



Justice Centre for Constitutional Freedoms

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Defending Democratic Discourse

Repealing the unconstitutional provisions of the
Election Finances and Contributions Disclosure Act

Presented to the Legislative Assembly of Alberta

By the Justice Centre for Constitutional Freedoms

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Executive Summary

In 2016, the Legislative Assembly of Alberta amended the *Election Finances and Contributions Disclosure Act* (“*EFCDA*”) to include novel and year-round (not limited to election periods) permanent restrictions on “political advertising” heretofore unheard of in Canada. In contrast to other federal and provincial legislation that restrict advertising only during election campaigns, these new restrictions apply at all times. The restrictions also apply to almost every conceivable issue of public interest, thereby severely limiting advertising as one form of public discourse.

The *EFCDA* requires “third parties”—defined as any individual or group that is not a political candidate or party—to “register” with Elections Alberta if spending more than \$1,000 *ever* on “political advertising” or “election advertising”. Political and election advertising includes any

advertising message that takes a position on an issue with which a registered party, the leader of a registered party, a member of the Legislative Assembly, a registered nomination contestant, a registered leadership contestant or a registered candidate is associated.

The extraordinarily broad definition of “political advertising” and “election advertising” encompasses any message, statement or argument regarding any matter of public policy, irrespective of how non-partisan or non-political the matter may be, so long as it is somehow “associated” at any time with a provincial political actor anywhere in the province. This essentially covers any and every issue that the public may want to discuss.

Consequently, any person or organization that uses paid advertising to get a message out to the public—regardless of what issue the message relates to, or how far removed from an election campaign it is—will be engaging in an illegal act unless first obtaining the consent of a government body.

Further, and equally egregious, these restrictions prohibit citizens and voluntary associations of citizens from using part of their general funds for paid advertising. Rather, they are required to use only funds designated for advertising obtained from donors who donate for that specific purpose. Worse, citizens and groups of citizens must *disclose to the government the names of such donors, the city they live in and the amount they donated* if they donated more than \$250 in a given year.

This is the kind of thing one expects to find in a dictatorship such as China, which required protesters to register prior to demonstrating at the 2008 Olympics. These violations of the freedoms of expression and association and citizens' privacy rights have no place in a free and democratic nation such as Canada.

In a free society, citizens should have a high degree of privacy regarding what they think and how they spend their money, among other things. A healthy and resilient democracy does not require the political views and choices of individuals to be put on display for the government and for the public to see. Hence secret ballots for elections, which protect all voters from intimidation and repercussions. In a manner similar to the secret ballot, individuals in a free and democratic society can engage in the democratic process by donating *privately* to organizations that advocate for views they share. A democracy welcomes voluntary organizations to advocate freely on issues, and express their messages through paid advertising. The *EFDA* restrictions stifle democratic discourse, and discourage engagement with the democratic process, therefore weakening democracy itself.

To preserve the free society and retain a robust democracy, the *Charter*-violating restrictions of the *EFDA* on the free expression of citizens, which also undermine the citizen's right to privacy, should be repealed.

Introduction

Freedom of thought, belief, opinion and expression on all political, social and public policy issues “are the essence of our life”.¹ As the Ontario Superior Court of Justice recently stated, freedom of expression “has been recognized as a fundamental ingredient to the proper functioning of democracy for hundreds of years.”² This is no less true in the early 21st century than in centuries past. The degree to which citizens are prevented from effectively expressing themselves regarding public issues is the degree to which democracy will suffer. Consequently, the Supreme Court of Canada’s jurisprudence protecting freedom of expression holds that “[t]he vital importance of freedom of expression cannot be overemphasized”³ and “[i]t is difficult to imagine a guaranteed right more important to a democratic society than freedom of expression.”⁴

The *EFCDA* restrictions on citizens’ democratic freedoms

In a democracy, citizens who feel strongly about an issue have the freedom to persuade their fellow citizens about moral and political problems, as well as possible solutions to those problems. Democracy is enriched by such efforts. Donating one’s own money towards advertising, to promote one’s conception of justice, is part of the freedom of expression that all citizens enjoy.

However, on December 14, 2016, the *EFCDA* was amended by the Alberta Legislature. These amendments introduced new restrictions on “election advertising” and “political advertising” that permitted the permanent policing, at all times, of paid advertising relating to almost every conceivable topic of public policy. Section 9.1 of the *EFCDA* requires any person or organization that is not a political candidate or party (referred to in the *EFCDA* as “third parties”) to “register” with Elections Alberta before ever spending more than \$1,000 on “political advertising”, regardless of how far or near an election is, or on “election advertising” even when

¹ *Committee for the Commonwealth of Canada v Canada*, [1991] 1 S.C.R. 139 [*Committee for the Commonwealth*] at para 79, quoting *Boucher v The King*, [1951] S.C.R. 265, at p 288.

² *CHP v City of Hamilton*, 2018 ONSC 3690 at para 39.

³ *Committee for the Commonwealth* at para 95, quoting *R. v Kopyto* (1987), 24 O.A.C. 81, at pp 90-91.

⁴ *Edmonton Journal v Alberta (Attorney General)*, [1989] 2 SCR 1326 (Cory J.) at para. 78.

there is currently no election campaign.

Under the *EFCDA*, “political advertising” and “election advertising” are not limited to promoting and opposing a political nominee, candidate or party. Rather, these terms also include any

advertising message that takes a position on an issue with which a registered party, the leader of a registered party, a member of the Legislative Assembly, a registered nomination contestant, a registered leadership contestant or a registered candidate is associated.⁵

Thus, “political advertising” and “election advertising” includes any message, statement or argument regarding any matter of public policy, irrespective of how non-partisan or non-political the matter may be, so long as it is somehow “associated” at any time with a political actor anywhere in the province. Practically speaking, this covers anything related to education, health care, human rights, taxes, the environment, social services, and a long list of other important topics on which political actors take a position. In addressing a substantially similar definition of “advertising”, the BC Supreme Court found it to be “very broad indeed”, and that so defined, it “encompasses virtually any issues that may be the subject of political expression” and “captures a seemingly limitless range of activities in which the government may be engaged”.⁶

For regularly held elections mandated to occur between March 1 – May 31 of the fourth year of the incumbent government’s mandate,⁷ the restrictions on “election advertising” are imposed from December 1 of the year prior through to the day of the election, as per section 44.1(d.1)(i) of the *EFCDA*.⁸ Considering election campaigns are typically no more than four to six weeks long, the election advertising restrictions apply to paid advertising on almost all matters of public policy for at least two months, and up to four months, prior to the election campaign.

The restrictions on “political advertising” apply at all times, except for the period of time covered by the election advertising restrictions. This means that at no time during the mandate of a government, regardless of how many months or years away an election is, are citizens

⁵ 44.1(1)(g) of the *EFCDA*.

⁶ *Reference re Election Act (British Columbia)*, 2012 BCCA 394 at para 20 [*BC Election Act Reference*].

⁷ See *Alberta Election Act*, section 38.1(2).

⁸ The time period covered by the election advertising restrictions for so-called snap elections is the campaign period following the drop of the writ, as per section 44.1(d.1)(ii) of the *EFCDA*.

permitted to communicate to the public regarding matters of public policy through one of society's most important and effective means of communication—paid advertising.

Further, the *EFCDA* restricts the right of citizens to spend their own money, individually or through voluntary association, without waiving their own privacy rights and without exposing themselves to intimidation and repercussions. Citizens must only use funds from donors who donate specifically for the paid advertising. Finally, the *EFCDA* compels citizens and voluntary groups to disclose to the government *the names of such donors, the city they live in and how much they donated* if they donated more than \$250 in a given year.⁹

The *EFCDA* restrictions are bad public policy

Placing such restrictions on citizens is an infringement of freedom of expression as protected by section 2(b) of the *Canadian Charter of Rights and Freedoms* (“*Charter*”). It also impinges upon Canadians’ privacy, undermining their ability to participate in democratic discourse without fearing backlash or repercussions.

One of the great things about a free country is that all citizens have an opportunity to fight for justice through advocacy for better laws and policies. In a democracy, citizens are not only free to criticize politicians, but also free to advocate openly and publicly for justice, however one may conceive of it. Free expression permits more diverse ideas to be considered and facilitates competition among opposing ideas. This creates the healthy debate that a democracy needs to thrive and leads to better ideas being discovered and implemented.

When everyone thinks alike, nobody thinks very much. Truth is more likely to emerge from the clash of ideas than from a herd of conformist thinkers who reject challenges to their orthodoxy. Free expression allows for tough questions and vigorous criticism, which in turn tend to destroy bad ideas.

The benefits of free expression are not limited to providing every individual with the right to advocate for justice. In a free country, citizens also enjoy the ability to join with each other to fight for a just cause. One citizen can do little to change a bad law, but 10,000 citizens working towards a common cause are a force to be reckoned with. Dictators know that individuals are

⁹ Sections 44.32, 44.2, 44.7, 44.8, and 44.82 of the *EFCDA*.

more powerful and more effective when united together in a group. This is why dictators restrict freedom of association: to isolate citizens from each other. Authoritarian governments demand that citizens register their groups and require that they seek permission to start a trade union, a church, a new political party or other groups.

Citizens of a free country are able to donate their money and volunteer time to worthy causes. They can do so anonymously, or with great fanfare. The secret ballot protects citizens from coercion, intimidation and public shaming. In similar fashion, privacy protects people who want their donation to a cause to remain confidential. The government of a free country respects people's privacy and does not attempt to discover for themselves or showcase to the public which political party an individual voted for, or which advocacy group they donated to.

Those who do not want the recipient of their donations announced do so for some of the same reasons why they do not want their vote announced. Some fear repercussions from government officials, employers, contractors or customers. Some fear that disclosure of which non-profits they support might cost them their jobs or a promotion. The compelled disclosure of the identity of donors and how much they donate will have a chilling effect on freedom of expression and therefore participation in democratic discourse. The *EFCDA* restrictions will result in *less* overall public engagement, because many people will choose not to donate, rather than risk the potential consequences of their donation being made public.

In effect, the new restrictions on advertising contained in the *EFCDA* will result in significantly less advertising, information sharing, and debate about issues of public importance because the funds to purchase such advertising will dry up.

The restrictions in the *EFCDA* may have been motivated by notions of fairness, transparency and equality, but they directly attack the citizen's right to be free from intimidation when donating to an unpopular or controversial cause. An attack on the secret ballot could also be justified on grounds of fairness and transparency. Governments never attack fundamental freedoms without conjuring a nice-sounding reason.

Whatever benefits were sought to be achieved by permanently restricting "third party" advertising by citizens—be it realizing some sort of "equality" in public discourse or a misguided attempt to make non-profit organizations more "transparent"—none will materialize.

Instead, Alberta's society will suffer from less overall public discourse and democratic engagement, a less informed public, less advocacy regarding neglected issues and less diversity of ideas.

To the extent Albertans lose the freedoms of expression and association, and the right to privacy regarding donations to third party advocacy groups, Albertans lose rights essential to democracy.

To preserve the free society, protect citizen's privacy and retain a robust democracy, the *EFCDA* restrictions on citizens' rights to advertise should be repealed.

The *EFCDA* restrictions violate the *Charter*

The *EFCDA* restrictions are not just bad public policy. They also violate the *Charter* and should be repealed on that basis. The courts that have had an opportunity to consider restrictions on "third party" advertising by citizens such as are contained in the *EFCDA* and have found them to be unconstitutional.

In 2001, British Columbia became the first jurisdiction in Canada to adopt a fixed election date regime. Subsequently, the BC government passed legislation to place restrictions on "election advertising" by citizens, which covered the election campaign as well as a period of 60 days prior to campaign.¹⁰ In 2009, the BC Supreme Court struck down these restrictions as an unjustified limitation on freedom expression, and therefore of no force and effect.

The Court stated:

Third party election advertising constitutes political expression. Political expression is at the very heart of freedom of expression and benefits from a high degree of constitutional protection. ...whether partisan or issue-based, third party election advertising enriches political discourse.¹¹

The Court ruled that the "impugned provisions restrict public discussion of the government while it is in session", which is "anathema to the principles of democracy".¹² The restrictions were struck down largely because they captured expression of which the primary purpose was

¹⁰ *BC Election Act Reference* at para 3.

¹¹ *B.C.T.F. v. British Columbia (Attorney General)*, 2009 BCSC 436 at para 172 [*B.C.T.F.* (2009)].

¹² *B.C.T.F.* (2009) at para 175.

not to influence the eventual election, but rather, for example, to criticize current government action, raise awareness about new legislation, or advocate regarding a particular issue unaddressed by government.

The harm caused to freedom of expression by imposing restrictions that apply to the 60 days prior to the election campaign far outweighed whatever small benefit was gained.¹³ In 2011, the BC Court of Appeal upheld the decision of the BC Supreme Court.¹⁴

The BC government then tried again. In 2012, the BC Attorney General requested a reference ruling from the BC Court of Appeal regarding a proposed new set of restrictions on “third party” advertising by citizens and voluntary associations. The new restrictions only applied to a period of 40 days prior to the dropping of the writ, and, if the legislature was still sitting at the 40-day mark, the restrictions would not apply until 21 days after the last day the legislature sat.¹⁵

As it had done when ruling on the actual BC legislation, the BC Court of Appeal ruled that the proposed new restrictions violate the *Charter*. The underlying problem, that of restricting expression that was not directly related to influencing the election outcome, was still not overcome in the draft legislation. The Court of Appeal stated that as long as the definition of “advertising” was so broadly defined, no restrictions that take effect prior to an election campaign period could be justified.¹⁶

The Supreme Court of Canada has not had occasion to rule on the constitutionality of restrictions on citizen advertising *outside* of an election campaign. While the Court has ruled that some restrictions *during* an election campaign are constitutional, its ruling was predicated on there not being further restrictions prior to the election period or any other time.¹⁷

In upholding restrictions on *Charter* freedoms during elections, the Supreme Court has relied on three reasons to permit restrictions during an election campaign: promoting equality in the political discourse, protecting the integrity of the financing regime applicable to the political parties and candidates and ensuring voters have confidence in the electoral process.¹⁸ Only one

¹³ *B.C.T.F.* (2009) at paras 196, 256, 279, 281, 284.

¹⁴ *B.C.T.F. v. British Columbia (Attorney General)* 2011 BCCA 408.

¹⁵ *BC Election Act Reference* at para 17.

¹⁶ *BC Election Act Reference* at paras 34, 36-37.

¹⁷ *Harper v. Canada (Attorney General)*, 2004 SCC 33 at para 112 [*Harper*].

¹⁸ *Harper* at para 92.

of these reasons, promoting the equality of the political discourse, could possibly be used to support the imposition of restrictions on citizen advertising during any period outside of an election campaign.

The new restrictions on advertising in Alberta's *EFCDA* are even worse than the BC legislation that was struck down,. The *EFCDA* places *permanent* (year-round) restrictions that cover *all* periods of time, not just a set period of time prior to and during an election campaign. Alberta's restrictions represent an even more egregious violation of citizens' freedom of expression than the BC restrictions that were found to be unconstitutional.

The Supreme Court of Canada has repeatedly acknowledged that political speech "lies at the core" of freedom of expression and "warrants a high degree of constitutional protection".¹⁹ Based on court rulings regarding freedom of expression, particularly the BC caselaw that directly addresses the relevant issues, the provisions of the *EFCDA* that restrict third party advertising outside an election period are very likely unconstitutional, and should be repealed.

Conclusion

In Canada's free and democratic society, citizens should not be prevented from engaging in public discourse by *privately* donating to organizations that advocate for the views of their supporters, without fear of reprisal or intimidation. Legislative requirements to register with a government body as a pre-condition to communicating with the public through paid advertising should be repealed, as should requirements to disclose the names of donors, where they live and how much they give. The *EFCDA*'s restrictions on citizen advertising stifle public discourse, infringe upon the privacy of individuals, undermine our resilient democracy, and violate the *Charter*.

¹⁹ *Harper* at paras 66, 84.