

DATE: February 9, 2021

TO: Board of Trustees

FROM: Grace Cooke, General Counsel

SUBJECT: Changes to the *Local Authorities Election Act* concerning Political Action Committees (Response to Request for Information #91)

ORIGINATOR: Karen Mills, Director Board and Superintendent Relations

REFERENCE: December 8, 2020, Board meeting (Trustee Janz)
[Local Authorities Election Act](#)
[Bill 29: Local Authorities Election Amendment Act](#)
[Bill 45: Local Authorities Election Amendment Act, 2020 \(No.2\)](#)

ISSUE

Trustee Janz requested the following information at the December 8, 2020, public Board meeting:

Free, fair, and transparent elections are the cornerstone of a healthy democracy and the Edmonton Public School Board has advocated for reforms that can ensure a healthy local democracy.

- 1) *Please outline the changes made to Political Action Committees in Alberta (Fall 2020).*
- 2) *As a school division, what changes could a school board require to ensure greater transparency related to political action committees?*
- 3) *Could the federal government, Elections Canada or the CRTC enact overriding provisions requiring transparency in political advertising (especially over social media) that could require Political Action Committees to disclose their funders?*

BACKGROUNDLegislation

The following bills amended the *Local Authorities Election Act* impacting political action committees in Alberta.

Bill 29: Local Authorities Election Amendment Act, 2020 came into force on September 1, 2020.

Bill 45: Local Authorities Election Amendment Act, 2020 (No.2) came into force on January 1, 2021.

While these Bills made numerous changes to the *Local Authorities Election Act* ("LAEA"), we highlight the following changes regarding transparency and disclosure of third party contributions to candidates and election advertising.

With respect to advertising contributions, Bill 45 added the following provision to section 167 of the LAEA:

(2.1) No individual, corporation, trade union or employee organization shall make advertising contributions to any third party during an election advertising period that exceed, in the aggregate, \$30 000.

This Bill also amends section 193 of LAEA by adding the following provision:

(2) If the Election Commissioner is of the opinion that ...

(c.1) an individual, a corporation, a trade union or an employee organization has made one or more advertising contributions in excess of the limit referred to in section 167(2.1),

...

the Election Commissioner may serve on the individual or entity either a notice of administrative penalty requiring the individual or entity to pay to the Crown the amount set out in the notice, or a letter of reprimand.

Consequently, a contravention of section 193(c.1) is also now subject to an administrative penalty that may be imposed by the Election Commissioner. Section 193(5) sets out the potential penalties:

(5) The amount of an administrative penalty that may be imposed under subsection (2) must not exceed

- (a) in the case of a contravention referred to in subsection (2)(a), twice the amount by which the contribution or contributions exceed the limit prescribed by section 147.2(3) and in no case may the amount of the administrative penalty exceed \$10 000 for each contravention,
 - (b) in the case of a contravention of section 147.2(1) or (2) or 167(3), twice the amount that was contributed in contravention of that provision, and in no case may the amount of the administrative penalty exceed \$10 000 for each contravention,
 - (c) in the case of a contravention referred to in section 147.4, \$1000,
 - (d) in the case of a contravention referred to in section 187,
 - (i) \$10 000 if the third party is an individual, and
 - (ii) \$100 000, if the third party is a trade union, employee organization, corporation or other organization,
- and
- (e) in the case of any other contravention, \$10 000.

Of the numerous amendments made through Bill 29, of specific potential impact regarding disclosure is the repeal of several provisions under section 147.4 (s.17 of Bill 29) which had authorized local jurisdictions to pass a bylaw requiring candidates to file pre-election disclosure statements containing information including contribution amounts, campaign expenses/revenues, surpluses, etc. The Board had not previously adopted such a bylaw requiring pre-election disclosure statements, and it does not appear that the Board would have the authority to pass such a bylaw in the future given the repeal of these provisions by Bill 29.

The Board had previously adopted Bylaw No. 2012-2013-1 which required, on or before the first working day of March in the year immediately following the year in which an election has been held, the disclosure of a candidate's campaign contributions and expenses including a list of:

- Each contributor whose cumulative campaign contributions exceed \$100.00;
- The amount of each contributor's cumulative campaign contribution(s) under the appropriate heading; and
- If no cumulative campaign contribution exceeded \$100.00, then the list must still be completed but marked nil.

The requirements of that bylaw appear to be superceded by section 147.4(1) of the LAEA which has not been amended by either Bill 29 or Bill 45. Section 147.4(1) requires that the following information be included in a disclosure statement:

147.4(1) On or before March 1 immediately following a general election or, in the case of a by-election, within 120 days after the by-election, a candidate shall file with the secretary of the candidate's local jurisdiction a disclosure statement in the prescribed form, which must include

- (a) the total amount of all contributions received during the campaign period that did not exceed \$50 in the aggregate from any single contributor,
- (b) the total amount contributed, together with the contributor's name and address, for each contributor whose contributions during the campaign period exceeded \$50 in the aggregate,
- (c) the total amount of all contributions received as referred to in section 147.22(3),
- (d) the total amount from fund-raising functions,
- (e) the total amount of other revenue,
- (f) the total amount of campaign expenses,
- (g) an itemized campaign expense report setting out the campaign expenses incurred by the candidate,
- (h) the total amount paid by the candidate out of the candidate's own funds not reimbursed from the candidate's campaign fund,
- (i) the total amount of any campaign surplus, including any surplus from previous campaigns, and
- (j) the amount of any deficit.

Bill 29 also amended the LAEA by removing the provisions regarding "political advertising". Section 162(1)(i) of the LAEA previously defined "political advertising" as "... the transmission to the public by any means, at any time other than during an election advertising period, of an advertising message that promotes or opposes the election of a candidate, including an advertising message that takes a position

on an issue with which a candidate is associated, ..." [emphasis added]. The "election advertising period" in a general election is "the period commencing May 1 in the year in which a general election is held and ending at the end of the election day" (s.162(1)(e)). The main result of the removal of these provisions regarding political advertising is that there are no longer any requirements or restrictions regarding third party (such as political action committees) expenses and advertising contributions prior to May 1 of a general election year. The restrictions and requirements under Part 8 of the LAEA (e.g., registrations, expense limits, contributors, reporting) regarding third party advertising will only apply starting May 1.

In terms of limitations on contributions, the following amendments are of note. Section 147.2(3)(b) of the LAEA previously provided a limitation in which an Alberta resident could only contribute up to \$4,000 "in the aggregate to candidates for school board trustees." With the amendments, an Alberta resident may contribute up to \$5,000 "to any candidate for election as a school board trustee." Furthermore, while section 147.22(1) prohibits a person accepting a contribution or incurring a campaign expense unless they have been nominated as a candidate, and no candidate or person acting for a candidate may accept a contribution except during the campaign period, there are two new exceptions to these rules. These rules now do not apply to the following circumstances (s.147.22(3)):

- (a) a person who accepts not more than \$5000 in the aggregate per year in contributions outside the campaign period;
- (b) a candidate who makes a contribution of not more than \$10 000 in the aggregate per year to the candidate's own campaign from the candidate's own funds.

The "campaign period" in a general election is defined in the LAEA as "the period of time from January 1 to December 31 in a year in which a general election is held."

A new requirement is also found in section 147.4(2) which requires a "candidate who has incurred campaign expenses or received contributions of \$50 000 or more shall file a review engagement...".

A "review engagement" is defined as:

- i. a review of financial statements or other financial information or assertions for the purpose of providing negative assurance as to whether the subject-matter of the review is, in all material respects, in accordance with generally accepted accounting principles or other practice standards, or
- ii. a report or other communication for the purpose of providing negative assurance as to whether financial information is presented fairly;

Although not a recent amendment to the LAEA, section 147.91(2) authorizes an elected authority to pass a bylaw (prior to December 31 of the year prior to the general election) determining the campaign expense limits a candidate may incur as long as those limits are less than the amount determined by regulation. However, as of the writing of this report, no such regulation has been made by the Minister.

Similarly, although not a recent amendment to the LAEA, section 179 of LAEA sets out the requirements regarding the identification of third parties who sponsor election advertising "in accordance with the Minister's guidelines":

- (a) the election advertising must include the third party's name and contact information and must indicate whether the third party authorizes the election advertising;
- (b) subject to clause (c), in the case of election advertising that is broadcast or is made through electronic media, the information referred to in clause (a) must be stated at the beginning of the election advertising;
- (c) in the case of election advertising transmitted to a telephone, whether in the form of a live call or an automated pre-recorded call,
 - (i) the telephone number of the third party must be capable of being displayed on the call display of called parties who subscribe to call display, and must not be blocked from being displayed,
 - (ii) the name of the third party must be stated at the beginning of the election advertising,
 - (iii) the election advertising must state whether the third party authorizes the election advertising, and
 - (iv) the telephone number of the third party at which the third party can be contacted must be stated at the end of the election advertising.

As of the writing of this report, the referenced guidelines have not been published on the Minister's department website as noted in section 179(3) of the LAEA.

COMMENTARY

Jurisdiction of the Board of Trustees

As to whether the Board may adopt new rules to ensure greater transparency related to political action committees, the LAEA does not expressly provide any such authority to do so. A legal analysis of whether such authority exists would need to be undertaken. Even if a school division could impose its own rules regarding political action committees, the issue of a school division's authority to enforce compliance would need to be reviewed.

Jurisdiction of the Federal Government

With respect to the issue of whether the federal government, Elections Canada or the CRTC may enact overriding provisions requiring transparency in political advertising (especially over social media) that could require political action committees to disclose their funders, with respect to the federal government, it is highly unlikely that the federal government may enact such legislation given the division of powers under the *Constitution Act, 1867*. As the elections of local authorities fall within the purview of provinces under section 92, it would not appear that the federal government would have any jurisdiction to intervene. Furthermore, given that the mandate of Elections Canada is to mainly administer the federal *Elections Act* regarding the election of members to the House of Commons, Elections Canada would not have any jurisdiction over local elections. With respect to whether the CRTC would have any role with respect to social media requirements regarding political advertising over local elections, further inquiries would need to be made.

KEY POINTS

- Bill 45 added a provision limiting advertising contributions to any third parties (such as political action committees) during an election period to \$30,000 in aggregate.
- Bill 29 removed the authority of local jurisdictions to pass a bylaw requiring candidates to file pre-election disclosure statements.
- Bill 29 removed rules regarding political advertising which included third party advertising prior to May 1st in a general election year.
- Identification requirements of third parties who sponsor election advertising after May 1 in a general election remain.
- Any contemplation of rules a school board wishes to impose regarding third parties such as political action committees would require a legal analysis as well as a review of the authority of a local jurisdiction to enforce compliance of such rules. The LAEA does not grant any express authority to local jurisdictions to impose such stricter rules.
- The division of powers under the *Constitution Act, 1867* likely does not grant the federal government jurisdiction to enact legislation regarding local elections.
- Further enquiries as to whether the CRTC has a role in social media requirements regarding political advertising in local elections would need to be made.

MGC/cv