

P. Bevan-Baker
27.11.18
emd

Bill No. 126: Government Advertising Standards Act No. 2

Background Document

Preamble

The purpose of Bill 126, the Government Advertising Standards Act (No.2), is to establish standards for government advertising. This document aims to provide some background information regarding the development of Bill 126.

The proposed and enacted legislation primarily considered during the development of this Bill were:

1. *Bill 46: Government Advertising Accountability Act* (NB, 2014)
 - a. Brought forward by Brian Gallant as NB's leader of the official opposition. Bill did not pass.
2. *Government Advertising Act* (NB, 2018)
 - a. Bill brought forward by NB Premier Brian Gallant. Enacted in 2018.
3. *Bill 101: Government Advertising Standards Act* (PEI, 2004)
 - a. Brought forward by Robert Ghiz as opposition leader. Bill did not pass.
4. *Government Advertising Act, 2004* (ON, 2006-2015)
 - a. This version was the last before advertising standards and the ability of the Auditor General to consider factors beyond the legislation were diminished.
5. *Government Advertising Act, 2004* (ON, 2016 - present)
 - a. Current version of the legislation. The Office of the Auditor General has reported their frustration regarding the limitations of this version.

1. Definitions

Each enacted or proposed Act prescribes definitions that apply in the respective Act. While the definitions differ based on the framework provided in the legislation, here:

- "Government advertising" means the use of public funds for the production and dissemination of material to the public which promotes activities, programs or initiatives of a Crown corporation or Crown entity
 - This is the definition of government advertising from New Brunswick's 2014 *Bill 46*
- "government office" means a department, the Executive Council Office, the Office of the Premier or a reporting entity listed in Schedule B to the *Financial Administration Act*¹
- "public money" means public money as that term is defined in the *Financial Administration Act*

¹ Effectively this means most of Schedule A under the Financial Administration Act is included under the definition of government office. The Schedules are included as an appendix to this document.

- From the *FAA*: (q) “public money” means all money belonging to the province received or collected by the Minister or any public officer in his official capacity or any person authorized to receive or collect such money, and includes
 - (i) revenues of the province,
 - (ii) money borrowed by the province or received through the sale of securities,
 - (iii) money received or collected for or on the behalf of the province, and
 - (iv) money paid to the province for a special purpose;

2. Application

This section would identify distribution mediums to which the legislation would apply. Of the bills we reviewed PEI’s *Bill 101* had the most exhaustive list of mediums:

- (a) “advertising” includes, but is not limited to:
 - i. advertisements on television, radio or in newspapers and magazines,
 - ii. advertising on the Internet,
 - iii. brochures, signs, posters, billboards,
 - iv. mailing inserts,
 - v. newsletters,
 - vi. displays, exhibitions;

Our bill uses this list and adds cinema advertisements, which stemmed from a 2017 report from the Ontario Auditor General that noted the provincial government had aired a cinema advertisement that was misleading². We additionally included advertisements on vehicles, such as bus wraps, and a provision that allows for additional mediums to be specified in the regulations.

3. Advertising Standards

Each piece of proposed or enacted legislation provides a set of standards that determines whether a government advertisement is suitable for public release, and this framework serves as the primary basis for the independent review of an advertisement by the Auditor General. The following are the standards required by subsection 6(1) the *Government Advertising Act, 2004* (for the period January 30, 2006 to June 3, 2015), which served as the model for our legislation:

1. *It must be a reasonable means of achieving one or more of the following purposes:*
 - i. *To inform the public of current or proposed government policies, programs or services available to them.*
 - ii. *To inform the public of their rights and responsibilities under the law.*
 - iii. *To encourage or discourage specific social behaviour, in the public interest, or*

² http://www.auditor.on.ca/en/content/annualreports/arreports/en17/v1_500en17.pdf

- iv. *To promote Ontario or any part of Ontario as a good place to live, work, invest, study or visit or to promote any economic activity or sector of Ontario's economy.*
- 2. *It must include a statement that the item is paid for by the Government of Ontario.*
- 3. *It must not include the name, voice or image of a member of the Executive Council or a member of the Assembly.*
- 4. *It must not be partisan.*
- 5. *It must not be a primary objective of the item to foster a positive impression of the governing party or a negative impression of a person or entity who is critical of the government.*
- 6. *It must meet such additional standards as may be prescribed. 2004, c. 20, s. 6 (1).*

These standards were revoked in 2015, which the Ontario Auditor General had cited as an issue allowing government to generate partisan advertising³. The amended Act does allow the name, voice or image of a member of the Executive Council or a member of the Assembly to be included in an advertisement *if* the primary target audience is located outside of the province⁴. There is valid rationale for this exception; for example, this could allow for a repatriation advertisement in Ontario featuring the Premier. We've allowed for such an exception in our legislation.

Bill 126 also adds a standard from the most recent version of the Ontario legislation that prohibits the use, to a significant degree, of a colour commonly associated with the governing party. We've included an exception for the depiction of a thing that is commonly depicted in a colour associated with the governing party.

Subsections 6(3) and 6(4) of Ontario's *Government Advertising Act, 2004* (2006-2015) give the Auditor General important leeway in two ways. The first is that the Auditor General may determine what is partisan through their own judgement and analysis, rather than being limited to a narrow definition:

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

The second way is that Auditor General can consider factors external to the legislation when determining whether an advertisement serves partisan purposes:

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

A 2015 special report by the Ontario Auditor General provides insight into the kinds of

³ http://www.auditor.on.ca/en/content/annualreports/arreports/en17/v1_500en17.pdf

⁴ This was consistent with Bill 46 in New Brunswick.

considerations such a legislative clause would enable. For example, some of the questions the Auditor General asks are:

- *Is the message fair, balanced and objectively presented?*
- *Are the factual and numerical data accurate and supportable?*
- *Is the tone overly self-congratulatory?*
- *Is the timing of the ad likely to net significant political gains for the government?*
- *Does the ad make inappropriate or overuse of a colour commonly associated with the governing political party?*⁵

Bill 126 adopts both of these provisions.

4. Review Process

Regarding the review process for government advertisements, there are two basic models: a proactive approach, and a reactive approach.

Under the proactive approach, the Office of the Auditor General would be required to review all advertisements prior to release, with exceptions⁶, and then issue a decision on whether an advertisement meets the standards. There is no complaints mechanism under the proactive approach - the Auditor General's decision on each advertisement is binding, although government may submit revised versions of rejected ads to be reviewed and approved. While this approach provides the greatest oversight on government advertisements, it is also the most resource-intensive.

With a reactive approach, government would produce and publish advertisements with members of Executive Council (or their designates) being responsible for ensuring the advertisements meet the standards outlined in the legislation. Members of Executive Council (or their designates) may solicit the advice of the Auditor General in determining whether an unpublished ad meets the standards. In the event that government publishes an advertisement which appears to contravene the advertising standards legislation, an MLA may submit a complaint to the Auditor General to have the advertisement reviewed by the Auditor General. The Auditor General would assess whether the advertisement in question met the standards, and would then provide a decision and reasons on the matter.

One of the considerations in drafting our legislation was the capacity of the Office of the Auditor General to handle the review of government advertising. While the proactive approach would be a more thorough approach to preventing partisan advertisements, it comes at the expense of being the most resource-intensive mechanism. On the other hand, a reactive approach would be the least resource-intensive by involving Auditor General only upon a request for review by a

⁵ http://www.auditor.on.ca/en/content/specialreports/specialreports/GAA_en.pdf pg 9

⁶Examples include notices required by law, urgent matters affecting public health or safety, job advertisements or the provision of goods (see ss.4(5))

member of Executive Council (or their designate) or after a complaint has been lodged by a member of the Legislative Assembly.

The 2015 Special Report from the Ontario Auditor General provides insight into the scale of their proactive model. On average, for the nine full years listed, the Office reviewed approximately 771 ads valued at ~\$43.1M annually. On PEI, that number is much smaller; documents tabled by Premier MacLauchlan during the 2018 consideration of the estimates pegged media advertising and promotional expenditures in 2017/18 at \$317,000, up from \$309,545 in 2016-17⁷

Given the administrative burden that a proactive approach would place on the Office of the Auditor General, Bill 126 is based on a reactive model.

5. Reporting

One of the key accountability pieces in the legislation is ensuring that any violations of government advertising legislation are reported to the Legislature. Ontario's *Government Advertising Act, 2004* (2006-2015) contained a requirement for the Auditor General to "report to the Speaker of the Assembly about such matters as the Auditor General considers appropriate relating to his or her powers and duties under this Act" (s. 9 (1)), with the Auditor General being expected to notify the Speaker about any advertising violations (s. 9(2)).

The legislation also allows for the Auditor General to "make a special report to the Speaker at any time on any matter that in the opinion of the Auditor General should not be deferred until the annual report" (s. 9(3)). In Ontario, this clause was used by the Auditor General to issue her special report on the 2015 amendments to the *Government Advertising Act*, which highlighted her concern about the negative impact the amendments could have. The *Act* also prescribed the timing for the tabling of reports in s.9 (4). Bill 126 uses the Ontario legislation as its model for reporting.

6. Immunity and Penalties

Bill 126 follows the lead of other legislation by adding a section to grant immunity to third-parties (media outlets, advertisers, etc.) who might have published government advertising that did not meet the standards of the legislation; other legislation has placed the onus on government to ensure the content it seeks to publish meets the standards of the legislation. Section 11 of the most recent version of Ontario's *Government Advertising Act, 2004* reads:

11. (1) *No action or other proceeding shall be brought against a person who publishes, displays or broadcasts a reviewable advertisement on the sole ground that, under this Act, a government office was not permitted to use it to communicate with the public.*
2004, c. 20, s. 11 (1).

⁷ <http://www.assembly.pe.ca/docs/estimates-Executive-Council.pdf> pg 10

(2) No action or other proceeding shall be brought against a person who distributes reviewable printed matter on the sole ground that, under this Act, a government office was not permitted to distribute it. 2004, c. 20, s. 11 (2).

(3) No action or other proceeding shall be brought against a person who conveys to the public on behalf of a government office a reviewable message on the sole ground that, under this Act, a government office was not permitted to convey it to the public. 2004, c. 20, s. 11 (3).

A similar provision was included in New Brunswick's 2018 *Government Advertising Act*. Bill 126 adopted the Ontario legislation as its model.

6.1 Penalties

Some pieces of legislation had considered penalties for government issuing partisan advertising. For example, then-opposition-leader Robert Ghiz's Bill 101 expected the governing party to reimburse the cost of partisan ads:

Reimbursement of Costs

(6) If the Auditor decides that government advertising specified in a complaint does not meet the standards set out in subsection 3(2)⁸ or (3)⁹, the Auditor may order the governing party to reimburse the Crown for the cost of the advertisement that was the subject of the complaint.

New Brunswick's Bill 46 also called for penalties, although it left them to be determined via regulations:

Regulations

*12 The Lieutenant Governor in Council may make regulations,
(f) prescribing penalties for violations of this Act.*

There could be challenges in issuing penalties for violations of the Act, particularly around the specific punitive action that would be taken, and the size of that action. For example, the Ghiz bill proposes an legally untested penalty mechanism. Bill 126 considers the public nature of the Auditor General's potential reporting on the violation of government advertising legislation to be a sufficient penalty.

7. Regulations

Each piece of government advertising legislation considered during the drafting of Bill 126 allows for the development of regulations, although they differ in what they permit. Some permit

⁸ Prohibition on the name, voice, or image of member of Executive Council or member of the Legislative Assembly

⁹ Prohibition on government advertising

for additional standards to be created; others allow for for government to create exemptions to the legislation. Bill 126 allows for the following in the regulations:

- specifying additional advertising mediums;
- specifying additional advertising standards;
- respecting the process for providing notice to a head of office, including determining when notice may be deemed to have been received by the head of office;
- defining terms used but not defined in this Act;
- respecting any matter that the Lieutenant Governor in Council considers necessary or advisable to carry out the intent and purposes of this Act.

Useful Links and Resources

<https://www.gnb.ca/legis/bill/FILE/57/4/Bill-46-e.htm>

http://www.auditor.on.ca/en/content/specialreports/specialreports/GAA_en.pdf

<http://laws.gnb.ca/en/showfulldoc/cs/2018-c.12//20180913>

http://www.assembly.pe.ca/bills/pdf_first/62/2/bill-101.pdf

<https://www.ontario.ca/laws/statute/04g20/v3>

<https://www.canlii.org/en/on/laws/stat/so-2004-c-20/latest/so-2004-c-20.html#history>

<http://www.auditor.on.ca/en/content/adreview/adreview.html>

<http://www.auditor.on.ca/images/adsubmission.pdf>

<http://www.auditor.on.ca/images/translationcertificate.pdf>

Appendix A:
Financial Administration Act, Schedule A & B

SCHEDULE A

Department of Agriculture and Fisheries
Department of Communities, Land and Environment
Department of Economic Development and Tourism
Department of Education, Early Learning and Culture
Department of Family and Human Services
Department of Finance
Department of Health and Wellness
Department of Justice and Public Safety
Department of Transportation, Infrastructure and Energy
Department of Workforce and Advanced Learning
Executive Council
Legislative Assembly*
Office of the Auditor General*
Public Service Commission*

* = excluded from 1(c) of Government Advertising Standards Act (2)

SCHEDULE B

Prince Edward Island Agricultural Insurance Corporation
Prince Edward Island Employment Development Agency
Prince Edward Island Housing Corporation
Prince Edward Island Energy Corporation
Prince Edward Island Liquor Control Commission
Finance PEI
Prince Edward Island Self-Insurance and Risk Management Fund
Health PEI
Innovation PEI
Island Investment Development Inc.
Island Waste Management Corporation
Prince Edward Island Crown Building Corporation
Prince Edward Island Grain Elevators Corporation
Prince Edward Island Lotteries Commission
Workers Compensation Board of Prince Edward Island
Prince Edward Island Museum and Heritage Foundation
Charlottetown Area Development Corporation
Summerside Regional Development Corporation
P.E.I. Aquaculture and Fisheries Research Initiative Inc.
Tourism PEI
P.E.I. Student Financial Assistance Corporation

**Appendix B:
Government Advertising Standards Flow Chart**



