

CHAPTER 13

CAMPAIGN FINANCE LAWS: CONTROLLING THE RISKS OF CORRUPTION AND PUBLIC CYNICISM

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1. INTRODUCTION

Campaigning for public office takes money. Election campaigns are becoming increasingly expensive¹ and evidence shows that higher spending correlates with electoral success.² The need for cash produces various threats to democratic systems, the first being corruption. Politicians may be inclined to reward wealthy campaign backers with favours, influence, or access. Campaign finance also carries other implications for equality and fairness. Unregulated financing may give well-resourced members of society disproportionate influence over electoral debate, electoral outcomes, and elected officials. In addition, without regulation, candidates and parties may face an unfair disadvantage if they lack personal wealth or wealthy supporters. Finally, campaign financing is often disastrous for public confidence. Cynicism creeps in when politicians accept hefty donations or benefit from expensive campaign advertising funded by corporations or wealthy individuals. Scandals

¹ Ingrid van Biezen, "State intervention in party politics: The public funding and regulation of political parties" in Keith D Ewing, Jacob Rowbottom & Joo-Cheong Tham, eds, *The Funding of Political Parties: Where Now?* (Routledge, 2012) at 200–201.

² OECD, *Financing Democracy: Funding of Political Parties and Election Campaigns and the Risk of Policy Capture* (OECD Publishing, 2016) at 22.

are common and further erode public confidence. For example, Canada's 2003 spate of campaign finance reform was likely an attempt to cushion the worst impacts of the sponsorship scandal, which erupted after Quebec advertising firms who had donated to the federal Liberal Party received lucrative government contracts in return for little work.³

Campaign finance laws can help address the risks of corruption, inequality, unfairness, and public cynicism. Lawmakers may attempt to reduce these risks by promoting transparency, reducing politicians' reliance on large donors, and encouraging the financing of campaigns through small outlays from a wide range of individuals. Disclosure requirements, contribution limits, and other measures may further these goals. Public funding of election campaigns is another option. Canada, the UK, and the US each provide some form of partial public funding. Private fundraising, however, remains indispensable to parties and candidates in all three countries.

Regulation generally targets not only parties and candidates but also third-party campaigners. Third-party campaigners fund their own advertising and other activities in support of a candidate or party. If parties and candidates are regulated and third parties are not, private money will simply be funnelled to unregulated third-party groups. Even with full public funding of parties and candidates, the use of private money in third-party campaigns would require regulatory attention.

Lawmakers face various stumbling blocks when designing campaign finance regimes. Campaign finance laws may infringe constitutional guarantees such as freedom of expression, freedom of association, and voting rights. Courts may, however, be willing to allow infringements of constitutional rights for the sake of equality, fairness, public confidence, and the prevention of corruption. Lawmakers must also ensure regulations do not entrench incumbents by, for example, imposing spending limits that disadvantage challengers.⁴ Other difficulties include anticipating loopholes and defining the scope of regulated activities. Finally, lawmakers face the challenge of determining how to apply old regulatory approaches to new digital campaigning techniques.

Canada, the US, and UK each take a different approach to the regulation of campaign finance, although all three impose transparency requirements for parties, candidates, and third-party campaigners. At the federal level, Canada caps both contributions and spending. Corporations and other organizations are prohibited from making contributions to parties and candidates. The federal regime also provides some public funding to parties and candidates. The UK limits spending, but political contributions are uncapped. Further, unlike in Canada, corporations, labour unions, and other entities are permitted to make

³ Lisa Young, "Shaping the Battlefield: Partisan Self-Interest and Election Finance Reform in Canada" in Robert G Boatright, ed, *The Deregulatory Moment? A Comparative Perspective on Changing Campaign Finance Laws* (University of Michigan Press, 2015) at 111.

⁴ Yasmin Dawood, "Democracy, Power, and the Supreme Court: Campaign Finance Reform in Comparative Context" (2006) 4:2 Intl J Con L 269 at 272.

donations to parties and candidates. In the US, freedom of speech jurisprudence has defeated various pieces of the federal campaign finance regime, including spending caps. Caps on contributions to candidates have survived, along with a ban on corporate and union donations. Although transparency requirements in the US apply to parties, candidates, and third parties, transparency is weak for some types of institutional third-party campaigners.⁵

In this chapter, I will begin by summarizing how election campaigns are financed and how campaign finance may be regulated. Next, I will discuss rationales for campaign finance regulation and the challenges involved in designing regulatory measures, followed by a discussion of the regulation of third-party campaigners. Finally, I will briefly note the paucity of provisions directed at campaign financing in UNCAC and the OECD Convention on Foreign Bribery and then examine in some detail the campaign finance laws in each of Canada, the UK, and US. For each country, I will first discuss the leading cases on freedom of expression and campaign finance. I will then describe each country's regulatory regime and common criticisms of those regimes.

2. HOW ELECTION CAMPAIGNS ARE FINANCED

2.1 Direct Contributions or Loans to Candidates and Political Parties

Campaigns may be financed by direct contributions to candidates or political parties. Contributions can take the form of cash, goods and services, or loans. In the US, if a political party or third party coordinates spending with a candidate, this spending is viewed as a contribution to the candidate.

2.2 Public Funding

The state may fund political parties and candidates through grants, reimbursement of election expenses, tax deductions for donors, allocation of free or discounted broadcasting time, or other subsidies.

2.3 Independent Expenditures by Third Parties

Individuals and entities other than political parties and candidates may wish to fund advertising and other initiatives to support or oppose the electoral success of a party or candidate. This is referred to as third-party campaigning or outside spending. Individuals and organizations may choose to contribute to a third-party campaigner instead of a

⁵ 52 USC § 30104(c),(f); 11 CFR §§ 114.10(b)(1)–(2), 109.10(e)(1)(vi), 104.20(b), 104.20(c)(7)–(9). See also Diana Dwyre, “Campaign Finance Deregulation in the United States: What Has Changed and Why Does It Matter?” in Robert G Boatright, ed, *The Deregulatory Moment? A Comparative Perspective on Changing Campaign Finance Laws* (University of Michigan Press, 2015) at 61.

candidate or party. Third-party campaigners include individuals, corporations, labour unions, non-profit interest groups, or other organizations, such as the ubiquitous political action committee, or “PAC,” in the US. Third-party campaign activities sometimes expressly support or oppose a candidate or party. In other instances, third parties advertise about an issue associated with a candidate or political party, often termed “issue advertising.” Third-party campaigning can be entirely independent from parties and candidates, or third parties may work “in the shadow of political parties” or “in close concert with them.”⁶

2.4 Self-funding

Wealthy candidates for public office may wish to finance their own campaigns with personal resources. Canada imposes limits on candidate self-funding,⁷ but in the US, jurisprudence on freedom of speech precludes such limits.⁸

3. OVERVIEW OF TYPES OF CAMPAIGN FINANCE REGULATION

In this section, I will describe the tools used to regulate campaign finance. The regulatory approaches described below are often applied not only to general elections but also to nomination contests, leadership campaigns, and referendums.

Campaign finance regulation should be complemented by other laws promoting integrity in politics, such as rules on lobbying, conflict of interest, and whistleblower protection.⁹ Without these rules, the improper influence of money could simply be redirected from campaign finance to other activities like lobbying.¹⁰

3.1 Transparency Requirements

Justice Brandeis wrote in 1913 that “[s]unlight is said to be the best of disinfectants; electric light the most efficient policeman.”¹¹ Campaign finance regimes often attempt to prevent corruption through the disclosure of political contributions and spending. Disclosure may discourage large donations and deter politicians from rewarding donors or supportive third-

⁶ Anika Gauja & Graeme Orr, “Regulating ‘third parties’ as electoral actors: Comparative insights and questions for democracy” (2015) 4:3 *Interest Groups & Advocacy* 249 at 251.

⁷ *Canada Elections Act*, SC 2000, c 9, s 367(6),(7).

⁸ *Buckley v Valeo*, 424 US 1 at 54 (1976); *Davis v Federal Election Commission*, 554 US 724 (2007).

⁹ OECD (2016) at 16.

¹⁰ *Ibid.*

¹¹ Quoted in Dwyre (2015) at 59.

party campaigners with favours.¹² Disclosure of contributions and third-party spending also helps to facilitate informed voting, as awareness of the “interested money behind a candidate may give voters insight into what interests the candidate will promote if elected.”¹³ Critics of disclosure requirements argue that revealing the identity of donors represents an unacceptable incursion on donors’ privacy interest.¹⁴

3.2 Spending and Contribution Limits

Campaign finance regimes may attempt to curb demand for political money by imposing ceilings on spending by candidates, political parties, and third parties. The supply of political money can be limited by imposing ceilings on donations. Donation caps address corruption and equality concerns by encouraging candidates, parties, and third-party campaigners to seek small donations from a broad range of donors.

3.3 Public Funding

Some campaign finance regimes provide public funding to political parties and candidates. Public funding is intended to dilute the influence of wealthy supporters and level the playing field for small or new parties,¹⁵ although legislation sometimes favours large parties and incumbents by calibrating funding to electoral performance.¹⁶ Public funding also compensates for falling party incomes and increasing campaign costs.¹⁷ The cost of election campaigns has skyrocketed owing to expensive mass media techniques and the

¹² For example, in the UK, the introduction of disclosure requirements led to embarrassment and scandal, causing some changes in behaviour on the part of parties and donors: see Section 9.3, below; see also KD Ewing, “The Disclosure of Political Donations in Britain” in KD Ewing & Samuel Issacharoff, eds, *Party Funding and Campaign Financing in International Perspective* (Hart Publishing, 2006) at 67.

¹³ Dwyre (2015) at 35, 59. See also Anika Gauja, *Political Parties and Elections: Legislating for Representative Democracy* (Ashgate Publishing, 2010) at 178.

¹⁴ Dwyre (2015) at 62.

¹⁵ Van Biezen (2012) at 200–201.

¹⁶ For example, in *Figueroa v Canada (Attorney General)*, 2003 SCC 37, the Supreme Court of Canada struck down a law stipulating that parties must endorse at least fifty candidates in a general election to access public funding. In the Court’s view, this requirement was an unjustifiable infringement of the right to vote in section 3 of the *Charter of Rights and Freedoms* because it “exacerbates a pre-existing disparity in the capacity of the various political parties to communicate their positions to the general public”: para 54. The Court emphasized that all parties have something meaningful to contribute to electoral debate, not simply those who are a “genuine ‘government option’”: para 39.

¹⁷ Van Biezen (2012) at 200–201.

professionalization of parties.¹⁸ Meanwhile, revenues are declining because of falling party membership.¹⁹

Another means of reducing reliance on large donations is to allocate free broadcasting time to political parties and candidates. For example, the UK has imposed a blanket ban on paid political advertising on television and radio and provides free airtime to political parties during elections.²⁰ The scheme aims to reduce demand for money during election campaigns, level the playing field between competitors, and prevent distortion of electoral debate by the wealthy.²¹ The question remains whether such measures are becoming irrelevant in the age of digital campaigning.

Opponents of public funding argue that taxpayers should not be forced to fund parties with whom they disagree.²² They also point out that public funding of political parties diminishes their participatory character by replacing “labour and fund-raising efforts once provided by party members and interested citizens.”²³

4. RATIONALES FOR CAMPAIGN FINANCE REGULATION

4.1 Corruption and the Appearance of Corruption

If an individual or entity spends large sums supporting a politician’s election campaign, the politician may feel obliged to repay the favour. Corruption could come in the form of *quid pro quos*, such as the provision of contracts, licenses, or tax breaks in exchange for large political donations.²⁴ Campaign financing may also produce more subtle yet pernicious forms of corruption. First, politicians often provide wealthy backers with special access.²⁵ As noted by the dissenting justices in *Citizens United v Federal Election Commission*, access is a

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Communications Act 2003* (UK), c 21. The ban is discussed further in Section 9.2.2 and 9.3, below.

²¹ Eric Barendt, *Freedom of Speech*, 2nd ed (Oxford University Press, 2005) at 485.

²² Young (2015) at 119.

²³ Gauja (2010) at 162–63. See also Navraj Singh Ghaleigh, “Expenditure, Donations and Public Funding under the United Kingdom’s *P.P.E.R.A. 2000 – And Beyond?*” in KD Ewing & Samuel Issacharoff, eds, *Party Funding and Campaign Financing in International Perspective* (Hart Publishing, 2006) at 56.

²⁴ OECD (2016) at 23.

²⁵ For example, Sheldon Adelson and his wife donated \$93 million to third-party campaigners in the American general election in 2012; in 2014, three Republican governors attended a donor conference in Las Vegas where each met one-on-one with Adelson: Jordan May, “Are We Corrupt Enough Yet? The Ambiguous Quid Pro Quo Corruption Requirement in Campaign Finance Restrictions” (March 2015) 54:2 Washburn LJ 357 at 357–58.

precondition for influence in the legislative process.²⁶ Privileged access may also lead to public cynicism. Second, monetary support for a candidate's campaign could taint the candidate's judgement once elected and give wealthy supporters undue influence over lawmakers. There are many opportunities for influence and distortion throughout the legislative process, starting with the decision to introduce bills or amendments in the first place.²⁷ Issacharoff observes that, after the election, lawmakers may be influenced by gratitude to large donors and a desire to secure "future support in order to retain the perquisites of office."²⁸ This can produce a kind of "clientelism," in which private interests capture the powers of the state and obtain "legislation in the private interest."²⁹ Yet the subtlety of such influence may allow politicians to "feel as if nothing improper has occurred."³⁰ Aside from effective governance issues, the potential for the wealthy to exert undue influence on the legislative process raises obvious equality concerns.³¹

It may be impossible to separate the influence of large donors and supportive third-party campaigners over lawmakers from the influence of principles, constituents, and other factors.³² An example of this difficulty is provided by *McCormick v United States*, in which the US Supreme Court overturned an elected official's conviction for corruption and struck down the law criminalizing his conduct.³³ The defendant politician had a long-standing reputation for favouring legislation beneficial to foreign doctors. He was charged with corruption after he accepted money from foreign doctors for his election campaign and subsequently sponsored legislation favourable to them. Because this was not a clear *quid pro quo*, the Court held that the defendant's actions did not constitute corruption. Dembitskiy criticizes this decision for its failure to address the appearance of corruption, which may be present even where an elected official is guided by their own principles, not their donors.³⁴

Publicly funded election campaigns help address the risk of corruption, but comprehensive public funding requires public support and political will. If election campaigns continue to be financed wholly or partly through private funds, many argue that corruption can be

²⁶ *Citizens United v FEC*, 588 US 310 at 455 (2009).

²⁷ John P Sarbanes, "Power and Opportunity: Campaign finance reform for the 21st century" (2016) 53:1 Harvard J on Leg 1 at 6. Although some studies claim that monetary support does not influence policy outcomes in the US, Sarbanes argues that these studies focus on votes and ignore the potential for influence and distortion at earlier stages in the legislative process.

²⁸ Samuel Issacharoff, "On Political Corruption" (November 2010) 124:1 Harvard LR 118 at 126.

²⁹ *Ibid* at 127.

³⁰ Sarbanes (2016) at 12.

³¹ The equality rationale for campaign finance regulation is discussed further in Section 4.2, below.

³² OECD (2016) at 22.

³³ *McCormick v United States*, 500 US 257 (1991).

³⁴ Vladyslav Dembitskiy, "Where Else is the Appearance of Corruption Protected by the Constitution? A Comparative Analysis of Campaign Finance Laws after *Citizens United* and *McCutcheon*" (2016) 43 Hastings Constitutional L Quarterly 885 at 886.

reduced by encouraging smaller donations from more sources.³⁵ This approach also accords with the argument that contributions are a valid form of participation in electoral debate.³⁶ In the US, micro-donations have become increasingly important in elections.³⁷ For example, President Trump raised as much from small donors (contributing \$200 or less) as Clinton and Sanders combined.³⁸ Ninety-nine percent of the \$229 million raised by Sanders came from individual donors.³⁹ In 2008, 38% of contributions to major party candidates seeking nomination came from micro-donors, compared to 25% in 2000.⁴⁰ From the perspective of corruption, fairness, equality, and public confidence, this trend is promising. On the other hand, some point out that reliance on small individual donations could lead politicians to cater to groups of small donors on the fringes, as opposed to cultivating the electoral support of voters who are more centrist but unlikely to make a donation.⁴¹

The prevention of corruption is accepted by courts in Canada, the UK, and US as a legitimate justification for the burdens on freedom of expression involved in campaign finance regulation. The US Supreme Court has further held that preventing corruption or the appearance of corruption is the *only* possible justification for the limits on political speech caused by contribution limits, spending limits, and other campaign finance laws. However, judicial definitions of “corruption” vary. The majority of the US Supreme Court has defined corruption narrowly to include only direct *quid pro quo* exchanges, not undue influence and access. However, direct *quid pro quos* are almost impossible to prove and are already captured by bribery laws.⁴² The dissenting judges of the US Supreme Court in *Citizens United v Federal*

³⁵ Issacharoff (November 2010) at 118, 137. Quebec’s *financement populaire* embodies this approach. At both the provincial and municipal levels, campaign finance scandals have led to the imposition of low contribution caps in the hopes of achieving the “popular financing” of political parties; the scheme is supplemented by public funding: see Maxime Pelletier, “Municipal Political Reform in Quebec: The Myth of ‘Popular Finance’” (Fall 2014) 43 *J of Eastern Township Studies* 63. Pelletier observes that only a small percentage of voters in Quebec makes political contributions and suggests that popular finance will remain a pipe dream if few citizens are interested in donating money to parties and candidates.

³⁶ Sarbanes (2016) at 11.

³⁷ Richard L Hasen, “The transformation of the campaign financing regime for US presidential elections” in Keith D Ewing, Jacob Rowbottom & Joo-Cheong Tham, eds, *The Funding of Political Parties: Where Now?* (Routledge, 2012) 225 at 229.

³⁸ Fredreka Schouten, “President Trump shatters small-donor records, gets head start on 2020 race”, *USA Today* (21 February 2017), online <<https://www.usatoday.com/story/news/politics/onpolitics/2017/02/21/president-trump-shattered-small-donor-records/98208462/>>.

³⁹ Katelyn Ferral, “One Person, one Algorithm, one vote”, *The Capital Times* (4 January 2017) 24.

⁴⁰ Hasen (2012) 225 at 229.

⁴¹ Young (2015) at 124.

⁴² Sarbanes (2016).

Election Commission argued in favour of viewing corruption as a “spectrum,” noting that “the difference between selling a vote and selling access is a matter of degree, not kind.”⁴³

Even under a broader conception of corruption, the anticorruption rationale for campaign finance regulation fails to justify some types of regulation.⁴⁴ Courts must therefore turn to other justificatory theories if such regulations infringe constitutional rights. For example, spending limits for candidates and parties do little to prevent reliance on big donors, although such limits reduce the amount of money needed by candidates and parties.⁴⁵ In the US, courts view the anticorruption rationale as insufficient to justify restrictions on third-party independent expenditures. According to the majority of the US Supreme Court, the lack of coordination between the third party and the candidate reduces the value of the expenditure to the candidate, therefore reducing the risk of *quid pro quo* exchanges.⁴⁶ However, others argue that the absence of coordination does not prevent candidates from feeling grateful to third parties who have spent vast sums supporting their candidacies, or from wishing to maintain their support for future elections.⁴⁷

4.2 Equality, Fairness, and Participation

Campaign finance regulations are sometimes motivated by the desire to promote equality and fairness in the electoral system. This egalitarian model of campaign finance can be contrasted with the libertarian model. The libertarian model responds to fears that “a regulated marketplace of ideas may result in the entrenchment of the powerful,” whereas the egalitarian model responds to concerns that “an unregulated marketplace of ideas may result in the entrenchment of the wealthy.”⁴⁸ The egalitarian model of campaign finance has been accepted as a valid legislative choice by the Supreme Court of Canada.⁴⁹ The majority of the US Supreme Court, on the other hand, has settled on the libertarian model.⁵⁰

Various goals are tied to the equality and fairness rationale. First, many argue that campaign finance must be regulated to prevent the wealthy from drowning out other speakers and setting the issue agenda of electoral debate.⁵¹ Otherwise, under-resourced viewpoints will be lost and under-resourced citizens will be barred from meaningful participation in debate,

⁴³ *Citizens United v FEC*, 588 US 310 at 448 (2009).

⁴⁴ Barendt (2005) at 482.

⁴⁵ *Ibid.*

⁴⁶ Issacharoff (November 2010) at 123.

⁴⁷ See, e.g., Hasen (2012) 225 at 237.

⁴⁸ Dawood (2006) at 290.

⁴⁹ *Harper v Canada (Attorney General)*, 2004 SCC 33 at para 62.

⁵⁰ The libertarian model is discussed further in Section 5.1 of this chapter on freedom of expression and campaign finance.

⁵¹ See, e.g., Janet L Hiebert, “Elections, Democracy and Free Speech: More at Stake than an Unfettered Right to Advertise” in K D Ewing & Samuel Issacharoff, eds, *Party Funding and Campaign Financing in International Perspective* (Hart Publishing, 2006) at 269.

leading to cynicism. In the House of Lords' decision in *Animal Defenders International v the United Kingdom*, Lord Bingham pointed out that, if "the playing field of debate" is not level, views "may come to be accepted by the public not because they are shown in public debate to be right but because, by dint of constant repetition, the public have been conditioned to accept them."⁵² The Supreme Court of Canada has similarly emphasized that, "[t]o ensure a right of equal participation in democratic government, laws limiting spending are needed to ... ensure that one person's exercise of the freedom to spend does not hinder the communication opportunities of others."⁵³

Second, many argue that unregulated campaign finance allows the wealthy to have a disproportionate impact on electoral outcomes.⁵⁴ Various studies suggest that the candidate who spends the most is more likely to win the election.⁵⁵ This is sometimes seen as a form of corruption, but a corruption of voters and the electoral system rather than elected officials.⁵⁶ Third, as discussed above in the context of the anticorruption rationale, campaign finance regulation seeks to ensure the wealthy do not have disproportionate influence over policy outcomes after the election. Finally, the equality and fairness rationale calls for regulation to level the playing field for parties and candidates. Unregulated campaigns may give candidates with personal wealth or wealthy supporters an unfair advantage. For example, in the US, the so-called "wealth primary" screens out candidates with insufficient financial heft, which bodes poorly for racial and gender diversity in public office.⁵⁷

In attempting to ensure the wealthy do not wield disproportionate influence over debate, electoral outcomes, and post-election policy, the egalitarian model responds to concerns that wealthy donors and third-party campaigners are unrepresentative of wider society. In the US, studies have found the donor class to be "underrepresentative of most Americans."⁵⁸ Most donors are "wealthier and older than average Americans, and they are more likely to be white and male than the general population."⁵⁹ Gilen and Page found that the policy preferences of wealthy donors differ from non-donors and people of colour.⁶⁰ For example, an American study in 2016 found that 44% of donors giving \$5,000 or more supported the *Affordable Care Act*, compared to 53% of American adults. Likewise, 39% of donors

⁵² *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport*, [2008] UKHL 15 (BAILII) at para 28.

⁵³ *Libman v Quebec (Attorney General)*, [1997] 3 SCR 569, 151 DLR (4th) 385 at para 47.

⁵⁴ Raymond J La Raja, *Small Change: Money, Political Parties, and Campaign Finance Reform* (University of Michigan, 2008) at 1.

⁵⁵ Sarbanes (2016) at 9.

⁵⁶ Issacharoff (November 2010) at 122.

⁵⁷ Sarbanes (2016) at 8.

⁵⁸ Hasen (2012) 225 at 238.

⁵⁹ Sean McElwee, *D.C.'s White Donor Class* (Demos, 2016) at 1, online: <<http://www.demos.org/publication/dc%E2%80%99s-white-donor-class-outsized-influence-diverse-city>>.

⁶⁰ Martin Gilens & Benjamin I Page, "Testing Theories of American Politics: Elites, Interest Groups, and Average Citizens" (2014) 12 *Perspectives on Politics* 564.

contributing \$1,000 or more supported the Waxman-Markey clean energy bill, compared to 63% of non-donors.⁶¹ Even if the policy preferences of the wealthy sometimes align with those of the general public, Sarbanes argues we should not be distracted from the problematic nature of the outsized impact of the wealthy in policy outcomes.⁶²

4.3 Informed Voting

Campaign finance regulation is often touted as a means of facilitating informed voting. Measures such as spending and contribution caps prevent well-resourced speakers from drowning out other speakers, thus making space for the effective dissemination of more information and viewpoints. Courts in Canada and Europe have upheld campaign finance regulations on the basis of the informed voting rationale. They interpret constitutional voting rights to include the right to an informed vote.⁶³ On the other hand, others argue that informed voting is better served by relaxing campaign finance and allowing unfettered dissemination of information. For example, the majority of the US Supreme Court views spending restrictions as a dangerous limitation on the quantity of information accessible to voters.⁶⁴

4.4 Public Confidence

Various studies in the US, UK, and Canada show falling public confidence in the electoral system, risking the “decay of civic engagement.”⁶⁵ In a study by vanHeerde-Hudson and Fisher in the UK, public opinion was characterized by the perception that “there is just ‘too much money’ in politics” and the belief that wealthy donors have undue influence over politicians.⁶⁶ In a 2012 survey in the US, 77% of respondents thought members of Congress were more likely to act in the interests of those who spent money supporting their election campaigns than they were to act in the public interest.⁶⁷ A 2014 poll indicated that three in

⁶¹ Sean McElwee, Brian Schaffner, & Jesse Rhodes, “Whose Voice, Whose Choice? The Distorting Influence of the Political Donor Class in Our Big-Money Elections” (Demos, 2016), online: <<http://www.demos.org/publication/whose-voice-whose-choice-distorting-influence-political-donor-class-our-big-money-electi>>.

⁶² Sarbanes (2016) at 6.

⁶³ See, e.g., *Harper v Canada (Attorney General)*, 2004 SCC 33 at para 62.

⁶⁴ *Buckley v Valeo*, 424 US 1 at 19 (1976).

⁶⁵ Sarbanes (2016) at 3.

⁶⁶ Jennifer vanHeerde-Hudson & Justin Fisher, “Public knowledge of and attitudes towards party finance in Britain” (2013) 19:1 Party Politics 41.

⁶⁷ Brennan Center for Justice at NYU School of Law, *National Survey: Super PACs, Corruption, and Democracy: Americans’ Attitudes about the Influence of Super PAC Spending on Government and the Implications for our Democracy* (2012), online: <<https://www.brennancenter.org/analysis/national-survey-super-pacs-corruption-and-democracy>>.

four American voters think wealthy individuals have a better shot at influencing elections than the rest of the population has.⁶⁸

Arguments in favour of stricter campaign finance regulation often raise the issue of voter confidence. For example, in *Canada (Attorney General) v Somerville*, the government argued that third-party spending limits are necessary to prevent the perception that lawmakers are more accountable to their wealthy supporters than to their electors.⁶⁹ In *Harper v Canada (Attorney General)*, the Supreme Court of Canada cited public confidence as a permissible justification for third-party spending limits and their limits on freedom of expression.⁷⁰ The US Supreme Court also accepts that the government may limit free speech to prevent the appearance of corruption, but the majority defines corruption narrowly to include only direct *quid pro quo* exchanges.⁷¹

4.5 Other Rationales

Campaign fundraising is time-consuming for politicians. Limits on campaign spending may reduce the time politicians spend on fundraising, allowing them to focus on policy development and other valuable functions.⁷² In addition, some argue that unrestrained campaign spending compromises the quality of public debate. For example, Dworkin argues that, if electoral debate is simply a free-for-all, discourse may “be so cheapened as to altogether lose its democratic character.”⁷³ Similarly, the Neill Committee in the UK justified a ban on paid political advertising on broadcast media by pointing to the undesirability of a “continuous barrage of party political propaganda.”⁷⁴

⁶⁸ Sarah Dutton et al, “Americans’ view of Congress: Throw ‘em out”, *CBS News* (21 May 2014), online: <<http://www.cbsnews.com/news/americans-view-of-congress-throw-em-out/>>.

⁶⁹ *Canada (Attorney General) v Somerville*, 1996 ABCA 217 at para 11.

⁷⁰ *Harper v Canada (Attorney General)*, 2004 SCC 33.

⁷¹ See, e.g., *McCutcheon v FEC*, 572 US __ (2014) (slip op).

⁷² Barendt (2005) at 481.

⁷³ Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Harvard University Press, 2000) at 369.

⁷⁴ UK, *Fifth Report of the Committee on Standards in Public Life: The Funding of Political Parties in the United Kingdom* (London The Stationery Office, 1998) at 174.

5. OVERVIEW OF CHALLENGES IN REGULATING CAMPAIGN FINANCE

5.1 Freedom of Expression and Association

Campaign finance regulation often entails limits on freedom of expression. As the US Supreme Court remarked in *Buckley v Valeo*, “virtually every type of communication in a modern mass democracy is dependent on expenditure.”⁷⁵ Limiting spending and fundraising therefore limits the “quantity of expression.”⁷⁶ Further, campaign finance regulations impact *political* speech, which enjoys a preferred position under US law and stronger protection under the European Convention on Human Rights.⁷⁷ Some regulations also hinder freedom of association by preventing individuals from freely pooling their resources to finance a political message. Governments attempting to restrict spending, fundraising, broadcasting, and other aspects of election campaigns must therefore show that restrictions are a justified infringement of freedom of expression and association.

As Dworkin observes, critics of campaign finance regulation view any restriction of political speech as harmful to democracy, even if that restriction is aimed at enhancing the quality of democracy.⁷⁸ These critics focus on the danger posed by government, rather than the wealthy, to democracy and individual freedom. The majority of the US Supreme Court follows this libertarian approach to freedom of speech. In *McCutcheon v Federal Election Commission*, for example, Chief Justice Roberts maintained that the government cannot be trusted to judge the value of certain speech over other speech, “even when the government purports to act through legislation reflecting ‘collective speech.’”⁷⁹

Dworkin dismisses this libertarian model as “prophylactic overkill.”⁸⁰ Under Dworkin’s “partnership” model of democracy, citizens participate in elections not only by voting, but by attempting to influence the opinions of others.⁸¹ Dworkin argues that citizens who lose must be “satisfied that they had a chance to convince others not merely that they have been outnumbered.”⁸² However, if the “admission price” to political debate is too high,

⁷⁵ *Buckley v Valeo*, 424 US 1 at 19 (1976).

⁷⁶ *Ibid.*

⁷⁷ Barendt (2005) at 159.

⁷⁸ Dworkin (2000) at 353.

⁷⁹ *McCutcheon v FEC*, 572 US __ (2014) (slip op at 17).

⁸⁰ Dworkin (2000) at 369.

⁸¹ *Ibid* at 358.

⁸² *Ibid* at 364–65.

citizens will be denied the opportunity to make persuasive efforts on the basis of wealth, “a circumstance... remote from the substance of opinion or argument.”⁸³

Many commentators agree with Dworkin that campaign finance regulation can be a justified limit on freedom of speech. Some proponents of campaign finance reform go further, arguing that restrictions on spending and fundraising, for example, may actually enhance free speech values. Restrictions may prevent the wealthy from drowning out other speakers and thus facilitate the dissemination of a wider range of perspectives. In this vein, Fiss argues that the state can be “a friend of speech,” not just its enemy.⁸⁴ According to Fiss, free speech should protect not only individual self-expression but also popular sovereignty.⁸⁵ To accomplish this, “the state may have to act to further the robustness of public debate in circumstances where powers outside the state are stifling speech.”⁸⁶

5.2 Entrenching Incumbents and Differential Impacts on Different Political Parties

Campaign finance regulations tend to have disproportionate impacts on different parties and candidates. These impacts may be unintended. For example, in Canada, the federal Liberal Party introduced campaign finance measures, which ultimately turned out to be most favourable to the Conservative Party.⁸⁷ In other instances, partisan finagling may be at work. La Raja argues that the design of campaign finance regulation often “can be tied to partisan strategies for influencing the value of one faction’s resources relative to one’s rivals.”⁸⁸

Most concerning is the potential for campaign finance regulation to favour incumbents.⁸⁹ For example, ceilings on candidate spending may give incumbents an advantage because they already have publicity.⁹⁰ As a result, critics argue that spending caps “limit competition and

⁸³ *Ibid* at 364. Dworkin also makes the argument that, in a society with a defensible distribution of wealth, “no one...could have the impact on political decisions, just in virtue of money spent in politics, that the rich can now have in the United States”: *ibid* at 176. In this sense, the campaign finance laws struck down by the US Supreme Court do not victimize anyone, as they do not make anyone’s position “worse, with respect to the liberty in question, than it would most likely have been in a defensible distribution”: *ibid* at 176.

⁸⁴ Owen M Fiss, *The Irony of Free Speech* (Harvard University Press, 1996) at 83.

⁸⁵ *Ibid* at 3–4.

⁸⁶ *Ibid*.

⁸⁷ Colin Feasby, “Canadian political finance regulation and jurisprudence” in Keith D Ewing, Jacob Rowbottom & Joo-Cheong Tham, eds, *The Funding of Political Parties: Where Now?* (Routledge, 2012) 206 at 217.

⁸⁸ La Raja (2008) at 6.

⁸⁹ Richard A Posner, *Law, Pragmatism, and Democracy* (Harvard University Press, 2003) at 240.

⁹⁰ Barendt (2005) at 482; Posner, (2003) at 240.

undemocratically serve to preserve the *status quo*.”⁹¹ Such arguments are particularly salient in the US, where “elections are candidate-centered and big campaigns are sometimes needed to blast out incumbents.”⁹²

Campaign finance regulations may also have differential impacts depending on the ideology and fundraising methods of different political parties. For example, in the UK, restrictions on donations from labour unions would clearly disadvantage the Labour Party. In Canada, Feasby argues that “contribution limits have created a persistent funding advantage for the federal Conservative Party,” which has had success gathering many small donations from individuals.⁹³ Because party expenditure is also limited, the Conservative Party often has money left over to spend on attack ads between elections.⁹⁴ The federal New Democratic Party, on the other hand, faced a greater disadvantage than the Liberals and Conservatives after the erosion of public funding in Canada in 2014, since the New Democrats derived a larger portion of their income from the public funding regime.⁹⁵

5.3 Loopholes

Loopholes are another challenge in crafting effective campaign finance regimes. The goals of ameliorating corruption, unfairness, and inequality will be subverted if donors simply find new ways to funnel money to politicians. Issacharoff points out that “the perverse ‘hydraulic’ of money finding its outlet” has caused many attempts at campaign finance reform to “backfire.”⁹⁶ For example, after Congress tightened regulations governing party fundraising and spending in the US in 2002,⁹⁷ spending by third-party campaigners jumped, suggesting that money was simply redirected to a new outlet.⁹⁸ Even if campaign finance regulations are skillfully designed to minimize these “hydraulics,” prospective donors may direct money to other activities like lobbying to achieve their ends.⁹⁹

5.4 Circumscribing the Scope of Regulated Activities

Another difficulty in designing campaign finance regulations is drawing the line between regulated and unregulated activities. Distinguishing between election activities and general political activities can be difficult, and entities and individuals will always try to fall on the

⁹¹ Gauja & Orr (2015) at 250.

⁹² *Ibid.*

⁹³ Feasby (2012) 206 at 217. See also Young, (2015) at 119.

⁹⁴ Feasby (2012) 206 at 217, 219.

⁹⁵ Young (2015) at 118.

⁹⁶ Issacharoff (November 2010) at 120.

⁹⁷ *Bipartisan Campaign Finance Reform Act of 2002*, Pub L No 107-155, 116 Stat 81.

⁹⁸ Dwyre (2015) at 54.

⁹⁹ OECD (2016) at 16.

unregulated side of the line.¹⁰⁰ Third parties might attempt to split costs between election-related spending and general expenses in order to avoid hitting the thresholds for regulatory requirements.¹⁰¹ In addition, it may be unclear whether an advertisement on a contentious political issue during an election aims to improve the chances of a certain political party or is merely part of general political debate. Responding to this difficulty, Barendt has argued that the Supreme Court of Canada's willingness to allow third party spending limits¹⁰² is based on the incorrect assumption that "a sensible line can be drawn between campaign expenditure on the one hand and expenditure on general political and social discussion" on the other.¹⁰³

Lawmakers may also encounter difficulty in drawing the line between regulated and unregulated time periods. Campaign finance regulation often kicks in when an election begins. However, because election campaigning has become more or less permanent, some commentators argue that lawmakers should approach political finance as a whole rather than focusing on campaign finance alone.¹⁰⁴ Further, contemporary digital campaigning techniques have shifted the timing of expenses. Many costly activities, such as forming databases of voters, occur before the election period begins, allowing expenses for these activities to slip through the regulatory net.¹⁰⁵ On the other hand, an overly broad cap on general party expenditures could impact useful activities such as policy development.¹⁰⁶

5.5 New Campaigning Techniques

The next challenge in campaign finance is the application of old regulatory regimes to new methods of campaigning. Traditionally, campaign finance regulation is designed with media like television and radio in mind. However, campaigns are increasingly reliant on digital techniques like "micro-targeting," which involves using data purchased from data companies to predict how particular voters might feel about certain issues and targeting small groups of voters with tailored advertisements.¹⁰⁷ Existing regulatory frameworks may be ill-suited to these new techniques. For example, spending caps may be undermined by the difficulty of tracking online and social media expenses.¹⁰⁸ Further, as discussed above in

¹⁰⁰ Keith D Ewing & Jacob Rowbottom, "The Role of Spending Controls" in Keith D Ewing, Jacob Rowbottom & Joo-Cheong Tham, eds, *The Funding of Political Parties: Where Now?* (Routledge, 2012) at 85.

¹⁰¹ *Ibid.*

¹⁰² See, e.g., *Harper v Canada (Attorney General)*, 2004 SCC 33.

¹⁰³ Barendt (2005) at 479–80.

¹⁰⁴ Gauja & Orr (2015) at 259.

¹⁰⁵ Damian Tambini et al, *Media Policy Brief 19: The new political campaigning* (London School of Economics, March 2017) at 5.

¹⁰⁶ Ewing & Rowbottom (2012) at 81.

¹⁰⁷ Katelyn Ferral, "One Person, one Algorithm, one vote", *The Capital Times* (4 January 2017) 24.

¹⁰⁸ Tambini et al (March 2017) at 5.

Section 5.4, some activities involved in digital campaigning may take place before the election period begins, allowing expenses for these activities to escape unregulated.¹⁰⁹

6. THE REGULATION OF THIRD-PARTY CAMPAIGNERS

6.1 The Role of Third-Party Campaigners

The proper role of third-party campaigners in elections is debated. On one hand, third parties may provide helpful perspectives and additional information not offered by parties and candidates. As the Alberta Court of Appeal observed in *Somerville*:

The citizenry looks to its community, political and religious leaders, and interest groups for input. Voters want the benefit of the independent advice and information on candidates and parties from others with similar ideologies and without the self interest involved in candidate and party advertising.¹¹⁰

The Alberta Court of Appeal noted further that, without third-party campaigners, voters would only receive the information politicians and the media choose to disseminate.¹¹¹ This is particularly problematic in relation to issues avoided by political parties as “non-winners,” since their positions on such issues are “critical to the voter.”¹¹² The dissent in *Harper v Canada (Attorney General)* echoed these points, arguing that deliberative democracy necessitates giving a voice to unpopular views avoided by political parties or candidates.¹¹³ In this conception of elections, “parties and third parties are on an equal footing” and third party “voices are seen to be in the interests of either open deliberation or competitive pluralism.”¹¹⁴

On the other hand, many commentators argue that political parties and candidates should be the primary players in elections, rather than unaccountable third-party groups with narrow interests.¹¹⁵ The Canadian Lortie Commission summarized this argument:

Parties remain the primary political organizations for recruiting and selecting candidates for election to the House of Commons, for organizing

¹⁰⁹ *Ibid.*

¹¹⁰ *Canada (Attorney General) v Somerville*, 1996 ABCA 217 at para 75.

¹¹¹ *Ibid* at para 48.

¹¹² *Ibid* at para 76.

¹¹³ *Harper v Canada (Attorney General)*, 2004 SCC 33 at para 14.

¹¹⁴ Gauja & Orr (2015) at 263.

¹¹⁵ See, e.g., La Raja (2008) at 7; Issacharoff, (November 2010) at 136, 141; dissenting judgement in *Citizens United v FEC*, 588 US 310 (2009).

the processes of responsible parliamentary government, and for formulating policy that accommodates and reconciles competing regional and socio-economic interests. As legitimate as interest groups are in a free and democratic society, by their nature they cannot perform these crucial functions.... It is therefore imperative that electoral reform address the fundamental objective of strengthening political parties as primary political organizations.¹¹⁶

In addition, since third-party organizations, such as corporations, do not have the right to vote, some argue they should be barred “from exercising an undue voice within the electoral process.”¹¹⁷

In the US, the growth of outside spending has deteriorated the centrality of candidates and political parties in campaigns. Dwyre argues that this deterioration is “detrimental to the overall health of American representative democracy.”¹¹⁸ Parties “link voters to lawmakers” and provide an “accountability mechanism.”¹¹⁹ They also give voters an idea of what to expect from candidates.¹²⁰ However, these functions are undermined by the shrinking role of parties in electoral debate.¹²¹ In Dwyre’s view, the diminishing influence of parties will lead to a “democratic deficit” and a disenfranchised electorate.¹²²

6.2 Regulating Third-Party Campaigners to Reinforce other Campaign Finance Controls

Third-party campaign regulations may help ensure the effectiveness of regulations governing parties and candidates. If party and candidate spending is limited without corresponding limits on third-party spending, parties and candidates may be forced to use their limited spending capacity to “fend off attacks” by third parties rather than advertising their policy positions.¹²³ The regulation of third parties also prevents circumvention of regulations governing spending, contributions, and transparency for candidates and political parties. A failure to regulate third parties could produce a “waterbed effect” in which front groups are “used to channel spending for parties and candidates.”¹²⁴ Gauja and

¹¹⁶ Canada, Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy: Final Report* (Ottawa: Minister of Supply and Services, 1991) vol 1 at 13.

¹¹⁷ Gauja & Orr (2015) at 254.

¹¹⁸ Dwyre (2015) at 35.

¹¹⁹ *Ibid* at 53, 57–58.

¹²⁰ Robert G Boatright, “U.S. Interest Groups in a Deregulated Campaign Finance System” in Robert G Boatright, ed, *The Deregulatory Moment? A Comparative Perspective on Changing Campaign Finance Laws* (University of Michigan Press, 2015) at 99–100.

¹²¹ Dwyre (2015) at 53, 57–58.

¹²² *Ibid*.

¹²³ Gauja & Orr (2015) at 254. See also Ewing & Rowbottom (2012) at 82.

¹²⁴ Gauja & Orr (2015) at 254.

Orr add that third-party regulations must prevent organizations from proliferating to circumvent spending caps.¹²⁵

6.3 The Regulation of Third Parties and Freedom of Speech

Third-party spending caps raise particularly potent freedom of expression concerns. Their constitutional validity is therefore controversial. As noted by the Alberta Court of Appeal in *Canada (Attorney General) v Somerville*, limits on third party spending “purport ... to protect the democratic process, by means of infringing the very rights which are fundamental to a democracy.”¹²⁶

Third-party spending limits have survived freedom of expression challenges in Canada and the UK, but in the US, caps on independent third-party expenditures have been struck down as an unjustifiable limit on freedom of speech.¹²⁷ Freedom of expression and third-party spending limits are discussed further below in the context of the Canadian cases of *Canada (Attorney General) v Somerville*,¹²⁸ *Libman v Quebec (Attorney General)*,¹²⁹ and *Harper v Canada (Attorney General)*;¹³⁰ the British case of *Bowman v the United Kingdom*;¹³¹ and the American cases of *Buckley v Valeo*,¹³² *Austin v Michigan Chamber of Commerce*,¹³³ *McConnell v FEC*,¹³⁴ *Citizens United v FEC*,¹³⁵ and *SpeechNow.org v FEC*.¹³⁶

6.4 Third-Party Spending and Corruption

A lack of consensus persists regarding the extent to which independent third-party campaigning entails a risk of corruption. Many argue that politicians may be inclined to reward third parties who fund advertising to support their campaigns, even if the third parties act independently. However, American courts have concluded that independent third-party campaign expenditures entail no significant risk of corruption or the appearance

¹²⁵ *Ibid* at 263.

¹²⁶ *Canada (Attorney General) v Somerville*, 1996 ABCA 217 at para 65

¹²⁷ See *Buckley v Valeo*, 424 US 1 (1976), *SpeechNow.org v FEC*, 599 F (3d) 686 (DC Cir 2010), *Citizens United v FEC*, 588 US 310 (2009).

¹²⁸ *Canada (Attorney General) v Somerville*, 1996 ABCA 217.

¹²⁹ *Libman v Quebec (Attorney General)*, [1997] 3 SCR 569, 151 DLR (4th) 385.

¹³⁰ *Harper v Canada (Attorney General)*, 2004 SCC 33.

¹³¹ *Bowman v the United Kingdom* (1998), No 24839/94, [1998] I ECHR 4.

¹³² *Buckley v Valeo*, 424 US 1 (1976).

¹³³ *Austin v Michigan Chamber of Commerce*, 494 US 652 (1989).

¹³⁴ *McConnell v Federal Election Commission*, 540 US 93 (2003).

¹³⁵ *Citizens United v FEC*, 588 US 310 (2009).

¹³⁶ *SpeechNow.org v FEC*, 599 F (3d) 686 (DC Cir 2010).

of corruption, assisted in this conclusion by a narrow definition of corruption. This debate is summarized in Section 8.3, below.

6.5 The Regulation of Institutional Third Parties

Institutional campaign spending may carry different implications for the quality of democracy depending on the type of institution in question. Rowbottom points out that “some institutions can be an important vehicle for participation ... Other institutions, however, may act as a conduit for wealthy individuals and organisations.”¹³⁷ In some cases, the difference between an individual donation and an institutional donation may be meaningless, as when an individual controls the institution and lacks accountability to members.¹³⁸ For example, Boatright notes that some interest groups in the US have a small membership to whom they are accountable, making them look more like for-profit corporations than vehicles for “representing citizens’ views to politicians.”¹³⁹ In other cases, institutional spending results from the “pooling of resources among lots of people,” which reduces both corruption and equality concerns.¹⁴⁰ This type of institutional spending is also a means of enhancing the effectiveness of small donations.¹⁴¹ Some institutions may also require “internal debate” before making political expenditures, which contributes to the deliberative process.¹⁴²

Blanket prohibitions or caps on institutional political spending may close off healthy “channels for participation.”¹⁴³ Rowbottom argues that the design of campaigning controls for institutions should not be based on their status as corporations, unions, or unincorporated associations, but rather on the “democratic credentials of the institution” and its ability to provide an effective channel for citizen participation.¹⁴⁴

a) Corporations

For-profit corporations are an example of an institution in which members have little influence over political spending. Rowbottom points out that, “since a company does not represent its shareholders (or anyone else) and has its own legal identity ... it may be

¹³⁷ Jacob Rowbottom, “Institutional donations to political parties” in Keith D Ewing, Jacob Rowbottom & Joo-Cheong Tham, eds, *The Funding of Political Parties: Where Now?* (Routledge, 2012) 11 at 11.

¹³⁸ Hasen (2012) 225; Rowbottom (2012) 11 at 17.

¹³⁹ Boatright (2015) at 100.

¹⁴⁰ Rowbottom (2012) 11 at 16.

¹⁴¹ *Ibid.*

¹⁴² *Ibid* at 18.

¹⁴³ *Ibid* at 16.

¹⁴⁴ *Ibid* at 27.

questioned why companies are legally permissible donors at all.”¹⁴⁵ A corporation’s money is not the property of the shareholders. If a company makes a political donation or expenditure at odds with the views of a shareholder, the shareholder’s only recourse is to sell their shares.¹⁴⁶ As noted by the dissent in the American case of *Citizens United v Federal Election Commission*, corporate communications are “at least one degree removed from the views of individual citizens, and ... may not even reflect the views of those who pay for it.”¹⁴⁷ If a corporation is closely held or has a controlling shareholder, donations from the corporation could be viewed by candidates and by the public as donations from the controlling individual, which raises issues in relation to corruption and public confidence.¹⁴⁸ Directors are restrained to some extent when directing money to political purposes by their duty to further the company’s interests, but this restraint seems irrelevant to the prevention of corruption, inequality, unfairness, and falling public confidence in the electoral system.¹⁴⁹

In the UK, companies are required to obtain a member resolution authorising any political donations or expenditures in advance.¹⁵⁰ However, the resolution “must be expressed in general terms ... and must not purport to authorize particular donations or expenditure.”¹⁵¹ Further, the resolution will have effect for four years.¹⁵² As a result, this mechanism does little to promote accountability or attenuate the control of the company’s management over political spending.

In contrast to for-profit corporations, incorporated interest groups could be a healthy means of participation for small donors wishing to act collectively. Individuals contribute money to the group because of its political agenda, as opposed to for-profit corporations, in which the company’s political activities have nothing to do with investor support.¹⁵³ Thus, as Rowbottom points out, corporate status “says little about whether donations should be permissible or capped.”¹⁵⁴

¹⁴⁵ *Ibid* at 22. Note that corporations are impermissible donors to candidates and parties at the federal level in Canada and are also prohibited from making contributions to candidates at the federal level in the US: see Parts 8.2.1.2(b) and 10.2(b), below. Corporations may, however, engage in third-party campaigning in Canada and the US. For an opposing view on the role of corporations in elections, see the judgement of Kennedy J in *Citizens United v FEC*, 588 US 310 (2009). At page 364, Kennedy J maintained that, “[o]n certain topics, corporations may possess valuable expertise, leaving them the best equipped to point out errors or fallacies in speech of all sorts”.

¹⁴⁶ Rowbottom (2012) 11 at 22.

¹⁴⁷ *Citizens United v FEC*, 588 US 310 at 419 (2009).

¹⁴⁸ Rowbottom (2012) 11 at 21.

¹⁴⁹ *Ibid*, 11 at 21.

¹⁵⁰ *Companies Act 2006*, c 46, s 366.

¹⁵¹ *Ibid*, s 367.

¹⁵² *Ibid*, s 368.

¹⁵³ Rowbottom (2012) 11 at 23.

¹⁵⁴ *Ibid*.

Issacharoff maintains that for-profit corporations in the US lack the desire and ability to overwhelm elections.¹⁵⁵ Studies indicate that corporate spending is low compared to other third party spending in the US.¹⁵⁶ Further, after a US Supreme Court decision struck down restrictions on corporate electioneering, there was no explosion in corporate spending.¹⁵⁷ Rather, money has come mostly from wealthy individuals.¹⁵⁸ Issacharoff explains this phenomenon by pointing out that corporations are probably unwilling to risk backlash by supporting candidates with controversial positions.¹⁵⁹ For example, Target faced a boycott in 2010 after contributing to a candidate that opposed same-sex marriage.¹⁶⁰ Issacharoff argues that for-profit corporations are more likely to direct their money towards lobbying, which is more effective and discreet.¹⁶¹

b) Labour Unions¹⁶²

Labour unions are often grouped with corporations in debates over and legislation on campaign finance. For example, the dissenting justices of the US Supreme Court in *Citizens United v Federal Election Commission* discussed corporations and unions together, stating that both represent “narrow interests.”¹⁶³ However, political spending by labour unions arguably differs from political spending by for-profit corporations in regard to its implications for corruption and equality. Ewing, commenting in the UK context, points out that “the trade union model of party funding is one that involves millions of people of modest means making a small annual contribution to sustain the political process.”¹⁶⁴ In Ewing’s view, “[t]his is precisely what we should be trying to encourage.”¹⁶⁵ Rowbottom adds that unions often have some form of “internal democracy,” such as requirements for internal debate on proposed political spending and measures to promote the accountability of union leaders.¹⁶⁶ For these reasons, Rowbottom argues that union spending is not problematic from the perspective of equality.¹⁶⁷ Yet unions are the most heavily regulated donors in the UK.¹⁶⁸ In contrast to the thin shareholder resolution requirement for UK corporations, unions in the

¹⁵⁵ Issacharoff (November 2010) at 130.

¹⁵⁶ *Ibid.*

¹⁵⁷ Boatright (2015) at 71.

¹⁵⁸ *Ibid.*

¹⁵⁹ Issacharoff (November 2010) at 130.

¹⁶⁰ Dwyre (2015) at 55.

¹⁶¹ Issacharoff (November 2010) at 131.

¹⁶² According to Gauja and Orr, labour unions are the most active third-party campaigners in the UK, Canada, New Zealand, and Australia: Gauja & Orr, (2015) at 268.

¹⁶³ *Citizens United v FEC*, 588 US 310 at 412 (2009).

¹⁶⁴ Keith D Ewing, “The Trade Union Question in British Political Funding” in Keith D Ewing, Jacob Rowbottom & Joo-Cheong Tham, eds, *The Funding of Political Parties: Where Now?* (Routledge, 2012) at 72.

¹⁶⁵ *Ibid.*

¹⁶⁶ Rowbottom (2012) 11 at 24.

¹⁶⁷ *Ibid* at 25.

¹⁶⁸ *Ibid* at 23.

UK must ballot their members to establish a separate political fund for any political spending.¹⁶⁹ Individual members must then opt in to payments into the fund.¹⁷⁰

6.6 Incidence of Third-Party Electioneering in Canada and the UK

Gauja and Orr argue that “there is relatively little demand for ‘big money’ third-party campaigning in parliamentary democracies,” especially those, like Canada and the UK, that are “culturally, rather than legally driven,” to accept limits on third-party spending.¹⁷¹ In the UK, third parties rarely approach their spending limits, although this could be partly due to gaps in reporting requirements or cost splitting by third parties.¹⁷² Similarly, third parties in Canada generally do not reach their spending limits.¹⁷³ Feasby argues that third parties in Canada have little “appetite ... for big money campaigns,” while the “lack of co-ordination between third parties suggests that third parties are not affecting electoral fortunes on a national level.”¹⁷⁴ In Canada’s 2008 federal general election, while political parties spent over \$58 million, third-party spending was relatively negligible at just under \$1.5 million.¹⁷⁵ In the 2015 federal general election, 104 third parties collectively spent over \$6 million on election advertising, but spending limits were much higher in 2015 because of the unusually long campaign.¹⁷⁶ Lawlor and Crandall add that third parties are probably not being used to circumvent contribution limits to parties and candidates.¹⁷⁷ Based on these observations, they argue that third-party spending restrictions in Canada seem “to be a preventative rather than a responsive approach.”¹⁷⁸

However, Canada’s 1988 federal general election suggests that third-party spending limits could play a significant role in issue-based elections, although such elections are rare in Canada.¹⁷⁹ The 1988 election, during which third-party spending was unlimited, was essentially reduced to a referendum on free trade.¹⁸⁰ Most of the \$4.7 million spent by third-party campaigners was directed toward the free trade issue and four times more money went

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

¹⁷¹ Gauja & Orr (2015) at 268.

¹⁷² Ewing & Rowbottom (2012) at 82, 88.

¹⁷³ Feasby (2012) 206 at 212.

¹⁷⁴ *Ibid.*

¹⁷⁵ *Ibid.*

¹⁷⁶ The top ten spenders were mainly labour unions: Joan Bryden, “Third Parties spent \$6-million to influence 2015 election” *The Globe and Mail* (1 April 2016), online: <<http://www.theglobeandmail.com/news/politics/third-parties-spent-6-million-to-influence-2015-vote/article29491009/>>.

¹⁷⁷ Andrea Lawlor & Erin Crandall, “Understanding third party advertising: An analysis of the 2004, 2006 and 2008 Canadian elections” (December 2011) 54:4 *Cdn Pub Pol’y* 509 at 509.

¹⁷⁸ *Ibid* at 527.

¹⁷⁹ *Ibid* at 526.

¹⁸⁰ Desmond Morton, “Should Elections be Fair or Just Free?” in David Schneiderman, ed, *Freedom of Expression and the Charter* (Thomson Professional Publishing Canada, 1991) 460 at 463.

toward promoting free trade than opposing it.¹⁸¹ This indirectly supported the ultimately successful Progressive Conservative Party, which campaigned on a platform of supporting free trade. As the Supreme Court of Canada noted in *Libman v Quebec (Attorney General)*, “[t]he 1988 federal election showed clearly how independent spending could influence the outcome of voting.”¹⁸²

7. INTERNATIONAL LAW

a) UNCAC

The United Nations Convention against Corruption (“UNCAC”) addresses transparency in campaign finance. Article 7(3) of UNCAC states that “[e]ach States Party shall consider taking appropriate legislative and administrative measures ... to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties.”¹⁸³

b) OECD Documents

The OECD’s *Guidelines for Multinational Enterprises* advise companies to follow local law on political contributions, stating that “enterprises should ... [n]ot make illegal contributions to candidates for public office or to political parties or other political organizations. Political contributions should fully comply with public disclosure requirements and should be reported to senior management.”¹⁸⁴ Political financing is also mentioned in the Recommendation for Further Combating Bribery, which recommends that companies develop measures to prevent bribery in a range of areas, including “political contributions.”¹⁸⁵

The OECD is showing increased interest in campaign finance and its consequences for integrity in government. This interest is demonstrated in its 2016 report, *Financing Democracy: Funding of Political Parties and Election Campaigns and the Risk of Policy Capture*.¹⁸⁶

¹⁸¹ Canada, Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy: Final Report* (Ottawa: Minister of Supply and Services, 1991) at 337.

¹⁸² *Libman v Quebec (Attorney General)*, [1997] 3 SCR 569, 151 DLR (4th) 385 at para 51.

¹⁸³ *United Nations Convention against Corruption*, 31 October 2003, 2349 UNTS 41 (entered into force 13 December 2005).

¹⁸⁴ OECD, *Guidelines for Multinational Enterprises* (OECD, 2011) at 48, online: <<http://mneguidelines.oecd.org/guidelines/>>.

¹⁸⁵ OECD, *Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, Annex II: Good Practice Guidance on Internal Controls, Ethics, and Compliance (OECD, 2010), online: <<http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/44884389.pdf>>.

¹⁸⁶ OECD (2016).

The report outlines a recommended policy framework with four “pillars.” First, policymakers should encourage transparency and accountability through “[c]omprehensive disclosure of income sources of political parties and candidates” and “user-friendly” organization of disclosed information.¹⁸⁷ Second, policymakers should promote a level playing field through measures such as public funding, spending limits, bans on certain types of private contributions (e.g., contributions from corporations), and rules to limit abuse of state resources.¹⁸⁸ Third, policymakers should foster a culture of integrity by developing rules in areas like conflict of interest and whistleblower protection.¹⁸⁹ Standards of integrity for private donors are also important in creating a culture of integrity.¹⁹⁰ Finally, policymakers should encourage regular review of campaign finance regimes and ensure compliance through dissuasive sanctions, independent oversight, and the provision of support to political parties to assist in compliance.¹⁹¹

8. US LAW

In the US, freedom of speech jurisprudence has led to the demise of various campaign finance regulatory measures.¹⁹² Commenting on this deregulatory bent, Boatright observes that the US “begins from a different place” from some other countries when it comes to the regulation of campaign finance.¹⁹³ This “different place” involves a long-standing reluctance to regulate campaign finance and the recognition of third-party campaigner organizations as an integral part of the electoral process.¹⁹⁴ In spite of these cultural tendencies and the American courts’ fierce protection of freedom of speech, limits and source restrictions on political contributions and transparency requirements for political spending have survived. However, the transparency requirements for some types of third parties are weak, allowing political money to be funnelled through non-transparent organizations.¹⁹⁵

In this part, I will focus on the interaction between free speech and campaign finance regulation, followed by a brief overview of the federal regulatory scheme in the US.

¹⁸⁷ *Ibid* at 65.

¹⁸⁸ *Ibid* at 30.

¹⁸⁹ *Ibid*.

¹⁹⁰ *Ibid*.

¹⁹¹ *Ibid* at 31.

¹⁹² Dwyre notes that recent rulings and regulations made by the Federal Election Commission have contributed further to the relaxation of regulation: Dwyre (2015) at 35.

¹⁹³ Boatright (2015) at 71.

¹⁹⁴ *Ibid*.

¹⁹⁵ See Section 8.3, below.

8.1 Constitutional Rights and Campaign Finance Regulation in the US

8.1.1 Introduction

The First Amendment of the US *Constitution* (“the First Amendment”) states:

Congress shall make no law ... abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.¹⁹⁶

Political speech enjoys a “preferred position” in American constitutional law.¹⁹⁷ According to the US Supreme Court, “[l]aws that burden political speech are ‘subject to strict scrutiny,’ which requires the Government to prove that the restriction ‘furthers a compelling interest and is narrowly tailored to achieve that interest.’”¹⁹⁸ In the context of campaign finance regulation, the US Supreme Court has held that the only permissible governmental interest in restricting political speech is the prevention of corruption and the appearance of corruption.¹⁹⁹ Other interests, such as equality and fairness, are considered insufficiently compelling to justify burdens on First Amendment rights. Further, the majority of the US Supreme Court has defined corruption narrowly to include only direct *quid pro quo* exchanges.²⁰⁰ In the majority’s view, influence and access alone do not raise the spectre of corruption.²⁰¹ Kang calls this approach to corruption “disappointingly underdeveloped.”²⁰²

By narrowly circumscribing the possible justifications for campaign finance regulation, the majority of the US Supreme Court guards against the risk of governmental influence over voters’ thoughts and decisions while overlooking the potential for undue influence by the wealthy over public discourse and elected officials. Thus, the protection of individual freedom is arguably accomplished at the expense of equality between individuals. This libertarian approach to campaign finance accords with the view that the First Amendment is “premised on mistrust of governmental power.”²⁰³ In line with this mistrust, Chief Justice

¹⁹⁶ US Const amend I.

¹⁹⁷ Barendt (2005) at 154. See also *Buckley v Valeo*, 424 US 1 at 14 (1976).

¹⁹⁸ *Citizens United v FEC*, 588 US 310 at 340 (2010), quoting *FEC v Wisconsin Right to Life*, 551 US 449 at 464 (2007). See also Deborah A Roy, “The Narrowing Government Interest in Campaign Finance Regulations: Republic Lost?” (Fall 2015) 46:1 U Mem L Rev 1.

¹⁹⁹ See, e.g., *Buckley v Valeo*, 424 US 1 (1976).

²⁰⁰ See, e.g., *Citizens United v FEC*, 588 US 310 (2010).

²⁰¹ *Ibid.*

²⁰² Michael S Kang, “The Brave New World of Party Campaign Finance Law” (2016) 101:3 Cornell L Rev 531 at 534.

²⁰³ *Citizens United v FEC*, 588 US 310 at 340 (2009).

Roberts of the US Supreme Court maintains that the public must be left to “determine for itself what speech and speakers are worthy of consideration”.²⁰⁴

The US Supreme Court’s adoption of a libertarian model of campaign finance has led to the extinction of campaign expenditure limits. However, the Court distinguishes between expenditures and contributions, concluding that contribution limits are permissible because they pursue the legitimate governmental interest of anticorruption.²⁰⁵ The Court has also upheld transparency requirements for both expenditures and contributions.²⁰⁶

A contingent of justices on the US Supreme Court has accepted a wider range of justifications for the burdens on political speech associated with campaign finance regulations. At one point, these justices formed the majority of the Court, leading to decisions upholding various campaign finance controls.²⁰⁷ However, this contingent is now in the minority, and their earlier decisions have been overruled.

8.1.2 Jurisprudence on the Constitutional Validity of Campaign Finance Regulation in the US

a) *Buckley v Valeo*

Buckley v Valeo (*Buckley*) is a foundational case for American campaign finance regulation and represents the beginning of the end for expenditure limits in the US.²⁰⁸ In *Buckley*, the US Supreme Court found that ceilings on independent, uncoordinated third-party campaign expenditures were an unacceptable restriction on political speech under the First Amendment.²⁰⁹ In the majority’s view, the impugned spending ceiling precluded anyone other than candidates, parties, and the press from making “any significant use of the most effective modes of communication.”²¹⁰ The Court observed that “virtually every type of communication in a modern mass democracy is dependent on expenditure.”²¹¹ Thus, restricting spending “reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached.”²¹²

²⁰⁴ *Ibid* at 341.

²⁰⁵ See, e.g., *Buckley v Valeo*, 424 US 1 (1976).

²⁰⁶ *Ibid*.

²⁰⁷ See, e.g., *Austin v Michigan Chamber of Commerce*, 494 US 652 (1989); *McConnell v Federal Election Commission*, 540 US 93 (2003). See Section 8.1.2(b), below.

²⁰⁸ *Buckley v Valeo*, 424 US 1 (1976).

²⁰⁹ “Uncoordinated” refers to uncoordinated with candidates. In other words, the spending ceiling at issue applied to independent third-party campaigners.

²¹⁰ *Buckley v Valeo*, 424 US 1 at 19–20 (1976).

²¹¹ *Ibid* at 19.

²¹² *Ibid*.

In the Court's view, the government's interest in preventing corruption did not justify the third-party expenditure limits.²¹³ The Court held that independent third-party campaign expenditures do not pose the same risk of corruption as large contributions to candidates.²¹⁴ The Court explained that "[t]he absence of prearrangement and coordination of an expenditure with the candidate ... alleviates the danger that expenditures will be given as a *quid pro quo* for improper commitments from the candidate."²¹⁵

The Court also rejected the argument that independent expenditure caps were justified by a governmental interest in "equalizing the relative ability of individuals and groups to influence the outcome of elections."²¹⁶ According to the Court, the idea that "government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."²¹⁷ Rather, the First Amendment was intended to promote unfettered dissemination of information and ideas.²¹⁸ The Court cited similar concerns in striking down a limit on candidate self-funding.²¹⁹

The Court did, however, uphold limits on direct contributions to candidates. First, unlike expenditure ceilings, contribution caps impose only a "marginal," indirect restriction on the contributor's right to free speech.²²⁰ According to the Court, a "contribution serves as a general expression of support for the candidate and his views" and this symbolic expression does not depend on the size of the contribution.²²¹ Further, the eventual speaker will be someone other than the contributor.²²² Second, the Court found that the contribution limits pursued the permissible objective of preventing corruption and its appearance. According to the Court, contribution limits address the risk that large donations will be "given to secure a political *quid pro quo* from current and potential office holders."²²³ Equally important, contribution limits address "the impact of the appearance of corruption stemming from public awareness of the opportunities for abuse inherent in a regime of large individual financial contributions."²²⁴

In *Buckley*, the US Supreme Court established several principles that continue to influence American jurisprudence on campaign finance regulation. First, the Court rejected the egalitarian rationale for regulation. Only the anticorruption rationale was accepted as a

²¹³ *Ibid* at 44.

²¹⁴ *Ibid* at 46.

²¹⁵ *Ibid* at 47.

²¹⁶ *Ibid* at 48.

²¹⁷ *Ibid* at 49.

²¹⁸ *Ibid*.

²¹⁹ *Ibid* at 54.

²²⁰ *Ibid* at 20.

²²¹ *Ibid* at 21.

²²² *Ibid*.

²²³ *Ibid* at 26.

²²⁴ *Ibid* at 27.

legitimate justification for limits on political speech during election campaigns. Second, the Court held that independent expenditures by third parties do not raise a significant risk of corruption. This holding set the stage for the growth of independent third-party spending in American elections by groups such as super-PACs (discussed further below). Finally, the Court distinguished between the First Amendment implications of contributions and expenditures. This explains why the concept of coordination is important in American campaign finance law. If spending by a third party or political party is coordinated with a candidate, it is viewed as a contribution to the candidate. As a result, coordinated expenditures, like contributions, are subject to caps and other restrictions. Only truly independent expenditures are unregulated. Various commentators have criticized this distinction between expenditures and contributions as unworkable in practice.²²⁵ In fact, Chief Justice Burger's dissenting opinion in *Buckley* argued that "contributions and expenditures are two sides of the same First Amendment coin."²²⁶

b) *Austin v Michigan Chamber of Commerce* and *McConnell v FEC*

The cases of *Austin v Michigan Chamber of Commerce* (*Austin*)²²⁷ and *McConnell v FEC* (*McConnell*)²²⁸ are no longer in line with the US Supreme Court's approach to campaign finance regulation. The views expressed in the majority judgements in both cases reflect the views of the dissenting justices in more recent cases on campaign finance regulation.

In *Austin*, the majority of the US Supreme Court upheld a Michigan law that prohibited corporations from using general treasury funds for independent expenditures in support of or opposition to a candidate's election. Corporations could still pay for political advertising, but were required to use a separate fund.²²⁹ Although the majority appeared to accept the idea, originating in *Buckley*, that political speech may only be burdened in the name of preventing corruption, the majority broadened the concept of corruption to include "the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."²³⁰ Thus, the majority appeared to blend the equality rationale for campaign finance regulation with the anticorruption rationale. The majority's decision also accepted that the speech of corporations and natural persons may be treated differently, since corporate status confers "special benefits ... and present[s] the

²²⁵ See, e.g., Gauja (2010) at 182; *Colorado Republican Federal Campaign Committee v FEC*, 518 US 604 (1996).

²²⁶ *Buckley v Valeo*, 424 US 1 at 241 (1976). Burger CJ would have struck down both the expenditure limits and the contribution limits.

²²⁷ *Austin v Michigan Chamber of Commerce*, 494 US 652 (1989).

²²⁸ *McConnell v Federal Election Commission*, 540 US 93 (2003).

²²⁹ Corporations could only solicit contributions to the segregated political fund from certain persons: *Austin v Michigan Chamber of Commerce*, 494 US 652 at 656 (1989).

²³⁰ *Ibid* at 660.

potential for distorting the political process.”²³¹ This decision was overturned in *Citizens United v FEC*, discussed further below.

In *McConnell*, the majority of the US Supreme Court upheld the ban on “soft money” in the *Bipartisan Campaign Finance Reform Act of 2002 (BCRA)*.²³² “Soft money” referred to unregulated donations to political parties for the purpose of party-building activities, such as issue advertising and voter-turnout efforts. Prior to the *BCRA*, political parties could raise unlimited funds for these activities.²³³ In *McConnell*, the majority held that contributions may be restricted for anticorruption purposes, as in *Buckley*, but expanded the definition of “corruption” beyond the *quid pro quo* to include the risk of undue influence on lawmakers. In the majority’s view, the soft money ban was directed toward the legitimate goal of preventing corruption, as it prevented the circumvention of contribution limits. The soft money ban is still in place.

In accordance with *Austin*, the majority in *McConnell* also upheld a provision prohibiting corporations and trade unions from using general treasury funds for independent expenditures on “electioneering communications.” “Electioneering communications” are a category of election advertisements created by the *BCRA* that refer to a candidate in the period before the election. The category is broader than the category of “express advocacy,” which involves words like “vote for” or “vote against.” The Court noted that corporations were allowed to establish segregated funds to pay for electioneering communications. Further, the same rationale for prohibiting corporations from spending general treasury funds on express advocacy, discussed in *Austin*, also applied to the broader category of electioneering communications. This part of the judgement was overturned in *Citizens United v FEC*, discussed further below.

c) *Davis v FEC*

Davis v FEC (Davis) aligns with current US Supreme Court jurisprudence on campaign finance regulation and freedom of speech.²³⁴ In *Davis*, the majority of the US Supreme Court struck down the “millionaire’s amendment,” a provision of the *BCRA* stipulating that candidates could benefit from a higher donation ceiling if facing a self-funded opponent whose spending reached a certain threshold. The Court found that the impugned provision was an unjustifiable burden on the freedom of speech of self-funded candidates. In *Buckley*, the Court had already struck down an attempt to cap candidates’ use of personal funds, since the cap interfered with candidates’ right to advocate intensively for their election and

²³¹ *Ibid* at 661.

²³² *Bipartisan Campaign Finance Reform Act of 2002*, Pub L No 107-155, 116 Stat 81.

²³³ Boatright, (2015) at 74. For more on soft money, see Richard Briffault, “Soft Money, Congress and the Supreme Court” in K D Ewing & Samuel Issacharoff, eds, *Party Funding and Campaign Financing in International Perspective* (Hart Publishing, 2006) at 191.

²³⁴ *Davis v Federal Election Commission*, 554 US 724 (2007).

lacked an anticorruption purpose.²³⁵ In *Davis*, the Court emphasized “the fundamental nature of the right to spend personal funds for campaign speech” and observed that the millionaire’s amendment imposed “an unprecedented penalty on any candidate who robustly exercises that First Amendment right.”²³⁶ This penalty was not justified by an anticorruption interest, as using personal funds actually decreases the risk of corruption by reducing candidates’ dependence on donations. Relying on *Buckley*, the Court rejected the idea that egalitarian concerns could justify a burden on First Amendment rights.²³⁷ The Court warned that allowing the state to limit political speech for the purpose of furthering equality “would permit Congress to arrogate the voters’ authority to evaluate the strengths of candidates competing for office.”²³⁸ The majority likened wealth to other “strengths” candidates may have, such as fame or “a well-known family name,” and emphasized that “[t]he Constitution ... confers upon voters, not Congress, the power to choose” officeholders.²³⁹

d) *Citizens United v FEC*

In *Citizens United v FEC (Citizens United)*,²⁴⁰ the majority of the US Supreme Court departed from its earlier decisions in *McConnell* and *Austin*. Although the Court upheld a ban on direct contributions to candidates from corporations and unions, along with various transparency requirements, the majority struck down limits on independent expenditures by corporations and unions. Under the *BCRA*, corporations and unions were prohibited from using general treasury funds for independent expenditures on express advocacy and electioneering communications. As mentioned above, express advocacy involves the use of “magic words” like “vote for” or “vote against.” “Electioneering communications,” a category of communications created by the *BCRA*, refer to a candidate in the period before the election but fall short of express advocacy. The majority of the Court held that the First Amendment precludes the government from prohibiting the use of general treasury funds for either express advocacy or electioneering communications.

Writing for the majority, Justice Kennedy began by asserting that the First Amendment restrains government from treating speakers differently based on their identity. Thus, corporations, including for-profit corporations, cannot be treated differently from natural persons in the context of political speech. Restricting some speakers but not others would “deprive the public of the right and privilege to determine for itself what speech and

²³⁵ *Ibid* at 738.

²³⁶ *Ibid* at 738–39.

²³⁷ *Ibid* at 741.

²³⁸ *Ibid* at 742.

²³⁹ *Ibid*.

²⁴⁰ *Citizens United v Federal Election Commission*, 588 US 310 (2009).

speakers are worthy of consideration.”²⁴¹ In Justice Kennedy view, the “governing rule” should be “more speech, not less.”²⁴²

In response to the majority’s decision on this point, Justice Stevens quipped that “American democracy is imperfect, [but] few ... would have thought its flaws included a dearth of corporate money in politics.”²⁴³ Justice Stevens disagreed that corporations and natural persons must be treated identically in the electoral context. Rather, in this context, “the distinction between corporate and human speakers is significant.”²⁴⁴ Corporations are not part of “We the People” and carry a special risk of corrupting the electoral process.²⁴⁵ Unlike human speech, corporate speech is “derivative” and restrictions on corporate speech do not prevent individuals from speaking themselves.²⁴⁶ Further, the amount of money in a corporation’s general treasury does not reflect public or even shareholder support for the corporation’s political activities.²⁴⁷

The majority went on to find that the impugned provisions amounted to content-based “censorship” and an outright ban on corporate speech.²⁴⁸ The dissent disagreed, pointing out that, far from banning corporate speech, the *BCRA* continued to allow corporations to fund political speech through the formation of separate segregated funds. However, in Justice Kennedy’s view, creating these funds was too administratively “burdensome” to be an adequate alternative.²⁴⁹ The dissent also argued that an exception to the prohibition could be carved out for non-profit corporations that raise funds almost exclusively from individuals, like *Citizens United*. However, to Justice Kennedy the alternatives suggested by the dissent were unworkable because they would nonetheless “chill ... political speech.”²⁵⁰ Further, according to Justice Kennedy, the “purpose and effect [of the ban on corporate independent expenditures] are to silence entities whose voices the Government deems to be suspect.”²⁵¹ Although the impugned prohibition was not overtly content-based, Justice

²⁴¹ *Ibid* at 341.

²⁴² *Ibid* at 361.

²⁴³ *Ibid* at 479.

²⁴⁴ *Ibid* at 394.

²⁴⁵ *Ibid* at 465, 454. Stevens J noted that “[b]usiness corporations must engage the political process in instrumental terms if they are to maximize shareholder value. The unparalleled resources, professional lobbyists, and single-minded focus they bring to this effort...make *quid pro quo* corruption and its appearance inherently more likely when they...spend unrestricted sums on elections.” 454. Stevens J then pointed to past instances in which corporations received something from elected officials in exchange for funding independent, uncoordinated issue advertisements: 455.

²⁴⁶ *Ibid* at 466.

²⁴⁷ *Ibid* at 419, 465.

²⁴⁸ *Ibid* at 337.

²⁴⁹ *Ibid*.

²⁵⁰ *Ibid* at 329.

²⁵¹ *Ibid* at 339.

Kennedy noted that restrictions “based on the identity of the speaker” can be “a means to control content.”²⁵²

The majority and the dissent also disagreed on the governmental interests capable of justifying limits on electoral speech. Following *Buckley*, Justice Kennedy held that the government may only limit campaign expenditure in the name of preventing corruption or its appearance. In Justice Kennedy’s view, independent, uncoordinated expenditures do not give rise to corruption or the appearance of corruption. Justice Kennedy reached this conclusion by defining corruption narrowly to encompass only direct *quid pro quo* exchanges. According to the majority, the provision of “influence or access” is not corruption and “will not cause the electorate to lose faith in our democracy.”²⁵³ Justice Kennedy attempted to support this proposition by explaining that “[d]emocracy is premised on responsiveness,” and the only reason to vote for or contribute to a candidate is to ensure the candidate “will respond by producing those political outcomes the supporter favors.”²⁵⁴ This seems to suggest that, in Justice Kennedy’s view, big donors *should* benefit from greater influence, or “responsiveness,” than non-donors.

The dissent disagreed with Justice Kennedy’s definition of corruption. First, in the dissent’s view, Justice Kennedy defined *quid pro quo* corruption too narrowly. Justice Stevens argued that *quid pro quo* exchanges need not “take the form of outright vote buying or bribes ... Rather, they encompass the myriad ways in which outside parties may induce an officeholder to confer a legislative benefit in direct response to, or anticipation of, some outlay of money the parties have made or will make on behalf of the officeholder.”²⁵⁵

Second, the dissent would have expanded the definition of corruption beyond the *quid pro quo* exchange:

Corruption can take many forms. Bribery may be the paradigm case. But the difference between selling a vote and selling access is a matter of degree, not kind. And selling access is not qualitatively different from giving special preference to those who spent money on one’s behalf. Corruption operates along a spectrum, and the majority’s apparent belief that *quid pro quo* arrangements can be neatly demarcated from other improper influences does not accord with the theory or reality of politics.²⁵⁶

²⁵² *Ibid* at 340.

²⁵³ *Ibid* at 359–60.

²⁵⁴ *Ibid* at 360.

²⁵⁵ *Ibid* at 452.

²⁵⁶ *Ibid* at 447–48.

Further, the dissent observed that, even if “ingratiation and access” are not corruption, they create the opportunity for and the appearance of *quid pro quo* exchanges.²⁵⁷

The dissent and the majority also disagreed on the validity of *Austin’s* “antidistortion” rationale for regulating corporate campaign finance. The majority rejected the idea from *Austin* that the state may limit corporate speech to prevent the distortion of electoral debate by well-resourced corporations. Relying on *Buckley*, Justice Kennedy held that Congress cannot restrict political speech based on the speaker’s wealth or with the goal of equalizing the relative ability of people and entities to influence electoral outcomes.²⁵⁸ In Justice Kennedy’s view, attempts by Congress to regulate electoral speech for these equality-related purposes would constitute an impermissible attempt to influence voters’ choices.²⁵⁹

The dissent argued in favour of the “antidistortion” rationale from *Austin*. In the dissent’s view, the impugned law represented an acceptable attempt to balance the First Amendment rights of listeners against those of speakers.²⁶⁰ Corporations amass funds that natural persons cannot, allowing them to flood broadcast media with their communications. Since citizens do not have unlimited time to consider all speech transmitted during an election, “corporate domination of the airwaves prior to an election may decrease the average listener’s exposure to relevant viewpoints.”²⁶¹ Further, corporate domination of electoral debate could lead individuals to feel cynicism about their own ability to be heard.²⁶² The dissent concluded that *Austin’s* “antidistortion” rationale was intended to “facilitate First Amendment values by preserving some breathing room around the electoral ‘marketplace’ of ideas.”²⁶³

Although the majority struck down the prohibition on the use of corporate and union general treasury funds, they upheld disclaimer and disclosure requirements for entities funding express advocacy and electioneering communications. According to Justice Kennedy, these transparency requirements were justified burdens on speech because they allow “the electorate to make informed decisions and give proper weight to different speakers and messages.”²⁶⁴

In October 2014, the Federal Election Commission approved new rules in response to *Citizens United*. The rules expressly permit corporations and unions to make independent expenditures on express advocacy and electioneering communications.²⁶⁵ The regulations

²⁵⁷ *Ibid* at 455.

²⁵⁸ *Ibid* at 350.

²⁵⁹ *Ibid*.

²⁶⁰ *Ibid* at 473. The idea that the First Amendment protects both listeners and speakers is echoed in Fiss’ arguments in favour of campaign finance regulation: Fiss, (1996).

²⁶¹ *Citizens United v Federal Election Commission*, 588 US 310 at 472 (2009).

²⁶² *Ibid* at 470.

²⁶³ *Ibid* at 473.

²⁶⁴ *Ibid* at 371.

²⁶⁵ 11 CFR § 114.4.

were also revised to allow corporations and unions to finance partisan voter registration and get-out-the-vote initiatives, as long as these activities are uncoordinated with parties or candidates.²⁶⁶ Funds used for these activities must be disclosed if express advocacy is involved and the reporting threshold of \$2,000 is exceeded.²⁶⁷ The Federal Election Commission further clarified that foreign nationals, national banks, and corporations created by a law of Congress continue to be prohibited from contributing to accounts used to fund electioneering communications.²⁶⁸

e) *SpeechNow.org v FEC*

Political action committees, or PACs, are organized under section 527 of the *Internal Revenue Code*.²⁶⁹ So-called “traditional PACs” coordinate at least some of their spending with candidates. This coordinated spending is treated as a contribution to the candidate. Prior to the US Supreme Court’s decision in *SpeechNow.org v FEC* (*SpeechNow*), contributions to all PACs were subject to the same restrictions as contributions to candidates.²⁷⁰ For example, PACs could not accept donations over \$5,000, just like candidates. These restrictions were intended to prevent donors from circumventing caps on donations to candidates, as prospective donors could, in the absence of such restrictions, simply create a PAC, donate large amounts to the PAC, and direct the PAC to engage in coordinated spending with the candidate.

In *SpeechNow*, a PAC organized solely for the purpose of making uncoordinated expenditures challenged the contribution cap.²⁷¹ The District of Columbia Circuit Court sided with *SpeechNow.org* on the basis that restricting independent expenditures does not serve the governmental interest of preventing corruption or its appearance. This decision hatched the “super-PAC,” or “independent-expenditure-only PAC,” which engages solely in uncoordinated spending and therefore has unlimited fundraising and spending capacity. The Court did, however, uphold registration and disclosure requirements for super-PACs. After this decision, the FEC released an advisory opinion clarifying that the combined effect of *Citizens United* and *SpeechNow* is to allow corporations and unions to contribute unlimited amounts to super-PACs.²⁷²

²⁶⁶ 11 CFR § 114.3(c)(4).

²⁶⁷ 11 CFR § 114.3(c)(4).

²⁶⁸ 11 CFR § 104.20(c)(7).

²⁶⁹ 26 USC § 527.

²⁷⁰ *SpeechNow.org v FEC*, 599 F (3d) 686 (DC Cir 2010).

²⁷¹ *Ibid.*

²⁷² Dwyre (2015) at 41–42. See 11 CFR § 114.2, note to paragraph (b). Corporations and unions may also contribute to the independent-expenditure-only accounts of hybrid PACs. Corporations and unions may also contribute to the independent-expenditure-only accounts of hybrid PACs.

f) *McCutcheon v FEC*

In *McCutcheon v FEC* (*McCutcheon*), the US Supreme Court struck down the BCRA's aggregate limits on contributions from a single contributor to different candidates, national party committees, and traditional PACs.²⁷³ However, the Court upheld the base limits on contributions per election to a single candidate and the base limits on contributions per year to national party committees and traditional PACs. The Court also upheld disclosure requirements for contributions. The majority pointed out that disclosure serves a valuable informational role for the electorate and deters corruption. In the majority's view, disclosure requirements are preferable to contribution caps, as limiting contributions could provoke the movement of money into less transparent campaigning vehicles.²⁷⁴

Chief Justice Roberts, for the majority, found that the aggregate limits imposed a significant infringement on freedom of speech and association, since a "donor must limit the number of candidates he supports and may have to choose which of several policy concerns he will advance."²⁷⁵ The government argued that donors could support a large number of candidates and stay within the aggregate limits by simply contributing less to each candidate or committee. However, Chief Justice Roberts found this option to be inadequate because it would impose a "special burden on broader participation" in support of a wide range of candidates or causes.²⁷⁶ This conclusion flowed from Chief Justice Roberts' conviction that all forms of political expression, regardless of whether that expression involves handing out a few leaflets or spending vast sums on a national advertising campaign, are deserving of equal protection.²⁷⁷

Chief Justice Roberts confirmed that the sole governmental interest capable of justifying restrictions on campaign finance is the prevention of *quid pro quo* corruption or its appearance. He also confirmed that corruption does not include "ingratiation and access," but rather is limited to a "direct exchange of an official act for money."²⁷⁸ The First Amendment therefore bars Congress from imposing contribution limits in order to prevent parties and candidates from rewarding donors with privileged access and influence. In Chief Justice Roberts' view, it is a "central feature of democracy" that "constituents support candidates who share their beliefs and interests, and candidates who are elected can be expected to be responsive to those concerns."²⁷⁹ Thus, like Justice Kennedy in *Citizens United*, Justice Roberts appeared comfortable with the idea that office-holders will be particularly

²⁷³ *McCutcheon v FEC*, 572 US __ (2014) (slip op).

²⁷⁴ *Ibid* (slip op of Roberts CJ at 36).

²⁷⁵ *Ibid* (slip op of Roberts CJ at 15–16).

²⁷⁶ *Ibid* (slip op of Roberts CJ at 16).

²⁷⁷ *Ibid* (slip op of Roberts CJ at 15).

²⁷⁸ *Ibid* (slip op of Roberts CJ at 2).

²⁷⁹ *Ibid* (slip op of Roberts CJ at 2).

responsive to wealthy backers. The dissent criticized this approach for failing to differentiate “between influence resting upon public opinion and influence bought by money alone.”²⁸⁰

As in *Citizens United*, the dissent, written by Justice Breyer, argued for a broader conception of corruption that goes beyond “act[s] akin to bribery” to capture the influence that large contributions may exert over elected officials’ judgement.²⁸¹ Further, Justice Breyer suggested that corruption encompasses the tendency of money to drown out the “voices of the many” and disrupt the responsiveness of elected officials to the people.²⁸² This conception of corruption echoes the equality rationale for campaign finance regulation.

Based on his narrower conception of corruption, Chief Justice Roberts held that the aggregate limits did not serve an anticorruption interest. Each contribution is subject to base limits, meaning the aggregate limits do not, in themselves, prevent corruption.²⁸³ The government argued that corruption may nonetheless occur when a donor gives a large cheque to a legislator to split up among various candidates and committees. The dissent agreed, observing that candidates who solicit large cheques for their party “will be deeply grateful to the checkwriter, and surely could reward him with a *quid pro quo* favor.”²⁸⁴ However, in Roberts CJ’s view, this argument must fail because it would “dangerously broaden ... the circumscribed definition of *quid pro quo* corruption” to include “general, broad-based support of a political party.”²⁸⁵

Unlike Justice Breyer, Chief Justice Roberts also rejected the argument that aggregate limits prevent circumvention of base limits, finding fears of circumvention too speculative. Owing to other provisions in the BCRA, such as restrictions on earmarking, Chief Justice Roberts argued that it would be difficult for a donor to channel large sums to a candidate and still get credit for the donation. If the donor receives no credit for their donation, there is no risk of a *quid pro quo*.

As in *Citizens United*, the majority also confirmed that the government must not “restrict the political participation of some in order to enhance the relative influence of others.”²⁸⁶ The majority emphasized that the First Amendment is intended to ensure that public debate is left in the hands of the public, not the government.²⁸⁷ In accordance with the libertarian approach to freedom of speech, Chief Justice Roberts maintained that government cannot be trusted to judge the value of certain speech over other speech, “even when the government

²⁸⁰ *Ibid* (slip op of Breyer J at 30).

²⁸¹ *Ibid* (slip op of Breyer J at 4, 6, 11).

²⁸² *Ibid* (slip op of Breyer J at 5–6).

²⁸³ *Ibid* (slip op of Roberts CJ at 22).

²⁸⁴ *Ibid* (slip op of Breyer J at 20).

²⁸⁵ *Ibid* (slip op of Roberts CJ at 37).

²⁸⁶ *Ibid* (slip op of Roberts CJ at 1).

²⁸⁷ *Ibid* (slip op of Roberts CJ at 14).

purports to act through legislation reflecting ‘collective speech.’”²⁸⁸ In Chief Justice Roberts’s view, by attempting to level the playing field through aggregate limits, Congress was meddling impermissibly in electoral debate and trying “to help decide who should govern.”²⁸⁹ Thus, Congress must not intervene even if non-interference means the wealthy decide who governs.

8.2 Regulatory Regime in the US

In this section, I will provide a brief overview of federal campaign finance regulations in the US.²⁹⁰

a) Expenditures

Because of the jurisprudence discussed above, campaign expenditures are unlimited in the US for candidates, political parties, and third parties. Third parties, such as corporations, unions, and independent-expenditure-only PACs (or “super-PACs”), may spend unlimited amounts in support of a candidate, party, or issue associated with a candidate or party, as long as that spending is not coordinated with a candidate. Candidates may also spend unlimited personal funds on their own campaigns.

b) Contributions and Coordinated Spending

Contributions to candidates are subject to caps and source restrictions.²⁹¹ Candidates must not accept direct contributions from corporations, unions, foreign nationals, national banks,

²⁸⁸ *Ibid* (slip op of Roberts CJ at 17).

²⁸⁹ *Ibid* (slip op of Roberts CJ at 3).

²⁹⁰ For more detail on the federal regulatory regime, see: 52 USC §§ 30101–30146; 11 CFR; advisory opinions, policy statements, and guidance released by the Federal Election Commission, online: <<https://www.fec.gov/legal-resources/>>; The Center for Responsive Politics, online: <www.opensecrets.org>; Samuel Issacharoff, *The Law of Democracy: Legal Structure of the Political Process*, 5th ed (Foundation Press, 2016); The Law Library of Congress, “Election Law”, online: <<https://www.loc.gov/law/help/guide/federal/elections.php>>; Campaign Legal Center, online: <www.campaignlegalcenter.org>; The Campaign Finance Institute, online: <<http://www.cfinst.org/law.aspx>>.

²⁹¹ See 52 USC § 30116 and 11 CFR §§ 110.1–110.4 for more information on contribution caps. As discussed above, super-PACs, which engage solely in independent expenditures, are not subject to these caps or source restrictions. Super-PACs therefore have unlimited spending and fundraising capacity. Hybrid-PACs, which engage in both coordinated and independent spending, must maintain a separate fund for independent expenditures, which will not be subject to contribution caps or source restrictions. All expenditures by single-candidate PACs are considered contributions to their candidate, even if some of the PAC’s spending is technically uncoordinated.

or federal government contractors.²⁹² Coordinated spending with a candidate is viewed as a contribution to the candidate. As a result, these restricted sources may not engage in coordinated spending with a candidate.²⁹³ Further, to prevent circumvention of the rules governing contributions to candidates, donations to entities that engage in coordinated spending with candidates, such as political party committees and traditional PACs, are also subject to caps and source restrictions.²⁹⁴ Before the *BCRA* was enacted, limits on contributions to political party committees could be circumvented by donating “soft money” to the party. Soft money was used for “party-building activities” and was unregulated.²⁹⁵ However, the *BCRA* closed this loophole, stipulating that political parties may only raise money that is subject to federal regulation.²⁹⁶

c) Transparency requirements

Different disclosure requirements apply to different types of political actors and organizations.²⁹⁷ For example, in reports to the Federal Election Commission (FEC), super-PACs must include the source, amount, and date of contributions to the super-PAC for any purpose, along with the amount, purpose, date, and recipient of disbursements over \$200 in a calendar year.²⁹⁸ Super-PACs must also disclose separately their spending on express advocacy.²⁹⁹

Corporations, unions, and groups organized under 26 USC § 501(c), often termed “501(c) organizations,”³⁰⁰ must disclose disbursements made for the purpose of express advocacy

²⁹² 52 USC §§ 30118, 30119, 30121; 11 CFR § 110.20. Issacharoff notes this rule may be up for grabs in relation to corporations after *Citizens United v FEC*, in which the majority of the US Supreme Court frowned upon making distinctions between corporations and natural persons: Issacharoff, (November 2010) at 132.

²⁹³ See, e.g., 11 CFR § 114.10(a).

²⁹⁴ See 52 USC § 30116 for contribution limits to political party committees.

²⁹⁵ Boatright (2015) at 74. For more on soft money, see Briffault (2006) at 191.

²⁹⁶ *Bipartisan Campaign Finance Reform Act of 2002*, Pub L No 107-155, § 101, 116 Stat 81.

²⁹⁷ For more detailed information on federal disclosure requirements, see: 52 USC § 30104; 11 CFR §§ 102.1–102.17, 104.1–104.22, 109.1–109.37. See also The Centre for Responsive Politics, online: <www.opensecrets.org>.

²⁹⁸ 52 USC §§ 30104(b)(3), 30104(b)(5)(A); 11 CFR § 104.3(a)(4).

²⁹⁹ 52 USC § 30104(b)(6)(B)(iii); 11 CFR §§ 104.3(b)(3)(vii), 104.4, 109.10(a). As discussed above, express advocacy uses words like “vote for” or “vote against”.

³⁰⁰ 501(c) organizations may engage in political campaigning activity so long as it is not their primary activity; however, Dwyre notes that the Internal Revenue Agency has done little to investigate whether 501(c) organizations are making campaigning activity their primary activity: Dwyre (2015) at 48–50. The most relevant types of 501(c) organizations in the context of election campaigns are labour organizations (organized under 26 USC § 501(c)(5)), trade associations or business leagues like the Chamber of Commerce (organized under 26 USC § 501(c)(6)), and “social welfare organizations” (organized under 26 USC § 501(c)(4)): Dwyre (2015) at 48–50.

and electioneering communications.³⁰¹ However, corporations, unions, and 501(c) organizations are not required to report the source of their donations to the FEC unless the donations were made specifically for the purpose of funding express advocacy or electioneering communications.³⁰² The same general rules apply to groups organized under 26 USC § 527, or “527 organizations,” that are not political committees, meaning their main activities are not political.³⁰³

Some entities also have disclosure obligations in relation to agencies other than the FEC, such as the Internal Revenue Service.³⁰⁴

d) Public Funding

In the US, an opt-in public funding scheme exists for presidential candidates, but the scheme is out-of-date and rarely used by major candidates.³⁰⁵ Candidates who opt in must also comply with expenditure limits. In the past, the government also provided public grants to political party committees for party conventions,³⁰⁶ but this scheme has been terminated.³⁰⁷

e) Role of the Federal Election Commission

The FEC is responsible for disclosing information on campaign finance, monitoring compliance with legislative requirements, and administering public funding of presidential campaigns.³⁰⁸ To assist in promoting compliance, the FEC promulgates rules and regulations and issues advisory opinions, of which there are over 1,000.³⁰⁹ The FEC is only responsible

³⁰¹ 52 USC §§ 30104(c),(f); 11 CFR §§ 104.20, 109.10(b), 114.10(b)(1)–(2). “Electioneering communications” are defined in 11 CFR § 100.29(a). As discussed above, the category of “electioneering communications” was created by the BCRA and captures a broader range of advertising than the category of “express advocacy” does.

³⁰² 52 USC §§ 30104(c),(f); 11 CFR §§ 114.10(b)(1)–(2), 109.10(e)(1)(vi), 104.20(b), 104.20(c)(7)–(9). See also Dwyre, (2015) at 61. Note that labour unions organized under 26 USC 501(c)(5) must disclose the source of all contributions of \$5,000 or more to the Department of Labor: see fn 650, below.

³⁰³ 52 USC §§ 30104(c),(f); 11 CFR §§ 109.10(b)–(e), 104.20(b).

³⁰⁴ For example, labour organizations organized under 26 USC 501(c)(5) must, in reports to the Department of Labor, disclose the identity of any contributor giving \$5,000 or more in the twelve-month reporting period, along with the purpose, date, and amount of the contribution: 29 USC § 431; 29 CFR § 403. Labour organizations must also disclose to the Department of Labor any political disbursements intended to influence elections and referendums: 29 USC § 431, 29 CFR § 403.

³⁰⁵ Dwyre (2015) at 35; Hasen (2012) 225 at 225.

³⁰⁶ Gauja (2010) at 158.

³⁰⁷ *The Gabriella Miller Kids First Research Act*, Pub L No 113-94, 128 Stat 1085 (2014) (codified at 26 USC § 9008).

³⁰⁸ Thomas E Mann, “The FEC: Administering and Enforcing Campaign Finance Law” in Anthony Corrado et al, eds, *The New Campaign Finance Sourcebook* (Brookings Institution Press, 2005) 232 at 234.

³⁰⁹ *Ibid* at 235–36.

for civil enforcement of campaign finance laws, not criminal enforcement, which falls under the Justice Department's mandate.³¹⁰

8.3 Criticisms of Campaign Finance Regulation in the US

The American regulatory regime is often criticized for encouraging the movement of campaign money away from relatively transparent political parties to unaccountable and less transparent outside spending groups, such as 501(c) organizations.³¹¹ As a result, the role of political parties and candidates is shrinking while the role of third parties grows. The dissent in *Citizens United* deplored this trend, noting that political parties represent "broad coalitions" while corporations and unions, the third parties at issue in that case, represent "narrow interests."³¹² Other types of third parties may also represent narrow interests. For example, in the 2012 general election, 93% of the money spent by super-PACs came from 0.0011% of the population of the US, raising significant equality concerns.³¹³

The growth of outside spending is driven by the absence of independent expenditure limits for third parties, the BCRA's prohibition on soft money for political parties, the limits on coordinated spending for political parties, and the less stringent transparency requirements for outside spenders like corporations, unions, 501(c) groups, and non-political 527 organizations. Although the lack of mandatory disclosure makes confirmation impossible, Dwyre speculates that many corporations direct their election campaign spending through 501(c) organizations to avoid revealing their support for particular candidates or parties.³¹⁴

According to the majority of the US Supreme Court in cases like *Citizens United*, all this outside spending raises no risk of corruption, or even the risk of the appearance of corruption, as long as the spending is independent and uncoordinated with candidates. Yet this premise is highly debatable. Many question whether "independent expenditures" are truly "independent" in the current environment of pervasive outside spending. Dwyre observes that many super-PACs are run by "former party officials, Congressional staff, and partisan operatives" and candidates and elected officials are allowed to speak at super-PAC fundraisers.³¹⁵ Boatright argues that there is "implicit coordination between groups and between groups and candidates and parties."³¹⁶ He suggests that some party functions have been *de facto* outsourced to outside groups because of the restrictions on party financing,

³¹⁰ *Ibid* at 236

³¹¹ See, for example, Hasen (2012) 225 at 225.

³¹² *Citizens United v Federal Election Commission*, 588 US 310 at 412 (2009).

³¹³ Blair Bowie & Adam Lioz, *Billion-Dollar Democracy: The Unprecedented Role of Money in the 2012 Elections* (Demos, 2013) at 8, online: <<http://www.demos.org/publication/billion-dollar-democracy-unprecedented-role-money-2012-elections>>.

³¹⁴ Dwyre (2015) at 55.

³¹⁵ *Ibid* at 46.

³¹⁶ Boatright (2015) at 73.

creating a “network” of parties and outside groups that is guided by “mechanisms of coordination.”³¹⁷ Boatright bolsters this argument by pointing out that personnel tend to move between interest groups, candidate campaigns, and political party committees, suggesting there is “informal” coordination.³¹⁸ This not only dilutes the responsiveness of parties to voters but also raises the spectre of corruption, since parties and candidates may wish to show gratitude toward the outside groups in their “network.”³¹⁹

Even if outside spending is truly independent, many argue that independent expenditures nonetheless give rise to the risk of corruption or its appearance. Based on the record before Congress in the lead-up to the *BCRA*’s enactment, the dissent in *Citizens United* pointed out that “corporate independent expenditures ... had become essentially interchangeable with direct contributions in their capacity to generate *quid pro quo* arrangements.”³²⁰ The record indicated that candidates’ campaigns are generally aware of who is behind independent advertisements on the candidates’ behalf.³²¹ Further, even if independent outside spending does not produce direct *quid pro quo* corruption, Hasen argues that it may lead to the sale of access to candidates.³²² He makes the common sense observation that “[p]residential candidates are likely to notice and appreciate when an individual spends millions of dollars supporting or opposing the candidate through an independent effort,” which may lead to “special access ... after the election.”³²³ The record cited by the dissent in *Citizens United* supported this argument, since it demonstrated that “the sponsors of...advertisements were routinely granted special access after the campaign was over.”³²⁴

Some commentators argue that political party financing in the US should be deregulated to reduce outside spending and restore the role of the political parties in elections. Boatright has suggested raising contribution caps for political parties, relaxing restrictions on coordinated spending of parties and candidates, providing more public funding to political parties, and tightening disclosure requirements for third parties.³²⁵ However, Sarbanes argues that deregulating contributions to political parties would only exacerbate the disproportionate influence of wealthy donors in American politics.³²⁶ Others agree that deregulating party finance is not the answer, as allowing “parties to engage in the same type of courting and solicitation of the very wealthy as Super PACs” is unlikely to “mitigate the

³¹⁷ *Ibid.*

³¹⁸ *Ibid* at 87.

³¹⁹ *Ibid* at 73.

³²⁰ *Citizens United v FEC*, 588 US 310 at 455 (2009).

³²¹ *Ibid.*

³²² Of course, the majority of the US Supreme Court does not recognize this kind of exchange as “corruption”: see *Buckley v Valeo*, 424 US 1 (1976); *SpeechNow.org v FEC*, 599 F (3d) 686 (DC Cir 2010); *Citizens United v FEC*, 588 US 310 (2009); *McCutcheon v FEC*, 572 US __ (2014) (slip op).

³²³ Hasen (2012) 225 at 237.

³²⁴ *Citizens United v FEC*, 588 US 310 at 455 (2009).

³²⁵ Boatright (2015) at 100.

³²⁶ Sarbanes (2016) at 33.

ongoing distributional shift of the campaign finance system toward the interests of the very wealthy.”³²⁷

Campaign finance legislation in the US is criticized for a variety of other problems. For example, the BCRA’s ban on soft money was intended to reduce the risk of corruption by preventing political parties from accepting unregulated, unlimited contributions. However, Hasen argues that the practice of “bundling” has replaced, to some extent, the use of soft money to gain access to politicians.³²⁸ Bundling involves one individual soliciting many donations from their acquaintances. Bundlers who reach certain thresholds are rewarded with access and other perquisites.³²⁹ Others criticize the regulatory regime for falling behind new developments in campaign finance. The public funding regime for presidential candidates provides an example of this “policy drift.”³³⁰ Dwyre calls the presidential public funding regime a “quaint remnant of a bygone era when public funding provided a way to level the playing field between presidential contenders.”³³¹ Hasen agrees that the scheme is “no longer viable.”³³² For example, in 2008, former President Obama opted out of the public funding regime and raised \$745.7 million for his presidential campaign.³³³ If he had opted in, he would have received \$84.1 million in public funding and his spending would have been limited to that amount.³³⁴

The FEC is also criticized for its lack of success in imposing “serious sanctions on high-stakes violations.”³³⁵ Enforcement problems are exacerbated by a complicated and slow enforcement process.³³⁶ Further, the FEC’s endless advisory opinions and other policy documents have led to an unwieldy and overly complex regime.³³⁷ Dwyre also notes that political deadlock among the Commissioners has prevented the FEC from keeping up with changing practices and newly discovered loopholes, thus feeding policy drift.³³⁸

³²⁷ Kang (2016) at 536.

³²⁸ Hasen (2012) 225 at 234.

³²⁹ *Ibid* at 229.

³³⁰ Dwyre (2015) at 34.

³³¹ *Ibid* at 35.

³³² Hasen (2012) 225 at 225.

³³³ *Ibid*.

³³⁴ Adam Nagourney & Jeff Zeleny, “Obama Forgoes Public Funds in First for Major Candidate”, *The New York Times* (20 June 2008), online:

<<http://www.nytimes.com/2008/06/20/us/politics/20obamacnd.html>>.

³³⁵ Mann (2005) 232 at 237.

³³⁶ *Ibid*.

³³⁷ The problem of complexity was pointed in *Citizens United v FEC*, 588 US 310 at 335–36 (2009).

³³⁸ Dwyre (2015) at 34.

9. UK LAW

Campaign finance-related scandals in past decades have led to increasing regulation of political financing in the UK.³³⁹ The UK's campaign finance regime imposes spending limits and transparency requirements on parties, candidates, and third-party campaigners. However, unlike in Canada and the US, contributions to parties and candidates are uncapped, although contributions must come from permissible sources. In other words, demand is limited but supply is not. Paid political broadcasting is also prohibited in the UK. The UK's limits on political spending and broadcasting have survived challenges based on freedom of expression, providing a stark contrast to American freedom of speech jurisprudence.³⁴⁰

9.1 Freedom of Expression and Campaign Finance Regulation in the UK

In two cases dealing with the UK's campaign finance laws, the European Court of Human Rights (ECtHR) accepted that states may impose some limits on campaign financing without falling afoul of the guarantees of freedom of expression and free elections.³⁴¹ Article 10 of the European Convention on Human Rights ("the Convention")³⁴² provides as follows:

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority ...
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public

³³⁹ See Justin Fisher, "Britain's 'Stop-Go' Approach to Party Finance Reform" in Robert G Boatright, ed, *The Deregulatory Moment? A Comparative Perspective on Changing Campaign Finance Laws* (University of Michigan Press, 2015).

³⁴⁰ See Section 8.1.2, below, for a discussion of freedom of speech jurisprudence in the US. Issacharoff points out that the UK has a tradition of treating elections as "an administrative tallying of preferences as they exist", which could play a part in the courts' willingness to allow limits on freedom of expression during elections: Samuel Issacharoff, "The Constitutional Logic of Campaign Finance Regulation" (2009) 26 *Pepperdine L Rev* 373 at 384.

³⁴¹ Brexit does not directly affect the weight of the Convention and ECtHR decisions in the UK. The ECtHR is a judicial body of the Council of Europe, which is separate from the European Union, and the Convention is incorporated into UK law through the UK *Human Rights Act*. For more information, see Chloe Smith, "Lawyers fear for UK's future in ECHR after Brexit vote", *The Law Society Gazette* (24 June 2016), online: <<https://www.lawgazette.co.uk/law/lawyers-fear-for-uks-future-in-echr-after-brexit-vote/5056112.article>>.

³⁴² *Convention for the Protection of Human Rights and Fundamental Freedoms*, 4 November 1950, 213 UNTS 221.

safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Article 3 of Protocol 1 to the Convention provides that contracting parties shall “undertake to hold free elections ... under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature.”³⁴³

In *Bowman v the United Kingdom (Bowman)*, the ECtHR considered a provision of the *Representation of the People Act, 1983 (RPA)* providing that third parties could spend no more than £5 promoting the election of a particular candidate in any one constituency in a general election.³⁴⁴ The applicant was charged under the *RPA* after distributing some 1.5 million leaflets in various constituencies to inform voters about candidates’ views on abortion.³⁴⁵

Although the spending limit infringed freedom of expression, the ECtHR accepted that it had the legitimate aim of protecting the rights and freedoms of others, as required by Article 10(2) of the Convention. The ECtHR identified the “others” as other candidates, since the provision aimed to promote “equality between candidates” and the electorate.³⁴⁶ However, the ECtHR found that the impugned provision was disproportionate to its goal. The spending cap formed a “total barrier” for third parties wishing to inform people in their area about a candidate’s views on a particular issue, even though the limit applied only in the four to six weeks before a general election.³⁴⁷ In response to this decision, Parliament raised the third-party spending cap at the constituency level for general parliamentary elections.³⁴⁸

In *Bowman*, the ECtHR discussed the interaction between the right to free elections and the right to free expression. According to the ECtHR, these two guarantees are the “bedrock” of democracy and reinforce one another, but they may also come into conflict.³⁴⁹ The ECtHR accepted that states may need to limit freedom of expression during elections to ensure “free expression of the opinion of the people”, as required by the right to free elections. However, information must nonetheless be permitted to “circulate freely” during an election.³⁵⁰ Like the Supreme Court of Canada in *Harper*, the ECtHR thus acknowledged the usefulness of

³⁴³ *Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms* 1952, ETS No 009.

³⁴⁴ *Bowman v the United Kingdom* (1998), No 24839/94, [1998] I ECHR 4. Paragraph numbers cited to online version: <[http://hudoc.echr.coe.int/eng#{"itemid":\["001-58134"\]}](http://hudoc.echr.coe.int/eng#{)>.

³⁴⁵ *Bowman v the United Kingdom* (1998), No 24839/94, [1998] I ECHR 4 at paras 11–12.

³⁴⁶ *Ibid* at para 38.

³⁴⁷ *Ibid* at para 45.

³⁴⁸ See Section 9.2.3.3, below, for current rules on third-party spending limits at the constituency level.

³⁴⁹ *Bowman v the United Kingdom* (1998), No 24839/94, [1998] I ECHR 4 at para 42.

³⁵⁰ *Ibid* at para 42.

third-party spending limits in enhancing electoral debate, but warned against stifling the flow of information through overly high spending caps.

In *Animal Defenders International v the United Kingdom (Animal Defenders)*, the ECtHR confirmed its willingness to allow limits on expression during elections for the sake of fairness and robust debate.³⁵¹ In this case, the applicant challenged a blanket ban on paid political advertising on broadcast media for political parties, candidates, and third parties under the *Communications Act 2003*.³⁵² The UK House of Lords and the ECtHR upheld the ban.

In its decision, the House of Lords emphasized that a level playing field in public debate enables citizens “to make up their own minds on the important issues of the day.”³⁵³ According to the House of Lords, the blanket ban on paid political advertising “avoid[s] the grosser distortions [in electoral debate] which unrestricted access to the broadcast media will bring.”³⁵⁴ In recognizing the need to prevent the wealthy from distorting electoral debate, the House of Lords accepted the egalitarian rationale for campaign regulation and acknowledged that limiting electoral speech can actually enhance the exchange of information and ideas. Speaking bluntly, Baroness Hale bolstered the majority’s conclusions by warning against “the dominance of advertising, not only in elections but also in the formation of political opinion, in the United States of America” and the “[e]normous sums” spent on such advertising.³⁵⁵

At the ECtHR, the parties agreed that the legislative objective of the ban on paid political advertising was to preserve the “impartiality of broadcasting on public interest matters and, thereby ... protect ... the democratic process.”³⁵⁶ The majority of the ECtHR accepted that this objective fell within the legitimate aim of protecting the rights of others, as required by Article 10(2) of the Convention. The ECtHR also concluded that the ban could reasonably be considered necessary in a democratic society. According to the majority, without the ban, the wealthy could “obtain competitive advantage in the area of paid advertising and thereby curtail a free and pluralist debate, of which the State remains the ultimate guarantor.”³⁵⁷

³⁵¹ *Animal Defenders International v the United Kingdom* [GC], No 48876/08, [2013] II ECHR 203.

³⁵² *Communications Act 2003* (UK), c 21, s 321(2),(3). Broadcasters must provide free airtime to political parties for political and campaign broadcasts: *Communications Act 2003* (UK), c 21, ss 319(2)(g), 333.

³⁵³ *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport*, [2008] UKHL 15 (BAILII) at para 48, Hale B.

³⁵⁴ *Ibid.*

³⁵⁵ *Ibid* at para 47.

³⁵⁶ *Animal Defenders International v the United Kingdom* [GC], No 48876/08, [2013] II ECHR 203 at para 78.

³⁵⁷ *Ibid* at para 112.

Finally, on the issue of proportionality, the majority of the ECtHR found the ban to be properly tailored to the “risk of distortion.”³⁵⁸ The ban applied to media with “particular influence,” those media being television and radio, and a narrower ban could lead to abuse and uncertainty.³⁵⁹ The ECtHR also pointed out the availability of alternatives to paid political advertising for third-party groups, such as participation in radio or television programs or the formation of a charitable arm to fund non-political paid advertising.³⁶⁰

By concluding that the state is the “ultimate guarantor” of robust debate, the ECtHR revealed a significant divergence from the US Supreme Court’s approach to freedom of speech. In campaign finance cases, the majority of the US Supreme Court has demonstrated an unwavering suspicion of state power and has emphasized the role of constitutional rights in shielding the individual from that power.³⁶¹ In *Animal Defenders*, by contrast, the ECtHR’s approach recalls Fiss’ theory that the state may enhance free speech, not merely threaten it.³⁶²

9.2 Regulatory Regime in the UK

The UK’s campaign finance regime attempts to level the playing field for parties and candidates by limiting demand for, but not supply of, political money. This runs opposite to the American approach of limiting supply but not demand. In the UK, parties, candidates, and third parties are subject to expenditure limits, but contributions to all three are uncapped, although contributions must come from permissible sources. The UK’s ban on paid political advertising on broadcast media is intended to further curb political parties’ demand for money.

Under the UK’s scheme of uncapped contributions, parties and candidates could rely solely on a small number of large donors to finance their campaigns. This raises obvious corruption concerns. Disclosure requirements supposedly address the risk of corruption. Disclosure also discourages large contributions, as big donors may find themselves the subject of unwanted media attention.

In the UK, different legislation applies to campaigning by political parties and candidates. Registered parties are governed by the *Political Parties, Elections and Referendums Act 2000 (PPERA)*,³⁶³ while candidates are governed by the *RPA*.³⁶⁴ Both Acts also regulate third-party campaigning in general parliamentary elections, with *PPERA* addressing national third-

³⁵⁸ *Ibid* at paras 117–22.

³⁵⁹ *Ibid*.

³⁶⁰ *Ibid* at para 124.

³⁶¹ See Section 10.1.2, below.

³⁶² Fiss (1996). See Section 5.1, above, for more on Fiss’ arguments regarding freedom of speech and campaign finance regulation.

³⁶³ *Political Parties, Elections and Referendums Act 2000 (UK)*, c 41.

³⁶⁴ *Representation of the People Act 1983 (UK)*, c 2.

party campaigns and the *RPA* addressing third-party campaigns at the constituency level. The campaign finance provisions in both Acts were amended by the *Electoral Administration Act 2006*,³⁶⁵ the *Political Parties and Elections Act 2009*,³⁶⁶ and the *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014* (the *Transparency of Non-Party Campaigning Act*).³⁶⁷ This Section will focus on the rules in *PPERA* and the *RPA* in relation to general parliamentary elections. The UK also regulates campaign financing in referendums and local government elections.

9.2.1 Regulation of Campaign Financing for Political Parties and Candidates in the UK

9.2.1.1 Spending Limits for Registered Parties and Candidates

In the UK, ceilings on candidate spending date back to 1883 and were extended to political parties and third parties in 2000 by *PPERA*.³⁶⁸ In *Attorney General v Jones*,³⁶⁹ the Court of Appeal explained that the purpose of spending caps is to promote “a level financial playing field between competing candidates, so as to prevent perversion of the voters’ democratic choice between competing candidates within constituencies by significant disparities of local expenditure.”³⁷⁰ By contrast, American courts view the objective of leveling the playing field as an insufficient basis for restricting campaign spending.³⁷¹

a) Expenses Captured by Spending Limits

i. Registered Parties: Definition of “Campaign Expenditure”

Registered parties are subject to ceilings on “campaign expenditure” under *PPERA*. “Campaign expenditure” is defined as an expense incurred by a party for election purposes that falls within Schedule 8 of *PPERA*, which lists such matters as advertising, publishing documents with the party’s policies, market research, and rallies or other events.³⁷² The phrase “for election purposes” is defined as “for the purpose of or in connection with (a) promoting or procuring electoral success for the party ... or (b) otherwise enhancing the standing” of the party or its candidates.³⁷³ This includes attempts to prejudice the chances or standing of other parties or candidates.³⁷⁴ Further, an activity could be done “for election

³⁶⁵ *Electoral Administration Act 2006*, c 22.

³⁶⁶ *Political Parties and Elections Act 2009* (UK), c 12.

³⁶⁷ *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014* (UK), c 4.

³⁶⁸ Ewing & Rowbottom (2012) at 77.

³⁶⁹ *Attorney General v Jones*, [1999] 2 Cr App R 253.

³⁷⁰ *Ibid* at 255.

³⁷¹ See, e.g., *Buckley v Valeo*, 424 US 1 (1976).

³⁷² *Political Parties, Elections and Referendums Act 2000* (UK), c 41, s 72(2).

³⁷³ *Ibid*, s 72(4).

³⁷⁴ *Ibid*, s 72(5)(a).

purposes” even if no express mention is made of any party or candidate.³⁷⁵ Finally, a registered party’s “campaign expenditure” does not include expenditures that are to be included in a candidate’s election expenses return, which prevents the same expenses from counting toward the spending limits of both a candidate and its party.³⁷⁶

Even if an expense falls within the definition of “campaign expenditure,” it will not count towards the party’s spending limit under *PPERA* unless it was incurred in the 365 days before a general parliamentary election.³⁷⁷

ii. Candidates: Definition of “Election Expenses”

The *RPA* limits the amount candidates may spend on “election expenses”. The definition of “election expenses” is similar to the definition of “campaign expenditure” for political parties. “Election expenses” are defined in the *RPA* as:

- “any expenses incurred at any time
- in respect of any matter specified in Part 1 of Schedule 4A
- which is used for the purposes of the candidate’s election
- after the date when he becomes a candidate at the election”.³⁷⁸

The matters in Part 1 of Schedule 4A include advertising, distributing unsolicited material to electors, transport, public meetings, and accommodation and administration costs. The phrase “for the purposes of the candidate’s election” is defined as “with a view to, or otherwise in connection with, promoting or procuring the candidates election,” which includes “prejudicing the electoral prospects of another candidate.”³⁷⁹ Exclusions are made for certain expenses, such as those related to the publication of non-advertising material in newspapers and periodicals.³⁸⁰ Further, the value of volunteer services provided on the volunteer’s own time is not considered an election expense.³⁸¹

b) Spending Limits

i. Registered Parties

In the 365 days before a general parliamentary election, registered parties’ campaign expenditure is limited to £30,000 per constituency contested by the party, or £810,000 in

³⁷⁵ *Ibid*, s 72(5)(b).

³⁷⁶ *Ibid*, s 72(6).

³⁷⁷ *Ibid*, Schedule 9, para 3(7).

³⁷⁸ *Representation of the People Act 1983* (UK), c 2, s 90ZA(1).

³⁷⁹ *Ibid*, ss 90ZA(3),(6).

³⁸⁰ *Ibid*, Schedule 4A, para 8.

³⁸¹ *Ibid*, Schedule 4A, para 10.

England, £120,000 in Scotland, and £60,000 in Wales, whichever is greater.³⁸² Constituency-level branches of registered parties are not subject to limits on spending in support of candidates in their constituencies.³⁸³ However, if a constituency-level branch spends money promoting the party as a whole, this spending will count toward the national party's spending limit.³⁸⁴

No political party spent the full amount permitted in the 2010 general parliamentary election. This could be a result of declining party income.³⁸⁵

ii. Candidates

Candidate spending limits are determined by adding together a base amount and a “top up” that depends on the number of registered electors in the candidate's constituency.³⁸⁶ There are two relevant time periods for candidate spending under the *RPA*. One limit applies to post-candidacy election expenses, while a separate limit applies to pre-candidacy election expenses under certain circumstances. The limit for post-candidacy expenses covers all election expenses incurred for things used after the candidate becomes a candidate, even if the expenses were actually incurred before they became a candidate, as indicated by the definition of “election expenses.”³⁸⁷ In the 2017 general parliamentary election, the post-candidacy spending limit consisted of a base amount of £8,700 with a top up of 9p per elector in county constituencies.³⁸⁸

A separate spending cap applies to pre-candidacy election expenses in some circumstances. If Parliament is not dissolved for 55 months, election expenses will be capped between the

³⁸² *Political Parties, Elections and Referendums Act 2000* (UK), c 41, Schedule 9, paras 3(2)–(3),(7).

³⁸³ Ron Johnston & Charles Pattie, “Local Parties, Local Money, and Local Campaigns: Regulatory Issues” in Keith D Ewing, Jacob Rowbottom & Joo-Cheong Tham, eds, *The Funding of Political Parties: Where Now?* (Routledge, 2012) at 92.

³⁸⁴ *Ibid.*

³⁸⁵ Ewing & Rowbottom (2012) at 80.

³⁸⁶ UK Electoral Commission, “UK Parliamentary general election 2015: Guidance for candidates and agents, Part 3 of 6 – Spending and donations” at 6, online: <http://www.electoralcommission.org.uk/data/assets/pdf_file/0004/173074/UKPGE-Part-3-Spending-and-donations.pdf>.

³⁸⁷ *Representation of the People Act 1983* (UK), c 2, s 90ZA.

³⁸⁸ *Ibid.*, s 76; *Representation of the People (Variation of Limits of Candidates' Election Expenses) Order 2014*, SI 2014/1870, art 4. See also United Kingdom Electoral Commission, “UK Parliamentary general election 2015: Guidance for candidates and agents, Part 3 of 6 – Spending and donations” at 7, online: <http://www.electoralcommission.org.uk/data/assets/pdf_file/0004/173074/UKPGE-Part-3-Spending-and-donations.pdf>; United Kingdom Electoral Commission, “UK Parliamentary general election 2017: Guidance for candidates and agents, Part 3 of 6 – Spending and donations” at 7, online: <https://www.electoralcommission.org.uk/data/assets/pdf_file/0019/214516/UKPGE-Part-3-Spending-and-donations.pdf>. In the 2017 parliamentary general election, there was no pre-candidacy spending limit, since Parliament was dissolved before the 55-month period expired.

end of the 55-month period and the day a person becomes a candidate.³⁸⁹ In other words, if an expense is incurred for something used during this pre-candidacy window, it will count toward the pre-candidacy spending limit. This window could last up to four months. In the 2015 general parliamentary election, spending during this period was limited to a base amount of £30,700 with a top up of 6p per elector.³⁹⁰ The addition of this pre-candidacy limit in 2009 was presumably directed toward preventing the circumvention of pre-existing post-candidacy spending limits.

9.2.1.2 Regulation of Contributions to Registered Parties and Candidates

As mentioned above, contributions to candidates and political parties in the UK are subject to source restrictions and disclosure requirements, but the amount of each contribution is unlimited. The source restrictions and disclosure requirements apply to all donations to political parties, regardless of whether donations are specifically intended for the purpose of election campaigning, although disclosure is required more frequently during election periods.

a) Definition of “Donation”

i. Definition of “donation” for parties: *PPERA*

“Donation” is defined in section 50(2) of *PPERA* to include gifts of money or property; membership fees; payments of the party’s expenses by a third person; and the provision of property, services, or facilities “otherwise than on commercial terms.” “Sponsorship” is also included in the definition of “donation” and is defined in section 51 of *PPERA* as the transfer of money or property to the party to help the party meet expenses for events, research, or publications. Sponsorship does not, however, include the price of admission to events and payments to access party publications.³⁹¹ The definition of “donation” also excludes various things, such as the provision of volunteer services on one’s own time free of charge.³⁹² In

³⁸⁹ *Representation of the People Act 1983* (UK), c 2, s 76ZA. Note that, for the purposes of section 76ZA, the definition of “election expenses” in section 90ZA(1) is changed to omit the words “after the date when he becomes a candidate at the election”: s 76ZA(1).

³⁹⁰ *Ibid*, s 76ZA(2); *Representation of the People (Variation of Limits of Candidates’ Election Expenses) Order 2014*, SI 2014/1870, art 4. See also United Kingdom Electoral Commission, “UK Parliamentary general election 2015: Guidance for candidates and agents, Part 3 of 6 – Spending and donations” at 7, online: <http://www.electoralcommission.org.uk/_data/assets/pdf_file/0004/173074/UKPGE-Part-3-Spending-and-donations.pdf>.

³⁹¹ *Political Parties, Elections and Referendums Act 2000* (UK), c 41, s 51(3).

³⁹² *Ibid*, s 52(1).

addition, donations of £500 or less are excluded from the definition of “donation” and are therefore exempt from source restrictions and disclosure requirements.³⁹³

Loans with a value over £500 are included within the regulatory scheme.³⁹⁴ After the self-explanatory “loans for peerages” scandal of 2006, the *Election Administration Act 2006* amended *PPERA* to ensure loans could not be used to circumvent source restrictions and disclosure requirements for donations.³⁹⁵

ii. Definition of “donation” for candidates: the *RPA*

The definition of “donation” under the *RPA* is similar to the definition under *PPERA*. “Donation” is defined to include gifts; sponsorship; money lent on non-commercial terms; and the provision of property, services, or facilities on non-commercial terms.³⁹⁶ Donations of £50 or less are excluded.³⁹⁷ Volunteer services provided free of charge on the volunteer’s own time are also excluded.³⁹⁸

b) Source Restrictions

Source restrictions are similar for candidates and registered parties.³⁹⁹ As indicated by the definitions of “donation,” these restrictions are triggered by donations and loans over £500 for parties and by donations over £50 for candidates. Donations and loans over these thresholds must not come from anonymous or impermissible donors.⁴⁰⁰ Permissible donors include individuals registered in the electoral register in the UK, companies and limited liability partnerships that carry on business in the UK, unincorporated associations that carry on their activities primarily in the UK and have their main office in the UK, and trade unions listed under UK legislation.⁴⁰¹ Charities are not allowed to make political donations.⁴⁰² An additional restriction applies to donations and loans to political parties.

³⁹³ *Ibid*, s 52(2).

³⁹⁴ *Ibid*, ss 71F(3),(12)(b).

³⁹⁵ Fisher (2015) at 155; Gauja, (2010) at 179. *Parties and Elections: Legislating for Representative Democracy* (Ashgate Publishing, 2010) at 179.

³⁹⁶ *Representation of the People Act 1983* (UK), c 2, Schedule 2A, para 2(1). “Sponsorship” is defined in para 3 of Schedule 2A.

³⁹⁷ *Ibid*, Schedule 2A, para 4(2).

³⁹⁸ *Ibid*, Schedule 2A, para 4(1)(b).

³⁹⁹ Third-party campaigners are subject to these same source restrictions under *PPERA*, as discussed in Section 9.2.3.2, below.

⁴⁰⁰ *Political Parties, Elections and Referendums Act 2000* (UK), c 41, s 54(1)(a); *Representation of the People Act 1983* (UK), c 2, Schedule 2A, para 6(1)(b).

⁴⁰¹ *Ibid*, Schedule 2A, para 6(1)(a). By contrast, under the federal regime in Canada, only individuals may contribute to political parties and candidates: see Section 8.2.1.2, above.

⁴⁰² United Kingdom Election Commission, “Permissibility checks for political parties” at 4, online: <<https://www.electoralcommission.org.uk/i-am-a/party-or-campaigner/guidance-for-political-parties/reporting-donations-and-loans>>; Rowbottom, (2012) 11 at 26.

Individuals contributing or lending more than £7,500 to a registered party must be resident, ordinarily resident, and domiciled in the UK for tax purposes.⁴⁰³

When accepting a donation from an unincorporated association, the Electoral Commission advises party officers to ascertain whether the association has an identifiable membership, a set of rules or a constitution, and a separate existence from its members.⁴⁰⁴ If these criteria are met, the party officer may accept the donation without inquiring further into the identity of the individuals funding the association, even if those individuals might be impermissible donors. The party officer must simply record the association's name and the address of its main office, in accordance with *PPERA*'s transparency requirements.⁴⁰⁵ If the above criteria are not met, party officers are directed to "consider whether the donation is actually from individuals" within the association "or if someone within the association is acting as an agent for others."⁴⁰⁶ If so, the officer must ensure the individuals in question are permissible donors.⁴⁰⁷

c) Disclosure Requirements

Donations and loans to registered parties, along with donations to candidates, are subject to disclosure requirements. These requirements will be discussed in Section 9.2.1.3, below, on transparency requirements.

9.2.1.3 Transparency Requirements for Registered Parties and Candidates

a) Registered Parties

The treasurer of a registered party must submit a campaign expenditure return to the Electoral Commission within six months after a general election.⁴⁰⁸ The report must contain all campaign expenditures in the 365 days before the election, along with supporting

⁴⁰³ *Political Parties, Elections and Referendums Act 2000* (UK), c 41, ss 54(2)(a),(2ZA), 71HZA(1)–(2).

⁴⁰⁴ United Kingdom Election Commission, "Permissibility checks for political parties" at 9, online: <<https://www.electoralcommission.org.uk/i-am-a/party-or-campaigner/guidance-for-political-parties/reporting-donations-and-loans>>.

⁴⁰⁵ *Ibid.* However, some additional transparency is provided by the reporting requirements for unincorporated associations. If an unincorporated association donates or lends over £25,000 in a year to a registered party, the association must report to the Electoral Commission any gifts over £7,500 received by the association before and after the association makes the donation or loan: *Political Parties, Elections and Referendums Act 2000* (UK), c 41, Schedule 19A, para 2.

⁴⁰⁶ United Kingdom Election Commission, "Permissibility checks for political parties" at 9, online: <<https://www.electoralcommission.org.uk/i-am-a/party-or-campaigner/guidance-for-political-parties/reporting-donations-and-loans>>.

⁴⁰⁷ *Ibid.*

⁴⁰⁸ *Political Parties, Elections and Referendums Act 2000* (UK), c 41, ss 80, 82(1). The treasurer commits an offence if they fail to submit the report on time without reasonable excuse: s 84(1).

invoices and receipts.⁴⁰⁹ The treasurer must also submit a declaration that the return is complete and correct and, if the party's campaign expenditure exceeds £250,000, an auditor's report.⁴¹⁰ The Electoral Commission must make the campaign expenditure returns available for public inspection "as soon as reasonably practicable," but may destroy returns two years after receiving them.⁴¹¹

Party treasurers must also submit quarterly donation reports.⁴¹² As mentioned above, only contributions over £500 meet the definition of "donation" and only loans of a value of over £500 count as regulated transactions under *PPERA*. Donation reports must include donations or loans over £7,500, donations or loans from the same source that add up to £7,500 in a calendar year, and donations or loans over £1,500 that come from a source already reported in that year.⁴¹³ Further, the treasurer must include donations or loans over £1,500 to the party's accounting units, or constituency-level branches.⁴¹⁴ If one person makes several donations to different branches of the party, the donations will be treated as a donation to the central party and must be reported if over £7,500 in the aggregate.⁴¹⁵ Reports must include information about the donor or lender, such as name and address.⁴¹⁶ During a general election, these reports must be submitted weekly.⁴¹⁷ If there is nothing to report, the treasurer must submit a nil return.⁴¹⁸ The Electoral Commission maintains a register of donations and loans reported under *PPERA*, which must include the amount and source of each donation or loan.⁴¹⁹ Donations are to be entered into the register "as soon as reasonably practicable."⁴²⁰

⁴⁰⁹ *Ibid.*, ss 80(3),(4).

⁴¹⁰ *Ibid.*, ss 83(2), 81.

⁴¹¹ *Ibid.*, s 84.

⁴¹² *Ibid.*, ss 62(1), 71M(1).

⁴¹³ *Ibid.*, ss 62, 71M; UK Electoral Commission, "Overview of donations to political parties" at 6, online: <http://www.electoralcommission.org.uk/_data/assets/pdf_file/0014/102263/to-donations-rp.pdf>; UK Electoral Commission, "Overview of loans to political parties" at 6, online: <http://www.electoralcommission.org.uk/_data/assets/pdf_file/0015/102264/to-loans-rp.pdf>.

⁴¹⁴ UK Electoral Commission, "Reporting donations and loans: Parties with accounting units" at 4, online: <http://www.electoralcommission.org.uk/_data/assets/pdf_file/0016/102283/sp-reporting-with-au-rp.pdf>.

⁴¹⁵ *Ibid.*

⁴¹⁶ *Political Parties, Elections and Referendums Act 2000* (UK), c 41, ss 62(13), 71M(13); Schedule 6, para 2; Schedule 6A, para 2.

⁴¹⁷ *Ibid.*, ss 63, 71Q.

⁴¹⁸ *Ibid.*, ss 62(10), 71M(10).

⁴¹⁹ *Ibid.*, ss 69, 71V.

⁴²⁰ *Ibid.*, ss 69(5), 71V.

b) Candidates

Candidates must submit a spending return within 35 days after the election result is declared.⁴²¹ The return must include all election expenses incurred and payments made, along with a statement of the amount of money provided from the candidate's own resources to cover election expenses.⁴²² Even if the candidate has incurred no election expenses, they must submit a nil return.⁴²³ The return must also list donations received and information about the donations, such as the date of acceptance, the amount of the donation, and the name and address of the donor.⁴²⁴ As noted above, these requirements only apply to donations over £50, as donations under this threshold do not meet the definition of "donation" in the RPA.⁴²⁵ If a candidate fails to deliver their return on time and is a Member of Parliament, the candidate is prohibited from sitting or voting in the House of Commons until delivery is complete.⁴²⁶ The RPA also requires a candidate's donation returns to be published in at least two newspapers in their constituency.⁴²⁷

9.2.2 Public Funding of Election Campaigns in the UK

The UK's campaign finance regime provides little in the way of public funding for parties or candidates. There are no tax credits for political donations and no reimbursements or allowances. Fisher notes that a tradition of "voluntarism as the basis for party finance" may explain the absence of robust public funding for election campaigns in the UK.⁴²⁸

a) Policy Development Grants

Policy development grants for political parties are intended to help fund long-term research, thus encouraging parties to become a source of ideas in politics, not just electoral campaigning machines.⁴²⁹ The Electoral Commission is not authorized to make more than £2 million in policy grants per year.⁴³⁰

⁴²¹ *Representation of the People Act 1983* (UK), c 2, s 81(1).

⁴²² *Ibid*, ss 81(1),(3).

⁴²³ UK Electoral Commission, "UK Parliamentary general election 2015: Guidance for candidates and agents, Part 3 of 6 – Spending and donations" at 16, online:

<http://www.electoralcommission.org.uk/_data/assets/pdf_file/0004/173074/UKPGE-Part-3-Spending-and-donations.pdf>.

⁴²⁴ *Representation of the People Act 1983* (UK), c 2, Schedule 2A, para 11; *Political Parties, Elections and Referendums Act 2000* (UK), c 41, Schedule 6, para 2.

⁴²⁵ *Representation of the People Act 1983* (UK), c 2, Schedule 2A, para 4(2).

⁴²⁶ *Ibid*, s 85(1). If a Member of Parliament contravenes this prohibition, they will be fined £100 for every day they sit or vote without submitting the return.

⁴²⁷ *Ibid*, s 88.

⁴²⁸ Fisher (2015) at 169.

⁴²⁹ Ghaleigh (2006) at 53.

⁴³⁰ *Political Parties, Elections and Referendums Act 2000* (UK), c 41, s 12(8).

b) Broadcasting Regulations

The *Communications Act 2003* prohibits paid political advertising on television and radio and requires broadcasters to provide free airtime to registered political parties for political and campaign broadcasts.⁴³¹ Licensed broadcasters must allocate political broadcasting time in accordance with the minimum requirements set out by Ofcom, the UK's communications regulator.⁴³² As long as these minimum requirements are met, broadcasters have discretion to set their own rules on the length, frequency, allocation, and scheduling of political broadcasts.⁴³³

Under section 321(2) of the *Communications Act 2003*, an advertisement will contravene the prohibition on paid political advertising if it is inserted by a body whose objects are wholly or mainly of a political nature or if it is directed towards a political end. Objects of a political nature and political ends include attempts to influence the outcome of elections or referendums, among other non-election-related purposes.⁴³⁴

The regulation of political broadcasting is motivated by the “fear of the societal consequences of unbridled private control of an especially potent form of communication,” although the

⁴³¹ *Communications Act 2003* (UK), c 21, ss 319(2)(g), 333. For more information on the ban on paid political broadcasting, see Jacob Rowbottom, “Access to the Airwaves and Equality: The Case against Political Advertising on the Broadcast Media” in K D Ewing & Samuel Issacharoff, eds, *Party Funding and Campaign Financing in International Perspective* (Hart Publishing, 2006) at 77. Rowbottom argues in favour of broadcasting restrictions by pointing out that access to broadcast media is always limited, but should not be limited on the basis of wealth: 96. See also Andrew Geddis, “The press: The media and the ‘Rupert Murdoch problem’” in Keith D Ewing, Jacob Rowbottom & Joo-Cheong Tham, eds, *The Funding of Political Parties: Where Now?* (Routledge, 2012) at 136. For criticism of the ban on paid political advertising, see Section 9.3, below.

⁴³² Ofcom, “Ofcom rules on Party Political and Referendum Broadcasts” (22 March 2017), online: <https://www.ofcom.org.uk/data/assets/pdf_file/0035/99188/pprb-rules-march-2017.pdf>. Ofcom advises that, before general elections, licensed broadcasters and the BBC should allocate one or more election broadcasts to each registered party “having regard to the circumstances of a particular election, the nation in which it is held, and the individual party’s past electoral support and/or current support in that nation”: *ibid*, Rule 14. Ofcom clarifies that registered parties should qualify for an election broadcast if contesting one sixth or more of the seats in a general election: *ibid*, Rule 15. Further, licensed broadcasters and the BBC “should consider making additional allocations of... [election broadcasts] to registered parties...if evidence of their past electoral support and/or current support at a particular election or in a relevant nation/electoral area means it would be appropriate to do so”: Rule 16. Registered parties may choose a television broadcast length of 2’40”, 3’40”, or 4’40” and a length of up to 2’30” for radio: *ibid*, Rule 24. Political broadcasts must be aired between 5:30pm and 11:30pm on television and between 6:00am and 10:00pm on radio: *ibid*, Rules 25–26. In the context of general elections, the relevant licensed broadcasters are “licensed public service television channel[s]” and “national (i.e. UK-wide, commercial) analogue radio service[s]”: *ibid*, Rules 1, 8.

⁴³³ *Ibid*, Rules 3–4.

⁴³⁴ *Communications Act 2003*, c 21, s 321(3).

potency of television and radio is arguably being diluted by other media.⁴³⁵ The prohibition on paid political broadcasting is also aimed at reducing demand for campaign funds among political parties and candidates, which theoretically helps to address corruption, equality, and fairness concerns.

As discussed above, the European Court of Human Rights upheld the ban on paid political advertising in *Animal Defenders International v the United Kingdom*.⁴³⁶ A “strong cultural antipathy to political advertising” in the UK also supports the continuing existence of the ban.⁴³⁷

9.2.3 Regulation of Third-Party Campaign Financing in the UK

The *RPA* governs third-party campaigns in relation to candidates in a particular constituency. Broader campaigns for or against a political party or category of candidates, or on policies or issues associated with a party or category of candidates, are governed by *PPERA*.⁴³⁸

The regulation of third-party campaigners in the UK mirrors the regulation of political parties and candidates. Third-party campaigners are subject to spending limits and, if they spend above a certain amount, they must comply with reporting requirements and source restrictions for donations.

9.2.3.1 Activities Captured by Third-Party Campaign Regulations

a) *PPERA*

i. Meaning of “Recognised” Third Party

“Third party” is defined in *PPERA* as “any person or body other than a registered party,” or a registered party if it campaigns to promote the electoral success of other parties or candidates from other parties.⁴³⁹

PPERA creates a scheme of unregistered and registered, or “recognised,” third parties. Unregistered third-party campaigners can only spend up to a certain amount. Third-party

⁴³⁵ Geddis (2012) at 146.

⁴³⁶ *Animal Defenders International v the United Kingdom* [GC], No 48876/08, [2013] II ECHR 203.

⁴³⁷ Stephanie Palmer, “The Courts: Legal challenges to political finance and election laws” in Keith D Ewing, Jacob Rowbottom & Joo-Cheong Tham, eds, *The Funding of Political Parties: Where Now?* (Routledge, 2012) at 184.

⁴³⁸ UK Electoral Commission, “Northern Ireland Assembly election March 2017: Non-party campaigners” (guidance document) at 5, online: <http://www.electoralcommission.org.uk/_data/assets/pdf_file/0007/219148/Northern-Ireland-Assembly-NPC-2017.pdf>.

⁴³⁹ *Political Parties, Elections and Referendums Act 2000* (UK), c 41, ss 85(8)–(9).

campaigners must register if their spending on “controlled expenditures” exceeds this threshold during the regulated period. Once registered, they will be a “recognised third party” with a much higher spending limit, but will be subject to various other requirements such as reporting requirements. Currently, there are ten recognised third parties in the UK, including three trade unions and two animal welfare organizations.⁴⁴⁰

ii. Definition of “Controlled Expenditure”

As mentioned above, once a third party reaches a certain threshold of “controlled expenditure,” they must register and meet various requirements. The definition of “controlled expenditure” in section 85 of *PPERA* has two components. First, a “controlled expenditure” is an expense incurred by or on behalf of the third party that falls under Part 1 of Schedule 8A, which includes expenses incurred for the “production or publication of material ... made available to the public in whatever form and by whatever means,” canvassing or market research, press conferences, and public rallies other than annual conferences of the third party, among other things.⁴⁴¹ Various expenses are excluded from the definition, such as expenses incurred by an individual to provide volunteer services on their own time.⁴⁴² Second, a “controlled expenditure” must be capable of being reasonably “regarded as intended to promote or procure the electoral success” of a party and its candidates or of a particular category of parties or candidates.⁴⁴³ A category of parties or candidates may be characterized by, for example, a policy position.⁴⁴⁴ A third party promotes the electoral success of parties or candidates if it engages in “prejudicing the electoral prospects ... of other parties or candidates.”⁴⁴⁵ Promoting electoral success also does not require express mention of any party or candidate,⁴⁴⁶ nor does the expenditure need to be solely for the purpose of promoting a party or candidate’s electoral success in order to fit within the definition of “controlled expenditure.”⁴⁴⁷

In its guidance for non-party campaigners, the Electoral Commission has superimposed an alternative or additional two-step test for determining whether spending on an activity is a “controlled expenditure” under *PPERA*. The first step is the “purpose test,” which involves asking whether the activity can reasonably be regarded as intended to influence voters to

⁴⁴⁰ The Register is found online at:

<<http://search.electoralcommission.org.uk/Search/Registrations?currentPage=1&rows=20&sort=RegulatedEntityName&order=asc&open=filter&et=tp®ister=none®Status=registered&optCols=EntityStatusName>>.

⁴⁴¹ *Political Parties, Elections and Referendums Act 2000* (UK), c 41, Schedule 8A, para 1.

⁴⁴² *Ibid*, Schedule 8A, para 2(1)(a)(i).

⁴⁴³ *Ibid*, s 85(2).

⁴⁴⁴ *Ibid*, s 85(2)(b).

⁴⁴⁵ *Ibid*, s 85(4)(b).

⁴⁴⁶ *Ibid*, s 85(4)(c).

⁴⁴⁷ *Ibid*, s 85(4A).

vote for or against a party or category of candidates.⁴⁴⁸ The purpose test will be met if the activity promotes or opposes policies so closely associated with the party or category of candidates that it can reasonably be regarded as intended to influence voters.⁴⁴⁹ The second step is the “public test,” which involves asking whether the activity is aimed at, seen by, or heard by the public or involves the public.⁴⁵⁰ The “public” does not include members of the non-party campaigner organization or its “committed supporters”.⁴⁵¹

b) The RPA

Under the RPA, persons other than the candidate, the candidate’s election agent, and those authorized by the election agent are subject to regulations if they incur expenses for matters such as public meetings or advertising with a view to promoting or procuring the election of a candidate.⁴⁵²

9.2.3.2 Regulation of Contributions to Recognised Third Parties under PPERA

Under PPERA, donations to recognised third parties are not capped, but are subject to other requirements if their value exceeds £500, such as reporting requirements.⁴⁵³ The reporting requirements are discussed in Section 9.2.3.4, below. Donations of over £500 to recognised third parties for the purpose of controlled expenditures must also come from permissible donors, just like donations to political parties.⁴⁵⁴ In relation to a recognised third party, donations are defined as gifts; sponsorship; membership fees; and the provision of goods, services, and facilities, among other things, but volunteer services do not count as a donation.⁴⁵⁵

⁴⁴⁸ UK Electoral Commission, “Northern Ireland Assembly election March 2017: Non-party campaigners” (guidance document) at 8.

⁴⁴⁹ UK Electoral Commission, “Overview of regulated non-party campaigning” (guidance document) at 6, online: <http://www.electoralcommission.org.uk/_data/assets/pdf_file/0006/193065/Overview-of-regulated-non-party-campaigning-May-2016.pdf>.

⁴⁵⁰ UK Electoral Commission, “Northern Ireland Assembly election March 2017: Non-party campaigners” (guidance document) at 8.

⁴⁵¹ UK Electoral Commission, “Overview of regulated non-party campaigning” (guidance document) at 7.

⁴⁵² *Representation of the People Act 1983* (UK), c 2, s 75.

⁴⁵³ *Political Parties, Elections and Referendums Act 2000* (UK), c 41, Schedule 11, para 4(2).

⁴⁵⁴ *Ibid*, Schedule 11, para 6. See section 54(2) of PPERA for the list of permissible donors.

⁴⁵⁵ *Ibid*, Schedule 11, paras 2(1), 4(1). “Sponsorship” is defined in para 3.

9.2.3.3 Regulation of Spending by Third Parties

a) *PPERA*

The spending limits for recognised third parties apply to the 365 days before a parliamentary general election,⁴⁵⁶ but expenses incurred before the regulated period will count toward the limit if they are incurred for property, services, or facilities that are used during this regulated period.⁴⁵⁷ Recognised third parties have a higher spending limit than unregistered third parties. In England, the controlled expenditure of recognised third parties may amount to up to 2% of the maximum campaign expenditure limit for England.⁴⁵⁸ The “maximum campaign expenditure limit” refers to the maximum amount political parties may spend in a particular part of the UK.⁴⁵⁹ A recognised third party may not spend more than 0.05% of the maximum campaign expenditure limit in any one constituency.⁴⁶⁰ If a recognised third party exceeds the spending limit, they will commit an offence under *PPERA* if they reasonably ought to have known that their expenditures would exceed the limit.⁴⁶¹

Unregistered third parties can spend up to £20,000 in England and up to £10,000 in each of Scotland, Wales, and Northern Ireland on controlled expenditures in the 365 days before a parliamentary general election.⁴⁶² Like recognised third parties, unregistered third parties must not spend more than 0.05% of the maximum campaign expenditure in a particular constituency.⁴⁶³ If a third party exceeds these limits without registering, they will commit an offence under *PPERA*.⁴⁶⁴

b) The *RPA*

Under the *RPA*, third parties can spend up to £700 campaigning for the election of a candidate after the date the candidate becomes a candidate.⁴⁶⁵ Expenses incurred before the candidate becomes a candidate will count toward this limit if incurred for something to be used after the candidacy begins.⁴⁶⁶ A person becomes a candidate the day Parliament is dissolved, unless their intention to become a candidate is not expressed until after

⁴⁵⁶ *Ibid*, Schedule 10, para 3(3).

⁴⁵⁷ *Ibid*, s 94(8).

⁴⁵⁸ *Ibid*, Schedule 10, para 3.

⁴⁵⁹ *Ibid*, s 94(10)(e).

⁴⁶⁰ *Ibid*, Schedule 10, para 3(2A).

⁴⁶¹ *Ibid*, s 94(2).

⁴⁶² *Ibid*, ss 94(3)–(5).

⁴⁶³ *Ibid*, s 94(5ZA).

⁴⁶⁴ *Ibid*, s 94.

⁴⁶⁵ *Representation of the People Act 1983* (UK), c 2, ss 75(1),(1ZZB),(1ZA).

⁴⁶⁶ *Ibid*, s 75(8).

dissolution, in which case they will become a candidate on the date this intention is declared or the date of the person's nomination, whichever is earlier.⁴⁶⁷

9.2.3.4 Transparency Requirements for Third-Party Campaigners

a) Attribution

Under *PPERA*, published election material must contain the names and addresses of the printer, promoter, and person on whose behalf it is published.⁴⁶⁸ The "promoter" is defined as "the person causing the material to be published."⁴⁶⁹ "Election material" is defined as "material which can reasonably be regarded as intended to promote or procure electoral success" for a registered party, for a category of registered parties, or for a category of candidates.⁴⁷⁰ For example, if a company causes material to be published in support of a registered party, the company's name and address must appear on the material.

b) Reporting Requirements

i. *PPERA*

Unregistered third parties have no disclosure obligations. However, recognised third parties must prepare a return if they incur any controlled expenditures during the 365 days before polling day.⁴⁷¹ The return must include a statement of payments made in respect of controlled expenditures and a statement of donations received for the purpose of controlled expenditures for the relevant election.⁴⁷² For donations from permissible donors with a value of more than £7,500, the return must state the amount or nature of the donation, the date it was received, and information about the donor.⁴⁷³ The total value of all donations that are worth more than £500 and that do not exceed £7,500 must also be reported.⁴⁷⁴ If a recognised third party incurs more than £250,000 for controlled expenditures during the 365 days before polling day, they must also submit an auditor's report with their return.⁴⁷⁵

⁴⁶⁷ *Ibid*, s 118A(2); UK Electoral Commission, "UK Parliamentary general election 2015: Guidance for candidates and agents, Part 3 of 6 – Spending and donations" at 6, online: http://www.electoralcommission.org.uk/_data/assets/pdf_file/0004/173074/UKPGE-Part-3-Spending-and-donations.pdf.

⁴⁶⁸ *Political Parties, Elections and Referendums Act 2000* (UK), c 41, s 143.

⁴⁶⁹ *Ibid*, s 143(11).

⁴⁷⁰ *Ibid*, s 143A.

⁴⁷¹ *Ibid*, s 96(1).

⁴⁷² *Ibid*, s 96(2).

⁴⁷³ *Ibid*, Schedule 11, para 10(1),(2).

⁴⁷⁴ *Ibid*, Schedule 11, para 10(3).

⁴⁷⁵ *Ibid*, s 97.

ii. The *RPA*

If a third-party campaigner incurs expenses that must be authorized by a candidate's election agent, such as expenses totalling over £700, the third party must submit a return stating the amount of the expenses and the candidate for whom they were incurred.⁴⁷⁶ The return must be submitted within 21 days after the election results are declared.⁴⁷⁷ If the expenses are under £700, meaning the candidate's election agent need not authorize the expenses, the Electoral Commission may nonetheless require the third party to submit a return that either shows the expenses incurred or contains a statement that the expenses were £200 or less.⁴⁷⁸

9.2.3.5 Rules Governing Specific Types of Third Parties

a) Companies

Companies must obtain a resolution from their members authorizing political donations or expenditures in advance.⁴⁷⁹ A resolution is not required unless the donation exceeds £5,000 by itself or in combination with other political donations made in the 12-month period leading up to the donation.⁴⁸⁰ The resolution "must be expressed in general terms ... and must not purport to authorize particular donations or expenditure."⁴⁸¹ The resolution has effect for four years.⁴⁸²

b) Trade Unions

Trade unions must ballot their members to establish a separate political fund for political donations and expenditures.⁴⁸³ Members must opt in in order to contribute to the union's political fund and may withdraw their opt-in notice at any time.⁴⁸⁴ Further, the trade union must take all reasonable steps to notify members of their right to withdraw from contributing to the political fund.⁴⁸⁵

Trade unions must provide detailed information in annual returns regarding payments out of their political fund if those payments exceed £2,000 in a calendar year.⁴⁸⁶ For example, if a union contributes to a third-party campaigning organisation, the union's annual return

⁴⁷⁶ *Representation of the People Act 1983* (UK), c 2, s 75(2).

⁴⁷⁷ *Ibid*, s 75(2)(a).

⁴⁷⁸ *Ibid*, s 75ZA.

⁴⁷⁹ *Companies Act 2006* (UK), c 46, s 366.

⁴⁸⁰ *Ibid*, s 378(1).

⁴⁸¹ *Ibid*, s 367(5).

⁴⁸² *Ibid*, s 368.

⁴⁸³ *Trade Union and Labour Relations (Consolidation Act) 1992* (UK), c 52, s 71.

⁴⁸⁴ *Ibid*, s 84(1).

⁴⁸⁵ *Ibid*, s 84A(1).

⁴⁸⁶ *Ibid*, s 32ZB.

must include the name of the organisation, the amount paid to that organisation, the names of the political parties or candidates that the union hoped to support through the expenditure, and the amount of the expenditure spent in relation to each political party or candidate.⁴⁸⁷

c) Unincorporated Associations

If an unincorporated association donates or lends over £25,000 in a year to a registered party or recognised third party, the association must report to the Electoral Commission any gifts over £7,500 received by the association before and after the association makes the political contribution.⁴⁸⁸ The Electoral Commission must maintain a register of gifts reported to them by unincorporated associations.⁴⁸⁹

9.2.4 Role of the Electoral Commission

The Electoral Commission supervises compliance with *PPERA* and other electoral law statutes, such as the *RPA*.⁴⁹⁰ It has the power to demand the production of documents or records of income and expenditure, to copy those documents and records, and to enter the premises of an individual or organization to retrieve those documents and records.⁴⁹¹ Failure to deliver documents to the Electoral Commission can lead to civil penalties.⁴⁹² The police, however, are responsible for initiating enforcement actions for criminal offences under *PPERA*.⁴⁹³

Since 2009, four out of nine commissioners on the Electoral Commission have been nominated by the political parties.⁴⁹⁴ This was introduced in response to criticisms that the commissioners, who formerly could not be members of parties or have held political office in the last ten years, were too apolitical and did not understand the “practical workings of political parties.”⁴⁹⁵

⁴⁸⁷ *Ibid*, s 32ZB(6).

⁴⁸⁸ *Political Parties, Elections and Referendums Act 2000* (UK), c 41, Schedule 19A, para 2.

⁴⁸⁹ *Ibid*, Schedule 19A, para 7.

⁴⁹⁰ Ghaleigh (2006) at 42; *Political Parties, Elections and Referendums Act 2000* (UK), c 41, s 145.

⁴⁹¹ *Political Parties, Elections and Referendums Act 2000* (UK), c 41, s 146.

⁴⁹² *Ibid*, s 147; Navraj Singh Ghaleigh, “The regulator: The first decade of the Electoral Commission” in Keith D Ewing, Jacob Rowbottom & Joo-Cheong Tham, eds, *The Funding of Political Parties: Where Now?* (Routledge, 2012) at 157.

⁴⁹³ Ghaleigh (2012) at 157.

⁴⁹⁴ *Ibid* at 158.

⁴⁹⁵ *Ibid*.

9.3 Criticisms of Campaign Finance Regulation in the UK

A heavily criticized aspect of the UK's campaign finance regime is the absence of donation caps.⁴⁹⁶ Even though most campaign finance scandals in the UK involve donations, only spending is capped.⁴⁹⁷ Uncapped donations allow reliance on a small number of large donors, which raises concerns regarding corruption, equality, fairness, and public confidence.⁴⁹⁸ Admittedly, the UK's spending limits might relieve the need for big donations to some extent by reducing demand for money. In addition, transparency requirements supposedly deter large donations through negative press attention. For example, after the disclosure requirements in *PPERA* came into force in 2000, the media seized on instances in which large donors to the Labour Party obtained some benefit from government around the same time they made donations.⁴⁹⁹ The resulting scandal may have deterred future large donors.⁵⁰⁰ However, Fisher notes this deterrence did not appear to be at work in the 2008 and 2010 elections.⁵⁰¹ Fisher argues further that, in spite of *PPERA*'s spending limits, the demand for money among parties has continued unabated, especially after the devolution of power to Scotland, Wales, and Northern Ireland and associated extra elections.⁵⁰² The major parties' reliance on large donations could also be exacerbated by "the decline of other forms of party income."⁵⁰³

Others criticize *PPERA*'s spending limits for leaving out local, constituency-level party branches.⁵⁰⁴ As noted by Johnston and Pattie, candidates are subject to stricter regulation than parties at the constituency level.⁵⁰⁵ They argue in favour of stricter regulation for local party units, particularly in light of the importance of local party branches in campaigning for marginal seats and the apparent effectiveness of local campaigning.⁵⁰⁶ Fisher adds that

⁴⁹⁶ According to Fisher, one reason for the UK's failure to impose a donation ceiling is the Labour Party's structure of affiliated trade unions: see Fisher, (2015) at 161.

⁴⁹⁷ Ewing & Rowbottom (2012) at 77.

⁴⁹⁸ For example, in the Brexit referendum, which was subject to similar rules as general elections, ten donors were responsible for over half of donations to the campaigns and 100 donors were responsible for 95% of all reported donations: Transparency International UK, *Take Back Control: How Big Money Undermines Trust in Politics*, Steve Goodrich & Duncan Hames, eds (October 2016) at 1.

⁴⁹⁹ Ewing (2006) at 63.

⁵⁰⁰ The scandals also led the Labour Party to set up extra "safeguards"; for example, the party instituted a requirement that donors sign a statement declaring that they are not seeking personal or commercial benefits: *ibid* at 67.

⁵⁰¹ Fisher (2015) at 167.

⁵⁰² *Ibid* at 153.

⁵⁰³ *Ibid*.

⁵⁰⁴ However, expenses incurred by local party branches to promote the party as a whole count toward the national party's spending limits. See Section 9.2.1.1, above.

⁵⁰⁵ Johnston & Pattie (2012) at 92.

⁵⁰⁶ *Ibid*.

spending at the constituency level will only become more important as volunteer campaigning drops with falling party membership.⁵⁰⁷

The timing of spending limits under *PPERA* is also problematic. The spending limits apply in the 365 days before a general election, yet elections are usually announced four to six weeks before polling day.⁵⁰⁸ As a result, parties cannot know whether the regulated period has begun and will struggle to “time their run.”⁵⁰⁹ Further, since the ruling party basically sets the date of the election, incumbents have a “tactical advantage.”⁵¹⁰

Criticism has also been directed toward the source restrictions and transparency requirements for political donations. Rowbottom argues that the permissible donor scheme can be circumvented through the use of corporate vehicles.⁵¹¹ For example, a foreign national could effectively make a political donation through a company carrying on business in the UK, as long as the company did not act as an agent for the foreign national.⁵¹² Lesser transparency requirements in Northern Ireland, where donors need not be disclosed, may also allow circumvention of *PPERA*'s transparency rules. For example, the Democratic Unionist Party of Northern Ireland caused controversy after accepting a £425,000 donation for the purpose of pro-Brexit advertising in England and Scotland.⁵¹³ The party was not

⁵⁰⁷ Justin Fisher, “Legal Regulation and Political Activity at the Local Level in Britain” in Keith D Ewing, Jacob Rowbottom & Joo-Cheong Tham, eds, *The Funding of Political Parties: Where Now?* (Routledge, 2012) at 121.

⁵⁰⁸ Ghaleigh (2006) at 47.

⁵⁰⁹ *Ibid.*

⁵¹⁰ *Ibid.*

⁵¹¹ Rowbottom (2012) 11 at 18.

⁵¹² *Ibid.*

⁵¹³ Peter Geoghegan & Adam Ramsay, “The strange link between the DUP Brexit donation and a notorious Indian gun running trial”, *openDemocracyUK*, online: <<https://www.opendemocracy.net/uk/peter-geoghegan-adam-ramsay/mysterious-dup-brexit-donation-plot-thickens>>; “DUP confirms £435,000 Brexit donation”, *BBC News* (24 February 2017), online: <<http://www.bbc.com/news/uk-northern-ireland-39075502>>; Fintan O’Toole, “What connects Brexit, the DUP, dark money and a Saudi prince?”, *The Irish Times* (16 May 2017), online: <<https://www.irishtimes.com/opinion/what-connects-brexit-the-dup-dark-money-and-a-saudi-prince-1.3083586>>; “The strange tale of the DUP, Brexit, a mysterious £425,000 donation and a Saudi prince”, *The Independent* (9 June 2017), online: <<http://www.independent.co.uk/news/uk/politics/election-dup-brexit-donations-saudi-arabia-tales-theresa-may-a7782681.html>>. Facing political pressure, the DUP eventually revealed the source of the donation to be an organization called the Constitutional Research Council. However, the ultimate source of the donation remains unclear. Even under *PPERA*'s disclosure requirements, the ultimate source of this type of donation could remain murky. As discussed above in Section 9.2.1.2(b), under *PPERA*, parties may, under certain circumstances, accept donations from an unincorporated association without inquiring into the identities of the individuals funding the unincorporated association.

required by the law of Northern Ireland to disclose the source of the donation, even though the advertising took place outside of Northern Ireland.

Complexity is another problem plaguing the UK's campaign finance regime. Ghaleigh observes that *PPERA*'s labyrinthine intricacy "impose[s] a regulatory burden that risks unintended consequences."⁵¹⁴ Volunteers at the local party level are unlikely to fully understand the requirements of *PPERA*'s "heavily amended" provisions, which could lead to fears of liability and a chilling effect.⁵¹⁵ Gauja and Orr also note that the introduction of stricter third-party campaigning regulations in 2014 could hinder the ability of voluntary organizations to "speak on issues of concern," creating a "chilling effect on democracy."⁵¹⁶ Some organizations may be unable to pay for independent legal advice to sort out the complex third-party rules, although the Electoral Commission releases guidance for third-party campaigners under section 3 of the *Transparency of Non-Party Campaigning Act*.⁵¹⁷ Small political parties may also lack the resources to meet reporting requirements, although the Electoral Commission may provide some assistance.⁵¹⁸

The UK's ban on paid political advertising on broadcast media has drawn criticism for its impact on freedom of expression, particularly in relation to public interest organizations.⁵¹⁹ Critics argue the ban is overbroad, since it captures "not just political parties but social advocacy groups seeking to take part in debate about matters of controversy."⁵²⁰ Using Amnesty International as an example, Barendt explains that the ban may preclude charities from running short advertisements on radio or television.⁵²¹ To Barendt, this constitutes "a monstrous and unjustifiable infringement of freedom of expression."⁵²² The case of *Animal Defenders*, which involved advertisements funded by an animal welfare organization, arguably provided an example of overbreadth. As noted by three of the dissenting justices in that case, nobody was suggesting that Animal Defenders International "was a financially powerful body with the aim or possibility of ... unduly distorting the public debate."⁵²³ Five

⁵¹⁴ Ghaleigh (2012) at 167.

⁵¹⁵ *Ibid.*

⁵¹⁶ Gauja & Orr (2015) at 250.

⁵¹⁷ *Ibid* at 259; *Transparency of Lobbying, Non-Party Campaigning and Trade Union Administration Act 2014* (UK), c 4, s 3.

⁵¹⁸ Gauja (2010) at 179.

⁵¹⁹ The ban's impact on political parties is less extreme, since broadcasters must provide parties with airtime for party political broadcasts. See *Animal Defenders International v the United Kingdom* [GC], No 48876/08, [2013] II ECHR 203, dissenting judgement of Tulkens J at para 14.

⁵²⁰ Tom Lewis, "Animal Defenders International v United Kingdom: Sensible Dialogue or a Bad Case of Strasbourg Jitters?" (2014) 77:3 Mod L Rev 460 at 462.

⁵²¹ Professor Eric Barendt, Minutes of Evidence presented to Joint Committee on the Draft Communications Bill [Minutes of Evidence], 17 June 2002, online: <<https://publications.parliament.uk/pa/jt200102/jtselect/jtcom/169/2061701.htm>>.

⁵²² *Ibid.*

⁵²³ *Animal Defenders International v the United Kingdom* [GC], No 48876/08, [2013] II ECHR 203, dissenting judgement of Tulkens J at para 19.

other dissenting justices in *Animal Defenders* argued further that “the prohibition applied to the most protected form of expression (public interest speech), by one of the most important actors in the democratic process (an NGO) and on one of the most influential media (broadcasting).”⁵²⁴

Critics also observe that the ban on paid political advertising prevents public interest groups from responding to commercial advertising on broadcast media. As Lewis points out, “under the current state of affairs a car manufacturer may advertise its SUVs on television without limit (finances permitting), but an NGO wishing to publicize the impact of such vehicles on the environment is prohibited, by law, from doing so.”⁵²⁵ Similarly, in Barendt’s view:

It can make no sense to allow commercial ads for automobiles and gas and other products associated with driving, or to allow the government to insert public service adverts ... but not to allow groups to pay for political adverts to make the opposite case.⁵²⁶

Critics of the ban on paid political advertising maintain that less restrictive options exist to level the playing field of public debate.⁵²⁷ Barendt argues that lawmakers can prevent “the domination of politics by ultra rich ... groups” through spending limits on advertising and restrictions on “the number of spots which could be purchased.”⁵²⁸ Both supporters and critics of the ban also question why it applies only to broadcast media.⁵²⁹ Television and radio are declining in importance while digital advertising, particularly on social media websites, is growing in importance. As a result, the goal of promoting a level playing field is undermined by the lack of regulation governing digital political advertisements, leading some commentators to argue that regulation should be extended to non-broadcast media.⁵³⁰

⁵²⁴ *Ibid*, dissenting judgement of Ziemele J et al at para 2. Ziemele J also argued that the majority’s decision was inconsistent with *VgT Verein gegen Tierfabriken v Switzerland* [GC], No 24699/94, [2001] VI ECHR 243, in which the ECtHR held that a similar prohibition on political advertising in Switzerland contravened the European Convention on Human Rights because it violated freedom of expression and was not necessary in a democratic society.

⁵²⁵ Lewis (2014) at 473.

⁵²⁶ Minutes of Evidence (17 June 2002).

⁵²⁷ Andrew Scott, “‘A Monstrous and Unjustifiable Infringement’?: Political Expression and the Broadcasting Ban on Advocacy Advertising” (March 2003) 66 Mod L Rev 224; Sarah Sackman, “Debating ‘Democracy’ and the Ban on Political Advertising” (May 2009) 72:3 Mod L Rev 475; Minutes of Evidence, (17 June 2002).

⁵²⁸ Minutes of Evidence (17 June 2002). See also Sackman, (May 2009) at 482. Barendt also suggests that radio and television can be distinguished from each other in designing a regulatory regime, as the price of advertising on radio “would not be extortionate.” Thus, the potential for distortion by the wealthy is smaller in the context of radio advertising: Minutes of Evidence, (17 June 2002).

⁵²⁹ See, e.g., Sackman (May 2009) at 484.

⁵³⁰ Tambini et al (March 2017) at 4, 8, 21.

Other criticisms of UK campaign finance law include the parsimoniousness of the public funding regime, which derives partly from public hostility toward the public funding of election campaigns.⁵³¹ Ewing and Rowbottom also point to holes in the reporting requirements for third parties. Regulations do not cover internal communications between organizations and their members, while some third parties, like newspaper companies, are excluded altogether.⁵³² In addition, Ghaleigh criticizes the lack of sanctioning options for contraventions of *PPERA*. The Electoral Commission may either issue a reprimand, which is essentially “nothing,” or refer the matter to the criminal prosecution authorities, which may be overly heavy-handed in some cases.⁵³³ Finally, because of the Electoral Commission’s “broad range of duties,” some critics warn against the “risk of overburdening.”⁵³⁴

10. CANADIAN LAW

Canada’s federal campaign finance regime is more extensive than the regulatory regime in the US or the UK. In Canada, both contributions and expenditures are capped. A “remarkable degree of consensus” exists regarding the need for campaign expenditure ceilings for parties and candidates, with no constitutional challenges or significant legislative proposals targeting caps.⁵³⁵ Third-party spending limits have been challenged but upheld by the Supreme Court of Canada.⁵³⁶ Further, in 2003, Parliament introduced “one of the most generous schemes for public funding of political parties that has been seen in a liberal democracy,” although an important element of that scheme was omitted in 2014.⁵³⁷

10.1 Constitutional Rights and Campaign Finance Regulation in Canada

10.1.1 Introduction

Freedom of expression is enshrined in section 2(b) of the Canadian *Charter of Rights and Freedoms* (“the *Charter*”). In *R v Keegstra*,⁵³⁸ the Supreme Court of Canada (“SCC”) stated that “[t]he connection between freedom of expression and the political process is perhaps the linchpin of the section 2(b) guarantee, and the nature of this connection is largely derived from the Canadian commitment to democracy.” The test for determining whether legislation infringes section 2(b) is found in *Irwin Toy Ltd v Quebec (Attorney General)*.⁵³⁹ First, a court

⁵³¹ Fisher (2015) at 165.

⁵³² Ewing & Rowbottom (2012) at 82.

⁵³³ Ghaleigh (2012) at 157.

⁵³⁴ Ghaleigh (2006) at 43.

⁵³⁵ Young (2015) at 121.

⁵³⁶ *Harper v Canada (Attorney General)*, 2004 SCC 33.

⁵³⁷ Young (2015) at 107.

⁵³⁸ *R v Keegstra*, [1990] 3 SCR 697, [1991] 2 WWR 1.

⁵³⁹ *Irwin Toy Ltd v Quebec (Attorney General)*, [1989] 1 SCR 927, 58 DLR (4th) 577.

will ask whether the activity in question fits within the sphere of activities protected by freedom of expression. This first step is established easily in regard to election-related communications, as political expression “lies at the core of the guarantee of free expression.”⁵⁴⁰ Second, a court will ask whether the legislation’s purpose or effect is to restrict freedom of expression.

Freedom of association is protected under section 2(d) of the *Charter*. According to the SCC, section 2(d) facilitates the exercise of other freedoms and guarantees the ability to exercise *Charter* rights collectively.⁵⁴¹ The right to vote is protected under section 3 of the *Charter*.

Once an infringement of a *Charter* right is established, courts consider section 1 of the *Charter*. Section 1 allows the impugned law to stand if the limit on the right in question is reasonable and demonstrably justifiable in a free and democratic society. At the section 1 stage of the analysis, courts ask whether the objective of the impugned law is pressing and substantial and whether the means chosen by the legislature are proportionate to its ends. In considering proportionality, the courts ask whether the means are rationally connected to the law’s objectives, whether the impairment of *Charter* rights is as little as is reasonably possible and whether the deleterious and salutary effects of the law are proportionate.⁵⁴²

10.1.2 Jurisprudence on the Constitutional Validity of Campaign Finance Regulation in Canada

a) *Canada (Attorney General) v Somerville*

Spending limits for third-party campaigners have been challenged several times in Canada. Although limits were eventually upheld by the SCC in *Harper v Canada (Attorney General)*,⁵⁴³ discussed further below, the Alberta Court of Appeal earlier struck down a \$1,000 cap on third-party spending on election advertising in *Canada (Attorney General) v Somerville* (“*Somerville*”).⁵⁴⁴ According to the Court in *Somerville*, the third-party spending limits “severely limit[ed]” the communicative power of third parties, thus violating their right to freedom of expression.⁵⁴⁵ The spending limits also constituted a limit on freedom of association, since they prevented people from combining “resources to pursue common goals, influence others, exchange ideas and effect change.”⁵⁴⁶ Further, the Court found that the impugned provisions violated the right to vote under section 3 of the *Charter*. In the

⁵⁴⁰ *Harper v Canada (Attorney General)*, 2004 SCC 33 at para 66.

⁵⁴¹ *Libman v Quebec (Attorney General)*, [1997] 3 SCR 569, 151 DLR (4th) 385 at para 36.

⁵⁴² *R v Oakes*, [1986] 1 SCR 103; *Carter v Canada (Attorney General)*, 2015 SCC 5 at para 94.

⁵⁴³ *Harper v Canada (Attorney General)*, 2004 SCC 33.

⁵⁴⁴ *Canada (Attorney General) v Somerville*, 1996 ABCA 217.

⁵⁴⁵ *Ibid* at para 48.

⁵⁴⁶ *Ibid* at para 26.

Court's view, the limits had "the effect of obstructing citizens' access to information to such an extent that the right to cast an 'informed vote' is breached."⁵⁴⁷

The Court held that the impugned provisions could not be justified under section 1 of the *Charter*. Without effective third-party advertising, citizens would only be as informed "as the news media, the parties and the candidates themselves want the citizens to be."⁵⁴⁸ The Court rejected the government's argument that the law was intended to prevent distortion of the political process. Rather, in the Court's view, the spending limits had the unacceptable objective of preserving the preferential position of political parties by preventing third parties from being "heard in any effective way."⁵⁴⁹

b) *Libman v Quebec (Attorney General)*

In *Libman v Quebec (Attorney General)* ("*Libman*"), the SCC struck down a provision in Quebec that restricted third-party campaigning in referendums.⁵⁵⁰ The impugned provision stipulated that only the national committees for each option in a referendum could incur expenses to promote or oppose each option. The law failed at the minimal impairment stage of the section 1 *Charter* analysis, as it constituted an almost total ban on the expression of those who could not join or affiliate themselves with national committees.

However, in *Libman*, the SCC accepted in principle the constitutionality of third-party spending limits in referendums and elections. The SCC found that the three objectives of the legislation were pressing and substantial. The first objective was the egalitarian goal of ensuring the wealthy do not have a "dis-proportionate influence by dominating the referendum debate."⁵⁵¹ Second, the spending limits aimed to facilitate informed voting "by ensuring some positions are not buried by others."⁵⁵² The third objective was to encourage public confidence by demonstrating that the political process is not "dominated by the power of money."⁵⁵³

Moving to the next stage of the section 1 analysis, the SCC found that the third-party spending limits were rationally connected to their three objectives.⁵⁵⁴ Based on the report of the 1991 Lortie Commission,⁵⁵⁵ the SCC remarked that third-party spending must be limited to ensure the effectiveness of party and candidate spending limits, which are, in turn, key to

⁵⁴⁷ *Ibid* at para 48.

⁵⁴⁸ *Ibid*.

⁵⁴⁹ *Ibid* at para 76.

⁵⁵⁰ *Libman v Quebec (Attorney General)*, [1997] 3 SCR 569, 151 DLR (4th) 385.

⁵⁵¹ *Ibid* at para 41.

⁵⁵² *Ibid*.

⁵⁵³ *Ibid*.

⁵⁵⁴ *Ibid* at para 57.

⁵⁵⁵ Canada, Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy: Final Report* (Ottawa: Minister of Supply and Services, 1991).

electoral fairness.⁵⁵⁶ The SCC also accepted that third-party spending limits must be lower than limits for candidates and parties because private resources are unlikely to be spread equally across candidates and policy positions.⁵⁵⁷ If limits are too high, third-party spending could produce “disproportionate” and unfair advantages for certain candidates.⁵⁵⁸

c) *Harper v Canada (Attorney General)*

Libman set the stage for *Harper v Canada (Attorney General)* (“*Harper*”), in which the SCC upheld third-party spending limits and accepted that Parliament may choose an “egalitarian model of elections.”⁵⁵⁹ The impugned provisions of the *Canada Elections Act* (“the *CEA*”) limited third-party spending on “election advertising” to \$150,000, of which only \$3,000 could be spent in a given electoral district.⁵⁶⁰ “Election advertising” includes taking a position on an issue with which a candidate is associated, otherwise known as issue advertising. The SCC also upheld registration and disclosure requirements for third parties.

Although the impugned spending limits infringed freedom of expression, the majority of the SCC found the infringement was justified. The spending limits had the pressing and substantial objectives of reducing the domination of political discourse by the wealthy, preventing circumvention of candidate and party spending limits, and enhancing public confidence in the electoral system.⁵⁶¹ The spending limits also satisfied the proportionality test under section 1 of the *Charter*. At this stage of the analysis, the majority emphasized the need for “deference to the balance Parliament has struck between political expression and meaningful participation.”⁵⁶²

The challengers argued that the impugned third-party spending limits unjustifiably infringed the right to vote in section 3 of the *Charter* by hindering electoral debate. The majority of the SCC, however, held that the impugned provisions actually enhanced the right to vote. Section 3 imports the “right to play a meaningful role in the electoral process,”⁵⁶³ but this does not confer the right “to mount a media campaign capable of determining the outcome” of an election.⁵⁶⁴ Rather, the right to “play a meaningful role in the electoral process” encompasses the right to an informed vote. Since “unequal dissemination of points

⁵⁵⁶ *Libman v Quebec (Attorney General)*, [1997] 3 SCR 569, 151 DLR (4th) 385 at paras 43–54.

⁵⁵⁷ *Ibid* at para 50.

⁵⁵⁸ *Ibid*.

⁵⁵⁹ *Harper v Canada (Attorney General)*, 2004 SCC 33 at para 62.

⁵⁶⁰ See Section 8.2.3, below, for the definition of “election advertising” and the current third-party spending limits under the *CEA*.

⁵⁶¹ *Harper v Canada (Attorney General)*, 2004 SCC 33 at para 92.

⁵⁶² *Ibid* at para 111. Dawood argues that, in light of the risk of “partisan self-dealing” in the design of campaign finance laws, courts “should not automatically defer to Parliament when reviewing laws that govern the democratic process”: Yasmin Dajwood, “Electoral Fairness and the Law of Democracy: A Structural Rights Approach to Judicial Review” (Fall 2012) 62:4 UTLJ 499 at 505.

⁵⁶³ *Harper v Canada (Attorney General)*, 2004 SCC 33 at para 70.

⁵⁶⁴ *Ibid* at para 74.

of view undermines the voter's ability to be informed," measures that promote "equality in the political discourse," such as the impugned spending limits, facilitate informed voting and meaningful participation.⁵⁶⁵

The majority of the SCC framed *Harper* as a clash between the right to meaningful participation under section 3 and the right to freedom of expression under section 2(b).⁵⁶⁶ In this case, the right to meaningful participation prevailed. The majority warned, however, that spending limits must not be so low that conveying information becomes impossible, as this could jeopardize the "informational component of the right to vote."⁵⁶⁷ Parliament must therefore find a middle road between overly stringent restrictions on the dissemination of information and overly permissive spending ceilings that allow some speakers to drown out others.

The dissent disagreed on the location of this middle road, but did not explicitly reject the constitutionality of all third-party spending limits. In light of the expense involved in mass communication, the dissent viewed the impugned spending ceiling as so low that it "effectively denies the right of an ordinary citizen to give meaningful and effective expression to her political views during a federal election campaign."⁵⁶⁸ As a result, "effective communication" during elections was "confined to registered political parties and their candidates."⁵⁶⁹ This could lead to inadequate coverage of viewpoints and issues unpopular with parties and candidates.⁵⁷⁰ The spending caps therefore undermine "the right to listen" and "curtail the diversity of perspectives heard."⁵⁷¹

Feasby notes that the CEA's third-party spending limits could be vulnerable to a fresh *Charter* challenge. In *Harper*, the majority held that evidence of a reasoned apprehension of harm is sufficient to justify an infringement of freedom of expression in cases involving "inconclusive or conflicting social science evidence of harm."⁵⁷² However, since *Harper*, more evidence on third-party spending has become available owing to the accumulation of data from third-party disclosure requirements.⁵⁷³ The disclosed information suggests there is little "appetite amongst third parties for big money campaigns."⁵⁷⁴

⁵⁶⁵ *Ibid* at paras 71 and 72.

⁵⁶⁶ *Ibid* at para 50.

⁵⁶⁷ *Ibid* at para 73.

⁵⁶⁸ *Ibid* at para 1.

⁵⁶⁹ *Ibid* at para 2.

⁵⁷⁰ *Ibid* at para 14.

⁵⁷¹ *Ibid* at para 19. The dissenting justices on the US Supreme Court have also turned to the idea that free speech protects both a right to speak and a right to hear. However, they have used this idea in support of spending limits. See, e.g., *Citizens United v Federal Election Commission*, 588 US 310 at 473 (2009).

⁵⁷² *Harper v Canada (Attorney General)*, 2004 SCC 33 at para 77.

⁵⁷³ Feasby (2012) 206 at 211.

⁵⁷⁴ *Ibid* at 211–12.

10.2 Regulatory Regime in Canada

This section describes the campaign financing regime for federal parliamentary elections in Canada. Federal campaign financing is governed by the *Canada Elections Act* (“the CEA”).⁵⁷⁵ Each province has also enacted its own regime in relation to campaign financing for elections to the provincial legislative assemblies.

The primary features of the federal regime are:

- a) contribution limits for political parties and candidates;
- b) source restrictions on contributions to third-party campaigners, political parties, and candidates;
- c) spending limits for third-party campaigners, political parties, and candidates;
- d) transparency requirements for third-party campaigners, political parties, and candidates; and
- e) a public funding scheme involving reimbursements and tax credits.

Unlike regulatory regimes in the UK and the US, the federal regime in Canada limits both the supply of and demand for money in elections, as politicians are subject to limits on the size of donations they may receive and the amount of money they may spend on election campaigns. By contrast, the federal regime in the US imposes caps only on political contributions, not spending. The UK, on the other hand, imposes spending caps on politicians and third-party campaigners but has no contribution ceilings.

10.2.1 Regulation of Campaign Financing for Political Parties, Candidates, Electoral District Associations, Leadership Contestants, and Nomination Contestants in Canada

10.2.1.1 Spending Limits for Registered Parties, Candidates, etc.

The provisions discussed in this section apply to expenditures by candidates, registered political parties, registered electoral district associations, nomination contestants, and leadership contestants.

a) Expenses Captured by Spending Limits

The spending caps in the CEA apply to “election expenses,” which are defined in section 376(1). “Election expenses” include any costs incurred or non-monetary contributions received by a registered party or candidate for goods or services used to directly promote or oppose a party, its leader, or a candidate during an election period. The definition also expressly includes some specific types of expenses, such as costs incurred or non-monetary

⁵⁷⁵ *Canada Elections Act*, SC 2000, c 9.

contributions provided for the production of promotional material and for the publication or broadcast of that material.⁵⁷⁶ “Expenses” are defined in section 349 to include the commercial value of property or services that are donated or provided, other than volunteer labour. The “election period” begins when the writ is issued and ends on polling day.⁵⁷⁷ Expenses outside of this period are not included in the definition of “election expenses.”

b) Spending Limits

i. Registered Parties

A registered party’s election expenses limit is calculated based on the number of electors in the electoral districts in which the party has endorsed candidates.⁵⁷⁸ If the election period lasts longer than 37 days, the limit is increased by a certain amount for each day beyond the 37-day period.⁵⁷⁹ The 2015 general election lasted 78 days. The Liberal, Conservative, and New Democratic Parties each had a spending limit of \$54,936,320.15.⁵⁸⁰ Transfers of funds from a registered party to its candidates do not count toward the spending ceiling under the *CEA*.⁵⁸¹ The *CEA* also expressly prohibits a registered party and a third party from colluding to circumvent the spending limit.⁵⁸²

ii. Candidates

Candidates’ election expense limits are determined by the number of electors in their electoral district.⁵⁸³ The limit is increased if the election period lasts longer than 37 days.⁵⁸⁴ For example, in the 2015 general election, which lasted 78 days, candidates running in the district of Victoria could incur up to \$234,268.29 in election expenses.⁵⁸⁵ Like registered parties, candidates are prohibited from colluding with others to circumvent the spending limit.⁵⁸⁶

⁵⁷⁶ *Ibid*, s 376(3).

⁵⁷⁷ *Ibid*, s 2(1).

⁵⁷⁸ *Ibid*, s 430(1).

⁵⁷⁹ *Ibid*, s 430(2).

⁵⁸⁰ Elections Canada, “Final Election Expenses Limits for Registered Political Parties”, online:

<<http://www.elections.ca/content.aspx?section=ele&document=index&dir=pas/42ge/pollim&lang=e>>.

⁵⁸¹ *Canada Elections Act*, SC 2000, c 9, s 430(3).

⁵⁸² *Ibid*, s 431(2).

⁵⁸³ *Ibid*, s 477.49(1).

⁵⁸⁴ *Ibid*, s 477.49(2).

⁵⁸⁵ Elections Canada, “Final Candidates Election Expenses Limits”, online: <<http://www.elections.ca/content.aspx?section=ele&document=index&dir=pas/42ge/canlim&lang=e#bc>>.

⁵⁸⁶ *Canada Elections Act*, SC 2000, c 9, s 477.52.

The Chief Electoral Officer may also establish categories of personal expenses and fix maximum amounts that may be incurred by candidates in each category.⁵⁸⁷ However, at the time of writing, no personal expense limits appear to exist.

iii. Electoral District Associations

During the election period, electoral district associations of registered parties are prohibited from transmitting election advertising or incurring any expenses for election advertising.⁵⁸⁸ Electoral district associations are therefore not subject to spending limits.

10.2.1.2 Regulation of Contributions to Registered Parties, Candidates, etc.

The provisions discussed in this section apply to contributions to candidates, registered political parties, registered electoral district associations, nomination contestants, and leadership contestants.

a) Definition of “contribution”

Under the *CEA*, a “contribution” can be monetary or non-monetary and includes money from a candidate’s own funds.⁵⁸⁹ Loans are also subject to source restrictions and count towards contribution limits. The outstanding amount of a loan cannot exceed an individual’s contribution limit when combined with any other contributions made by that individual.⁵⁹⁰ Transfers and loans between the party, its electoral district associations, and its candidates are not included under the definition of “contribution”.⁵⁹¹ Thus, the *CEA* targets “money being transferred from the private to the political domain”, not transfers within the political domain.⁵⁹² Other exclusions from the definition of “contribution” include annual party membership fees of \$25 or less.⁵⁹³ However, the *CEA* expressly includes fees for party and leadership conventions within the definition of “contribution.”⁵⁹⁴ The *CEA* also clarifies that, if a candidate or party sells tickets to a campaign fundraising event, the amount of the contribution will be the difference between the price of the ticket and its fair market value.⁵⁹⁵

⁵⁸⁷ *Ibid*, s 378(2). “Personal expenses” are defined in section 378 of the *CEA*.

⁵⁸⁸ *Ibid*, s 450(1). “Election advertising” is defined in section 319 of the *CEA*. The definition of “election advertising” is discussed in Section 8.2.3.1, below, in the context of third-party campaigners.

⁵⁸⁹ *Canada Elections Act*, SC 2000, c 9, ss 2(1) and 364(1).

⁵⁹⁰ *Ibid*, s 373.

⁵⁹¹ *Ibid*, ss 364(2)–(4), 373(5).

⁵⁹² Feasby (2012) 206 at 208.

⁵⁹³ *Canada Elections Act*, SC 2000, c 9, s 364(7).

⁵⁹⁴ *Ibid*, s 364(8).

⁵⁹⁵ *Ibid*, s 377.

b) Source Restrictions

Contributions must come from individuals who are Canadian citizens or permanent residents.⁵⁹⁶ Similarly, loans are permitted only from certain financial institutions or from individuals who are Canadian citizens or permanent residents.⁵⁹⁷ This means corporations, unions, and other non-natural legal persons cannot donate or make loans to a political party or candidate. However, these entities can make contributions to third-party campaigners for the purpose of election advertising, as discussed further below, or engage in third-party campaigning themselves.

Attempts to conceal the identity of the source of a contribution are prohibited by section 368 of the *CEA*. Indirect contributions and loans are also prohibited, as source restrictions and contribution limits could otherwise be circumvented.⁵⁹⁸ This means an individual cannot make a contribution using money from another person or entity that was provided for the purpose of making a contribution.⁵⁹⁹

c) Contribution Limits

Individuals may contribute no more than \$1,550 per calendar year to a particular registered party and no more than \$1,550 per calendar year to the registered associations, candidates, and nomination contestants of a registered party.⁶⁰⁰ The same limit applies to contributions to leadership contestants.⁶⁰¹ As mentioned above, the outstanding amount of any loans made by an individual will count toward their contribution limit.⁶⁰² Candidates are also prohibited from contributing more than \$5,000 to their own campaign, while leadership contestants may contribute no more than \$25,000 to their own campaign.⁶⁰³ Section 368(1) of the *CEA* prohibits attempts to circumvent contribution limits.

10.2.1.3 Transparency Requirements for Registered Parties, Candidates, etc.

a) Registered Parties

Registered parties must submit an election expenses return to the Chief Electoral Officer after a general election, along with an auditor's report and a declaration by the party's chief

⁵⁹⁶ *Ibid*, s 363(1).

⁵⁹⁷ *Ibid*, ss 373(3)–(4).

⁵⁹⁸ *Ibid*, ss 370, 373.

⁵⁹⁹ *Ibid*, s 370(1).

⁶⁰⁰ *Ibid*, ss 367(1)–(1.1).

⁶⁰¹ *Ibid*, s 367(1)(d).

⁶⁰² *Ibid*, s 373.

⁶⁰³ *Ibid*, ss 367(6),(7).

agent that the return is complete and accurate.⁶⁰⁴ The return must set out all election expenses incurred and non-monetary-contributions used as election expenses.⁶⁰⁵ Aside from this election expense reporting requirement, registered parties are also subject to ongoing reporting requirements. Each fiscal period, the party's chief agent must provide the Chief Electoral Officer with a financial transactions return, along with an auditor's report and a declaration by the chief agent that the return is complete and accurate.⁶⁰⁶ The financial transactions return must set out contributions received by the party during the fiscal period; the number of contributors; the name and address of contributors who gave more than \$200; the value of goods, services, or funds transferred by the registered party to a candidate or electoral district association (and vice versa); and a statement of election expenses incurred in by-elections during the fiscal period, among other things.⁶⁰⁷

b) Candidates

A candidate's official agent must provide the Chief Electoral Officer with an electoral campaign finance return, along with an auditor's report and declaration by both the official agent and the candidate that the return is complete and accurate.⁶⁰⁸ The return must set out the candidate's election expenses, loans, contributions, and the identity of contributors who gave more than \$200, among other things.⁶⁰⁹ The return must also state any "electoral campaign expenses" not already reported as election expenses.⁶¹⁰ "Electoral campaign expenses" are defined as any "expense reasonably incurred as an incidence of the election," including personal expenses.⁶¹¹ Further, the candidate must send their official agent a written statement setting out personal expenses paid by the candidate.⁶¹²

c) Electoral District Associations

Electoral district associations are subject to ongoing reporting requirements, not election-specific reporting requirements. Like registered parties, associations must submit a financial transactions return to the Chief Electoral Officer each fiscal period. The return must state contributions, the identity of donors who give more than \$200, expenses, loans, and other

⁶⁰⁴ *Ibid*, s 437(1).

⁶⁰⁵ *Ibid*, s 437(2).

⁶⁰⁶ *Ibid*, s 432(1).

⁶⁰⁷ *Ibid*, s 432(2).

⁶⁰⁸ *Ibid*, s 477.59(1).

⁶⁰⁹ *Ibid*, s 477.59(2).

⁶¹⁰ *Ibid*, s 477.59(2)(b).

⁶¹¹ *Ibid*, s 375.

⁶¹² *Ibid*, s 477.64(1).

items.⁶¹³ The report must be accompanied by an auditor's report and a declaration by the association's financial agent that the return is complete and accurate.⁶¹⁴

10.2.2 Public Funding of Election Campaigns in Canada

a) Quarterly Allowances

Quarterly allowances for registered parties were phased out by the Conservative government beginning in 2014. The phasing-out process ended in 2016.⁶¹⁵

b) Reimbursement of Election Expenses

In the 2015 general election, reimbursements totalled approximately \$104 million.⁶¹⁶ Registered parties are reimbursed for 50% of their election expenses if the candidates endorsed by the party receive at least 2% of the votes cast in the election or 5% of the votes cast in electoral districts in which the party ran candidates.⁶¹⁷ If a candidate gets at least 10% of the vote, but only spends 30% or less of their total spending limit, they will be reimbursed for 15% of the total amount they were permitted to spend under section 477.49 of the *CEA*.⁶¹⁸ If a candidate receives at least 10% of the vote and incurred more than 30% of the total amount they were allowed to spend, they will be reimbursed for 60% of their paid election expenses or 60% of the total amount they were allowed to spend, whichever is less.⁶¹⁹ Electoral district associations may also be reimbursed for up to \$1,500 for auditing expenses incurred to meet the requirements of the *CEA*.⁶²⁰

c) Tax Deductions

Monetary contributions to registered parties, registered electoral district associations, and candidates entitle the donor to a tax credit under the *Income Tax Act*.⁶²¹ The amount of the credit is based on the size of the donation. Donations up to \$400 entitle the donor to a 75% tax credit. Donations over \$400 entitle the donor to a \$300 tax credit plus 50% of the amount

⁶¹³ *Ibid*, s 475.2(1).

⁶¹⁴ *Ibid*, s 475.4(1).

⁶¹⁵ *Ibid*, s 445(2). A private member's bill has been put forward to reintroduce quarterly allowances, but private members' bills often do not become law. See Bill C-340, *An Act to amend the Canada Elections Act and to make a consequential amendment to another Act (political financing)*, 1st Sess, 42nd Parl, 2017, cl 2 (first reading 7 March 2017).

⁶¹⁶ "Remarks of the Chief Electoral Officer of Canada before the Committee on General Government", 26 July 2016, online:

<<http://www.elections.ca/content.aspx?section=med&dir=spe&document=jul2616&lang=e>>.

⁶¹⁷ *Canada Elections Act*, SC 2000, c 9, s 444.

⁶¹⁸ *Ibid*, s 477.73(1).

⁶¹⁹ *Ibid*, s 477.74.

⁶²⁰ *Ibid*, s 475.8.

⁶²¹ *Income Tax Act*, RSC 1985, c 1 (5th Supp).

by which the donation exceeds \$400. The tax credit is decreased further for donations over \$750.⁶²² This scheme is intended to encourage small contributions from a broad range of donors.⁶²³

d) Broadcasting Time

Free broadcasting time is reserved and allocated to political parties for political broadcasts during elections.⁶²⁴ The allocation is based on performance in the latest election, but the Broadcasting Arbitrator can modify the allocation if necessary for fairness or the public interest.⁶²⁵ The allocation scheme was challenged in *Reform Party of Canada v Canada (Attorney General)* on the basis that it entrenched incumbents and therefore breached the rights of smaller parties to freedom of expression and equality.⁶²⁶ However, the allocation system was upheld, although the Broadcast Arbitrator subsequently adopted a practice of allocating one-third of the available time equally among all registered parties.⁶²⁷ The Court also held that a prohibition on the purchase of additional broadcast time by political parties was an unjustifiable limit on freedom of expression. This can be contrasted with the UK, in which the House of Lords and the European Court of Human Rights have upheld a blanket ban on paid political advertising.⁶²⁸

10.2.3 Regulation of Third-Party Campaign Financing in Canada

The federal campaign finance regime in Canada subscribes to the idea that political parties are the “principal vehicles for communal political organization and expression,” which is reflected in spending limits for third-party campaigners under the *CEA*.⁶²⁹ The Supreme Court of Canada has echoed this idea, stating in *Libman* that, although third parties have an important contribution to make, “it is the candidates and political parties that are running for election.”⁶³⁰

⁶²² Elections Canada, “The Electoral System of Canada: Political Financing”, online: <<http://www.elections.ca/content.aspx?section=res&dir=ces&document=part6&lang=e>>.

⁶²³ Gauja (2010) at 157.

⁶²⁴ *Canada Elections Act*, SC 2000, c 9, s 345.

⁶²⁵ *Ibid*, ss 345, 338(1),(5); Feasby (2012) 206 at 200.

⁶²⁶ *Reform Party of Canada v Canada (Attorney General)* (1995), 123 DLR (4th) 366 (Alta CA).

⁶²⁷ Feasby (2012) 206 at 213–14.

⁶²⁸ *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport*, [2008] UKHL 15 (BAILII); *Animal Defenders International v the United Kingdom* [GC], No 48876/08, [2013] II ECHR 203.

⁶²⁹ Feasby (2012) 206 at 207.

⁶³⁰ *Libman v Quebec (Attorney General)*, [1997] 3 SCR 569, 151 DLR (4th) 385 at para 50.

10.2.3.1 Activities Captured by Third-Party Campaign Regulations

a) Definition of “third party”

“Third party” is defined in section 349 of the *CEA* as “a person or a group, other than a candidate, registered party or electoral district association of a registered party.” Thus, a third-party campaigner could be any individual, corporation, or other organization that wishes to promote the success of a candidate or political party in an election.

b) Definition of “election advertising”

If a third party engages in “election advertising” as defined in the *CEA*, they will be subject to the *CEA*’s requirements in regard to spending, contributions received by the third party, and transparency. “Election advertising” is defined in section 319.⁶³¹ The components of the definition are as follows:

- transmission to the public by any means
- during an election period
- of an advertising message that promotes or opposes a registered party or the election of a candidate.

The definition includes an advertising message “that takes a position on an issue with which a registered party or candidate is associated,” also known as issue advertising.⁶³² The election period begins when the writ is issued and ends on polling day.⁶³³

Various communications are excluded. For example, “election advertising” does *not* include things like editorials, debates, interviews, and columns.⁶³⁴ It also does not include the transmission of documents by an organization to its members, employees, or shareholders.⁶³⁵ Further exclusions are made for the transmission of an individual’s personal political views on a non-commercial basis on the Internet and the making of phone calls to encourage people to vote.⁶³⁶

⁶³¹ Although the definition of “election advertising” relates mainly to the regulation of third-party campaigners under the *CEA*, the definition is also relevant to some rules for political parties and candidates, such as requirements for attribution on advertising and the ban on election advertising on Election Day. However, the definition of “election advertising” is irrelevant to spending limits for political parties and candidates. As discussed above, the relevant concept for spending limits for political parties and candidates is “election expenses.” “Election advertising expenses” constitute a narrower category than “election expenses.”

⁶³² *Canada Elections Act*, SC 2000, c 9, s 319.

⁶³³ *Ibid*, s 2(1).

⁶³⁴ *Ibid*, s 319(a).

⁶³⁵ *Ibid*, s 319(c).

⁶³⁶ *Ibid*, ss 319(d)–(e).

Elections Canada has further clarified that communications on the Internet will only be considered “election advertising” if they have or normally would have a placement cost.⁶³⁷ Elections Canada explains this requirement by pointing out that such communications give the well-resourced an unfair advantage, while communications without a placement cost do not. However, this means that the cost of producing Internet material will not be considered an election advertising expense unless there is a placement cost for the material, even if production is costly and the communication meets all other criteria of “election advertising.”

c) Definition of “election advertising expense”

An “election advertising expense” is incurred to produce an election advertising message or to acquire the means of transmitting that message.⁶³⁸ “Expenses” are defined in section 349 of the *CEA* to include the commercial value of property or services that are donated or provided, other than volunteer labour.

10.2.3.2 Regulation of Contributions to Third-Party Campaigners

Contributions to third parties are subject to source restrictions. Third parties cannot accept contributions for the purpose of election advertising from foreign nationals, corporations that do not carry on business in Canada, foreign political parties, or foreign governments, among other entities.⁶³⁹ Further, third parties cannot use a contribution from an anonymous donor for the purpose of election advertising.⁶⁴⁰ However, there is no limit on the amount that eligible donors may contribute to a third party for the purpose of election advertising.

10.2.3.3 Regulation of Spending by Third Parties on Election Advertising

Third parties are subject to spending limits on election advertising. Individuals who are not citizens or permanent residents and corporations that do not carry on business in Canada may spend less than \$500 on election advertising in relation to a general election.⁶⁴¹ Other third parties are limited to \$150,000, multiplied by an inflation adjustment factor, for election advertising expenses in relation to a general election.⁶⁴² Of this amount, no more than \$3,000 may be incurred to promote or oppose the election of candidates in a single electoral district, including by “(a) naming them; (b) showing their likenesses; (c) identifying them by their ...

⁶³⁷ Elections Canada, “Election advertising on the Internet” (July 2015), online:

<http://www.elections.ca/content.aspx?section=res&dir=gui/app/2015-04&document=index&lang=e>.

⁶³⁸ *Canada Elections Act*, SC 2000, c 9, s 349.

⁶³⁹ *Ibid*, s 358. Note that, although these foreign third parties cannot make contributions to other third parties for the purpose of election advertising, they are permitted to spend amounts totalling less than \$500 on election advertising in Canada. See Section 10.2.3.3.

⁶⁴⁰ *Canada Elections Act*, SC 2000, c 9, s 357(3).

⁶⁴¹ *Ibid*, s 351.1.

⁶⁴² *Ibid*, s 350(1).

political affiliations; or (d) taking a position on an issue with which they are particularly associated.”⁶⁴³ The spending limits for these non-foreign third parties will be increased if the election period lasts longer than 37 days.⁶⁴⁴ This resulted in much higher expenditure ceilings for the 2015 general election, which lasted 78 days. Third parties were allowed to spend up to \$439,410.81 on election advertising expenses and up to \$8,788.22 in a given electoral district.⁶⁴⁵

Third parties are prohibited from attempting to circumvent spending limits by splitting themselves into multiple third parties or by acting in collusion with other third parties.⁶⁴⁶

10.2.3.4 Transparency Requirements for Third-Party Campaigners

a) Registration

Third parties must register as soon as they incur election advertising expenses of \$500 or more.⁶⁴⁷ If required to register, the third party must also appoint a financial agent to accept contributions for election advertising purposes and to authorize election advertising expenses.⁶⁴⁸

b) Attribution

Third parties must identify themselves in any election advertising they produce and indicate they have authorized the advertisement.⁶⁴⁹

c) Reporting

If a third party is required to register, they must file a detailed election advertising report with the Chief Electoral Officer within four months of polling day.⁶⁵⁰ For general elections, the report must include a list of all election advertising expenses at the district and national level, as well as “the time and place of broadcast or publication of the advertisements” to which those expenses relate.⁶⁵¹ The report must also disclose the amount of contributions

⁶⁴³ *Ibid*, s 350(2). Unlike the overall limit, the limit for each electoral district does not use the term “election advertising expenses”.

⁶⁴⁴ *Ibid*, s 350(6).

⁶⁴⁵ Elections Canada, “Limits on Election Advertising Expenses Incurred by Third Parties – 42nd General Election”, online:

<<http://www.elections.ca/content.aspx?section=ele&document=index&dir=pas/42ge/thilim&lang=e>>.

⁶⁴⁶ *Canada Elections Act*, SC 2000, c 9, s 350.

⁶⁴⁷ *Ibid*, s 353(1).

⁶⁴⁸ *Ibid*, ss 354(1), 357(1). The financial agent must be named in the third party’s application for registration, which is submitted to the Chief Electoral Officer: *ibid*, s 353(2).

⁶⁴⁹ *Ibid*, s 352.

⁶⁵⁰ *Ibid*, s 359(1).

⁶⁵¹ *Ibid*, s 359(2).

received for election advertising purposes from six months before the issue of the writ to polling day.⁶⁵² For contributions of more than \$200 during this time period, the report must state the name and address of the contributor and the amount and date of the contribution.⁶⁵³ If the contributor is a numbered company, the third party must include the name of its CEO or president.⁶⁵⁴ The report must also include the amount used out of the third party's own funds to pay for election advertising expenses.⁶⁵⁵ Third parties who incur election advertising expenses of \$5,000 or more must appoint an auditor, who must confirm that the election advertising report is a fair reflection of accounting records.⁶⁵⁶

The Chief Electoral Officer is required to publish registered third parties' names and addresses and, within one year of the issue of the writ, the third parties' election advertising reports.⁶⁵⁷ If the information is not released until a year after the writ drops, the delay could undercut the anticorruption goals of disclosure, as the potential for undue influence may not be discovered until irrevocable decisions have been made by lawmakers. The public and the media could therefore be temporarily deprived of potentially relevant information in evaluating lawmakers' proposals and decisions.

10.2.4 Role of the Chief Electoral Officer and the Commissioner of Canada Elections

Sections 16.1 and 16.2 require the Chief Electoral Officer to issue guidelines, interpretation notes, and advisory opinions on the application and interpretation of the *CEA*. The Chief Electoral Officer also publishes disclosed information on political financing.⁶⁵⁸ The Commissioner of Canada Elections is responsible for compliance with the requirements of the *CEA*. The Commissioner's responsibilities in this regard include investigation of non-compliance and referral of potential offences to the Director of Public Prosecutions, who may initiate prosecution.⁶⁵⁹

10.3 Criticisms of Campaign Finance Regulation in Canada

The Canadian campaign finance regime has apparently had some success in reducing reliance on large donors. Before the regulations governing contributions were introduced in

⁶⁵² *Ibid*, s 359(4)(a).

⁶⁵³ *Ibid*, s 359(4)(b).

⁶⁵⁴ *Ibid*, s 359(4)(b.1).

⁶⁵⁵ *Ibid*, s 359(4)(c).

⁶⁵⁶ *Ibid*, ss 355(1), 360.

⁶⁵⁷ *Ibid*, s 362.

⁶⁵⁸ For disclosed information, see:

<<http://www.elections.ca/content.aspx?section=fin&&document=index&lang=e>>.

⁶⁵⁹ For more information, see Government of Canada, "Enforcing the *Canada Elections Act*", online:

<<https://www.cfc-ccc.gc.ca/content.asp?section=abo&dir=bck&document=index&lang=e>>.

2004, 2% of donors were responsible for 54% of funds raised by politicians.⁶⁶⁰ From 2004 to 2008, the 1% of donors who gave over \$1,200 per year accounted for only 17% of the total amount contributed, and since 2008, this same 1% of donors has accounted for about 1% of the total amount contributed.⁶⁶¹

However, other problems persist under the current regime. The *CEA* has become more complex over the years and volunteers are often responsible for compliance.⁶⁶² Yet the *CEA*'s only sanctions are criminal.⁶⁶³ The Chief Electoral Officer has criticized these sanctions as heavy-handed for many infractions and recommends the addition of an administrative monetary penalty regime.⁶⁶⁴ The Chief Electoral Officer has also argued that the Commissioner, who investigates offences under the *CEA*, needs more investigatory tools, such as the power to compel testimony.⁶⁶⁵

The *CEA*'s increased spending limits for long elections have also drawn criticism.⁶⁶⁶ During the 2015 general election, spending limits were more than double their usual amount because of the unusual length of the election period.⁶⁶⁷ This raises concerns about the efficacy of the spending limits in achieving their objectives in relation to corruption, fairness, equality, and public confidence. The scheme also allows the governing party to effectively determine the spending limits for an election.⁶⁶⁸ The Chief Electoral Officer has recommended imposing a maximum election length to address these issues.⁶⁶⁹

⁶⁶⁰ "Remarks of the Chief Electoral Officer of Canada before the Committee on General Government", 26 July 2016, online:

<<http://www.elections.ca/content.aspx?section=med&dir=spe&document=jul2616&lang=e>>.

⁶⁶¹ *Ibid.*

⁶⁶² "Remarks of the Chief Electoral Officer on the Recommendations Report Following the 42nd General Election", 4 October 2016, online:

<<http://www.elections.ca/content.aspx?section=med&dir=spe&document=oct0416&lang=e>>.

⁶⁶³ *Ibid.*

⁶⁶⁴ *Ibid.*

⁶⁶⁵ *Ibid.*

⁶⁶⁶ As mentioned above in Parts 8.2.1.1 and 8.2.3.3, spending limits for political parties, candidates, and third parties are raised if the election lasts longer than 37 weeks.

⁶⁶⁷ "Remarks of the Chief Electoral Officer of Canada before the Committee on General Government", 26 July 2016, online:

<<http://www.elections.ca/content.aspx?section=med&dir=spe&document=jul2616&lang=e>>.

⁶⁶⁸ "Remarks of the Chief Electoral Officer on the Recommendations Report Following the 42nd General Election", 4 October 2016, online:

<<http://www.elections.ca/content.aspx?section=med&dir=spe&document=oct0416&lang=e>>.

⁶⁶⁹ *Ibid.* A private member's bill has been introduced in the House of Commons to impose a maximum length for elections, but the bill has only passed through the first reading stage and private members' bills often do not become law: Bill C-279, *An Act to amend the Canada Elections Act (length of election period)*, 1st Sess, 42nd Parl, 2016 (first reading 31 May 2016).

Others criticize the phasing out of quarterly allowances for registered political parties.⁶⁷⁰ Before the quarterly allowances were eliminated, the public funding regime adequately offset losses to party income caused by contribution caps.⁶⁷¹ Without the quarterly allowance scheme, the Chief Electoral Officer has warned that contribution caps may lead parties to resort to “illicit and undisclosed funding strategies.”⁶⁷² The Chief Electoral Officer has also argued that combining contribution caps with inadequate public funding may produce a state of perpetual campaigning as parties attempt to inspire more contributions from more donors.⁶⁷³ Permanent campaigning could negatively impact “the overall tone of political discourse and the level of public cynicism.”⁶⁷⁴ On the other hand, some point out that less public funding might have the “merciful consequence” of reducing attack ads and restricting campaign advertising to the actual election period.⁶⁷⁵

Others argue that spending limits should be extended to pre-election advertising expenses, especially in light of the prevalence of attack ads and campaigning between elections.⁶⁷⁶ However, pre-election limits may not survive a constitutional challenge if applied to third-party spending. In British Columbia, a pre-writ third-party spending cap was struck down as an overbroad restriction on freedom of expression in *British Columbia Teachers’ Federation v British Columbia (Attorney General)*.⁶⁷⁷ The impugned limit was intended to prevent circumvention of spending limits during the election period. The British Columbia Court of Appeal emphasized that limits on spending during the election period are fundamentally different from pre-writ limits, as the legislature is not in session during an election. Therefore, unlike pre-writ limits, third-party spending limits during the election period will not compromise debate on issues before the legislature.⁶⁷⁸

⁶⁷⁰ See Section 8.2.2, above.

⁶⁷¹ “Remarks of the Chief Electoral Officer of Canada before the Committee on General Government”, 26 July 2016, online:

<http://www.elections.ca/content.aspx?section=med&dir=spe&document=jul2616&lang=e>.

⁶⁷² *Ibid.*

⁶⁷³ *Ibid.*

⁶⁷⁴ *Ibid.*

⁶⁷⁵ Lisa Young, “Shaping the Battlefield: Partisan Self-Interest and Election Finance Reform in Canada” in Robert G Boatright, ed, *The Deregulatory Moment? A Comparative Perspective on Changing Campaign Finance Laws* (University of Michigan Press, 2015) at 123.

⁶⁷⁶ A bill was introduced in the Senate to extend party spending limits to the period before the election: Bill S-215, *An Act to amend the Canada Elections Act (election expenses)*, 2nd Sess, 41st Parl, 2014 (second reading 10 June 2014).

⁶⁷⁷ *British Columbia Teachers’ Federation v British Columbia (Attorney General)*, 2011 BCCA 408.

⁶⁷⁸ Feasby (2012) 206 at 219.

11. CONCLUSION

Campaign finance is a high profile issue, and scandals break out regularly.⁶⁷⁹ Frustration and cynicism arise when wealthy individuals or corporations support a candidate's election campaign and benefit from favourable policies after the candidate is elected. Even when it is impossible to determine whether policies and decisions result from a politician's own principles or from the need to maintain future financial support by rewarding past support, the relationship between politicians and their financial backers can be toxic for public confidence.⁶⁸⁰ Further, aside from the risk of corruption of elected officials, many argue that unregulated campaign finance may corrupt the electoral process itself by allowing the wealthy to set the electoral debate agenda and exert disproportionate influence over the

⁶⁷⁹ For some examples, see Tony Paterson, "Bought by BMW? German Chancellor Angela Merkel forced on to defensive over €700,000 donation from carmaker to her Christian Democratic Party", *The Independent* (16 October 2013), online: <<http://www.independent.co.uk/news/world/europe/bought-by-bmw-german-chancellor-angela-merkel-forced-on-to-defensive-over-700000-donation-from-8884777.html>> (Angela Merkel's party accepted a large donation from BMW shortly before European environment ministers caved "to German demands to scrap an agreement to cap car emissions after Berlin argued that the measure would adversely affect its car industry and create job losses"); Lindsey Renick Mayer, "Big Oil, Big Influence", *PBS Now* (2008), online: <<http://www.pbs.org/now/shows/347/oil-politics.html>> (Mayer notes that oil and gas companies donated large amounts to Republican election campaign efforts and subsequently benefited from a highly favourable energy policy under former president George W. Bush); Alice Walton & David Zahniser, "Politicians and activists demand answers on mystery donations tied to 'Sea Breeze' developer", *Los Angeles Times* (31 October 2016), online: <<http://www.latimes.com/local/lanow/la-me-ln-seabreeze-reaction-20161030-story.html>> (the authors discuss the corrosive effects of campaign finance at the municipal level in Los Angeles, noting that "[c]ritics have long accused city leaders of being too willing to change local planning rules for well-connected developers, particularly those who make campaign donations"); Dom Phillips, "Brazil president Michel Temer accused of soliciting millions in illegal donations", *The Guardian* (12 December 2016), online: <<https://www.theguardian.com/world/2016/dec/12/brazil-president-michel-temer-illegal-campaign-donations>> (in a plea bargain, a former executive at construction company Odebrecht "alleged in colourful detail how leading lawmakers from Temer's and other parties across the political spectrum were paid millions in bribes and both legal and illegal campaign donations to defend the company's interest in Congress"); Dan Levin, "British Columbia: The 'Wild West' of Canadian Political Cash", *The New York Times* (13 January 2017), online: <<https://www.nytimes.com/2017/01/13/world/canada/british-columbia-christy-clark.html>> (Levin discusses allegations that British Columbia's provincial government headed by former premier Christy Clark rewarded generous campaign donors, turning government "into a lucrative business, dominated by special interests that trade donations for political favors"; as an example, the author notes that, in the interim between the provincial government's public opposition to the Trans Mountain pipeline project in 2016 and its subsequent approval of the pipeline in 2017, Ms. Clark's party received \$718,000 in donations from the company proposing the pipeline).

⁶⁸⁰ See, e.g., *McCormick v United States*, 500 US 257 (1991).

outcome of elections.⁶⁸¹ This influence arguably undermines the foundational principle of “one person, one vote.”⁶⁸²

Tension exists between the goal of alleviating the potentially poisonous effects of wealth in politics and the goal of facilitating free and open debate. This tension is often framed as a clash between equality and freedom. The UK’s ban on paid political advertising provides an example.⁶⁸³ Although the ban prevents the wealthy from flooding broadcast media with political advertisements, it also arguably chills debate by preventing public interest groups from advertising their views on broadcast media.⁶⁸⁴

The tension between equality and freedom makes campaign finance regulation a controversial and partisan issue, particularly in the US. The jurisprudence discussed in this chapter demonstrates that Canada, the UK, and the US each have a different approach to resolving this tension. Courts in Canada and the UK, along with the European Court of Human Rights, appear to navigate a middle path between the twin goals of freedom and equality, accepting campaign finance regulations with equality-related objectives if open debate is not overly restricted in the eyes of the court. American courts, on the other hand, have been unwilling to allow incursions on freedom of speech unless those incursions clearly prevent *quid pro quo* corruption or its appearance. Different cultural and judicial approaches to campaign finance regulation have led to divergent regulatory regimes in the three countries. Criticisms of each regime abound, demonstrating that lawmakers in all three countries face ongoing challenges in developing regulation that effectively addresses the problems of campaign finance without shutting down debate.

⁶⁸¹ See, e.g., Hiebert (2006) at 269; La Raja, (2008) at 1.

⁶⁸² La Raja (2008) at 3.

⁶⁸³ See Section 9.2.2 & 9.3, above, for further discussion of the ban on paid political advertising.

⁶⁸⁴ Minutes of Evidence (17 June 2002).