



October 10, 2018

Written Submissions of the British Columbia Civil Liberties Association to the Standing Committee on Procedure and House Affairs regarding Bill C-76, *An Act to amend the Canada Elections Act and other Acts and to make certain consequential amendments* (“*Elections Modernization Act*”)

Executive Summary

In this brief, the BCCLA sets out its chief concerns with Bill C-76, *An Act to amend the Canada Elections Act and other Acts and to make certain consequential amendments*.

1. Third Party Advertising

We recognize that the regulation of spending by third parties prior to and during an election period can be beneficial if developed and implemented to level the playing field between those with vast resources and those without. In trying to prevent such a potential distortion from unequal access to money, however, we are concerned that some approaches in C-76 will adversely affect small voices disproportionately.

We recommend:

- Revising 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;
- Increasing the minimum spending thresholds, indexed to inflation, below which third parties would not be required to register; and

- Elections Canada should provide advance rulings to groups seeking clarity about how the rules work in relation to their specific activities.

2. Lack of Meaningful Privacy Standards

Bill C-76's requirement that registered parties have a publically-available policy for the protection of personal information falls far short of internationally recognized privacy standards. The exception for political parties from privacy legislation that otherwise applies to private entities is unjustified, as evidence from jurisdictions without such an exception (such as BC and Europe) does not indicate that communications between parties and electors are impeded. Canadians deserve more than an empty promise from registered parties about how their personal information is collected, used and disclosed.

We recommend:

- Requiring registered parties to (1) seek consent from individuals for the collection of personal information, (2) limit the collection of personal information to what is required, (3) limit disclosure of information to others, (4) provide individuals access to their personal information and (5) be subject to independent privacy oversight.

3. Balancing Privacy of Contributors with Accountability of Third Party Advertisers

Bill C-76 will increase the disclosure obligations of third parties that trigger the registration obligation, which will most likely result in more information being shared with Elections Canada about the individuals who contribute \$200 or more to a third party.

We recommend:

- Requiring Elections Canada to work pro-actively with the Office of the Privacy Commissioner to review and shape policies for the disclosure of records and their details. The Office of the Privacy Commissioner could make ongoing recommendations to the Chief Electoral Officer for how to balance accountability under the *Elections Act* and the protection of privacy.

Introduction

The BCCLA is one of Canada’s oldest and most active civil society organizations. Our mandate is to preserve, defend, maintain and extend civil liberties and human rights in Canada. We are an independent, non-partisan organization. We speak on the principles which protect individual rights and freedoms, and have played an important and prominent role in defending and promoting both freedom of expression and privacy.

Bill C-76 is a complex, omnibus bill. Our submission does not canvas the bill in an item-by-item fashion, but rather, takes a thematic approach to addressing the matters which constitute our chief concerns.

1. Third Party Advertising

The BCCLA acknowledges that the regulation of spending by third parties prior to and during an election period can be beneficial if developed and implemented to level the playing field amongst those with vast resources and those without.

In trying to prevent such a potential distortion from unequal access to money, however, we are concerned that the approach in C-76 will adversely affect small voices disproportionately. More specifically, our apprehension revolves around the unclear and broad definition of election advertising, the lack of a mechanism for a third parties to seek a proactive opinion by the regulator and the low spending threshold that requires third parties to register with and report to Elections Canada, as well as open a specific bank account for their advertising contributions and expenses.

A decade ago, the BCCLA collaborated with others in researching the impact of British Columbia’s third party advertising rules on social movement groups in the period leading up to and following the 2009 provincial election. Our concerns about the regulation third party advertising and associated recommendations draws upon insights learned from the resulting report: “Election Chill Effect: The Impact of BC’s New Third Party Advertising Rules on Social Movement Groups”.¹

¹ Shannon Daub & Heather Whiteside, *Election Chill Effect: The Impact of BC’s New Third Party Advertising Rules on Social Movement Groups* (Vancouver: Canadian Centre for Policy Alternatives—BC Office, BC Civil Liberties

a) *Definition of Election Advertising and Potential Chill Effect*

The definition of “election advertising”, under the current law and as proposed in C-76, is expansive and unclear and thus likely to confuse third parties who may choose to self-censor out of fear that their communications could require them to register and comply with the associated bank account and disclosure requirements about expenses and contributions.

The definition of “election advertising” in C-76 is substantially similar to that used in BC’s *Elections Act*.² For instance, both definitions capture issues-based advertising (i.e. taking a position on an issue with which a registered candidate or party is associated) and exclude “the transmission of a document directly by a person or a group to their members, employees or shareholders.”³ Like BC’s approach, C-76 does not rule out free or low-cost tools like websites, social media, emails, petitions or public forums. For instance, does a Facebook post disseminated to a third party’s followers—but available to the public—fall outside of the scope of “election advertising” as a document transmitted to a group of their members?

The combined effect of including issues-based advertising and the unclear definition which does not adequately deal with the realities of online communication has been found to confuse a significant number of third parties, which has resulted in arbitrary, inconsistent and incorrect interpretations.⁴ The issues-based advertising creates anxiety for many non-profit organizations that use their website to communicate with their members and the general public about issues that fall under their mandate. With the third-party advertising scheme proposed in C-76, such a website—unchanged—could suddenly become election advertising as soon as an issue that is communicated about is associated with the campaign of a registered candidate or political party.

Association and the BC Freedom of Information and Privacy Association, 2010) [“Daub & Whiteside”], online: https://www.policyalternatives.ca/sites/default/files/uploads/publications/BC%20Office/2010/10/ccpa_bc_election_chill_effect_full.pdf

² *Election Act*, RSBC 1996, c. 106.

³ *Election Act*, RSBC 1996, c. 106, s. 1(1).

⁴ Daub & Whiteside at p. 16.

This confusion has led to third parties self-censoring out of an abundance of caution prior to and during election periods in BC.⁵ There is a disproportionate risk of this self-censorship by small organizations, as they often lack the resources simply to navigate the rules.⁶

Recommendation: 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 the 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.

b) Thresholds for Registration of Third Parties Should Increase Over Time

The BCCLA supports having an advertising spending threshold which triggers the requirement for a third party to register with Elections Canada. Having no threshold would capture too many entities and have an extremely chilling effect on political speech. Setting the threshold too high would enable third parties with deep pockets to disproportionately influence election campaigns while remaining anonymous to the public and unaccountable to Elections Canada.

Bill C-76's adoption of the historic amount of \$500 means that the threshold has effectively been falling and will continue to decrease in spending power given that it is not indexed to inflation (unlike the spending caps). Acknowledging that tying the registration threshold amount to the inflation rate may make it more difficult to interpret and apply the law, we encourage the use of other mechanisms to periodically increase the value of the spending amount which triggers the legal obligation to register. Without such increases, the integrity of the purpose of registration could be compromised.

Recommendation: Enable the periodic increase of the minimum spending thresholds below which third parties would not be required to register.

⁵ Daub & Whiteside at p. 36.

⁶ Daub & Whiteside at p. 26.

c) *Enable Advanced Rulings by Elections Canada*

Due to the confusion that new third party advertising rules in pre-election and election periods had on community and citizen's groups in British Columbia in 2009, we would like to see a mechanism for third parties to seek a pro-active opinion by Elections Canada about the nature of their activities and whether they fall within the legislative scheme. Such an instrument would help those entities that would otherwise self-censor or put themselves in jeopardy of violating the law. Research demonstrates that smaller groups are more apt to self-censor in the face of the larger risk of liability under the *Elections Act*.⁷

Recommendation: Elections Canada should provide advance rulings to groups seeking clarity about how the rules work in relation to their specific communication activities.

2. Lack of Meaningful Privacy Standards

Bill C-76 requires political parties to have a policy about the protection of personal information and to make that policy available to the public. This approach to the collection, use and disclosure of personal information by political parties is so inadequate that it is meaningless. While the legislation requires that the policy provide a name and contact information for a person to whom privacy concerns may be addressed, there will be no enforcement mechanism available to deal with any of these concerns. This falls far short of what Canadians expect from political parties with respect to their privacy interests.

We concur with the Acting Chief Electoral Officer,⁸ the Privacy Commissioner of Canada⁹ and the Canadian Civil Liberties Association¹⁰ that the approach to privacy in Bill C-76 is weak and not up to international standards, or even the standard that applies in BC. Political parties are

⁷ Daub & Whiteside at pp. 33-37.

⁸ Canada, Parliament, House of Commons, Standing Committee on Procedure and House Affairs, *Evidence*, 42nd Parl, 1st Sess, No. 106 (28 May 2018) at p. 33 (Stéphane Perrault), online:

<http://www.ourcommons.ca/Content/Committee/421/PROC/Evidence/EV9902991/PROCEV106-E.PDF>

⁹ Canada, Parliament, House of Commons, Standing Committee on Procedure and House Affairs, *Evidence*, 42nd Parl, 1st Sess, No. 111 (05 Jun 2018) ["June 5 *Evidence*"] at p. 11 (Daniel Therrien), online:

<http://www.ourcommons.ca/Content/Committee/421/PROC/Evidence/EV9945864/PROCEV111-E.PDF>

¹⁰ Canada, Parliament, House of Commons, Standing Committee on Procedure and House Affairs, *Evidence*, 42nd Parl, 1st Sess, No. 113 (07 Jun 2018) at p. 8 (Cara Zwibel), online:

<http://www.ourcommons.ca/Content/Committee/421/PROC/Evidence/EV9953953/PROCEV113-E.PDF>

subject to privacy legislation in BC for almost 15 years and have been subject to privacy laws in Europe for 20 years. There is no evidence that subjecting a political party to the same privacy laws that apply to any other private entity will inhibit communications between parties and electors.

Recommendation: Amend C-76 so that parties are required to: (1) seek consent from individuals for the collection of personal information, (2) limit the collection of personal information to what is required, (3) limit disclosure of information to others, (4) provide individuals access to their personal information and (5) be subject to independent privacy oversight. As the Privacy Commissioner submitted, “The precise law where privacy rules should be found does not much matter. It could be the Elections Act, the Personal Information Protection and Electronic Documents Act, PIPEDA ... or another act.”¹¹ We agree that what is important is that internationally recognized principles, and not policies defined by parties, be included in domestic law.¹²

3. Balancing Privacy of Contributors with Accountability of Third Party Advertisers

Bill C-76 will increase the disclosure obligations of third parties that trigger the registration obligation, which will most likely result in more information being shared with Elections Canada about the individuals who contribute \$200 or more to a third party. Currently, the name, city and postal code of each contributor who falls into this class is included in a report which is made available to the public on the Elections Canada website. We are alive to the growing use of data analytics and how this personal information about contributors could be useful, but there is also a concern that individuals may not want to trade off their anonymity in order to contribute towards political speech.

We recommend:

- Require Elections Canada to work pro-actively with the Office of the Privacy Commissioner to review and shape policies for the disclosure of records and their details. The Office of the Privacy Commissioner could make ongoing

¹¹ June 5 *Evidence* at p. 11(Daniel Therrien).

¹² June 5 *Evidence* at p. 11(Daniel Therrien).

recommendations to the Chief Electoral Officer for how to balance accountability under the *Elections Act* and the protection of privacy.