

Ontario third party advertising provisions held to be unconstitutional

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The ability to openly and freely debate political issues is the lifeblood of democracy. There is significant value in people being engaged in issues and voicing their positions to others, including government. However, in the past 20 years concern has been expressed by political scholars that the rich and powerful can unduly influence elections by advertising their opinions to others and persuading people to either vote for candidates or parties who support their views or against candidates or parties who oppose their views. While the concerns are understandable and legitimate from the perspective that elections should be fought on a level and even financial playing field for all candidates and parties, restricting third parties from advertising their opinions on issues either before or during an election period can have a chilling effect on the rights of freedom of speech and cause harm to our democracy.

In *Working Families Ontario v. Ontario*, 2021 ONSC 4076, Justice Morgan determined that recent amendments to Ontario's *Election Finances Act* that increased the pre-election restricted spending period for third party advertising from six months to twelve months was unjustified in a free and democratic society. Accordingly, multiple sections of the Act have been struck down as being unconstitutional.

Ontario has had rules concerning third party advertising since 2007. While originally there were no spending limits placed on the third party advertisers, they were required to register with the Chief Electoral Officer and to report on how much they spent during the election period. "Political advertising" was defined as advertising in any medium with the purpose of promoting or opposing a registered party, its leader, or the election of a registered candidate.

In 2017, the Ontario government amended the Act to redefine the definition of "political advertising" to include "issue-based" advertising. In addition, the restricted period for third party advertising was extended to 6 months before the dropping of a general election writ. The Act also includes restrictions for "political advertising" during a by-election period which applies to third party political advertising throughout the province even if the advertising is only done locally and not within an electoral district where a by-election is being held. This decision does not deal with the constitutionality of this restriction.

In 2021, the current Ontario government amended the Act by extending the pre-election restriction spending period from 6 months to 12 months.

In this case, the applicants contended that certain definitions in s. 1(1) of the Act (such as, "political advertising") and sections 37.0.1, 37.10.1(2), 37.10.1(3)-(3.1) and 37.10.2 were unconstitutional. For sake of convenience, these sections are set out at the end of this blog.

Section 37.10.1(2) establishes the pre-election expenditure limit.

In connection with the definition of "political advertising", the applicants argued that the definition was unfairly broad and unworkably vague because of its inclusion of "issue-based" advertising. The definition covered "...advertising in any broadcast, print, electronic or other medium with the purpose of promoting or opposing any...position on an issue that can reasonably be regarded as closely associated with a registered party or its leader or a registered candidate". The applicants submitted that this definition prevents individuals and civil society organizations from effectively communicating their views on virtually all major issues — from health care to education to policing to the environment — because elected politicians, in particular, the Premier, cabinet ministers and the governing party, are frequently associated with all of the important public policy issues of the day.

With respect to s. 37.10.1(3), which dealt with third parties co-ordinating with one another, the applicants argued that this provision too was unworkably broad and vague. Many of the terms in the section were undefined.

Among other arguments, the applicants also criticized the penalty regime established under the amended legislation. They argued that the penalties were severe and subject to unchecked discretion. Under s. 46.0.2, any third party that contravened the spending limit was, in addition to other penalties, liable to a fine up to five times the amount by which they overspent, in addition to an administrative penalty, under s. 45.1, of up to \$100,000 for each contravention. The applicants contended the severity of the penalties placed a chilling effect on political expression.

Justice Morgan found that there was little doubt that third party political advertising spending limits such as those found in section 37.10.1(2) restricted freedom of expression. Indeed, the Attorney General conceded this point. Accordingly, the ultimate outcome of the case turned on whether the constitutional infringement was justified under s. 1 of the *Charter of Rights and Freedoms*.

While the court found that the definition of “political advertising” was not constitutionally vague because it did not so lack in precision as to not give sufficient guidance for legal debate (see *R. v. Nova Scotia Pharmaceutical Society*, 1992 CanLII 72 (SCC)) or, in other words, could be coherently debated in terms of the Act’s own guidelines, the impugned third party advertising provisions were unconstitutional because they failed to meet the minimal impairment component of the *R. v. Oakes*, 1986 CanLII 46 (SCC) test.

Under the *Oakes* test, in order to save a statutory provision as being a reasonable limit under s. 1 of the *Charter*, the court must first be satisfied that the objective of the law is of sufficient importance to warrant the overriding of a constitutionally protected right. The objective must be pressing and substantial.

The court must also be satisfied that the means chosen are “reasonable and demonstrably justified”. This involves a “proportionality test” under which the following three components must be satisfied”:

- (i) there must be a rational connection between the means chosen by the legislature and the legislative objective;
- (ii) the means must impair the right as little as possible in order to achieve the legislative objective; and
- (iii) there must be proportionality between the legislative objective and the effect of the legislation on the Charter-protected interests that it limits.

Justice Morgan held that the legislation failed the minimal impairment test because the government’s own expert witnesses had testified that a 6 month pre-election period was the appropriate and effective period in which spending restrictions for political advertisements should operate. While these same experts also testified that a 12 month pre-election period was reasonable, it was self-evident to the court that if a 6 month impairment accomplished the desired objective of the restriction, a 12 month impairment could not be a least drastic means. The government failed to provide any justification or explanation why the doubling of the pre-election regulation period was implemented. As determined by the Supreme Court of Canada in *Alberta v. Hutteran Brethren of Wilson Colony*, 2009 SCC 37 at paragraph 54: “...the minimum impairment test requires only that the government choose the least drastic means of achieving its objective.”

Since all of the features of the impugned provisions were enacted in aid of the creation of a pre-election 12 month regulated period and that the time period failed the minimal impairment test and, for the same reasons, the proportionality test, it made no sense for those provisions to survive in the Act on their own. Justice Morgan determined that if there was no restriction on political advertisements there was no reason to define the term, provide examples in aid of its interpretation, require reporting expenditures or enforce anything in relation to such expenditures. In His Honour’s judgment, once the primary policy in section 37.10.1(2) fell, the subordinate policies also had to fail.

This decision is important because it now permits third parties to advertise on political issues without restrictions. There are no spending limits in place and no administrative requirements to follow or penalties to be worried about for the time being. The Ontario government can, of course, draft new legislation that will implement new restrictions and perhaps reduce the time period in which pre-election spending restrictions apply. Based on the government’s evidence, a 6 month period might be reasonable subject to any lesser period being found to be reasonable. The ball is now in the government’s court and it will be interesting to see what it does before the next election to ensure that all elections, whether general elections or by-elections, are fought on an equal and fair financial footing for all candidates and parties.

According to media reports, the Ontario government may not amend the Act, but may seek to invoke the notwithstanding clause of the Charter to preserve the 12 month pre-election spending restriction. If they do so, then third parties will be required to comply with the provisions that have just been declared to be unconstitutional and there may be more litigation.



Election Finances Act, R.S.O. 1990, c. E-7

Interpretation

1 (1) In this Act,

“broadcasting undertaking” means a broadcasting undertaking as defined in [section 2](#) of the *Broadcasting Act (Canada)*; (“entreprise de radiodiffusion”)

“by-election” means an election other than a general election; (“élection partielle”)

“campaign expense” means any expense incurred for goods or services in relation to an election by or on behalf of a political party, constituency association or candidate registered under this Act for use in whole or in part during the period commencing with the issue of a writ for an election and terminating on polling day, other than,

- (a) expenses incurred by a candidate in seeking nomination in accordance with the *Election Act*,
- (b) a candidate's deposit as required under the *Election Act*,
- (b.1) expenses that are incurred by a candidate with disabilities and that are directly related to the candidate's disabilities,
- (c) auditor's and accounting fees,
- (d) interest on loans authorized under [section 35](#),
- (e) expenses incurred in holding a fund-raising activity referred to in [section 23](#),
- (f) expenses incurred for “victory parties” held and “thank you” advertising published after polling day,
- (g) expenses incurred in relation to the administration of the political party or constituency association,
- (h) transfers authorized under [section 27](#),
- (i) fees paid in respect of maintaining a credit card facility,
- (j) expenses relating to a recount in respect of the election,
- (k) child care expenses of a candidate and other expenses not of partisan value that are set out in guidelines provided by the Chief Electoral Officer under [clause 2 \(1\) \(j\)](#),
- (l) expenses relating to research and polling, and
- (m) travel expenses,

but shall be deemed to include the value of any goods held in inventory or any fees or expenses for services for any candidate or political party, and any contribution of goods and services to the political party, constituency association or candidate registered under this Act, for use in whole or in part during the period commencing with the issue of the writ for an election and terminating on polling day; (“dépenses liées à la campagne électorale”)

“campaign period” means the period commencing with the issue of a writ for an election and terminating three months after polling day; (“période de campagne électorale”)

“candidate” means a person who has received a certificate under [section 27.1](#) or [27.2](#) of the *Election Act* as a candidate in an electoral district; (“candidat”)

“Chief Electoral Officer” means the Chief Electoral Officer appointed under [subsection 3.1 \(2\)](#) of the *Election Act*; (“directeur général des élections”)

“constituency association”, in an electoral district, means the association or organization endorsed by a registered party or an independent member as the official association of that party or that member in the electoral district; (“association de circonscription”)

“contribution” does not include,



(a) any goods produced, or services performed, for any political party, constituency association, nomination contestant, candidate or leadership contestant by voluntary labour, and

(b) any money, goods or services solicited by or donated to a political party, constituency association, nomination contestant, candidate or leadership contestant for purposes other than the purposes set forth in subsections 10 (1), 11 (1), 12.1 (1), 13 (2) and 14 (1), respectively; (“contribution”)

“election” means an election to elect a member or members to serve in the Assembly; (“élection”)

“financial institution” means,

(b) a corporation registered under the *Loan and Trust Corporations Act*,

(c) a credit union within the meaning of the *Credit Unions and Caisses Populaires Act, 1994*, or

Note: On a day to be named by proclamation of the Lieutenant Governor, clause (c) of the definition of “financial institution” in subsection 1 (1) of the Act is amended by striking out “*Credit Unions and Caisses Populaires Act, 1994*” and substituting “*Credit Unions and Caisses Populaires Act, 2020*”. (See: 2020, c. 36, Sched. 7, s. 308)

(d) a retail association as defined under the *Cooperative Credit Associations Act (Canada)*; (“institution financière”)

“general election” means an election in respect of which election writs are issued for all electoral districts; (“élection générale”)

“independent member” means a member of the Assembly who is not affiliated with a registered party in the Assembly; (“député indépendant”)

“leadership contest period” means the period commencing with the date of the official call for a leadership contest as set forth in the statement filed by a registered party under subsection 14 (2) and terminating 14 months after the date of the leadership vote; (“période de campagne de désignation du chef d’un parti”)

“leadership contestant” means a person seeking election as leader of a registered party at a leadership contest called by that party for the purpose; (“candidat à la direction d’un parti”)

“leadership vote” means the date on which polling takes place to elect a leader of a registered party at a leadership contest; (“scrutin tenu en vue de désigner le chef d’un parti”)

“nomination contestant” means a person seeking endorsement as an official party candidate for an electoral district; (“candidat à l’investiture”)

“nomination contest period” means, with respect to a nomination contestant, the period that begins when the contestant first receives or spends funds for the purpose of achieving the endorsement, and ends three months after the candidate for the electoral district is selected; (“période de course à l’investiture”)

“person” includes a nomination contestant, a candidate and a leadership contestant, but does not include a corporation or trade union; (“personne”)

“political advertising” means advertising in any broadcast, print, electronic or other medium with the purpose of promoting or opposing any registered party or its leader or the election of a registered candidate and includes advertising that takes a position on an issue that can reasonably be regarded as closely associated with a registered party or its leader or a registered candidate and “political advertisement” has a corresponding meaning, but for greater certainty does not include,

(a) the transmission to the public of an editorial, a debate, a speech, an interview, a column, a letter, a commentary or news,

(b) the distribution of a book, or the promotion of the sale of a book, for no less than its commercial value, if the book was planned to be made available to the public regardless of whether there was to be an election,

(c) communication in any form directly by a person, group, corporation or trade union to their members, employees or shareholders, as the case may be,

(d) the transmission by an individual, on a non-commercial basis on the Internet, of his or her personal political views, or



(e) the making of telephone calls to electors only to encourage them to vote; (“publicité politique”, “annonce politique”)

“polling day” means the day fixed under the *Election Act* for holding the poll at an election; (“jour du scrutin”)

“pre-certified candidate” means an individual whose nomination paper has been accepted for filing and who has been issued a certificate by the Chief Electoral Officer under subsection 27.2 (5) of the *Election Act* before the date a writ of election is issued; (“candidat doté d’une attestation préalable”)

“registered candidate” means a candidate registered under this Act; (“candidat inscrit”)

“registered constituency association” means a constituency association registered under this Act; (“association de circonscription inscrite”)

“registered leadership contestant” means a leadership contestant registered under this Act; (“candidat à la direction inscrit”)

“registered nomination contestant” means a nomination contestant registered under this Act; (“candidat à l’investiture inscrit”)

“registered party” means a political party registered under this Act; (“parti inscrit”)

“third party” means a person or entity, other than a registered candidate, registered constituency association or registered party; (“tiers”)

“trade union” means a trade union as defined by the *Labour Relations Act* or the *Canada Labour Code* that holds bargaining rights for employees in Ontario to whom those Acts apply and includes any central, regional or district labour council located in Ontario; (“syndicat”)

“voluntary labour” means any service provided free of charge by a person outside their working hours, but does not include such a service provided by a person who is self-employed if the service is one that is normally charged for by that person; (“travail bénévole”)

“year” means calendar year. (“année”) R.S.O. 1990, c. E.7, s. 1 (1); 1998, c. 9, s. 51 (1-9); 2001, c. 32, s. 25; 2007, c. 15, ss. 29, 40 (1); 2007, c. 7, Sched. 7, s. 186 (1); 2016, c. 22, s. 1 (1-6), 58; 2016, c. 33, s. 35 (1); 2017, c. 18, s. 4 (1); 2018, c. 17, Sched. 12, s. 7; 2021, c. 5, Sched. 2, s. 1.

Considerations re political advertising

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Considerations re political advertising

37.0.1 In determining whether an advertisement is a political advertisement, the Chief Electoral Officer shall consider, in addition to any other relevant factors,

- (a) whether it is reasonable to conclude that the advertising was specifically planned to coincide with the period referred to in section 37.10.1;
- (b) whether the formatting or branding of the advertisement is similar to a registered political party’s or registered candidate’s formatting or branding or election material;
- (c) whether the advertising makes reference to the election, election day, voting day, or similar terms;
- (d) whether the advertisement makes reference to a registered political party or registered candidate either directly or indirectly;



GARDINER
ROBERTS

Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com

- (e) whether there is a material increase in the normal volume of advertising conducted by the person, organization, or entity;
- (f) whether the advertising has historically occurred during the relevant time of the year;
- (g) whether the advertising is consistent with previous advertising conducted by the person, organization, or entity;
- (h) whether the advertising is within the normal parameters of promotion of a specific program or activity; and
- (i) whether the content of the advertisement is similar to the political advertising of a party, constituency association, nomination contestant, candidate or leadership contestant registered under this Act. 2016, c. 22, s. 33.

No combination to exceed limit

(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. 2021, c. 5, Sched. 2, s. 15 (3).

Contributions

(3.1) Any contribution from one third party to another third party for the purposes of political advertising shall be deemed as part of the expenses of the contributing third party. 2021, c. 5, Sched. 2, s. 15 (3).

Interim reporting requirements

37.10.2 (1) Every third party shall promptly file the following interim reports with the Chief Electoral Officer, in the prescribed form:

1. When it has paid or committed to any person or entity to spend any funds on paid political advertising, it shall report the amount spent or committed, with a separate report being required each time its aggregate spending increases by an amount of at least \$1,000.
2. When it has reached the applicable spending limit under [section 37.10.1](#), it shall report that fact. 2021, c. 5, Sched. 2, s. 16.

Administrative penalties

45.1 (1) Where the Chief Electoral Officer believes on reasonable grounds that a person or entity has contravened one of the following provisions of this Act, the Chief Electoral Officer may make an order requiring the person or entity to pay an administrative penalty:

1. Subsection 12.1 (1).
2. Subsection 14 (1).
3. Section 18.
4. Subsection 22 (9).
5. Section 32.
6. Subsection 36.1 (1).



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7. Subsections 37 (2) and (3).
8. Subsections 37.5 (1) and (5).
9. Subsections 37.10.1 (1) and (2).
10. Subsections 37.10.2 (1) and (5).
11. Subsections 37.12 (1) and (8).
12. Subsections 38 (1), (2), (3) and (3.1).
13. Section 38.1.
14. Section 41.1.
15. Section 41.2. 2021, c. 5, Sched. 2, s. 22.

Purpose

(2) The purpose of an administrative penalty is to promote compliance with this Act and the *Election Act*. 2021, c. 5, Sched. 2, s. 22.

Limitation

(3) The Chief Electoral Officer shall not make an order requiring the payment of an administrative penalty more than two years after the date on which the Chief Electoral Officer became aware of the contravention. 2021, c. 5, Sched. 2, s. 22.

Payment, etc.

(4) An administrative penalty shall be paid into the Consolidated Revenue Fund, and shall be in an amount determined by the Chief Electoral Officer in accordance with this section. 2021, c. 5, Sched. 2, s. 22.

Maximum amounts

(5) The maximum amount of an administrative penalty under this section shall be determined as follows:

1. For a contravention of [section 18](#) is an amount equal to twice the amount that was contributed in contravention of that section, plus \$1,500, in the case of an individual, and plus \$5,000, in the case of a corporation or other entity.
2. For a contravention of [subsection 22 \(9\)](#), [37 \(2\)](#) or [37.10.2 \(1\)](#) or (5), \$10,000 in the case of an individual, and \$100,000 in the case of a corporation or other entity.
3. For a contravention of [subsection 37.5 \(1\)](#), [37.5 \(5\)](#) or [37.12 \(8\)](#), \$10,000.
4. In all other cases, \$1,500, in the case of an individual, and \$5,000 in the case of a corporation or other entity. 2021, c. 5, Sched. 2, s. 22.

Criteria for penalty

(6) The amount of an administrative penalty is to be determined taking into account,

- (a) the degree of intention or negligence on the part of the person or entity that committed the contravention;
- (b) the harm done by the contravention;
- (c) whether the person or entity derived any advantage from the contravention;
- (d) whether the person or entity made reasonable efforts to mitigate or reverse the contravention's effects;
- (e) whether the person or entity has taken steps to avoid committing the contravention in the future;



Bay Adelaide Centre — East Tower
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Phone: 416.865.6600
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- (f) whether the person or entity has provided all reasonable assistance to the Chief Electoral Officer with respect to the contravention, including reporting it and providing any relevant information;
- (g) the person's or entity's history of compliance with the provisions of this Act;
- (h) the person's or entity's ability to pay the penalty;
- (i) any aggravating and mitigating circumstances; and
- (j) any other factor that, in the opinion of the Chief Electoral Officer, is relevant. 2021, c. 5, Sched. 2, s. 22.

Notice

(7) The Chief Electoral Officer may take into account a factor under clause (6) (j) only if a notice that sets out the factor has been published on the website of the Chief Electoral Officer. 2021, c. 5, Sched. 2, s. 22.

Consultation

(8) Before publishing a notice under subsection (7), the Chief Electoral Officer shall publish for the purpose of public consultation, a notice that sets out the proposed factor for at least 30 days on the website of the Chief Electoral Officer. 2021, c. 5, Sched. 2, s. 22.

Procedure

- (9) An order requiring a person or entity to pay an administrative penalty shall be served on the person or entity and shall,
- (a) contain a description of the contravention to which the order relates, including the date of the contravention;
 - (b) specify the amount of the penalty, and warn about the increasing amounts for subsequent contraventions;
 - (c) give particulars respecting the time for paying the penalty and the manner of payment; and
 - (d) provide details of the person or entity's right of appeal. 2021, c. 5, Sched. 2, s. 22.

Appeal

(10) A person or entity who is served with an order to pay an administrative penalty may appeal the Chief Electoral Officer's decision by filing an application with the Superior Court of Justice within 30 days from the date the order was served, and the following applies to such an appeal:

1. The application must be accompanied with a copy of the order and state the reasons for the appeal.
2. A copy of the application must be served on the Chief Electoral Officer not less than 30 days before the appeal is to be heard.
3. The Superior Court of Justice may, on application, extend the 30 day period for making an appeal, if it considers it appropriate to do so.
4. On hearing the appeal, the Superior Court of Justice may confirm, rescind or vary the amount of the administrative penalty. 2021, c. 5, Sched. 2, s. 22.

Failure to pay

(11) If a person or entity who is required to pay an administrative penalty fails to comply with the requirement, the Chief Electoral Officer may file the order that requires payment with a local registrar of the Superior Court of Justice and the order may be enforced as if it were an order of the court. 2021, c. 5, Sched. 2, s. 22.

Additional penalty, third parties

46.0.2 Any third party that contravenes [section 37.10.1](#) is liable, in addition to the any other applicable penalty, to a further fine not exceeding five times the amount by which the third party exceeded the applicable limit under that section. 2016, c. 22, s. 57.

If you require any litigation assistance, our [Dispute Resolution Group](#) lawyers are available to assist you. Please contact [Stephen Thiele](#) at 416.865.6651.



Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com

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Author



Stephen A. Thiele

Partner

416.865.6651

sthiele@grllp.com



Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
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