



Submission to the House of Commons Standing  
Committee on Procedure and House Affairs

*Bill C-76: An Act to amend the Canada Elections Act  
and other Acts and to make certain consequential  
amendments (Elections Modernization Act)*

**Canadian Civil Liberties Association**

June 7, 2018

Canadian Civil Liberties Association  
90 Eglinton Ave. E., Suite 900  
Toronto, ON M4P 2Y3  
Phone: 416-363-0321  
[www.ccla.org](http://www.ccla.org)  
Contact: [media@ccla.org](mailto:media@ccla.org)

## **Canadian Civil Liberties Association (CCLA)**

The CCLA fights for the civil liberties, human rights, and democratic freedoms of all people across Canada. Founded in 1964, we are an independent, national, non-profit, non-governmental organization, working in the courts, before legislative committees, in the classrooms, and in the streets, protecting the rights and freedoms cherished by Canadians and entrenched in our Constitution.

### **Introduction**

The Bill before this Committee is lengthy and makes numerous and complex changes to Canada's federal election law. CCLA's submissions will focus on two core concerns with respect to Bill C-76: the reforms it makes in relation to advertising by political parties, candidates and third parties, and its failure to adequately address the handling of personal information held by political parties.

With respect to political advertising, the CCLA notes that the restrictions place significant limits on political expression, which lies at the core of the freedom of expression that is protected by the *Canadian Charter of Rights and Freedoms*. While we appreciate and take seriously the concern that wealth should not be translated into the ability to dominate political discourse, we have not seen the evidence that purports to justify the restrictions contained in the Bill and the distinctions it makes between different types of political expression and different political actors. Restrictions on core political speech should not be imposed absent evidence that the restrictions are necessary and proportionate. This evidence has not been produced in relation to the existing third party advertising regime in the *Canada Elections Act*, nor with respect to the changes proposed by Bill C-76. Further, we suggest that the Committee consider whether limits on spending should be set by an independent body, rather than established in legislation (and subject to an inflation adjustment factor).

On political parties' collection, use and disclosure of personal information, the CCLA believes the scheme proposed by the Bill is inadequate and that meaningful privacy protections should be incorporated into the Bill, or political parties should be brought under the purview of existing privacy legislation. The Bill's requirement to simply have and publish a policy is woefully inadequate. CCLA is in general agreement with the amendments proposed by the Office of the Privacy Commissioner of Canada.

CCLA also wishes to note its support for portions of the Bill that reverse some of the negative changes that were made when Parliament passed the so-called *Fair Elections Act* (allowing for use of voter information cards, the return of vouching, and the loosening of restrictions on the educational activities of the Chief Electoral Officer). We also welcome the reform that will allow Canadian citizens who reside abroad to continue to participate in federal elections.

## **Restricting Political Expression**

Bill C-76 imposes a new regime with respect to advertising expenses incurred by both political parties/candidates and third parties by adding limitations on what can be spent during a pre-election (or pre-writ) period. The addition of new restrictions in the pre-writ period is premised on the idea that, with fixed-date elections, political actors can easily circumvent spending limits imposed after the writ has dropped by instead spending in the lead up to the election period. In addition to changing the overall spending limits the *Canada Elections Act* places on these actors, the Bill purports to draw a distinction between partisan advertising and election advertising and sets out different thresholds and limits that apply during the writ and pre-writ periods. Moreover, third parties and political parties/candidates continue to receive differential treatment under the regime.

As recognized by the government in its *Charter* statement in relation to Bill C-76, these restrictions have an impact on freedom of expression, freedom of association, and the right to vote protected by the *Charter*. The statement suggests that these impacts are consistent with the *Charter* and that they promote equality and help to ensure that those with more resources do not crowd out the voices of other actors who may be less able to express themselves politically. This justification is likely based in part on statements by the Supreme Court of Canada in certain election finance cases which accept that in some cases it is legitimate and consistent with the *Charter* to restrict political speech in service of egalitarian objectives.<sup>1</sup> In particular, the Act's third party spending limits were upheld by the Supreme Court of Canada in *Harper v. Canada*.<sup>2</sup> In principle, the CCLA acknowledges that some restrictions on political advertising may be justified on the basis of egalitarian principles. However, in our view, the majority in the *Harper* case was wrong to find that the spending limits were adequately justified by the government in that case, and the dissenting judges correctly found that the restrictions could not be justified on the evidence before the Court. We note that in *Harper*, the dissenting judgment stated:

The law at issue sets advertising spending limits for citizens – called third parties – at such low levels that they cannot effectively communicate with their fellow citizens on election issues during an election campaign. The practical effect is that effective communication during the writ period is confined to registered political parties and their candidates. Both enjoy much higher spending limits. This denial of effective communication to citizens violates free expression where it warrants the greatest protection — the sphere of political discourse. As in *Libman v. Quebec (Attorney General)*, [1997] 3 S.C.R. 569, the incursion essentially denies effective free expression and far surpasses what is required to meet the perceived threat that citizen speech will drown out other political discourse.<sup>3</sup>

Political expression lies at the very core of section 2(b) of the *Charter*. Restricting what can be spent on advertising clearly limits expression on matters of public interest at a time when discussion of such matters may be most vital – just prior to or during an election period. In CCLA's view, any restrictions of this type of expression are significant and should be clearly and demonstrably justified on the basis of some clear evidence that a failure to regulate would do

---

<sup>1</sup> *Harper v. Canada*, 2004 SCC 3 [*Harper*], *R. v. Bryan*, 2007 SCC 12.

<sup>2</sup> *Harper*, supra note 1.

<sup>3</sup> *Harper*, para. 2 (emphasis added).

harm, and that the particular restrictions imposed are narrowly tailored in light of the objective sought. In the context of justifying third party spending limits, there should be some evidence that the harm Parliament seeks to guard against is more than merely speculative and that the measures imposed by law are tailored in a manner that doesn't effectively silence third parties. The CCLA wishes to highlight three points for the Committee to consider in relation to the Bill's political advertising scheme.

First, notwithstanding the Supreme Court of Canada's decision in *Harper*, there does not appear to be clear or convincing evidence of the need for the significant restrictions on third party election advertising contained in the Act (including existing requirements, such as the need to register with Elections Canada after spending only \$500). The Court has largely relied on logic and common sense to support these restrictions, without carefully considering that expression that lies at the core of section 2(b) should not be restricted absent a higher standard. We appreciate that regulating political advertising is a complex matter and that scientific evidence or proof of the impact of advertising on elections may be elusive and will not be conclusive. Nevertheless, restricting a freedom as fundamental as the right to engage in political speech requires justification on evidence. The Committee should be considering the costs associated with mounting an effective national campaign and competing with the spending that is permitted for parties and candidates. Absent any evidence of the impact of advertising on elections, the line drawing and details around restrictions on advertising can be simply plucked out of thin air.

The need for evidence is highlighted by some of the distinctions the Bill draws. As the Chief Electoral Officer noted when he appeared before the Committee, the Bill restricts political parties in the pre-writ period only in terms of their partisan advertising, while the restrictions on third parties are much broader. On what basis has this distinction been drawn? How can it be justified? In *Harper* the evidence demonstrated that the national cap on third party spending was lower than the cost of publishing a one-time, full-page advertisement in major Canadian newspapers,<sup>4</sup> and that the cap in single constituencies would have precluded a bulk mailing to all homes in that constituency.<sup>5</sup> Have these problems been addressed with the new spending limits such that a third party could effectively engage in a national campaign?

Second, and at a more general level, CCLA has concerns about the value and practicality of differentiating between partisan and election advertising, or more generally, attempting to limit issue-based advocacy when an issue is one with which "a registered party or candidate is associated". It is important to recognize that whether or not an issue is associated with a candidate or party will change over time, and regulation of this type requires the regulator to be aware of which issues may be associated with candidates and parties – something that may be quite difficult to track and monitor given the size of our country and the number of constituencies. As the U.S. Supreme Court has noted: "What separates issue advocacy and political advocacy is a line in the sand drawn on a windy day."<sup>6</sup>

By continuing to restrict issue-based advocacy, the limits on third party advertising restrict expression that may not be targeted at influencing elections, and may instead serve to unduly

---

<sup>4</sup> *Ibid.*, para. 4

<sup>5</sup> *Ibid.*, para. 5

<sup>6</sup> *McConnell v. Federal Election Commission*, 540 U.S. 93 (2003) and *Federal Election Commission v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007).

narrow the parameters of public debate around government policy or proposed policy options. CCLA also has concerns that this distinction between issue advocacy and partisan advocacy may not provide helpful guidance to political actors who are advertising, and will be difficult for election officials to enforce equally across the board.

Third, while we appreciate the rationale for restricting advertising in the pre-writ period, there is no evidence that these limits will be effective in curbing the influence of money in electoral campaigns. Indeed, there is reason for doubt. Certain communications tools – particularly some social media platforms – may be used to build a large audience or group of followers well in advance of the campaign or pre-writ period, making it easier to advertise without significant additional expenditures during the regulated periods. If restrictions on freedom of expression cannot be clearly justified and there are sound reasons to doubt their effectiveness, such restrictions should not be imposed. Once again, CCLA is concerned about the evidentiary basis for the regulation set out in the Bill and calls for the government to be transparent about the evidence upon which its policies are based. Absent such evidence, significant restrictions on core political expression cannot be justified.

We note, finally, that particularly in the realm of electoral reform, lawmakers have a vested interest in reforming the system in a way that may benefit them personally and politically. Insisting that restrictions on political speech be based on clear evidence is one important way to address this concern about self-dealing and may, as a result, enhance the integrity of the system. In addition, CCLA suggests that the Committee consider whether spending limits should be set by an independent commission (as is done with respect to electoral boundaries) rather than established in legislation and subject to an inflation adjustment factor. Since the parties in Parliament have a direct interest in spending limits, referring the issue to an independent body would help avoid the potential for self-dealing *and* any perception that this may be occurring.

### **Privacy protections and political parties**

Another area of concern for the CCLA relates to Bill C-76's treatment of personal information held in the hands of political parties. While the government has touted this reform as "empowering" parties to better protect the privacy of Canadians, the legislative provisions at issue set out no meaningful privacy standards to which parties would be held. The Bill simply requires parties to have a policy for the protection of personal information and to make that policy available to the public. While the policy would have to include the name and contact information of a person to whom privacy concerns may be addressed, there is no effective enforcement mechanism to deal with such concerns. The provisions also contemplate that parties may choose to sell personal information in certain circumstances and places no restrictions on this kind of activity so long as the circumstances in which this may be done are set out in the public policy.

Canadians are increasingly concerned about the protection of their personal information and have reason to question how and why it is being used. The use and management of voter information by political parties is an important issue and, in CCLA's view, basic privacy principles must be respected. As Prof. Teresa Scassa has written, the provisions contained in Bill C-76 fall short on many grounds:

There is no requirement that the purposes for collection, use or disclosure meet a reasonableness standard; there is no requirement to limit collection only to what is necessary to achieve any stated purposes; there is nothing on data retention limits; and there is no right of access or correction. And, while there is a requirement to identify a contact person to whom any concerns or complaints may be addressed, there is no oversight of a party's compliance with their policy... There is also no external complaints mechanism available.<sup>7</sup>

In CCLA's view, the Bill could do significantly more to protect the personal information of Canadians and hold political parties to account for their practices with respect to such information. We have had the opportunity to consider the amendments proposed by the Office of the Privacy Commissioner and believe they would substantially improve the Bill. At the same time, we are particularly concerned about the parties' use of online tools and tracking and note that explicit requirements that these questions be addressed in party policies would be helpful and should be explicitly set out in the legislation. This would extend beyond the current requirement to include a statement about the use of cookies on the parties' websites, and should encompass other embedded tracking technology.

### **Other Aspects of Bill C-76**

CCLA was a strong opponent of some of the changes that were ushered in under the so-called *Fair Elections Act*. We are pleased to see that some of the regressive provisions have been reversed, including allowing use of the voter information card, the return of vouching, and removing some of the restrictions that were placed on the Chief Electoral Officer's ability to engage in educational activities for voters.

The change to allow Canadian citizens who reside abroad to vote is one that CCLA strongly supports. We are pleased to see this long overdue amendment and continue to take the position that the current law violates the right to vote as set out in section 3 of the *Charter*.

---

<sup>7</sup> [http://www.teresascassa.ca/index.php?option=com\\_k2&view=item&id=276:a-federal-bill-to-impose-privacy-obligations-on-political-parties-in-canada-falls-way-short-of-the-mark&Itemid=80](http://www.teresascassa.ca/index.php?option=com_k2&view=item&id=276:a-federal-bill-to-impose-privacy-obligations-on-political-parties-in-canada-falls-way-short-of-the-mark&Itemid=80)