

GET WITH THE PROGRAM: THIRD PARTIES AND POLITICAL ADVERTISING

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Ontario Provincial Election 2022 Edition

Public discourse and civic participation take many forms during an election. Among other things, individuals may choose to donate to a political party, third parties may run advertising campaigns, and grassroots organizations may lobby candidates and political parties to adopt preferred policy positions. There are rules that carefully govern these activities in Ontario and interactions between political entities and stakeholders – whether it be individuals or organizations.

In this article, as part of McMillan LLP's ongoing coverage of this year's Ontario provincial election, we discuss the *Election Finances Act*, third party organizations, and rules concerning political advertising during and outside of elections. Ontario's provincial election is likely taking place on June 2, 2022. The election period begins at 12:01 AM on the day the writ of election is issued, running until the last polling day.

Who are Third Parties?

To influence public policy and opinion, third parties frequently participate in the political process. As such, third parties actively engaged in public discourse are subject to certain rules and requirements to ensure transparency and fairness in our democratic system.

Third parties are broadly defined as persons or entities other than a registered candidate, registered constituency association, or registered party.^[1] This definition captures grassroots organizations and large corporations alike – and everything in-between.

Third Party Contributions

To fund their political activities, third parties will often accept contributions. There are fewer restrictions on making third party contributions than those governing contributions to political parties and candidates. Third parties can accept contributions from individuals normally resident of Ontario, corporations operating in Ontario that are not registered charities, and trade unions.^[2]

There are no monetary or non-monetary limits on the amount that can be contributed to third parties, but the donations cannot be anonymous,^[3] and all contributions over \$100 are reported to Elections Ontario and subsequently published.^[4]

What is Political Advertising?

Of course, once third parties have accepted contributions, they will want to use those contributions to fund political activities. Most commonly, third parties will use funds to purchase advertising for the purpose of influencing the election. So, what exactly constitutes political advertising?

Political advertising is advertising in any broadcast, print, electronic, or other medium with the purpose of promoting or opposing any registered party, its leader, or the election of a registered candidate.^[5] Some may be surprised to learn that “political advertising” can also extend beyond partisan messaging or explicit endorsements of political entities: The definition of political advertising can capture advertising concerning public policy issues, also known as “issue advertising”, that can be reasonably regarded as being closely associated with political parties, candidates, and leaders.^[6]

Issue advertising can be a difficult area of the law to navigate, in particular. For example, a third party may be running advertisements on an issue unrelated to a campaign – or so they thought – until a political party or candidate decides to discuss the issue as part of an election platform. In this circumstance, non-partisan advertising may be reclassified as political advertising, and on a case by case basis, the Chief Electoral Officer can determine whether such communication is political advertising.^[7] Therefore, it is important to seek professional advice if you or your organization may be captured under the broad definition of “political advertising”.

All political advertising must name the third party that has authorized the advertising so that the public is aware as to who has created and published the information they are consuming.^[8] Additionally, vendors must keep records of political advertisements for at least two years after the advertisement appears, with vendors that fail to adhere to these rules facing fines and penalties.^[9]

Spending Limits on Political Advertising

In Ontario, there are also strict spending limits on how much third parties can spend on political advertising.

Third party spending limits on political advertising depend on whether a fixed date or non-fixed date election is called. For fixed date general elections, which includes the 2022 Ontario provincial election, a third party cannot spend:

- more than a total amount of \$654,600 outside of the election period (the 12-month period prior to Writ

Day) for the purposes of political advertising;

- more than a total amount of \$109,100 during an election period (Writ Day to Polling Day) for the purposes of political advertising;
- more than \$26,184 outside of the election period in any single electoral district for the purpose of political advertising; and
- more than \$4,364 during an election period in any single electoral district for the purpose of political advertising.

Third parties must strictly adhere to the above spending limits, and any attempt to circumvent the law by colluding or improperly sharing information with political entities, outside vendors, or other third parties is expressly prohibited. Similarly, third parties may not split themselves into separate entities for the purposes of spending above the maximum amount allowed.^[10]

Election advertising expenses include not only cash payments made to outside vendors, but also to any internal resources devoted to facilitating third party political advertising. Therefore, third parties must carefully track all additional activities and spending that facilitate political advertising.

Importantly, given recent changes to the *Election Finances Act*, vendors selling political advertising to third parties are responsible for third parties not overspending their budgets.^[11] In particular, media companies and other publishers should seek professional advice when selling political advertising to third parties.

Registration Requirements

Third parties must register with Elections Ontario immediately after spending \$500 or more on advertising during an election period or in the twelve months before a general election.^[12] To register, third parties must appoint a CFO; appoint an auditor if the third party intends to spend, or does spend, \$5,000 or more on political advertising;^[13] and submit the requisite application form.^[14]

There are many considerations when participating in an election, be it as an individual, lobbyist, third party organization, or political entity. These considerations are particularly nuanced with respect to third parties and political advertising. It is important to ensure compliance and work with qualified professionals that can assist you and your organization in navigating applicable lobbying and election finance laws.

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

[1] EFA 1(1)

[2] EFA 37.10(1)

[3] EFA 37.10(2)

[4] EFA 31.12(4)

[5] EFA 1(1)

[6] EFA 1(1)

[7] EFA 37.0.1

[8] Handbook for Broadcasters and Publishers of Political Advertising at p. 9

[9] EFA 45.1(5)

[10] EFA 37.10.1(3)

[11] EFA 37.10.2(5)

[12] EFA 37.5(1)

[13] EFA 37.7(1)

[14] EFA 37.5(2)

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A Cautionary Note

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