

## Submission to Elections Canada:

### Consultation on regulating election communications under the Elections Act

The Ontario Nonprofit Network (ONN) is pleased to share perspectives from the nonprofit sector regarding potential changes to the regulatory framework governing participation in federal elections by “third parties” -- that is, organizations other than political parties and candidates for election. Our submission responds to Elections Canada’s Discussion Paper One (Political Advertising) and Discussion Paper Two (Social Media).

ONN is the independent network for the 58,000 nonprofits in Ontario, focused on policy, advocacy and services to strengthen Ontario's nonprofit sector as a key pillar of our society and economy. ONN has played a role in advocating for a more enabling environment for public benefit nonprofit organizations<sup>1</sup> and educating the sector on advocacy rules during and between election periods.<sup>2</sup> Public benefit nonprofits are significantly affected by the regulatory framework for public policy advocacy around election campaigns. It is from the perspective of these organizations, their supporters, and their volunteers that we comment on the current regulatory framework and suggest changes.

As the first [consultation paper](#) notes, regulating “third-party activities during election and pre-election periods has become necessary to prevent third parties with strong financial backing from unfairly swaying elections, such as occurred in 1988 during the “free trade election” when industry groups spent significant amounts on advertising promoting free trade.

New rules regarding third-party advertising were brought in prior to the 2019 Federal election. The intent of this regulation is to level the playing field, so the multiple and diverse voices of a democracy can be heard. The purpose of the present consultation is to solicit feedback on whether the current legislation and regulations are accomplishing the goals of the regulation.

We are pleased to have the opportunity to comment as the voices of public benefit nonprofits are an essential constituency of a vibrant democracy. Canada’s public benefit nonprofits are not well served by the current regime. In the effort to restrict and limit the influence of big money in election campaigning an unintended consequence of the regulation is to silence the many smaller community voices that contribute to a vibrant democracy but are unable to manage the reporting requirements.

Moreover, the limitation of focusing only on paid advertising, excluding text messages, websites, videos, and materials on social media platforms, means the playing field is not level; well-funded partisan supporters can flood the communication channels.

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<sup>1</sup> For more information, please see ONN’s paper “Introducing the Public Benefit Sector” (2017) at <https://theonn.ca/wp-content/uploads/2017/12/Introducing-the-Public-Benefit-Nonprofit-Sector-July-2017.pdf>. An excerpt that includes the definition of public benefit organizations is provided below as Appendix A.

<sup>2</sup> See for example <https://theonn.ca/resources/advocacy/> and <https://beta.imaginecanada.ca/en/election-hub>

Efforts to make elections fair are critically important but the challenge is enormously complex in today's communications environment. We hope our perspective and suggestions will assist in the shaping of regulation.

## **Public Benefit Nonprofits and Public Policy Advocacy**

Public benefit nonprofits include charities, nonprofit co-operatives, and other nonprofits that are community-governed and have a public-oriented mission, as opposed to member-serving nonprofits such as private clubs and industry associations. There is currently no public benefit/member benefit distinction in law, but ONN has argued for one -- and the Senate Committee on the Charitable Sector has recommended that the Government of Canada consider it.<sup>3</sup> The uniform treatment of public interest advocacy (e.g., promoting anti-poverty measures) and private interest advocacy (e.g., tax breaks for certain industries) under the Elections Act suggests that making this distinction is relevant for the fair and appropriate regulation of election advocacy.

If we are to protect and hear the voices of community-driven advocacy in elections, public benefit nonprofit organizations must be understood as distinct from Political Action Committees (PACs) and other partisan advocacy groups. They differ in three fundamental ways:

1. Public benefit nonprofits have a public character (i.e., a mission that "seeks the welfare of the public: it is not concerned with the conferment of private advantage".)<sup>4</sup>
2. Public benefit nonprofits are vehicles for citizen engagement.<sup>5</sup> They are governed by volunteer directors. More than half are completely volunteer run with no paid staff.<sup>6</sup> They do not form *for the purpose of* influencing an election. They undertake their community building work on an ongoing basis. That said, election periods offer a significant opportunity for public benefit organizations to raise public policy issues requiring government action because people are listening.
3. Public benefit organizations, when they undertake advocacy, are *issue focused* and not linked to supporting a political party.<sup>7</sup> Their objective in undertaking public policy issue advocacy is to have governments take action on the issues they raise. During an election period and at other times, they raise issues that sometimes are taken up by one or more political parties. Charity regulation forbids charities from undertaking partisan political activities; community benefit nonprofits and nonprofit cooperatives typically do not support a political party as they must work with whomever forms government.

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<sup>3</sup> See Special Senate Committee on the Charitable Sector. "Catalyst for Change." Recommendation 40.

<https://sencanada.ca/en/info-page/parl-42-1/cssb-catalyst-for-change/>

<sup>4</sup> Canada Revenue Agency. "Guidelines for registering a charity: The public benefit test."

<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/policy-statement-024-guidelines-registering-a-charity-meeting-public-benefit-test.html#toc3>

<sup>5</sup> Statistics Canada. Cornerstones of Communities. p. 8.

<https://www150.statcan.gc.ca/n1/en/pub/61-533-x/2004001/4200353-eng.pdf?st=KeF1VF2Q>

<sup>6</sup> Statistics Canada. Cornerstones of Communities. p. 32.

<sup>7</sup> See Canada Revenue Agency guidance.

<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/public-policy-dialogue-development-activities.html#toc5>

In large part, the public outrage that we saw in response to (misleading) reports that Elections Canada was “silencing” environmental groups in the 2019 election<sup>8</sup> stemmed from the public’s intuitive understanding that public benefit nonprofits are different from partisan groups in certain relevant ways. If Elections Canada does not find a way to draw this distinction, it will have difficulty defending its regulatory regime to the public.

### **Election messaging and greater transparency**

We share concerns expressed in the first Discussion Paper about lopsided election messaging. ONN shares the concerns of Elections Canada regarding the need to regulate third-party activity and the challenges posed by social media for democratic elections. We agree with many concerns raised in the consultation papers regarding political advertising and social media and encourage Elections Canada in their efforts to level the playing field.

We also agree that all organizations should be transparent about who a message is from and that messages should not distort or mislead.

### **The need to maintain and further extend “differential regulation” of Third Parties.**

The biggest practical difference in election activity between public benefit nonprofits, on one hand, and partisan advocacy groups and (PACs), on the other, is found in the amount of money these two types of groups can raise. This resource differential leads to a common difference in the methods of advocacy.

- Public benefit organizations typically conduct advocacy themselves; they also undertake advocacy on an ongoing basis, take a non-partisan, issue-based approach, have limited access to funding for advocacy outside of their regular revenues and rely on their volunteer supporters.
- Partisan advocacy groups and PACs have access to considerable funds and expertise, and are most active around elections. Unlike most public benefit nonprofits, they have the funds to purchase professional media, data, and communications assistance. Their deep pockets, funded by private interests, warrant a greater degree of regulation and reporting.

The challenge with the current regulation is that it imposes the same requirements on virtually all spending during the election and pre-election period (above the \$500 threshold). Yet the limits of spending are \$1,023,400 pre-election and \$511,700 during the election period. A public benefit organization that finds its issue advertising has become “political” (in a party platform) has the same complexity in reporting for a \$500 expenditure as a PAC has for \$500,000. Indeed, the complexity is even greater for the public benefit organization who has to disentangle “election related” staff and communications expenses for the election period from regular spending whereas the PAC is generally a single purpose organization.

In practical terms, the requirements for nonprofits to identify funders of election issue advertising and obtain board resolutions to open a separate bank account present serious problems for public benefit organizations.

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<sup>8</sup> See for example CBC’s news report, “Environmental groups were warned that some climate change ads could be seen as partisan during election period.”

<https://www.cbc.ca/news/politics/environment-groups-warned-climate-change-real-partisan-1.5251763>

Boards of directors of charities are nervous about appearing to sanction “partisan political advertising” as they know they cannot be politically partisan on Canada Revenue Agency (CRA) terms or risk losing their charitable status. Asking for a board resolution to undertake “partisan” election advertising requires boards, along with organizational members and supporters, to learn the nuances between “political *partisan* activity” (regulated by CRA) and “partisan advertising” (regulated by Elections Canada). Informing the vast Canadian nonprofit sector about these distinctions is not a useful or productive undertaking since the trigger for being deemed “partisan” by Elections Canada relates to actions beyond organizations’ control that are taken by a political candidate or party.<sup>9</sup>

It would also be helpful to clarify and strengthen the definition of “partisan” under the Canada Elections Act. Under the (similar) Ontario Election Finances Act,<sup>10</sup> some nonprofits have found the definition of partisan too vague leaving too much interpretation room for election staff. Erring on the side of caution, Elections staff have ruled issues partisan -- resulting in an “advocacy chill” for charitable organizations that are advocating on related issues and are forbidden by charitable regulation from being partisan. The federal definition of “partisan” could benefit from greater clarity and specificity.

The current Canada Elections Act definition of “partisan” can result in issues being identified and regulated as “partisan” that have been the focus of a group’s educational work for years and that relate to a clear public good. Ongoing nonprofit sector public policy advocacy on issues like poverty, environmental protection, and accessibility for persons with disabilities, etc. is disrupted when declared “partisan” because many groups will choose to stay silent rather than navigate complex regulations and risk their nonpartisan reputation.

On a practical level, establishing a separate election period bank account for a charity or nonprofit requires significant paperwork from volunteer directors for an account that will be used for mere days. Furthermore, an independent audit for expenses over \$10,000 is cumbersome and costly when most nonprofits have routine annual audits.

There is also the issue of unintended consequences, such as a “donation chill” to organizations that embrace their role in election-related issue-based advocacy. For privacy reasons, many public benefit organizations are careful to protect the anonymity of donors that request it; consider the example of a suicide hotline or cancer charity all of a sudden being required to reveal their donors. Given that many organizations offer a mix of service provision, public education, and advocacy work, having an issue deemed “partisan” by Elections Canada could have this result, which would potentially be seen by their donors as a betrayal of trust. Some public benefit organizations also have ongoing funders who support their organization and the issues they address but will not fund them for “partisan” activities. During the election period, these funders could find themselves accidental “partisan” donors and publicly listed as such. The requirement to report “partisan election advertising” under these circumstances is unduly punitive for public benefit organizations, many of which rely on donations -- and must disclose them. By contrast,

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<sup>9</sup> In the example cited above, organizations advocating for action on climate change all of sudden found their advocacy work deemed “political” under the Elections Act because the People’s Party included climate change denial in their party platform. If this party had not contested the election, climate change advocacy would have been understood as issue-based advocacy.

<sup>10</sup> <https://www.ontario.ca/laws/statute/90e07>

for-profit businesses can spend their earned funds without similar disclosure. This is not a level playing field.

The Elections Canada financial reporting and regulatory regime for third parties is a serious impediment for public benefit organizations' participation in elections. This regime is too complex and onerous for smaller participants, especially when their issues become "politically partisan" only if a party or candidate addresses them.

Public benefit organizations have much less difficulty with transparency. Indeed, many already identify themselves in communications, operate websites, and report annually on their activities. Charities file extensive financial reporting annually which is publicly available.<sup>11</sup> Non-profits file financial information and are exempt from taxes but the government has not made their information returns publicly available. Both public benefit and member benefit nonprofit organizations file T2 and T1044 returns<sup>12</sup>, including PAC's which operate as member based nonprofits.

The challenges with the current regime and the relevant differences between public benefit and member benefit nonprofits lead us to the following recommendations:

### **Transparency for All**

1. Broaden the definition of partisan advertising and issue advertising to include all social media activity, whether purchased or not, during the pre-election and election periods. This will allow for increased transparency in communications.
2. Increase transparency by requiring partisan and issue advertising (broadened definition as per our first recommendation) to provide identifying information or hyperlinks to easily accessible identifying information for the public on all advertising and social media communications during the pre-election and election periods. All partisan and issue communications (paid and not) should be subjected to transparency requirements. The public has the right to know where a message originated and have easy access to information about the group responsible for the message.
3. All partisan communications should be required to meet a standard of truthfulness and be required not to distort or mislead. This may be difficult to achieve but it is critically important. Comparable frameworks exist in the judicial (standards of evidence) and advertising (Ad Standards sector self-regulation) realms that may provide a basis for framework development.
4. Clarify the definition of partisan to avoid including the educational and public policy work of the public benefit sector. For example: a summary of all party responses to issues is educational, not partisan, and should not be classified as such. If it is factual and inclusive then it is not partisan. Public benefit organizations do considerable work around elections to help their communities understand the issues and their election choices.

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<sup>11</sup> See the CRA Registered Charity Information Return.

<https://www.canada.ca/content/dam/cra-arc/formspubs/pbg/t3010/t3010-19e.pdf>

<sup>12</sup> Nonprofit organizations owning \$200,000 in assets or receiving \$10,000 a year in royalties, interest or dividends must file the T1044 return.

## Level the Playing Field

5. If the intent is to level the playing field for third parties during an election then the ceiling on the amount of spending permitted must be reduced. Public benefit organizations cannot compete with corporations and PAC.

### *During the Pre-election Period*

6. Maintain the exemption of issue-based advertising from financial reporting during the six month pre-election period. If further limits are placed year-round on partisan advertising and activity, maintain the exclusion for issue-based advertising and advocacy. Public benefit organizations on an ongoing basis undertake public policy activities to inform their constituencies and encourage governments to improve or change public policies. It will be extremely difficult to draw the line between public policy activity and partisan activities if issues are included. Transparency in messaging during pre-election and election periods however is appropriate for issue-based advertising and essential for partisan messaging.

### *During the Election Period*

7. Simplify registration and reporting for *public benefit organizations* engaged in ongoing non-partisan issue advocacy during the election period.
  - i) Requiring “simplified reporting” during the election period for issue-based advertising that has become partisan (by virtue of a party taking a position) for expenditures over \$5000 and up to \$50,000. Above this threshold, full third-party reporting and costing is required.
  - ii) Enable simplified financial accounting. Do not require a separate bank account if a public benefit organization is audited annually.
  - iii) Simplify reporting. Accept evidence that the board of directors has been informed of the issue-based advocacy becoming partisan rather than requiring a board resolution to undertake partisan advocacy.
  - iv) Simplify audit requirements. Most public benefit organizations undergo annual audits. This should be sufficient accountability for reporting election expenses. Public benefit organizations typically operate with multiple program budgets. Require a separate election period advocacy budget with expenditures.
  - v) Remove the threat to public benefit nonprofits’ donor base. Do not require disclosure of donors unless full partisan third-party reporting is required.

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## Appendix A Definition of Public Benefit Organization

Public Benefit Organizations are composed of charities, non-profit cooperatives and nonprofit organizations serving communities (as opposed to member benefit organizations serving members). Charities and cooperatives are well defined in law. The last group of Public Benefit Organizations are called Community Benefit Organizations and the following is ONN's working definition<sup>13</sup>

(I) Community Benefit Organization

An organization, society, club or association that, was not a charity, was organized and operated primarily to benefit the public good, and,

- I. Incorporated without share capital;
- II. Is self-governing and a tangible benefit<sup>14</sup> must be conferred, directly or indirectly: and the benefit must have a public character<sup>15</sup>.
- III. Excess revenues reinvested - does not distribute profits to members, directors, or managers
- IV. Have a constraint in its bylaws that prohibits distribution of assets to members on dissolution (provides for gifting residual assets to public benefit organization).
- V. Is independent or institutionally separate from the formal structures of government or the profit sector (i.e., governing or managing directors are not controlled by any level of government or private company).
- VI. Is nonpartisan in its public issue advocacy

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<sup>13</sup> This definition draws heavily on Canada Revenue Agency's (CRA) "Guidelines for registering a charity: Meeting the public benefit test" in defining the terms used in charity regulation.

<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/policy-statement-024-guidelines-registering-a-charity-meeting-public-benefit-test.html#fn18>

<sup>14</sup> "Organizations are often found to be of 'benefit' to the community, but not charitable, for a number of reasons. . . when benefit is proven, it must be weighed against any harm that may arise from the proposed activity and a net benefit must result." Canada Revenue Guidance.

<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/policy-statement-024-guidelines-registering-a-charity-meeting-public-benefit-test.html#fn18>

<sup>15</sup> This notion of public benefit has also been called the "public character" of charity, in that it "seeks the welfare of the public; it is not concerned with the conferment of private advantage. See Canada Revenue Agency guidance

<https://www.canada.ca/en/revenue-agency/services/charities-giving/charities/policies-guidance/policy-statement-024-guidelines-registering-a-charity-meeting-public-benefit-test.html#fn16>