

Money and Elections: Can Citizens Participate on Fair Terms amidst Unrestricted Spending?*

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Scholarly consideration of the role of money in elections has commanded far more attention in the United States than in Canada. American elections are notoriously expensive events that raise the ironic question of whether serious issues are being adequately dealt with despite, or perhaps because of, vast and ever-increasing campaign expenditures.¹ In the wake of a 1996 Alberta Court of Appeal decision, this nexus between election expenditures and the vitality of the Canadian electoral process has assumed far more importance. This decision is *Somerville v. Attorney General for Canada*,² in which David Somerville, president of the right-wing advocacy group National Citizens' Coalition (NCC), successfully challenged a 1993 amendment to the *Canada Elections Act* which regulated the amount of money that individuals, interest groups, corporations or unions could spend during elections (from hereon referred to as independent expenditures) for violating freedom of expression, freedom of association and the right to vote.

This case may prove to be one of the most significant decisions to date under the Canadian Charter of Rights and Freedoms³ because it

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1 For a spirited commentary on this issue, see Ronald Dworkin, "The Curse of American Politics," *The New York Review of Books*, October 17, 1996.

2 *Somerville v. Canada (Attorney General)*, [1996] 8 W.W.R. 199.

3 Canadian Charter of Rights and Freedoms, Part 1 of the *Constitution Act, 1982*, being Schedule B of the *Canada Act 1982* (U.K.), 1982, c.11.

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has immediate consequences for the complex and interconnected regulatory regime of electoral finance. Since the Alberta decision was not appealed to the Supreme Court of Canada,⁴ it could influence how the Canadian polity responds to one of democracy's most thorny and complex conflicts: how to facilitate robust and competitive elections while guarding against the use of money in ways that undermine the democratic ideal of citizens' participation on fair terms in the act of self-governance. What makes this influence all the more remarkable is that the Supreme Court of Canada has since, in an unrelated decision in October 1997, specifically disapproved the *Somerville* decision.⁵

Implications of the Alberta Court's Decision for the Election Regulatory Regime

The legislative history of regulating election expenses in Canada has been examined in detail elsewhere⁶ and need not be restated here other than to underscore that an important objective has been to address the concern that corruption is more likely to arise in an unregulated election environment. The state interest in regulating election expenses is not an objective unique to Canada. Whether spurred by specific scandals, escalating costs of elections and the concomitant concern of corruption arising from the need to raise increasing amounts of campaign contributions, by the mid-1980s, 21 countries had enacted some system of regulating election spending, including such measures as disclosure, expenditure and contribution limits and public subsidies to candidates and parties.⁷

- 4 In October 1996, Alan Rock, minister of justice, announced that the government would not appeal the *Somerville* decision to the Supreme Court of Canada. He suggested that parts of the law were "not defensible" and indicated that the government was considering legislation that would "express" the "underlying objectives and principles" of the law. However, it did "not plan to go forward with monetary limits" (*The Globe and Mail* [Toronto], October 10, 1996, A8).
- 5 The Supreme Court addressed the *Somerville* decision in *Libman v. Quebec (Attorney General)* while reviewing the constitutionality of Quebec's *Referendum Act*. The Court specifically disapproved the Alberta Court's finding that the legislative objective was not justified or consistent with a free and democratic society (*Libman v. Quebec [Attorney-General]*, [1997] SCJ No. 85 [unreported at the time of writing], para. 55, 56, 79).
- 6 F. Leslie Seidle and Khayyam Zev Paltiel, "Party Finance, the Election Expenses Act, and Campaign Spending in 1979 and 1980," in Howard R. Penniman, ed., *Canada at the Polls, 1979 and 1980: A Study of the General Elections* (Washington: Enterprise Institute for Public Policy Research 1981), 226-79; and Janet Hiebert, "Interest Groups and Federal Elections," in F. Leslie Seidle, ed., *Interest Groups and Elections in Canada* (Toronto: Dundurn Press, 1991), 3-76.
- 7 Herbert E. Alexander, "Money and Politics: Rethinking a Conceptual Framework," in Herbert E. Alexander, ed., *Comparative Political Finance in the 1980s* (New York: Cambridge University Press, 1989), 12.

Abstract. In 1996 the Alberta Court of Appeal struck down election spending limits for individuals, interest groups, corporations and unions for violating the Canadian Charter of Rights and Freedoms. These spending restrictions were part of a complex regulatory regime which sought to promote fairness by controlling the election spending of candidates and parties. Although this decision was not appealed to the nation's highest court, the Supreme Court disapproved the Alberta ruling in an unrelated decision. This suggests that spending limits are justifiable under the Charter. Yet if new legislation is not introduced, the Alberta decision will continue to govern election conduct throughout the country and could undermine the democratic ideal of citizens participating in fair terms in the act of self-governance.

Résumé. En 1996, la Cour d'appel de l'Alberta a annulé les dispositions fixant des limites aux dépenses électorales que pouvaient engager les personnes, les groupes d'intérêt, les sociétés et les syndicats, en prétextant qu'elles violaient la Charte canadienne des droits et libertés. Ces limites s'inscrivaient dans le cadre du régime de réglementation complexe visant à promouvoir la justice en contrôlant les dépenses électorales des candidats et des partis. Même si personne n'a interjeté appel de cette décision devant la Cour suprême du pays, celle-ci a désavoué la décision de la Cour d'appel de l'Alberta dans un jugement distinct, ce qui porte à croire que le contrôle des dépenses se justifie en vertu de la Charte. Pourtant, à défaut d'adopter une nouvelle loi, c'est le jugement de la Cour albertaine qui continuera de régir la conduite des élections dans l'ensemble du pays, ce qui risque d'ébranler l'idéal démocratique des citoyens qui participent de bonne foi à l'exercice de la démocratie.

In Canada, another equally important objective has been the promotion of fairness between the central contenders in elections, candidates and parties. Fairness is promoted in a number of ways, including modest spending limits, partial reimbursements for election costs and broadcasting regulations that govern when and how much candidates and parties can advertise. Together, these regulatory measures ensure that the costs for contesting office do not systematically preclude all but those who have, or enjoy access to, wealth. This objective of making election opportunities fairer, at least in financial terms, is particularly important if Canadian representative institutions are going to more closely resemble society. Money is an obstacle to contending for office, particularly at the nomination level, where spending limits are not in place.⁸

The legislation that the Alberta court declared unconstitutional was a fundamental component of the complex federal election regulatory regime. It prohibited individuals and groups from spending more than \$1,000 to produce, publish, broadcast or distribute any advertisement that promoted or opposed, directly, a registered party or candidate.⁹ The legislation did not impose any restrictions on the amount of money that could be spent to advertise issues, as long as the issue was not linked directly to a candidate or party. The principal purpose of the

8 Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy, Final Report*, Vol. 1 (Ottawa: Minister of Supply and Services, 1991), 107-08.

9 See ss. 259 and 259.1 of *An Act to Amend the Canada Elections Act*, Third Session, 34th Parliament, 40-41-42 Elizabeth II, 1991-92-93.

legislation was to protect the effectiveness of the strict regime of spending limits for candidates and parties. In the absence of a comprehensive regulatory framework that addresses all participants' spending, limits for candidates and parties may be undermined in the following ways: since candidates and parties are subject to spending limits, independent expenditures that promote a particular party or candidate would give the candidate or party receiving the endorsement a financial advantage over partisan rivals; conversely, independent expenditures that target a candidate or party in a negative way would place the object of the negative advertisement at a disadvantage vis-à-vis other candidates and parties.

Despite the perceived importance of regulating independent expenditures, Canada has undergone four consecutive federal elections (1984, 1988, 1993, 1997) in which candidate and party spending levels have been strictly regulated while limits on independent expenditures have not been enforced.¹⁰

1984 Federal Election

The initial decision not to enforce the limits for independent expenditures occurred on the eve of the 1984 election. It followed the successful challenge by the National Citizens' Coalition in a lower Alberta court of a 1983 amendment to the *Canada Elections Act* which banned all forms of independent expenditures, both issue and partisan advertisements.¹¹ Although the decision applied only to Alberta, the legislation regulating independent election expenses was not enforced anywhere because it was considered inappropriate to subject people in one province to one set of regulations while different rules applied elsewhere.¹² The timing of the decision not to enforce the legislation likely

10 The 1997 federal election occurred after research was completed for this article; hence, there is no systematic evaluation of independent expenditures. This does not mean independent expenditures did not occur. For examples, see a National Citizen's Coalition advertisement which targeted Ralph Goodale in the *Regina Leader Post*, May 27, 1997, and an advertisement in *Le Devoir*, May 26, 1997, A2, which identified several candidates, including Jean Chrétien and Stéphane Dion, with the message: "Jean Charest n'est pas moins dangereux. Chaque vote pour les fédéralistes est un vote contre le Québec et son territoire. Bloquons-les, dès le 2 juin! La partition, c'est le refus du Québec tel qu'il est. Ce refus s'est trouvé une expression: le Parti libéral du Canada. Ce parti a des candidats postés dans chacune de nos circonscriptions."

11 *National Citizens' Coalition v. Canada (Attorney General)*, [1984] 5 W.W.R. 436 (Alta.Q.B.).

12 Author's telephone interview with Hughette Collins, former administrative assistant to Joseph Gorman, Commissioner of Canada Elections, September 16, 1987.

created uncertainty and organizational problems for interest groups, and the 1984 election did not result in significant levels of independent expenditures.¹³

1988 Federal Election

The decision not to enforce limits on independent expenditures was maintained in the 1988 election. However, unlike the 1984 election, the independent expenditures in 1988 were substantial. The issue of independent expenditures was central to the mandate of the Royal Commission on Electoral Reform and Party Financing (from hereon referred to as the Lortie Commission after its chairperson, Pierre Lortie). A study undertaken by the Commission estimated independent expenditures in excess of \$4.7 million, most of which was spent by business groups to promote free trade. The pro-free trade advertisements were generally confined to the issue without direct advocacy of candidates or parties.¹⁴ Notable exceptions were advertisements by the National Citizens' Coalition which spent \$150,000 to criticize then New Democratic party leader Ed Broadbent and Liberal leader John Turner for their failure to support free trade.¹⁵

Although the overwhelming majority of independent expenditures promoting free trade did not make any reference to parties or candidates, the fact that the Progressive Conservative party was the only one of the three national parties to promote free trade gave rise to perceptions of unfairness. The benefits associated with the large amount of independent expenditures urging Canadians to support free trade accrued to the Conservative party because this policy was central to its platform. The only empirical attempt to measure the effects of the independent expenditures was inconclusive: Richard Johnston, using data collected by the Lortie Commission, attempted to evaluate the effects of interest group advertisements in newspapers on voters' intentions in the 1988 election. Johnston ultimately concluded that "third-party advertising coefficients defy substantive interpretation: some are large and significant but the pattern is off-setting and the total coefficient effectively zero."¹⁶

13 Janet Hiebert, "Fair Elections and Freedom of Expression under the Charter," *Journal of Canadian Studies* 24 (1989-1990), 79.

14 Hiebert, "Interest Groups," 20-23.

15 *The Globe and Mail* (Toronto), November 18, 1988, and *The Toronto Star*, November 20, 1988.

16 Richard Johnston et al., *Letting the People Decide: Dynamics of a Canadian Election* (Montreal: McGill-Queen's University Press, 1992), 163. Johnston's initial findings, although tentative, suggested that the flood of advertising in the last week of the election may have had a modest effect on voters' intention. See also Hiebert, "Interest Groups," 24-25.

1993 Federal Election

In 1993, the federal government introduced a \$1,000 spending limit for independent expenditures. However, the status of the new amendment during the 1993 election was uncertain. The legislation was almost immediately ruled to be unconstitutional by a lower Alberta court¹⁷ and was awaiting judgment by the Alberta Court of Appeal during the election campaign. As was the case with the first indictment of spending limits for independent expenditures a decade earlier, a decision was made in 1993 not to enforce the spending regulations for independent expenditures anywhere in the country.

The independent expenditures in the 1993 federal election were almost insignificant compared with those in 1988. The 1988 election revealed that independent expenditures on election advertising were more likely to occur in newspaper advertisements than on television or radio. For this reason, research of independent expenditures in the 1993 election focused on newspaper advertising, with the exception of one television advertisement provided by the National Citizens' Coalition. The survey of newspaper advertisements revealed independent expenditures of at least \$235,000.¹⁸ The advertisements which were identified as representing independent expenditures were those paid for by individuals, corporations, unions or individuals which either (1) identified a candidate or party, (2) identified a policy issue as an election issue with some message that voters should consider it when casting their ballot, (3) exhorted voters to cast their vote in support or opposition of a particular candidate or party or (4) urged the reader to engage in strategic voting on a particular issue on the basis of information provided about candidates or parties.

The largest expenditures from a single group came from the National Citizens' Coalition, which spent \$50,000 of its \$80,000 total¹⁹

17 *Somerville v. Canada (Attorney General)*, Alberta Court of Queen's Bench, Calgary, oral judgment, June 25, 1993, unreported.

18 This figure is based on a survey of newspaper advertisements which revealed expenditures of \$158,010.92 and an additional \$80,000 which the NCC said it spent on election advertising. This figure of \$235,000 has been adjusted to reflect an advertisement by the NCC in the *Calgary Herald* which has been accounted for in the newspaper survey total. Newspapers surveyed during the election period were the *Calgary Herald*, *The Catholic Register*, *The Halifax Chronicle-Herald*, *Ottawa Citizen*, *Le Droit*, *Le Devoir*, *The Edmonton Journal*, *The St. John's Evening Telegram*, *The Financial Post*, *The Gazette*, *The Globe and Mail*, *The Charlottetown Guardian*, *The Leader Post*, *La Nouvelliste*, *La Presse*, *The New Brunswick Telegraph Journal*, *The Toronto Star*, *The Vancouver Sun*, *The Kingston Whig-Standard* and *The Winnipeg Free Press*.

19 Figure provided by Communications Director Gerry Nicholls in telephone interview with Nancy Loane, research assistant, December 9, 1993.

on negative advertisements in the Calgary area. The messages, in newspapers and on television as well as in a mail drop, exhorted voters to defeat Progressive Conservative member Jim Hawkes for his support of Bill C-144, the law which introduced the \$1,000 independent expenditure limit.²⁰ A press release issued by the NCC characterized Hawkes as "the ringleader of the three established parties' drive to impose the election gag law on Canadians."²¹ Print advertisements featured a coupon requesting a voluntary contribution to the Coalition if readers agreed that their "freedoms would be safer if Jim Hawkes didn't sit in the next Parliament."²² In addition to the Calgary-area advertisements, the NCC spent \$30,000 on advertisements in smaller community newspapers which targeted, in a negative manner, the record of the incumbent Progressive Conservative government.²³ Conservative leader Kim Campbell was also targeted in a negative manner by independent expenditures.²⁴ Although both Hawkes and Campbell lost their seats, the fact that every sitting Conservative member in the country but one was defeated,²⁵ makes it difficult to demonstrate a causal linkage between the advertisements and their electoral defeats.²⁶

- 20 Nicholls indicated that the interest group spent \$50,000 in Calgary, primarily on a television advertisement, as well as three newspaper advertisements and a mail drop in the riding of Calgary West. The television advertisement was a negative one, urging voters to defeat Hawkes for his "shocking" attempts to prevent election advertisements by those other than candidates and parties. The advertisement ran on the CTV's Calgary station CFRN.
- 21 National Citizens' Coalition, News Release, Calgary, September 27, 1993.
- 22 *Calgary Herald*, September 28, 1993, B2.
- 23 Nicholls characterized the advertisements as a "scorecard type" message with a negative assessment of the Conservative government's performance.
- 24 One of these was an advertisement by the Council of Canadians which warned voters that "those who cannot remember the past are condemned to repeat it" and offered a photograph and unflattering résumé of Kim Campbell while urging readers to vote to stop free trade, save social programmes and make Canada more democratic (*The Globe and Mail* [Toronto], September 21, 1993, A12) at a cost of \$19,250. Another advertisement, sponsored by the Ontario Secondary School Teachers' Federation, asked "Who's Doing More for Public Education?" with reference to side-by-side pictures of Kim Campbell and the *Sesame Street* character Big Bird. The message was critical of the incumbent government's record and encouraged voters to support candidates who would remove the application of the Goods and Services Tax to books, restore federal transfer payments to provincial education budgets, invest in national child care and support post-secondary education (*The Kingston Whig-Standard*, October 16, 1993, 29) at a cost of \$1,867.60. This advertisement also ran in *The Toronto Star* (October 16, 1993, A19) at a cost of \$7,020.90.
- 25 Jean Charest was the only incumbent government member who retained his seat.
- 26 Other candidates were targeted by independent expenditures in smaller advertising campaigns. Some of these advertisement combined an anti-abortion message with an endorsement of candidates who had answered "correctly" to questions that elicit support for introducing a law, and constitutional amendment, to protect

Unlike the 1988 election, the overwhelming majority of money spent by individuals or groups in 1993 was explicitly partisan rather than issue-oriented. Overall, 91 per cent of the independent expenditures identified in newspaper advertisements engaged in partisan advocacy, predominantly negative in orientation: either a critical message about particular candidates and parties or one in combination with a positive endorsement of another candidate or party. When the \$80,000 the NCC spent on advertising is added to the figure,²⁷ 95 per cent of all identified independent expenditures were engaged in partisan advocacy. Although the law was not enforced anywhere in the country, it is interesting to note that of the 41 advertisements identified, 22 would have been allowed under the impugned legislation. These include 16 advertisements that focused only on issues, without any explicit reference to a party or candidate, and six other partisan advertisements which were each under \$1,000.²⁸ No empirical analysis has been undertaken to assess what, if any, effects these independent expenditures may have had on voters' intentions or outcomes.

Where's the Harm? Are Spending Regulations Justified?

The pattern and volume of independent expenditures in recent elections raise two obvious questions. Since levels of independent expenditures were not substantial in the 1984 and 1993 elections, was the 1988 election an anomaly? And, if so, does this mean that independent expenditures do not impose a harm that requires legislative redress?

Those who are inclined to answer yes to both of these questions believe that their position is supported by the lack of evidence that unregulated independent expenditures have affected election outcomes.²⁹ Quite apart from a lack of evidence of harm, critics of the legislation³⁰ argue that their position is more than justified by the impor-

the foetus from abortion. See advertisements by Campaign Life Coalition in *The Charlottetown Guardian* (October 16, 1993) at a cost of \$1,140; and in *The Regina Leader Post* (October 22, 1993) at a cost of \$494.

27 This total was spent entirely on negative advertising, including the \$50,000 spent on advertisements directed at Hawkes and another \$30,000 spent on advertisements with negative assessments of the incumbent Conservative government's record.

28 The NCC's advertisements in Calgary would have exceeded the legal limit of \$1,000. The NCC did not provide the dates or costs of its other advertisements.

29 This was a principal claim in *Somerville*.

30 Apart from the NCC, a strenuous objection to the regulation of election advertising of either independent expenditures or candidates comes from Filip Palda, *Election Finance Regulation in Canada: A Critical Review* (Vancouver: Fraser Institute, 1991).

tance of protecting freedom of expression.³¹ In the context of elections, free speech functions to ensure the necessary consideration, reflection and debate about issues of public policy, and of the merits of those seeking office. Independent expenditures can be seen as a positive contribution to the election process: they are indicative of a spirited debate about issues which is not only important to the individual fulfilment of the speaker but have a functional purpose. The advertising of a multitude of issues, and conflicting perspectives, informs the listener.³² Consequently, in an election, advertising ensures that the voter will be better educated about election choices and, as a result, better able to make a well-informed decision at the ballot box. However, the effect of the legislation was to restrict seriously the ability of individuals and groups to purchase advertisements to criticize candidates and parties (and the incumbent government) during the election period. The legislation also denied individuals or groups from engaging in national advertising because it prohibited coordinating or pooling monies to augment the buying force of their \$1,000 limit. Thus the legislation is viewed as denying individuals the right to engage in free speech, and society the benefits of an informed and interactive citizenry.

The force of the preceding argument is augmented by the Canadian Charter of Rights and Freedoms which makes it clear that free speech should be protected against unjustified state-imposed restrictions. The Charter, in section 1, purports to guarantee rights subject only to such "reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." In light of the constitutional imperative that the state limit protected rights only when its reasons are demonstrably justified, many are sceptical about whether the government can demonstrate that a superior objective exists to justify restricting independent expenditures. Quite apart from the absence of proof of harm, critics may question whether the government can legitimately restrict speech when the only justification for limiting a protected right, a free and democratic society, itself presumes free speech.

- 31 See, for example, *ibid*; Jamie Cameron, "Participation and Democratic Process: Do Third-Party Spending Limits Protect or Threaten Democratic Values?" *Canada Watch* (July/August 1993), 7-8; Diane Francis, "A New Attack on Freedom of Speech," *Maclean's*, May 31, 1993, 9; and Brent D. Tyler, "Third-Party Limits Hurt Public's Right-to-Know," *The Gazette* (Montreal), July 31, 1997, B3. The following is an amalgam of many of these concerns and others raised in seminar or conference discussions on the subject.
- 32 The Supreme Court of Canada has ruled that the importance of free speech is not confined to the speaker but that it protects the listener as well. This is because it plays a significant role in enabling individuals to make informed choices, which is an important aspect of individual self-fulfilment and personal autonomy. See *Ford v. Quebec (Attorney General)*, [1988] 2 S.C.R. 712 at 767.

It is difficult to deny the force of the argument that exposure to ideas makes a positive contribution to robust debate. It is also difficult to argue against the idea that freedom of expression is particularly important in elections and that state-imposed constraints on its exercise should be difficult to justify. But does this necessarily embrace the corollary claim: unless elections have become corrupt, no justification exists to restrict what individuals or groups can spend to purchase advertising that engages in partisan advocacy? I will argue that assessing independent expenditures in isolation from the broader regulatory objectives, and the focus on the volume of these expenditures in recent elections as a barometer for measuring harm, misrepresent concerns about the role of money in elections.

Reassessing the Need to Regulate Election Expenditures

The purpose of restrictions on independent expenditures is not to prevent corruption. It is to ensure the viability of candidate and party spending limits, which are critical in addressing problems associated with money. The historical record in Canadian politics reveals that in an unregulated environment, money has, in fact, had a corrupting influence on the political process by trading policy considerations for electoral and political support.³³ Spending regulations for candidates and parties were instituted as a response to corruption³⁴ and have had the salutary benefit of reducing candidates' and parties' dependency on contributions from large corporations as well as their dependency on a small number of large contributors.³⁵ The severing of financial dependency of candidates and parties on large donations, which is accomplished by spending limits, and the transparency offered by compulsory disclosure are important and effective ways of responding to a conflict of interest inherent in democratic regimes: candidates and parties feel the pressure to raise large amounts of campaign funds and, with election victory, assume the power to make policy choices and discretionary decisions about the benefits and burdens imposed by the administrative state.

In *Somerville*, the Alberta Court of Appeal broached the justification of limits on independent expenditures in terms of whether harm would otherwise occur. The court posed questions such as: Is there a danger that someone could buy an election? What does it mean to buy an election? Is it a realistic danger?³⁶ The court mistakenly assumed

33 Seidle and Paltiel, "Party Finance," 227.

34 W. T. Stanbury, *Money in Politics: Financing Federal Parties and Candidates in Canada* (Toronto: Dundurn Press, 1991), 52.

35 *Ibid.*, 411.

36 *Somerville v. Canada* 226.

that the legislation was premised on the view that independent expenditures are the basic corrupting threat and concluded that the system was not coherent: the legislation was not seriously interested in preventing corruption because it did not address direct contributions to parties or candidates.³⁷ The court failed to appreciate the fact that corruption from political donations has not been considered to be a serious problem in Canada since 1974, precisely because of the introduction of spending limits and disclosure requirements. Furthermore, by focusing on the issue of independent expenditures isolated from the larger objectives of the regulatory regime, the court did not address the implications of its decision for the heart of the regulatory regime: controlling the amount that is spent by candidates and parties.

It does not seem realistic to expect that this judicial-imposed asymmetry in the regulatory system, of limiting candidate and party spending but not restricting independent expenditures, is sustainable. Quite apart from the issue of whether candidate and party spending limits will be effective without controls on independent expenditures, it is highly probable that many candidates will not be willing to abide by spending constraints if they consider the regulatory regime to be fundamentally unfair by allowing independent expenditures to augment the force of some candidates' messages or place others at a financial disadvantage. If candidates were to challenge spending limits as a violation of freedom of expression under the Charter, a court may be understandably troubled about the lack of coherency of a regulatory regime which seeks to limit the spending of the principal election participants yet subverts that intent by not addressing the spending of others.

Yet if spending limits for candidates and parties were removed, the normative intent of the *Canada Elections Act* of promoting fairness between contenders would be extremely difficult, if not impossible, to achieve. It is important to bear in mind that because of spending limits, the majority of candidates spend less than they have at their disposal. Two thirds of the total reimbursements for federal candidates in the 1988 election was in the form of surplus funds.³⁸ This means that candidates raise more money, through a combination of their own initiatives, party contributions and state reimbursements, than they are allowed to spend legally. Thus it is highly probable that in the absence of legal constraints, candidates' election spending would be considerably higher than it is currently. Furthermore, candidates' fund-raising abilities vary considerably. For example, in the 1988 election, Progressive Conservative candidates raised \$12,800 more than the average for Liberal candidates and \$22,300 more than for that of New Democratic

37 Ibid., 222.

38 Stanbury, *Money in Politics*, 361.

party candidates.³⁹ Thus an absence of spending limits would likely increase the differences among candidate spending. This suggests that in the absence of spending limits, the normative goal of fairness in election spending would be undermined in two ways: the cost of contesting elections would increase, which could discourage some from seeking office, and larger disparities would exist in the spending levels of candidates and parties, giving some a competitive advantage in the ability to purchase advertising to influence voters.

The Alberta Court of Appeal's decision would not likely have differed had the court focused not on the linkage between independent expenditures and corruption, but on the question of whether candidate and party spending limits can be sustained in the absence of constraints on independent expenditures. The reason for suggesting this is that the court was entirely unsympathetic with the objective of controlling election costs. What bothered the court was the lack of quantitative analysis confirming what impact money has had on election outcomes. In the absence of quantitative proof that money buys an election, the court concluded that there is "no pressing and substantial need to suppress" advertising merely because it might have an impact. Furthermore, even if reliable proof existed that money has an effect on elections, this may not be sufficient to justify restricting "the need in a democracy for citizens to participate in and affect an election."⁴⁰ The Alberta court's opinion echoes the United States Supreme Court ruling more than 20 years ago on a similar issue. In that case, the American court rejected outright the validity of limiting election expenses and argued that restricting the amount of money that some can spend to enhance the relative voice of others is not merely in tension with the First Amendment's protection for speech—it is wholly foreign to it.⁴¹

However, an assumption central to the Alberta court's approach to free speech is problematic. A criticism of the claim that restrictions on election expenditures frustrate an essential condition of democracy, free and open debate about issues, is that this justification of unregulated election advertising is advanced within the context of a conceptual "marketplace of ideas" which fails to recognize that disparities in economic resources will affect how the marketplace functions. A core assumption of this marketplace thesis is the pluralist view that *all* different aspects of, or perspectives on, issues will be aired, and thus citizens will be capable of making informed judgments based on full and complete information. Some may even argue that the force of competing ideas ensures that the truth emerges, provided that there is no

39 Ibid.

40 *Somerville v. Canada*, 227.

41 *Buckley v. Valeo*, 424 U.S. 1 (1976) 48-49, 56-57.

restriction by the state on the expression of particular points of view.⁴²

However, this defence of an unregulated election marketplace is based on a "romantic"⁴³ conception of the exchange of ideas that bears no resemblance to economic inequalities that pervade liberal democracies. It treats the state as the only obstacle, or potential threat, to the full airing of all perspectives. The opportunity to speak (advertise) costs money, and access to money varies enormously. Since political debate occurs principally in a commercial market, a nonregulated election environment privileges only those who have the financial means to purchase advertising (expression).

If money is unregulated in elections, its effects can undermine the democratic ideal that citizens participate on fair terms in the act of self-governance. Money can do this by affecting which candidates can contest office in a competitive manner. Money privileges those who can purchase the kind of "image-makers" necessary to ensure a candidate's commercial appeal or ensure the "saleability" of a message in 30-second advertisements. Money also allows for purchase of sufficient advertising time to compete with, or drown out, the messages of a partisan rival. Money can undermine the ability of citizens to participate on fair terms by allowing those who have purchasing power to influence the issues that are given prominence in debate. Money, rather than the power of ideas, is a determining factor in deciding which issues are debated and, through the volume of advertising purchased, what priority is attached to them. In short, in an unregulated election environment, access to money is a critical element in determining the influence and power that citizens can exercise on election outcomes.

Although the Alberta Court of Appeal was troubled by the lack of empirical proof that money, if unregulated, would have a corrupting influence on elections,⁴⁴ it is troublesome to conclude that proponents

42 Zechariah Chaffee argued that America's First Amendment was designed to protect the social interest which included "the attainment of truth . . . as the basis of political and social progress" (Zechariah Chaffee, Jr., *Free Speech in the United States* [Cambridge: Harvard University Press 1941], 137).

43 This characterization is made by Jerome A. Barron, "Access to the Press—A New First Amendment Right," *Harvard Law Review* 80 (1967), 1643. Barron describes the judicial view of the First Amendment as a "romantic" conception of free expression because it uncritically accepts the view that constitutional status should be given to a free market theory in the realm of ideas.

44 The Alberta Court of Appeal's difficulty with spending regulations, given absence of proof of harm, echoes the concern expressed in 1984 when Mr. Justice Medhurst ruled that "Fears or concerns of mischief that may occur are not adequate reasons for imposing a limitation [on election advertising]. There should be actual demonstration of harm or a real likelihood of harm to a [societal] value before a limitation can be said to be justified" (*National Citizens' Coalition v. Canada*, 453).

of spending regulations are simply pandering to unwarranted apprehensions of harm. Social scientists may not have developed predictable and accepted means to assess how the volume and nature of election advertising affect the ways voters determine which issues are important, or which candidates or parties are deemed to be the most election-worthy. However, it is counter-intuitive to expect that advertising, and hence money, is neutral in the complex process by which voters assess issues and assign preferences to candidates. Advertisers do not spend money in a benevolent effort to improve the economic livelihood of the commercial media. They advertise with the full expectation or hope that their messages will have an influence on the purchasing decisions of consumers. Similarly, it is reasonable to expect that in an election environment, money is spent on advertising to influence the voting decisions of the electorate.

Although the *Somerville* decision was not appealed to the Supreme Court, the Court, nevertheless, has disapproved it. This unusual event occurred in *Libman v. Quebec (Attorney General)* when the Supreme Court was determining the constitutionality of Quebec's *Referendum Act*. In discussing whether the objective of regulating advertising in a referendum is valid under the Charter, the Court made it clear that it disagreed with the Alberta Court of Appeal's decision in *Somerville*. The Supreme Court concluded that the objective of promoting fairness by regulating campaign expenditures, in a referendum or election, is an objective that can be justified under the Charter.

[I]t is our view that the objective of Quebec's referendum legislation is highly laudable, as is that of the Canada Elections Act. We agree in this respect with the analysis of the Lortie Commission . . . regarding the need to limit spending both by the principal parties . . . and by independent individuals and groups in order to preserve the fairness of elections and, in the present case, referendums.⁴⁵

However, in *Libman* the Court was troubled by what it considered to be overly restrictive spending limits in the *Referendum Act*. Although it was not prepared to recommend a specific amount of allowable spending for Quebec's *Referendum Act*, the Court cited with approval the Lortie recommendation of a \$1,000 spending limit for independent expenditures, upon which the 1993 federal legislation was based.⁴⁶

45 *Libman v. Quebec*, para. 56.

46 *Ibid.*, para. 78, 79, 80, 81. The Supreme Court indicated that the \$1,000 spending limit in the federal legislation may be considered reasonable under the Charter. This inference is drawn from the Court's suggestion that the recommendation of the Lortie Commission represented a "far less intrusive" approach than utilized in the *Referendum Act*. Although the federal legislation was based on the Lortie Commission's recommendation of a \$1,000 spending limit, it differed in one significant respect. The Lortie recommendation was to subject both issue and parti-

Despite the Supreme Court's disapproval of *Somerville*, the Alberta court's decision stands and independent expenditures will not be regulated unless new legislation is introduced. The United States, which does not have spending limits for candidates and parties or on independent expenditures, offers a worrisome example of how an unregulated election environment can influence the nature and quality of political debate. It shows that when the amount of money is not regulated, election costs can be "staggering"⁴⁷ as television advertising becomes the principal mode for election debate. In this format, argument, counter-argument and debate are displaced by product advertising, the selling of candidates and parties. The constraints of the format, often 30-second commercials, prevent the advancement of serious understanding of the issues because all but the most wealthy (such as Ross Perot who can afford lengthy, prime-time "infomercials") cannot afford to purchase the opportunity to develop positions and arguments in greater detail.

Whether due to the constraints imposed by the television format or the belief that negative advertisements are considered to be particularly attention getting and memorable,⁴⁸ election advertising has become increasingly negative. The negative component of the message is not confined to criticism of partisan rivals, but often reflects manipulative and misleading messages.⁴⁹ Negative advertising in the United States is not confined to candidates and parties but includes interest groups as well. Although interest-group participation is often described in salutary terms, independent advertisements put pressure on candidates or parties to address issues that would not otherwise be raised, a different perspective is that the prospect of interest-group attacks has a chilling effect on public debate because it encourages candidates to avoid controversial issues.⁵⁰

Critics of limits on election spending may support their position by giving examples of wealthy individuals who have spent huge sums in unsuccessful bids for political office. But these examples do little to rebut the claim that in an unregulated election environment economic power undermines political fairness. What is objectionable about the claim that money is a problem only if it has a causal effect on a particu-

san advocacy to the \$1,000 limit, whereas the legislation subjected only partisan advocacy to the \$1,000 limit. Hence, the legislation can be considered to be even less intrusive than the Lortie recommendation.

47 Stephen Ansolabehere and Shanto Iyengar, *Going Negative: How Political Advertisements Shrink and Polarize the Electorate* (New York: The Free Press, 1995), 3.

48 *Ibid.*, 48.

49 See *ibid.* for a discussion of some of the more memorable negative advertisements.

50 *Ibid.*, 133.

- lar outcome is that this provides an incomplete measure of the significance of money in elections. Those who characterize the issue so starkly that the test becomes whether money alters or, in the extreme, “buys,” elections do not take into account the more nuanced ways in which money makes a difference in the political process. The example of Ross Perot having spent a huge personal fortune in an unsuccessful bid for the presidency of the United States in 1992 might be cited in support of the claim that money “does not buy elections.” But this says little about the asymmetry between economic power and political fairness. While Perot ended up with only 19 per cent of the vote, and therefore is a case example that even an extremely rich person may not actually buy office, Perot’s “astonishing success” in shaping and influencing the presidential campaign agenda was largely attributed to his “extraordinary wealth, which enabled him to deluge the media with advertisements in his favor.”⁵¹ Whatever the power of ideas that Perot held may have had in influencing his success, those ideas would not have swayed such a large portion of the American voting electorate had Perot not been able to saturate the media.

The high costs of campaigns in the US have encouraged speculation that campaign spending is undermining the vitality of the political process. Calls for reforms are coming from divergent camps, including editorials in *The Economist* lamenting the increased costs of campaigns⁵² because “fair democratic process and unbridled free speech cannot always live together”⁵³ and Ronald Dworkin, the legal scholar famous for the idea that rights should “trump” policy objectives even if these policies are in the general interest.⁵⁴ Dworkin has not suddenly changed his mind about the importance of freedom and the paramountcy of rights to achieve this. Rather, he believes that a free and democratic society itself requires the limitation of election spending. Thus, in his opinion, the United States Supreme Court erred in the 1976 *Buckley v. Valeo* decision when it concluded that the objective of ensuring fairness and greater equity between candidates is foreign to the First Amendment. What is foreign to the First Amendment, from Dworkin’s perspective, is that unequal distributions of money should be permitted to undermine the democratic and egalitarian ideals of self-governance:

51 Cass R. Sunstein, *Democracy and the Problem of Free Speech* (New York: The Free Press, 1995), 99.

52 “Politicians for Rent,” *The Economist*, February 8, 1997, 23-25.

53 “How to Cut the Cost of Politics,” *The Economist*, February 8, 1997, 17-18.

54 Ronald Dworkin, *Taking Rights Seriously* (Cambridge: Harvard University Press, 1977), 269.

Citizens play two roles in a democracy. As voters they are, collectively, the final referees or judges of political contests. But they also participate, as individuals, in the contests they collectively judge: they are candidates, supporters, and political activists; they lobby and demonstrate for and against government measures, and they consult and argue about them with their fellow citizens. . . .

[W]hen wealth is unfairly distributed and money dominates politics . . . though individual citizens may be equal in their vote and their freedom to hear the candidates they wish to hear, they are not equal in their own ability to command the attention of others for their own candidates, interests, and convictions. When the Supreme Court said, in the Buckley case, that fairness to candidates and their convictions is “foreign” to the First Amendment, it denied that such fairness was required by democracy. That is a mistake because the most fundamental characterization of democracy—that it provides self-government by the people as a whole—supposes that citizens are equals not only as judges but as participants as well.⁵⁵

Primacy of Political Parties

A different criticism some make of limiting independent expenditures is that it places primacy on political parties during elections. For example, the Alberta court indicated that the objective of promoting a level playing field between candidates and parties vying for election should not be pursued in a manner that restricts “meaningful third-party input.”⁵⁶ In the court’s view, the legislation was inappropriate because rather than “trying to balance expenditures of outside groups, the press and parties” the legislation “bans input” and gives to parties “preferential protection.” This, in the court’s view, was not only a limitation on protected rights, but runs so directly contrary to the purpose of the Charter, that it could never be constitutionally justified.⁵⁷ The court buttressed its concerns for protecting individuals’ and groups’ abilities to express ideas by emphasizing that it is individuals whose rights are protected in the Charter—not those of parties.⁵⁸

However, in assessing the legislation, the court neither distinguished the role parties serve from that of interest groups nor acknowledged that spending limits affect candidates and parties differently than they do interest groups. The centrality of political parties to the Canadian parliamentary system and the processes of representative democracy are evident in three primary functions political parties serve which distinguish them from other organizations, groups or individuals. First, parties organize the political processes of democratic parliamentary government. The importance of parties is crucially linked to Canada’s

55 Dworkin, “The Curse of American Politics,” 23.

56 *Somerville v. Canada*, 229-31.

57 *Ibid.*, 231.

58 *Ibid.*, 229.

constitutional heritage of the Westminster model of government and the principle of responsible government. It is through parties that positions of executive authority in government are filled.⁵⁹ Second, political parties organize competition for public office. They are the primary institutions for recruiting and selecting candidates for election to the House of Commons. As the Lortie Commission stated, the "selection of candidates by political parties is one of the most fundamental functions that parties perform. It distinguishes them from all other types of organizations that bring individuals together to promote common political ideas, interests and values."⁶⁰ Third, political parties give meaning to the vote. Political parties are expected to represent and mediate the broad and diverse interests of Canadian society and to provide the vehicle by which the multiplicity of regional, cultural and socio-economic interests are reconciled and ordered in the choosing of government. As such, parties "structure electoral choice, making it possible for voters to determine who forms the government."⁶¹ George Perlin has remarked:

In competing for office candidates advocate the policies of parties, and criticize and defend government actions as the actions of parties. Thus, parties claim and are accorded responsibility for the implementation of government policy. By choosing among parties, voters express their preferences about the direction of government. In short, it may be said that democratic government in Canada operates through a system of party democracy. Parties are the vehicles through which governments are formed, representation in the direction of government is achieved by citizens, and governments are made accountable to citizens for their actions.⁶²

A large part of the court's concern about according primacy to parties was the size of the disparities in allowable spending. The Alberta Court of Appeal concluded that the legislation was not carefully enough conceived because there was no rational connection between the legislation and existing levels of candidate and party spending. In its view, no rational connection exists "between legislation that limits third party expenditures to \$1,000 while candidates can spend up to about \$55,000 and parties can spend millions." The court considered the gap so disproportionate that it was "arbitrary and unfair" and failed the minimal impairment test.⁶³

59 George Perlin, "Party Democracy in Canada: An Introduction to the Issues," in George Perlin, ed., *Party Democracy in Canada* (Scarborough: Prentice-Hall Canada, 1988), 2.

60 Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy*, Vol. 1, 256.

61 *Ibid.*, 209.

62 Perlin, "Party Democracy in Canada," 2.

63 *Somerville v. Canada*, 232. Minimal impairment is one of the criteria developed by the Supreme Court of Canada in its assessment of whether policies, which

Admittedly, a discretionary component underlies this issue of how to regulate election spending. Neither the appropriate ratio between candidate or party and independent expenditures nor the actual spending levels yield definitive answers. For example, a study for the Lortie Commission of policy options for regulating independent expenditures assessed alternative policy measures, which included greater levels of independent expenditures, but rejected these because of effectiveness and regulatory concerns.⁶⁴ Another issue of contention has been whether or not the nature of the prohibition should be confined to partisan advocacy or also embrace issue advocacy.⁶⁵

Yet this acknowledgment of a discretionary aspect to regulatory attempts to control election costs does not justify dismissing the objective of controlling election costs for its lack of precision. Policy making is not some precise science which allows drafters to calculate, with certainty, the appropriate parameters. Rather, policy makers often must act on incomplete information and conflicting data, anticipate unintended consequences and respond to previous and comparative experiences. The imprecision of policy making, particularly where inconclusive social science data is involved, has been cited by the Supreme Court of Canada as a reason for not "second guessing" Parliament and for granting it latitude to choose how best to accomplish its objectives, even where speech is being limited.⁶⁶ In *Somerville*, a serious problem with how the court assessed the rationality of the legislation, and whether it imposed a sufficiently minimal restriction on freedom of expression, was that the court did not address the difficulties inherent in defining a fair level for independent expenditures or the appropriate ratio between independent expenditures and candidate spending. Specifically, the court did not acknowledge the fact that spending limits affect candidates and parties differently than they do interest groups. Although a candidate or party would be subject to a finite spending limit, interest groups could organize around an infinite number of issues and, by coordinating their efforts, could augment substantially the amount of money that would be spent to promote an issue or

limit rights, are nevertheless reasonable and constitutionally sustainable. See *R. v. Oakes*, [1986] 1 S.C.R. 103.

64 For example, the study considered larger spending limits for individuals or groups that would be subject to registration and disclosure but concluded that this would be ineffective and overly burdensome (Hiebert, "Interest Groups," 48-63).

65 The 1993 legislation departed from the Lortie recommendation by limiting only partisan advocacy and not issue-only advertisements. In its final report, the Lortie Commission concluded that the distinction between issue and partisan advocacy is sufficiently blurred that it "cannot be sustained" (Royal Commission on Electoral Reform and Party Financing, *Reforming Electoral Democracy*, Vol. 1, 354).

66 *Irwin Toy Ltd. v. A.G. Quebec*, [1989] 1 S.C.R. 927 at 989-990.

engage in partisan advocacy. Thus comparable spending limits for candidates and interest groups or parties and interest groups would not only be ineffective but could be manifestly unfair. This point has been upheld by the Supreme Court as a valid reason for distinguishing between levels of spending for independent groups and parties.⁶⁷

Conclusions

How to allow for meaningful citizen electoral involvement while ensuring that money does not undermine the democratic ideal that citizens participate on fair terms in the act of self-governance is among the most difficult and complex challenges facing democratic polities. Unless new legislation is enacted, the Alberta Court of Appeal's decision will govern federal election conduct throughout the country. Through its judgment, the court has been able to exercise considerable influence on what the norms will be for federal election competition. This is troubling, because the court offered only a partial view of the complex relationship between freedom of expression and democratic values. It emphasized the importance of the opportunity to express oneself without addressing discrepancies in access and opportunity. This is a narrow, and essentially negative, view of the democratic process: one which emphasizes freedom from constraints without recognizing that unregulated election spending can undermine important normative goals. What is missing is consideration of how money, as the most important commodity in elections, affects the abilities of individuals to contest elections in a fair manner and determines for voters which issues will be given priority in the media, the venue for political debate.

In nullifying the legislation, the Alberta court was particularly troubled by what it perceived to be a basic incoherency in the claim that the spending restrictions were justified. Can Parliament limit free speech when the only justification for limiting a protected right, a free and democratic society, itself presumes free speech? The court's answer to the question was an emphatic "no."⁶⁸

67 The Supreme Court stated that it is "important to limit independent spending more strictly than spending by candidates or political parties. . . . [I]ndependent individuals and groups cannot be subject to the same financial rules as candidates or political parties and be allowed the same spending limits. Although what they have to say is important, it is the candidates and political parties that are running for election. Limits on independent spending must therefore be lower than those imposed on candidates or political parties. Otherwise, owing to their numbers, the impact of such spending on one of the candidates or political parties to the detriment of the others could be disproportionate" (*Libman v. Quebec*, para. 50).

68 *Somerville v. Canada*, 231.

Despite the court's view that the restrictions on independent expenditures are not justified, I respectfully disagree. While free speech is obviously an important right that needs judicial nurture and protection, equating democracy with individuals' ability to purchase unlimited quantities of partisan advertising is not the only interpretation of a free and democratic society. A more compelling view embraces the positive values of enriching democratic experience by encouraging individuals, other than those from privileged backgrounds or with access to substantial monied interests, to contest elections on a fair basis. A more robust model of democracy should seek to prevent those with wealth from influencing, through sheer purchasing power of commercial advertising, which issues are deemed to be important. This is why regulating independent expenditures is so important. It is a necessary part of a regulatory regime that wishes to control election costs to address not only issues of corruption, but also to promote the democratic ideal that citizens participate on fair terms in the act of self-governance. This more positive view of democracy has been endorsed by the Supreme Court. In disapproving the Alberta court's finding in *Somerville* the Supreme Court has made it clear that the objective of limiting independent expenditures, as part of a regulatory regime intended to promote fairness in campaigns, is consistent with the Canadian Charter of Rights and Freedoms.

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