



Bill 2: Election Finances Statute Law Amendment Act, 2016

Standing Committee on General Government

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Introduction

The Canadian Union of Public Employees (CUPE) Ontario is the largest union in the province with more than 260,000 members in virtually every community and every riding in Ontario. CUPE members provide services that help make Ontario a great place to live. CUPE members are employed in five basic sectors of our economy to deliver public services. Our members are attentive voters, who have a strong interest in provincial elections. All of our work is geared towards making our communities and our province better for workers, including those who are unionized and those who are not yet members of a union, and we therefore have an interest in electoral politics. Our interest includes rules governing financing of elections, and 3rd party advertising during elections, which are addressed in Bill 201. We are committed to the principle of electoral fairness, including creating a level playing field for everyone who stands for public office. We believe strongly that a vibrant and thriving democracy requires input from workers' organizations. It is only through robust participation in public debate that workers' interests can be articulated and made relevant. Political parties are not the only organizations that have an interest in shaping public discourse during elections.

We welcome the reintroduction of the Election Finances Statute Law Amendment Act, 2016. As we have indicated in our earlier submissions (attached as Appendix A) it is necessary to get big money out of politics. There are provisions in this Bill that we support, including the ban on corporate and union donations to political parties. It is also a positive step that the new legislation has lowered maximum contributions to \$1200 per year for candidates, riding associations, and parties. This is still significantly more than most Ontarians can afford, but is still an improvement over the existing limits.

There are, however, several provisions of the legislation, and the recently proposed amendments that remain problematic. These areas include the prohibition on MPPs and candidates attending fundraisers, the prohibition on third party advertisements in the 6 months prior to an election campaign, and the limited scope of the ban on government advertising.

Ban on MPPs and Candidates Attending Fundraisers

As recent Liberal scandals have made clear, there is a need to end the practice of cash for access fundraisers. Giving cabinet ministers a funding target, and essentially instructing them to achieve those targets by soliciting contributions from affluent donors is at odds with the democratic principal that all citizens should have equal access to their government without having to pay for it. At the very core of this practice is, at the very least, the perception that the wealthy can purchase access to government that is denied to the vast majority.

There are two reasons why these cash for access fundraisers are a problem. First, the access in recently revealed scandals was to the government. In a parliamentary democracy there is a very real difference between cabinet and the backbench, and between the government party and the opposition. Second, the access came at a price that only the very affluent can afford.

The proposal to prohibit MPPs, party leaders, and candidates for election from attending any fundraisers is a crass move by the government. It deliberately obfuscates the very real difference between members of the government (i.e. the premier and cabinet), and backbench MPPs, especially those in the opposition. Equating cabinet ministers' collection of tens of thousands of dollars from contributors seeking access to those who make decisions about public policy with a candidate or MPP's attendance at a \$25 a plate spaghetti dinner is truly perverse. Nobody seriously believes that a small donation made in a community fundraiser will actually buy influence.

Attending small scale, low contribution fundraisers has always been an important part of politics at the constituency level. It gives citizens the sense that they are providing something meaningful to a candidate or party that they support. Having an MPP or a candidate at such an event helps to give it political salience, and helps build a connection between everyday people and their political representatives.

The amendment to Bill 2 that would prohibit attendance at fundraisers actually does not prohibit cabinet ministers from engaging in cash for access practices. The amendment specifically permits the MPPs, including the premier and cabinet ministers, to "solicit contributions by mail, telephone, electronic communication or other means." This particular amendment does not end cash for access, it merely drives it underground to one-on-one conversations. Lower caps on contributions might help mitigate against this practice, but will not eliminate it.

There is a very real concern that the prohibition on MPPs and candidates from attending fundraisers could be deemed to violate the Charter right to freedom of association. This prohibition would ban Ontarians from attending meetings that are perfectly legal gatherings. Since there is no prohibition on MPPs and candidates doing fundraising work, it is not clear that this amendment would pass the Oakes test.¹ Controlling the influence of big money is a "pressing and substantial" concern (part one of the Oakes test). The point of this legislation is not, however, to get all money out of politics. Small scale fundraisers are not a problem that needs to be address because there is no real threat that contributions of \$100 or less will be perceived to give undue access or influence. It is arbitrary to prohibit MPPs and candidates

¹ The Oakes test is the constitutional test used by the Supreme Court to determine if an infringement of a Charter right is a reasonable limit on the exercise of that right (consistent with section 1 of the Charter of Rights and Freedoms). Part one of the test requires that the government demonstrate that the law being reviewed is a "pressing and substantial" concern. Part two of the test is the proportionality test: is the law rationally connected to the goal the government is trying to achieve? Does the law minimally impair the Charter right? Is the price of the infringement too high a price to pay? See <https://ualawccsprod.srv.ualberta.ca/ccs/index.php/i-o/774-oakes-test>

from attending small scale fundraisers when they (and/or their staff) are still permitted to engage in fundraising activities through other means (i.e. it is the location of the fundraising, not the fundraising itself that is being regulated). Moreover, this amendment does not minimally impair MPPs and candidates in their ability to exercise their right to associate with supporters and constituents. Small scale fundraisers are an important part of the life of constituency associations, creating spaces in which politicians and constituents can interact, exchange ideas, and build support for the democratic process. The proposed amendment is an unreasonable restriction on the exercise of this important role of MPPs and candidates for office.

Instead of the blanket prohibition on MPPs and candidates attending fundraisers, it would be more appropriate to put a low cap on the price of admission to such events. The limit should be a price that most people can afford, but low enough that it is highly unlikely that there will be a perception that influence is being purchased.

Third Party and Government Advertising

We would like to take this opportunity to reiterate our opposition to the limits on third party advertising in the six-month period before an election campaign. Political parties are not the only actors that have an interest in communicating their messages with the public, trying to raise the importance of political issues, and share information. There is a wide array of organizations, including our union, that contribute to political debate in a meaningful way. Putting unreasonable limits on the ability of organizations to contribute to public discourse is a fetter to a fully functioning democracy.

In the *Harper v. Canada (Attorney General)* case, the Supreme Court of Canada did rule (in a split decision) that restrictions on third party advertising during election campaigns are a reasonable limit on freedom of expression as guaranteed in the Charter of Rights and Freedoms. The majority decision in the Harper case also reasoned that limits on third party advertisements are reasonable because these organizations have unlimited capacity to exercise their right to freedom of expression outside of election campaigns. Enacting restrictions on third parties outside of the writ period appears to violate the reasoning of the Supreme Court. There is good reason to believe that this provision of Bill 2, if passed, would be challenged in the courts. Based on the rationale given in the Harper case, there is a high probability that it would be found to be unconstitutional.

Bill 2 is an improvement on the earlier attempt to revise legislation on election finances by including a prohibition on government advertisements for 60 days prior to an election campaign. This measure, however, does not go far enough. As we noted in our original submission, the only party that will reap any benefit from government advertising is the party that is currently in government. Government advertising in the lead up to an election is a public subsidy to the government party, and there must be strict limitations on it during this period. In

the absence of stronger oversight over the partisan nature of government advertising (which we would encourage the government to adopt), we argue that the government advertising should be prohibited for six months prior to an election.

Conclusion

We stand firmly behind the principles that were the basis of our original submission on the Election Finances Statute Law Amendment Act, namely:

- Promoting fairness in elections, including in election financing and campaign expenditures, is a laudable goal.
- Preventing large financial contributors from distorting electoral and policy processes is necessary to a properly functioning democracy.
- Ensuring that political parties are competing on a relatively level playing field is an important goal.
- Public financing of elections will help reduce the influence of large financial contributors, and will help parties function when financial contribution limits are lowered.
- Political parties are not the only actors who have an interest in the conduct and outcomes of elections. Workers' organizations have a real and legitimate interest in raising political issues during and outside of election campaigns.
- 3rd parties should face some limits on their ability to advertise during election periods, but those limitations should only be used to create a more even playing field amongst all interested groups.

There is much about Bill 2 that will improve the election financing regime in Ontario. However, there are still some parts of the Bill that are highly problematic. Some of the problematic areas were not reiterated in this submission (e.g. allowing candidates for office, or candidates for party leadership to contribute higher sums to their own campaigns than others). Our original submission is appended below for your reference. Our goal is the creation of a fair playing field for everyone who participates in electoral politics. The proposals we make in our submissions will help strengthen this legislation.

Appendix A: CUPE Ontario Submission on Bill 201

Introduction

The Canadian Union of Public Employees (CUPE) Ontario is the largest union in the province with more than 260,000 members in virtually every community and every riding in Ontario. CUPE members provide services that help make Ontario a great place to live. CUPE members are employed in five basic sectors of our economy to deliver public services. Our members are attentive voters, who have a strong interest in provincial elections. All of our work is geared towards making our communities and our province better for workers, including those who are unionized and those who are not yet members of a union, and we therefore have an interest in electoral politics. Our interest includes rules governing financing of elections, and 3rd party advertising during elections, which are addressed in Bill 201. We are committed to the principle of electoral fairness, including creating a level playing field for everyone who stands for public office. We believe strongly that a vibrant and thriving democracy requires input from workers' organizations. It is only through robust participation in public debate that workers' interests can be articulated and made relevant. Political parties are not the only organizations that have an interest in shaping public discourse during elections.

The issue of campaign contributions has garnered a great deal of attention of late. The role of large contributors to electoral campaigns has been highlighted as a problem. We would like to thank the government for introducing this legislation, much of which we agree with in principle. Our submission will focus on the components of Bill 201 that we find to be of greatest significance, including rules around campaign contributions, and third party advertising. We also propose amendments that we believe will strengthen and clarify parts of the legislation, including proposals that are not currently included in Bill 201.

This submission is based on several premises:

- Promoting fairness in elections, including in election financing and campaign expenditures, is a laudable goal.
- Preventing large financial contributors from distorting electoral and policy processes is necessary to a properly functioning democracy.
- Ensuring that political parties are competing on a relatively level playing field is an important goal.
- Public financing of elections will help reduce the influence of large financial contributors, and will help parties function when financial contribution limits are lowered.
- Political parties are not the only actors who have an interest in the conduct and outcomes of elections. Workers' organizations have a real and legitimate interest in raising political issues during and outside of election campaigns.

- 3rd parties should face some limits on their ability to advertise during election periods, but those limitations should only be used to create a more even playing field amongst all interested groups.

Caps on 3rd Party Advertising

Among the most significant changes made by this Bill are the restrictions that will be placed on 3rd party advertising during an election campaign and for the 6 month period before the writ is dropped. To date there have been no limits on how 3rd parties intervene during provincial elections in Ontario, and many groups have become accustomed to using print, electronic, and broadcast advertisements to promote their positions on a wide variety of issues. Introducing limitations will certainly have a significant effect on the ways in which these groups, our union included, promote important issues and raise concerns about the policies of political parties.

That being said, caps on 3rd party advertising during election campaigns are not unheard of in Canada. Legislation limiting such advertising has existed at the federal level for years, and has been deemed to be constitutional by the Supreme Court of Canada.² As such, we should expect that some limitations on 3rd party advertising during election campaigns would be considered by the courts to be constitutional. The question then becomes, what limits are reasonable?

One criterion on which to base reasonableness is the degree to which the limits promote equality of voice. Political parties have global limits on campaign expenditures, but do not have any additional specific restrictions on how much is spent on advertisements. In the 2014 election the party spending limit was approximately \$7.4 million. During that election campaign, the PC Party reported spending of \$6,124,693 on advertising, the Liberal Party reported spending \$4,410,934 on advertising, and the NDP reported spending \$1,977,755 on advertising.³

Bill 201 establishes a province wide limitation on 3rd party advertising of \$100,000, with a cap of \$4,000 in any electoral district. This represents approximately 5% of the amount spent on advertising by the NDP, the party that reported spending the least on advertising while still electing MPPs to the legislature. It is only 1.6% of the budget spent by the PC Party, which reports having spent the most on advertising. Such a discrepancy is contrary to the principle of ensuring equal voice to all relevant participants in elections, including 3rd parties. Limits for 3rd parties do not necessarily need to be as high as limits for parties, but 3rd parties should still have the opportunity to make a meaningful contribution to public discourse. Spending limits on 3rd parties during the writ period should therefore be increased from those established in Bill

² Harper v. Canada (Attorney General), 2004.

³ Elections Ontario, General Election Party Annual Financial Statements, <https://www3.elections.on.ca/internetapp/PartyStatements.aspx?SearchType=6&EventId=114&Display=General%20Election%202014&EventType=1&&lang=en-ca>

201. In order to afford 3rd parties the ability to make some use of broadcast and print media it would not be unreasonable to double the limits established in this Bill.

Limits on 3rd party advertising can also be reasonable if they help to enforce restrictions on contributions to political parties and on party spending. Federal legislation has been interpreted in a way that allows for 3rd parties to advertise on issues during election campaigns. This kind of interpretation should be applied to the legislation in Ontario. 3rd parties have a role in raising important policy issues for discussion during campaigns, whether these issues have been addressed by political parties or not. Voters also have an interest in hearing a diversity of positions on issues, to inform their own voting intentions, and to equip them with tools to question parties and candidates on their positions.

Any limits on 3rd party advertising will have to exempt communication with members of organizations. Bill 201 currently exempts unions' communication with their members from the restrictions on 3rd party advertising, which is entirely appropriate. The outcome of elections has a direct and immediate effect on union members, notably on members of public sector unions. The right to communicate freely with our members is one that we must maintain.

Bill 201 also exempts "the transmission by an individual, on a non-commercial basis on the Internet, of his or her personal political views" from the definition of political advertising. As currently stated this provision would protect the right of a union executive member (e.g. the president of the provincial division of the largest union in Canada), as an individual, to use websites and social media as a platform to express their opinion. Unions are democratic organizations. The positions of unions are determined by the membership, not merely by the elected officers. This section of the Bill needs to be clarified or amended to ensure that unions, as democratic collectivities, have the ability to use their websites and social media platforms to publish their positions on elections on the same basis as individuals. Such communication should not be considered to be political advertising.

Limits on advertising for 6 months before an election

Federal legislation on 3rd party advertisements only covers the election period itself. The Supreme Court decision in *Harper v. Canada (Attorney General)*, therefore did not rule that pre-writ restrictions on advertising are constitutional. In fact, in applying the Oakes test⁴ the Court argued that the federal legislation "minimally impairs the right to free expression [because] third party advertising is unrestricted prior to the commencement of the election period, and third parties may freely spend money or advertise to make their views known or to persuade others."⁵ That is to say that the federal legislation was deemed to be constitutional, despite the

⁴ <http://www.sfu.ca/~aheard/oakes.html>

⁵ *Harper v. Canada (Attorney General)*, 2004.

explicit restriction on freedom of expression, precisely because the limitation was only during the writ period.

By including restrictions on 3rd party advertisements for six months prior to an election the government is opening itself up to litigation by 3rd parties that want to have an unfettered right to advertise outside of election campaigns. Since there is a constitutional requirement of minimal impairment of rights, and the Supreme Court itself has already written that the federal legislation was deemed constitutional because it did not restrict 3rd party advertising outside of election periods, there is a very good chance that this provision in Bill 201 would not survive a constitutional challenge.

In this Bill there is, however, a striking omission from the limits on advertising during, and prior to an election period: the issue of government advertising. It would be unthinkable for advertisements issued by the government to be critical of government policy, or the people who formulate it. Instead, government advertising is used to promote the initiatives of government, putting a positive spin on them. Government advertising can only possibly benefit the party that currently forms government, and therefore constitutes an unfair advantage to the governing party. As a matter of electoral fairness this legislation should be amended to prohibit all government advertisements during elections, and for the 6 months immediately before election campaigns.

Campaign Contributions

A fundamental aspect of electoral fairness requires assurances that money does not unfairly privilege some interests above others. Recent public attention to the role of “big money” in political parties’ fundraising activities has raised concerns that there is not a level playing field. Most people in Ontario cannot come anywhere close to the maximum contribution limits in the current legislation. In fact, 94% of all individual political donations in 2014 were less than \$1330,⁶ far below the maximums in either the current legislation or the proposed legislation. Caps on campaign contributions that allow individuals to make annual donations of more than \$1330 in total, privilege the relatively affluent.

All individuals in Ontario must be treated equally in order for the system to be fair. Individuals who are nominated as candidates, and contestants for party leadership should not be allowed to contribute more than anyone else. We object to provisions that allow individuals to contribute up to \$5000 to their own campaign, and individuals running for leadership of a political party should not be allowed to contribute \$25,000 to their campaign. These exceptions to the limits established for other individuals are contrary to the principle of equality. These increased limits give a significant advantage to relatively affluent individuals to run for office.

⁶ <http://globalnews.ca/news/2744923/bill-should-include-stricter-third-party-ad-rules-ontarios-chief-electoral-officer/>

There are no reasonable grounds on which to justify giving the affluent such an advantage over lower income citizens.

One of the issues that brought election financing rules to the forefront of public debate is the Liberal Party's use of cash-for-access fundraisers, in which contributors would pay large sums of money to meet with Ministers and the Premier. Bill 201, however, does not have any provisions in it that would prohibit such activities in the future.⁷ Cash-for-access fundraisers have the appearance, at the very least, of granting influence over policy in exchange for financial contributions. Granting access based on the ability to pay is contrary to the principles of open and transparent government, and clearly disadvantages Ontarians who cannot afford the entrance fee.

CUPE Ontario is supportive of the move to prohibit contributions from corporations and unions. This will bring Ontario in line with similar legislation in other provinces and at the federal level. Banning corporate and union donations, if coupled with reasonable caps on individual contributions, can help get "big money" out of politics, and level the playing field for everyone.

Political parties do require significant funds to fulfill all of their functions and responsibilities, and to remain competitive during election campaigns. Lowered individual contribution caps, and the elimination of corporate and union donations to parties could have an adverse effect on their ability to fulfill all of their functions. Therefore we are supportive of the proposal to publicly finance political parties. Public financing will provide stable funding for the years between elections, and should become a permanent part of Ontario's party financing regime.

Party Spending Limits during Election Campaigns

Addressing concerns about money in politics should not only be focused on contributions to political parties. It is equally important to ensure that there is a level playing field when it comes to electoral expenses. Maintaining a relatively level playing field requires that keen attention be paid to party expenditures. It would be wrong to say that higher levels of expenditures unambiguously lead to higher levels of electoral success. A party might have a message that is unpalatable, or a leader who does not inspire the electorate, or might use money unwisely or inefficiently. The party that spends the most does not necessarily win the most votes. But it is safe to say that money can be used to improve a party's chances. More money can give a competitive edge. Limits on expenditures must therefore be of concern.

In 2014 the campaign spending limit was approximately \$7.4 million. None of the three parties that successfully elected MPPs reported that their expenditures subject to limitation reached that limit. The PC Party spent the most, at \$7,020,170 (approximately 95% of the limit), the Liberals spent \$6,089,859 (approximately 82% of the limit), and the NDP spent \$3,510,908

⁷ <http://www.theglobeandmail.com/news/national/ontario-introduces-legislation-to-ban-corporate-and-union-donations/article30058705/>

(approximately 47% of the limit).⁸ If no party is able to spend up to the limit, then clearly the limit is too high.

There is a wide discrepancy in spending between parties, with the highest spending party almost doubling the spending of the least expensive campaign. This does not even take into account the Green Party, which spent a mere \$107,345 and was still able to capture 4.8% of the popular vote, even though it elected no MPPs. In order to reduce the spending gap (and therefore reduce the competitive edge given to parties that spend more) the limit on party expenditures should be reduced to no more than $\frac{3}{4}$ of the current level, and should be reviewed every five years with the goal of setting reasonable limits that are also fair to all parties. Reducing the limit to $\frac{3}{4}$ of the 2014 level would still allow parties to spend approximately \$5.5 million during election campaigns, only marginally less than the amount spent by the party that won the 2014 election.

Recommendations

1. Increase the limit on 3rd party advertising during election campaigns.
2. In keeping with practices at the federal level, ensure that limitations on 3rd party advertising still allow for issue based advertising.
3. Clarify Section 4(d) of the Bill to allow unions, not just individuals, to transmit their positions on the internet, on a non-commercial basis (i.e. on union websites and union social media platforms).
4. There should not be any restrictions on political party, or 3rd party advertisements during the 6 months prior to an election campaign.
5. There should be strict restrictions on government advertising, especially during election campaigns and in the 6 months prior to an election period.
6. Review the individual political contribution limit on a regular basis with the goal of ensuring that contribution limits do not exceed what the majority of Ontarians are willing to donate to political parties.
7. Eliminate the provisions in Bill 201 that would allow candidates to contribute \$5,000 to their own campaign, and candidates for party leadership to contribute up to \$25,000 to their leadership bid.
8. Prohibit cash-for-access fundraisers.
9. Make public financing of political parties a permanent part of the party financing regime.
10. Lower political party campaign expenditure limits to no more than $\frac{3}{4}$ of their current level. Review campaign expenditure limits on a regular basis to ensure they are consistent with the principles of creating a level playing field between parties.



⁸ Elections Ontario, General Election Party Annual Financial Statements, <https://www3.elections.on.ca/internetapp/PartyStatements.aspx?SearchType=6&EventId=114&Display=General%20Election%202014&EventType=1&&lang=en-ca>