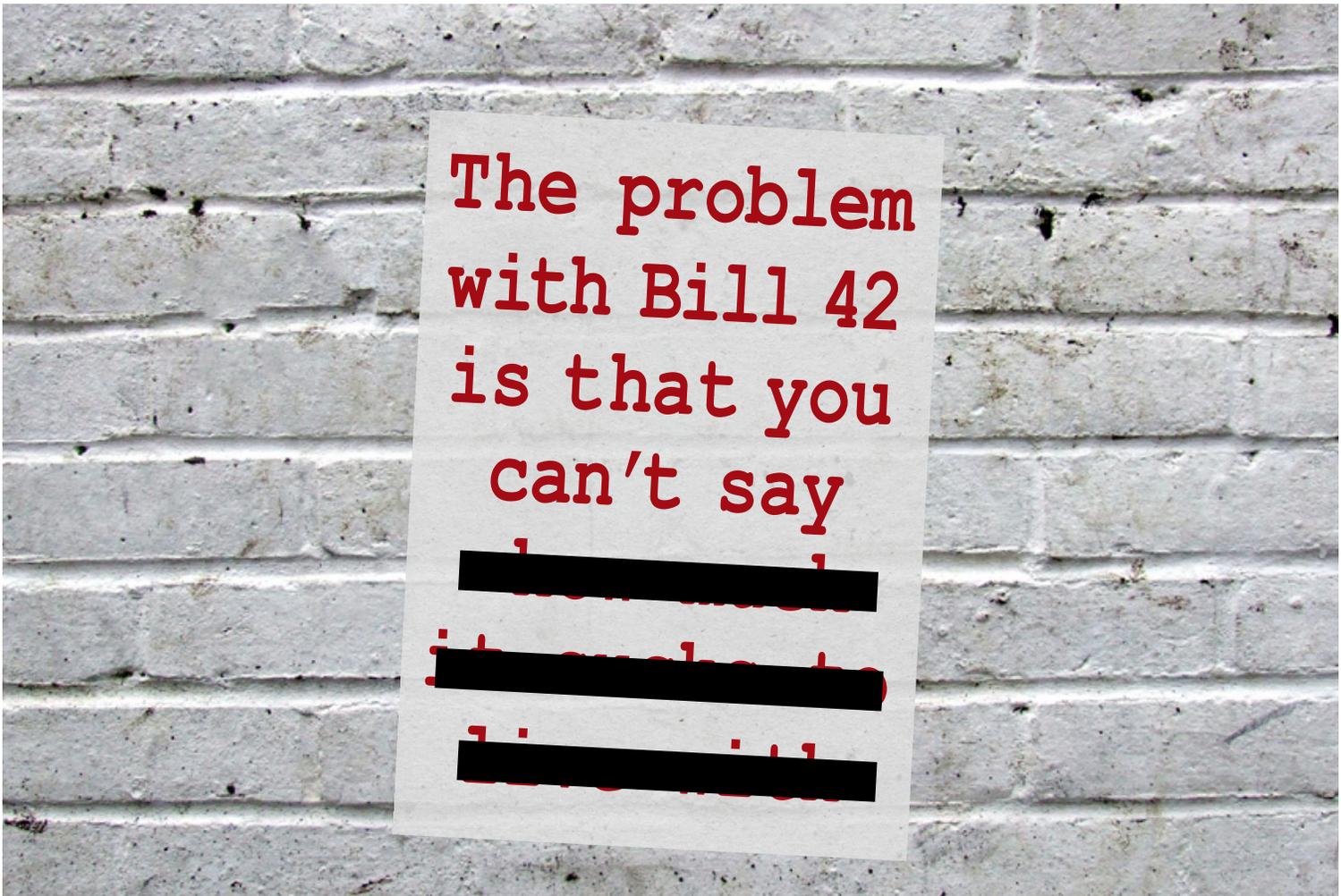


Election Chill Effect

The Impact of BC's New Third Party Advertising Rules on Social Movement Groups

by Shannon Daub and Heather Whiteside
October 2010



The problem
with Bill 42
is that you
can't say
[REDACTED]
[REDACTED]
[REDACTED]



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ASSOCIATION

**ELECTION CHILL EFFECT: THE IMPACT OF BC'S NEW THIRD PARTY
ADVERTISING RULES ON SOCIAL MOVEMENT GROUPS**

October 2010

Canadian Centre for Policy Alternatives – BC Office, BC Civil Liberties Association,
and the BC Freedom of Information and Privacy Association

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Summary

“For groups to be scared to speak up about the government...or scared to know what they could and could not do, is really bad. It was not a good feeling.”

IN MAY 2008 THE BC GOVERNMENT PASSED BILL 42, the Election Amendment Act, which limits spending on election advertising by “third parties” (any individual or group other than political parties and candidates running for office).

Bill 42 had significant and disturbing impacts on public debate in the lead-up to the 2009 provincial election, particularly for “social movement organizations:” charities, non-profits, coalitions, labour unions and citizens’ groups. These problems resulted from features of the third party advertising rules other than the spending limits themselves, in particular:

- *An extremely broad definition of election advertising:* The new definition covers a host of activities that most people likely would not think of as “advertising.” It includes non-partisan analysis of public policy issues and public communication that “takes a position on an issue with which a registered political party or candidate is associated.” The definition does not rule out free or low-cost tools like websites, social media, emails, petitions, or public forums.
- *Zero-dollar registration threshold:* Third parties must register with Elections BC before they conduct any “advertising,” even if they plan to engage *only* in free or low-cost activities; all registered third parties are publicly listed as election advertising sponsors on Elections BC’s website.
- *Volunteer labour defined as an election advertising “expense”:* If a third party uses volunteers in its advertising activities, the market value of their work must be reported as an expense. Political parties and candidates, in contrast, are not required to report volunteer labour as an election expense.
- *60-day pre-campaign period:* Rather than limit third party advertising during the official 28-day election campaign only, the new rules extended the limits to an additional 60-day pre-campaign period. The BC Supreme Court subsequently struck down the spending limits during this extra 60 days, but the requirement to register and report on advertising activities for the entire 88 days remains in force.

Bill 42 sparked heated media debate and a strong public reaction, mostly focused on how it would affect the speech rights of “big spenders” like corporations and large unions. Indeed, the new third party advertising rules were created, according to then-Attorney General Wally Oppal, to ensure electoral fairness—to level the playing field so those with the deepest pockets cannot dominate the election discourse. Contrary to this objective, however, the rules also extensively regulate the activities of “small spenders”—individuals and groups that spend little or nothing on election advertising.

This study examined the impact of BC’s new third party advertising rules specifically on social movement organizations in the lead-up to the 2009 provincial election. Sixty-five social movement groups participated in the research, 60 of which were aware of the new third party advertising rules prior to being contacted. Most are non-profit societies, 10 per cent are coalitions and 27 per cent are labour groups. Sixty-one per cent have annual budgets of less than \$500,000.

LEGISLATING CONFUSION

- The rules led to widespread confusion among study participants, which resulted in contradictory and incorrect interpretations, and arbitrary responses such as self-censorship.
- Participants had particular difficulty determining whether the very broad new definition of advertising and the inclusion of free and low-cost communication activities meant that their normal, mandate-driven education and advocacy work was suddenly re-defined as election advertising.
- Eighty-seven per cent of participants reported finding the definition of election advertising somewhat or very confusing.
- Confusion persisted for many groups despite expert advice from lawyers or Elections BC.

“Like other non-profit organizations, our website is our primary tool of communication with and information for our members and the general public...But with these rules, the very same website—unchanged—suddenly becomes election advertising. This is neither logical nor supportive of democracy.”

REGULATING THE WRONG GROUPS

- An analysis of the disclosure reports filed with Elections BC by 232 organizations registered as third party sponsors reveals that 59 per cent spent less than \$500 during the 2009 election campaign period. More than three quarters (76 per cent) spent well below even the \$3,000 limit for a single constituency.
- Because most non-profits are careful to remain non-partisan, and because registered charities are strictly prohibited under federal law from engaging in partisan activities, the prospect of being publicly labeled as a “third party advertising sponsor” created anxiety for many of the participant organizations.
- Six participant groups censored their public communication activities specifically in order to avoid having to register as advertising sponsors. Ten others did not register because they felt the law was illegitimate, as it does not distinguish between advertising versus information and analysis that contributes to healthy democratic debate.

- The third party advertising rules disproportionately burden small organizations, which are often entirely volunteer-run or have only one or two staff members. Small groups tended to spend inordinate amounts of time figuring out the rules and their potential reputational impact, tracking financial contributions and expenses and second-guessing their decisions—which disrupted their core activities and services.
- The rules were particularly problematic for small spenders and charities, many of which represent vulnerable citizens and less economically powerful interests—the very groups that should benefit from third party advertising limits.

CHILL EFFECT

“The term ‘election advertising’ is a misnomer; it’s actually ‘speaking out legislation.’”

The most troubling finding of this research is that a significant number of organizations self-censored in order to comply with the new election advertising rules—including both registered and non-registered groups. In other words, the rules cast an anti-democratic chill over election discourse. As a result, public debate during the months leading to the 2009 BC provincial election did not benefit from the full range of perspectives historically made available to voters by local charities, non-profits, coalitions and other social movement organizations.

- Forty per cent of participants altered their normal or previously planned activities as a result of the new rules. The spending limits themselves were only relevant to a few of these alterations (i.e., some reduced their activities in order not to over-spend the limits). Between 27 and 33 per cent of participants self-censored for other reasons, including confusion about the rules, decisions to err on the side of caution, and/or to avoid having to register as an election advertising sponsor.
- Most of the activities the participants altered had little to do with commercial advertising. For example, nine groups did not post new material on their websites; four removed previously posted material from their websites; four altered the tone or content of their communications; five temporarily halted an existing campaign or project; three refrained from using online social networking sites; four refrained from issuing or endorsing a call for changes to government policy or legislation; and one group withdrew from two coalitions.

Definition of Election Advertising in BC’s Election Act (S. 228)

“Election advertising” means the transmission to the public by any means, during the period beginning 60 days before a campaign period and ending at the end of the campaign period, of an advertising message that promotes or opposes, directly or indirectly, a registered political party or the election of a candidate, including an advertising message that takes a position on an issue with which a registered political party or candidate is associated, but does not include

- (a) the publication without charge of news, an editorial, an interview, a column, a letter, a debate, a speech or a commentary in a bona fide periodical publication or a radio or television program,
- (b) the distribution of a book, or the promotion of the sale of a book, for no less than its commercial value, if the book was planned to be made available to the public regardless of whether there was to be an election,
- (c) the transmission of a document directly by a person or a group to their members, employees or shareholders, or
- (d) the transmission by an individual, on a non-commercial basis on the internet, or by telephone or text messaging, of his or her personal political views.

- Five groups refrained entirely from public commentary in the mainstream media, an activity that is explicitly exempt from the definition of “election advertising.”

KEY RECOMMENDATIONS

The following recommendations would, provided they are implemented together, clarify BC’s third party advertising rules and shift their focus away from small spenders. We are of the view, however, that if these recommendations are not implemented, Bill 42 should be repealed, as its harmful effects on the democratic process outweigh any benefits.

The provincial government should abandon its appeal of the BC Supreme Court ruling that struck down spending limits during the 60-day pre-campaign period, and amend BC’s Election Act to:

- Remove all references and requirements related to the 60-day pre-campaign period.
- Revise the definition of election advertising so that it is easier to interpret and focuses more narrowly on commercial advertising activities, rather than the broad range of political speech activities currently encompassed. A revised definition of election advertising should also adequately deal with the realities of online communication.
- Establish minimum spending thresholds, indexed to inflation, below which third parties would not be required to register. These should be set at \$1,000 for advertising within a single constituency, and \$5,000 for province-wide advertising.
- Require third parties to register only once they reach the threshold, as is the case in the Canada Election Act.
- Exempt charities from the third party advertising rules altogether, as they are already federally regulated and in order to achieve registered charity status must demonstrate that they are non-partisan and make a contribution to the public good.
- Exempt volunteer labour from the definition of an election advertising expense (as is the case federally, and as the BC Election Act does for political party and candidate expenses).

“We meet in each others’ homes, in our living rooms, and we do it all for free... I really think that these kinds of rules, it’s good to have them...for big corporations, for unions. ...But, it shouldn’t be about us small groups that are volunteer based that are doing things out of our living rooms for goodness’ sake.”

The following additional recommendations are particularly important if the provincial government does not fix the third party advertising rules prior to the next election:

- The provincial government should provide additional funds to Elections BC to improve administration of the rules.
- Elections BC should develop case examples that explain more clearly and concretely how the rules apply, in particular with regard to what kinds of communication activities and messages are covered.
- Elections BC should provide advance rulings to groups seeking clarity about how the rules work in relation to their specific communication activities.

Ultimately, third party advertising limits should not be enacted in a vacuum, but rather should be considered in the context of a broader examination of electoral reforms that can deepen democratic rights and increase participation in elections.

Introduction

Public debate on the new rules was focused mainly on “big spenders” like corporations and large unions. As the election drew nearer, however, the CCPA began to hear anecdotal evidence from charities, non-profits and small coalition groups that they were struggling to interpret the new rules and in some cases were self-censoring as a result.

In May 2008, the BC government brought in new rules governing how much third parties can spend in the lead-up to a provincial election. These rules prohibit individuals and groups (other than political parties and candidates running for office) from spending more than \$150,000 province-wide or \$3,000 in a single constituency on a broad range of communication activities defined as “election advertising.”

The new third party advertising rules, introduced through Bill 42 (the Election Amendment Act), were highly controversial. Most of the media coverage and broader debate surrounding them focused on whether it is acceptable to limit the speech rights of “big spenders” like corporations and large unions. As the 2009 provincial election drew nearer, however, the CCPA began to hear anecdotal evidence from charities, non-profits and small coalition groups that they were struggling to interpret the new rules and in some cases were self-censoring as a result.

The difficulties these groups experienced—and that the CCPA itself also encountered—relate to problematic features of the rules other than the spending limits themselves. These include:

- *A very broad definition of election advertising:* Bill 42 established a wide-ranging definition that captures many speech activities most people would not likely think of as “advertising,” such as non-partisan analysis of government policies posted on websites, distributed using social media tools or published in a brochure. Election advertising is defined to include any advertising message “that promotes or opposes, directly or indirectly, a registered political party or the election of a candidate, including an advertising message that takes a position on an issue with which a registered political party or candidate is associated,” with some exemptions.¹ See *Definition of Election Advertising* on page 6 for the full definition.

1 Province of BC, *Election Act*, sec. 228.

- *A zero-dollar registration threshold:* The new rules did not set a minimum spending threshold below which third parties need not register with Elections BC. Even if a group (or individual) plans to engage *only* in free “advertising” activities (using no-cost tools like Facebook, for example), or spend just a few dollars (such as photocopying a brochure), the group is required by law to register *before* it even conducts its advertising activities.² Registered groups (and individuals) are then publicly listed on the Elections BC website as election advertising sponsors, and are required to file an extensive disclosure report listing all recent financial contributions and details about advertising expenses (including the “market value” of no-cost activities).
- *Volunteer labour is included in the definition of an election advertising expense:* If a third party uses volunteers in its “advertising” activities, the market value of this labour must be reported as an expense.³
- *60-day pre-campaign period:* Rather than limit third party advertising during the election campaign only (i.e., the four-week lead-up to election day), the new rules extended the limits to an additional 60-day pre-campaign period.⁴ The BC Supreme Court subsequently struck down the spending limits during this extra 60 days, but the requirement to register and report on advertising activities remains in force. Thus, if a third party wishes to conduct election advertising during the 60-day pre-campaign period, it must still register with Elections BC and report on its activities (even though it can spend without limit during that time).

“There’s a fine line between advertising and promotion, and then education and information sharing. And that’s where our efforts as an organization are—trying to spread information, so that voters can make educated decisions.”

These features of BC’s third party advertising rules, combined with significant penalties for violations, created a great deal of confusion and anxiety for small groups (many of which have annual budgets smaller than the provincial advertising limit of \$150,000) and organizations that spend little or nothing on commercial advertising. Did they need to register or not? If so, would it affect their status as a registered charity, or their reputation as a non-partisan organization? If they misinterpreted the rules or decided not to register, would members of their board or staff be hit with fines or even go to jail? Did the rules apply to informal groups, such as networks or unincorporated non-profits? Exactly what activities “counted” as election advertising? Could a group’s ongoing, mandate-driven education and advocacy activities suddenly be defined as election advertising by these new rules? Would it be safer to simply stop doing such activities until the election was over? Every conversation about the new rules seemed to produce new questions, the answers to which were not evident from reading the legislation or the information available on Elections BC’s website.

This research study set out to assess whether problems interpreting the new rules were experienced broadly among social movement groups in BC (charities, non-profits, coalitions, labour unions and citizens’ groups); to document the impacts of the new rules on their public communication activities in the lead-up to the 2009 provincial election; and to assess whether these impacts support the rationale of electoral fairness on which the rules are based.

The paper begins with a brief history of third party election regulation in Canada and some context about Bill 42 in BC (below). Section 2 details the method used in the study, and provides an overview of the organizational characteristics of the groups that participated in

2 Ibid., sec. 239.

3 Ibid., sec. 228.

4 Ibid.

the research. Sections 3, 4 and 5 detail the key findings that widespread confusion resulted from the rules; the rules over-regulate “small spenders” and charities; and, the rules led to a chilling effect for a significant number of organizations. Recommendations to improve BC’s third party advertising rules are made in the conclusion.

BACKGROUND: CANADIAN ELECTIONS, THIRD PARTIES AND ELECTORAL FAIRNESS

Two fundamental democratic rights are at stake in the regulation of third parties in elections—freedom of speech on one hand, and on the other, the right to meaningful participation in elections, which includes the public’s right to be informed by a broad diversity of viewpoints.⁵ In *Harper v. Canada* (2004), the Supreme Court ruled that third party advertising limits represent a legitimate infringement on free speech under Section 1 of the Charter of Rights and Freedoms.⁶ Section 1 establishes that Charter rights are subject to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”⁷ The court’s ruling upheld federal third party limits on the basis that they serve the objective of electoral fairness, by preventing economically powerful individuals and/or groups from dominating election discourse and drowning out others’ voices, including those of candidates and political parties.⁸

“Normally we would be trying to get noticed, get our stances on issues noticed during an election period...and finding ourselves [this time] going ‘ahh, maybe we’ll kind of keep our heads down.’ So it was all about not drawing attention.”

The burden of showing that infringements on Charter rights are justified under Section 1 is on the government, however, and such infringements must meet a very high standard. While in *Harper v. Canada* the court was unanimous in finding that third party advertising limits are a legitimate infringement on free speech given the objective of electoral fairness, the dissenting judges felt the dollar limits were overly restrictive. And Justice Bastarache, writing for the majority, cautioned that spending limits “must be carefully tailored.”⁹

Federal efforts to regulate third party interventions in elections date back to legislation enacted in 1974, in response to recommendations made by the 1966 Barbeau Committee on Election Expenses.¹⁰ Since the 1980s, various iterations of third party spending limits have been subject to a series of Charter challenges, mainly in the Alberta courts. In 1997, the Supreme Court of Canada established electoral fairness as a valid legislative aim for the first time in *Libman v. Quebec*—though it nevertheless overturned the third party limits set out in Quebec’s Referendum Act on the grounds that they were overly restrictive.

The current federal framework was adopted in 2000, but was challenged successfully in the Alberta courts by Stephen Harper (in his capacity at that time as President of the National Citizens Coalition). The rules enacted in 2000 came into force only after the 2004 Supreme Court decision discussed above.

Only one other province—Ontario—had third party advertising rules in place prior to 2009, but Alberta (Bill 205) and New Brunswick (Bill 10) have recently enacted new rules.

5 Supreme Court of Canada, *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827.

6 Ibid.

7 *Canadian Charter of Rights and Freedoms*, sec. 1.

8 Supreme Court of Canada, *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, 46-47.

9 Ibid., 51.

10 Elections Canada, “Chronology of the Federal Campaign Finance System of Third Parties in Canada.”

BILL 42 AND THIRD PARTY LIMITS IN BC

Bill 42 was not the first effort to limit third party advertising in BC. In 1995, the province's NDP government introduced third party limits of \$5,000, along with the requirement that third party advertisers register with Elections BC and report their expenditures. These rules applied only during the 28-day campaign period and used a more limited definition of election advertising than the one enacted in 2008. The spending limits were overturned by the BC Supreme Court in 2000 (following a challenge by the newspaper group Pacific Press). However, the requirement that third parties register with Elections BC and report expenditures remained in force during subsequent provincial elections.

In 2001, the newly elected Liberal provincial government introduced fixed election dates. During the next general election in 2005, the government faced an intensive advertising campaign by several public sector unions critical of its first-term record. Together these unions spent more than \$3 million.¹¹ Fixed election dates—which allow third parties to plan well in advance of election day—were cited by the government as a key reason for reintroducing third party limits, and in particular for creating a “pre-campaign” period.¹²

The broader rationale of electoral fairness established in *Harper v. Canada* was also echoed by then-Attorney General Wally Oppal when he introduced Bill 42.¹³ He argued third party advertising limits were needed to create a more level election playing field and to prevent “the hijacking of the process by wealthy participants.”¹⁴ The labour movement was widely viewed as the unofficial target of Bill 42.¹⁵

While the federal limits served as a framework for Bill 42 in BC, there are several crucial differences relevant to this study, including:

- Bill 42 capped third party election advertising at \$150,000 province-wide and \$3,000 in a single electoral district. Federally, the same dollar limits apply, but during the 28-day election campaign period only. In contrast, when Bill 42 was first introduced, it extended the provincial limits over an extra 120 pre-campaign period.¹⁶ As discussed below, the pre-campaign period was later shortened to 60 days and then partially overturned by the BC Supreme Court.
- The definition of advertising set out in Bill 42 is somewhat broader than the federal definition.
- There is no minimum threshold for registration, whereas federally a third party need not register until it spends \$500 on election advertising.
- Volunteer labour is included in the definition of an advertising expense, whereas federally it is excluded.

When then-Attorney General Wally Oppal introduced Bill 42, he argued third party advertising limits were needed to create a more level election playing field and to prevent “the hijacking of the process by wealthy participants.”

11 BC Supreme Court, *British Columbia Teachers' Federation v. British Columbia (Attorney General)*, 2009 BCSC 436, 59.

12 Province of BC, “Hansard – Official Report of Debates of the Legislative Assembly – Tuesday, May 27, 2008 a.m. – Vol. 35, No. 1 (HTML),” 1025.

13 Province of BC, “Hansard – Official Report of Debates of the Legislative Assembly – Wednesday, April 30, 2008 p.m. – Vol. 31, No. 8 (HTML),” 11773.

14 Justine Hunter, “Third parties loudly boo legislation to tone them down,” S.3.

15 Michael Smyth, “Premier's gag order aims to silence public-sector unions; Pre-Election tactic.”

16 Province of BC, *Bill 42 – 2008: Election Amendment Act, 2008 [First Reading]*.

See Appendix on page 47 for a more detailed comparison of relevant sections of the third party advertising rules set out in BC's Election Act and the Canada Elections Act.

“Our activities were much less than they might otherwise have been because we had to spend so much time trying to figure this out... It was onerous.”

When introduced, Bill 42 set off a storm of controversy. Media commentators, newspaper editorial boards, labour unions, civil libertarians, business groups, lawyers and others took issue with the new rules, which they viewed as an attack on free speech—a “gag law” intended to stifle criticism of the government's policies.¹⁷ Of particular concern was the 120-day “pre-campaign period,” an unprecedented provision in Canadian electoral law. Combined with the 28-day election campaign period, it meant the spending limits would be in force for nearly five months prior to the election—a period that would include the Throne Speech, the provincial budget, and the introduction and passage of new legislation.¹⁸

In response to these concerns, the government cut the pre-campaign period in half, a move that did little to quell the controversy. The amended Bill 42 became law on May 29, 2008, and a group of labour unions subsequently filed a court challenge, arguing it violated rights to freedom of expression and freedom of association under the Charter. On March 30, 2009—less than two months before the May 12 provincial election—the BC Supreme Court struck down the spending limits during 60-day pre-campaign period, leaving the rules otherwise intact.

17 See, for example: Michael Smyth, “Hypocritical Libs are killing free speech – B.C. gov't playing mean to keep critics off its back”; *The Vancouver Sun*, “Third-party spending laws are unnecessary and unwarranted.”; Vaughn Palmer, “Campbell goes with his interests now, not his principles from the past”; Justine Hunter, “Third parties loudly boo legislation to tone them down”; Lindsay Kines, “B.C. Liberals' gag law triggers political uproar; Bill 42 would slap limits on advertising for five months prior to election date”; and BC Civil Liberties Association, “BCCLA Opposes Ad Restrictions in Bill 42.”

18 In 2001, the provincial government introduced fixed election dates, the second Tuesday in May every four years. The Throne Speech typically is made on the second Tuesday in February, and the BC Budget is tabled on the third Tuesday in February.

Method

THIS RESEARCH SET OUT TO EXAMINE the effect of BC's new third party election advertising limits on social movement organizations in the period leading up to, and immediately following, the May 12, 2009 general provincial election. We use the term "social movement organization" broadly in this paper and include non-profits, charities, advocacy groups, labour unions, citizens' groups, and coalitions. These organizations may be formal (i.e., legally constituted) or informal; all have non-profit aims and structures.

The study used a sequential, mixed-methods research design, conducting a structured survey of a sample of social movement organizations, followed by in-depth semi-structured interviews (by phone and email) with a smaller subsample. The study also draws on a review of relevant public policy, jurisprudence, and academic and non-academic literature. This included a review of media coverage related to the new rules. Recent developments in other provinces relating to third party spending restrictions were also examined. Finally, an analysis was conducted of all filings submitted by 2009 third party advertising sponsors to Elections BC.

The survey was distributed to a purposive sample of approximately 380 social movement groups in BC during September and October 2009. The aim was to send the survey to a mix of registered and non-registered groups.¹⁹

The survey sampling frame of 380 social movement organizations was constructed in August, September and October 2009. This sampling frame included registered (195) and non-registered (185) groups, of a variety of organizational types (non-profits, charities, coalitions, neighbourhood associations, formal and informal citizens' groups, and labour unions). These organizations worked across a variety of issue areas (such as social services, the environment, labour, housing, people with disabilities, child and family services, mental

The survey was sent to groups that worked across a variety of issue areas—social services, the environment, labour, housing, people with disabilities, child and family services, mental health, the arts, women's rights, and others.

19 The sampling frame was compiled from the CCPA's own extensive contacts; publicly available lists (for example, an environmental network); and the list of all 240 organizations registered as 2009 election advertising sponsors, which was captured on June 23, 2009 from the Elections BC website and coded for social movement groups (195 of 240).

health, the arts, women's rights, and others), with different mandates (education, advocacy, research, social services provision, and membership-based services). We did not include businesses (which are for-profit entities, not social movement organizations), business associations (which may be structured as non-profit societies but whose aim is to support or further the interests of businesses) or individuals.

The survey was sent primarily by email. Over the course of four weeks, three attempts were made to contact groups by email. The survey was sent by mail when a functioning email address was not available. Sixty-five valid surveys were returned,²⁰ for a response rate of 17 per cent. Survey responses were analyzed using SPSS software.

Follow-up interviews were conducted with 11 groups in fall 2009. These were in-depth, semi-structured interviews, conducted over the phone and in person. Of the 11 groups, six had registered with Elections BC as election advertising sponsors and five had not. Fourteen other groups responded to follow-up queries.

Participants were asked whether they were aware of the third party election advertising limits prior to receiving the survey. Five of 65 were not, and any responses they provided to subsequent survey questions were deleted from the sample. The survey asked for details about the participating organization (see Table 1); what activities the group undertook during the 2009 provincial election campaign period; whether it registered as a third party advertising sponsor; whether the group sought legal advice and/or assistance from Elections BC; whether the group altered its normal activities as a result of the new third party advertising limits, and if so, what activities were altered; and about their views on the new rules. Participants that did not register as third party advertising sponsors were asked questions about their decision and whether they sought legal advice and/or assistance from Elections BC. Participants that did register as advertising sponsors were asked whether they sought legal advice and/or assistance from Elections BC, and for details about their spending on election advertising.

Given the potential legal implications of asking organizations to disclose information about their compliance with the law, all research participants were assured of confidentiality, and all survey and interview data are reported anonymously in this study. Quotes and comments from the surveys and interviews have been altered to remove identifying information about the group or interviewee (specific words or references that might identify them were removed, and all interviewees are described using the male gender). Any references in this paper to specific organizations were drawn from publicly available statements or examples discussed in media stories.

A request for information was also sent to Elections BC regarding the administration and enforcement of the third party advertising rules in the 2009 election. The response received was reasonably timely and very thorough.

"I was very surprised to hear that we needed to register with Elections BC, considering we are a completely non-partisan association and our only interest in 'advertising' was to bring [these] issues to the fore during the campaign period so that candidates from all political parties were aware of the importance of provincial investment in [these] initiatives and programs. We spent \$0 on this campaign."

20 One additional survey was deleted from the sample because it was from a group not relevant to the focus of this study.

PROFILE OF PARTICIPANT ORGANIZATIONS

Table 1 offers a breakdown of the study participants by organizational characteristic for the overall sample, as well as by registered and non-registered status, and by whether groups altered their activities as a result of the rules. The five groups that were not aware of the third party rules before receiving the survey are not included below, and subsequent references to “all participants” do not include them. (The five non-aware groups included three non-profits, two coalitions and one “other”; four are charities.)

Table 1: Profile of study participants and responses to new third party advertising rules

	Total		Did your organization register as a third party advertising sponsor with Elections BC for the 2009 provincial election?		Did your organization alter its normal or previously planned activities or public statements in any way as a result of the new third party advertising rules?	
	#	%	Registered	Did not register	Altered activities	Did not alter
			%	%	%	%
All respondents n = 60	60	100	52	48	40	60
Type of organization (n=60)			% of registered	% of did not register	% of altered	% of did not alter
Non-profit society	34	57	29	86	38	69
Coalition	6	10	16	3	13	8
Informal/semi-formal network	3	5	3	7	0	8
Labour union or association	16	27	52	0	50	11
Other	1	2	0	3	0	3
Is organization a registered charity? (n=57)						
Yes	21	37	14	59	19	47
No	36	63	86	41	81	53
Organization's 2008 operating budget (n=59)						
Less than \$100,000	19	32	33	31	29	34
\$100,000 – \$499,000	17	29	23	35	25	31
\$500,000 or more	23	39	43	35	46	34
Organization's primary activities (n=60, multiple responses allowed)						
Social/community services	16	27	13	41	13	36
Legal services	4	7	7	7	17	0
Health services	1	2	0	3	4	0
Education	32	53	52	55	54	53
Advocacy	42	70	77	62	83	61
Research	14	23	26	21	38	14
Other	13	22	26	17	25	19

Legislating Confusion

Confusion about the rules resulted in arbitrary, inconsistent and incorrect interpretations of the rules for a significant number of participants in the lead-up to the 2009 provincial election.

The surveys and interviews revealed widespread confusion about BC's new third party election advertising rules. Uncertainty surrounded what exactly constitutes election advertising; whether a group's activities warrant registering with Elections BC; and how to report expenses. Confusion persisted for many groups despite receiving advice from lawyers and Elections BC. Confusion about the rules resulted in arbitrary, inconsistent and incorrect interpretations of the rules for a significant number of participants in the lead-up to the 2009 provincial election.

CONFUSION ABOUT WHAT CONSTITUTES ELECTION ADVERTISING

Survey participants were asked how easy or difficult they found it to understand the definition of election advertising in relation to their organization's activities. Eighty-seven per cent reported finding it somewhat (63 per cent) or very (23 per cent) confusing. (The definition of election advertising as spelled out in the Election Act was included in the survey for reference.) Participants' comments also indicated widespread difficulty interpreting the definition. For example:

The challenge is that the legislation is so nebulous that the only thing they can do is provide more examples and more details for one to have to read through—the direction [that they do provide] is pretty nebulous as well.

Many participants thought of election advertising as commercial advertising activities (such as mainstream media ads, billboards or lawn signs) with partisan messages. They found it difficult to interpret the much broader definition in the Election Act.

All of the groups in this study have mandates related to one or more issues associated with BC's political parties. As Justice Cole noted in his March 2009 ruling:

Practically speaking, it is not readily apparent when an issue is not associated with a candidate or political party. The Liberal Party's campaign platform for the 2005 election demonstrates the extent to which this is the case...[It] sets out the

party's platform regarding a wide range of topics: education, including life-long learning and advanced education; the arts; cultural diversity; healthier living and physical fitness; health care; seniors; children and families; First Nations; women; public safety; democratic reform; partnerships with local governments; parks; environmental protection; job creation; free enterprise; income taxes; research and technology; forestry industry; sustainable development in the energy and mining industries; the 2010 Olympics; tourism; new "gateways" to the Asia Pacific; transportation; northern development; regional growth; and relations with the federal government and other provinces. Against this platform, it is difficult to conceive of an issue that is not associated with the Liberal Party. [emphasis in original].²¹

Participants had difficulty figuring out whether this effectively meant that nearly every organization in the province was thus a third party advertiser, or whether some aspect of the tone, content or purpose of their communications qualified it as election advertising.

The executive director of one group was advised that communication dealing with an issue that is associated with a political party could be considered advertising depending on its tone and content. He described sitting in front of his computer while on the phone to an Elections BC representative, jointly combing through the organization's website to determine which sections included "advertising messages." However, he was unable to clearly understand the rationale for why some sections of the site qualified as advertising and others did not. Since virtually all of the group's public statements relate to government policies one way or another, in the end he simply labeled the entire website with the authorization statement that must appear on third party advertising messages. Similarly, another group decided to label every communication it put out during the campaign period as advertising—including exempt communication such as emails to members—just to be sure it didn't inadvertently break the rules.

"When I'd tell people... 'You know, it's election advertising,' they'd say 'We don't do election advertising. We can't afford to run ads.' But it's not about running ads, you know, so that's the biggest misunderstanding."

Participants also found it difficult to understand the wide range of activities captured by the broad definition of advertising, which includes "the transmission [of an advertising message] to the public by any means." For example, one of the interviewees related the experience of trying to explain to people from other organizations that their group might need to register as third parties:

When I'd tell people... "You know, it's election advertising," they'd say "We don't do election advertising. We can't afford to run ads." But it's not about running ads, you know, so that's the biggest misunderstanding.

Participants also found it difficult to interpret the four categories of exemptions. For example, one group commented:

The overly-broad definition of election advertising remained questionable to us, and the fuzziness of the exceptions (e.g. what's a "bona fide" periodical—does it include electronic publications?) left us unclear on their application to our circumstances.

More importantly, the exemptions do not rule out a host of common communication activities and tools used by these groups, such as websites, online social media tools (such as

²¹ BC Supreme Court, *British Columbia Teachers' Federation v. British Columbia (Attorney General)*, 2009 BCSC 436, 106.

Facebook groups), email broadcasts, brochures, posters, petitions, rallies or protests, public forums and others.

In the survey comments and interviews, participants described conflicting understandings of what activities are captured by the definition. For example, some groups had the impression that public events (such as rallies, protests or all-candidates meetings) do not “count” as advertising, and that any materials produced to promote those events, such as handbills or posters, were also exempt. At least one of these groups had been in contact with Elections BC to get help interpreting the rules. Other groups had the opposite interpretation. One of them refrained from organizing a public all-candidates debate during the campaign period as a result. Another stated that it was required to monitor and report the costs of organizing and promoting a public meeting.

“Like other non-profit organizations, our website is our primary tool of communication with and information for our members and the general public... [W]ith these rules, the very same website—unchanged—suddenly becomes election advertising. This is neither logical nor supportive of democracy.”

The question of “intent” was particularly troublesome for a significant number of participants. That is, activities that groups undertook or materials they produced in the normal course of their work—that they would not normally think of as “advertising” and that were not undertaken with the intention of affecting the outcome of an election—were transformed during the election into third party advertising messages. Their confusion was compounded by the fact that it doesn’t matter when such materials are created—as long as they are publicly communicated during the pre-campaign or campaign periods, they are considered to be advertising messages. For example, one participant commented:

Like other non-profit organizations, our website is our primary tool of communication with and information for our members and the general public. It’s also an important public accountability tool—who we are and what we stand for is clearly shown and publicly accessible. But with these rules, the very same website—unchanged—suddenly becomes election advertising. This is neither logical nor supportive of democracy.

Another group noted that:

Most of the materials I distributed [and reported as advertising to Elections BC] were the same exact materials I have been distributing for the past year.

A third described the uncertainty about what constitutes advertising that lingered after the group decided not to register as an advertising sponsor:

There was more of a generalized concern that things that we do in our normal course of business, that would have been there on the website during an election, might have been interpreted in a way that suggested we were entering into a lobbying activity.

It is not surprising, then, that when asked to characterize the definition of advertising, 87 per cent said it is too broad and restricts too many activities. Neither is it surprising that Elections BC states in one of its Frequently Asked Questions documents that “the definition of advertising is broad and in some cases it can be difficult to determine if an item or activity is election advertising.”²²

22 Elections BC, “Frequently Asked Questions: Election Advertising, Election Act Part 11,” 1.

CONFUSION ABOUT WHETHER TO REGISTER

Participants reported extensive confusion about whether they needed to register as third party advertising sponsors. Unlike in the Canada Election Act, BC's third party advertising rules do not set out minimum a spending threshold below which individuals and groups need not register. Remarkably, Elections BC's own website states, "Election advertising sponsors must be registered with the Chief Electoral Officer, even if the election advertising they are conducting does not cost any money."²³ The inclusion of no-cost activities as third party advertising expenses added to groups' confusion and led to the adoption of contradictory strategies by various "small spenders."

Confusion about the definition of election advertising, compounded by the zero-dollar threshold, led at least some participant groups to not register when they likely should have. One in three that did not register chose this course of action because they did not believe the new third party advertising rules applied to their organization's activities (see Table 2). Non-registered groups were somewhat less active than registered groups during the election campaign, but engaged in fairly similar activities (see Table 3). Indeed, of all the 29 non-registered participant groups, there are only five to whom the advertising rules quite clearly did not apply based on the activities they reported undertaking in the survey and selective follow-up interviews, and a brief review of their websites.

"Elections BC was confused about whether we needed to register, but advised us to do so because then our bases would be covered."

Table 2: Organization's reason for not registering

Q: Please indicate the reason your organization did not register	Did not register as a third party advertising sponsor (n = 27)	
	#	%
We did not think the new third party advertising rules applied to our organization's activities	9	33
We altered our activities during the election period in order to avoid having to register	6	22
We felt the law as written was illegitimate and therefore chose to ignore it	10	37
Other	2	7

Our assessment that only five of 29 non-registered groups likely did not need to register is not definitive and depends to some extent on how narrowly one interprets the rules. Without asking Elections BC to review and rule on each of these groups' activities and the content of their public communications, it is not possible to say with certainty how many should have registered. However, most are quite active organizations with a direct interest in provincial public policy issues, and other groups with similar mandates and/or activities did register.

Many participants simply did not realize that their organization's activities could be considered election advertising, or that groups spending very small amounts of money would

²³ Elections BC, "Advertising Sponsors."

be required to register—which led some to break the rules inadvertently. For example, the executive director of one group explained:

My understanding was that the registration had a lot to do with the amount of money that might be spent by any organization. And I don't think we felt that, certainly our own organization, would ever be anywhere near the limits.

Additional anecdotal evidence from conversations with people who did not take part in this research suggests unintentional violations of the rules were not uncommon.

Table 3: Activities undertaken during campaign				
Q: Please indicate which of the following activities (if any) your organization undertook during the 2009 provincial election campaign period.	Total (n = 55)		Registered as a third party advertising sponsor?	
	#	%	Yes	No
			% of registered	% of did not register
Commented in the mainstream media (radio, television, newspapers)	31	56	73	36
Sent information by email or mail to your organization's members	46	84	93	72
Sent a call for action to your organization's members (for example, a request for member to write letters or post information on social networking sites, etc.)	36	66	73	56
Paid for advertisement(s) in the mainstream media (radio, television, newspapers)	15	27	47	4
Paid for advertisement(s) in an online venue	3	6	10	0
Posted, printed or distributed signs (billboards, lawn signs, etc.)	15	27	47	4
Distributed a brochure, leaflet or poster	28	51	67	32
Published commentary, analysis, facts or news releases on your organization's website	32	58	67	48
Published or circulated commentary, analysis, facts or news releases on a social networking site	19	35	47	20
Published a report or research paper	10	18	17	20
Published a book	0	0	0	0
Posted a video or interactive tool online	13	24	27	20
Organized, sponsored or participated in an all-candidates debate	23	42	40	44
Organized, sponsored or participated in a public meeting, forum, speech, rally, conference or teach-in	25	46	53	36
Organized or sponsored a meeting with other organizations	10	18	17	20
Endorsed a call for change in government policy, actions or legislation	26	47	40	56
Issued a public call for action (asked people other than your organization's members to write a letter, sign a petition, contact an elected official or candidate for office, etc.)	21	38	47	28
Other	4	7	3	12

Of equal concern, however, is that some participants registered to err on the side of caution, without having clarity about whether it was necessary. For example, one participant reported:

We found the rules very confusing. Although we felt this may not have applied to our group, we registered because we did not have a definitive answer as to whether or not we were required to register.

Another group reported a similar dilemma, despite having contacted Elections BC for clarification:

Elections BC was confused about whether we needed to register, but advised us to do so because then our bases would be covered.

A participant from a third organization, a registered charity with an annual budget of less than \$500,000, said:

I was very surprised to hear that we needed to register with Elections BC, considering we are a completely non-partisan association and our only interest in 'advertising' was to bring [these] issues to the fore during the campaign period so that candidates from all political parties were aware of the importance of provincial investment in [these] initiatives and programs. We spent \$0 on this campaign.

"We found the rules very confusing. Although we felt this may not have applied to our group, we registered because we did not have a definitive answer as to whether or not we were required to register."

Taken together, these examples suggest there was little or no consistent rationale governing groups' decisions about whether to register. Organizations with similar profiles in terms of mandate, size, and type and tone of materials chose very different courses of action.

CONFUSION ABOUT THE REPORTING PROCESS

Groups that registered as third party advertising sponsors were required to file a disclosure report with Elections BC. The disclosure report must include a summary of advertising expenses by class (or type) incurred during the 28-day campaign period, and a separate summary by class for expenses during the 60-day pre-campaign period. (As discussed in the introduction, the requirement to *report* spending during the pre-campaign period remains on the books, despite the BC Supreme Court ruling that spending *limits* are not in force during that time.) A detailed listing of all contributions over \$250 received by the third party in the previous six months plus 28 days is also required. Third parties that spent less than \$500 during the combined pre-campaign and election campaign periods were simply required to submit a one-page form indicating this fact.

Participants reported particular difficulty determining the cost or value of their advertising efforts. The Election Act defines the value of election advertising as:

*(a) the price paid for preparing and conducting the election advertising, or
(b) the market value of preparing and conducting the election advertising, if no price is paid or if the price paid is lower than the market value.²⁴*

²⁴ Province of BC, *Election Act*, sec. 228.

Elections BC's Election Advertising Sponsor Disclosure Report Completion Guide²⁵ includes quite a lot of detail about how to report contributions, but almost no guidance on how to calculate expenses.

Questions about online communication were particularly common. For example, how to calculate the value of an organization's website that is online year-round and includes a wide variety of content, some having to do with public policy issues and some not? What kinds of costs, and what portion of them, should be included—internet connection costs, website design and hosting fees, the value of staff time spent preparing materials and maintaining the site, computer workstation costs for that staff person, etc.? Questions also arose about assigning a market value to free communication, such as a Facebook group. Another group wondered about its email newsletters to members—an exempt activity—which it always also posted on its website—not an exempt activity. How much of the costs associated with producing and distributing the email newsletter should be exempt, and how much reported as an advertising expense?

“So all of the stuff that I gave out that I printed in 2007 and 2008, I had to calculate the unit cost and number of things distributed... So I started getting very nervous about, if we're looking at a [xx]-year-old organization, what the aggregate costs are over time... That was particularly frustrating. I'm one person, imagine how long this kind of crap takes.”

Materials that were created well before the election period were also a source of confusion. For example, one participant with an organization that has only one staff person described spending hours tracking down old invoices in order to calculate the value of materials used during the campaign and pre-campaign periods:

So all of the stuff that I gave out that I printed in 2007 and 2008, I had to calculate the unit cost and number of things distributed... [during both pre-campaign and campaign periods]. And the same goes for material printed in 2003. So I started getting very nervous about, if we're looking at a [xx]-year-old organization, what the aggregate costs are over time... That was particularly frustrating. I'm one person, imagine how long this kind of crap takes.

This sense of frustration with the reporting process was echoed by several other participants.

CONFUSION PERSISTED DESPITE EXPERT ADVICE

Getting legal advice or seeking clarification from Elections BC about the third party advertising rules did not eliminate confusion or anxiety for a number of groups.

Twenty-five participants received legal advice, but many of them nevertheless reported ongoing confusion and/or decisions that suggest they continued to struggle to interpret the rules. For example, after receiving a legal opinion, one group altered its activities to avoid having to register and likely acted with excessive caution, explaining:

We were very nervous about what we could do because really nobody could tell us, and we just had to be sure. I mean the last thing we wanted was the [group] to be in trouble, not because it had made the decision to take a chance, but because we didn't know what we were doing... It was just too difficult to figure out what the chances were.

25 Elections BC, “Election Advertising Sponsor Disclosure Report Completion Guide.”

Several other groups reported being more confused after receiving legal advice, or receiving conflicting advice.

Twenty-six groups were in contact with Elections BC about whether to register as third party sponsors (by phone and online). Of those, eight reported that Elections BC's advice was very helpful; nine reported it was somewhat helpful; nine reported it was not helpful. One group commented:

*The rules do not give adequate direction regarding what can be posted on websites.
The FAQs that were on the Elections BC website actually added to uncertainty over what was allowed.*

Advice about the reporting process was more effective. Nearly three quarters (23 of 31) of the groups that registered consulted Elections BC for assistance—almost half (11) found the advice helpful, though eight groups reported the advice was not timely.

In a number of cases, groups had entirely different interpretations of specific aspects of the rules, even though all were in contact with Elections BC. Others reported that Elections BC was unable to answer their questions. A common complaint was that Elections BC would quote the legislation in response to questions, instead of interpreting it, leaving groups without clear answers.

In fairness to Elections BC, it is important to point out that these rules were enacted by the legislature. It is Elections BC's role to administer and enforce them. We are unaware of any additional or one-time funds provided to Elections BC for this purpose, despite the controversy surrounding the new third party advertising regime.

In a number of cases, groups had entirely different interpretations of specific aspects of the rules, even though all were in contact with Elections BC. Others reported that Elections BC was unable to answer their questions.

Over-regulation of “Small Spenders” and Charities

A key finding that emerges from this research is that the rules have a number of perverse impacts that together effectively over-regulate small organizations and charities—groups that generally spend little on election advertising and avoid partisan activities.

BC’S THIRD PARTY ADVERTISING RULES were created, according to then-Attorney General Wally Oppal, to ensure electoral fairness. He argued:

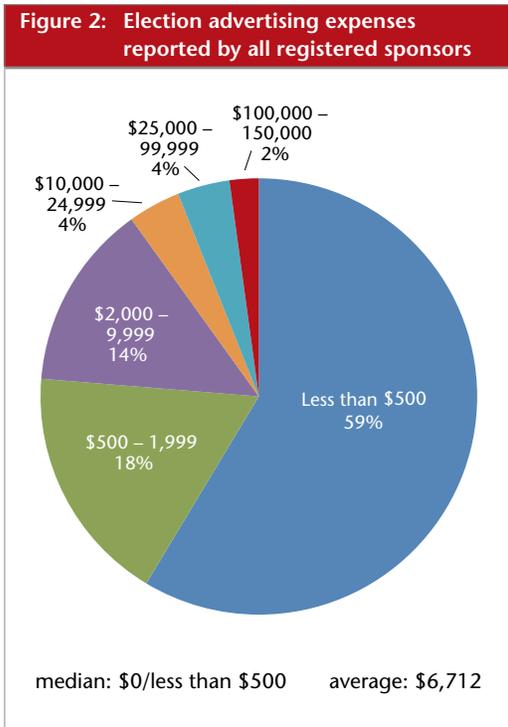
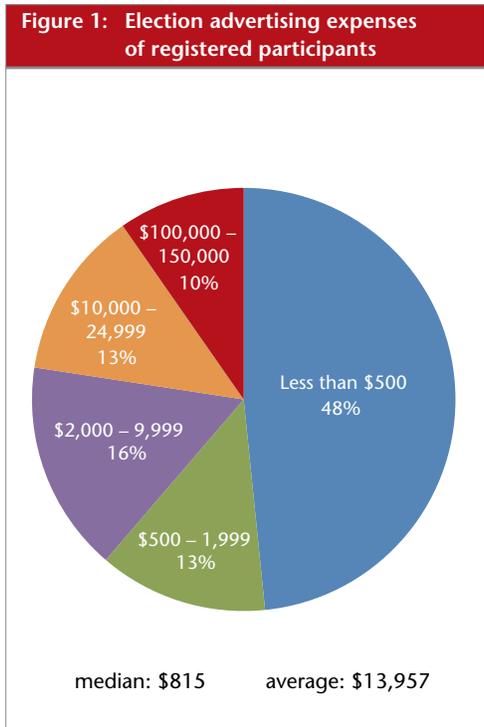
...in the Supreme Court of Canada, the Hon. Mr. Justice Michel Bastarache, in upholding third-party campaign spending, wrote: “Without the limits, a few wealthy groups could drown out others in debates on important political issues.” We agree with that, and that is why we are setting reasonable limits on what third parties can spend.²⁶

A key finding that emerges from this research, however, is that the rules have a number of perverse impacts that together effectively over-regulate small organizations and charities—groups that generally spend little on election advertising and avoid partisan activities.

REGULATING THE WRONG GROUPS

The clearest demonstration that the new third party advertising rules are not effective in focusing on big spenders comes from the disclosure reports of registered third party sponsors in the 2009 election. As Figure 1 shows, of the 31 registered participants in this research study, the median amount spent during the election campaign period was a mere \$815, and the average was \$13,957. Nearly half—15 of 31 registered groups—spent less than \$500 (and for these groups, less than \$500 was spent during the entire 88-days before the election, not only during the 28-day campaign period). Another four spent between \$500 and \$1,999 during the campaign period itself—meaning that nearly two thirds of registered participants

²⁶ Province of BC, “Hansard – Official Report of Debates of the Legislative Assembly – Monday, May 5, 2008 p.m. – Vol. 32, No. 4 (HTML),” 1530.



Source: Participant surveys and Election Advertising Sponsor Disclosure Reports accessed in Elections BC database, British Columbia Disclosure Reports, <http://142.36.252.26/bcimg/>

Table 4: Election advertising expenses of registered participants, by organization type

Amount spent	Charity (#)	Organization type (#)			
		Non-profit	Coalition	Network	Labour
<\$500	4	5	2	1	7
500 - 1,999		1	1		2
2k - 9,999		4			1
10k - 24,999		1			3
25k - 99,999					
100 - 150k					3
Total	4	11	3	1	16

Source: Participant surveys and Election Advertising Sponsor Disclosure Reports accessed in Elections BC database, British Columbia Disclosure Reports, <http://142.36.252.26/bcimg/>

in this study spent well below even the \$3,000 limit for a single constituency. Table 4 shows expenses by organization type.

Remarkably, the expenditures by groups that participated in this study are slightly higher than those of all 232 organizations that registered as advertising sponsors for the 2009 provincial election and filed disclosure reports (see Figure 2). An online search of these reports reveals that the median amount spent by all registered sponsors during the election campaign period is “less than \$500”—in fact, 59 per cent (136) of registered sponsors spent less than \$500. An additional 41 groups spent between \$500 and \$1,999—meaning that 76 per cent of registered sponsors spent well below the \$3,000 limit for a single constituency. Only five registered sponsors spent \$100,000 or more during the campaign period.

DISPROPORTIONATE BURDEN ON SMALL ORGANIZATIONS

Complying with BC's third party advertising rules imposed a significant burden on groups' resources, which was particularly onerous for small organizations. One participant from a large labour union that made extensive use of legal expertise noted, "[It] would be extremely difficult for small organizations and groups without the resources or staff of an organization like [ours]." Indeed, many of the participants spent inordinate amounts of time figuring out the rules, tracking contributions and expenses, and second-guessing their decisions and activities.

"We had to spend so much time trying to figure this out as a very small volunteer organization. And we took the responsibility seriously...I guess we could have just said 'what the heck with it anyhow,' but we didn't."

The time and effort required to navigate the rules diverted resources from other activities. Nine of 11 groups interviewed for this study reported spending extensive amounts of time dealing with the rules and most of them described the experience as disruptive to their normal mandate-driven work. A number of other participants commented in the survey on their frustrations with the amount of time and energy involved. One entirely volunteer-run group observed:

Our activities were much less than they might otherwise have been because we had to spend so much time trying to figure this out...There was so much confusion and so much discussion with it, our activities were altered because things were delayed...We had to spend so much time trying to figure this out as a very small volunteer organization. And we took the responsibility seriously...I guess we could have just said "what the heck with it anyhow," but we didn't...It was onerous.

Small groups with one or two paid staff also reported a drain on resources. As one participant commented in regard to the reporting requirements, "These are very labour intensive things to do with one full-time staff position." Another noted, "There was a huge increase in time. I had a lot of time wasted just trying to figure out the rules, and then phoning to make sure we claimed the right thing."

DISPROPORTIONATE RISK TO SMALL ORGANIZATIONS AND CHARITIES

Beyond the resources required simply to navigate the rules, small organizations and charities also face a disproportionate risk if they fail to comply. Section 264 of the Election Act states that violations related to election advertising can result in fines of up to \$10,000 and/or a jail sentence of up to a year. These penalties apply to any group (or individual) that sponsors election advertising without registering or without identifying the sponsor (and other violations). In addition, S. 235 states that a group that exceeds the election advertising limits can be fined 10 times the amount spent over and above the limits and be prohibited from participating in the next general election as an advertising sponsor.

For most small organizations, these risks are amplified by lack of access to in-house legal expertise and scarce resources for hiring lawyers. Indeed, even relatively modest legal bills could financially cripple many non-profits and charities, not to mention the impact on their reputations and/or charitable status. In addition, under S.235(2) of the Election Act, members of unincorporated groups are "jointly and severally liable" to penalties for exceeding the spending limits, meaning that members of informal coalitions or citizen groups, for example, are personally at risk of fines. Further, S. 253(2) stipulates that if an organization

violates the Election Act, “an officer, director, employee or agent of the organization who authorizes, permits or acquiesces in the offence commits the same offence, whether or not the organization is convicted of the offence.”

In light of the potentially severe consequences of violating the third party election advertising rules, the degree of confusion and uncertainty they generated is even more problematic. The risk of penalty loomed large for a number of the participants, and contributed to decisions to self-censor during the election campaign (see Section 5: Chill Effect).

GUILT BY ASSOCIATION AND OTHER ORGANIZATIONAL WORRIES

The third party election advertising rules impacted several groups’ internal relationships and associational activities. These participants worried about the prospect of ‘guilt by association,’ which arose when groups with formal relationships or partnerships took different approaches to the rules. This concern was particularly problematic in coalition settings, where organizations issued a joint or common position related to a specific public policy issue, or where a number of small locally-based groups pooled resources to coordinate some aspect of their ongoing work at a province-wide level.

One coalition group reported its board worried that “those who are comfortable being part of an advocacy coalition...may be less comfortable linked to an organization that is registered for election advertising.” Guilt by association was a concern even for a group with which the coalition worked only at an informal level:

We did have one partnership, one group that we work with in a pretty informal way, and they were so worried. They were very worried...because they are a registered charity, and that...had a whole other layer of implications for them. So that was trickier and that did affect, I'm not sure if solidarity is the right word, but it certainly affected their relationship in terms of what we were prepared to do and what they were prepared to do, and how we worked that through.

“We did have one partnership, one group that we work with in a pretty informal way, and they were so worried. They were very worried...because they are a registered charity, and that...had a whole other layer of implications for them.”

The coalition went to significant lengths to avoid having its status as a registered advertising sponsor impact its members:

One of the things we do as a...coalition is try to activate local action, and we provide material...They [our members] rely on us to give them information that they can then use in their local communities. But then we were concerned because if they took our information and used it, then they would be caught in the election advertising thing...So that's why we offered to send photocopies to people, so that they wouldn't be photocopying anything, so then we had to say “contact us if you want copies of these materials,” which was onerous and kind of crazy, but that was the way we felt we weren't putting them on the hook personally for something they may not know about or understand.

A second group withdrew from two coalitions due to concerns about risk to its charitable status. In one case, it withdrew because the coalition had registered as an advertising sponsor—“we felt, well, if we stay, we're kind of registered by association.” It withdrew from the other coalition—a small, informal group that did not register—to avoid being associated with any form of public policy advocacy that could be seen as election advertising under the new rules, and thus a breach of the law it would be indirectly party to.

For a third participant, the rules took a toll on internal relationships. This volunteer-run group initially decided not to register on principle, on the basis that its no-cost activities should be defined neither as advertising nor as directly or indirectly partisan. However, the potential of fines and jail time ultimately led the group to register following much internal discussion and some conflict. This participant noted that the group “really has not done a huge amount since that time, because the group itself, the dynamics, the personal relationships, are affected.”

Three other participants cited an impact on funding as a result of the third party advertising rules. These groups receive financial contributions from unions—not for the purpose of election advertising, but as support for their ongoing mandate-driven work. However, concerns related to the Election Act’s prohibition against indirect sponsorship of advertising (S.230) and the anti-combination provision (S.235.1(b)), led unions to delay their funding contributions.

CONFLICTING REGULATION OF CHARITIES

“As a registered charity, we do not endorse candidates or take partisan stands; however, because of the above definition [of election advertising], we would have to register as a third party advertiser which could put us at risk of violating the definition of a charity.”

Twenty-one participants indicated they are federally registered charities. There was a clear reluctance among charities to be labeled as election advertising sponsors. Only four of the 21 registered. Of the remaining 17 charities, four altered their activities specifically to avoid having to register (in all four cases due to concerns about charitable status) and five others did not register because they felt the law was illegitimate. One participant from a charity noted:

As defined, a significant part of our advocacy work would qualify as advertising. We don’t agree with that assessment. As a registered charity, we do not endorse candidates or take partisan stands; however, because of the above definition [of election advertising], we would have to register as a third party advertiser which could put us at risk of violating the definition of a charity, per CCRA [Canada Revenue Agency, which regulates charities]. It feels very much like a Catch-22. Though in this election, we chose to not change how we do our work, we did have to seek legal counsel to make that decision.

Several other charities that did not register reported similar concerns.

Federally registered charities are already required under Canadian tax law to be strictly non-partisan and to limit advocacy activities to a small proportion of their overall work. They are prohibited from taking part in *any* partisan political activity, defined as “one that involves direct or indirect support of, or opposition to, any political party or candidate for public office.”²⁷ Charities are, however, allowed to spend between 10 and 20 per cent of their resources on non-partisan political (or advocacy) activities,²⁸ provided these are directly linked to the charity’s mandate.²⁹

27 Canada Revenue Agency, “Charities & Giving – Policy Statement – Political Activities – Reference Number CPS-022,” 32.

28 Ibid., 64-65.

29 Ibid., 37.

According to the Canada Revenue Agency:

An activity is political if a charity:

- a. *explicitly communicates a call to political action (i.e., encourages the public to contact an elected representative or public official and urges them to retain, oppose, or change the law, policy, or decision of any level of government in Canada or a foreign country);*
- b. *explicitly communicates to the public that the law, policy, or decision of any level of government in Canada or a foreign country should be retained... opposed, or changed; or*
- c. *explicitly indicates in its materials...that the intention of the activity is to incite, or organize to put pressure on, an elected representative or public official to retain, oppose, or change the law, policy, or decision of any level of government in Canada or a foreign country.*³⁰

In contrast, BC's Election Act defines election advertising as public communication that "promotes or opposes, directly or indirectly, a registered political party or the election of a candidate, including an advertising message that takes a position on an issue with which a registered political party or candidate is associated."³¹ Given that federal law expressly prohibits charities from indirectly supporting or opposing a candidate or political party, it is not surprising that many were reluctant to register as advertising sponsors under rules that define taking a position on an issue in precisely those terms (i.e., taking a position on an issue with which a candidate or party is associated is defined as indirect support or opposition).³²

Federal regulation allows charities to undertake non-partisan political activities in recognition that they enhance society's wellbeing, and that through their work society gains valuable knowledge about the impacts of public policy and the needs of particular communities and/or populations. The Canada Revenue Agency's Policy Statement on Political Activities states:

Canadian society has been enriched by the invaluable contribution charities have made in developing social capital and social cohesion. By working with communities at the grassroots level, charities are trusted by and understand the needs of the people they serve. This is important work that engages individuals and communities in shaping and creating a more inclusive society.

*Through their dedicated delivery of essential programs, many charities have acquired a wealth of knowledge about how government policies affect people's lives. Charities are well placed to study, assess, and comment on those government policies...their expertise is also a vital source of information for governments to help guide policy decisions. It is therefore essential that charities continue to offer their direct knowledge of social issues to public policy debates.*³³

The availability of such expertise and knowledge is no more important than during election campaigns, when citizens assess the public policy positions and records of competing parties and candidates.

30 Ibid., 38.

31 Province of BC, *Election Act*, sec. 228.

32 This is also a problem with the federal third party election advertising rules.

33 Canada Revenue Agency, "Charities & Giving – Policy Statement – Political Activities – Reference Number CPS-022," 7-8.

Given that federal law expressly prohibits charities from indirectly supporting or opposing a candidate or political party, it is not surprising that many were reluctant to register as advertising sponsors under rules that define taking a position on an issue in precisely those terms.

CONFLICTING VIEWS ABOUT WHAT CONSTITUTES ADVERTISING

Central to the difficulty groups experienced with the third party election advertising rules is a distinction many made between advertising versus contributions to healthy democratic debate through the provision of information about public policy. These participants understood their work to be in service of educating and informing the public, often on behalf of vulnerable groups.

Eighteen of the participant groups work directly and primarily on behalf of vulnerable populations such as children, low-income families, the homeless, marginalized women and other groups with low access to political power. An additional five work primarily on issues related to socio-economic inequities. (These numbers exclude the 16 participant groups that are labour unions or associations, however, several represent workers in low-wage job sectors, who can also be considered vulnerable populations.) These non-profits, charities and coalitions tend to view themselves as working on behalf of society's least powerful voices—they provide analysis of public policy and government decisions and enhance the range of perspectives available in the proverbial public square. In other words, they understand their activities to be in the realm of the public interest. The participants we interviewed from such groups were deeply uncomfortable with legislation that transformed their work into the crass purchase of influence. As one noted, “Anyone registering faces a stigma as a person or organization that is attempting to use money to influence the election, even if you actually spent nothing.” Similar discomfort was echoed by participants from environmental sustainability and conservation groups.

“It’s not that we didn’t consider it seriously—we did. And we got several unofficial legal opinions, some of which contradicted each other, and we made the choice that we weren’t going to do anything differently than in any other three month period... We tremendously disagreed with how they [the provincial government] tried to frame advertising.”

A significant number of participants rejected outright the idea that issue-based communication should be defined as advertising by rules that equate taking a position on a public policy issue with “indirect” support or opposition of a political party or candidate. Ten participant groups did not register as sponsors because they felt the law was illegitimate. Five of these groups are charities, seven are non-profit organizations, and six have modest budgets of less than \$500,000. One of these participants described the organization’s decision as a serious and principled one:

It’s not that we didn’t consider it seriously—we did. And we got several unofficial legal opinions, some of which contradicted each other, and we made the choice that we weren’t going to do anything differently than in any other three month period...We tremendously disagreed with how they [the provincial government] tried to frame advertising. Like distributing a brochure, on an issue we’ve been working on all along.

Similar views about the definition of election advertising were expressed by others, including groups that did register, but reluctantly so. For example, one such participant pointed out:

There’s a fine line between advertising and promotion, and then education and information sharing. And that’s where our efforts as an organization are—trying to spread information, so that voters can make educated decisions, based on issues of interest to them. And that’s where we’ve been sabotaged, I think, and restricted by the legislation.

The disconnect between the third party advertising rules and groups’ responses to them can also be seen in how participants answered the survey question, “How would you describe your organization’s role during an election period?” As Table 5 shows, 47 groups—more than

three quarters of participants—selected “inform voters about specific issues.” Twenty-five selected “increase voter turnout/get out the vote.” Yet only 31 of the participants registered as advertising sponsors. Of the 29 that did not register, 20 (69 per cent) indicated their role is to inform voters about issues during an election period, and seven (24 per cent) seek to increase voter turnout.

Table 5: Organization’s role during an election

Q: How would you describe your organization’s role during an election period?	TOTAL (n = 60)		Registered as a third party advertising sponsor?	
	#	%	Yes	No
			% of registered	% of not registered
Our organization does not play any role during elections	4	7	0	14
Inform voters about specific issues	47	78	90	69
Encourage voters to choose specific candidates	6	10	16	0
Encourage voters to choose a specific political party	4	7	13	0
Increase voter turnout/get out the vote	25	42	58	24
Other	17	28	29	28

ANTI-EGALITARIAN IMPACTS

Although BC’s third party advertising rules were ostensibly implemented to level the playing field during elections, they instead over-regulate small spenders—the very groups that should benefit from caps on election advertising. They do so by turning a wide range of civic activities carried out in association with others into election advertising, including the work of small and volunteer-run groups with few financial resources, non-profit and charitable organizations that work with or on behalf of some of society’s most vulnerable and least influential citizens, and groups that work to educate the public on various social, economic and environmental issues. These groups are also least likely to contribute to political parties or candidates—with charities prohibited by law from doing so. In contrast, corporations, business groups and unions—those with comparatively greater access to financial resources—do contribute to political parties, and in BC are free to do so without limit.³⁴ Indeed, only six participants endorsed a candidate and/or political party in the 2009 election, and all six are labour groups with relatively large budgets.

The inclusion of volunteer labour in the definition of an advertising expense is especially problematic. Non-profits, coalitions, charities and informal associations rely extensively on volunteers. Political parties and candidates, in contrast, are not required to report volunteer

Although BC’s third party advertising rules were ostensibly implemented to level the playing field during elections, they instead over-regulate small spenders—the very groups that should benefit from caps on election advertising.

³⁴ In the 2009 provincial election, corporations provided \$5.97 million – 66 per cent – of total BC Liberal Party contributions (<http://contributions.electionsbc.gov.bc.ca/pcs/Published/100116308.pdf>, page 5); trade unions provided \$2 million – 40 per cent – of total NDP BC contributions (<http://contributions.electionsbc.gov.bc.ca/pcs/Published/100115118.pdf>, page 6).

labour as an election expense. The rules thus treat political parties and third parties unequally, which favours citizens who participate in the realm of partisan politics over those who participate in organizations based on issues or social problems of interest to them.

The principle of one-person-one-vote that underlies liberal democracies vests the right to participate in determining the priorities and governance of a society with the individual. Third party advertising limits recognize that this right can be distorted by the unequal distribution of wealth, which can result in a small number of economically powerful voices dominating public discourse during elections. In this context, including volunteer labour as an advertising expense makes no sense. Unlike financial power, which is potentially unlimited and unequally distributed, volunteer labour is finite and equally distributed among all individuals (i.e., there are only so many hours in the day that any one person could spend volunteering). Including volunteer labour as an election expense thus inappropriately treats it as a financial resource, rather than a personal one that rests with the individual.

“We meet in each others’ homes, in our living rooms, and we do it all for free... It’s a completely inappropriate law for a group like us.”

The frustration caused by these perverse impacts of the rules is reflected in the comment of a participant from an informal citizens’ group:

We meet in each others’ homes, in our living rooms, and we do it all for free... I really think that these kinds of rules, it’s good to have them...for big corporations, for unions. ...But, it shouldn’t be about us small groups that are volunteer based that are doing things out of our living rooms for goodness sakes. You know, we’re not even a non-profit, we’re not even registered as a society...It’s a completely inappropriate law for a group like us.

The notion that the rules are misdirected is also reflected in participants’ responses to the survey question asking whether the zero-dollar registration threshold is appropriate, somewhat intrusive or very intrusive—90 per cent of participants said it is somewhat (13 per cent) or very (77 per cent) intrusive.

Chill Effect

BY FAR THE MOST SERIOUS FINDING to emerge from this research is that a significant number of organizations self-censored in order to comply with the new election advertising rules. Table 6 shows that 40 per cent (24) of participants in this research answered “yes” to the survey question “Did your organization alter its normal or previously planned activities or public statements in any way as a result of BC’s new third party advertising rules?” Of them, the majority (18) were registered as advertising sponsors.

The “chill effect” produced by the new rules extended well beyond activities that could be considered “advertising” even under a very broad definition, and cast a shadow on quintessential forms of democratic participation and free speech.

Table 6: Organizations that altered activities

Q: Did your organization alter its normal or previously planned activities or public statements in any way as a result of BC’s new third party advertising rules?	TOTAL (n = 60)		Registered as a third party advertising sponsor?	
	#	%	Yes	No
			% of reg’d	% of did not reg
Yes	24	40	58	21
No	36	60	42	79

Participants were also asked to detail what kinds of activities they altered during the campaign period. What is particularly striking about the responses (see Table 7) is that most of these activities have nothing to do with commercial advertising. For example, of the groups that altered their activities, one in three did not post new materials on their organization’s website, four removed previously posted material from their websites, and six refrained from endorsing or signing on to a campaign coordinated by another group. Perhaps most troubling is that five groups refrained entirely from public commentary in the mainstream media, an activity that is explicitly exempt. Thus the “chill effect” produced by the new rules extended well beyond activities that could be considered “advertising” even under a very broad definition, and cast a shadow on quintessential forms of democratic participation and free speech.

Table 7: Which activities were altered

Q: Please indicate how your organization changed its normal activities or public statements.	Altered activities (n = 24)	Registered as a third party advertising sponsor?	
		Yes (n = 18)	No (n = 6)
	#	#	#
Removed previously posted material from our organization's website	4	3	1
Did not post new material on our organization's website	9	6	3
Temporarily halted an existing campaign or project	5	5	0
Did not launch a previously planned campaign or project	4	4	0
Refrained from endorsing or signing on to a campaign coordinated by another group	7	4	3
Refrained from issuing or endorsing a call for changes to government policy or legislation	4	2	2
Refrained from public commentary in the mainstream media	5	3	2
Refrained from using online social networking sites such as Facebook or Twitter	3	3	0
Decided not to organize or sponsor a public event, forum or conference	4	4	0
Did not publish a report, briefing paper, study or book	0	0	0
Did not publish a brochure, leaflet or poster	7	6	1
Did not post a video or interactive tool online	0	0	0
Other	14	9	5

Beyond the altered activities listed in Table 7, participants reported a range of changes to their normal work under "other." These included:

- Changed content or tone of communication (4 groups reported);
- Diverted resources from normal activities in order to respond to the rules (4);
- Refrained from or reduced paid media advertising (3);
- Restrained in overall public communication (2);
- Changed timing of planned public communication (2); and,
- Focused on activities exempted from definition of election advertising (2).

Once again, what is striking about the above list is that it includes very few instances of groups restricting commercial advertising.

DOLLAR LIMITS EXPLAIN A MINORITY OF SELF-CENSORSHIP DECISIONS

It is not surprising that some organizations would reduce their public communication activities during the election campaign—the dollar limits require third parties to cease “advertising” once they have spent \$3,000 in a single constituency and/or \$150,000 province-wide. However, while the dollar limits clearly explain the actions of some participants, they are only part of the story.

We did not conduct interviews with all 18 registered participants that altered their activities; however, based on the advertising expenditures listed in their disclosure reports (filed with Elections BC), their survey responses, and selective interviews and follow-up queries, at least 10 and as many as 14 altered their activities for reasons *other than* the dollar limits.³⁵ As Table 8 shows, five spent less than \$500, and two others spent less than \$2,000 (well under the limit for a single constituency). Combined with the six non-registered groups, therefore, between 16 and 20 participants altered for reasons other than the dollar limits—or 27 to 33 per cent of all participants in this study.

Table 8: Registered groups that altered their normal activities, by amount spent

Amount spent during campaign period	Registered groups that altered their activities (#)
<\$500	5
500 – 1,999	2
2k – 9,999	4
10k – 24,999	4
25k – 99,999	0
100k – 150,000	3
Total	18

“Our mandate is to get people focused... and mobilized...By deliberately not being as proactive as we normally would have been... we’re sitting on our own mandate during an election period. It’s kind of outrageous.”

Whether one supports third party election advertising limits or not, the above findings raise two concerns. First, the overly broad definition of advertising means that groups spending near the limits restricted a wide range of speech activities that went well beyond “commercial” advertising (for example, not posting information on websites, not making use of social networking tools, and not endorsing campaigns organized by other groups). Second, the third party advertising rules led to self-censorship by a significant number of “small spenders,” in particular small organizations (including some small unions), non-profits and charities, the reasons for which are discussed below.

³⁵ Of the 18 registered groups that altered their activities, we know that four managed their “advertising” activities as a direct result of the spending limits. To be conservative, we also add four groups that spent more than \$3,000 during the campaign period but that did not indicate a reason for the decision to alter their activities (i.e., it may have been related to hitting the limit for a single constituency). The remaining groups either indicated explicitly that they self-censored for reasons other than the limits themselves (such as confusion about the rules or a desire to err on the side of caution) and/or spent well under the limit for even a single constituency.

REPUTATIONAL AND CHARITY CONCERNS LED TO SELF-CENSORSHIP

Six of the 24 groups that altered their activities as a result of the third party advertising rules did so explicitly to avoid having to register. Five of these groups are non-profits, one is a coalition, and four are registered charities. Table 7 (on page 34) lists the specific activities these participants altered (see column for non-registered groups). None are commercial advertising activities. These groups altered their activities primarily because they did not want to be labeled as “registered election advertising sponsors” or be publicly listed as such on the Elections BC website. For them, the label carried an implication of partisanship that would be harmful to their reputations or charitable status.

“I felt like I really had to err on the side of caution for accountability. Accountability both to my board of directors, our funders and our individual donors.”

One of these groups is a small coalition with two staff members that works with non-profits, charities and public service agencies on issues related to a vulnerable segment of the BC population. Navigating the third party advertising rules and deciding whether to register took up a significant amount of time. The group wanted to be cautious, having carefully developed its reputation as a non-partisan coalition that brings together a diverse range of partners, some of which are already cautious about publicly critiquing the provincial government’s policies because they rely on provincial funding. The group’s executive director felt his hands were tied, noting:

Our mandate is to get people focused... and mobilized...By deliberately not being as proactive as we normally would have been...we’re sitting on our own mandate during an election period. It’s kind of outrageous.

The group was much less active than usual during the campaign period and refrained from commenting in the mainstream media, an activity that is exempt from the definition of advertising. When asked why, the group’s director replied:

Normally...we would be trying to get noticed, get our stances on issues noticed during an election period...and finding ourselves [this time] going “ahh, maybe we’ll ... kind of keep our heads down.” So it was all about not drawing attention.

CONFUSION AND CAUTION LED TO SELF-CENSORSHIP

The extensive difficulty participants experienced interpreting BC’s new third party advertising rules resulted in self-censorship among both registered and non-registered groups. As discussed in Section 3, participants reported varied and often conflicting interpretations, anxiety, and second-guessing decisions.

One of the groups, a small non-profit with one staff member, registered as an advertising sponsor and was fairly active during the campaign period. The group’s executive director spent a great deal of time of the phone with Elections BC (whom he described as very responsive overall) to clarify what specific activities and messages would “count” as advertising. Nevertheless, the director reported that “I didn’t use my Facebook sites because I didn’t know how much cash value they [Elections BC] would ascribe to them, and they wouldn’t say.” The group also refrained from endorsing or signing on to a campaign coordinated by another group and decided not to organize or sponsor a public event. According to this

participant, despite having registered as an advertising sponsor, it was still important to act with caution. He noted:

I felt like I really had to err on the side of caution for accountability. Accountability both to my board of directors, our funders and our individual donors.

The desire to act “with an abundance of caution,” as another participant put it, was a common refrain. For example:

All this angst about, you know, am I putting my organization in jeopardy?

And:

In terms of the website, we took things down that we felt were a little risky. [Because they were critical government policy.]

Other groups were so nervous they would inadvertently break the rules that they effectively sat out the election campaign period. One participant described it this way:

We did limit what we did because we were scared of the rules and screwing it up... People just got so overwhelmed by it they didn't do anything. We kind of did that.

Another participant from a group that did not register because it didn't think the rules applied to its work stated:

I think it's really made us do a double-take...It's a chilling law. It chills people and makes them nervous.

CHILL CLIMATE REINFORCED SELF-CENSORSHIP DECISIONS

Several features of BC's new third party advertising rules and the public debate that surrounded their introduction contributed to a “chill climate” during the 2009 provincial election. This chill climate increased the anxiety groups experienced and reinforced their decisions to self-censor. In addition to the broad definition of advertising and the zero-dollar registration threshold, the very long pre-campaign period of 120 days that was initially proposed led to concerns that the rules would effectively shut down public debate for five months before election day. The subsequent media reaction and court challenge framed Bill 42 as a “gag law.”³⁶

“It's not really even about advertising. It's about saying anything that's critical of the government within that [election] timeframe.”

Bill 42 was interpreted by many participants as having the intention to reduce public debate and dampen criticism of the provincial government's policies. Comments to this effect were a frequent response to the open-ended survey question, “What, if any, concerns do you have about BC's new third party advertising rules?” For example:

It's not really even about advertising. It's about saying anything that's critical of the government within that [election] timeframe.

Another participant stated:

The term “election advertising” is a misnomer; it's actually “speaking out legislation.”

³⁶ See, for example: Pablo, “Liberal gag law linked to 2005 vote”; CBC News, “CBC News – British Columbia – B.C.'s election gag law takes effect amid criticism”; BC Federation of Labour, “BC unions file Charter challenge against election gag law.”

Others interpreted the rules as an attempt to “keep tabs” on small organizations and non-profits. For example, one participant argued:

This is ridiculously broad and labels all advocacy that has any success in getting political attention as political advertising requiring monitoring by government. The fact that you are supposed to register even if you are not spending any or much money makes it clear that it's not just about limiting spending that could be interpreted as “buying” influence.

Two participants felt that the third party advertising rules compounded an existing chill climate among groups that depend on provincial government funding. One noted:

Frankly, a lot of non-profits don't [speak out] because of the funding, the scare of losing the funding, and we do tend to speak out quite a bit, but it's also a consideration...So it's hard enough to do it anyway, and then you've got this additional muzzle on you.

“For groups to be scared to speak up about the government...or scared to know what they could and could not do, is really bad. It was not a good feeling. We felt quite powerless and depressed actually.”

The other participant, talking about the series of cuts to community service agencies announced during the fall of 2009, felt the chill effect would be worse during the next election, stating:

Everybody is being told “don't criticize” [by the government]. Some of the groups we work with wouldn't even go meet with their MLA to discuss some of the issues of concern.

For those who self-censored during the election, the experience was deeply unpleasant. One participant with a charity that took a particularly cautious approach noted:

For groups to be scared to speak up about the government...or scared to know what they could and could not do, is really bad. It was not a good feeling. We felt quite powerless and depressed actually.

This participant felt his organization might have been overly cautious, but observed “Maybe that's what it was all about.” Thus, whether or not it was the provincial government's desire to chill public debate in the lead-up to the 2009 election, that is nevertheless how many groups interpreted the intent of the law.

Conclusion and Recommendations

THE EXPERIENCES OF SOCIAL MOVEMENT GROUPS in the lead-up to the 2009 provincial election suggest that BC’s third party advertising limits, as currently structured, are at best confusing and arbitrary; at worst they are harmful to democracy.

The definition of election advertising introduced through Bill 42 is overbroad and, combined with the zero-dollar registration threshold, makes the rules unintelligible in practice. These two key features of the rules led to widespread confusion before and after the election, including for many groups that had the benefit of legal advice and/or were in contact with Elections BC. Confusion about the rules led to arbitrary results, including conflicting interpretations, unintentional violations, second-guessing of decisions and public statements, and outright self-censorship.

In rejecting the arguments put forward by the Attorney General regarding the workability of the 60-day pre-campaign period, Justice Cole stated in his BC Supreme Court decision:

To essentially require third parties to seek a discretionary opinion from the Chief Electoral Officer as a condition of the exercise of political expression is simply not a suitable response to the overbreadth of the definition [of election advertising].³⁷

Yet in practice, this is the precisely the outcome the third party advertising framework produced.

The rules as currently structured also impose a regulatory burden on the wrong groups: “small spenders,” many of which are charities. Small organizations with modest budgets, including volunteer-run groups, are faced with a disproportionate administrative burden (figuring out and complying with confusing rules) and disproportionate risk (potentially serious penalties

The rules as currently structured impose a regulatory burden on the wrong groups: “small spenders,” many of which are charities. Small organizations with modest budgets, including volunteer-run groups, are faced with a disproportionate administrative burden and disproportionate risk.

³⁷ BC Supreme Court, *British Columbia Teachers’ Federation v. British Columbia (Attorney General)*, 2009 BCSC 436, 111.

and/or damage to the organization's reputation or financial stability). Charities, in particular, found themselves in a Catch-22 in which registering as a third party advertising sponsor created a perceived risk to charitable status. The rules also strained internal and external relationships for some participants, particularly in situations where groups worked together in formal or informal coalition settings.

The structure of the third party advertising rules thus means that BC's election laws are regulating groups that spend little or nothing on commercial advertising—and even under the very broad definition of election advertising introduced through Bill 42, are unlikely to exceed the spending limits (particularly the provincial limit of \$150,000). These organizations are non-partisan, rely extensively on low- or no-cost public communication activities, and in some cases are entirely volunteer-run. If the government's stated aim was to prevent "the hijacking of the [election] process by wealthy participants,"³⁸ then imposing regulations on groups spending minimal amounts of money has no connection whatsoever with that aim.

"If the appeal holds up, it would make the government bolder next time around. We'd be more nervous."

Of greatest concern is that the third party advertising rules produced a significant chilling effect during the election campaign period. While any amount of self-censorship other than straightforward compliance with the dollar limits is cause for concern, the extent to which participants in this research curbed their normal, mandate-driven public communication activities seriously undermined the democratic process. Debate during the months leading to the 2009 BC provincial election did not benefit from the full range of perspectives historically made available to voters by local charities, non-profit organizations, coalitions, and other social movement organizations. These groups often represent the interests of those most marginalized in society and/or least likely to possess the financial resources needed to dominate election discourse through the purchase of advertising.

It is possible that the problem of confusion will lessen in future elections. Groups have more time to learn more about the rules and Elections BC will hopefully offer additional clarifications (though as one participant pointed out, with four years between elections, groups may simply be in the position of needing to re-learn the rules all over again). It is also possible that more and more groups will deregister (according to Elections BC, 60 had already done so as of January 2010) and will be less cautious about their public communication activities.³⁹ However, given that Elections BC's enforcement of the rules is complaint-driven, these groups do so at some risk. Further, it may take only one well-publicized complaint to revive fears about the rules.

Regardless of whether concern and confusion abate over time, certain features of the rules remain highly problematic in relation to the over-regulation of small spenders and charities, in particular the zero-dollar registration threshold and the inclusion of volunteer labour as an election advertising expense. The provincial government has also appealed the BC Supreme Court decision that struck down the 60-day pre-campaign period, which may reinforce the perception among social movement groups that the intention is to chill public debate and reduce criticisms of the government's policies. When asked what effect the appeal could have in future elections, one participant responded:

If the appeal holds up, it would make the government bolder next time around. We'd be more nervous.

38 Justine Hunter, "Third parties loudly boo legislation to tone them down."

39 Nola Western, "Letter from Elections BC to authors," January 12, 2010.

ARE THE NEGATIVE EFFECTS OF THE RULES JUSTIFIED?

While the rights set out in the Charter of Rights and Freedoms are not absolute guarantees, the Supreme Court of Canada has established that infringements must meet a very high standard. This is particularly important in the case of laws that infringe on political speech, which is “the single most important and protected type of expression.”⁴⁰

A law that infringes on a Charter right must serve a valid, or “pressing and substantial,” objective.⁴¹ *Harper v. Canada* established that “the overarching objective of third party election advertising limits is electoral fairness” and that this goal is of sufficient importance to justify infringement on the speech rights of third parties.⁴² Electoral fairness was echoed by the BC Attorney General as the rationale for the new rules set out in Bill 42, and was accepted by BC Supreme Court Justice Cole in his March 30, 2008 ruling that upheld all aspects of the rules except the use of spending limits during the 60-day pre-campaign period.

Justice Bastarache, writing for the majority in *Harper v. Canada*, identified three specific objectives of third party advertising limits. First, such rules aim “to promote equality in the political discourse,”⁴³ which gives less powerful voices a better chance of being heard and allows the public to be informed by a broad range of views. Second, they “protect the integrity of the financing regime applicable to candidates and parties,”⁴⁴ meaning they prevent third parties from gaining an unfair advantage over political parties and candidates, which are constrained by election expense limits. Third, they “ensure that voters have confidence in the electoral process.”⁴⁵

In contrast to the above objectives, BC’s rules over-regulate and chill small spenders and charitable organizations, many of which represent the interests of society’s least powerful citizens. In doing so, they deprive the public of the opportunity to hear from the very voices the rules are meant to stop from being drowned out. The rules also create an anti-egalitarian effect. They over-regulate the groups that are least likely to conduct expensive advertising campaigns (charities, non-profit societies, small coalition groups, social service agencies) and that are also least likely to contribute funds to political parties. In contrast, those most likely to conduct expensive advertising campaigns (business groups and unions) and that are also most likely to contribute to political parties are free to do so without limit in the absence of caps on provincial contributions. The anti-egalitarian effect is compounded by the inclusion of volunteer labour in the definition of a third party election advertising expense. Given these dynamics, and the view expressed by all of the participants interviewed that the rules chilled political speech, it is difficult to conclude that they can enhance confidence in the electoral system.

In addition to meeting a valid objective, a law that infringes on a Charter right must meet what is called the “proportionality test,” which means the harm created by the infringement must be proportionate to the pressing and substantial objective it serves.⁴⁶ The proportionality test includes three components. First, the law in question must be effective in focus—there must

BC’s rules over-regulate and chill small spenders and charitable organizations, many of which represent the interests of society’s least powerful citizens. In doing so, they deprive the public of the opportunity to hear from the very voices the rules are meant to stop from being drowned out.

40 Supreme Court of Canada, *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827, 17.

41 Supreme Court of Canada, *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827.

42 *Ibid.*, 60.

43 *Ibid.*, 5.

44 *Ibid.*

45 *Ibid.*

46 Supreme Court of Canada, *Harper v. Canada (Attorney General)*, 2004 SCC 33, [2004] 1 S.C.R. 827.

be a rational connection between the measures it employs and its objectives. Second, the law must use the least drastic means possible to achieve the objective—or minimally impair the right in question. Third, the law must not do more harm than good. BC’s third party advertising rules are, at minimum, questionable when measured against these standards. Unfortunately, small organizations do not have the means to mount a constitutional challenge, whereas big spenders have been able to use the legal system to defend their rights. In other words, those who are the identified targets of the rules have been able to use the legal system to defend their rights, while those who are clearly not the source of the problem must depend on the legislators to protect their rights. So far, the legislators have not done a very good job.

RECOMMENDATIONS

Those who are the identified targets of the rules have been able to use the legal system to defend their rights, while those who are clearly not the source of the problem must depend on the legislators to protect their rights. So far, the legislators have not done a very good job.

The following recommendations would, provided they are implemented together, clarify BC’s third party advertising rules and shift their focus away from small spenders. We are of the view, however, that if these recommendations are not implemented, Bill 42 should be repealed, as its harmful effects on the democratic process outweigh any benefits.

Fix the Third Party Advertising Rules Set Out in the BC Election Act

The provincial government bears primary responsibility for improving the design of BC’s third party advertising limits. It should abandon its appeal of the BC Supreme Court ruling that struck down the 60-day pre-campaign period, and amend BC’s Election Act to:

- Remove all references and requirements related to the pre-campaign period. For example, election advertising is defined in the Act as advertising that takes place beginning 60 days before the start of the election campaign. The BC Supreme Court did not strike down the definition of advertising—it only ruled that the spending *limits* could not be in force during the pre-campaign period. Thus, while the limits do not apply during that time, all other provisions of the Act relating to the pre-campaign period do. As a result, if a group sponsors election advertising during the 60-day pre-campaign period, it must still register with Elections BC and file a disclosure report.
- Revise the definition of election advertising so that it is easier to interpret and focuses more narrowly on commercial advertising activities, rather than the broad range of political speech activities currently encompassed. A revised definition of election advertising should also adequately deal with the realities of online communication. For example, communication tools like websites or Facebook pages can be created well outside of an election period, but will live on during and after an election. A law that requires people to either censor such communication or label it as advertising and attempt to determine its value is not an appropriate solution to the problem of third party influence during elections.

- Establish minimum spending thresholds below which third parties would not be required to register. These should be set at no less than \$1,000 for advertising within a single constituency, and \$5,000 for province-wide advertising.
- Third parties should be required to register only once they reach the threshold, as is the case in the Canada Election Act. Currently under BC's Election Act, third parties must register with Elections BC *before* they conduct *any* election advertising.
- Exempt charities from the third party advertising rules altogether, as they are already federally regulated and, in order to achieve registered charity status, have had to demonstrate a contribution to the public good.
- Index both the spending limits and the (proposed) minimum thresholds to inflation (federal spending limits are indexed).
- Exempt volunteer labour from the definition of an election advertising expense (as is the case federally, and as the BC Election Act does for political party and candidate expenses).
- Require third party advertising sponsors to report only those contributions received *for the purpose* of election advertising (as is the case federally) in the period beginning six months before the election is called, rather than requiring them to report *all* contributions received during that time. This change would still allow Elections BC to monitor indirect advertising by third parties and pooling (attempts to circumvent the limits), but would prevent social movement groups that receive funding from unions from having contributions delayed as a result of the rules.

Round Two? Changes to the Lobbyists Registration Act

Changes to BC's Lobbyists Registration Act that significantly expand its scope came into force on April 1, 2010. Well-crafted rules governing lobbyists are vital for fairness, transparency and accountability in the public policy process. However, the changes significantly expand the definition of lobbying such that social movement groups working on public policy issues may now be captured by the new rules. The CCPA is once again hearing anecdotal evidence that the lobbyist rules are causing confusion and concern for charities and other organizations engaged in education and advocacy work. With reporting requirements that create a much greater administrative burden than the third party advertising limits, the changes to the Lobbyists Registration Act may represent another layer of misdirected (or inappropriately directed) regulation of social movement groups, and a further diversion of their mandate-driven work to interpreting and complying with complicated rules whose objectives are not connected to the activities of such groups.

Improve Administration and Education About the Rules

The following recommendations are particularly important if the provincial government does not fix the third party advertising rules prior to the next election.

- The provincial government should provide additional funds to Elections BC to improve administration of the rules.
- Elections BC should develop case examples that explain more clearly and concretely how the rules apply, in particular with regard to what kinds of communication activities and messages are covered. This is especially important in relation to helping groups understand whether they need to register; clarifying whether and how the rules apply in coalition settings (both formal and informal); clarifying the definition of advertising (particularly as it relates to online communication); and providing guidelines for the valuation of expenses (especially volunteer labour).
- Elections BC should provide advance rulings to groups seeking clarity about how the rules work in relation to their specific communication activities.
- Elections BC should hold information sessions specifically geared to social movement groups in advance of the next provincial election.

Ultimately, third party advertising limits should not be legislated in a vacuum, but rather should be considered in the context of a broader examination of electoral reforms that can deepen democratic rights and increase participation in elections.

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Key Components of BC’s Third Party Advertising Rules, Compared to Federal Rules

Requirement under the BC Election Act	Notable differences in the Canada Election Act
Definition of election advertising	
<p>Section 228 states (variations from the federal definition are in italics):</p> <p>“election advertising” means the transmission to the public by any means, during the period <i>beginning 60 days before a campaign period</i> and ending at the end of the campaign period, of an advertising message that promotes or opposes, <i>directly or indirectly</i>, a registered political party or the election of a candidate, including an advertising message that takes a position on an issue with which a registered political party or candidate is associated, but does not include</p> <p>(a) <i>the publication without charge of news, an editorial, an interview, a column, a letter, a debate, a speech or a commentary in a bona fide periodical publication or a radio or television program,</i></p> <p>(b) the distribution of a book, or the promotion of the sale of a book, for no less than its commercial value, if the book was planned to be made available to the public regardless of whether there was to be an election,</p> <p>(c) the transmission of a document directly by a person or a group to their members, employees or shareholders, or</p> <p>(d) the transmission by an individual, on a non-commercial basis on the internet, or by telephone or text messaging, of his or her personal political views;</p>	<p>S. 319 states:</p> <p>“election advertising” means the transmission to the public by any means during an election period of an advertising message that promotes or opposes a registered party or the election of a candidate, including one that takes a position on an issue with which a registered party or candidate is associated. For greater certainty, it does not include</p> <p>(a) the transmission to the public of an editorial, a debate, a speech, an interview, a column, a letter, a commentary or news;</p> <p>(b) the distribution of a book, or the promotion of the sale of a book, for no less than its commercial value, if the book was planned to be made available to the public regardless of whether there was to be an election;</p> <p>(c) the transmission of a document directly by a person or a group to their members, employees or shareholders, as the case may be; or</p> <p>(d) the transmission by an individual, on a non-commercial basis on what is commonly known as the Internet, of his or her personal political views.</p>
Definition of an election advertising expense	
<p>Section 228 defines an election advertising expense as:</p> <p>(a) the price paid for preparing and conducting the election advertising, or</p> <p>(b) the market value of preparing and conducting the election advertising, if no price is paid or if the price paid is lower than the market value.</p>	<p>S. 349 exempts “volunteer labour” from the definition of an election advertising expense.</p>

Requirement under the BC Election Act	Notable differences in the Canada Election Act
Identification of sponsor	
S. 231 requires that election advertising must include an authorization statement (including the sponsor's name and contact information).	Same.
Third party advertising limits	
<p>S. 235.1 states:</p> <p>(1) [Third parties] must not sponsor, directly or indirectly, election advertising during the period beginning 60 days before the campaign period and ending at the end of the campaign period</p> <p>(a) such that the total value of that election advertising is greater than</p> <p>(i) \$3,000 in relation to a single electoral district, and</p> <p>(ii) \$150,000 overall</p> <p>[or in combination with other individuals or groups]</p>	S. 350 sets out the same dollar limits but indexes them to inflation.
Registration of sponsors	
Section 239 requires third parties to register before they are allowed to sponsor <i>any</i> election advertising.	S. 353 requires third parties to register only <i>after</i> they spend \$500, and does not allow them to register before the start of the election period.
Filing of disclosure reports	
<p>Sections 244 and 245 require sponsors that spend \$500 or more to file a disclosure report with Elections BC within 90 days of voting day. The report must include:</p> <p>The value of election advertising sponsored, by class; and</p> <p>All financial contributions received by the sponsor, by class, during the six months before the campaign period through to the election. The names of contributors must also be listed for amounts over \$250.</p>	Section 359.4 requires only contributions received "for election advertising purposes" to be reported.
Penalties	
<p>According to Section 235.2 a third party that exceeds a spending limit will not allowed to participate as an advertising sponsor in the next election, and must pay a fine 10 times the amount by which they exceed the limit.</p> <p>Violations of other parts of the third party advertising rules are liable to a fine of up to \$10,000 and/or imprisonment for up to a year.</p>	Sections 496 and 500.1, 500.5 and 500.6 set out fines of up to five times the amount by which a sponsor exceeds the spending limit, and punishments for other violations ranging from fines \$1,000 to \$2,000 and/or between three months and one year in jail.
<p>Sources: BC Election Act (www.bclaws.ca/Recon/document/freeside/--%20e%20--/election%20act%20sbc%201996%20c.%20106/00_act/96106_00.htm); Canada Elections Act (www.elections.ca/content.asp?section=loi&document=part00&dir=leg/fel/cea&lang=e&textonly=false)</p>	



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