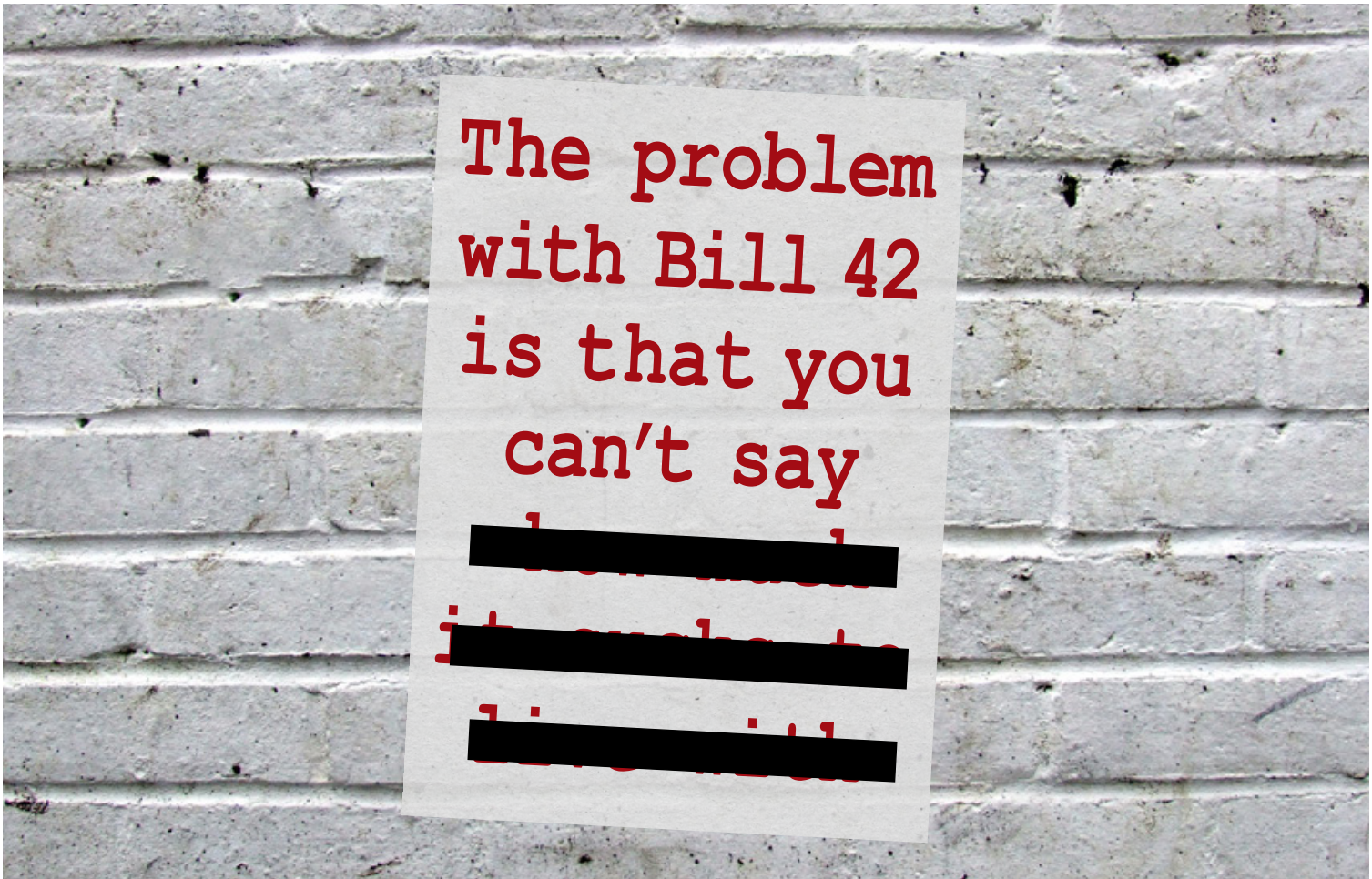


Election Chill Effect

The Impact of BC's New Third Party Advertising Rules on Social Movement Groups

Summary

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The problem
with Bill 42
is that you
can't say
[REDACTED]
[REDACTED]
[REDACTED]

by Shannon Daub and Heather Whiteside
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Summary

“For groups to be scared to speak up about the government...or scared to know what they could and could not do, is really bad. It was not a good feeling.”

IN MAY 2008 THE BC GOVERNMENT PASSED BILL 42, the Election Amendment Act, which limits spending on election advertising by “third parties” (any individual or group other than political parties and candidates running for office).

Bill 42 had significant and disturbing impacts on public debate in the lead-up to the 2009 provincial election, particularly for “social movement organizations:” charities, non-profits, coalitions, labour unions and citizens’ groups. These problems resulted from features of the third party advertising rules other than the spending limits themselves, in particular:

- *An extremely broad definition of election advertising:* The new definition covers a host of activities that most people likely would not think of as “advertising.” It includes non-partisan analysis of public policy issues and public communication that “takes a position on an issue with which a registered political party or candidate is associated.” The definition does not rule out free or low-cost tools like websites, social media, emails, petitions, or public forums.
- *Zero-dollar registration threshold:* Third parties must register with Elections BC before they conduct any “advertising,” even if they plan to engage *only* in free or low-cost activities; all registered third parties are publicly listed as election advertising sponsors on Elections BC’s website.
- *Volunteer labour defined as an election advertising “expense”:* If a third party uses volunteers in its advertising activities, the market value of their work must be reported as an expense. Political parties and candidates, in contrast, are not required to report volunteer labour as an election expense.
- *60-day pre-campaign period:* Rather than limit third party advertising during the official 28-day election campaign only, the new rules extended the limits to an additional 60-day pre-campaign period. The BC Supreme Court subsequently struck down the spending limits during this extra 60 days, but the requirement to register and report on advertising activities for the entire 88 days remains in force.

Bill 42 sparked heated media debate and a strong public reaction, mostly focused on how it would affect the speech rights of “big spenders” like corporations and large unions. Indeed, the new third party advertising rules were created, according to then-Attorney General Wally Oppal, to ensure electoral fairness—to level the playing field so those with the deepest pockets cannot dominate the election discourse. Contrary to this objective, however, the rules also extensively regulate the activities of “small spenders”—individuals and groups that spend little or nothing on election advertising.

This study examined the impact of BC’s new third party advertising rules specifically on social movement organizations in the lead-up to the 2009 provincial election. Sixty-five social movement groups participated in the research, 60 of which were aware of the new third party advertising rules prior to being contacted. Most are non-profit societies, 10 per cent are coalitions and 27 per cent are labour groups. Sixty-one per cent have annual budgets of less than \$500,000.

LEGISLATING CONFUSION

- The rules led to widespread confusion among study participants, which resulted in contradictory and incorrect interpretations, and arbitrary responses such as self-censorship.
- Participants had particular difficulty determining whether the very broad new definition of advertising and the inclusion of free and low-cost communication activities meant that their normal, mandate-driven education and advocacy work was suddenly re-defined as election advertising.
- Eighty-seven per cent of participants reported finding the definition of election advertising somewhat or very confusing.
- Confusion persisted for many groups despite expert advice from lawyers or Elections BC.

“Like other non-profit organizations, our website is our primary tool of communication with and information for our members and the general public...But with these rules, the very same website—unchanged—suddenly becomes election advertising. This is neither logical nor supportive of democracy.”

REGULATING THE WRONG GROUPS

- An analysis of the disclosure reports filed with Elections BC by 232 organizations registered as third party sponsors reveals that 59 per cent spent less than \$500 during the 2009 election campaign period. More than three quarters (76 per cent) spent well below even the \$3,000 limit for a single constituency.
- Because most non-profits are careful to remain non-partisan, and because registered charities are strictly prohibited under federal law from engaging in partisan activities, the prospect of being publicly labeled as a “third party advertising sponsor” created anxiety for many of the participant organizations.
- Six participant groups censored their public communication activities specifically in order to avoid having to register as advertising sponsors. Ten others did not register because they felt the law was illegitimate, as it does not distinguish between advertising versus information and analysis that contributes to healthy democratic debate.

- The third party advertising rules disproportionately burden small organizations, which are often entirely volunteer-run or have only one or two staff members. Small groups tended to spend inordinate amounts of time figuring out the rules and their potential reputational impact, tracking financial contributions and expenses and second-guessing their decisions—which disrupted their core activities and services.
- The rules were particularly problematic for small spenders and charities, many of which represent vulnerable citizens and less economically powerful interests—the very groups that should benefit from third party advertising limits.

CHILL EFFECT

“The term ‘election advertising’ is a misnomer; it’s actually ‘speaking out legislation.’”

The most troubling finding of this research is that a significant number of organizations self-censored in order to comply with the new election advertising rules—including both registered and non-registered groups. In other words, the rules cast an anti-democratic chill over election discourse. As a result, public debate during the months leading to the 2009 BC provincial election did not benefit from the full range of perspectives historically made available to voters by local charities, non-profits, coalitions and other social movement organizations.

- Forty per cent of participants altered their normal or previously planned activities as a result of the new rules. The spending limits themselves were only relevant to a few of these alterations (i.e., some reduced their activities in order not to over-spend the limits). Between 27 and 33 per cent of participants self-censored for other reasons, including confusion about the rules, decisions to err on the side of caution, and/or to avoid having to register as an election advertising sponsor.
- Most of the activities the participants altered had little to do with commercial advertising. For example, nine groups did not post new material on their websites; four removed previously posted material from their websites; four altered the tone or content of their communications; five temporarily halted an existing campaign or project; three refrained from using online social networking sites; four refrained from issuing or endorsing a call for changes to government policy or legislation; and one group withdrew from two coalitions.

Definition of Election Advertising in BC’s Election Act (S. 228)

“Election advertising” means the transmission to the public by any means, during the period beginning 60 days before a campaign period and ending at the end of the campaign period, of an advertising message that promotes or opposes, directly or indirectly, a registered political party or the election of a candidate, including an advertising message that takes a position on an issue with which a registered political party or candidate is associated, but does not include

- (a) the publication without charge of news, an editorial, an interview, a column, a letter, a debate, a speech or a commentary in a bona fide periodical publication or a radio or television program,
- (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) the transmission of a document directly by a person or a group to their members, employees or shareholders, or
- (d) the transmission by an individual, on a non-commercial basis on the internet, or by telephone or text messaging, of his or her personal political views.

- Five groups refrained entirely from public commentary in the mainstream media, an activity that is explicitly exempt from the definition of “election advertising.”

KEY RECOMMENDATIONS

The following recommendations would, provided they are implemented together, clarify BC’s third party advertising rules and shift their focus away from small spenders. We are of the view, however, that if these recommendations are not implemented, Bill 42 should be repealed, as its harmful effects on the democratic process outweigh any benefits.

The provincial government should abandon its appeal of the BC Supreme Court ruling that struck down spending limits during the 60-day pre-campaign period, and amend BC’s Election Act to:

- Remove all references and requirements related to the 60-day pre-campaign period.
- 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.
- Establish minimum spending thresholds, indexed to inflation, below which third parties would not be required to register. These should be set at \$1,000 for advertising within a single constituency, and \$5,000 for province-wide advertising.
- Require third parties to register only once they reach the threshold, as is the case in the Canada Election Act.
- Exempt charities from the third party advertising rules altogether, as they are already federally regulated and in order to achieve registered charity status must demonstrate that they are non-partisan and make a contribution to the public good.
- Exempt volunteer labour from the definition of an election advertising expense (as is the case federally, and as the BC Election Act does for political party and candidate expenses).

“We meet in each others’ homes, in our living rooms, and we do it all for free... I really think that these kinds of rules, it’s good to have them...for big corporations, for unions. ...But, it shouldn’t be about us small groups that are volunteer based that are doing things out of our living rooms for goodness’ sake.”

The following additional recommendations are particularly important if the provincial government does not fix the third party advertising rules prior to the next election:

- The provincial government should provide additional funds to Elections BC to improve administration of the rules.
- Elections BC should develop case examples that explain more clearly and concretely how the rules apply, in particular with regard to what kinds of communication activities and messages are covered.
- Elections BC should provide advance rulings to groups seeking clarity about how the rules work in relation to their specific communication activities.

Ultimately, third party advertising limits should not be enacted in a vacuum, but rather should be considered in the context of a broader examination of electoral reforms that can deepen democratic rights and increase participation in elections.



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