The Federal Electoral Regime Confronts The Charter ... Again: A Comment on *Somerville* v. *Canada (A.G.)*

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In June 1993, in Calgary before the Court of Queen's Bench of Alberta, reforms to the *Canada Elections Act* passed that May were found to infringe Sections 2 and 3 of the *Charter of Rights and Freedoms*.[1] These reforms include a limit, during the campaign, on independent expenditures on advertising directly to support or oppose a candidate or party.[2] The limits on the interventions of anyone who is not an official candidate or a registered party are serious; they may spend no more than $1000.00. Nonetheless, the logic of this comment is that the restriction on freedom of expression involved is necessary to protect and sustain another — equally central — value of Canada's democratic politics, that is a collective interest in elections which are competitive and facilitate openness and access. The challenge in this case is to appreciate the interconnectedness of the elements of a regulatory regime rather than to treat each part in isolation. Therefore, the argument, in brief, is that limits on independent expenditures are essential to the federal electoral regime as it exists, and has existed, for two decades. Since its creation, a basic principle of that regime has been to limit expenditures by parties and candidates in the name of equity. Such restraints on official candidates and registered parties would be easily bypassed if interest groups were permitted to make unlimited expenditures on their own. The *Somerville* decision, if left to stand, would threaten the whole regime of election financing, created in order to translate into practice the general principle of fairness in access — that is, a level playing field — for ideas and persons seeking office. Given the centrality of the regime to free and democratic government in Canada, this matter needs to be addressed by the Supreme Court.

Background To The Decision

This second challenge to the federal election law, brought by David Somerville, President of the National Citizens' Coalition (NCC), is a direct descendent of the first. The initial NCC case in 1984, decided by Mr. Justice Medhurst, found the federal election law's prohibition of spending by non-contestants during the campaign to infringe upon the *Charter*.[3] When the federal government decided not to contest the judgement, the way was opened for unlimited independent expenditures in both the 1984 and 1988 federal elections. In the "free trade election" of 1988 the huge sums spent by the supporters of the agreement and the notable, if less lavish, expenditures of its opponents constituted a parallel campaign which threatened at times to eclipse the parties' efforts.[4] This was only the most visible manifestation of the kind of independent spending which had characterised campaigns in several ridings since 1984, where single-issue groups (pro-life, for example) targeted sitting Members or other candidates who did not share their position.[4] Such interest groups were able to spend as much as they liked, not being subject to the restrictions on campaign expenditures which the *Canada Elections Act* sets for official candidates and registered parties. Fear of the results if such interventions were to multiply in future elections, as well as a more general concern to fit the regime of federal electoral law designed in the 1960s and 1970s to the constraints of the *Charter*, prompted the 1989 appointment of the Royal Commission on Electoral Reform and Party Financing (RCEFPF), chaired by Pierre Lortie.

The federal regulatory regime has drawn laudatory comments from many in Canada and abroad.[6] Its coherence and its capacity to make a significant contribution to maintaining fair elections and enhancing access has been highlighted.[7] It is a quite simple regime which depends on four basic principles, all of which are challenged directly or indirectly by the *Somerville* decision. First, it limits the amount candidates and political parties can spend during the campaign. Such regulation of expenditures is designed to keep the costs of elections from rising. Expensive elections have been identified as a hindrance to incumbent challengers mounting serious campaigns, and therefore restrains the competition of ideas and persons.[8] Studies in other jurisdictions, especially congressional elections in the United States, show that incumbents have major advantages in raising money and are able to outspend their opponents at all stages

of the electoral process. This does not mean, of course, that incumbents always win congressional elections. It does mean, however, that they have a substantial financial advantage over any challengers.[9] Simply put, the elections are less competitive.[10] The second principle of the regime is public funding, both through reimbursement and tax credit. The goal is to enhance fairer access of persons to candidacy by the public assuming responsibility for some of the costs incurred by candidates and parties. Of course, such funding can only have its desired effect of levelling the playing field if spending is restrained so that the wealthy — or successful fund-raisers — do not simply overwhelm the competition. The third principle is regulation of the who, how and how much of advertising in the broadcast media, again so that spending will not spiral out of control. The fourth principle of the federal regime is that of *transparency*. The designers of the federal regime decided to rely on the public dissemination of information about who — which individuals, associations, corporations, unions, interest groups — made contributions to candidates or parties. If neither public funding, broadcast regulation nor transparency was directly impugned in the *Somerville* case, their effectiveness would also be affected if the first principle were to fall.

THE DECISION

The plaintiff's case was that Sections 213(1), 259.1(1) and 259.2(2) of the *Canada Elections Act*, as amended by Bill C-114 in May 1993, are an impermissible infringement of the *Charter*. Somerville argued that the first two sections infringed section 2(b) (freedom of expression) and section 3 (the right to vote and run for office), while the third of the contested sections infringed section 2(d) (freedom of association) in addition to sections 2(b) and 3. These sections of the *Elections Act* limit "independent expenditures" for advertising in print or broadcast media during the last four weeks of the election campaign to promote or oppose a registered party or candidate directly to $1000.00, and prohibit combining such advertising to exceed $1000.00.

The *Canada Elections Act*, as amended in 1993, reimposed the ban on independent expenditures aimed directly or indirectly to support or oppose a party or candidate. These had been found to infringe the *Charter* in the 1984 case. Nonetheless, in recognition of the rights defined in the *Charter*, expenditures for advertising to present general policy positions were not prohibited completely. They were limited, however, to $1000.00.[11]

Even before the reforms had been presented to Parliament in the spring of 1993, David Somerville and the NCC were assaulting them in advertisements in the national press. As soon as the law was passed he took his case to the jurisdiction where the NCC had been successful in 1984. Mr. Justice Macleod heard the case, and found for the plaintiff.

Following previous *Charter* cases (especially *R. v. Keegstra*, [1990] 3 S.C.R. 697 and *Irwin Toy Ltd. v. Quebec (A.G.)*, [1989] 1 S.C.R. 927), Macleod J. delivered the judgement in two steps. The first was to find that the relevant sections of the *Charter* were indeed infringed; the second was to determine whether the Crown had demonstrated that such interference was justified under Section 1 of the *Charter* and constituted a "reasonable limit" on the rights defined in subsequent sections. The judge's finding was that the *Canada Elections Act* infringed the *Charter*, and that the Crown had not provided sufficient justification for such.

Step 1:

There is probably little doubt, although the Crown did not concede the point, that the *Canada Elections Act* interferes with section 2(b). Macleod J. found, however, that sections 2(b), 2(d), and 3 were all infringed. The major issue meriting commentary in the first step of the process relates to section 3. The finding that the *Canada Elections Act* interferes with section 3 is especially important because, while section 2 is subject to section 33 of the *Charter* (the notwithstanding clause), section 3 is not. Therefore, decisions touching on it deserve even more careful scrutiny than usual.

With respect to section 3, the Crown argued that the right to vote was not infringed by limits on advertising, even when measured against the standard of an "informed vote". The Attorney-General claimed that no evidence had been presented that Mr. Somerville's vote could not be a sufficient vote if the delivery system for some information (advertising) was limited (9-10). Macleod, J. rejected this argument and then went on very quickly and without much argumentation, to set an exceedingly high standard for an "informed vote". Quoting from the final report of the RCEFPF, that a $1000.00 limit on advertising would be "insufficient for those who wish to mount national media campaigns," Mr. Justice Macleod found that David Somerville was denied his rights under section 3, because "voters are effectively precluded from receiving third party views from other parts of the country" (11).

Two comments can be made about the formulation presented in *Somerville v. Canada (A.G.)*. The first is the simple observation that nothing in the *Canada Elections Act* precludes voters hearing views from other parts of the country. Nothing prevents an individual or association from Alberta choosing to spend its $1000.00 in Ontario, Nova Scotia or Newfoundland. Nor is anyone from Alberta prohibited from *seeking* such views by consulting a local newspaper from other parts of the country. These are readily available in public libraries or newspaper stores. Any information about an election campaign — with the possible exception of campaign literature which arrives at the door unsolicited — must be sought by the voter, by reading a newspaper or gaining access to electronic media. Such steps necessary to inform oneself about "other parts of the country"

do not seem at variance with the way voters must always conduct themselves, and therefore is not an undue burden.

The second comment is more general and relates to the very definition of an election and a campaign, following the basic principles of liberal democratic theory. In Canada, as in other countries with comparable first-past-the-post electoral systems, elections are local events. Citizens must elect an MP from their locality, judging his or her merits as a potential representative of their interests, both local and national. An election is not a referendum. In the latter the electorate *as a whole* is called upon to act together and to evaluate a single political proposal. In elections, in contrast, the decision process is fragmented, as votes are cast for the local candidate who the voter considers able to provide representation on many different issues. Therefore, the local campaign remains central to democratic electoral politics. It is precisely in such local campaigns that $1000.00 can provide a hefty amount of advertising and can inform and convince others about how to behave. Moreover, Canadian history, including most recently, is replete with examples of federal political parties which are rooted in a region. Again, advertising in regional media, often emanating from one or two population centres, could have an impact on the campaign. Finally, while something which is often termed "the national campaign" does exist, this is nothing other than the campaign waged by the leader of a political party and reported to the voters by the media. Unless the leader visits a voter's area, any voter experiences this "national campaign" only as it is mediated by the media. There is nothing in the *Canada Elections Act* that prohibits the media reporting how the campaign "is going" in particular parts of the country, including how "independent expenditures" are being made.

In his decision, Mr. Justice Macleod did not evaluate these or other basic philosophical principles and everyday practices underpinning Canadian democracy. Thus, the notion that section 3 of the Charter somehow includes a fundamental right to receive advertising directly in one's home looks suspiciously like a judge reaching far beyond either the legislators' or the ordinary citizens' understanding of the right to vote. It merits further attention.

Step 2:

In determining whether section 1 concerns justify sections 2 and 3 infringements in this case, Macleod J. relied on the *Oakes* test.[12] He determined, first, that the onus falls on the party proposing the limit, in this case the Crown defending the *Canada Elections Act*, to demonstrate that the limit on a *Charter* right or freedom is reasonable and justified. If the Crown failed to make such a demonstration, then the law is of no force or effect. Mr. Justice Macleod declared himself unable to conclude that the Crown's argument that limits on independent expenditures were essential to the comprehensive regulatory regime was a sufficiently pressing and substantial claim which could outweigh *Charter* rights and freedoms (15). Because he did not consider the Crown had passed the first test of demonstrating a pressing and substantial need to limit the *Charter*, he did not consider it necessary to go to the next step in the *Oakes* test, which is that of "proportionality". He did, however, offer a few thoughts on this second test.

In finding that the Crown had failed to establish a "pressing and substantial" case for limiting a *Charter* right or freedom, Macleod J. broke with the practice of almost all reviewing courts, which have been open to arguments about the societal interests, as expressed by legislatures, moderating individual rights in the *Charter*.[13] Macleod J., in contrast, rejected — or ignored — Parliament's intent to enhance electoral democracy. That societal goal provided the essential argument of the Crown, which explained why limits on independent expenditures are a crucial element of the regulatory regime. Relying heavily on a logic similar to that used by the RCEFPF, Mr. Shaw argued for the Crown that:

> third party spending limits are an essential part of the comprehensive electoral financing regime which seeks to promote fairness in the electoral process by equalizing the opportunity of all to participate in democratic debate in a meaningful way regardless of financial resources. The *specific objective of third party limits* is to preserve the integrity and effectiveness of party and candidate spending limits.
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> (quoted at 14-15, emphasis added.)

Instead, Macleod, J. focused on another issue. He concentrated on whether unlimited spending has "an undue influence" or, most simply, whether elections can be bought. This issue has never been at the heart of the debate about the federal regulatory regime.[14] Nonetheless, the *Somerville* decision is centred around this issue.

Mr. Justice Macleod gave five reasons for his decision, none of which assessed the claim of the Crown — and as we will see below, the lawmakers' — insistence that preservation of the federal regime of election financing, which is a good in itself because of the values it fosters, *requires* limits on independent expenditures. Instead, three reasons — and the ones which occupied the bulk of his argumentation — addressed the question of the power of spending to influence electoral choice, rather than the power of spending to alter the contours of electoral competition.[15]

As part of his test of whether the matter was "pressing and substantial" Mr. Justice Macleod found that the Chief Electoral Officer's failure to "make any investigation that third party advertising influences election results" to be a reason to reject limits on independent expenditures. It is questionable, of course, whether Elections Canada is empowered to conduct such investigations on its own initiative. Nonetheless, the matter is somewhat moot, in that

the judgement fails to mention that the federal government, alarmed by reactions to the events of the 1988 election, appointed the Royal Commission on Electoral Reform and Party Financing and provided it with a substantial budget which permitted it to investigate precisely this issue of independent expenditures.

Mr. Justice Macleod's fourth and fifth reasons occupied most attention in the judgement, and both of these dealt exclusively with attempts to assess the influence of spending on electoral outcomes. One involved the interpretation of statistical findings in empirical studies of public opinion. The plaintiff's expert witness, Neil Nevitte of the University of Calgary, testified that the data from the 1988 National Election Study he was asked to comment on showed "... that the cumulative impact of advertising is nothing, there is none" (17). This testimony did not, however, fully reflect the spirit of the statistical complexities which the authors of the book in which the data were reported were struggling to analyze, nor their final conclusions about advertising's influence on elections. Confronted with data which suffered from multicollinearity (which means, basically, that all effects were going in the same direction and independent causes could not be identified statistically), Johnston *et al.* wrote that "third-party advertising coefficients defy substantive interpretation." By this they meant that the statistical meaning was not clear, and they could not give a firm statistical interpretation to the data.[16] This is quite different from saying that the *data show* that advertising has no impact. What the data meant to the authors was that further analysis was needed before they could come to any assessment of the influence of advertising.[17]

Finally, Macleod J. liberally quoted M.P. Jim Hawkes, who chaired the parliamentary committee to which the final report of the RCEFPF was sent, and testimony to that committee by Harvie André. Both of these Tory MPs declared their personal opposition to spending limits for anyone; Mr. André is quoted at length about the impossibility of spending your way to victory, as well as the supposed mythology of the impact in 1988 of independent expenditures (19-20). These extracts from the parliamentary hearings were presented in the judgement without commentary. Imputing a reason for presenting them, one might think that Macleod J. wished to point out that at least some politicians do not consider spending limits essential, and that some do not believe that victory goes to the candidate or group which spends the most, despite the fact that they themselves continue to seek funds and spend them in election campaigns.

Summarising this encounter between the federal regulatory regime and *Charter* jurisprudence, we see that Mr. Justice Macleod followed the unusual practice of denying Parliament's claim that the *Canada Elections Act* represented a "pressing and substantial" step towards realising a free and democratic society. The second stage — termed the "form of proportionality test," having the three criteria identified by Hogg (1992: 867) — is the more usual area of dispute in cases which invoke the *Oakes* test. At this stage, the court attempts to balance society's interests against those of individuals and groups. The *Somerville* decision makes no determination on these matters because of its rejection of the first criterion, that the objective itself was sufficiently important.

ELECTION-FINANCING REGIMES AND SOCIETAL INTERESTS

In focusing almost exclusively on the question of the *impact of advertising on electoral results*, Mr. Justice Macleod ignored the argument about the structure of the financing regime which was made by the Crown, by both the Barbeau Committee and the RCEFPF, and by the same politicians quoted in the judgement. As Mr. André so bluntly put it, "You can't have limits on the candidates and parties without limiting third parties" (20). This was essentially the position taken by the RCEFPF after its detailed reflection on the matter, an analysis which it shared with the Barbeau Committee which had made the first recommendations for a federal regulatory regime in 1966. While concern about the impact of unlimited spending on voters' choice did figure in the RCEFPF's reasoning, it was primarily with reference to the regulation of party or candidate expenditures. When the Commission turned to independent expenditures, the weight of its analysis and rationale for regulation — and that of most experts on the subject as well as the politicians who live under the regime — was the presence of an integral and inevitable link between controls on candidate and party spending and limits on independent expenditures. As K.Z. Paltiel wrote of Barbeau:[18]

> The Committee was aware that this [restrictions on independent expenditures on advertising] could be interpreted as an interference with the freedom of political action but argued that to ignore such groups and their activities would 'make limitation on expenditures an exercise in futility, and render meaningless the reporting of election expenses by parties and candidates.'

From the beginning, in other words, all these observers have seen the regulatory framework as a regime, in the sense that its parts are interdependent. It can function as its designers intended it only with all of its parts and only if none of the parts are rendered ineffective. For example, restricting expenditures rather than contributions *requires* transparency in reporting; otherwise, the risk is that the public will not be able to monitor the relationship between candidates or parties and those who provide them with campaign contributions. Otherwise, the legitimacy of electoral outcomes might be threatened. Secondly, spending limits are effective only if they are meaningful and real. If they can be by-passed by

individuals who are not candidates or by groups which are not parties, then the regime as a whole is threatened.

It is this regime which the *Somerville* decision threatens to dismantle, because it renders ineffective one of the essential pillars, that of limiting campaign expenditures by candidates and parties. While the decision did not address the limits on candidates and parties directly, the judgement dismantled the corollary, which are the limits on independent expenditures.

The question to be faced remains, however, whether this regime is worth maintaining because of the contributions it makes to a free and democratic society, and despite the constraints on individual freedoms which it necessarily imposes for a short period of time and for some forms of expression.[19] The answer given at the federal level has always been that society's interest in such a regime, because of the fairness which it promotes in election campaigns, outweighs the limits imposed on individuals, whether candidates, party campaign organisers, or interest groups.

Since the 1960s at the federal level in Canada, that question has been answered consistently in the positive not only by commissions of inquiry like the Barbeau Committee and the RCEFPF but also by legislators, even when as individuals they might have preferred no limits. The regulations were interpreted as a design to accomplish certain goals benefitting society as a whole. In the case of the federal regime, a central — although never the exclusive — goal identified by the Barbeau Committee, the RCEFPF, the members of the public who intervened before the Royal Commission, and the legislators who argued for spending limits, was one of sustaining democracy by encouraging equity. Restrictions on spending went along with public funding to enhance equality among participants.[20] Such an increase in fairness, as well as other efforts to broaden participation — tax credits for example — would all contribute to the legitimacy of electoral politics, upon which Canadian democracy rests.

Not all regulatory regimes identify the same goals, of course. In many cases the motivation for establishing regulations has been to limit corruption. Reform efforts were sparked by scandals in which contributors to candidates or parties appeared to have gained an unfair advantage from their ability to give important sums of money. Such concerns about undue influence motivated the regulations in the U.S., for example, where contributors to congressional campaigns are limited in how much they may give. Quebec and Ontario's regulatory regime are also products of scandal, while Alberta adopted the same approach as Ontario, setting contribution limits as part of a set of measures to prevent undue influence.[21]

From the beginning the architects of the federal regime were motivated by a variety of goals which were somewhat different. While seeking to avoid the fact or appearance of undue influence and limiting escalating costs were two of their intentions, they never were pre-eminent. Central to these reforms were the goals of guaranteeing meaningful debate about policy options while guaranteeing fairness during that primordial moment of democracy, the election. Reformers sought to develop a set of rules of the game which would guarantee that the formal rights to run for office and to present competing policy positions during elections would be meaningful ones. Therefore, the fundamental principles of equity and equality of opportunity demanded a democratic system in which wealth, whether of an individual or a party, could not hinder others' participation.

Such a notion of fairness has been at the core of the federal regime regulating election activities from the beginning, and has been confirmed by each round of legislative reform. This notion rests, of course, on a larger definition of what constitutes a free and democratic society. As the five Commissioners, charged by the federal government in 1989 with addressing the obvious tension between the rights of individuals and the requirements of Canada's long-standing commitment to certain democratic practices, wrote after two years of consultation with the public, consideration of numerous research studies, and their own debates:[22]

> The gaping hole in our existing framework in relation to independent expenditures is patently unfair. The conundrum that this development presents for electoral reform is now widely acknowledged. Without fairness, we may continue to have a 'free' society, but we would certainly diminish the 'democratic' character of our society.❑

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Endnotes

1. *Somerville v. Canada (A.G.)* (June 25, 1993), Calgary 9301-05393 (AB. Q.B.). Internally cited page references refer to this decision.
2. There is no perfect label for such expenditures, which are distinguished by being "other than" spending by candidates or registered parties. In common parlance they are "third party expenditures" and this is the label used in the judgement. This term is obviously confusing, however, because of the use of the word "party" in order to distinguish such spending by non-party groups or individuals from that of registered parties and because of the long-standing habit in political science in Canada of calling parties other than the Liberals and Conservatives "third parties". Therefore, I have adopted the term used by the Royal Commission on Electoral Reform and Party Financing (RCEFPF), that of independent expenditures.
3. *National Citizens' Coalition Inc. and Brown v. Canada (A.G.)*, [1984] 5 W.W.R. 436.

4. According to a research study prepared for the RCEFPF, more than $4.7 million in advertising expenditures made during the campaign was in the form of independent expenditures. Janet Hiebert, "Interest Groups and Canadian Federal Elections" in F. Leslie Seidle, ed., *Interest Groups and Elections in Canada* (Toronto: Dundurn Press, 1992) at 20.

5. For example, the NCC targeted Jim Hawkes, the sitting Conservative in Calgary West in 1993, because he had chaired the parliamentary committee which recommended the limits on independent expenditures. The irony was that, as the quotations given in the judgement indicate (at 19), he was not himself a great fan of spending limits for anybody. The NCC spent $50,000 in the riding; *Calgary Sun* (10 October 1993). Mr. Hawkes was limited to spending $62,413.07.

6. In a recent book addressed to policy-makers in the U.K., the author recommends Canada as a positive model of appropriate action in the face of the "quagmire of money politics" and goes on to suggest that when the U.K. finally examines the issue in detail (that it should do so is one of the major recommendations of the report), "it will recognise the value of the system that Canada has created". Martin Linton, *Money and Votes* (London: Institute for Public Policy Research, 1994) at 65.

7. The RCEFPF convened a symposium at the Kennedy School of Government, Harvard University in November 1990 to examine the U.S. party system and the regime regulating election financing, particularly of congressional elections. After a detailed exploration of the American system and its reforms, the symposium developed a consensus that the Canadian party system is healthier than its U.S. counterpart, in part because the traditional functions of parties — especially policy development and campaigning — have not yet been given over to non-party groups, such as Political Action Committees (PACs). See RCEFPF, *Reforming Electoral Democracy*, Vol. 4 (Ottawa: Supply and Services, 1991) Part 2:3, especially at 164-65.

8. Restraints on expenditures have always been a pillar of thinking about electoral reform at the federal level in Canada. As early as 1870 Edward Blake proposed such limits, while the Committee on Election Expenses (the Barbeau Committee) was established in 1964 with the mandate to investigate establishing such limits. K.Z. Paltiel, *Political Party Financing in Canada* (Toronto: McGraw-Hill, 1970) at 133-34.

9. Herbert Alexander, the leading expert on electoral finance legislation in the U.S.A., prepared a research study for the RCEFPF in which he described the costs of campaigning in a regime where spending is not limited. According to him the major effect of the very high costs of elections was to favour the incumbent. For example, in 1990 the re-election rate of incumbents was 96%. Alexander, "The Regulation of Election Finance in the United States and Proposals for Reform" in F.L. Seidle, ed., *Comparative Issues in Party and Election Finance* (Toronto: Dundurn Press, 1991) at 32. At one of its symposia, the RCEFPF heard more about the 1990 election:

> Of the 406 incumbents in the 1990 election for the House of Representatives, 79 were unopposed, 168 faced challengers who spent less than $25,000, and 124 faced challengers who had less than half the financial resources of the incumbent, leaving only 10 per cent of incumbents in competitive contests.
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> (RCEFPF, *Reforming Electoral Democracy*, Vol. 4 [Ottawa: Supply and Services, 1991] at 156.)

Any turnover which did occur was essentially because an incumbent did not run again. Other practitioners at the same symposium estimated that a challenger in the U.S. must spend more than $600,000 simply to achieve the same name recognition enjoyed by an incumbent.

10. Empirical studies in Canada demonstrate that public funding and spending limits together can contribute to weakening the "incumbent effect". More campaigning by a challenger can undermine the advantages which an incumbent begins with due to name recognition, etc. Keith Heintzman, "Electoral Competition, Campaign Expenditure and Incumbency Advantage" in F. Leslie Seidle, ed., *Issues in Party and Election Finance in Canada* (Toronto: Dundurn Press, 1991). Obviously, the ability of a candidate to undertake such spending is enhanced by the availability of tax credits and the promise of reimbursement. In addition, spending limits prevent the incumbent from simply drowning the challenger's message. Both forms of regulation, in other words, contribute to more competitive elections as well as to enhancing access for challengers.

11. It is worth noting that Bill C-114 did *not* implement the recommendation of the RCEFPF. In its final report, the Commission rejected the distinction between partisan and policy advertising, arguing that the distinction was too murky to be sustainable, either in practice or under the *Charter*. Therefore, it recommended that independent expenditures be permitted, but limited to $1000 and without a possibility of pooling. See RCEFPF, *Reforming Electoral Democracy*, vol. 1 (Ottawa: Supply and Services, 1991) at 337-39, 350-56. While Mr. Justice Macleod relied heavily on a few sentences in the final report about the $1000,00 making a "national campaign" impossible, he never distinguished between the Commission's "$1000.00 limit," and the one enacted.

12. For a presentation of the *Oakes* test, upon which I have relied, see Peter Hogg, *Constitutional Law of Canada* 3rd ed. (Scarborough: Carswell, 1992) at 866-67.

13. As Peter Hogg writes:

> ... the requirement of a sufficiently important objective has been satisfied in all but one or two of the Charter cases that have reached the Supreme Court of Canada. It has been easy to persuade the Court that, when Parliament or Legislature acts in derogation of individual rights, it is doing so to further values that are acceptable in a free and democratic society, to satisfy concerns that are pressing and substantial and to realize collective goals of fundamental importance.

Constitutional Law of Canada, *ibid.* at 870.

14. As K.Z. Paltiel, the research director for the Barbeau Committee, wrote in 1970: "[d]espite the rising cost of election campaigns it would be rash to conclude that there is a direct relationship between the amounts spent by a party or candidate and success at the polls" in *Political Party Financing in Canada*, *supra* note 8 at 158-59.

15. The other two reasons were the following. The first reason given by Macleod J. was that the regime itself, because it limits party and candidate spending, infringes on the *Charter* (at 15). This was, not of course, the matter under consideration but it was his first reason for rejecting the Crown's argument. His third reason (at 15-16) was that the expert witnesses called by the Attorney-General were unaware that Alberta did not limit election expenditures at all. The thrust of this point is difficult to discern, since he said nothing further, but one can assume that his notion was either that elections in Alberta are democratic,

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power lends to federal government initiatives in otherwise provincial areas of control. A conditional offer of federal funds is of course formally voluntary; provinces are free to reject the offer. However, realistically, such offers are politically difficult to turn down, particularly since provincial residents will continue to pay federal taxes which fund the shared programme for other provinces (Peter Hogg, *Constitutional Law of Canada, 3rd Edition* [Scarborough: Carswell, 1992]). As well, the federal government continues to occupy the tax room required to co-fund such programmes, thus depriving provinces of the availability to generate funding on their own for their own programmes through provincial taxes. See Andrew Petter, "Meech Ado About Nothing? Federalism, Democracy and The Spending Power" in K.E. Swinton & C.J. Rogerson, eds., *Competing Constitutional Visions: The Meech Lake Accord* (Toronto: Carswell, 1988) at 191.

30. Alberta has recently lowered its social assistance rates. In an attempt to reduce the provincial deficit, the Alberta government has cut $39 million dollars from welfare payments. This has meant a very substantial reduction of monthly rates. The new rates will give a single, employable adult $427 a month for basic requirements as compared with $521 before. The allowance a single parent with one child receives has gone from $1013 to $899. See Jim Morris, "Poor will suffer under welfare cuts, agencies contend" *The Vancouver Sun* (21 August 1993); "Alberta cuts welfare, justice and farm programs" *The Vancouver Sun* (20 August 1993).

31. McLachlin J. does, in her minority opinion, note that the level of assistance felt necessary to meet basic requirements is fixed by the provinces. However, McLachlin J. speculates that provinces cannot arbitrarily reduce payments below the amount required for "basic requirements" and still claim under CAP.

32. See *supra* text associated with notes 5-6.

33. Arne Peltz, "The *Finlay* Decision: What Next?" (on file with author).

34. See for example, Peltz, *ibid.*

35. The Supreme Court has yet to rule directly on the issue of the constitutional legitimacy of the federal spending power. In *Re Canada Assistance Plan*, [1991] 2. S.C.R. 525, British Columbia brought a constitutional challenge to federal legislation amending CAP which placed a five per cent annual cap on growth of federal contributions to the three economically healthy provinces of Ontario, Alberta, and British Columbia. The result of such amendment was unilaterally to alter the terms of the agreements the federal government had reached under CAP with each of these provinces. In answering one particular argument raised by the intervening province of Manitoba, Sopinka J. for the unanimous Court said that the CAP cost-sharing scheme and the fact that the CAP amendments resulted in the withholding of federal money previously granted to fund a matter within provincial jurisdiction did not amount to federal regulation of that provincial matter. A number of cases have been dealt with this issue in the lower courts, the most recent of which is *Winterhaven Stables* v. *Canada*, (1988) 53 D.L.R. (4th) 413 (Alta. C.A.), in which CAP was upheld as constitutional.

36. See discussion *ibid.*

37. Recent newspaper accounts cite unnamed federal sources as indicating that the CAP programme could be replaced within the next two years in favour of more direct delivery of federal money to the poor. See Geoffrey Yorke, "Fishery may be test of social reforms" *The Globe and Mail* (12 February 1994).

38. Commentators have argued that the solution to this problem is to constitutionalize social welfare rights, thus insulating such protections from political alteration. However, it is far from uncontroversial that the judiciary is a reliable overseer of the interests of the economically disadvantaged. As evidence of this, one need only be reminded of the obliviousness exhibited by the majority in *Finlay* to the hardship individuals like Finlay experience when monthly assistance rates are reduced. In any case, the issue of constitutionally entrenched social rights has been discussed quite extensively, see, for example: Havi Echenberg *et al.*, *A Social Charter For Canada: Perspectives on the Constitutional Entrenchment of Social Rights*, (C.D. Howe Institute, 1992); Joel Bakan and David Schneiderman, eds., *Social Justice and the Constitution: Perspectives on a Social Union for Canada* (Ottawa: Carleton University Press, 1992).

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too, or that there are alternative regimes available. As will be discussed below, the Alberta regime (which is modelled on Ontario's in many ways) is designed to achieve other goals than those that have always been at the heart of the federal regime. For comparisons of the rationales for and forms of regimes see F. Leslie Seidle, *Provincial Party and Election Finance in Canada* (Toronto: Dundurn Press, 1991).

16. Richard Johnston, André Blais, Henry E. Brady and Jean Crête, *Letting the People Decide* (Montreal, McGill-Queen's, 1992). The authors were also suspicious that "lag effects" might be in play, which would mean that any effect would appear only after a lag, and would not be reflected in correlations of action and attitudes at a single point in time.

17. Indeed, in subsequent pages they came back to the problem from another direction, performing an analysis which led them to conclude, for example, that "if news drove the immediate aftermath of the debates, advertising dominated the endgame", and each boosted support for the FTA. Johnston *et al.*, *Letting the People Decide*, *ibid.* at 166.

18. K.Z. Paltiel, *Political Party Financing in Canada*, *supra* note 8 at 142.

19. It is worth noting that all forms of expression by "third parties" are not limited. Internal communications within organizations (companies, trade unions, associations) are not — and never have been — prohibited under the federal regime.

20. F.L. Seidle and K.Z. 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: AEI, 1981) at 276-79.

21. The Alberta legislation also differs from Ontario in significant ways: it does not set spending limits, for example. Nonetheless, the Legislative Assembly explicitly saw its regulations as forming a package, which included disclosure, designed to regulate the contributor-recipient relationship in the direction of transparency.

22. RCEFPF, *Reforming Electoral Democracy*, Vol. 1 (Ottawa: Supply and Services, 1991) at 328.