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March 30, 2021

Standing Committee on the Legislative Assembly
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The Honourable Doug Downey
Attorney General of Ontario
The McMurtry-Scott Building
720 Bay Street, 11th Floor
Toronto, ON M7A 2S9

Dear Attorney General Downey and the Standing Committee on the Legislative Assembly,

Re: Unifor's Objections to Bill 254

Unifor writes to you to express our deep concern about *Bill 254*: *the Protecting Ontario Elections Act, 2021* (the "*Bill*").[1] This *Bill* will bring profound change to Ontario's political system and will grant wealthy Ontarians excessive political influence, while silencing the voices of workers who join together through their unions to engage in political action and expression. It will weaken political debate and impoverish our democracy.

Unifor has four central objections to the *Bill*. We oppose the extension of the non-election period prior to an election period during which third party political advertising is restricted, from six months to twelve. Unifor objects the *Bill*'s amendments to the existing anti-collusion provision, which will interfere with our ability to communicate political positions and will prevent us from joining with other trade unions in support of shared public policy concerns and objectives. Unifor disagrees with the *Bill*'s unwarranted proposed increase to Ontario's political contribution limit. Finally, Unifor objects to the advance on the quarterly allowance payments to political parties.

[1] 1st Sess., 42nd Leg., Ontario, 2001 (committee stage).

In Unifor's submission, the *Act*'s extension of the non-election period and the anti-collusion provisions will violate our members' freedom of expression and association, as protected by sections 2 (b) and (d) of the *Canadian Charter of Rights and Freedoms* (the "*Charter*"). If the *Bill* is passed, these changes will take effect on May 4th of this year, which is one-year prior to the date on which the writs of election will be issued. This gives Unifor, as well as other trade unions and third parties very little time to prepare for these significant restrictions, which have been proposed without research or consultation. Unifor therefore urges the Government to withdraw this *Bill*.

ABOUT UNIFOR

Unifor is the largest private sector trade union in Canada. We represent 315,000 private and public sector employees in all regions of Canada, working in over 20 defined sectors of the economy, including resources, manufacturing, hospitality, health and transportation. Unifor represents approximately 162,800 members in Ontario, in over 1,425 different bargaining units.

Unifor was founded on Labour Day 2013, through the amalgamation of the former Canadian Auto Workers and Communications Energy and Paperworkers unions. Unifor is committed to a vision of democratic, innovative, social unionism. Our founding documents recognize that the union's responsibility as an organized voice for working people must extend beyond the workplace and the collective bargaining table, into society as a whole. They charge Unifor with the responsibility to defend and promote the interests of all working people in Canada, their families, and their communities – not just those that are our members.

Unifor's Constitution is "the highest authority governing Unifor, its Local Unions, subordinate bodies, members elected or appointed to any office in the Union, and the membership generally."[2] The Constitution provides that "Unifor represents its members who have joined together to enhance their strength and collectively improve their workplaces and communities through collective bargaining and political action. The Constitution tasks Unifor with the responsibility "to be broadly politically active at the municipal, provincial and federal levels and to mount issue-based campaigns."[3] Pursuant to these provisions of the Constitution, Unifor provides a collective base for workers to join together to both improve their working conditions and to engage in political activism in pursuit of social justice. On behalf of its members, Unifor seeks to shape the policies and laws that affect every aspect of workers' lives.

Unifor has been a registered third party advertiser with Elections Ontario in both the 2014 and 2018 Ontario provincial elections.

UNIFOR'S SUBMISSIONS

1. **Unnecessary Extension of Third Party Non-Election Period**

Extending the non-election period, during which third party political advertising is restricted is an unnecessary and unjustifiable limitation of the political expression of civil society groups, including trade unions and their members. It will constitute a clear violation of s. 2(d) of the *Charter* that is neither reasonable nor demonstrably justified in a free and democratic society. Moreover, there is no evidence that this change is necessary.

[2] Unifor Constitution, as amended in Ottawa, Ontario in August of 2016, at Article 1.4 (the "Constitution").
[3] The Constitution, supra at Article 3.

Pursuant to sections 37.10.2 (1) and (2) of the *Election Finances Act*, Third Parties are already restricted in the amount that they may spend to promote or oppose an Ontario political party, its leader or its candidates. This restriction applies during both the election period, from when the writs are issued until polling day, and during the six-month non-election period immediately preceding it. During that non-election period, Third Parties may not exceed $637,200 in spending on political advertising.[4] While this limit restricts the ability of Third Parties to communicate advertising that is directly partisan, it also limits their ability to communicate issue-based political advertising. The *Act*'s existing definition of political advertising, which is restricted during the non-election period, includes advertising on "…an issue that can reasonably be regarded as closely associated with a registered party or its leader or a registered candidate…".[5]

This existing legislation already imposes a significant restriction on the expressive rights of Third Parties which limits the ability of groups like Unifor to take public positions on issues of deep concern to its membership. This broad, six-month limitation on the political expression of Third Parties is already the most restrictive of any Canadian jurisdiction. It is presently the subject of a *Charter* challenge before the Ontario Superior Court of Justice.

The *Bill*, as currently drafted, would double this non-election period to twelve months prior to the election period, without making an accompanying increase to the limit on third party political advertising

[4] The *Election Finances Act*, R.S.O. Chapter E.7, (the "*Act*"), s. 37.10.1(2)
[5] The *Act*, s. 1(1) "political advertising."

expenses.[6] This constitutes an outright attack on political expression. The Government has offered no justification for this change and there is no evidence that it is a necessary one.

This new, non-election period will restrict the speech of Third Parties over a time period that will undoubtedly include the tabling and passage of a provincial budget, as well as untold other legislative reforms. The effect of this clause of the *Bill* will be to significantly restrict the ability of labour organizations and civil society groups more generally, to speak out on political issues of concern, regardless of whether they relate to an election or not.

Mass-media advertising campaigns are expensive. The existing spending limit of $637,200 forces trade unions to be very judicious in their advertising choices and, often times, to scale back on media campaigns they would otherwise run. The extension of the non-election period will further exacerbate this problem and will create a "chilling effect" on third party speech. Third parties will be limited even in their ability to run advertising that has very little to do with an election. For example, the expenses any advertising that Trade Unions do in support of health care workers in the one-year non election period will have to be attributed towards the spending limit and will limit what other advertising that third parties may run.

The Supreme Court has repeatedly emphasized the central importance of political expression in a democratic society. In its 1997 decision *Libman v. Quebec (Attorney General)*, the Court held that "[p]olitical expression is at the heart of the values sought to be protected by the freedom of expression guaranteed by s. 2(b) of the Canadian Charter."[7] The Court has subsequently expressly recognized the

[6] The *Bill*, *supra* note 3at cl. 14 (2).
[7] [1997] 3 S.C.R. 569 at p. 591, ("*Libman*").

importance of third party advertising to political discourse, ruling in *Harper v. Canada (Attorney General)*, that

> *[t]hird party advertising is political expression. Whether it is partisan or issue-based, third party advertising enriches the political discourse. As such, the election advertising of third parties lies at the core of the expression guaranteed by the Charter and warrants a high degree of constitutional protection.*[8]

Both the Supreme Court and lower courts have weighed any restrictions on third party political expression against the importance of this essential speech. They have been vigilant to ensure that any such limitations impaired this freedom of expression as little as reasonably possible in order to achieve the legislative objective of ensuring electoral fairness. To date, no restrictions on third party political expression outside of an election period have been upheld by any court in Canada.

In 2009, the B.C. Court of Justice struck down legislation in the province that limited third party advertising during a 60 day pre-campaign period, in addition to the election period.[9] The Court ruled that the legislation infringed freedom of expression, and was not justified under s. 1 of the *Charter*, because it was more than minimally impairing. The Court reached that conclusion because the 60 day pre-election period would capture issue-based advertising that could be unrelated to the objective of influencing an election. The Court also noted that the pre-election period would be in force while the legislature was in session, therefore capturing advertising that endeavored to influence the government about proposed legislation. This decision was upheld by the B.C. Court of Appeal in 2011.[10]

[8] [2004] S.C.J. No. 28., ("*Harper"*)
[9] *BCTF v. British Columbia (Attorney General)*, [2009] B.C.J. No. 619 (F.W. Cole).
[10] *BCTF v. British Columbia (Attorney General)*, [2011] B.C.J. No. 1945 (B.C.C.A.)

Following that decision, the B.C. Government then enacted new legislation limiting third-party advertising for a shorter, 40 day pre-election period, but retaining the same definition of election advertising that included issue-based advertising. The Government then referred that legislation to the B.C. Court of Appeal, who again found that it unjustifiably infringed the *Charter* right to free expression set out in s. 2 (b) because it was not minimally impairing.[11]

In light of these two decisions, which struck down legislation that restricted third-party expression for much shorter periods than proposed in the present *Bill*, it is extremely unlikely that a court would uphold this legislation in the face of a *Charter* challenge. Moreover, it is inappropriate for the Government to amend the *Act* while it is currently the subject of *Charter* litigation.

Recommendation: Unifor urges the Attorney General to remove clause 14 (1) and (2) from the Bill

2. Creation of Restrictive, Unnecessary and Unmanageable Prohibitions on Collusion

As the Government is aware, the *Act* already prohibits third parties from engaging in collusion to circumvent the expense limits on third party political advertising imposed by the *Act*. Subsection 37.10.1 (3) of the existing *Act* bars each third party from splitting itself into two or more third parties in order to circumvent the spending limit. It also prohibits third parties from colluding with another third party so that their combined political advertising expenses exceed the limit, or from colluding with a political actor to circumvent the spending limit.

[11] *Reference re Election Act (BC)*, 2012 BCCA 394.

This prohibition is already sufficiently robust to prevent third parties from circumventing the spending that limit third party political advertising. The section is also substantially similar to the prohibition on third party collusion contained in the *Canada Elections Act* at the Federal level, and is equally or more restrictive to anti-collusion provisions in other provincial election legislation.[12]

To Unifor's knowledge, there have been no incidents of collusion or circumvention of the third party political advertising expense limits set out in the *Act* that have prompted this proposed amendment. We are unaware of any prosecutions of alleged collusion under the current anti-collusion provision contained in subsection 37.10.1 (3) of the *Act*. There is therefore no justification for imposing further restrictions when the current prohibition remains untested.

The proposed amendment contained in clause 14 (3) of the *Bill* will dramatically expand the reach of the existing prohibition on third-party collusion and is likely to have far-reaching impacts. If the *Bill* is passed in its current form, third parties will be prohibited from sharing a vendor with any other third party that shares a "common advocacy, cause or goal".[13]

The term "vendor" is not defined in either the *Act* or the *Bill*, and therefore creates considerable confusion about what businesses will be classified as a vendor, and when this prohibition would be triggered. Similarly, the phrase "common advocacy, cause or goal" is undefined and is extremely vague. The *Bill*, as drafted, provides no details about to determine when multiple third parties share a common advocacy, cause or goal.

[12] *Canada Elections Act*, S.C. 2000, c. 9
[13] The *Bill* at clause 14(3)(d).

Given its broad drafting, Unifor can only assume that the amendment would bar more than one third party trade union from retaining a particular advertising agency, advertising purchaser, graphic designer or videographer to produce their political advertising.

This prohibition could also mean that no more than one third party with similar political objectives could advertise on a particular media platform. For example, only one trade union who is a registered third party may be permitted to advertise on Facebook for the year prior to an election, as well as during an election period. Similarly, only one third party of a particular political stripe would be permitted to run advertisements on a given television network.

This restrictive anti-collusion language is unprecedented in Canada and it will compound the silencing effect of the extension of the non-election period. Given this restriction on vendors, third parties may not even be able to spend the full amount of their political advertising expense limit if they cannot be the first to secure the right to advertise on a platform, creating a competitive race to be the first to retain particular vendors. In this way, it has the potential to interfere with third parties' *Charter*-protected political expression in very significant ways.

The *Bill* provides no details about how this provision will be enforced or monitored. It is unclear to Unifor how it will learn whether another registered third party has already retained a given vendor, such that it may not do so for fear of violating this provision. There are only a select few advertising agencies and providers who understand and cater to the labour movement. If this *Bill* is passed, trade unions will be prevented from working with these businesses and contractors with whom we have deep and longstanding business relationships.

This restriction could also have punitive and detrimental impacts on these "vendors", many of which are small businesses or independent contractors. This restriction will penalize those small businesses, forcing them to choose only one client with whom to work. This has the potential to devastate those businesses and the income of independent contractors.

The *Bill*, as drafted, would also prevent third parties from sharing information with other third parties who share the same "common advocacy, cause or goal".[14] There are no qualifiers in the *Bill* about what information these third parties will be prevented from sharing. This provision could therefore restrict third parties from sharing information that has little or nothing to do with an election. For example, third parties who are trade unions may be prevented from sharing information about shared collective bargaining concerns or strategies. They may be prevented from sharing information about shared health and safety concerns, or views on legislation. This restriction will apply throughout the non-election period as well as the election period. This is a substantial infringement of the freedom of expression and freedom of association of these third parties.

Canadian courts have repeatedly found that restrictions on third parties' political speech and advocacy in the context of elections violate freedom of association, as protected in section 2 (d) of the *Charter*. In *Canada (Attorney General) v. Somerville*, the Alberta Court of Appeal ruled that:

> *…the ability to associate to combine funds to inform and influence others in an election is inextricably tied to the exercise of the freedoms such as freedom of expression and the right to be informed in an election.*
>
> *An important aspect of association is the ability to combine resources to pursue common goals, influence others, exchange ideas and effect change. Association for the purpose of participation and communication during an election must*

[14] The Bill, at clause 14(3)(f).

> *surely stand as a primary reason for constitutionally entrenching the right to associate.*[15]

Similarly, the Supreme Court ruled in *Libman* that restrictions on how third parties could advertise during the Quebec referendum not only violated the *Charter* right to free expression, but also the freedom of association.[16] In both these cases, these breaches were found not to be demonstrably justified in a free and democratic society in accordance with section 1 of the *Charter*, and were struck down. In Unifor's view, there is every reason to believe that courts would reach the same conclusion about the provisions of *Bill 254* if they are passed into law.

Recommendation: Remove clauses (d), (e) and (f) of clause 14 (3) (e) of the Bill.

3. Increased Contribution Limits

Bill 254 will also double the contribution limit for political contributions to individuals. Currently, Ontario residents may donate $1,650.00 annually each to registered political parties, to constituency associations, nomination contestants, registered candidates of any one party, as well as independent candidates and leadership contestants. If passed, the *Bill* will increase this limit to $3,300.00 for each category of political actor. Residents will then be able to donate a total of $9,900 per year to a political party and its associated candidates, constituency associations and nomination contestants. Residents will be able to donate an additional $3,300.00 to independent candidates as well as $3,300.00 to any contestant for the leadership

[15] 1996 ABCA 217 at para. 25 and 26.
[16] *Libman*, *supra* note 7 at pg. 594.

of a political party. In a given year, an individual Ontario resident could donate up to a maximum of $16,500.00 to political actors pursuant to this *Bill*.

This extraordinarily high political contribution limit will privilege political parties who benefit from wealthy donors. It is already the case that the vast majority of Ontarians cannot afford to donate anywhere near the maximum contribution to political parties. Unifor members, like most other trade union members, cannot hope to donate $1,650 to a political actor, let alone the $3,300 that they will be permitted should the *Bill* pass. The few wealthy Ontarians who can afford to make such extravagant donations to political actors will be amongst the few. This raises the prospect of wealthy donors expecting to receive influence or access to politicians in exchange for their donations amplifying their political voice while leaving other Ontarians, who cannot afford to pay in exchange for political access, further behind.

Contrary to the Government's rhetoric, this increase will give Ontario the highest contribution limit in Canada, except for the two jurisdictions that lack limits on political contributions.[17] When comparing the amounts that Canadian jurisdictions permit individuals to contribute to political parties, their associated candidates, their associated constituency associations and their associated nomination contestants, Ontario's contribution limit will exceed the next highest limit, $5,000.00, by almost double.[18] As these numbers demonstrate, this *Bill* will bring Ontario's political contribution limit significantly out of step with other Canadian jurisdictions.

[17] Newfoundland and Saskatchewan have placed no limitations on the amount of political contributions that individuals may make.
[18] Nova Scotia and Manitoba both permit contributors to donate a maximum of $5,000.00 to these political actors.

The timing of this proposed increase is extremely suspect. This Government already increased political contributions in 2018 shortly after it was elected. At that time, *Bill 57* increased the political contribution limit from $1,200 to $1,600. This increased limit is yet to be tested through an election cycle, and yet the Government is already seeking to double it, no doubt in anticipation of next year's planned election.

There is simply no justification for this unnecessary increase that will increase the political influence of wealthy Ontarians. It will do so at the same time that this Government is restricting Ontarians ability to exercise their political expression through collective political action, by extending the non-election period and enacting restrictive anti-collusion measures. Workers will see their ability to join together to make their voices heard and to communicate their political priorities and preferences compromised. This unwarranted increase to the political contribution limit ought to be withdrawn.

Recommendation: Remove clause 7(1) of the Bill

4. Front-Loading of Quarterly Allowance Payments

Finally, *Bill 254* seeks to provide political parties with a nine-month advance on their quarterly allowance payments. Pursuant to clause 11 (2.1) of the *Bill*, in the second quarter of 2022, political parties will receive their allowance for that quarter, as well as their allowance for the balance of 2022 and the first quarter of 2023.

The Government has provided no justification in support of this advance, and there is no principled basis for it. While Unifor supports the public allowance payments to political parties, we see no reason why political parties ought to receive this advance. Our members employed in long-term care, who have been working tirelessly throughout this pandemic to keep our elders safe and cared for, will not receive a nine-

month advance on their wages. Our members working at the Bombardier plant in Thunder Bay do not have nine months of job security, let alone a nine-month advance on their income. Retail workers did not have the benefit of nine months of pandemic pay before it was cancelled. Unifor sees no reason to provide political parties with this needless financial advance when everyday Ontarians are struggling so much through this profoundly challenging pandemic and its accompanying financial crisis.

Recommendation: Remove subsection (2) of clause 11 of the Bill.

In light of the *Bill*'s significant flaws, as outlined herein, and its constitutional vulnerability, Unifor hereby urges the Government to withdraw the *Bill*.

Yours truly,

Naureen Rizvi
Ontario Regional Director
Unifor

pc/cope343

cc. Jerry Dias, Lana Payne, Chris MacDonald, Josh Coles, Natalie Clancy, Sarah McCue, Laura Johnson, Anthony Dale

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