

## **Bill 254: Protecting Ontario Elections Act**

### **The unintended impact on nonprofits' role in policy debate**

To meet the objective of regulating third-party influencers while preventing unintended consequences for community-based nonprofits, the Ontario Nonprofit Network recommends that the Ontario Government increase the threshold for “third-party advertisers” to register and report, clarify language around “collusion” to take into account the legitimate coalition-based advocacy that nonprofits engage in, and lighten the administrative burden for nonprofits by enabling the use of existing audited financial statements in reporting.

#### **Issue**

On February 25, 2021, the Ontario Government tabled [Bill 254](#), extending to even more “smaller spenders” the rules for organizations that engage in pre-election advocacy on issues on which a political party or candidate takes a position. Bill 254 would keep intact the current \$500 registration threshold (on direct election-related advertising expenses) but extends the period covered from six months to one year before the writ drops. The bill also introduces new “collusion” language against organizations sharing information, donors, and campaign strategy- language that could contribute to an advocacy chill among nonprofits that often collaborate. ONN is recommending four measures to mitigate the impact of new regulatory red tape on “small spender” nonprofits as a result of this bill.

#### **Key recommendations**

1. **Raise the threshold for registration as a “third-party advertiser”** for the proposed extended pre-election period to ensure that small community-based nonprofits can undertake their regular non-partisan policy dialogue activities and are not required to keep complex separate accounts if their work becomes an election issue.
2. **Clarify the proposed rules around “collusion”** so they explicitly do not apply to third-party advertisers whose combined spending remains below the maximum spending limit. This is consistent with the intent of the collusion provisions which are intended to prevent third parties circumventing spending limits.
3. **Remove the prohibition ([Section 37.10 of the Election Finances Act, established in 2016](#)) on charities' ability to donate to pre-election advocacy campaigns** in line with a [2018 court ruling](#) that eliminates caps on charities' participation in nonpartisan public policy advocacy.

4. **Reduce the administrative burden** for nonprofits that do have to register as third-party advertisers by enabling the Chief Electoral Officer to accept 1) a separate budget line in the nonprofit's accounts for election-related advocacy revenue and election-related expenses, and 2) their annual audited financial statements- with revenue/expenditure lines for election advocacy- in lieu of separate accounting statements that will often cost more than the election expenditure. Nonprofits' accounting uses budget lines instead of separate bank accounts for their multiple programs and sources of revenue.

## Key messages for nonprofits to raise with their MPPs

- Nonprofits play an essential role in bringing the voices of communities to the democratic process.
- If a nonprofit works *for the public benefit* and their issue advocacy is *part of their mission, ongoing, and nonpartisan*, they should be exempt from pre-election advertising rules in Ontario as they are in most other jurisdictions in Canada.
- Bill 254 imposes new administrative burdens on “small spenders” who engage in issue-based (nonpartisan) pre-election advocacy.
  - Nonprofits that spend as little as \$42 a month would have to register and report spending separately (with a separate bank account) for advocacy on issues on which a candidate or political party has taken a position.
- The cumulative effect of administrative burdens (“red tape”) is taking nonprofit energy away from their missions, whether election advocacy rules, lobbyist registration, executive compensation reporting, or quarterly reports for ongoing programming.
  - Where possible, processes should be automated or make use of existing reports, such as nonprofits' annual financial statements.
- Nonprofits are not afraid of transparency.
  - Many already publish their annual audited financial statements showing how they spend their money and who their major donors are.
- We must not underestimate the “advocacy chill” effect of frequently changing the rules about public policy advocacy at all levels of government.
  - If the rules change every few years at three levels (municipal, provincial, federal) and the rules do not align at different levels of government, local nonprofits -- many of which are volunteer-run or have only a handful of staff -- will disengage, to the detriment of their communities' well-being.
- Election advocacy rules are more burdensome for community-based nonprofits than for political action groups<sup>1</sup> because the former operate year-round and have to keep two separate bank

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<sup>1</sup> Political action groups are not defined in law but can be characterized as organizations that exist primarily to influence voter behaviour and may be dormant in between elections. See for example Doug Downey, Attorney General of Ontario in Hansard: “We strongly believe that Ontario voters should determine the outcome of elections, and not pop-up organizations, big-money conglomerates or faceless political action groups.” Hansard March 3, 2021.

<https://www.ola.org/en/legislative-business/house-documents/parliament-42/session-1/2021-03-03/hansard#para174>

accounts if they register to advocate, whereas political action groups operate primarily during elections (and the pre-election period) and just have to keep one set of books for the campaign.

- A more level playing field can be created for community-based nonprofits by enabling them to use their existing audited financial statements for reporting purposes.
- Current election advocacy rules constitute an unfair playing field for charities. It is inappropriate in the wake of the [“Canada Without Poverty” ruling](#) for the Ontario government to constrain charities in their participation in nonpartisan advocacy.
- It is important to limit the influence of deep pockets in politics, but it is also important that regulations for third parties do not overreach or have unintended consequences, such as preventing community voices from raising issues.<sup>2</sup>

## **Nonprofits play a critical role in serving communities- and engaging them in democracy**

Public benefit nonprofits are the [bridge between our communities and government](#). One of their key roles is public policy advocacy, through which communities share their experiences with government policies and programs in order to improve them. Without an engaged nonprofit sector, government would have a more difficult time knowing what people want and need.

Elections are an important time for engaging people in the policy development process. For a healthy democracy, the participation of people and their community-based nonprofits in the election process is critical.

**ONN holds that public benefit nonprofits<sup>3</sup> should be exempt from third-party advertising rules as long as their communications remain nonpartisan.** At a minimum, we have specific policy recommendations to mitigate the impact of community-based nonprofits having to adhere to rules designed for political action groups.

*Equality in the political discourse is thus necessary for meaningful participation in the electoral process and ultimately enhances the right to vote. This right, therefore, does not guarantee unimpeded and unlimited electoral debate or expression. Spending limits, however, must be carefully tailored to ensure that candidates, political parties and third parties are able to convey their information to the voter; if overly restrictive, they may undermine **the informational component of the right to vote.***

- Supreme Court of Canada, Harper v. Canada (2004)<sup>4</sup> (*emphasis added*)

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<sup>2</sup> As the Canadian Civil Liberties Association has noted: “The 2016 changes to the law didn’t only target third party spending during the election period – it capped what could be spent in a six-month pre-election period, meaning that for a half a year before an election, campaigns to raise awareness of important political issues were hobbled by spending limits and onerous registration requirements.”

<https://ccla.org/proposed-election-finance-changes-are-bad-for-democracy/>

<sup>3</sup> Public benefit nonprofits include charities, nonprofit cooperatives, and other nonprofits that have a public benefit mission and remain nonpartisan. For more on public benefit nonprofits, see <https://theonncanada.ca/our-work/our-regulatory-environment/public-benefit-nonprofits/>

<sup>4</sup> <https://scc-csc.lexum.com/scc-csc/scc-csc/en/item/2146/index.do>

## How is the nonprofit sector's participation in election advocacy regulated?

**Provincial elections:** Since Bill 2 (Election Finances Statute Law Amendment Act) was passed in 2016, community-based nonprofits have been subject to the “third party advertising” rules that were created to limit the influence of large political action groups.<sup>5</sup> As of the last Ontario general election, nonprofits that spend \$500 directly on “third party advertising” in a six-month period leading up to a fixed election date have to keep two bank accounts and two sets of financial records and report election-related expenses if a candidate or political party takes a position on an issue on which they advocate. Bill 2 also prohibited charities from *donating* to nonpartisan advocacy campaigns (although they could still run them in-house). *ONN will update our guidance to the sector on election advocacy once Bill 254 has passed.*

**Canadian elections:** At the [federal level](#), nonprofits are subject to similar rules for the election period only and must register and report on advocacy finances if they spend over \$500 in an election period after the writ has dropped. Non-partisan issue advertising is not regulated in the pre-election period.

**Ontario municipal elections:** At the municipal level, ONN [successfully advocated](#) with our partners in 2016 to prevent proposed changes (Bill 181) from imposing new rules on issue-based pre-election advertising on the part of nonprofits. Only organizations that endorse candidates (or a yes/no position on a ballot question) must [register as third parties](#) in municipal elections.

### Key terms:

- **“Pre-writ” or “pre-election” versus “election” periods:** There have long been rules about advertising after the election “[writ](#)” has dropped (i.e., once an election has been called). Since the advent of fixed election dates in Canada, governments have increasingly sought to regulate advertising in the “pre-writ” period.
- **“Third-party advertising”:** “Third parties” in election finance rules are organizations other than political parties and their local constituency associations and candidates. Regulated advertising costs are *direct costs*, e.g., purchasing paid social media ads, pop-up ads, or airtime and the costs to prepare such materials. They do not include your regular activities such as maintaining your organization's website and regular communication channels.
- **“Issue-based” versus “partisan” advertising:** *Charities* that engage in advocacy must remain nonpartisan at all times by virtue of CRA rules.<sup>6</sup> Many other public benefit nonprofits also choose to remain nonpartisan when they engage in advocacy. In other words, rather than engaging voters to make their voting decision based on party affiliation, they would urge them to think about issues like child care affordability, community housing, or tackling climate change. This falls under regulated “issue-based” advertising *when they pay for advertising AND a candidate or party takes a position on the issue.*<sup>7</sup> Regulators are concerned that advocacy could implicitly endorse a candidate or political party and so the rules trigger registration requirements when a candidate or

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<sup>5</sup> ONN was unsuccessful in [advocating for](#) an exemption for public benefit nonprofits, or a higher registration threshold for them, when Bill 2 was passed.

<sup>6</sup> Note that charities in Canada are no longer subject to the “10 percent rule” by which they could spend no more than ten percent of their resources on (nonpartisan) political advocacy.

<https://theonncanada.ca/our-work/our-financing/take-action-on-review-of-charities-political-activities/>

<sup>7</sup> Recall the 2019 Canadian election when a political party launched a platform denying the existence of human-caused climate change, making this a regulated topic for nonprofit election advocacy.

<https://www.cbc.ca/news/politics/climate-elections-canada-perrault-1.5253580>

political party takes a position, even if in another election the same issue might not make it onto the radar of parties and would therefore not be subject to regulation.

The sum of these issues add up to important restrictions facing Ontario nonprofits as they seek to participate in public policy debate.

## About Bill 254

There are a number of positive elements in Bill 254 that will aid the democratic process: for instance, it extends advance polling and it reduces the administrative burden on constituency associations.

The bill also increases the per-donor spending limit and extends the per-vote subsidies of political parties that were about to expire. ONN does not take a position on these elements. The relevant sections for our purposes are the following:

### a) Extending the regulated pre-election period from six months to twelve

Schedule 2 amends the Election Finances Act as follows:

*14 (1) Clause 37.10.1 (2) (a) of the Act is amended by striking out "six-month period" and substituting "12-month period".*

The effect of this change is to cut in half the threshold spending for registration as a third-party advertiser (and the related tracking and reporting of expenses) to organizations that spend as little as \$42 a month (\$500 over a twelve month period). It does not take many social media ads to reach this threshold, so many more organizations would have to register, create a separate bank account, track expenses, and report.

These onerous requirements will likely mean many community-based nonprofits will sit out pre-election and election periods while well-funded third parties have a spending limit of \$600,000 for pre-election spending. The net effect will be to muffle small, community-based voices while amplifying the reach of political action groups.

### b) Introducing new language preventing "collusion" among third parties

Schedule 2 also amends the Election Finances Act as follows:

**(3) No third party shall circumvent, or attempt to circumvent, a limit set out in this section in any manner, including by,**

*(a) acting in collusion with another third party so that their combined political advertising expenses exceed the applicable limit;*

*(b) splitting itself into two or more third parties;*

*(c) colluding with, including sharing information with, a registered party, registered constituency association, registered candidate, registered leadership contestant, or registered nomination contestant or any of their agents or employees for the purpose of circumventing the limit;*

**(d) sharing a common vendor with one or more third parties that share a common advocacy, cause or goal;**

**(e) sharing a common set of political contributors or donors with one or more third parties that share a common advocacy, cause or goal;**

**(f) sharing information with one or more third parties that share a common advocacy, cause or goal; or**

*(g) using funds obtained from a foreign source prior to the issue of a writ for an election.*

The intended impact of this clause is to ensure that large, well-funded political action groups cannot simply collaborate behind the scenes (with each other and with political parties/candidates) to circumvent the spending rules. The bill's text is somewhat unclear as to whether undertaking activities listed (sharing a common vendor, sharing donors, or sharing campaign information/strategy) is a prohibited act by itself, or whether it is prohibited only in cases where the combined spending of third parties exceeds the allowable limit. We are asking for greater clarity so the proposed rules around "collusion" explicitly do not apply to third-party advertisers whose combined spending remains below the maximum spending limit.

## **Increased administrative burdens ("red tape") facing nonprofits under Bill 254 rules**

ONN was active on Bill 2 in 2016 when the definition of "third party advertising" was changed to include nonpartisan, issue-based advertising as well as advertising that explicitly endorsed candidates and party platforms. We were concerned that the low registration threshold (\$500 in direct spending over six months) would catch a lot of nonprofits that are active on issue-based advertising around elections.

We fully support the principle of regulating third-party advertising around elections and acknowledge that getting it right is very complex. It is important to recognize, however, that community-based nonprofits are different in relevant ways from political action groups that are mainly active only around elections and exist almost exclusively to influence voter behaviour. The separate bank account rule, registration process, and reporting requirements are the same whether organizations spend \$500 or \$500,000 -- but they are actually more complex for community nonprofits that have to have two separate bank accounts and disentangle "election-related" expenses for the election period from other communications spending whereas a political action group is generally a single purpose organization that has to maintain only one account.

There is no evidence that small-spender nonprofits have undue influence over voter behaviour and they should not be subject to new, stricter rules just when they are struggling to continue serving communities and bring their voices to government and the general public during a pandemic. To mitigate the impact of registration, we propose a lessening of the administrative burden for nonprofits that have to register as third-party advertisers by enabling the Chief Electoral Officer to accept 1) the use of a single bank account for election-related advocacy alongside other activities, and 2) their annual audited financial statements (with separate lines for advocacy revenue and expenses) in lieu of accounting statements prepared and audited specifically for election advocacy.

## **Interjurisdictional comparison**

In a preliminary review of reporting thresholds related to third-party advertising rules in other Canadian jurisdictions, we found:

- only three provinces limit nonpartisan issue-based advertising before the actual election period: Manitoba, Alberta and Ontario.
- Ontario's \$500 registration threshold is the lowest for pre-election advertising. Alberta's threshold is \$1000 (charities are prohibited entirely from participation), and Manitoba's is \$2500 (for 90 days) (\$10,000 for a year.)
- The governments of Canada and Quebec both limit only *partisan* pre-election activity before the writ has dropped. Canada limits "[election advertising](#)" (nonpartisan/issue-based advertising) only once the writ has dropped.

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## About ONN

The ONN is the independent nonprofit network for the 58,000 nonprofits in Ontario, focused on policy, advocacy and services to strengthen the sector as a key pillar of our society and economy. We work to create a public policy environment that allows nonprofits to thrive. We engage our network of diverse nonprofit organizations across Ontario to work together on issues affecting the sector and channel the voices of our network to government, funders, and other stakeholders.