overview section, there are two issues which are being reviewed in this report being first, whether legislation in relation to partisan advertising is the correct approach and, secondly whether the current law dealing with government communications during election periods ought to be repealed. The Elections Manitoba representatives had comments bearing on both issues but, for the time being, I will only refer to the comments which might be relevant to the proposed legislation respecting partisan advertising. Other comments relevant to the existing law will be referred to in the portion of the report dealing with the question of repeal.

It was noted that the Proposed Act deals only with paid advertising, being restricted to advertising under "a commercial agreement or arrangement" and that this constituted a major change in approach. Ontario is the only province in Canada ever to embark on legislation concerning government advertising in general, with its rather bold initiative of providing an independent agency (the Auditor General) with a wide discretion in policing government ads. This, according to Elections Manitoba representatives, appears to have resulted in a great deal of controversy. The Ontario government eventually amended the legislation by eliminating most of the discretion which had been provided to the Auditor General.

It was also noted that the definition of paid advertising in the Proposed Act is quite similar to the definition found in the recently amended section 82(1) of the EFA, which of course is important in legislative interpretation.

The consensus seemed to be that Section 3(2) of the Proposed Act, which deals with what may constitute partisan advertising, appears to be a helpful guide, particularly concerning activities which may occur closer to an election period. There was general agreement that that it is almost impossible to provide an all-encompassing definition of partisanship.

A word of caution was introduced. The point was made that although information may be factual, does not include the name or logo of a political party, and does not directly criticize the views of others (including political parties) it may nevertheless be very influential in affecting the outcome of an election or a by-election. Examples which were raised included child protection issues, environmental issues such as a carbon tax, and issues surrounding family planning. These can be extremely influential in promoting the government's message or detracting from the contrary positions of others. There is therefore a possibility that a sitting government could find ways of distributing that kind of information during the period leading up to an election. This observation is relevant to both of the issues being considered in

that the Proposed Act could be seen as facilitating questionable activities in the lead up period to an election.

Section 7(1) of the Proposed Act provides that any person who believes that the government or a government agency has violated Section 6 (the section dealing with activities during an election period) may apply to a judge of the Court of Queen's Bench for a declaration that a violation has occurred. This, according to those at the meeting, appears to be out of step with other election-related complaints which are dealt with through the office of the Commissioner of Elections.

Most of my discussions with the Elections Manitoba representatives centered around Part 13 of the EFA, which I will detail in the part of this report dealing with that topic.

THE ONTARIO EXPERIENCE WITH GOVERNMENT ADVERTISING LEGISLATION

As mentioned previously I was asked to speak with the Auditor General of Ontario and, if possible, obtain her reaction to the proposed Manitoba legislation. I wrote to the Auditor General and sent her a copy of the Proposed Act. Despite several follow-up requests and telephone conversations with her staff I never did hear directly from the Auditor General.

Having reviewed public comments which the Auditor General made when the proposed amendments to the Ontario legislation were announced in 2015, I believe that it is safe to assume that she would not be impressed with what is being proposed.

At present Ontario is the only province which has legislation dealing with government advertising generally, that is throughout the year as opposed to during election periods.

The legislation is entitled *Government Advertising Act*, 2004. It was passed as a result of alleged abuse by the former government in using public funds to further its political agenda during the 2003 Ontario provincial election.

The intention of the legislation was to minimize partisan advertising by having all paid government advertising reviewed in advance by the Auditor General. The Auditor General was given the power to reject advertising which was considered to be overly partisan.

The scheme which was set up included detailed rules and guidelines as to what constituted partisan political advertising. The Auditor General was provided with wide discretion in deciding what was or was not acceptable.

The Act remained basically in its original state until 2015. By that time the government had become disillusioned with many of the rulings which the Auditor General had made. One of the decisions which was frequently referred to as warranting a change in the Act involved a ruling that a proposed advertisement contained an excess of red polka dots which the Auditor General apparently felt the public would associate with the Liberal party.

As a result, on the belief that many of the Auditor General's rulings "did not make sense", the government introduced significant amendments to the Act. The definition of what constituted partisanship was narrowed considerably and the discretion which the Auditor General had originally been given was almost entirely eliminated.

When the proposed amendments were first announced the Auditor General took the unusual step of issuing a special report to the Legislative Assembly. In the opening portion of that report she cautioned that if the proposed amendments were passed without change that her office might be put in the "untenable and unacceptable position of having to approve an advertisement as being in in compliance with the GAA because it conforms to the proposed, very narrow definition of what is partisan - even though, in my opinion it is clearly a partisan advertisement. I would no longer be able to consider factors such as political context, the use of self-congratulatory messages, factual accuracy or an advertisement's criticisms of other political parties in my review to help determine whether an ad is partisan".

There is little doubt that what had been a very wide discretion in the original legislation would be almost entirely gutted under the amendments which were being proposed. The definition of partisan advertising would be limited to advertisements which included the name, voice or image of a member

of the Executive Council or a member of the Assembly, or which contained the name or logo of a recognized political party, or if included to a significant degree, a colour associated with the governing party unless the colour was depicting something normally depicted in the same colour.

Despite the efforts made by the Auditor General the legislation was amended as first introduced.

In her annual report for 2017 the Auditor General of Ontario continued to raise the issue of loss of jurisdiction, saying that in the year being reported upon she estimated that 30% of the advertisements which she reviewed and cleared under the new partisan advertising provisions would have been rejected under the old regime.

CONSULTATIONS WITH THE COMMISSIONER OF ELECTIONS

The Commissioner of Elections raised the same concern as was raised by Elections Manitoba, namely that the Proposed Act deals only with paid advertising but also calls for the repeal of Part 13 of the EFA. The concern is that a potential area of abuse may result. I will leave comment on this concern until later in this report and the discussion as to whether Part 13 of the EFA should be repealed.

The Commissioner of Elections also made observations regarding the contents of the Proposed Act itself which follow. This summary is included to demonstrate some of the difficulties which arise when attempting to draft legislation dealing with partisanship and not as a direct criticism of what has been included in the Proposed Act.

The definition of "Paid advertising" uses the phrase "commercial advertising agreement or arrangement". It is felt that this phrase is rather vague, and that problems of interpretation may be the inevitable result.

The definition of "government agency" has changed from that which is contemplated by Part 13 and is more restrictive. Specifically, the definition no longer includes agencies responsible to the Crown unless all the board members are appointed by the government.

The definition of social media lists only a few sites. It goes on to say that other sites will be considered but only if they are listed in the Regulations. There are many other Internet social media sites not listed and experience tells us that more sites are inevitable. It is doubtful that the government could maintain a current list.

Section 2 allows the government to engage in paid advertising if it falls into one or more defined areas. The question posed by the Commissioner of Elections is whether a listed purpose must be the dominant purpose or whether a subsidiary purpose will suffice.

Similarly, Sec. 3(2) says that paid advertising is partisan if certain features are present. The question will probably arise as to whether this also means "and only if" those features are present.

Sec. 3(2) provides that advertising is partisan if it "directly criticizes the views, policies or actions of others, including a political party". It is felt that this may be overly broad as there are many advertisements which may by their very nature require at least covert criticism.

Section 6(1) is much more restricted than the previous legislation. The Commissioner points out that paid advertising arguably does not apply to the use of government staff, the use of government supplies, etc. It also doesn't include printed material paid for out of government funds, but which is distributed by volunteers. In other words, the Proposed Act could well be seen as enabling the use of government resources to finance political messages of the party in power.

The meaning of what is intended by "new information" in section 6(1)(b) of the Proposed Act is unclear and may present yet another difficult interpretation.

Sec. 6(2) contains the phrase "a matter affecting public health" which suggests that there must be an effect on public health. Perhaps something along the lines of "concerning or relating to" would be appropriate.

The Commissioner of Elections also raised the remedy provided by Section 7 of the Proposed Act, namely that a person may apply to the Court of Queen's Bench for a declaration that there has been a violation of the provision. It is felt that it would be extremely unlikely that anyone would avail themselves of this provision, particularly where there may be an award of costs against the individual if they are unsuccessful. There has only been one court challenge relating to Part 13 of the EFA and that occurred in 1988.

APPROACH OF THE CANADIAN GOVERNMENT TO PARTISAN ADVERTISING

The fact that there has been only one foray by any government in Canada into passing legislation aimed at avoiding or eliminating partisan government advertising and that effort ended badly is not, in and of itself, a valid reason for abandoning the legislative route in attempting to achieve the desired result, but it does, in my opinion, justify looking at potential alternatives.

Two other jurisdictions, being Canada and the province of Alberta, have attacked the problem by way of policy and guidelines as opposed to legislation. Countries other than Canada have done likewise.

Canadian Government Policy

The Canadian government has chosen to deal with partisan advertising by way of policy statement. The Policy on Communications and Federal Identity was adopted on May 16, 2016 and it replaced two existing policies, including a Communications Policy which had been in effect since 2002. The current policy applies to government departments and agencies which are set out in Schedule I of the Financial Administration Act, as well as divisions or branches of the federal public administration set out in Schedule I.1 of that legislation.

To support this policy the government also released a Directive on the Management of Communications which replaced, among other policy instruments, the Procedures for the Management of Advertising, which had been established in 2014, and a Standard on Social Media Account Management published in April of 2013. Together these instruments were said to bring the federal government's communications practices in line with the current digital environment, and to provide clearer, simplified guidance to government officials engaged in communication activities.

The fact that there have been a number of revisions in a relatively short period of time may lend credence to the suggestion that policies in this area are much more flexible and can be revised or modified much more quickly than legislation.

One of the stated objectives of the new policy was to ensure that government communications are non-partisan. The term "non-partisan communications" had not previously been defined, but it is defined under the new policy in a stated effort to provide clarity and ensure that public resources are not used to promote political agendas. The definition is as follows:

> "In the context of all Government of Canada communications, products and activities, non-partisan' means:
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> - Objective, factual and explanatory;
> - Free from political party slogans, images, identifiers; bias; designation; or affiliation;
> - The primary colour associated with the governing party is not used in a dominant way, unless an item is commonly depicted in that colour; and
> - Advertising is devoid of any name, voice or image of a minister, member of Parliament or senator."

The policy has specific provisions with respect to government advertising. It prohibits federal departments and agencies from advertising during the ninety days preceding a fixed general federal election date. Advertising is defined as "any message conveyed in Canada or abroad and paid for by the government for placement in media, including but not limited to newspapers, television, radio, cinema, billboards and other out-of-home media, mobile devices, the Internet and, any other digital medium". The 90-day ban excepts job advertisements, requests for tenders, and messages to the public regarding urgent matters affecting public health and safety.

The policy establishes an independent third-party oversight mechanism to review government advertising campaigns with budgets over $500,000. Advertising Standards Canada ("ASC") is a not-for-profit body, and is mandated to review all such campaigns against the established criteria for non-partisanship. These standards can of course be modified from time to time as experience dictates.

The mandatory review does not apply to announcements of an administrative or operational nature (such as public hearings, employment offers, notices of public consultations, requests for tenders) nor to messages to the public regarding urgent public health and safety concerns, nor messages concerning the environment.

The results of ASC reviews are published on the Government of Canada website. It should be noted that the Auditor General of Canada is conducting an audit of this review mechanism and is expected to issue a report in the Spring of 2019.

In 2017 the House of Commons Standing Committee on Government Operations and Estimates undertook a review of the 2016 policy and made recommendations for improvement. The Committee acknowledged that among the main challenges of establishing policy in this area is that rules surrounding non-partisan advertising must be clear, but with the recognition that the environment is continuously changing. The Committee commented favourably upon the definition of non-partisan advertising but cautioned that the definition and the policy in general be reviewed regularly to ensure that they remain current and relevant.

Alberta Government Policy

In September 2018 the Alberta government established a Communications Policy to ensure that all communications activity is coordinated and that it adheres to stated principles. Although the Policy is not specifically geared to partisanship in communications, it establishes principles and processes to ensure that communications are accurate and fair and that government spokespeople do not communicate in a partisan manner. It provides direction as regards government communications through the news media and paid advertising, as well as managed government media channels and programs, including social media accounts. In order to satisfy the overarching principles, the Policy provides that social media account managers must ensure that social media use complies with a list of standards including "non-partisanship," which is described as follows:

> "Non-partisan: Government of Alberta social media accounts are non-partisan and will not share content that promotes or favours any political party. Ministers and staff may share and post non-partisan material created for Government of Alberta social media accounts."

The Policy specifically incorporates the *Election Act* restrictions on communications activity during election and by-election periods, and it provides that government social media accounts must reduce or stop engagement during election periods. The *Election Act* restrictions came into force on January 1, 2018 as a result of amendments to the legislation. These amendments are similar to the provisions in Part 13 of Manitoba's EFA.

As mentioned in the section of this report dealing with the existing Manitoba legislation, the Alberta government has also created policies, guidelines and interpretation bulletins to provide additional direction on advertising during election and by-election periods, specifying what constitutes an advertisement and the kinds of advertising which are exempt.

British Columbia Recommendation for Government Policy

The Auditor General of British Columbia released a report in 2014 which included a review of the policy and legislation developed by other jurisdictions to address partisanship in government communications. After considering the pros and cons of legislation, policy and guidelines, the Auditor General recommended that the BC government establish a general policy supported by specific guidelines and a mechanism for review and enforcement. The arguments in favour of legislation – that policies and guidelines are vulnerable to revision and do not have the force of law – were apparently not persuasive. As outlined above, the ability to modify policies is an argument in their favor, and resort to the courts for declaratory relief should not be necessary where a policy establishes an appropriate mechanism for ensuring compliance.

I spoke with the Deputy Auditor General of British Columbia and it is his understanding that the government in that province has taken the recommendation to heart and is in the process of formulating a government policy concerning government advertising with supporting guidelines.

RECOMMENDED APPROACH TO PARTISAN GOVERNMENT ADVERTISING

On balance therefore, I recommend that the government consider dealing with the overall problems which have been identified with government advertising and partisanship by way of policy statement and guidelines, perhaps along the lines employed by the federal government. It would seem to make sense that if the guideline route is followed that the initiative at first be directed toward paid advertising with other forms of advertising and communications during election periods perhaps to follow.

Whether government or government agency advertising is or is not partisan can often be a difficult matter to decide. Reasonable people might reasonably disagree. An opinion as to partisanship can often be in the eye of the beholder.

The concept of *de minimis* might also be relevant, meaning that some government "bragging" can be seen as inconsequential and perhaps can be overlooked.

Policy and guidelines are perhaps better suited to addressing partisanship, particularly in the relatively early stages of addressing the problem of partisan advertising by government. I have commented elsewhere upon the difficulty of arriving at a satisfactory, all-encompassing definition of partisanship. The drawback to attempting a definition by way of legislation is that, should the definition prove wanting, that it can be cumbersome and time-consuming to effect change. It could be a proposition of having to start over from the beginning, depending on what problems with the definition may arise.

Either the legislative route or the policy route can be used to establish positive standards to which government advertising is expected to adhere, and the processes to be followed. However, policies can more readily evolve.

When the House of Commons Standing Committee on Government Operations was tasked with reviewing the federal government's communication policy in June of 2017, it acknowledged that one of the main challenges in developing policy in this area is the fact that communications are evolving in a continuously changing environment. It received submissions which underscored the difficulty in defining partisanship, the importance of context, and the need for clear rules. It recommended that the government's Policy and Directive, including its definition of "non-partisan communications" be updated regularly to ensure that the policy remained relevant to address the challenges associated with continually evolving communications. Legislation simply does not lend itself to regular updating.

As mentioned, the Alberta government has recently followed suit in utilizing the policy route to address the issue. This, by the way, was done almost contemporaneously with changes to the Election Act by incorporating provisions similar to our Part 13 of the EFA. Presumably the Alberta government was alive to the benefits of using policy in some areas with legislation being utilized in others.

Similarly, it appears that the British Columbia government is in the process of preparing a government policy on government advertising.

In my opinion the difficulties encountered in Ontario and the fact that other jurisdictions in Canada have chosen to proceed by way of government policy and guidelines, supports a policy approach, at least at this point in time.

PART II – REPEAL OF THE EXISTING LEGISLATION

The purpose of the Proposed Act is to prevent public funds from being used to pay for partisan advertising. There is currently no comparable legislation in Manitoba that restricts government advertising on a year round basis. There is, however, legislation that restricts government advertising in the lead up to a provincial election.

The restrictions are set out in Part 13 (sections 92 and 93) of the EFA. Their focus is slightly different than the focus of the Proposed Act. Whereas the Proposed Act appears to be primarily aimed at curbing a misuse of public funds, sections 92 and 93 are aimed at preventing public funds being used to help the party in power win an election. The two goals are related, of course, but their focus is different.

Under the Proposed Act it is proposed that Part 13 be repealed. The balance of this part of the report considers the possible effects of doing do. I have consulted with both Elections Manitoba and the Commissioner of Elections for Manitoba on the repeal question. Summaries of those consultations together with my comments are included below.

I have also had communication with the Liberal Party of Manitoba as well as the Winnipeg Construction Association. Their comments indirectly involve the existing legislation and will be referred to later in the report.

The introduction of the Elections Finances Act

The restrictions on government advertising during the lead up to an election were first introduced as section 56 of *The Elections Finances Act*, when that act was passed in 1983 by the NDP government. *The Elections Finances Act* was replaced with *The Election Financing Act* in 2012. In what follows in this section I will refer to *The Elections Finances Act* as the "old EFA" and *The Election Financing Act* as the "current EFA". I will simply refer to the "EFA" when making statements applicable to both.

The old EFA is notable for having introduced public financing of elections in this province. Public financing of elections was vigorously opposed by the PC party.

There was lengthy debate on the bill. Sterling Lyon, who was at that time the leader of the official opposition, spoke against the bill in the House several times. Feelings were obviously running high. Mr. Lyon at one point described the proposed legislation as "iniquitous" and suggested that the government of the day was inserting its "grimy, sticky hands into the pockets of taxpayers".

It is obvious that the public financing of elections was the focal point of the debates and that the restriction on government advertising during election periods did not attract much attention.

When Roland Penner, Attorney General at the time, first introduced the bill he made the following remarks:

> "One other important reform which this bill proposes is an almost total prohibition on government advertising during the course of an election campaign; that is from the time the writs are issued. In all of Canada only Saskatchewan has similar legislation. Now here, Sir, and I would like the opposition to take note of this - indeed, I would like the

> media to take note of this - here is the government in power, imposing, in effect, a gag on itself because we feel if we are going to talk about the principle of fairness and equity we have to be consistent, and we are, in our own legislation, limiting the amount and quality of government advertising during the course of the time when the writs are issued".

The opposition wasn't impressed. In an address to the House Mr. Lyon suggested that the provision wasn't tough enough. He referred to the prohibition on advertising as being "a fraud" because the section in the proposed legislation contained an exclusion for publications or advertisements concerning ongoing programs. As Mr. Lyon put it, if a program has already started "well, of course, that's different".

Gary Filmon suggested to the house that the section on government advertising was not needed and was added only for show. Referring to section 56 Mr. Filmon said "I find another aspect of the legislation that's being proposed to be absolutely ludicrous . . . it was acceptable to all governments that you didn't do blatant advertising, but it doesn't matter because this government is putting that forward as presumably a stirring example of how they are committed to a very moral form of financing elections".

Despite the tumult surrounding its birth, the aim of preventing public money being used as campaign funds for the governing party is, in my view, a legitimate one. However, the section has been amended on several occasions and is now significantly more restrictive that it was when it was first enacted. In fact, the current government apparently finds it too restrictive and now proposes to repeal it altogether, replacing it with the provisions in sections 6 and 7 of the Proposed Act.

The evolution of section 56

The original section 56 read:

> **Restriction on government advertising**
>
> **56(1)** No department of the government of Manitoba and no Crown agency shall
>
> (a) during an election period for a general election, publish or advertise in any manner; or
> (b) during an election period for a by-election in an electoral division, publish or advertise in any manner in the electoral division;
>
> Any information concerning the programs or activities of the department or Crown agency, except
>
> (c) in continuation of earlier publications or advertisements concerning ongoing programs of the department or Crown agency; or
> (d) to solicit applications for employment with the department or Crown agency; or
> (e) where the publication or advertisement is required by law; or
> (f) where the publication or advertisement is deemed necessary by the Chief Electoral Officer for the administration of an election.

Complaint concerning government advertising

56(2) Any person who believes that a department or Crown agency has violated subsection (1) may file a complaint with the Chief Electoral Officer, and where the Chief Electoral Officer finds that the complaint is justified, the Chief Electoral Officer shall provide particulars of the violation in the annual report to the Speaker of the Assembly under section 99.

As first enacted, section 56 provided that neither the Government nor any Crown agency could "publish or advertise in any manner . . . any information concerning the programs or activities of the department or Crown agency" during an election period for a general election, but that broad restriction was subject to the four exceptions set out in 56(1)(c) through (f).

The amendments made in 2006 and 2008 were the most significant. In his 2003 Annual Report, the then Chief Electoral Officer made the following recommendation:

> **Recommendation:** That clause 56(1)(c) of *The Elections Finances Act* should be clarified and strengthened to reduce an overly broad exemption on government advertising during an election period.

In the Chief Electoral Officer's view:

> The apparent intent of the section is to limit the ability of a government to use public funds to advertise during an election period while ensuring that the necessary business of government continues. The need for such a section is brought more into focus since limitations have been placed on the ability of registered political parties to receive contributions and since limits have been placed on the annual advertising of registered political parties. Section 56(1)(c), however, provides a very broad exemption. Section 56(1)(c) exempts government advertising ". . . in continuation of earlier publications or advertisements concerning ongoing programs of the department or Crown agency . . .". This exemption is too broad and could conceivably defeat the purpose of the overall prohibition. Clause 56(1)(c) needs to be more consistent with the intent of section 56 and with the other specific exemptions.
>
> The exemption would be more effective if it specified the types of advertising permitted during an election period such as advertising for urgent matters or where it is a matter of the public's welfare.

The concern expressed by the Chief Electoral Officer seems to be precisely the one Mr. Lyon expressed to the house when he suggested that the provision was "a fraud" because if a program has already started "well, of course, that's different".

Apparently as the result of these recommendations, section 56(1)(c) was amended in 2006 so that it no longer applied to the government during a general election. It continued to apply to Crown agencies during a general election and it applied to both government and Crown agencies during a by-election.

In place of the exemption in 56(1)(c) for government during a general election, specific exemptions for specific matters were introduced. But each of those, and what remained of the exemption in 56(1)(c), were to apply only when "required at that time".

All of these changes appear to have been in accordance with the recommendations of the Chief Electoral Officer. An additional change, not referred to in the Chief Electoral Officer's annual report, was to increase the restriction on advertising during a by-election. Whereas originally section 56 only restricted publications or advertising in a by-election in the electoral division in which the by-election was being held, the restrictions in the revised section applied province wide, even during a by-election.

The other significant amendment was made in 2008. Fixed date elections had been brought into Manitoba through an amendment to *The Election Act* and section 56 was amended to increase the blackout period – that is, the time during which the advertising restrictions applied – from the election period (which had typically been 30 days) to a 90-day period before the election. This amendment was significant as I understand that little government business was typically done in the 30 days immediately before an election but that the 90-day period made it significantly more difficult for the government to conduct its business for an entire quarter of the election year.

After the 2006 and 2008 amendments, section 56 read as follows:

GOVERNMENT ADVERTISING

Government advertising and publications in general election

56(1) No government department or Crown agency shall publish or advertise any information about its programs or activities in the last 90 days before polling day, and on polling day, in the case of a fixed date election, or during the election period for any other general election, unless the publication or advertisement

(a) is required by law;
(b) is required at that time;
  i. to solicit proposals or tenders for contracts or applications for employment with the department or agency, or
  ii. because it relates to important matters of public health or safety; or
(c) is by a Crown agency, is in continuation of earlier publications or advertisements and is required at the time for ongoing programs of the agency.

Government advertising and publications in by-election

56(1.1) During the election period for a by-election, no government department or Crown agency shall publish or advertise any information about its programs or activities unless the publication or advertisement

(a) is required by law;
(b) is required at that time
  i. to solicit proposals or tenders for contracts or applications for employment with the department or agency, or
  ii. because it relates to important matters of public health or safety; or
(c) is in continuation of earlier publications or advertisements and is required at the time for ongoing programs of the government department or Crown agency.

Publication of Assembly business in by-election

56(1.2) During the election period for a by-election, nothing in subsection (1.1) shall restrict any publication or advertisement that deals with matters before the Assembly, such as a press release or other publication relating to the throne speech, the budget, the introduction or passage of bills and orders or resolutions of the Assembly.

Complaint concerning government advertising

56(2) Any person who believes that a department or Crown agency has violated subsection (1) or (1.1) may file a complaint with the commissioner.

Commissioner to advise if complaint justified

56(3) If the commissioner finds that a complaint is justified, he or she must give particulars of the violation to the Chief Electoral Officer.

Notice in annual report

56(4) The Chief Electoral Officer must give particulars of the violation in the annual report provided under section 99.

The Intent of Section 56

When Mr. Penner introduced the restrictions on government advertising, he spoke of limiting government advertising during the election period in terms of "fairness and equity". If the government is now intending to repeal those provisions, it may be useful to consider what potential unfairness the section was intended to prevent.

There are two Acts in Manitoba that govern the administration of provincial elections: *The Elections Act* and the EFA. *The Elections Act* deals with the running of elections – who can vote, how voters lists are maintained, how elections will be run, how elections are called, how candidates are nominated, and so on.

The EFA deals specifically with financial matters. Although, as noted above, the public financing of elections was the most controversial aspect of the old EFA, it was not it's major purpose. The major purpose of the EFA is to ensure a level playing field between all parties and candidates by governing the way campaign funds are raised and limiting the amount that each party and candidate can spend on their election campaigns. The implication is that ungoverned fundraising and unlimited spending could result in some candidates raising vast sums from a very few wealthy donors, that those candidates would then be able to far outspend their rivals, and that this would be unfair and inequitable.

The EFA prohibits contributions for companies or organizations. It puts a limit on the amount each party and candidate can spend in an election and provides reimbursement to candidates and parties that reach a threshold number of votes in an election. The last of these provisions is what I have referred to as public financing of elections. Although it was the most contentious aspect of the old EFA, it was only one component of the scheme set out in the act for regulating election fundraising and spending. Whether one agrees with the philosophical underpinnings of these provisions or not, their purpose was

to ensure some measure of equality between the amount each party and each candidate can spend and to ensure that each party and candidate has a reasonable opportunity to raise the necessary funds for their campaign.

The government chose to put the government advertising restrictions in the EFA and not in *The Elections Act*. It is reasonable to suppose, therefore, that the purpose of section 56 fits within the overall scheme of the Act. The scheme of the EFA is to set limits on fundraising and spending in an election so that each party and each candidate that attain a reasonable level of popular support will have the same funds available to run their campaigns. That scheme would be ineffectual if the party in power could use government money to assist it in its campaign. Even a government expenditure that is small in the context of overall government spending, could create an enormous imbalance in an election campaign. Section 56 was intended to address that problem.

I have quoted above a part of the Chief Electoral Officer's Report for 2003. His remarks show that his understanding of the purpose of section 56 was in line with the view I have just expressed. His report also makes it clear that the amendments made in 2006, that followed his recommendations from 2003, were designed to make the section more restrictive in order to close loopholes that were seen to exist in the section as it then stood.

The next section of this report examines how, against that background, the government advertising rules have been interpreted.

Interpretation of the government advertising rules in the EFA

There appears to be general agreement that the purpose of the government advertising rules is as set out in the previous section. Nonetheless, the rules, both as originally enacted as section 56 of the old EFA and in their current form as sections 92 and 93 of the current EFA, raise several questions of interpretation:

- What is meant by "publish or advertise"?
- Is the prohibition against publishing "any information about its programs or services" really intended to apply to any information at all? Was it meant to include even non-partisan (that is, factual and objective) information?
- The reference to a government department or crown agency must include anyone acting on behalf of the department or crown agency. Does it therefore include ministers of the government as well?
- If "publish" is interpreted broadly to include any communication to the public, are government Ministers running for re-election barred from talking about the accomplishments of their departments?

I have located only one court judgement that has considered this section. Most of the interpretation has been done by the Chief Electoral Officer and Commissioners of Elections as the result of complaints they have received and investigated.

The first complaints of which I am aware arose in connection with a by-election in the electoral division of Kildonan in 1985. The government had published three advertisements during the blackout period

and complaints had been filed, pursuant to section 56, by the Manitoba Progressive Party. All of them were dismissed by the Chief Electoral Office and the Manitoba Progressive Party appealed his decisions to the Court of Queen's Bench. The appeal was heard by Glowacki, J.

One of the three advertisements was a call for tenders by the Department of Manitoba Housing. It read, in part:

> To advise the Minister of Housing on possible changes to both the Landlord and Tenant Act and the Residential Rent Regulation Act, a review committee is accepting submissions from interested individuals and organizations.
>
> The committee, comprised of representatives of both landlords and tenants as well as department officials, has been asked
>
> > 'to review the legislation, regulations, and administration of the Landlord and Tenant Act and the Residential Rent Regulation Act.'

The Chief Electoral Officer had found that the advertisement did not refer to a government activity. Justice Glowacki found that it clearly did, and he overturned the decision of the Chief Electoral Officer with respect to this complaint.

On its face, the impugned advertisement did not appear to be a partisan one. It was both factual and objective. Yet that was not a factor in Justice Glowacki's decision. Partisan vs non-partisan considerations therefore do not appear to be relevant in interpreting the section. The government is prohibited from publishing or advertising any information at all about its programs or activities.

Over the next 21 years I understand there were only three further complaints made under section 56, being in 1990, 1992 and 1999. Each of them was dismissed by the Chief Electoral Officer.

There were therefore six complaints in total relating to section 56 between the time of its enactment in 1983 and the time of the first significant amendment in 2006 – the three by the Manitoba Progressive Party in 1985 and the complaints in 1990, 1992 and 1999. Of those, three of them – one in 1983 and the complaints of 1990 and 1993 were dismissed on the basis of the exclusion in 56(1)(c) that related to publications in connection with ongoing government programs. As mentioned, that section was amended in 2006 so that it no longer applied to government during a general election.

The next complaint of which I am aware concerned the then Minister of Agriculture, Rosann Wowchuk who, in March of 2009, during the blackout period of a by-election, announced on behalf of her department a one-time grant for repairs to the Trade Fair Building located at the Provincial Exhibition Grounds in Brandon. The announcement was made at a speech she gave in Brandon. At that time, I was the Commissioner of Elections in Manitoba and I found that Minister Wowchuk's announcement constituted a breach of section 92. The government had decided on a speech instead of a news release as it did not see a speech as being a publication within the meaning of the section. I held that it was, and that "publication" must be read broadly enough to include an oral as well as a written communication.

In the lead up to the 2011 election, the Commissioner of Elections, by that time Mr. Bill Bowles, received a series of complaints concerning government advertising. Nine complaints were filed by the PC Party, eight of them in a space of ten days. One complaint was filed by the Liberal Party. A breach of section

56 was identified in only two of the ten cases. Whether the number of complaints filed was out of genuine concern or simply part of an election strategy is unknown.

Another complaint was received during a by-election in 2014. The PC Party complained that the government breached section 92 when the Manitoba Status of Women, a division of the Department of Family Services, sponsored, advertised and held an event in honor of Nellie McLung during the blackout period. That complaint was upheld.

In the 2016 election, three more complaints were received relating to what was by that time section 92. One of them, relating to highway signs posted by the government that read "Steady Growth, Good Jobs" was found to be a breach of section 92. The advertising surrounding that program was, of course, the source of Mr. Brian Pallister's pique.

The result of the complaints in 2011, 2014 and 2016 was a series of decisions interpreting section 56.

The key interpretations were these:

- The section is not intended to restrict government programs or activities during the blackout period. It is intended to restrict government from publicizing their programs or activities during that period.
- The words "publish or advertise" refer to any communication to the general public, including any steps taken to bring that communication about. If, for example, the government writes an advertisement, but someone else publishes it, that is still a publication by the government.
- The words "publish or advertise" must be read together so that some promotional aspect to the publication must exist. Signs identifying government departments or agencies, or informational brochures, would not be publications or advertisements.
- The words "government department" ought to include the Minister of the Department, but the section should not prevent a government minister from campaigning on the government's record. The section therefore requires distinguishing between an MLA acting as a representative of a government department and an MLA acting as a candidate for reelection. The restriction only applies in the former case. The commissioner acknowledged that while "some cases will be relatively easy to decide, others may involve drawing fine distinctions that will seem artificial and forced".
- A Minister of a department would only be speaking as a representative of his or her department if some government resources were used in connection with the publication. So, for example, a minister could speak to the press about some ongoing matter during the blackout period but could not use a government speech writer to write her statement or government staff to plan and arrange the news conference.

In all, I have identified 21 complaints relating to government advertising. Six of them were found to be valid. The subject matter of those breaches was:

1985: An advertisement posted by Manitoba Housing

2009: A cheque presentation by a Minister of the Crown relating to a government grant

2011: A minister holding a press conference, arranged by government staff, at a facility built by the government

2011: An advertisement posted by Manitoba Housing

2014: An event sponsored and hosted by the Manitoba Status of Women, a division of the Department of Family services, held and advertised during the blackout period.

2016: A series of signs, posted by the government at highway construction sites, proclaiming "Steady Growth, Good Jobs".

Problems with Part 13

I have been provided with a paper prepared by Legislative Counsel entitled Reforming Manitoba's Government Advertising Rules. It contains the following description of the problems the government is encountering with section 92:

> "The basic problem with the existing law is that the restrictions are too onerous given the length of the black-out period. The restrictions have the effect of shutting down most government communications during the blackout period. And whether the advertising is partisan or not, paid for or not, is irrelevant under the law.
>
> Because the current law deals with all "publications" and not just advertising, it has been interpreted to apply to any form of communication by government, including speeches and statements by ministers. This has had the effect of restricting the normal and necessary operations of government.
>
> This section has become ineffective if its purpose is (and has always been) to prohibit, in the run-up to an election, advertising designed to assist in the re-election of the governing political party.
>
> Many of the decisions of the Commissioner of Elections over the years bear out the view that the section as currently worded is unworkable".

I have also met with representatives of the Legislative Counsel and have spoken with Communication Services. In those conversations, particular examples of government concerns were raised. They were:

1. Apprenticeship Manitoba displays brochures outside its office in the Norquay Building for each of the 45 trades with which it works. They feel compelled to remove that display during the black-out period;

2. Manitoba Housing has an office at street level and, during the blackout period, they remove all of their posters from their exterior windows;

3. Manitoba Agriculture posts information on-line which farmers use to determine when they can spray their crops. Manitoba Agriculture shuts that part of the web-site down during the black-out period;

4. The Winnipeg Regional Health Authority will not post health information on their sites unless there is an absolute urgency to do so. This is apparently the result of their understanding of how the Commissioner of Elections interprets the phrase "required at that time" in section 92 of the EFA;

5. The government runs a bus used for mobile health care. The bus has information on the outside about the program. The government stops the bus from running during the blackout period, concerned that it breaches section 92.

6. The government does not post Requests for Proposals during the blackout period.

It is not clear to me that all of these situations would be found to be breaches of section 92 and it may be that the government has been overly cautious. But that is understandable given the issues with the interpretation of section 92. For example, one of the commissioner's reports made it clear that information brochures and signs which are not promotional in nature would be exempt. I suspect it is very likely, therefore, that the brochures outside Apprenticeship Manitoba would not be in breach of the section. But every case requires a judgement call and it is understandable that government staff would be uneasy about making a wrong decision.

Whether these situations would be found to be breaches or not, the fact that the government has felt obliged to react as it has, does suggest the need for a change. As I have noted above, the government's proposed remedy is to repeal Part 13 of the current EFA (sections 92 – 94) entirely, replacing it with the restrictions on paid advertising in accordance with sections 6 and 7 of the Proposed Act. In the next section, I summarize the consultations I have had with both Elections Manitoba and the Commissioner of Elections relating to the repeal of Part 13.

CONSULTATIONS WITH ELECTIONS MANITOBA

In the first part of this report, I referenced my meeting with the Chief Electoral Officer, the Deputy Chief Electoral Officer and their counsel and I summarized the comments and advice which they provided relating to the Proposed Act. They also provided comments concerning section 92 of the EFA and some potential ramifications if it is removed. Their comments were of considerable assistance to me in understanding the intent and interpretation of section 92 of the EFA. As I have set out that understanding above, I will only briefly summarize those comments in this section.

Much of our discussion centred around the underlying policy to Section 92 and its earlier legislative versions namely, to provide a level playing field for political entities taking part in the electoral process. The spending limits set by other sections of the current EFA for overall campaigning and specifically for advertising recognize the importance of advertising expenditures and their perceived impact on the electoral process. Section 92 can be viewed as being related to the spending and advertising limits placed on candidates and political parties in the sense that it is aimed at preventing an incumbent government from circumventing the established limits by using government funds and/or resources to promote itself at the time of elections.

At our meeting I was provided with a copy of remarks made by Ms. Verma during the delivery of her annual report to the standing committee on Legislative Affairs in December of 2015. Her remarks contain a succinct overview of the existing legislation dealing with government advertising and communication prior to and during election periods, that is, Section 92 (part 13) of The Election Financing Act and, in my opinion, are worth summarizing here.

Of note, the guidelines set out by Ms. Verma during her testimony were prepared in consultation with the Commissioner of Elections, Mr. Bill Bowles, whose office investigates and reports upon complaints of possible breaches of the section.

A summary of Ms. Verma's remarks, with direct quotes where appropriate, follows.

Section 92 is part of an Act having a purpose of ensuring fairness and accountability in the way money is raised and spent during election periods.

The primary purpose of Section 92 is to foster fairness by preventing government resources from being used to circumvent campaign spending limits set out in the Act. This is achieved by preventing government departments from advertising or promoting government programs or activities during a specified blackout period.

The words "advertise" and "publish" found in Section 92(1) have been construed fairly broadly. The words not only refer to paid advertisements or written publications, but include any dissemination of information to the general public. This could include speeches made at public events by a government department or Crown agency concerning their programs or activities.

Section 92 has been interpreted by the Commissioner as meaning that a government department or Crown agency will be involved in a publication if it is involved in any intermediate step taken in disseminating information to the public. For example, a campaign ad placed by the governing party would be in breach of the sections if it was prepared by a government department.

A department or Crown agency will be interpreted as having been involved in an intermediate step in a publication or advertisement if any of its resources have been used or expended in connection with the publication or advertisement.

Ministers of the Crown have been interpreted as being part of their departments and can therefore be seen as government resources involved in a publication. Ministers, however, will only be involved in government advertising if they are acting in their capacity as ministers as opposed to acting as candidates in an election. Broadly speaking, Ministers will be acting in their capacity as ministers only if further government resources have been used to support their involvement in a publication. An example is where a department sets up a press conference for a Minister. If government resources have not been used to provide the minister with a platform to speak there is no problem. For example, if a reporter encounters a minister in a hallway at the Legislature, the minister may answer questions without running afoul of Section 92 as the meeting had not been arranged using government resources.

It is recognized that the distinction may appear somewhat artificial to some, but it is felt that the interpretation is in keeping with the overall purpose of Section 92, namely that government resources should not be used to assist the campaign of the party in power.

The Chief Electoral Officer stressed that the section was not intended to restrict MLAs in their re-election campaigns, nor was it intended to restrict government activities. The restriction was only on government publicizing its activities. She said:

> "The next point is that the section is not intended to prevent members of the government, including ministers, from acting in their capacity as candidates during an election campaign. Members running for office and those assisting them are free to campaign on the government's record. They are free to talk about and disseminate information and government programs and activities as long as they do so in their capacity as candidates or volunteers on behalf of campaigns and as long as no government resources are being used.
>
> And finally, this section is also not intended to halt government business. It limits dissemination of information; it does not prevent the government from acting".

Several additional points were raised at the meeting, and in a subsequent memo from Mr. Graham, that relate to the elimination of section 92 and its replacement with sections 6 and 7 of the Proposed Act.

There was a concern that reducing the 90-day period to just the election period (of approximately 30 days) is not sufficiently restrictive and is inconsistent with the 90-day spending limit imposed on candidates and parties in the EFA.

Limiting the restriction, in the lead up to an election, to paid advertising will leave the government free to use its considerable resources to assist its campaign, as long as it doesn't actually pay for advertising or use certain specified social media sites. It could, for example, use its staff to arrange media events and write speeches for its MLA's.

Even if the government repeals Part 13 (sections 92 – 94) of the EFA, other sections remain that might restrict a government's ability to expend resources during the lead up to an election. That point was

made in more detail by the Commissioner of Elections in my conversations with him and is considered further below.

CONSULTATION WITH THE COMMISSIONER OF ELECTIONS

When I spoke to the Commissioner of Elections, he had already had an opportunity to review the memo from Mr. Graham and agreed with Mr. Grahams comments. He also had a few drafting notes on the Proposed Act which I have considered above. Finally, he explained in more detail the point Mr. Graham and Elections Manitoba had made about other sections of the EFA that might restrict government communications and use of its resources in the lead up to an election.

To understand the point, it is helpful to review the Act's provisions concerning contributions and election expenses.

The EFA regulates how parties and candidates raise money and how they spend it. I have already noted that the Act is intended to ensure a degree of fairness in election campaigns by limiting the amount each party and candidate can spend and by ensuring that money raised by a party or candidate is made up of many small contributions rather than a very few large ones.

Part 4 of the EFA deals with contributions to parties and candidates. It defines (in section 32) a "contribution" as either (a) money provided without compensation or (b) property or services provided free of charge or at less than market value.

Part 4 provides (in section 33) that only individuals normally resident in Manitoba may make a contribution and specifically prohibits contributions from persons or organizations other that individuals normally resident in Manitoba.

Limits are set (in section 34) on the amount an individual can contribute to a candidate or political party. The limit is $5000, adjusted for inflation. There is a specific prohibition on contributions in excess of the limit.

Part 7 of the EFA deals with Election Expenses. Section 50 defines an "election expense" as either:

> (a) a cost incurred by a registered party or a candidate, before or during an election period, for property or services used during that period to support or oppose (directly or indirectly) a registered party or a candidate in the election, or
>
> (b) the value of a non-monetary contribution made to or for the benefit of a registered party or a candidate, before or during an election period, in the form of property or services used during that period to support or oppose (directly or indirectly) a registered party or a candidate in the election.

Subsection (2) of section 50 gives examples of election expenses. They include a cost incurred for, or the value of a non-monetary contribution used in relation to, advertising and promotional materials, transportation for candidates, rental or office space, office equipment and supplies, rental of meeting space and opinion surveys and market research.

Sections 51 and 52 set out election expense limits for political parties and candidates. The limits are based upon a specified amount for each name on the relevant voters lists adjusted before each election

for inflation. These sections also provide limits on advertising expenses for parties and candidates, calculated in a similar manner. The advertising expense limit for a party or candidate is part of that party's or candidate's overall election expense limit. The expense limits only restrict the amount that a party or candidate can expend in an election period.

The issue raised by both Elections Manitoba and the Commissioner of Elections is whether these provisions apply to the government and, if so, how they might continue to restrict government advertising and the use of government resources for campaigns, even if section 92 is repealed. In my opinion, these sections are likely to apply to the government and the government ought therefore to consider whether any changes to the legislation should be made.

The government is a separate entity from the party in power. If the government provides property or services free of charge or at less than market value for campaign purposes, that would appear to fall within the definition of a contribution. It would be a contribution made by the government to the party in power.

The government is not an individual and yet only individuals are allowed to make contributions. The government's contribution would therefore be an illegal one.

Finally, if the contribution is made within the election period, it would appear to be "a non-monetary contribution made to or for the benefit of a registered party or a candidate in the form of . . . services" and would therefore be an election contribution.

As the Commissioner of Elections pointed out, section 92 has in some ways worked as a shield for the government. Complaints about government advertising have been dealt with under section 92 (the breach of which carries no consequence other than a mention in the Chief Electoral Officer's annual report) and not the sections on contributions and election expenses which can result in prosecution and penalties. The government should consider, therefore, what the consequence would be if section 92 is repealed.

Of course, repealing section 92 will allow for some types of government advertising that is now prohibited. Section 92 applies to every government publication or advertisement, but the contribution and election expense rules do not. A contribution must be made to a party or candidate, and an election expense resulting from a contribution of property or services must be for the benefit of a party or candidate. Government ads that were part of on-going government business and that did not benefit the governing party would presumably not be prohibited.

In principle, this appears to be a welcome consequence: allowing the government to continue with non-partisan government business while at the same time preventing government resources from being used to assist the governing party's election campaign. In practice, however, the government and those implementing the Act will be facing the same fundamental difficulty that has already been identified: how to distinguish between partisan activity that should be prohibited and non-partisan government business that should not. In addition, repealing Part 13 would leave a loophole in the scheme regulating campaign spending as there would not be a prohibition on government using its resources in a way that might appear non-partisan but which could have a significant impact on an election.

MANITOBA LIBERAL PARTY

I wrote to the leaders of the New Democratic Party of Manitoba and the Manitoba Liberal Party advising that I had been tasked with seeking input from various parties, including the two opposition political parties, in regard to proposed legislation dealing with government advertising. My letter requested the names of a person or persons within their parties with whom I might have discussions.

Not having heard back from either of the parties I sent a further letter in early October of 2018 asking whether they wished to be involved or not.

The Manitoba Liberal Party chose to address my request by sending a written communication entitled Manitoba Liberal Party Suggestions on the *Elections Financing Act*.

I never did hear from the New Democratic Party of Manitoba.

In brief, the points raised by Manitoba Liberal Party are:

- The government is "claiming" confusion about when government communications are allowed before and during elections or by-elections;
- In the past public funds were used for major spending announcements in the lead-up to elections, which were effectively campaign announcements financed by public funds. Specific examples of such announcements were referred to;
- In the past some crown corporations had engaged in paid advertising which was "designed to present the government in a positive light";
- Exception was taken to advertising which was felt designed to promote provincial budgets;
- There are "common threads" in "objectionable" communications made prior to or during elections, one of which is that the government is going to be spending money.

Although the present legislation dealing with government communications during and immediately prior to elections is considered by some to be overly restrictive in promoting positive information, it should be recognized that these restrictions can be used as an excuse to withhold negative information which should be released on a more timely basis. An example of a report on soil testing in St. Boniface is referred to in the Liberal's submission and the suggestion seems to be that the report should have been released earlier as it fell within existing exceptions to the communications legislation.

The Liberal Party submission went on to make two recommendations as follows:

> "Have a blackout on spending announcements during by-elections, and before and during general elections. These are the types of announcements that have been used and abused.
>
> Allow the release of reports that have an impact on public health or safety and that require the public to take action. Examples of taking action is getting securing (sic) more information about a problem (infectious diseases, dangerous weather, health or environmental hazard, testing for contaminants) and acting on it (getting a vaccination, calling a phone number or checking a website, taking action for remediation)".

As mentioned above my initial contact with Manitoba Liberal Party was basically to introduce myself and extend an invitation for discussions. The response was the submission paper which I have summarized above. This approach was of course acceptable, but my initial letter did not contain a copy of the draft legislation. After hearing from the Liberal party I sent a copy of the draft to the leader and indicated that if he had any comments, they would be welcome. Nothing further has been received.

The position of the Liberal party would appear to be that Part 13 of the EFA should remain in force or that something along the same lines be contained in new legislation.

WINNIPEG CONSTRUCTION ASSOCIATION

In October I received an email from the President of Winnipeg Construction Association ("WCA") stating that the association would like to submit to me concerns which its members had regarding past interpretations of the existing legislation and was wondering whether I would be amenable to hearing from them. That, of course was acceptable and on October 22, 2018 I received a letter outlining the concerns.

One of the key services provided by WCA is the tracking and sharing of construction opportunities. When the tender stage of a project is reached WCA uploads the relevant bidding documents to its website called Buildworks. Each year approximately 2,500 projects are identified with some 70% involving publicly funded projects.

The WCA feels that during the election "blackout" periods several governmental departments and Crown corporations completely suspend construction tendering and the issuance of requests for proposals. According to AMC these suspensions occurred during the recent by-election in St. Boniface and in the general election of 2016.

AMC apparently approached various purchasing managers to advise that the suspension was problematical but was informed that tenders could not be issued as that was seen as advertising.

Other purchasing managers advised WCA that their tenders would be issued as the project had been announced well before the election, that it had been identified in public documents and was therefore an ongoing project and tendering would continue without interruption.

The AMC letter contains the following comment:

"During the 2016 provincial election the blackout period lasted from January 25 – April 16. Provincial government tendering dropped dramatically during this period. This is a very long time for the construction industry to sit idle, and for critical health and education projects to be delayed".

AMC feels that the problem which is being encountered during these periods can be solved by way of an amendment to the existing legislation which would exempt advertisements or publications seeking proposals or tenders for contracts in connection with construction projects.

OTHER JURISDICTIONS

Saskatchewan

Until recently, Saskatchewan was the only province other than Manitoba with legislation regulating government advertising during election periods. Effective January 2018, Alberta has adopted similar legislation, discussed below.

Saskatchewan's legislation pre-dated Manitoba's and Manitoba's legislation when it was originally passed in 1983 was patterned after the then existing Saskatchewan Act.

In its present form, Saskatchewan's rules regulating government advertising before an election (contained in The Elections Act, 1999) are more complex than Manitoba's. The Act treats publications and paid advertisements differently. Restrictions on publications are in place "during a general election" and "during a by-election". These are interpreted to be the periods between the issuance of the writ and polling day.

In a by-election the restriction on publication is limited to publications made in the constituency of the election or, if the constituency is in a city of more than 20,000 people, to publications made in the city.

Publishers and broadcasters are required to file solemn declarations with the Chief Electoral Officer, disclosing the cost of any publications or broadcasts during a general election or by-election.

Restrictions are placed on paid advertising during the 90 days immediately preceding the "election period", which is defined as the 27 days before polling day.

Restrictions are placed on the amount that can be spent on advertising in the 120 days before the election period.

There are a number of exceptions to the general prohibitions on publishing or advertising and they differ, depending on the period in question (general election, by-election, 90days before the election period or 120 days before the election period).

The effect of all these provisions is a restriction, with few permitted exceptions, on any publications in the period between the writ and polling day and a restriction with somewhat more generous restrictions, on paid advertising in the 117 days before an election.

Saskatchewan issues detailed guidelines as well as interpretation bulletins to ministries and agencies which are impacted by the legislated advertising restrictions. Separate guidelines are issued for the separate periods defined in the act.

I am informed by the Deputy Chief Electoral Officer of Elections Saskatchewan that most of the complaints received are from private citizens. She cannot recall any complaints from political parties about government advertising during election periods. As outlined elsewhere in this report that is not the situation in Manitoba. I am informed by our Commissioner of Elections that during the 2016 provincial election nine complaints were received from the PC party, eight of them within a 10-day period.

Alberta

As mentioned previously, Alberta has recently adopted legislation restricting government advertising during elections.

It is apparent that the Alberta provisions were enacted with sections 92 and 93 of the EFA in mind.

There is a similar prohibition on government departments or "Provincial corporations" publishing or advertising in the lead up to an election. The exceptions to this general prohibition are very similar to the ones in the Manitoba legislation.

There are, however, some differences. The most significant of these are:

The exception for publications that are in continuation of earlier ones and that concern ongoing programs applies to the government in general elections as well as in by-elections. In Manitoba, as I discussed above, the provisions were amended in 2006 so that this exclusion did not apply to government in general elections.

The period of the restriction is the "election period" defined to be the period between the issuance of the writ and polling day.

The restrictions in by-elections only apply to publications or advertisements that have "a disproportionate impact on voters in the electoral division in which the by-election is being held"

As in Saskatchewan, Alberta also publishes guidelines and interpretation bulletins to assist those affected by the legislation to interpret it and decide whether communications being considered are prohibited by the Act.

SUMMARY AND RECOMMENDATIONS RESPECTING THE REPEAL OF PART 13

The government's current plan is to repeal Part 13 of the current EFA and replace it with a watered-down version in a new act that deals primarily with regulating partisan advertising, outside of an election period. My consultations with stakeholders and consideration of the practice in other jurisdictions leads me to advise against that course.

My consultations have led me to believe that matters involving election expenditures should all be contained in the EFA. I say this for several reasons. First, election rules need some type of enforceability and there is no practical enforceability in the Proposed Act. Secondly, as restrictions on government advertising are an outgrowth of other spending limits, they should be governed by the same Act and administered by the same individuals. Thirdly, I have already recommended that partisan advertising outside of elections should be dealt with by way of policy and guidelines instead of legislation, as is done in other Canadian jurisdictions. But election rules cannot be relegated to guidelines and so must be located elsewhere. The obvious place is the EFA.

If the government decides to address government advertising within the EFA, I would not recommend repealing Part 13 and replacing it with something akin to what is now contained in the Proposed Act. The proposed restrictions deal only with paid advertising and leave the entire issue of the government's use of its resources in other ways during an election period unregulated. As noted above, there would be no restriction on the governing party using government employees to write media speeches and arrange press conferences. The government could plan a event about global warming or attracting jobs to Manitoba all at government expense. These are the sorts of activities that the restriction on government communications in the blackout period was intended to regulate. To abandon that entire scheme would, in my view, be unjustified.

That is not to say that the current Part 13 is achieving its goal. It is clear that the government feels unable to conduct legitimate business in the 90-day period leading up to an election. I would recommend, therefore, that amendments be made. I have not canvassed possible amendments with the various stakeholders in any detail as it may be that the government will choose not to accept my recommendation. I can, however, make some observations.

It is my impression that there are two problems with the current legislation. The first is that the government believes it to be too restrictive; the second is that the wording of the legislation is not sufficiently precise to allow the government to decide, with confidence, what communications will and will not be permissible.

In order to deal with the first of these problems, the legislation can be amended. One relatively straightforward amendment would be to walk back some of the changes that were made to section 56 in 2006. In particular, I believe that something as simple as restoring the original exemption in 56(1)(c) would go a long way to alleviating many of the problems the government is experiencing with the current section 92. That exemption allowed information to be published or advertised "in continuation of earlier publications or advertisements concerning ongoing programs". That is currently the approach being taken in Alberta.

Another possible change would be with respect to by-elections. Both the Saskatchewan and Alberta legislation provide somewhat more leeway for government communications during by-elections. In Saskatchewan the leeway is geographic – the restrictions only apply to publications in the area of the by-election. In Alberta, publications are restricted based upon the impact the publication would have on voters in the by-election. The Saskatchewan approach has, in my view, the benefit of clarity and certainty in its application.

The second problem is the uncertainty created by Part 13 of the EFA. That problem would be fixed, in part, by well drafted amendments. But I would also recommend the approach that has been taken in both Saskatchewan and Alberta of publishing guidelines to assist those responsible for government communications to decide in advance on what is, and what is not, appropriate.

Part of my consultations involved discussions with the Crown Law Team, a part of Manitoba Justice – Legal Services Branch. Their team advises government departments and government agencies about what may or may not be permissible communications during election periods. In the view of the team the current difficulties with Part 13 are fixable.

REPORT SUMMARY

In summary, it is my recommendation, based upon my consultations with interested parties and my review of the approaches that have been tried in other jurisdictions, that the government should consider implementing a policy and guidelines on paid government advertising instead of proceeding with legislation.

I say this for several reasons.

First, there appears neither to be an urgent need nor a strong pressure for this legislation. That is not to say that regulating partisan advertising is not a good idea. In my view, it is. There certainly are known examples of advertising abuses and opposition parties have often alleged that such abuses have taken place in this province. But it is to say that the government is not under immediate pressure to pass legislation and has the time and flexibility to begin with a more modest approach.

Secondly, no other jurisdiction in Canada, of which I am aware, has passed legislation similar to the Proposed Act. There is therefore no precedent and no experience upon which to base new legislation. Ontario, in something of a knee jerk reaction, did pass legislation dealing with partisan advertising by government but the eventual outcome was not a happy one.

Thirdly, legislation will be inherently difficult to draft as it will require a definition of "partisan advertising". Providing objective tests such as no party logos or colours, no pictures or likenesses of MLAs, and so on, runs the risk of failing to capture much of what is partisan. On the other hand, leaving the Auditor General with too much discretion to decide what is partisan may leave those responsible for creating government advertising programs unable to confidently predict what is and what is not prohibited. A fine line will have to be walked between these alternatives and the first attempt (and quite likely the second and third) will have to be revised.

This leads to the fourth consideration, namely that an act of the legislature can be slow and cumbersome to amend. It seems unwise to legislate restrictions if another, more flexible, option is available.

Amending an act of the legislature can become a heavily political process. Amending might be difficult, even if amendments are legitimately required, if other parties are suggesting that it is being done to permit the government to engage in more partisan advertising.

Viewed in the light of the foregoing considerations, adopting a policy and guidelines appears to have several advantages:

- Doing so would be in accordance with the practice that has been adopted in many other jurisdictions;
- A policy and guidelines would allow the flexibility to make changes more easily;
- Implementing a policy and guidelines would give the government time to gain experience in regulating partisan advertising, to experiment with adjustments which may be needed and be in a position at a later date to pass legislation that has a better chance of achieving the desired outcome.

For these reasons I recommend that the government not proceed with the Proposed Act at this time but instead set the wheels in motion for devising an appropriate government policy and guidelines.

It is important that a system be put in place for frequent review and updating of the policy and guidelines and the federal practice in that regard should obviously be considered.

I would also recommend that if these suggestions are followed that there be a mechanism for persons to file a complaint if they are of the view that there has been a breach of policy or guidelines.

The office of the Auditor General might well be an appropriate official to receive and review such complaints.

As indicated during the part of this report dealing with my consultations with the Auditor General, that office seems to have a good understanding of the issues which will arise in dealing with government advertising and input from that source in devising a government policy and guidelines is encouraged.

Similarly, if the government decides to retain Part 13 of the EFA and agrees that amendments are required then presumably Elections Manitoba and the Commissioner of Elections should participate in the amendment discussions.

January 31, 2019

Michael T. Green

A NEW GOVERNMENT ADVERTISING ACT

CONTENTS

DEFINITIONS

Definition of government advertising

1 The following definitions apply in this Act.

"paid advertising" means

(a) advertising that, under a commercial advertising agreement or arrangement, is

(i) published in newspapers, magazines or other periodicals,

(ii) broadcast on radio or television or in a movie theater,

(iii) posted or distributed on the Internet or through the use of social media,

(iv) posted on billboards, buses or other property normally used for commercial advertising; and

(b) printed material that, under a commercial agreement or arrangement, is distributed on an unsolicited basis.

"government agency" means a government agency as defined in *The Financial Administration Act*.

"social media" means the Internet sites referred to as Facebook, YouTube, Twitter and MySpace, and includes any other Internet site or digital means of distributing a message prescribed by regulation made under this Act.

ADVERTISING STANDARDS FOR GOVERNMENT

Purpose of the government's paid advertising

2 The government or a government agency may engage in paid advertising if the advertising is for one of the following purposes:

(a) to inform the public about existing, new or proposed programs, plans, services, developments or policies, or about changes or proposed changes to existing ones;

(b) to inform the public of their rights and responsibilities under the law;

(c) to encourage or discourage specific social behaviour, in the public interest;

(d) to inform the public in times of emergency, including health emergencies and fires, floods and other natural disasters;

(e) to enhance the reputation of the province by promoting Manitoba or a part of Manitoba as a good place to live, work, invest, study or visit, but only if the advertisement's primary target audience is outside Manitoba.

Standards for the government's paid advertising

3(1) The government and a government agency must ensure that its paid advertising

(a) is objective and factual;

(b) is non-partisan; and

(c) includes a statement that it is paid for by the government or the applicable government agency.

When is paid advertising partisan?

3(2) Paid advertising by the government or a government agency is partisan if

(a) it includes the name or logo of a political party;

(b) it includes slogans or is designed to promote the government or the interests of a political party instead of communicating a factual message;

(c) directly criticizes the views, policies or actions of others, including a political party;

(d) it includes the name, voice or image of a member of the Executive Council or a member of the Assembly, unless the advertisement's primary target audience is outside Manitoba; or

(e) it lists the achievements of the government or the government agency.

Standards for the government's infrastructure signage

4 The government and a government agency must ensure that signage placed by or on its behalf at construction sites is non-partisan, within the meaning of clauses 3(2)(a) to (e).

Compliance reviews by Auditor General

5(1) The Auditor General must, at least once during the four-year period between fixed date elections, examine a government department or agency that engages in paid advertising to determine if it has adequate administrative and compliance procedures in place, and is adequately applying those procedures, to ensure that its paid advertising

(a) reasonably achieves one or more of the purposes in section 2; and

(b) adheres to the requirements of section 3 and 4.

Reporting

5(2) The Auditor General must make public his or her report on the compliance review at least 90 days before a fixed date election.

Powers

5(3) Section 18 of *The Auditor General Act* applies to a compliance audit.

ADVERTISING FREEZE DURING ELECTION PERIOD

Restrictions during election period

6(1) The government or a government agency must not, during the election period of a general election or a by-election period,

(a) engage in paid advertising; or

(b) post or distribute new information on the Internet or through other digital means.

_xceptions
6(2) Subsection (1) does not apply to

(a) a notice to the public that is required by law;

(b) a matter affecting public health or safety, employment opportunities with the government or a government agency or the provision of goods or services to the government or a government agency;

(c) infrastructure signage described in section 4; or

(d) in the case of the election period of a by-election, other paid advertising or the distribution of information that is of a routine nature in relation to the usual operational activities of the government or a government agency.

Definitions
6(3) In this section, **"by-election"**, **"election period"**, **"fixed date election"** and **"general election"** have the same meaning as in *The Election Financing Act.*

Court application for declaration
7(1) A person who believes that the government or a government agency has violated section 6 may apply to a judge of the Court of Queen's Bench for a declaration that the section has been violated.

Decision
7(2) Upon hearing an application, the court may

(a) declare or refuse to declare that section 6 has been violated; and

(b) award costs for or against any party to the hearing.

The court's decision is final and may not be appealed.

GENERAL

Regulations
8 The Lieutenant Governor in Council may make regulations prescribing an Internet site or a digital means of distributing a message to be social media for the purpose of the definition of **"social media"** in section 1.

Consequential amendment, C.C.S.M. c. L110

9 ***The Legislative Assembly Act*** *is amended by adding the following after subsection 52.22(6) and before the centred heading that follows it:*

Mailings are not paid advertising

55.22(7) The printing and mailing of material under this section is not subject to *The Government Adverting Act*.

Repeal

10 Part 13 of *The Election Financing Act* is repealed.

Coming into force

11 This Act comes into force on the day it receives royal assent.