Strange Bedfellows: The Misleading Debate over Third Party Election Financing in Alberta

Is a government backbencher's third party election finance bill an attempt by the Progressive Conservative (PC) government to silence Albertans by infringing their right to free expression? Or is it a private member's humble legislative proposal to ensure that all organizations play by the same rules that registered political parties play by?

Bill 205: The Proposed Legislation

Bill 205, the *Election Finances and Contributions Disclosure (Third Party Advertising) Amendment Act, 2009*,[1] would apply to third parties, such as trade unions or corporations, which engage in political advertising during election periods. Introduced by government MLA Rob Anderson, the bill would force third parties that intend to spend $1000 or more on election advertising to register with Alberta's Chief Electoral Officer.[2]

Registered third parties will be required to open a third party advertising bank account and all contributions over $375 will have to be declared, as is already the case with registered provincial political parties.[3]Significantly, Bill 205 limits individual contributions to third party advertising accounts to $15,000 in any non-election year and $30,000 in an election year.[4] Third parties will also have to identify themselves by name on all election advertising.[5]

The proposed legislation was passed by the Committee of the Whole on June 1st and will be debated again when the legislature resumes sitting in the fall.[6] At that time, critics from all points on the political spectrum will have their chance to denounce a bill they see as a direct attack on Albertans' freedom of expression (guaranteed by section 2(b) of the *Charter of Rights and Freedoms*).

Strange Bedfellows from Right and Left

The motivation for Bill 205 seems to come from the "Albertans for Change" anti-Conservative campaign, funded by trade unions during the last provincial election. Over a year ago, Premier Ed Stelmach went on record saying that he was considering limiting third party advertising during elections.[7] Bill 205 has received support from the PC caucus, with dissent limited to a minor amendment

proposed by Calgary MLA Neil Brown (discussed below).

Mr. Anderson has defended his bill by declaring that it will "bring more transparency to election advertising and make third parties meet the same rules as political parties."[8] The up-and-comer government backbencher believes it strikes the right balance between election fairness and necessary restrictions on individuals' freedom of speech.[9] Minister and former PC leadership candidate Ted Morton supported the bill's balancing act and reminded the legislature that it must be cautious when restricting the public's ability to criticize government.[10]

Interestingly, New Democratic Party (NDP) MLA Rachel Notley voted in favour of Bill 205 at second reading.[11] In fact, New Democrats are perhaps the most vocal supporters of limiting third party election advertising. NDP leader Brian Mason told the *Edmonton Journal* that the bill does not go far enough, saying: "I don't support third party financing in election campaigns at all."[12]

This puts the NDP at odds with their traditional trade union allies, who spent over $2 million on the 2008 "Albertans for Change" campaign, while also giving the NDP over $100,000.[13] Gil McGowan, president of the Alberta Federation of Labour, has criticized Bill 205 for "dealing with a problem that never existed."[14]The New Democrat position is supported by Public Interest Alberta, a lobby group advocating a more activist government, endorses Bill 205 in principle but as part of a comprehensive electoral reform agenda.[15]

Opposing this odd alliance of Tories and New Democrats are the Alberta Liberals, who have come out strongly against any limitations on third party election financing. Liberal MLA Harry Chase declared: "Bill 205 is not about democracy…it's about stifling the opportunity to speak."[16] His colleague Darshan Kang has gone as far as suggesting that the proposed legislation may be struck down by the courts for violating the*Charter* right to free expression.[17]

While the Liberals are alone in the legislature in opposing Bill 205, the frontrunner for the leadership of the Wildrose Alliance party Danielle Smith joins the official opposition in denouncing third party election financing restrictions. Ms. Smith believes that Bill 205 should be repealed, if passed this fall, because it "attacks one of the most basic freedoms in a democracy."[18]

The odd couples paired on either side of the issue should make for lively debate when the proposed legislation comes up for debate in the fall session of the legislature.

Tempest in a Teacup?

Critics of Bill 205 have been quick to contend that it infringes Albertans' freedom

of expression, protected by section 2(b) of the *Charter*. Liberal MLA Hugh McDonald stated in the legislature:

I think individual Charter rights are being restricted and limited by this legislation, and I don't think if it goes to court, this piece of legislation would be upheld.[19]

Similar statements were made several times during debate over Bill 205, with Liberal MLAs specifically referring to previous court decisions where restrictions on third party advertising were challenged for violating section 2(b) and section 3 (right to vote) of the *Charter*. This raises the question: would Bill 205 survive a court challenge on the grounds that it violates the *Charter*?

The Supreme Court of Canada decision in *Harper v. Canada (Attorney General)*[20] is the seminal case on the issue of third party advertising restrictions. Stephen Harper, while president of the National Citizens Coalition – an organization which advocates smaller government – challenged federal legislation limiting third party campaign *expenditures* to $150,000 nationally and $3,000 per electoral district.[21]

The Supreme Court unanimously found the restrictions did not violate section 3 of the *Charter* (democratic rights) but did violate individuals' right to free expression. However, a majority of 6-3 ruled that the restrictions were saved by section 1 as they were a reasonable limit demonstrably justified in a free and democratic society (see *Oakes test*).[22] The minority believed that the restrictions were not "minimally impairing" of free expression. However, the majority ruled that they allowed third parties "to inform the electorate of their message in a manner that will not overwhelm the candidates, political parties or other third parties."[23]

While Liberal critics of Bill 205 have not raised the *Harper* decision in debate, they have frequently noted a recent B.C. decision in which third party campaign *expenditure* restrictions were struck down. B.C.'s *Election Amendment Act, 2008* capped expenditures at $150,000 provincially and $3,000 in each electoral district[24](as did the federal legislation upheld in *Harper*). However, the B.C. restrictions applied not only to the 28-day campaign period, but also to a 60-day period prior, to reflect B.C.'s fixed-date election legislation.

The B.C. Supreme Court followed the *Harper* decision in finding the restrictions breached section 2(b). However, Justice Cole found that B.C.'s restrictions were *not* saved by section 1. The feature that distinguished the B.C. case from *Harper* was the 60-day pre-campaign period, which the court determined was not "minimally impairing."[25]As a result, the B.C. court struck down the

restrictions on third party advertising in the 60-day pre-election period, but upheld the restrictions during the 28-day campaign period.[26]

Liberal critics have jumped on the B.C. decision as evidence that Bill 205 would not survive a *Charter* challenge. Liberal MLA Darshan Kang highlighted the decision in suggesting the proposed legislation would be struck down.[27] However, two important distinctions exist between the law challenged in the previous decisions and Alberta's Bill 205.

First, while Liberal critics are correct in noting that restrictions on third party *expenditures* have been found to violate Canadians' freedom of expression, Bill 205 deals only with individual's *contributions* to third parties. The proposed legislation does not restrict how much third parties can spend, only how much individuals can give to them, as is the case with political parties. There has yet to be a case where limits on individual contributions to political or third parties have been struck down.

Second, both the *Harper* and B.C. decisions upheld restrictions on third party advertising during the election campaign period. Only in B.C., where fixed election dates allow for longer advertising campaigns prior to the election, were the pre-election campaign restrictions struck down. Alberta's Bill 205 defines the campaign period as only the period after the election has been called, as is the case in the legislation upheld in *Harper*.[28]

Liberal MLA Hugh MacDonald seemed to acknowledge this distinction, stating that:

The difference [between B.C.'s legislation and Alberta's Bill 205] is in the election period prior to the writ being dropped. That's a major difference between what was quashed in the courts in B.C. and what we have before us here today.[29]

However, MacDonald believes that because "the intent is still the same," Bill 205 will be struck down for violating section 2(b) of the *Charter*.[30]
There are valid and important arguments justifying the view that restrictions to third party advertising during election campaigns are so vital to electoral fairness that they warrant infringing Canadians' right to freedom of speech. The fall debate over Bill 205 should provide an opportunity for those on both sides of the debate to influence public opinion. However, critics who charge that Alberta's potential third party election finance legislation will be struck down by the courts are being, perhaps, overzealous at best, and disingenuous at worst.

[1]2nd Sess., 27th Leg., Alberta, 2009 .
[2]*Ibid*. at s. 39.2(1).
[3]Legislative Assembly of Alberta, *Alberta Hansard* (4 May 2009) at 942.
[4]*Bill 205* at s. 39.4(1).
[5]*Supra* note 3 at 941.
[6]Legislative Assembly of Alberta, *Alberta Hansard* (1 June 2009) at 1433.
[7]Trish Audette, "Bill 205 would limit third party advertising during elections" *Edmonton Journal* (18 April 2009).
[8]Darcy Henton, "Tories kill Liberal municipal funding bill" *Edmonton Journal* (5 May 2009).
[9]Legislative Assembly of Alberta, *Alberta Hansard* (25 May 2009) at 1221-22.
[10]*Supra* note 6 at 1429.
[11]*Ibid.*
[12]*Supra* note 7.
[13]Mark Lisac, "Bills Debate: Bill 205, control of third party advertising" *Insight into Government* (Vol: 23, No: 34, 8 May 2009).
[14]*Supra* note 7.
[15]Larry Booi, "Alberta lags the rest of country when it comes to election finance rules" *Edmonton Journal*(30 June 2009).
[16]*Supra* note 3 at 942.
[17]*Ibid.* at 945.
[18]"Policy" *Danielle Smith* (undated).
[19]*Supra* note 6 at 1432.
[20]2004 SCC 33 .
[21]Hogg, Peter W., *Constitutional Law of Canada,* 2008 Student ed., (Toronto: Thomson Carswell) at 1020.
[22]*Ibid*.
[23]*Harper* at para. 118.
[24]4th Sess., 38th Parl., British Columbia.
[25]*British Columbia Teachers' Federation v. British Columbia (Attorney General)*, 2009 BCSC 436 at para. 256.
[26]*Ibid.* at para. 284.
[27]*Supra* note 3 at 945.
[28]*Bill 205* at s. 39.1(1)(b).
[29]*Supra* note 6 at 1431.
[30]*Ibid.*