Government of Ontario's Bill 254, *Protecting Ontario Elections Act 2021*

Standing Committee on the Legislative Assembly

Ontario Federation of Labour Submission
March 2021

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The Honourable Doug Downey
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Standing Committee on Justice Policy
Online Submission

Dear Attorney General Downey and the Standing Committee on the Legislative Assembly,

The Ontario Federation of Labour represents 54 unions and one million unionized workers across this province. The OFL has serious practical, policy and constitutional concerns with the Government of Ontario's Bill 254, *Protecting Ontario Elections Act 2021* (the "Bill"), and urges the Government to withdraw it.

In this submission, the OFL will focus on three particularly objectionable components of the Bill:

1. Lengthening the non-election period, including doing so without any corresponding increase to spending limits, and doing so without excluding issue-based advertising from the definition of "political advertising";

2. Unclear/unworkable rules regarding collusion, which will also have the effect of deterring and punishing constitutionally-protected political expressive activity;

3. Doubling individual contribution limits, particularly in connection with the restrictions placed on spending by third parties.

<u>Lengthening of Non-Election Period</u>

The *Election Finances Act* ("*EFA*") currently imposes spending limits on third parties for political advertising during the "election period" (from the writ to the election day) and the "non-election period" (currently six months prior to the writ).

With these restrictions, which themselves are subject to an existing constitutional challenge, Ontario already has the most restrictive regime in the country for third-party political advertising as a result of the lengthy six-month non-election period combined with a broad definition of political advertising.

Under the existing rules, third party political advertising is defined in the same overbroad manner, whether it occurs during the election period or the six-month non-election period, extending to advertising on any issue closely associated with a party, leader, or candidate. As noted, even the current regime is already the subject of an ongoing constitutional challenge.

The Bill proposes to double the length of the regulated period prior to the writ, currently six months, to twelve months, and to do so without any corresponding increase to the spending limit, and without any change to the definition of "political advertising" to permit issue-based expression. The combination of the broad definition of political advertising in the Ontario *EFA*, combined with the uniquely long pre-election period, is unprecedented in Canada, and constitutes an unprecedented attack on the political expression of third parties.

The Supreme Court has repeatedly held that political expression is the single most important and protected type of expression, and lies at the core of the guarantee of free expression. The Supreme Court has specifically commented, "Third party advertising is political expression. Whether it is partisan or issue-based, third party advertising enriches the political discourse." Limits on spending invariably restrict these important Charter rights and must only do so in circumstances where they can be reasonably justified. To date, courts have not upheld restrictions on political advertising by third parties outside of election periods.

In B.C., the Court of Appeal held that a 60-day restriction on issue-based political advertising by third parties was unconstitutional.[1] The Court was particularly concerned that political speech was restricted while the legislature was sitting. The trial judge accepted, and the Court of Appeal agreed, that the definition of election advertising was overly broad when applied during the pre-campaign period as it would capture advertising which was not directly designed to influence an election, but rather to influence government action. The Court accepted that third party advertising was valuable in a democracy because third parties play an important role in the process of public deliberation distinct from that of political parties. Third parties help to set the public agenda and to define the parameters of debate in ways that mainstream political parties are often unwilling or unable to do. Legislation that targets third party political speech on public policy matters outside of the election period overshoots the objective of fair elections and cannot be justified.

The B.C. Government subsequently referred a reference to the Court of Appeal to address amendments to its election financing rules.[2] The amended rules shortened the pre-campaign period to a maximum of 40 days and provided that there would be no overlap with the sitting of the legislature. The Court held that even these amendments were still unconstitutional, given that the definition of political advertising continued to target issue-based advertising, and that there was a significant difference between restricting political expression during an election period as compared to a period of time (even a short time) before the election period. As a result of these decisions, the B.C. legislation was amended to exclude issue-based advertising from the definition of advertising applicable to the pre-campaign period.

Federally, the *Canada Elections Act* ("*CEA*") regulates third party political advertising for a relatively short period prior to the writ, approximately three months. Crucially, the *CEA* defines advertising during the election period separately from advertising during the pre-election period. The *CEA* only restricts third party advertising during the pre-election period where it directly promotes or opposes a party, candidate, nomination contestant, or leader. The *CEA* does not restrict third party advertising prior to the election period that simply addresses policy issues, even where a party or person may be associated with those issues. The *CEA* does this by having separate definitions for "election advertising" during the election period and "partisan advertising" for the pre-election period, with only the former extending to policy issues.

[1] *British Columbia Teachers' Federation v. British Columbia (Attorney General),* 2011 BCCA 408 (CanLII)
[2] *Reference re Election Act (BC),* 2012 BCCA 394

The existing regime under the *EFA*, at six months, which applies the same definition to both the election period and non-election period prior to the writ, is already significantly more restrictive than what was declared unconstitutional in B.C., and the Bill doubles down on the problems with the legislation.

The OFL accepts that some regulation of third party political advertising is appropriate to ensure political fairness and a level playing field. However, a one-year regulated period prior to the writ (approximately thirteen months prior to the election itself) is simply too long, and captures advertising and expressive activity on a broad range of public policy issues, and that has nothing to do with an upcoming election, which in this context, is the only possible justification for restricting constitutionally-protected speech. As other Canadian jurisdictions have recognized, any advertising that takes place more than six months prior to the writ simply will not have any relevance to an election or any bearing on its outcome, and is not necessary for election fairness.

The doubling of the non-election period will also result in the regulation of advertising while the legislature is in session, restricting the ability of organizations to engage with citizens on issues of public policy importance. This will restrict the ability of organizations to try to persuade the government to change its position on important issues, or hold the government to account. These considerations led the B.C. Court of Appeal, as described above, to declare very similar legislation to be unconstitutional.

The OFL and many of its affiliates appropriately engage in advertising that is political in nature but unconnected to elections. This advertising seeks to educate, influence public opinion and persuade political parties to take positions favorable to the interests of workers. This includes advertising that addresses issues of concern to the labour movement, including increasing the minimum wage, paid sick days, and improved health and safety protections and enforcement. Some of the OFL's affiliates engage in advertising on issues specific to their sectors and members, including strengthening public funding for healthcare and education, and the elimination of private profit-based long-term care facilities. Some unions also advertise in connection with their collective bargaining.

Moreover, in the context of the ongoing pandemic, all major political parties and their leaders have taken strong positions relating to paid sick days, schools, and healthcare such that there are many important matters of public interest that could be considered closely associated with a registered party or its leader. The OFL is deeply concerned that the proposed Bill will affect the ability of organizations to engage in public expression through advertising on broad matters of public interest – advertising that has nothing to do with elections.

As noted above, Ontario's existing six-month pre-election period is already significantly longer than other Canadian jurisdictions. While the OFL strenuously opposes a twelve-month non-election period on constitutional and other public policy grounds, if the period is going to be extended, advertising relating to issues in the public interest that does not mention any leader or party should be excluded (as is the case federally).

Moreover, while the non-election period has been doubled, there has been no corresponding increase to the spending limit. This will force some organizations to scale back their advertising significantly, and will prevent them from engaging in campaigns involving television, print, and radio advertising, which are by their very nature very expensive. If the non-election period is going to be extended, the spending limits should be increased commensurately. By maintaining the existing spending limits over a much longer period of time, the proposed Bill restricts the nature

and scope of advertising that third parties can engage in, without any meaningful connection to election fairness.

The Bill also singles out third parties for stricter and unfair treatment. In this respect, the changes to the *EFA* for third party political advertising stand in contrast to some of the other changes made by the Bill. In particular, individual donation limits and the amounts that candidates and leadership contestants may contribute from their own funds are being doubled, at the same time as the amount that can be spent by third parties is being restricted. These changes are no doubt intended to favour the interests of wealthier Ontarians, and will undoubtedly have the effect of limiting the speech of those Ontarians who cannot afford to come close to reaching the new individual contribution limits, while limiting their ability to express themselves by pooling their resources through third parties such as unions.

The Bill does not restrict the role of money in politics, but rather targets third parties, many of which are labour organizations and unions advancing the interests of working people. Taken as a whole, the package of reforms introduced by the Bill will significantly weaken the ability of the labour movement to influence public opinion and hold the government to account, while correspondingly increasing the amount of money flowing to the Conservatives. There is nothing "fair" or neutral about this approach, which is blatantly partisan as well as likely unconstitutional.

Unclear/Unworkable Rules Regarding Collusion

The Bill also introduces new provisions purporting to target collusive activity. The *EFA* already prohibits third parties from circumventing or attempting to circumvent a spending limit through collusion, and has also prohibited coordination with parties/candidates. The new provisions in the Bill go further however, imposing unnecessary and vague restrictions, which will inevitably cause confusion for third parties, and deter them from engaging in expressive activity for fear of being exposed to potentially significant fines and penalties, with a chilling effect on their expression.

The Bill targets third parties that "share a common advocacy, cause or goal," a phrase that is not further defined or explained. The OFL is concerned that many trade unions and progressive entities could be found to share common advocacy, causes, or goals related to broad matters of public interest like employment standards, health and safety, and strong public services.

The Bill addresses "sharing information" but the term "information" is not defined and it is not clear if this provision encompasses publicly available information (ward maps, population data, funding data, etc.) or information developed by the third party (e.g. focus group or polling data, etc.). The broad language raises concern that an organization could potentially be restricted from sharing information with other third parties that does not relate to an election at all, but relates to issues of public interest about which it may engage in issue-based advertising (e.g. health and safety). The restrictions on sharing information could also have important implications for matters of public interest and coordinating collective bargaining strategies among trade unions. Any restrictions on information sharing are of particular concern in light of the increased length of the non-election period.

The Bill also addresses having "a common set of political contributors or donors". It is unclear how a third party can be expected to know the identities of contributors/donors of other third parties to ensure compliance with this provision. It is also unclear whether the new provision precludes an organization from both using its own funds for its own advertising and making a contribution to a separate third party with an overlapping advocacy goal. To the extent that the Bill operates to limit contributions for third party advertising, this would be a significant diminution

of the ability to influence public debate on important issues, and a further restriction on *Charter* rights of free expression.

The Bill further addresses having "a common vendor". It is unclear how a third party can be expected to know the identities of vendors of other third parties to ensure compliance with this provision. In addition, there are a limited number of progressive firms, making it difficult for third parties to comply with this new requirement, while doing nothing meaningful to advance election fairness, given there are already existing rules in place prohibiting collusion.

The unclear and unworkable nature of these rules will undoubtedly have a chilling effect on speech, as organizations will avoid engaging in political advertising, making contributions to third parties for political advertising, or sharing information with each other, out of concern that they could be found to be violating the *EFA*.

Moreover, given that many registered third parties are labour organizations and unions, the OFL is concerned that the Conservative government is targeting its political opponents in a partisan manner through this Bill, making it difficult or even impossible to comply with the *EFA*'s requirements, with the effect of chilling speech that would hold the Government to account on significant issues of public concern.

For all of these reasons, the OFL demands that the Government immediately withdraw Bill 254. Alternatively, the OFL proposes that the Government refer to the constitutionality of the proposed Bill to the Ontario Court of Appeal for a constitutional determination, and not proceed with the Bill until such time as the court has ruled.

Spending Limits for Individuals

The OFL opposes the significant increase to individual donation limits introduced by the Bill, separate and apart from any considerations related to third parties, because this is a change that favours the interests of only wealthy individuals, ensuring that their voices will be more likely to be heard, an approach that is inconsistent with previous reforms enacted to promote electoral fairness. The reality is that very few Ontarians can afford to donate $1,600 to political entities, much less $3,300. In the circumstances of the pandemic, working people have borne the brunt of job losses, and have even less money to consider contributing to political parties and candidates. In the current environment, the increase to individual donation limits only ensures that the interests of the wealthy will be heard and privileged above the voices of working people.

The existing limit of $1,600 was introduced in 2018, and represented a modest increase from the limit of $1,200 that was introduced in 2016. Prior to 2016, the *EFA* permitted individual donation limits of $7,500 to a party, $1,000 to a constituency association (with an aggregate of $5,000), $1,000 to a candidate (with an aggregate of $5,000). The reductions to individual donation limits introduced in 2016 (taking effect January 1, 2017) were made concurrently with the introduction of spending limits for third party advertising, as part of a broad set of reforms intended to limit the influence of money in politics. While the change to donation limits would be highly objectionable on its own, especially given the timing, the change is all the more offensive in light of the divergence in the approach between individual donation limits and spending by third parties. Many third parties are labour organizations and unions that collectively advance the interests of thousands of individual working people who may not otherwise have the ability to engage in spending on political issues. Spending by third parties on political advertising ensures that the voices of working people can be heard and promotes balance as well as electoral fairness. The

approach introduced by the Bill, favouring the interests of wealthy individuals while restricting the expression of third parties, distorts this balance and undermines electoral fairness.

Conclusion

The *EFA* requires the Chief Electoral Officer to provide regular recommendations to the Speaker regarding changes to monetary contributions under the *Act*. None of the Bill's changes to monetary contributions (individual donation limits, further restrictions on spending limits for third parties) were recommended by the Chief Electoral Officer. These changes are not necessary to promote electoral fairness and they in fact undermine electoral fairness.

For all of these reasons, the OFL demands that the Government immediately withdraw Bill 254. Alternatively, the OFL proposes that the Government refer to the constitutionality of the proposed Bill to the Ontario Court of Appeal for a constitutional determination, and not proceed with the Bill until such time as the court has ruled.

Respectfully submitted.

Ontario Federation of Labour

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