Financing Canadian Elections

by W. Scott Thurlow

In the last decade, we have seen a litany of changes to the Canada Elections Act and various provincial electoral law statutes regarding financial contributions to candidates and political parties. It was under the auspices of accountability that these changes to fundraising were introduced – getting big money out of politics to ensure that the system was not artificially influenced by large contributors or corporations. Setting aside whether or not those limitations are constitutional, the more important question is whether or not the changes have made a difference to the democratic discourse and to the composition of the House of Commons. This paper will focus on two specific changes and what effect, if any, these changes have had on the electoral process.

Money is speech. All modern jurisprudence relating to campaign contributions stems from the idiom that in order to effectively communicate your ideas in the modern era of politics you have to spend your way onto the agenda. This is the most important conclusion of the leading case on the issue – a United States Supreme Court ("USSC") decision of *Buckley v. Valeo*.[1] In *Buckley,* the USSC linked property rights with the freedom of speech and found that using one to exercise the other was a natural vehicle towards truly free expression. In the decision, the USSC held that individual contribution limits to a campaign were a constitutionally permitted safeguard to help avoid the appearance of corruption. The Court conceded that placing limits on the amount of money a person could spend was tantamount to limiting their ability to assemble and be heard, noting that spending limits on campaigns constituted "direct and substantial restraints on the quantity of political speech". The Court wrote that "the First Amendment denies government the power to determine that spending to promote one's political views is wasteful, excessive or unwise." The Court did not, however, accept those limits were permissible when contributing to one's own campaign.

In Canada, similar limitations have featured prominently in both federal and some provincial electoral laws. The courts have considered them and linked the right to vote (section three of the *Charter of Rights and Freedoms*[2]) with the right to free expression (section 2 of the *Charter*). The key elements of the judicial discussion in Canada on campaign financing were summarized in the Supreme Court of Canada's reasoning in *Figueroa v. Canada*.[3] In *Figueroa,* the Supreme Court stated that effective participation in the process was about much more than voting and the protection of the right to vote. The Court held that the right to vote was strengthened by ensuring that no political movement was disadvantaged because it could not be a registered party under the *Canada Elections Act*. The Court ruled that the right to vote was about having access to a wide array of views and information in advance of election day. Meaningful participation requires that a voter be able to hear all sides before casting his/her vote. It includes the ability to hear political positions that might otherwise be left out of the debate because the proponents of those positions have limited resources. The result of the decision is that the smallest parties are able to issue receipts and qualify for reimbursements, which were previously reserved to the parties that ran at least 50 candidates.

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In its most recent pronouncement on the influence of money on elections, the Supreme Court took a decidedly different approach. In *R. v. Harper*, the Court held that the purpose of section three was to ensure an effective vote, which requires the equal dissemination of points of view.[4] By limiting the election advertising by third parties, an egalitarian model of elections creates a more level playing field for those who wish to engage in the electoral discourse with limited resources. These limits, while infringing the right to freedom of political expression for wealthy electors, were saved as a reasonable limit under section 1 of the *Charter* because the influence of those electors had was so significant, that they drowned out all other voices.[5] It was determined that the capital that could be infused into the process by the wealthy deprived their opponents of their corresponding opportunity to speak and be heard, and undermined the voter's ability to be adequately informed of all views.

In the absence of those spending limits, the Supreme Court articulated that it was possible for the affluent, or any number of persons pooling their resources, to dominate the political discourse. By limiting the ability to spend, the Supreme Court argues that everyone's ability to participate is protected. In so doing, the Court has defended the provisions of the *Elections Act* that place limits on an individual's right to free assembly and the right to make one's voice heard. The limitation on 3rd party spending is permissible because a group is restricted in the same manner as an individual. For example, 150,000 contributors of one dollar to one cause are restricted the same way a single contributor of $150,000.00. It is counterintuitive to justify a limit on the ability of the truly poor to come together to speak collectively by saying that the truly wealthy would dominate the discourse. There was no evidence, anecdotal or otherwise, that the wealthy were dominating the discourse prior to the changes being introduced to the *Canada Elections Act*.

That having been said, $3,000 per riding and $150,000 nationally (adjusted to inflation to $3,666 and $183,300, respectively) is a relatively paltry sum when compared to how much the political parties themselves are able to spend.[6]

Campaign Contributions and Corporate Participation

The Liberal Government first capped individual contributions at $5,000, and allowed modest corporate contributions of $1,000 (adjusted for inflation to $1,100) to individual candidates and riding associations of each registered party in 2003. When it passed the *Federal Accountability Act* in 2006, the Conservative Government reduced the personal contribution to $1,000 (adjusted for inflation to $1,100) and banned corporate contributions entirely. These are not the first examples of caps on individual donations, but the most recent limitations are by far the most severe. For example, the provinces of Quebec and Manitoba both limit contributions at $3,000 per individual and ban corporate contributions altogether.[7] Other provinces have no contribution limits for either individuals or corporations, and do not even require residency for eligible donors.

The assumption underlying both the personal and corporate limitations is that financial contributions have a negative impact on the results of an election – ostensibly buying candidates and political parties with the funds they need for re-election. There is no evidence, anecdotal or otherwise, that these contributions were corrupting the political system. In fact, many larger contributors contributed to more than one party to avoid that very problem. Large corporate contributors would often muse (off the record) that their contributions actually led to further regulation of their businesses by the very candidates and parties to whom they made contributions – in order to avoid the appearance of impropriety.

Anecdotal observations on how these changes favour one party over another aside, ultimately, the changes to the contribution rules are more about changing fundraising practices than they are about changing the composition of the House of Commons. While the bans on corporate contributions may not adversely affect parties which can now rely on the quarterly allowance, it has tied the hands of local MPs and candidates who are looking to mount their own campaign, which is separate from the national campaign. This is best illustrated by looking at the debts of the most recent aspirants to the 2006 leadership of the Liberal Party of Canada, who were unable to use corporate contributions to raise funds for their leadership campaigns. By comparison, the race for the leadership of the Conservative Party won by Steven Harper, was contested under the old rules, and did not have lingering debts 18 months later. A fact not lost on future candidates for sure.

As a direct result of the changes in the rules, there has been a concerted push towards cultivating the individual contributor and some parties are more effective at it because it was on that model, they were built. Tying a small contribution ($10-$20) to a specific intra-party initiative, is a great way to energize the grassroots elements of a party and to engage individual party members. To that end, some political parties are using their quarterly allowances (described below) to fund their fundraising activities with increasingly aggressive direct mailing campaigns soliciting contributions. Not surprisingly, it is easy to encourage an elector to make numerous small

contributions as opposed to one large contribution per year.

There are some philosophical drawbacks to the changes. Campaign contribution rules that limit individual contributions to one's own campaign are contrary to the principle that persons can create their own platform from which they can engage in a debate. Whether it is local or national, individuals should be able to share their own ideas. Separate and apart from whether it is acceptable to contribute to a campaign that shares your ideals, it is a direct affront to individual freedom of speech that persons cannot use their own resources to further their own political ideals – as a member of a registered party or otherwise. Whether or not that affront could survive constitutional analysis remains to be seen.

Unfortunately, the changes that impose contribution limits under the auspices of avoiding influence peddling and levelling the playing field for all candidates may lead to the exact opposite result. The changes may further disadvantage new candidates who would not otherwise have access to the same sources of revenue. Wealthy individuals who may present themselves as candidates have wealthy clients and friends who are statistically more likely, and have greater capacity, to make the maximum contribution. It should come as no surprise then, that the executives of corporations, who once contributed through their businesses, now make personal contributions to local campaigns and national parties. It is important to note that the *Canada Elections Act* makes it illegal for corporate money to flow through and individual to a registered entity. Attending political fundraisers, however, remains a key networking tool for those most affected by government decisions.

Another unintended consequence of the move was that political parties in provinces where the same stringent rules on corporate contributions do not exist, have been the beneficiaries in the immediate short term. In 2007, the provincial parties, particularly in Ontario, aggressively targeted those funds, knowing that these corporate contributions were still in the budgets of large corporations and national trade associations. Yet another unintended result was the increasing importance of campaign bundlers – people who can get several maximum level donors – to the parties and candidates to make the maximum possible contribution.

Finally, preventing corporations from making contributions does not remove them from the political process. In fact, they simply shift their capacity – away from the coffers of parties and candidates, and into those of registered third parties – who are not precluded from accepting their contribution for election expenses. The ability to spend their funds directly in individual contests or as part of a national coalition on an issue of particular importance – which would openly support or oppose a candidate – removes the accountability that previously existed when their corporate name appeared on an election expense return for parties and individuals. While they still have to register their respective third parties – those returns are not scrutinized in the same way that contributions to political players are reviewed. A direct contribution to a candidate will lead to closer examination than a contribution to a third party who campaigned against that candidate's opponent. The effect, however, is likely the same.

Cash for Votes

In 2003, Parliament passed a significant change to the way that political parties are funded. In creating the "quarterly allowances," Parliament ensured that any party receiving 2% of the total votes cast or 5% of the votes cast in the electoral districts where the registered party endorsed a candidate would be provided with government funding every three months (the threshold). That quarterly allowance equals $1.75 per year for every vote cast for the party, which is adjusted for inflation by the Chief Electoral Officer every year based on the consumer price index.

While the quarterly allowance may not make a radical change to the results of elections, it has certainly changed campaigns. Parties who would now not expect to make electoral gains in certain regions or specific ridings are now using the allowance to leverage voters who would otherwise stay at home. Parties are convincing electors that their vote is no longer meaningless in the first past the post system and those electors can go and vote for his/her preferred party to ensure a financial benefit. The quarterly allowance can now legitimize a protest vote or buoy against strategic voting. In the past, said voter would either not bother voting, or direct his/her vote in order to achieve a strategic result whereas now, casting their ballot for their preferred option will ensure that some benefit, however minor, will accrue to his/her party of choice. Their vote is not for this election, but in preparation of the next one. Perhaps ironically, since the inception of the new program, voter turnout has been very low, with the voter turnout in 2008 being the lowest on record.[8]

Creditors look at the allowance as a predictable, stable and guaranteed source of income for the parties who are seeking loans. Parties whose coffers are close to, or over, the maximum allowable expenses will launch pre-writ spending knowing that they will be assured to recover the capital after the election.

In *Longley v. Canada*, the Ontario Court of Appeal ostensibly reversed the principled position described above in Figueroa which requires that a broader spectrum of political views be heard.[9] In so doing, the Court made a compelling case for the obverse result. While holding that resources are essential to the ability of a party and its supporters to communicate their message and views to the public, and that garnering resources is an area in which smaller parties are already disadvantaged in comparison to larger parties, the court refused to grant relief to the petitioners – a melange of small parties that frequently run candidates in multiple ridings. The Court even went so far as to note that the vote-based thresholds themselves enhanced the imbalance on an already tilted playing field between larger and smaller parties. The Court noted that this imbalance exacerbates the discrepancies in the respective parties' ability to communicate their message to voters. In considering the quarterly allowances (and registered party qualification for reimbursements) the Court noted that while the threshold was unconstitutional, it was justifiable under section one of the *Charter*.

The Crown successfully argued that the threshold test prevented fraudsters from abusing the process for pecuniary gain and that previous incidents involving registered parties could emerge again if the section was struck down. In preserving the legislation, the Court ruled that the goal of upholding the integrity of that regime overshadows the value of absolute equality in the treatment of all political parties in terms of access to public funding.

It is not a logical decision. While pushing aside the section three *Charter* analysis in *Figueroa*, it assumes that voters would be fooled into voting for an otherwise registered party whose participation in the electoral discourse can have no value to the discourse because of their true intentions to use the system to generate capital. It assumes that ensuring the participation of the smallest parties is not worth the potential of using the system to create wealth. The decision ignores the fact that there is nothing in law that would prevent use of the system for that specific purpose. Small, issue specific parties are pushed out of the debate because they cannot qualify for comparatively small amounts of money. They cannot build on their existing support until they meet the threshold, which may be impossible without those funds.

The circularity mentioned above works both ways. A strong correlation can be drawn between the gradual ascension in popularity and subsequent stability in popularity of the Green Party of Canada and the changes ushered into law by Liberal Prime Minister Jean Chrétien. The quarterly payments issued to the party have provided them with the capital required to insert them directly into the national discourse. It is perhaps not surprising that their message has begun to resonate with Canadians. To a certain extent, however, the Green Party's experience is a self-fulfilling prophecy. Once they have the money required to run a larger campaign, they will need more money to run a national campaign that builds on their previous success. The axiom, known to all salespeople, is that you have to spend money to make money. There is little doubt that the party's profile was increased significantly (almost 2% nationally). However, this electoral support for the Green Party did not translate into any seats.

That having been said, in what would seem to be a counterintuitive and financially detrimental move, some Green Party candidates encouraged their supporters to vote for other parties to ensure a different electoral result.[10] Some have even argued that the leader herself became a shill for another party.[11] While the leader of the party denied suggesting this approach, any form of 'strategic' voting would have an adverse impact on the financial solvency of an elector's first choice.

Conclusion

This fall, Canadians participated in their third federal election in four years. The one truth that most informed observers can agree on is that the current rules have entered into the calculus that party leaders will have before they 'force' another election. The new rules will also play a profound impact on an individual's decision to seek a nomination or the leadership of a registered party.

From both sides of the equation, courts across the country have said that money seriously affects democracy. In some cases, it is a requirement that allows smaller actors to effectively participate in the debate. In other cases, money is an impediment to informed debate – and when too much of it is thrown around, it restricts effective participation of those involved.

We have heard mixed messages from the Courts on the issue of money. On the one hand, we have heard that money is required to ensure that you and I can cast an effective ballot and broadening our section three right. Not long after, the Court held that too much money being spent by some people adversely affected our ability to participate – by forcing out those without the resources to compete. Not long after that, we are told that there are some views that are too small to be protected because doing so would expose the system to abuse. Judicial clarification on the interplay between speech, money and section three of the *Charter* is needed.

Sceptics would argue that two new parties were able to emerge in 1993 without any fundraising assistance. The

Reform Party of Canada and the Bloc Quebecois won over 100 seats combined. What most people fail to recognize, however, is the value that money played in building the profile of their respective leaders. Both Mr. Bouchard and Mr. Manning were active participants in the 1992 Charlottetown Accord referendum – and both of whom benefited, directly or otherwise, from public money used to fuel the respective "no" campaigns.

While the changes may have improved the appearance of propriety, they have done little to change the actual outcomes of elections. Ultimately, to be competitive, individual candidates still require significant funds to run their campaigns. The playing field has been angled upwards for everyone simultaneously. We have had too few elections to assess whether the changes will have the desired long term effect. However, in the immediate short term, we have seen a marked change in how the largest parties raise funds for elections. The smallest political parties will continue to face significant hurdles to qualify for federal funding.

Notes

1. *Buckley v. Valeo*, 424 U. S. 1 (1976).
2. *Charter of Rights and Freedoms*, Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11 ("the *Charter*").
3. *Figueroa v. Canada (Attorney General),* 2003 SCC 37 (CanLII) ("Figueroa").
4. *Harper v. Canada (Attorney General),* 2004 SCC 33 (CanLII)
5. *R. v. Oakes,* [1986] 1 S.C.R. 103 established the "reasonable limits" test where judges balance a violation of the right in question against other demonstrably justified and pressing and substantial policy goals. There must be also be proportionality between the effects of the limiting measure and the objective.
6. Upwards of $20,000,000 nationally if a party runs a full suite of candidates and an average of approximately $1.00 per elector per riding, depending on the size of riding in question.
7. A complete compendium of financing rules is compiled by Elections Canada, and can be found at: http://www.elections.ca/loi/com2008/compoverview2008_e.pdf
8. http://www.cbc.ca/news/canadavotes/story/2008/10/15/voter-turnout.html
9. *Longley v. Canada (Attorney General),* 2007 ONCA 852 (CanLII).
10. http://www.cbc.ca/news/canadavotes/story/2008/10/12/may-strategic.html
11. http://network.nationalpost.com/np/blogs/fullcomment/archive/2008/10/16/national-post-editorial-board-next-time-let-greens-pay-their-own-way.aspx