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The regulation of election campaign financing in Canada and New Zealand

Andrew Geddis
University of Otago

The regulatory background

Both Canada and New Zealand place wide-ranging legal restrictions on the use of money in election campaigns. The explicit aim of these laws is to limit the potential political influence exercised by private sources of wealth, through the application of a mix of controls on both the supply of, and demand for, campaign cash. Hence, both Canada and New Zealand share what may be termed an 'egalitarian' approach to the issue of money in politics. The central concern of this conceptual approach is to retain a measure of equality between the individual participants in the electoral process: equality between the various 'primary' participants (i.e. the candidates and political parties directly contesting the vote); as well as the various other participants at election time (i.e. all those who seek to support, oppose or otherwise influence the views of those primary participants).

Privileging equality as a regulatory goal obviously conflicts with the liberty interests of at least some participants at election time (i.e. those who wish to use money to engage in some form of election-related activity, but are prevented by law from doing so). The means by which such conflicts are resolved then differs between the two countries. In Canada, the courts can and do review Parliament's decisions where these are challenged under *The Canadian Charter of Rights and Freedoms.* New Zealand's lack of any entrenched rights instrument means that Parliament's legislative disposition of the issue remains the final legal word. The consequence is that any change to the system of election campaign finance regulation in New Zealand depends ultimately on what the majority of parliamentarians will (and will not) accept, whereas Canada always must take into account the additional question of what the *Charter* (or, more accurately, the courts when interpreting the *Charter*) will (and will not) allow.

Despite having an already existing, quite extensive set of controls in place, both countries look set to institute changes in the near future as to how these operate. These likely changes are the result of recent problems that have emerged with regard to the reach of their current regulatory frameworks. In some cases, these appear inadequate to fully protect the egalitarian interests underlying the overall regulatory approach. In others, the desire to ensure a measure of equality appears to encroach too greatly upon the ability of the primary participants to campaign effectively at election time. Canada and New Zealand thus seem ready to move to further regulate the issue of election campaign financing, but quite what the final shape of these changes will be remains to be seen.

- *Current impetus for reform in Canada*

Canada has seen a number of waves of reform of its electoral campaign financing laws. The template for the current regulatory system dates back to 1974, with some amendments made as a consequence of the 'Lortie Commission' report on electoral reform and party financing in 1991. Further changes were enacted in 2003 as a result of the then-emerging 'sponsorship scandal' (to be discussed in a moment), and yet more have been promised by the newly elected Conservative minority government as a part of its 'accountability package' to address the issues arising out of that episode. Some background on the nature of this sponsorship scandal is necessary for understanding why it so dominates the issue of election campaign finance regulation in Canada. To simplify a complex set of facts, in the mid-1990s the Federal government established a program to 'sponsor' certain events in Quebec in order to boost the image of Canada as a nation, and undermine separatist sentiments in that province. The money used to fund this program was kept outside the usual channels of government, with officials from the Prime Ministers office having a large say in how it was to be spent. It subsequently emerged that some millions of dollars had been paid to advertising firms which then produced little to show for the money, but which had been (and continued to be) loyal contributors to the governing Liberal party. A commission of inquiry into the affair, the 'Gomery Commission', found that there was a clear causative link between the grant of these sponsorship contracts and the making of political donations (as well as unrecorded cash gifts) to members of the Liberal government.

These revelations largely were responsible for the defeat of the Liberal government at the January, 2006 general election, and the coming into office of a new Conservative government. This government has promised a number of further measures, which have broad cross-party support in light of the Gomery Commission's findings and recommendations (no party wishes to appear 'anti-reform' in the current political climate). These measures are:

- To limit all individual donations to political parties or candidates to $1000 per year;
- To prohibit all corporate, union or organization donations to political parties, electoral district associations or candidates;
- To ban all cash donations to political parties or individual candidates of more than $20;
- To extend to 10 years the period of time for which Election Act violations can be investigated and prosecuted;
- To prohibit candidates or MPs seeking re-election from accepting large personal gifts;
- To ban the use of trust funds to finance the campaigns of individual candidates;
- To require all sitting MPs to report the existence of any such trust funds and secret accounts, and to wind these up immediately.

When these measures are enacted on top of the already existing forms of election campaign finance regulation, they will give Canada one of the most tightly regulated electoral environments in the world.

- *Current impetus for reform in New Zealand*

New Zealand's present regulatory structure was introduced in 1995 through an amendment to the Electoral Act 1993, in preparation for the country's first election under the mixed-member proportional (MMP) electoral system. However, the genesis of these regulations really lies in the 1986 report of the Royal Commission on the Electoral System. Not only did this report recommend that New Zealand adopt its present MMP electoral system in place of its then-existing first-past-the-post system, but it also contained a number of recommendations with regards to the regulation of election campaign financing. These recommendations then formed the basis for setting up the

country's post-MMP regulatory environment, with only minor amendments made since 1995. However, following the 2005 election, an unusually large number of issues with respect to election campaign financing have arisen.

- Members of the Exclusive Brethren Church spent an estimated $500 000 on producing and distributing leaflets attacking both the Labour and Green Parties. The Chief Electoral Officer has since reported these leaflets to the police on the basis that they may also have unlawfully acted to promote the National Party.
- The Labour Party has been reported to the Police by the Electoral Commission after overspending the overall limit on its election expenses by some $400 000.
- The National Party has been reported to the Police by the Chief Electoral Officer after overspending the limit on its election broadcasts by some $100 000.
- An election petition brought against the winning candidate in the Tauranga electorate alleging that he had overspent the financial limit on individual constituency campaigns failed, in large part due to the court's very restricted interpretation of what types of expenditure fell within the statutory language.

These details of these various contretemps will be discussed in the following sections of this paper. For now, it should be noted that they have led to a general feeling that the present rules on election campaign financing require attention, both in terms of resolving some ambiguities in what particular types of election related spending is or is not covered by the present statutory regime, and in terms of the overall reach of that regime. This matter will be addressed by Parliament's Justice and Electoral Committee in its review of the 2005 General Election, but as yet there is no indication of what specific legislative reforms that Committee may recommend.

Forms of 'supply side' regulation: donation limits and disclosure

The first form of regulation applied in both Canada and New Zealand is restrictions on the way in which primary participants may receive money from private sources for the purpose of funding their election campaign. Insofar as the primary participants must get the money with which to communicate to the electorate from somewhere, this need creates the risk that inequalities in the private, economic sphere will translate into inequalities in the public, political sphere. Simply put, those with more wealth to

contribute may receive more attention from the primary participants, and consequently wield more political influence, than those without such wealth. By trying to regulate the 'supply' of money to the primary participants, these regulatory measures constitute one attempt at mitigating this risk.

- *Canada's tight(ening) restrictions on political giving.*

Restrictions on both who may contribute money to fund a primary participant's electoral campaign, and how much may be given by private donors, were first introduced in 2003 by way of an amendment to the Canada Elections Act 2000. 'Contributions' – meaning both direct monetary donations and the commercial value of a service or material provided at less than market value – are thus restricted as follows:

- Only individual Canadian citizens or permanent residents, as well as corporations or unions involved in Canadian business, may make contributions to the primary electoral participants. Government corporations, or any corporation which receives more than half its income from the government also are prohibited from making such contributions.
- Each individual person may make contributions of no more than $5000 in any one year to any single political party (including all that party's candidates, electoral district associations, and leadership contenders). Candidates may only donate up to $10 000 of their own money to their own campaigns.
- Corporations, unions and unincorporated associations may make contributions to individual candidates or electoral district associations, but not to the national political party organisations or to candidates in a party's leadership race. However, contributions to any one candidate or electoral district association must not exceed $1000 in any year.

The aim of these rules is to force the primary participants at election time to turn away from institutional sources of wealth, and to cultivate a wide 'grass-roots' network of political support. (Also, concomitant changes to the state funding of political parties has provided an alternative source of election campaign finance to the parties, as is discussed below.) It is too early to tell whether they will be successful in doing so, or whether the new rules will simply encourage 'gaming' behaviour to avoid their reach. However, it

should be noted that the new Conservative government already intends further tightening these 'supply side' controls, in the manner described in the first section of this paper.

The other form of 'supply side' regulation in Canada is a set of extensive disclosure requirements regarding who is donating to the political parties, candidates for party nominations or the party leadership, electoral district associations, and individual candidates. Each of these electoral actors must report to Elections Canada all contributions of more than $200, along with the identity of the donor and the date it was received. Anonymous donations greater than $25 are prohibited. However, with the exception of candidates for a party's leadership (who must file a report disclosing contributions to his or her campaign four weeks before the leadership vote), all these disclosure reports need only be filed *after* the relevant campaign is over. Therefore, while the disclosure reports may act as a form of 'sunlight' to deter outright corrupt behaviour, they do not work to inform the voters as to who is supporting each party or candidate in the immediate election race.

- *New Zealand's simulacrum of a donation disclosure regime.*

Aside from the basic criminal law prohibition on outright bribery, there are no limits in New Zealand on who a primary participant (either individual candidate or political party) may receive money from, nor any limits on how much any donor may give to any primary participant. 'Supply side' regulation is thus restricted to the requirement that individual candidates must publicly disclose the name and address of any donor who gives more than $1000 per election cycle, while political parties must make an annual financial return disclosing the identity of any donor who gives more than $10 000 in that year. However, this disclosure regime suffers from a number of major flaws.

- Donors may still make 'anonymous' donations of any size to both individual candidates and political parties;
- Trusts may be used to funnel donations of any size to both individual candidates and political parties;
- Disclosable donations (i.e. of an amount greater than $1000/$10 000) may lawfully be split into several separate donations from separate 'straw' donors, each of which fall under the level of disclosure;

- Public disclosure of any donors' identity only takes place 50 days after the election has taken place (for candidates), or in April the year following the donation (for political parties).

Consequently, the donation disclosure regime in New Zealand is such that any donor who wishes to keep his or her identity a secret can easily (and quite lawfully) do so; the primary participants can lawfully collude with the donor to enable him or her to do so; and any resultant information about who is funding the primary participants is then only made public long after the election has already taken place. It is thus fair to say that the current rules really form a simulacrum of a disclosure regime, and repeated reports of Parliament's Justice and Electoral Committee on previous elections have called for the matter to be addressed. Given the present interest in election campaign funding issues, this might actually take place this time around.

Forms of 'demand side' regulation: spending limits

The second form of regulation applied in both Canada and New Zealand is restrictions on how much the primary participants can spend on various types of election related activity. The aim of this form of regulation is not to provide a complete measure of equality between all electoral contestants – there will remain a large gap between the resources available to the various primary participants, even with some spending-cap in place – but rather to prevent a well-funded primary participant from 'buying' an election through outspending the competition by a large amount. Furthermore, by controlling overall electoral spending, such caps seek to reduce the 'arms-race' phenomena, whereby every primary participant seeks to raise as much funding as is possible in case an opponent proves able to raise and spend substantially more.

- *Canada's briefly applying, but comprehensive, election spending limits.*

The imposition of limits on the primary participants' 'election expenses' dates back to 1974. The concept of an 'election expense' is defined in the same way for both political parties and individual candidates (only these participants lawfully may incur an 'election expense', and they must do so through their official or registered agent).

- The overall test is whether the cost incurred, or non-monetary contribution received, is used to directly promote or oppose a political party, its leader or a candidate in the period beginning with the issuance of the election writ and election day (in 2006, this amounted to 54 days, but it may be as short as 36 days by law).
- Specifically included as being an 'election expense' is the cost of:
  - The production of advertising or promotional material and its distribution, broadcast or publication in any media or by any other means;
  - The payment of renumeration and expenses to a person acting as an election agent or in any other official capacity;
  - Securing a meeting space and supplying light refreshments at meetings;
  - Any product or service provided by a government, Crown corporation or any other public agency;
  - The conduct of surveys or research.
- Specifically excluded from being an 'election expense' is the cost of:
  - Fund raising activities;
  - Personal expenses such as travel and living expenses, childcare costs, additional expenses related to any candidate's disability. The Chief Electoral Officer establishes separate categories of person expenses and fixes maximums that may be spent on these.

Different 'election expenses' maximums then apply to the various classes of primary participant.

- Political parties may spend $0.70 per registered voter in each electoral district in which the party is running a candidate (this amount is indexed to inflation – in 2006 it actually amounted to $0.803). Therefore, a party which contested all 308 electoral districts in the 2006 election could incur up to $18 278 278.64 in election expenses.
- Individual candidates may spend up to a limit determined by the number of voters in the electoral district, with an adjustment factor allowing for a higher limit in larger, less densely populated districts. The election expense maximums for individual candidates in 2006 ranged between $62 500 and $106 000.

- In addition, candidates for a party's nomination in an individual electoral district also face a spending limit of 20 percent of the general election spending limit. However, candidates for a political party's leadership do not face any limit on their expenses when campaigning to win this position.

There are a few points on which Canada's particular form of 'demand side' regulation may be criticised. For one thing, it operates only to control political spending for a relatively short period just before an election. It is true that a lack of fixed election dates at a federal level makes predicting exactly when an election will be held a tricky matter, but given the development of a 'continuous campaign' style of politics, it may be asked whether it is sufficient to restrict how much the primary participant spend in the month or two immediately prior to the actual vote? Related to this point is the fact that the 'election expenses' maxima applying to the national political parties is quite high, with much of their campaign spending going on 30-second television advertisements (which often attack a party's opponents rather than spell out the party's own position on the issues). And given that much of the parties' election-related spending is now funded through the public purse (see the following section), it seems legitimate to ask whether this is a desirable state of affairs. Finally, there were some complaints at the 2006 election from candidates in large, rural electoral districts that the 'election expenses' maxima applying to them made it impossible for them to adequately campaign in all areas of the district (especially with the greatly increased cost of petrol). This may indicate that some greater flexibility is required in the election expenses limits for those areas where there are particular difficulties in communicating with the voters.

- *New Zealand's ambiguous limits on 'election expenses'.*

New Zealand places caps on the total amount of 'election expenses' that both individual candidates and political parties can incur;

- For individual candidates, the amount is $20 000;
- For political parties, the amount is $1 000 000 + $20 000 per electorate in which the party is running a candidate (i.e. a party contesting all 69 electorates in 2005 was entitled to spend up to $2 380 000 on 'election expenses'). Note also that this amount is additional to any funds provided by the state through the 'broadcasting

allocation', for use in purchasing access to the broadcast media (see the section on broadcast regulation below).

What constitutes an 'election expense' is defined by the Electoral Act 1993. In terms of political parties, the legislative definition incorporates any expenditure made on an 'election activity'; defined in turn as all advertising of any kind or any published materials which encourage (or appear to encourage) voters to vote for the party (or not to vote for any other party). Specifically excluded is any spending on advertising which relates exclusively to the election of any of the party's individual candidates, as well as spending on travel or conducting an opinion poll. The activity also must occur in the three months preceding an election. Note also that spending on election broadcasting is subject to a separate set of controls (considered in the next section).

In relation to an individual candidate, 'election expenses' are also defined as expenses incurred by or on behalf of a candidate for an 'election activity'. An election activity constitutes any kind of advertising, any radio or television broadcasting, or any publication or distribution of any notice, poster, or billboard, which is authorised by the candidate's campaign. In addition, the activity must relate solely to the candidate in his or her capacity as a candidate, must relate exclusively to his or her campaign, and must take place in the three months before the election is held. Therefore, as with the political parties, the Electoral Act 1993 restricts only the amount a candidate may spend on advertising his or her candidacy during the three months preceding an election. However, by contrast with the provisions governing political party spending, the limits only apply to expenditures on advertising which 'relates exclusively' to the election campaign, rather than to all advertising which broadly 'encourages' voters to vote in a particular way.

The adequacy of these definitions has come under a great deal of scrutiny following the 2005 election. In relation to political parties, the Labour Party is being investigated by the Police for overspending its maximum after the Electoral Commission deemed some $440 000 spent on 'pledge cards' and pamphlets sent to voters prior to the election to constitute an 'election expense'. The party had paid for these using parliamentary funding allotted to each party for the purpose of communicating its policies to the electorate, and it argues

that their distribution therefore falls outside the statutory definition of 'electoral expenses'. While this argument seems rather tenuous, it does highlight the problem that expenses incurred by a party as a part of its normal parliamentary activities may come to be deemed part of its electoral activities, especially as the 3 month 'election window' can *retrospectively* cover activities carried out before the election date has been announced.

In relation to individual candidates, the problems associated with determining what is and is not an 'election activity' (and hence, what kinds of spending constitute an 'election expense') has been highlighted in a recent election petition alleging candidate overspending in the closely contested Tauranga electorate. The winning candidate, Bob Clarkson, was alleged to have overspent the $20 000 maximum by some tens-of-thousands of dollars. In the course of hearing the petition, the Election Court examined a number of alleged 'election activities', before ruling that 'the definition of 'election activity' is deliberately narrowly drawn' – 'It is the expense incurred in the direct endeavour to persuade voters which is caught, not the myriad of other activities which may form part of an election campaign.' Thus, the cost of hiring a professional campaign manager and paid secretary is not an 'election expense', nor is the cost of renting a building as a campaign headquarters (even if this has a large street frontage enabling a sign to be mounted). Consequently, even though Mr Clarkson did *in fact* spend far more than $20,000 on getting elected, his total 'election expenses' were found to amount to less than the statutory maximum.

The fact that primary participants actually felt the sting of the spending limits on their campaigns in 2005 has led to calls for the rules to be 'clarified', which may be code for either 'loosened up' or 'tightened further'. Certainly, with regard to the rules governing individual candidate spending, there is a need for some kind of change as the present rules make it a matter of inspired guesswork as to what is, or isn't, an 'election expense'. With regard to the political parties, there is somewhat less urgency, given that the 2005 election was the first at which any party even spent up to the maximum allowed (let alone is alleged to have spent over that amount). Further, the problem here really lies in uncertainty as to what a political party's parliamentary funding may or may not be used for, an issue considered in the next section.

Forms of state assistance: public funding

The forms of regulation discussed in the previous two sections seek to advance the egalitarian objective at election time by equalising the amounts that individuals can contribute to the primary participants, or the amounts that the primary participants may spend on campaigning for election. This section examines a complimentary form of regulation: replacing the role that private (and thus unequally distributed) sources of wealth can play in the electoral process with an alternative (and politically neutral) source of funding – the general taxpayer.

- *Canada: Opening wide the public purse.*

Canada utilises three different forms of public funding, two of which date back to the original 1974 regulatory schema, while the third was introduced in 2004 as part-compensation for the introduction of limits on private donations.

The first form of state assistance is a tax credit provided to individual donors to political parties and individual candidates. This measure is aimed at encouraging the development of widespread, 'grass roots' funding networks. Donors may claim 75 percent of the first $400 donated, 50 percent of amounts $400-$750, and 33.3 percent of amounts $750-$1275 (thus, a maximum tax credit of $650 is available for a donation of $1275).

The second form of state assistance is the partial reimbursement of the election expenses of both individual candidates and political parties. Any candidate who receives 10 percent or more of the vote in his or her electoral district is eligible for the reimbursement of 60 percent of his or her election expenses and personal expenses. (Roughly half the candidates running in 2006 qualified for this, with most of these from the main parties.) Any political party which received 2 percent of the vote nationwide (or 5 percent in those electoral districts in which it ran candidates) is eligible to receive a reimbursement of 50 percent of its election expenses.

The final (and most recently introduced) form of state assistance is a quarterly allowance paid to all political parties which received 2 percent of the vote nationwide (or 5 percent

in those electoral districts in which it ran candidates), of an annual amount equivalent to $1.75 per vote received. In 2006, 5 parties qualified under these criteria. The largest polling party (the Conservatives) will receive $9 400 000 per annum, while the lowest polling qualifying party (the Greens) will receive $1 165 500. This money is then subject to no special restrictions on how it is to be spent.

These latter two forms of state assistance must be viewed with some caution, however, as it is possible that the qualifying threshold placed applied to them could be found to breach the *Canadian Charter of Rights and Freedoms*. Canada's Supreme Court, in the case of *Figueroa v. Canada (A.G.)* [2003] 1 S.C.R. 912, has struck down a rule requiring that parties run candidates in 50 electoral districts before being able to officially register (which then had the incidental effect of preventing donors to small parties from being able to claim the benefit of the tax credit described above). By a 6-3 vote, the Court held that this rule breached the *Charter*-guaranteed right to vote of all those who supported a smaller party, as;

> Owing to the competitive nature of the electoral process, the capacity of one citizen to participate in the electoral process is closely connected to the capacity of other citizens to participate in the electoral process. The reason for this is that there is only so much space for political discourse; if one person 'yells' or occupies a disproportionate amount of space in the marketplace for ideas, it becomes increasingly difficult for other persons to participate in that discourse. It is possible, in other words, that the voices of certain citizens will be drowned out by the voices of those with a greater capacity to communicate their ideas and opinions to the general public. … [Therefore, the *Charter*] imposes on Parliament an obligation not to enhance the capacity of one citizen to participate in the electoral process in a manner that compromises another citizen's parallel right to meaningful participation in the electoral process.

A similar argument can be made with respect to the qualifying threshold to receive the quarterly allowance and election expense reimbursements. This threshold has the undoubted effect of providing larger, established political parties with a significant electoral advantage over smaller, emerging ones; hence, infringing upon the right of all those voters who support the latter parties to "meaningful[ly] participat[e] in the electoral process". Whether the justification that *some* such threshold is necessary in order to protect the public purse can justify this infringement of voting rights is rather uncertain, especially given the finding in *Figueroa* that '[t]he connection between legislation that

has no impact upon either the number of citizens allowed to claim the tax credit or the size of the credit and the objective of ensuring the cost-efficiency of the tax credit scheme is tenuous at best.' In a similar fashion, because there is nothing to stop all Canadian voters casting their votes for parties that subsequently qualify for the quarterly allowance and election expense reimbursements, or prevent all candidates in a particular electoral district from qualifying for the election expense reimbursements, the claim that it is necessary to exclude small parties from receiving these benefits in order to limit overall costs does not really seem to hold water. Cases currently are before the courts designed to test just this issue.

- *New Zealand: Largely leaving it to the private sector.*

New Zealand provides no direct state funding towards the general election expenses of either political parties or individual candidates (but it does provide funds for use in buying access to the broadcast media, as is discussed below). Political parties must therefore rely almost entirely on the private sector to provide the funds with which to run their electoral campaigns. However, there has been an increasing tendency for those political parties represented in Parliament to use the parliamentary funding provided for general electorate communications for quasi-electoral purposes, culminating in the Labour Party's spending $440 000 of its parliamentary funding to send 'informational material' to voters shortly before the 2005 election. The New Zealand auditor general has expressed concern about the lack of controls and guidelines with regard to this sort of spending, and has recommended a series of measures to address the issue.[1]

Forms of third party regulation.

In addition to individual candidates and political parties, any developed democratic system also contains a plethora of 'third parties' with an interest in the outcome of the election, who want to take some part in the campaign battle. Such 'third parties' range from a single individual with a liking for, or grudge against, some particular local candidate; through groups of like-minded individuals who are motivated by some

[1] Office of the Auditor-General, *Report on government and parliamentary publicity and advertising*, June 2005 (http://www.oag.govt.nz/2005/govt-publicity/default.htm).

particular policy issue which they want addressed by central government; up to trade associations, large companies, or trade unions that have nationwide clout, and are concerned to advance the economic wellbeing of their members. The outcome of some particular electoral contest may be of great importance to such third parties, giving them a strong interest in independently using their resources to try and convince the voters to cast their ballot for or against one of the primary contestants in the electoral race.

Such 'third parties' create a real dilemma when it comes to election campaign finance regulation. On the one hand, the free involvement of a diverse range of interests come election time is a necessary before any country can legitimately be called 'democratic'. However, not only might the capacity of third parties to involve themselves differ in terms of the wealth of those concerned, but they also present a means by which the primary participants at election time can, through the use of 'parallel' election campaigns, evade rules that otherwise would limit their spending. This regulatory catch-22 makes the crafting of rules to govern the election-related activities of third parties a particularly knotty problem.

- *Canada: A comprehensive (and controversial) limit on speech.*

The issue of regulating election-related spending by third parties has a long history in Canada, with a series of regulatory measures introduced by Parliament, but subsequently struck down by the courts as a breach of the right to freedom of expression contained in the *Canadian Charter of Rights and Freedoms*. The present, broadly drawn definition of 'election advertising', along with limits on how much third parties may spend on these forms of communication was introduced in the *Canada Elections Act 2000*. The definition of 'election advertising' encompasses 'advertising during an election period that promotes or opposes a registered party or the election of a candidate, including by taking a position on an issue with which the registered party or candidate is associated';[2] with an 'election period' defined as 'the period beginning with the issue of the writ and ending on polling day'. A nationwide spending limit of $150 000 is placed on the election

[2] There are exceptions made for editorials, news, speeches or interviews published or broadcast by the media; publishing a book; communicating with employees or shareholders; and transmitting personal views over the internet.

advertising of each third party, with an additional provision limiting spending in support or opposition to an identifiable candidate in a particular electoral district to $3000. Third parties are prohibited from circumventing, or even attempting to circumvent, this spending limit by setting up multiple 'front' organizations, or by colluding with other groups.

In addition to limiting the overall amounts that third parties may spend on election advertising, the *Elections Act, 2000* places formal registration and disclosure requirements on third parties undertaking election advertising. All election advertising must identify the third party that is paying for it. Once a third party expends more than $500 on election advertising, they must apply to be registered with the Chief Electoral Officer, and thereafter comply with a series of administrative procedures. Registered third parties must also file an 'election advertising report' not more than 4 months after an election, disclosing any expenditures on election advertising they have incurred, as well as the identities of all donors who gave more than $200 to the third party.

These legislative measures faced an immediate judicial challenge, with the Supreme Court finally pronouncing on their *Charter*-compatibility in *Harper v. Canada (A.G.)* 2004 SCC 33. By a majority of 6-3, the Court ruled that the legislation's theoretical objective of 'promoting electoral fairness' was a legitimate governmental end, and Parliament's 'right … to choose Canada's electoral model and the nuances inherent in implementing this model' meant that the limits imposed were proportionate to the end sought. Therefore, even though the legislative limits on third party speech do infringe on the *Charter*-guaranteed right to freedom of expression, they were found to be a 'reasonable limit … prescribed by law and demonstrably justified in a free and democratic society', and thus were not in breach of the *Charter* itself.

Nevertheless, the limits imposed on third party election advertising in Canada may still be questioned on a couple of basis. First, the amounts which third parties are entitled to spend at election time are quite low. The $3000 cap on election advertising in an individual electoral district, for instance, amounts to only 3 cents per voter in some densely populated urban electoral districts. Second, the precise coverage of the limits is

somewhat vague, especially in regards to advertising which 'tak[es] a position on an issue with which [a] registered party or candidate is associated.' At any election, almost every conceivable public issue can be associated with one or another political party. Consequently, virtually all spending on communicating a position on any public issue at election time potentially will fall under the regulatory controls (and tight spending limits) placed on third party election advertising. Debate at election time, therefore, inevitably will be almost entirely dominated by the primary electoral participants (which have much higher spending limits on their election advertising), as well as the news media (which are exempt from any limits on their communications). While this state of affairs may justified on the grounds that it is the primary participants who are seeking election, and so their voices should dominate the debate, it also can be argued that it empowers the primary participants to define what *they* want the election to be about, rather than forcing them to respond to the issues and concerns that civil society would like to hear debated.

- *New Zealand: A mix of strict and lax controls.*

Third parties are prohibited from publishing any advertisement which 'is used or appears to be used to promote or procure the election of a constituency candidate', or 'encourages or persuades or appears to encourage or persuade voters to vote for a party', unless it is authorised in writing by the candidate or party concerned, and contains a statement setting out the 'true name' and address of the person at whose direction it is published. This rule effectively gives the primary participants a veto over any proposed 'parallel campaign' by a third party to promote the candidate or party they wish to see in office. It also limits such forms of third party spending, as the definition of a candidate or political party's 'election expenses' covers activities carried out with the party or candidate's authority. Therefore, the authorisation of a third party's expenditure by a primary participant automatically includes that spending as a part of the participant's election expenses.

However, authorisation is only required where an advertisement is 'used to promote or procure the election of a constituency candidate', or 'encourages or persuades or appears to encourage or persuade voters to vote for a party'. Obviously, there are difficulties in defining in advance the kind of message that meet these tests. In particular, the status of

'issue advocacy' advertisements, which do not refer specifically to any candidate or party but rather promote a position in respect of a public policy issue which also features in some primary participant's election campaign, is problematic. These types of communications generally are regarded as falling outside the rule's ambit, which obviously leaves a wide loophole in the limits on third party spending. However, the line here is very vague, as the Exclusive Brethren pamphlets at the 2005 election demonstrate. Even though these never mentioned the National Party by name, they have been reported to the Police as potentially breaching the ban on unauthorised third party publications because they combined the phrase 'vote to change the government' with a blue tick – which, it is claimed, 'appears to encourage or persuade voters to vote for' the National Party (which uses blue as its party colour).

All other advertisements 'relating to an election' require a statement identifying the 'true name' of the person at whose direction it is published; but unlike advertisements advocating support for a particular candidate or party, these do not require any formal authorisation from any person. This labelling requirement covers not only 'negative advertising' (i.e. messages which attack one or more parties, but do not specifically support any alternative), but also any 'pure' issue advocacy.

Because third parties are under no obligation to disclose the amount spent on election related advertising, it is difficult to gauge just how much of this type of expenditure occurs during each election campaign. Certainly, each election has seen some advertising by third parties — in particular, employer and union groups — on issues that one or another political party has been closely aligned with, and which may therefore help to promote that party's election campaign. But that said, the precise impact of such spending on any recent election result is debateable: while the Green Party claims that the Exclusive Brethren leaflets did have a significant impact on its level of support in 2005, it also is arguable that the National Party's association with such a group also dented its standing in the polls. The Exclusive Brethren example, however, does indicate that New Zealand is vulnerable to a well-financed interest group which wishes to promote its agenda at election time. Quite how to combat this problem without also overly traducing

the right of persons other than the primary participants to take part in the election debate is a very complex question, as the Canadian experience demonstrates.

Forms of broadcast regulation.

Even with the rise of the internet and the diversification of media outlets, the major television networks remain the pre-eminent source for information for a majority of the populace in the advanced industrialised countries. This fact, allied with the ability of television (and, to a lesser extent, radio) advertisements to carry a message directly into a voter's home in a way that is difficult to avoid, makes access to the broadcast media of critical importance to those campaigning for election. However, while broadcast advertisements are perhaps the most effective means of reaching the voters, they are also expensive. Furthermore, control of the broadcast media lies in the hands of a very few operators, who thus may wield substantial power of their own in terms of deciding which primary participants may (and may not) access that media. These facts have led both Canada and New Zealand to impose special forms of regulation on the broadcast media when used for electoral purposes.

- *Access in Canada – a measure of guaranteed availability.*

Each broadcaster is required to make available a total of six-and-a-half hours of broadcast time in the period between the issuance of the election writ and election day, to be made available to political parties for purchase at the lowest rate the outlet charges any other advertiser for the equivalent time. The time set aside for purchase must be during 'prime time' hours (i.e. 6 pm – midnight for television). A 'Broadcasting Arbitrator' is then responsible for allocating this guaranteed purchase time amongst the political parties, according to the following formula:

- Equal weight is given to the percentage of seats held by each party, and the percentage of the popular vote won by each party at the previous election;
- 'Half weight' is given to the number of candidates run by a party in the previous election, as a percentage of the total number of candidates running for all parties.

There is an overarching restriction that no one party may receive more than 50 percent of the guaranteed purchase time. The Broadcasting Arbitrator also retains a residual discretion to alter the outcome of the formula if he or she deems it to be unfair to a

particular party, and it would be in the public interest to make a change. At the 2006 election, the application of this formula gave the Liberal Party 105 minutes of guaranteed purchase time and the opposition Conservative Party 85 minutes, while the smallest allocation (for, *inter alia*, the 'Animal Alliance Environment Voters Party of Canada') amounted to 6 minutes.

Originally, each political party was in practice restricted to purchasing the amount of access to the broadcast media granted to it by the Broadcasting Arbitrator. However, in the case of *Canada (A.G.) v Reform Party of Canada* [1995] 123 D.L.R. (4th) 366, the Alberta Court of Appeal struck down this restriction as a breach of the parties' freedom of expression under the *Charter*. The Court ruled that as the overall spending limits on political party election campaigns already limit how much the parties may spend on election advertising, further restrictions on their access to the broadcast media could not be justified. The Court's judgment gave special attention to the position of new political parties, which might not qualify for any guaranteed purchase time at all and thus would be completely prevented from accessing the airwaves directly. Therefore, while the guaranteed purchase time provisions still give each qualifying party an assured access route into the broadcast media, they do not stop any party from then negotiating to purchase additional advertising time within the confines of the overall limits on the party's 'election expenses'.

In addition to these guaranteed purchase time provisions, the publicly owned CBC television (as well as some French language stations in Quebec) makes a certain amount of free broadcast time available to the political parties. Every registered party is entitled to a minimum of two minutes, with time otherwise allocated according to the paid broadcast allocation formula described above. At the 2006 election, a total of 214 minutes were distributed in this fashion.

Spending on broadcast advertising remains the single biggest expense for the national political parties at election time, making up some 40 percent of their total reported election expenses. It is thus a significant driver of the overall cost of campaigning. Furthermore, with the development of enhanced forms of public funding, the taxpayer

now is giving the parties money which they then can use to pay the broadcast stations to air their campaign commercials. Many of these commercials are of questionable value in terms of generating an informed debate over public policy issues – they are more likely to be thirty-second long 'attack ads' designed to weaken support for the political opposition. Whether this is a desirable use of public resources is a valid question.

- *Access in New Zealand – a gift of the state.*

All broadcast media, whether privately owned or state run, are regulated by the Broadcasting Act 1989. This legislation prohibits any broadcaster from permitting the broadcast of any 'election programme' at any time. An election programme is defined as one which encourages or persuades (or appears to encourage or persuade) the voters to vote for (or not to vote for) some individual candidate or political party, or which advocates support for or opposes a candidate or political party, or which notifies that a meeting is to be held in conjunction with an election. There are then rules allowing political parties and individual candidates some limited access to the broadcast media during an election campaign.

Prior to each election, the state distributes a grant of money for the sole purpose of allowing the broadcast of election advertisements. In 2005, this 'broadcasting allocation' amounted $3.2 million. The Electoral Commission is charged with distributing the broadcasting allocation between all qualifying political parties requesting a share. The allocation criteria involves such factors as: the number of votes the party attracted at the last election; the number of votes gained by the party in any by-election held since the last general election; any other indications of public support for that political party (such as results of public opinion polls and the number of persons who are members of that political party); as well as the general 'need to provide a fair opportunity for each political party … to convey its policies to the public … .' Clearly, the application of such a complex formula will generate disputes, and following every allocation decision there are complaints that some of the parties have been unfairly treated. The fact that the Electoral Act 1993 requires a representative of each of the two largest political parties to take part in the allocation decision, while the minor political parties are given no direct voice in the process, only sharpens these complaints.

At the 2005 general election, this broadcasting allocation gave the governing Labour Party $1 100 000 and the main opposition National Party $900 000. (This gap was then somewhat reduced by the National Party overspending its allocation by some $100 000, due to a failure to ensure all bills incurred were GST inclusive – an oversight which currently is being investigated by the Police.) A second tier of parties (ACT, Green Party, NZ First, United Future) each received $200 000, while a nominal $10 000 was granted to a range of 'outsider' parties. (For reference, a 30 second advertisement in prime time on the main television station costs $10 000.)

Irrespective of the overall fairness of this allocation process, it provides the political parties with virtually their only means of direct access to the broadcast media. A political party may *only* broadcast an election programme in time purchased with money allocated to it by the Commission. While the costs of producing an election programme may be paid for from the broadcasting allocation, they do not have to be. Instead, parties may spend their own funds on such production costs, although this expenditure will still count as an 'election expense' to be counted towards the total that party may spend on its general election advertising.

An additional exception to the blanket ban on using the broadcast media for electioneering is made for individual candidates. A candidate may purchase time to broadcast an election programme, so long as it relates solely to the promotion of their candidacy, and is broadcast in the three months prior to the election. However, any such spending by a candidate will count as an 'election expense', and must therefore be counted towards the maximum of $20,000 that she may spend on advertising her campaign.

One further point should be noted with regard to the regulation of election broadcasting in New Zealand. Given the tight restrictions on the primary participants directly accessing the broadcast media, "free" media coverage of the political parties' campaigns becomes vitally important. Policy announcements, as well as the activities and schedules of political party leaders, are designed so as to feature on the nightly television news

bulletins. And the participation of these leaders in the televised election debates takes on a heightened importance, as this is one of the few chances the voters get to form a direct impression of each leader's merits. Minor parties, which receive a negligible share of the broadcasting allocation, and which receive less attention in the news media's campaign coverage, may be particularly dependent upon the visibility offered by such leaders' debates.

It is against this background that Peter Dunne and Jim Anderton, leaders of two of the minor parties in Parliament, sought to challenge the decision by TV3 to exclude them from its multi-party debate format (*Dunne & Anderton v CanWest TVWorks Ltd*, HC Wellington, 11 August 2005, CIV 2005 495 1596). Their claim was that the decision of TV3 to rely on a TNS opinion poll as determinative of the six highest polling parties (and thus the debate participants) breached several public law duties of TV3: not to act unreasonably or arbitrarily; take into account irrelevant considerations; or discriminate amongst political parties on grounds that were unreasonable, arbitrary, irrational, or disproportionate. They sought declarations to that effect, and an order directing TV3 to include them in the leaders' debate.

However, in order to be able to invoke the supervisory jurisdiction of the Court, the two excluded MPs (by virtue of their parties' ranking 7th and 9th in the TNS poll), had first to show that TV3, a private broadcaster, was exercising public law functions or making decisions that had public consequences. Justice Ron Young declared that by choosing to hold such a debate, TV3 had entered the public law arena. He noted the importance of televised debates to the election campaign and government formation, saying, "the effect of what [TV3] chooses to do regarding election coverage is significant in a national context. What it does can influence voters' decisions and is thus a vital part of democracy." (para 34). His Honour also gave weight to what he regarded as the "fundamental right of citizens in a democracy to be as well informed as possible before exercising their right to vote and to ensure that the electoral outcome is as far as possible not subject to the arbitrary provision of information." (para 43). Salient too was the detrimental impact of the exclusion on the two leaders, and the public consequences thereof.

Turning to the basis used by TV3 to select which party leaders to include in the debate, his Honour found these to be unreasonable and arbitrary, primarily because the levels of support in this single opinion poll for the included parties (the Maori Party on 2.2% and ACT on 1.6%) compared with those of the excluded (United Future on 1.4%, Destiny on 0.6%, and the Progressives on 0.4%) were "effectively indistinguishable" (para 45). Justice Young concluded; "there is little to commend the basis on which TV3 decided to select the six leaders. It is clearly established that a single poll with small percentages and high levels of error provides little or no guidance on actual relative electoral support." (para 44).

Therefore, Messrs Dunne and Anderton were successful on all counts and appeared on the debate that evening. Whether it had much impact on their electoral fortunes is unclear. Although their support on the night did lift from that recorded in the TNS poll, each party lost MPs on election day. In United Future's case, it went from eight MPs to three and was not as influential in government formation as in the previous election.

However, the decision did cause consternation in a media community worried about the possibility of a judge being able to dictate editorial content to the Fourth Estate, and perplexity in the legal academy at the relaxed interpretation of the usually strict Wednesbury unreasonableness standard.[3] Political hopefuls were quick to seize on the possible precedent value of the case, and there has already been one case challenging, albeit unsuccessfully, TV One's treatment of an independent candidate at the expense of major party candidates (Labour and the Maori Party) in the Te Tai Tonga electorate (*Mangu v TVNZ*, HC Auckland, 5 September 2005, CIV 2005 404 4875). It also ought to be noted that the basis of Justice Young's decision has been appealed to the Court of Appeal.

[3] See Dean Knight, "*Dunne v CanWest TVWorks Ltd*: Enhancing or Undermining the Democratic and Constitutional Balance?" *New Zealand Universities Law Review* 21(4) (2005).

Conclusion

The egalitarian concern underpinning the regulatory approaches of both Canada and New Zealand has lead each country to impose a range of different legal controls upon the use of money in their electoral processes. The different reach of the measures adopted by each nation reflect their particular histories – money has been seen to be more of a 'problem' in the Canadian context than it has in New Zealand's more benign electoral climate – as well as each country's particularized judgment as to how the demands of electoral equality should be balanced against other competing values in the electoral process. This context-specific nature of each country's regulatory choice makes it difficult to generalise from their experiences, but perhaps two points may profitably be made in conclusion.

First of all, the issues surrounding the regulation of election campaign finance are ever-evolving. Changing campaign practices mean that new issues will arise with virtually every election. This change is partly driven by the emergence of novel technologies and tactics, but also is the result of electoral participants adapting to the existing campaign rules and seeking to exploit perceived loopholes in them. In turn, regulators are then faced with deciding whether to concoct new legal rules in order to maintain the overall integrity of the regulatory schema, or allow the new campaign practices to flourish in an unimpeded fashion. The point is that regulatory choices in this area often will be a case of playing 'catch up' with the electoral participants, rather than getting ahead of the curve. There probably is no escaping this dynamic, but it does mean that regular scrutiny of the existing rules is required as a matter of course.

Second, when it comes to deciding whether regulatory change is needed, there needs to be a careful consideration of precisely what end goals are being pursued. While participant equality is an undoubtedly important element in any democratic electoral framework, it is not the only one that is of value. In particular, the impact of 'equality enhancing' regulatory measures upon the liberty interests of various electoral participants needs to be closely scrutinised. This scrutiny is especially necessary where the regulatory choices are being made by incumbent political representatives, who may use their rule-setting power to entrench their positions at the expense of 'outsider' challengers. Again,

there may be no escaping this risk of partisan rule-making – a decision by elected representatives *not* to impose certain forms of legal controls on election campaign finance may be just as suspect as is a decision to regulate. But the ever-present risk of self-interested regulation does require a close scrutiny of the reasons for adopting any particular reform measure, an analysis of the goals that the measure is intended to serve, a consideration of how that measure links in with other regulatory strategies which have been adopted, and a reckoning of how the measure is likely to impact upon various political actors (especially any new participants who may seek to enter into the electoral field).

Further Reading

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